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October 26, 2001

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Missouri Public Service Commission

**VIA FEDERAL EXPRESS**

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101

Re: 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

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are an original and eight (8) copies of the Initial Brief of Union Electric Company.

Please kindly acknowledge receipt of this filing by stamping as filed a copy of this letter and returning it to the undersigned in the enclosed, self-addressed, stamped envelope.

Sincerely,

David B. Hennen
Associate General Counsel

DBH:rd
Enclosures
cc: Parties of Record

**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| 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 UNION ELECTRIC COMPANY

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October 26, 2001



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## Summary of Union Electric Company's Position

Union Electric Company ("Company" or "AmerenUE") has requested that the Commission allow it to withdraw from one Regional Transmission Organization (RTO), the Midwest ISO, in order to join another one, the Alliance RTO. The Commission should approve the Company's request because it is not detrimental to the public interest to do so. The Commission should also approve this request because it is consistent with the action taken by Federal Energy Regulatory Commission on these same topics, which this Commission did not challenge in the FERC proceeding.

The Company's withdrawal from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest because the quality of transmission service that the customers of the Company will receive from the Alliance RTO will be no different from the quality of transmission service they would receive from the Midwest ISO. Moreover, because the Company will retain significantly more open access transmission revenues from third parties under the Alliance RTO tariff and revenue allocation design than the Company would have retained in the Midwest ISO, the Company's bundled retail customers will benefit from the lowering effect this retained revenue has on bundled retail rates. Furthermore, because Ameren has not filed to increase its transmission rate, there will not be any adverse transmission rate impact from the Company's participation in the Alliance RTO. Finally, the withdrawal of the Company from the Midwest ISO was an undeniable catalyst to the execution of the settlement agreement that created the Alliance RTO - Midwest ISO Super-Region rate. By gaining access to the Super-Region rate, the Company and its customers will have non-pancaked access to generation located in the Midwest ISO and Alliance RTO

regions. Non-pancaked access to a greater amount of generation should enhance the competitiveness of the wholesale and retail generation markets, and over time, result in significant savings to the Company and its customers.

The Commission should also approve the Company's request because it is consistent with the action taken by the FERC on the same issues in a proceeding in which this Commission actively participated. The FERC issued an Order on May 8, 2001 approving the settlement agreement, which allowed AmerenUE, AmerenCIPS, and others, to withdraw from the MISO and to join the Alliance RTO. This Commission was a party to that proceeding and did not file any objections to the settlement agreement. As a result, it would not be appropriate for the Commission to treat the Company's request in the present proceeding in any way that is inconsistent with FERC's treatment. Based on the Supremacy clause to the United States Constitution, this Commission may not act in any way inconsistent with the FERC's order because the U.S. Congress has authorized the FERC to preempt the field of regulation concerning transmission in interstate commerce. This limitation on the Commission's authority is especially necessary given the fact that it would be extremely disruptive, if not impossible, for AmerenCIPS and the Illinois portion of AmerenUE to be in one RTO and for the Missouri portion of AmerenUE to be in a different one.

**BEFORE THE PUBLIC SERVICE COMMISSION**
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**INITIAL BRIEF OF UNION ELECTRIC COMPANY**

**COMES NOW** Union Electric Company d/b/a AmerenUE ("Company", "UE" or "AmerenUE") and submits its Initial Brief in accordance with the procedural schedule established by the Administrative Law Judge.

## I. Procedural and Factual History

On February 21, 1997, the Missouri Public Service Commission ("Commission"), in Case No. EM-96-149, approved a Stipulation and Agreement that required the Company to file or join in the filing of a regional Independent System Operator ("ISO") proposal at the Federal Energy Regulatory Commission ("FERC") that would eliminate pancaked transmission rates and be consistent with the ISO guidelines set forth in FERC Order No. 888.

Since January 1, 1998, UE and its affiliate, Central Illinois Public Service Company (d/b/a AmerenCIPS), have made their transmission systems available for service pursuant to a single system tariff known as the Ameren Open Access Transmission Tariff ("OATT"). The FERC accepted the Ameren OATT in conjunction with its review of the merger of Union Electric and CIPSCO, Inc. The Ameren OATT allows for transmission customers to obtain transmission service across the entire Ameren system at a single rate. It thereby avoids the pancaking of rates for the use of the systems of both AmerenUE and AmerenCIPS. (See FERC docket no. EC96-7-002 et al.,

Letter order of July 21 1997 accepting settlement agreement concerning the rates, terms and conditions of the Ameren OATT.)

In accordance with the Commissions directive in Case No. EM-96-149, on March 30, 1998, the Company filed an application, in Case No. EO-98-413, requesting Commission authority to participate in the Midwest ISO.

On May 13, 1999, in Case No. EO-98-413, the Commission approved the Company's application to participate in the Midwest ISO. The Commission conditioned its approval so that "in the event that UE seeks to withdraw from its participation in the Midwest ISO pursuant to Article five or Article Seven of the Midwest ISO Agreement, the Company shall 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." (Stipulation and Agreement at p. 2-3)

On November 9, 2000, following the announced withdrawals of Illinois Power Company and Commonwealth Edison Company from the Midwest ISO, Ameren Services Company, on behalf of its operating companies Union Electric Company and Central Illinois Public Service Company, provided written notice to the Midwest ISO of its intent to withdraw from participation in the Midwest ISO.

On January 11, 2001, in order to remain in compliance with the requirements of FERC Order No. 2000, Ameren executed an Amendment to the Alliance Agreement to become a transmission owning member of the Alliance RTO. Ameren's membership in the Alliance RTO is contingent upon Ameren's receipt of all necessary regulatory approvals.

On January 16, 2001, Ameren filed with the FERC in Docket No. ER01-966-000, on behalf of its operating companies Union Electric Company and Central Illinois Public Service Company, a notice of intention to withdraw from the Midwest ISO.

On January 24, 2001, in Docket No. ER01-123-000, the FERC issued an order in the Illinois Power Company withdrawal case establishing settlement judge procedures suggesting that it would be in the best interest of all interested parties in the Midwest region to jointly asses the Midwest ISO and Alliance RTO situation further and make one last effort at resolving their differences before the FERC rules in this proceeding.

On February 1, 2001, pursuant to the Order issued in Docket No. ER01-123-000, the Chief Administrative Law Judge convened settlement procedures that continued through February 23, 2001. On March 21, 2001, a formal Stipulation and Agreement ("Settlement Agreement") was reached by the parties at the settlement proceedings and was filed with the FERC.

On March 30, 2001, initial comments to the Settlement Agreement were filed by numerous parties including the Missouri Public Service Commission and the Missouri Office of Public Counsel.

On April 6, 2001, the Chief Judge certified the Settlement Agreement to the FERC. On May 8, 2001, FERC issued its Order on the Settlement Agreement accepting it after making some minor modifications and clarifications.

On May 14, 2001, the Alliance Companies filed with FERC a letter of acceptance indicating that the Alliance Companies, the Midwest ISO, Inc. and the certain Midwest Transmission Owners had accepted the minor modifications and clarifications made by FERC to the Settlement Agreement contained in the FERC's May 8, 2001 Order.

On May 15, 2001, in accordance with the terms of the Settlement Agreement approved by FERC in its May 8, 2001 Order, Ameren tendered to the Midwest ISO $18 million ($12.5 million from AmerenUE, $5.5 million from AmerenCIPS).

On June 11, 2001 UE filed an application with the Commission requesting an Order authorizing it to withdraw from the Midwest ISO to participate in the Alliance RTO, which initiated this proceeding.

On July 26, 2001, the Commission granted the intervention requests of the Missouri Industrial Energy Consumers, the Missouri Energy Group and the Doe Run Company. No other interventions were filed.

A prehearing Conference was held on July 31, 2001. Prefiled direct, rebuttal and surrebuttal testimony were filed in this case in accordance with usual Commission procedures and pursuant to orders entered in this case.

The hearing for this case was held on October 10, 2001.

## II. The Company's Application for authorization to withdraw from the Midwest ISO to join the Alliance RTO should be approved because it is not detrimental to the public interest.

The Company has requested that the Commission allow it to withdraw from one Regional Transmission Organization (RTO), the Midwest ISO, in order to join another one, the Alliance RTO. The Commission should approve the Company's request because it is in the public interest to do so.

It is undisputed that the functions, characteristics and responsibilities of the for-profit Alliance RTO will be identical to the not-for-profit Midwest ISO since they have been mandated by FERC Order No. 2000. (Ex. 2, p. 5, lines 1-2) Thus, the quality of transmission service that the customers of the Company will receive from the Alliance

RTO will be no different from the quality of transmission service they would receive from the Midwest ISO. In fact, Mr. Kind's inability to identify at the hearing, even after three separate and distinct requests of Commissioner Gaw, any advantages that the Company's customers would see if the Company were to remain in the Midwest ISO versus joining the Alliance RTO is compelling evidence that there are none. (See Transcript at pp. 203-208)

Furthermore, because the Company will retain significantly more open access transmission revenues from third parties under the Alliance RTO tariff and revenue allocation design than the Company would have retained in the Midwest ISO, the Company's bundled retail customers will benefit from the lowering effect this retained revenue has on bundled retail rates. (Ex. 2, p. 11, lines 18-19) These open access transmission revenues will not come from the Company's bundled retail or wholesale customers, but third party users of the Company's transmission system. (Ex. 2, p. 12, lines 21-23) Moreover, because Ameren has not filed to increase its transmission rate, the zonal facilities charge rate Ameren will be charging in the Alliance RTO is the same that it would have charged in the Midwest ISO. (See Transcript at pp. 151-153) Thus, there will be no adverse transmission rate impact from the Company's participation in the Alliance RTO.

Finally, the withdrawal of the Company from the Midwest ISO was an undeniable catalyst to the execution of the Settlement Agreement that created the Alliance RTO - Midwest ISO super-region rate. (Ex. 2, p. 16, lines 6-7) By gaining access to the super-region rate, the Company and its customers will have non-pancaked access to generation located in the Midwest ISO and Alliance RTO regions. (Ex. 2, p. 16, lines 7-8) Non-

pancaked access to a greater amount of generation should enhance the competitiveness of the wholesale and retail generation markets, and over time, result in significant savings to the Company and its customers. (Ex. 2, p16, lines 10-13)

For all of the foregoing reasons, and the reasons set forth in the remainder of this brief, the Commission should approve the Company's request because it is not detrimental to the public interest.

**a. For-profit Governance Structure of the Alliance RTO cannot be shown to be detrimental to the public interest.**

There is absolutely no fact based evidence in the record, or otherwise, that indicates the for-profit governance structure of the Alliance RTO will be in any way detrimental to the public interest.

First of all, the Company's relationship to the Alliance RTO will be identical to the relationship the Company would have had with the Midwest ISO. (Ex. 2, p. 4, lines 8 - 9) Since Ameren intends to be a non-divesting transmission owner in the Alliance RTO, the Company's relationship to the for-profit Alliance RTO will be through an operating agreement. (Ex. 2, p. 4, lines 9 - 11) If Ameren were to remain in the Midwest ISO as a non-divesting transmission owner, the Company's relationship with the Midwest ISO also would have been through an operating agreement. (Ex. 2, p. 4, lines 11-12) The operating agreement with the Alliance RTO will provide the Alliance RTO with the authority to provide non-discriminatory transmission service on the Ameren transmission system pursuant to, and in accordance with a FERC approved open access transmission tariff and in a way that will not adversely effect Ameren's transmission system. (Ex. 2, p. 4, lines 12-16) The operating agreement with the Midwest ISO would have provided the Midwest ISO with the same capability subject to the same restrictions. (Ex. 2, p. 4, lines

16-18) Thus, the governance structure of the RTO in which Ameren participates will have absolutely no impact on this operational relationship. (Ex. 2, p. 4, lines 18-20) Moreover, none of the other parties in this proceeding have in any way provided factual evidence that the for-profit governance structure of the Alliance RTO will have any negative impact on the operational relationship the Alliance RTO will have with the Company.

Secondly, the functions, characteristics and responsibilities of the for-profit Alliance RTO will be identical to the not-for-profit Midwest ISO. (Ex. 2, p. 5 line 1) Moreover, these functions, characteristics and responsibilities have been mandated by FERC Order No. 2000. (Ex. 2, p. 5, lines 1-2) So, the primary difference between the for-profit Alliance RTO and the not-for-profit Midwest ISO only will arise in the efficiency in which each RTO is able to implement these required functions, characteristics and responsibilities. (Ex. 2, p. 5, lines 4-6) Furthermore, as Dr. Proctor admits in his rebuttal testimony, the transmission services provided by RTOs, regardless of their governance structure, will be FERC approved, tariff-based services. (Ex. 3, p. 9, lines 15 - 16) Thus, the transmission services RTOs provide and the rates they charge for those services will have to be approved by FERC. (Ex. 3, p. 11, lines 2 - 3) In order for the services and rates to be approved by FERC, the RTO will have to demonstrate that the rates for the transmission services are just and reasonable (Ex. 3, p. 11, lines 3 - 7) and the transmission services provided are consistent with or superior to those transmission services set forth in the FERC pro forma open access transmission tariff. (Central Maine Power Co., 82 FERC ¶ 61,251, at 62,003 (1998); Arizona Pub. Serv. Co., 78 FERC ¶ 61.083, at 61,304 (1997); Order No. 888, 1991-96 FERC Stats. & Regs., Regs. Preambles

¶ 31,036, at 31,770 (1996)) Because of this, the governance structure of an RTO will have no impact on the type of tariff-based transmission services provided to transmission customers. The only impact that the governance structure will have is on the efficiency in which these tariff-based transmission services are provided.

Dr. Proctor also admits in his rebuttal testimony that there are those who advocate that for-profit Transcos, like the Alliance RTO, will be the most efficient providers of these tariff-based services. (Ex. 3, p. 8, lines 18-20) In doing so, Dr. Proctor provides a quote by Curt L. Hebert Jr., the former Commissioner and Chairman of FERC at the time Order No. 2000 was issued, where Chairmen Hebert stated: "For now, FERC must re-evaluate the traditional cost-of-service formula of depreciated original cost. We should institute incentive rates with proper review of customer satisfaction and oversight. ... I believe that, while there may be circumstances that require ISOs or other entities, from an economic perspective the most cost-effective and efficient alternative for transmission operation is a Transco, a company promoting efficiency through market solutions. ... Through performance-based regulation, FERC can provide incentives for maximum efficiency of operations rather than embedded, cost-based regulation under FERC transmission pricing policy." (**The Electricity Journal**, March 1999, pp. 21-22) (Ex. 3, pp. 8 - 9, lines 22 - 25, 1 - 7)

However, Dr. Proctor elects to disagree with Commissioner Hebert even though, as Commissioner Murray pointed out during her questioning of Dr. Proctor, Commissioner Hebert's position on the efficacy of for-profit Transcos was the majority position at FERC, while Commissioner Massey proffered the minority position. (See Transcript at p. 172, lines 8-14) In an attempt to justify his disagreement with

Commissioner Hebert in his rebuttal testimony, Dr. Proctor, in the Company's opinion, uncharacteristically relies on pure conjecture, and other illogical and unrealistic performance based rate hypotheticals. (Ex. 2, p. 5, lines 18-20) Apparently realizing that his rebuttal testimony was mere speculation, Dr. Proctor, under questioning by Commissioner Lumpe, admitted that his "major concern with -- is not whether [the RTO] is for-profit of not-for-profit. My major concern is over the performance-based incentives that might be put into place that would cause, perhaps unintended, actions on the part of the RTO. I think it's much more important that the RTO perceive to be totally independent, totally not take a position in the market, doing exactly what it has been set out to do, and that is to facilitate the functioning of the market." (See Transcript at p. 185, lines 6-15) The possibility of FERC providing an incentive to an RTO to become a market participant, which is contrary to the independence characteristics that FERC has established for RTOs, simply defies all reasonable logic. (Ex. 2, p. 6, lines 9-12) Even Mr. Dauphinais admitted, under questioning by Commissioner Lumpe, that "independence is the bedrock of ISOs and RTOs." (See Transcript at p. 226, lines 16-17) Thus in order for the FERC to approve a performance based rate that provides an incentive to the RTO to take a position in the market, FERC will have to ignore the very bedrock upon which RTOs were formed.

The only reasonable conclusion that can be drawn from the evidence in the record is that the for-profit governance structure of the Alliance RTO has in no way been shown to be detrimental to the public interest. In fact, the evidence in the record suggests the contrary. It is more likely that the for-profit Alliance RTO governance structure will provide FERC with the ability to enhance the efficiency in which the Alliance RTO

provides the tariff-based transmission services through performance based rates with proper review of customer satisfaction and oversight.

**b. Open Access Transmission Revenue Retention will have a lowering effect on Bundled Retail Rates making the Alliance RTO tariff and revenue allocation design beneficial to the public interest.**

None of the other parties to this proceeding have in any way refuted the fact that the Midwest ISO tariff and revenue allocation design in place at the time the Company submitted its intention to withdrawal from the Midwest ISO, would have caused a tremendous open access transmission revenue shift away from Ameren. (Ex. 1, P. 6, lines 1-7) Furthermore, none of the other parties to this proceeding have challenged the Company's estimate that the Midwest ISO tariff design and revenue allocation approach would have resulted in an approximately $60 million open access transmission revenue decline to Ameren. (Ex. 2, p. 12, lines 10-12; See also Ex. 5P, Attachment RK 1, p. 3) This massive decline in open access transmission revenues would have had a detrimental impact on the Company's bundled retail customers' rates. (Ex. 2, p. 12, lines 12-15) To the contrary, the retention of open access transmission revenues afforded by the Alliance RTO tariff and revenue allocation design will result directly in the retention of these open access transmission revenues, thereby preserving the significant revenue credits applicable to the bundled rates of the Company's retail customers. (Ex 1, p. 12, lines 11-14) By preserving the open access transmission revenue credits under the Alliance RTO tariff and revenue allocation design, the bundled retail customers of the Company will benefit from the lowering effect the transmission revenue credits have on the bundled rates of the Company's retail customers. (Id.)

As Mr. Whiteley pointed out in his surrebuttal testimony, the revenue requirement for the delivery components[1] of bundled retail rates are determined on a cost of service basis. (Ex. 2, p. 11, lines 14-18). This cost of service for the delivery components is calculated by capturing the Company's revenue requirement (capital, operations and maintenance, administrative and general) for the Company's entire delivery system, including its transmission system. (Ex. 2, p. 11, lines 14-18) The revenues the Company receives from those entities using Ameren's transmission system via the open access transmission tariff are then subtracted from this revenue requirement. (Ex. 2, p. 11, lines18-20) If a large part of these open access transmission revenues are forfeited (like they would have been under the Midwest ISO tariff and revenue allocation design), the large offsets also would be forfeited. (Ex. 2, p. 11, lines 20-23). These open access transmission revenues, which serve as offsets for bundled retail rates, would be forfeited even though the use of the Company's transmission assets by others under the open access transmission tariff may have remained the same if not increased in magnitude. (Ex. 2, p. 12, lines 1-2)

The tremendous benefit of retaining these open access revenue credits on bundled retail rates has not been factually refuted in any way by the other parties to this proceeding. Counsel for the Office of Public Counsel ("OPC"), during its re-cross-examination of Mr. Whiteley, attempted to argue that the open access revenue retention afforded by the Alliance RTO tariff would not flow down to consumers because Ameren did not file to reduce its zonal rate. (See Transcript at pp. 151-153) What Counsel for OPC must not realize is that the Company's bundled retail customers' rates do not include

[1] The Company's reference to delivery components is meant to include the Company's transmission and distribution systems. The Company would also note that the revenue requirement for providing energy to

as a component of their bundled rates the transmission rate Ameren files at FERC. Bundled retail rates are determined solely on a cost of service basis by the Commission. (Ex. 2, p. 11, lines 14-18) What Counsel for OPC does admit by acknowledging that Ameren's zonal rate will not change under the Alliance RTO, is that no rate harm will occur to the wholesale customers residing in Ameren's zone. No negative rate impact will occur because Ameren did not file for a transmission rate increase in the Alliance RTO rate filing, but instead filed the same rate currently paid under the Ameren open access tariff. (See Transcript at p. 152) Moreover, because the Settlement Agreement produced the Alliance RTO - Midwest ISO Super-Region, wholesale customers in the company's service area will have access to a much larger pool of generation resources from which the wholesale customers may competitively procure generation and ancillary services. (Ex. 1, p. 12, lines 2 - 8)

Similarly, Counsel for Staff failed in its attempt to argue that Ameren's retention of open access revenues that it currently receives under the Ameren open access transmission tariff, can only mean that the Alliance RTO rates are still pancaked. (See Transcript at pp. 146-148) This allegation is completely refuted within the chief judge's certification of the Settlement Agreement where he states "[t]he Settlement is the basis for two RTOs that ***eliminate pancaking*** between the two RTOs *by providing for the transmission of electric energy from any source within the Alliance RTO and the Midwest ISO regions, now called the 'Super-Region' to any sink within the Super-Region* ***for a single rate***..." (emphasis added) (Ex. 1 to Ex. 1, 95 FERC ¶ 63,003, p. 2) Mr. Whiteley also states in his direct testimony that "[t]he Settlement calls for the development of a 'Super-Region' transmission service rate that eliminates rate pancaking across the

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bundled retail customers also is calculated on a cost of service basis.

Midwest ISO and Alliance RTO systems. While the development of non-pancaked rates within each RTO (but not between RTOs) would have been expected under the guidelines established by FERC Order No. 2000, the Super-Regional rate eliminates pancaking within the Super-Region, even for transactions between RTOs." (See Ex.1, pp. 9 - 10) The Midwest ISO, in the Status Report it filed at FERC, states that "[t]he parties have also moved forward on aspects of the IRCA[2] that will create a single 'virtual' market for the Midwest. Toward this goal, on August 31, 2001, the Midwest ISO, its transmission-owning members and the Alliance Companies filed tariff amendments necessary to create a Super Region *that eliminates rate pancaking for transactions between the two organizations.*" (emphasis added) (Ex. 13, Status Report of the Midwest Independent System Operator Inc., p. 17)

Because Ameren will retain significantly more revenue from open access transmission customers under the Alliance RTO tariff and revenue allocation design than the Company would have received under the Midwest ISO tariff and revenue allocation design, and because such revenue retention unequivocally has been shown to have a lowering effect on bundled retail rates, the Company's withdrawal from MISO to participate in the Alliance RTO can only be found to be beneficial to the Company's bundled retail customers and therefor in the public interest.

**c. The Company's withdrawal from the Midwest ISO will not create an additional seam in Missouri.**

At the time the Company announced its intentions to withdraw from the Midwest ISO, a couple of utilities on the west and southwest portions of Missouri were participating members of the Southwest Power Pool ("SPP"). At this same time, SPP was

[2] Inter-RTO Cooperation Agreement

(and still is) actively pursuing RTO status at FERC. (See FERC Docket No. RT01-34-000 and FERC Docket No. RT01-100-001, Order Granting Rehearing For Further Consideration, September 10, 2001) In other words, these utilities, and presumably the customers of these utilities, must not be at all concerned about the seam that would exists between the Midwest ISO and SPP if SPP were granted RTO status. Nor is there any evidence in the record in this proceeding that would suggest that this Commission has in any way intervened in the SPP proceedings to oppose SPP's continuing request for such RTO status.

Notwithstanding SPP's continuing rehearing efforts at FERC, on July 12, 2001 FERC did issue an order affirmatively rejecting the request of SPP, Inc. for RTO status. (See Southwest Power Pool, Inc., 96 FERC ¶ 61,062, July 12, 2001) FERC indicated in its July 12, 2001 order that SPP, Inc. did not meet the minimum requirements set forth in FERC Order No. 2000. Id. More specifically, the SPP RTO did not meet the size and scope requirement. Id. However, had FERC approved the SPP RTO in its July 12, 2001 order, a seam between SPP and the Midwest ISO would have existed. Moreover, this seam would have existed in the state of Missouri. Thus, the creation of the seam in Missouri did not arise from the Company's departure from the Midwest ISO, it arose from the voluntary choice of a few utilities in Missouri to participate in the SPP RTO. Absolutely nothing other than the continuing desire of these companies to be in the SPP RTO kept these companies from joining either the Midwest ISO or the Alliance RTO by February 28, 2001, in accordance with the Settlement Agreement, which would have eliminated all of the seams in Missouri. (Ex. 10, p. 17, ¶ 5.1(b))

It should also be noted by the Commission, that the potential lack of access by these utilities to the Midwest ISO - Alliance RTO Super-Region rate does not prevent the utilities, or their wholesale customers from having non-pancaked access to a significant generation market as members of the Midwest ISO or the Alliance RTO. (Ex. 2, p. 15, lines 3-6) It just means that all customers in Missouri may not have non-pancaked access to the same identical generation market. Id.

Furthermore, it would be unreasonable and inequitable for this Commission to hold the Company responsible for the willful decisions made by other utilities in this state in which the Company has no state or federal statutory obligations whatsoever to serve. While the Company understands that some parties to this proceeding would prefer that all of the Missouri utilities place their respective transmission assets in the same RTO, for the Commission to dictate such a requirement, absent legislative action, would be beyond the authority granted to this Commission under current Missouri statute. (State ex. Rel. Kansas City Transit, Inc. v. Public Service Commission, 406 S.W.2d 5 (Mo. 1966); State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, (Mo. Banc 1943))

Furthermore, it should be noted, that while the Settlement Agreement benefits do not extend automatically to any member of the Midwest ISO or the Alliance RTO that joined after February 28, 2001, it is possible that, FERC will order the Alliance RTO and the Midwest ISO to apply the Super-Region rate benefits to such new members. (Ex. 10, p. 17, ¶ 5.1(b))

**d. The Alliance RTO has not made any business decisions that are in violation of FERC Order nor have there been any decisions made by the Alliance Companies that have been, or can be shown to be detrimental to the public interest.**

One has to look no farther than the recently filed status report of the Alliance RTO to determine that the Alliance Companies have not made any business decisions that are in violation of FERC Order or that can be shown to be detrimental to the public interest. (See generally Ex. 13, Alliance Companies Report and Update on IRCA Implementation: Building a Strong Foundation for a Seamless Market) Furthermore, within the Status Report, the Alliance Companies overtly acknowledge and agree that they "are prohibited from implementing RTO market design programs that have not been approved by the [FERC]..." (Id. at p. 18) While mindful of this prohibition, the Alliance Companies have a commitment vis-à-vis the Settlement Agreement and FERC Order No. 2000 to have the Alliance RTO operational by December 15, 2001. In an effort to meet these commitments, in March of 2001, the Alliance Participants Administrative and Start-Up Activities Company, LLC ("BridgeCo") was formed and began to function. (Id. at p. 21)

From the beginning, the Alliance Companies instructed the BridgeCo to avoid systems or administrative decisions that were market-sensitive so that such market-sensitive decisions could be left for the Alliance Transco when formed. (Id. at p. 21) Consequently, since March of 2001, when BridgeCo was formed, BridgeCo has adhered to a "guiding philosophy to provide an operating RTO on time, within budget and, most important, with the flexibility to change." (Id.) As a result, the operational systems of the Alliance Transco are based on computer systems "which permit adaptation to changes required by the independent decision-maker or necessitated by evolution in the marketplace." (Id. at p. 22) More importantly, the arrangements made by the BridgeCo

to date, for Day-1 operations, have avoided market design decisions while preserving the flexibility for change. (Id.)

Notwithstanding the overwhelming evidence to the contrary, Dr. Proctor and Mr. Kind make several unsubstantiated allegations in their respective rebuttal testimonies that the Alliance Companies are making market-sensitive decisions that are focused on benefits to transmission owners (Ex. 3, p. 14, lines 16-17), will have an impact on the development of competitive wholesale markets, will be inimical to the public interest (Ex. 5P, p. 23, line 7), or in the alternative will be costly to rectify. (Ex. 3, p. 22, lines 22-23; Ex. 5P, p. 18, line 24, p. 19, lines 1-4)

To support their illusory position, Dr. Proctor and Mr. Kind rely ostensibly on a proposal, not a final decision, made by the Alliance Companies regarding Energy Imbalance service in the Alliance RTO tariff. For Day-1 operations, the Alliance Companies have proposed that all load-serving entities with obligations to serve load, must submit balanced energy schedules on a day ahead basis to serve their load. (Ex. 3, p. 26, line 1; Ex. 5P, p. 22, line 15-17) Of course, neither Dr. Proctor nor Mr. Kind has provided a legitimate explanation in their rebuttal testimonies why such a proposal is detrimental to the public interest. Mr. Kind, however, apparently supports the assertion that requiring load serving entities to submit balanced schedules, as proposed by the Alliance Companies, will limit the load serving entities reliance upon the highly volatile spot market, thereby potentially hindering the development of a substantial real-time spot market for power. (Ex. 5P, p. 22, lines 16-19) Apparently Mr. Kind has forgotten, or does not realize, that the recent California power crisis was caused in large part by the requirement imposed on load serving entities to acquire all of their power through the

California power exchange, which was California's spot-market for energy. In fact, Dr. Proctor emphatically issues a warning in his rebuttal testimony stating that "[w]holesale competition has and will continue to result in a significant increase in price risk for those who lean on the [spot] market to purchase electricity." (Ex. 3, p. 6, lines 14-15)

Mr. Kind identifies two other decisions made by the Alliance Companies: the selection of a market monitor and the development of a pro forma interconnection agreement. (Ex. 5P. p. 22, lines 19-21) However, Mr. Kind in no way describes how such decisions are detrimental to the public interest. Moreover, if Mr. Kind objects to the Market Monitor chosen by the Alliance Companies, he must also object to the Market Monitor selected by the Midwest ISO and SPP, since the Alliance Companies, the Midwest ISO and SPP have all selected the same Market Monitoring entity. (Ex. 13, See Status Report of the Midwest ISO, Inc., p.14) Furthermore, if Mr. Kind finds the interconnection agreement developed by the Alliance Companies to be objectionable, then Mr. Kind must also find the Midwest ISO interconnection agreement objectionable, since, according to the Status Report of the Midwest ISO, Inc., the two interconnection agreements are very close to identical. (Id at pp. 14-15)

Since the other parties to this proceeding have utterly failed to affirmatively identify in any way how the Alliance Companies or the BridgeCo have made any market-sensitive business decisions that are detrimental to the public interest, this Commission has no basis whatsoever for finding that the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO is detrimental to the public interest.

**e. The Company's bundled ratepayers will in no way be harmed by provisions in the Alliance RTO agreement that provide for future divestiture of the Company's transmission assets to the Alliance RTO at market value.**

First of all, the Company has no immediate intentions of selling or contributing its transmission assets to the Alliance RTO or any other third party. (Ex. 1, p. 18, lines 15-17) Furthermore, the Company agrees that should it decide in the future to sell or divest all or part of the Company's transmission assets to the Alliance RTO or to a third party, the Company will be required, in accordance with Missouri statute, to acquire approval of the Commission. (Ex. 1, p. 18, lines 13-15, also see generally RSMo § 393.190) Only after this Commission has determined that a request from the Company to sell or divest all or part of its transmission assets to the Alliance RTO or to some other third party is not detrimental to the public interest, will such request be granted. (State ex rel. City of St. Louis v. Public Service of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934)) Because of this unequivocal statutory requirement to seek the Commission's approval prior to selling or divesting the Company's transmission assets, a provision in the Alliance Agreement merely codifying a contractual right the Company has with regard to the sale or divestiture of its transmission assets to the Alliance RTO, cannot alone be deemed to have any harmful or detrimental effect on the Company's rate-payers.

**f. The Company is not seeking recovery of the exit fee it paid to the Midwest ISO in this proceeding.**

The Company firmly believes that its withdrawal from the Midwest ISO is in the public interest. (Ex. 2, p. 16, lines 1-22) Therefore, the Company also firmly believes that recovery of the exit fee paid to the Midwest ISO is a prudently incurred regulatory expense that should be recovered from all users of the Company's transmission system. (Ex. 1, p. 19, lines 9-10) However, the Company is not seeking recovery of the exit fee paid to the Midwest ISO, pursuant to the terms of the FERC-approved Settlement

Agreement, in this proceeding. (Ex. 1, p. 19, lines 11-12 and Ex. 2, p. 15, line 20) The Company believes that such a determination is best made within the confines of a rate case before the Commission, where an appropriate analysis can be performed by the Company to validate whether the expense was prudently incurred.

## III. Legal Issues

### a. The appropriate legal standard for the Commission to apply in deciding this case is that the request by the Company to withdraw from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest.

The Commission, in this case, must approve the request by the Company to withdraw from the Midwest ISO to participate in the Alliance RTO provided such withdrawal is *not detrimental to the public interest*. (State ex rel. City of St. Louis v. Public Service of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934)) Furthermore, the Commission may not withhold its approval of the Company's request unless it can be shown that such request is detrimental to the public interest. (State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (App. E.D. 1980)) Since the Company is the moving party in this proceeding, the Company has the burden of proving that its request is not detrimental to the public interest. (Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. Banc 1991); see also Dycus v. Cross, 869 S.W.2d 745 (Mo. Banc 1994)) While the Company must prove that its request is not detrimental to the public, if other parties assert the Company's request is detrimental in one or more specific areas, the burden of going forward with such evidence of detriment may shift if a prima facie case is made by the other parties. (Anchor Centre Partners at 30)

**b. Authority of the Commission to approve the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO.**

Whatever authority the Commission has to review the Company's request to withdraw from the MISO and to join the Alliance RTO, the Commission should exercise such authority in a manner consistent with the orders of the FERC concerning these issues. Based on doctrines of federal preemption and estoppel and waiver, the Commission may not act in any manner inconsistent with the FERC Order.

**1. Federal Preemption**

The law is clear that the FERC, under Section 201 of the Federal Power Act, has the exclusive authority concerning the regulation of transmission in interstate commerce and also the sale of such energy at wholesale in interstate commerce. 16 U.S.C. 824.

The United States Supreme Court has held that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Mississippi Power and Light v. Mississippi, 487 U.S. 354, 377 (1988). In that case, the Court concluded that the state of Mississippi was precluded from reexamining issues relating to the wholesale sale of power which had been resolved by the FERC. The issue in question concerned the allocation of wholesale power by FERC to the operating utilities of Middle South Utilities, a public utility holding company. Mississippi Power and Light and its operating utility affiliates of the MSU system operated as part of an integrated electric system. Mississippi at 358.

In discussing its analysis, the U.S. Supreme Court cited an earlier decision to the same effect as Mississippi. Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986). "Our decision in *Nantahala* relied on fundamental principles concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regulation."

Mississippi, 487 U.S.371. As a result, the Court concluded that "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable". Id. at 374.

The same analysis and conclusion applies to transmission, particularly since AmerenCIPS and AmerenUE provide transmission service in an integrated manner over their systems under the single system Ameren OATT. Neither Missouri nor any other state may alter a FERC ordered determination concerning the rates, terms and conditions of transmission in interstate commerce. See Mississippi at 370. See also more recently Duke Energy Trading and Marketing, L.L.C. v. Davis, 2001 U.S. App. Lexis 20660, a decision rendered September 20, 2001. In that case, the 9th Circuit Court of Appeals held that the Governor of California was preempted in executing certain actions that would have been inconsistent with FERC's determinations concerning credit related terms and conditions of the California Power Exchange.

Even if AmerenCIPS and AmerenUE did not offer transmission service in an integrated manner under the Ameren OATT, it should be evident that FERC has exclusive jurisdiction over the regulation of transmission in interstate commerce particularly as it relates to the establishment of regional organizations that cover more than one state. Under Section 202 of the FPA, the FERC "is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy". (16 U.S.C. 824a) For Missouri or any state to act in a manner inconsistent with FERC on such a topic would be equivalent to the regulation of interstate commerce. Pursuant to

the Supremacy Clause of the U.S. Constitution, a state is prohibited from doing this, especially when it is clear that Congress has empowered a federal agency in this area.

**2. Estoppel and Waiver**

In any event, based on the doctrines of estoppel and waiver, this Commission may not act in a manner inconsistent with FERC's May 8, 2001 order. This Commission was a party to the FERC proceeding which led to that order, and the Commission had an opportunity to raise whatever objections it saw fit before the FERC. The Commission chose not to do so. It may not do so now if the result is an order inconsistent with FERC's May 8 Order.

As the Supreme Court noted,

> The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the [FERC] or a court reviewing the [FERC's] order.

Mississippi Power and Light v. Mississippi, 487 U.S. 354, 375 (1988).

The rule of estoppel by record bars a second action between the same parties on an issue necessarily raised and decided in the first action. Drainage District No. 1 v. Matthews, 234 S.W.2d 567, 572 (Mo. 1950). In the present case, the record before the FERC is clear that the issue of whether the Company should be allowed to withdraw from the MISO in order to participate in the ARTO was plainly before the FERC, and necessarily decided by it. The impact of the Settlement Agreement approved by FERC was clear and unambiguous. Article 4.11 of the Settlement Agreement states that "[u]pon issuance of an initial order approving the Settlement Agreement by the [FERC],

the Departing Companies[3] will be permitted to withdraw from the Midwest ISO and to join the Alliance RTO. (Ex. 10, p. 15) Therefore, the Commission should be estopped from issuing any order which would be inconsistent with the FERC's May 8 order.

To establish waiver from the conduct of a party, the conduct must be clear, unequivocal, and decisive, showing a purpose to relinquish the right. MCI Metro Access Transmission Services, Inc. v. City of St. Louis, 941 S.W.2d 634, 640 (Mo. App. 1997). In this case, it is clear that the Commission had a full and unrestricted opportunity to object in the FERC proceeding to the settlement authorizing the Company to withdraw from the Midwest ISO. As a result, the Commission has waived any right it might otherwise have possessed to issue an order in the present proceeding that is consistent with the FERC order.

**c. The Company did not 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 FERC on January 16, 2001.**

The Company agreed in Case No. EO-98-413 that "in the event that UE seeks to withdraw from its participation in the Midwest ISO pursuant to Article five or Article Seven of the Midwest ISO Agreement, the Company shall 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." (Stipulation and Agreement at p. 2-3) There is absolutely nothing implicit or explicit in this language that required the Company to file the Notice of Withdrawal with this Commission at the same time as the Company filed its notice of withdrawal at FERC.

[3] Departing Companies, as defined in Article II of the Settlement Agreement, means Illinois Power, Ameren, and ComEd. Ameren, as defined in Article II of the Settlement Agreement, means Ameren

Thus, the fact that the Company did not file a notice of withdrawal with this Commission at the same time it filed at FERC was not a violation of the Stipulation And Agreement.

In fact, the Company's decision not to file with this Commission at the same time it made its filing with FERC was solely driven by the required approval for withdrawal set forth in the Midwest ISO agreement. Article V and Article VII of the Midwest ISO agreement clearly state that in order for a Member, who is also an Owner, to withdraw from the Midwest ISO, such withdrawal may only become effective if approved by FERC. (For copy of the Midwest ISO agreement, see Exhibit 4 to filing made on January 15, 1998 in FERC Docket No. ER98-1438-000 at pp. 671-754) Thus, any proceeding initiated with this Commission prior to receiving FERC approval to withdraw, would be premature and quite possibly moot.

Dr. Proctor even acknowledged, under questioning by Commissioner Murray, that if the FERC disallowed Ameren's request to withdraw, any proceeding initiated before this Commission would be moot. (See Transcript at pp. 166-167) Dr. Proctor also acknowledged, again under questioning by Commissioner Murray, that when the Company was asked about when they would be filing with this Commission, the response given by the Company was that "we want to see what comes out of the settlement conference [at FERC]. We think that's going to -- to clarify some things that the Commission will need to know." (See Transcript at p.166, lines 8-11, where Dr. Proctor was recollecting a response from James J. Cook, Counsel for Ameren) Thus, it is clear from the evidence in the record, that the Company was waiting to see if FERC would approve its withdrawal before initiating a potentially meaningless proceeding with this Commission. Any other course of action by the Company may have caused the other

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Corporation (on behalf of Union Electric Company and Central Illinois Public Service Company).

parties to this proceeding and this Commission to unnecessarily spend time and incur expenses, which would have been unreasonable.

The other issue is whether the Company should have conditioned its payment of $18 million, under the terms of the Settlement Agreement filed with FERC, on acquiring the approval of this Commission. (See Transcript at pp. 122-125) The Company acknowledges that the Commission may be concerned that the Company did not condition the $12 million payment[4], made pursuant to the Settlement Agreement, on its receipt of approval to withdraw from the Midwest ISO from this Commission. However, as Mr. Whiteley indicated upon questioning from Commissioner Gaw, it is the Company's firm belief that the circumstances and nature of the Settlement Conference proceedings did not afford the Company with the opportunity to condition the settlement in this fashion. (See Transcript at p. 124) The $60 million payment made by the departing companies had to be made immediately in order to keep the Midwest ISO financially viable. The Midwest ISO could not afford to wait for a ruling by this Commission or anyone else without going bankrupt. Moreover, because the Commission participated in the settlement conference, was aware of the settlement reached, filed comments on the settlement that was reached, but did not offer any opposition, the Company fully believed the Commission was satisfied with the outcome codified in the Settlement Agreement.

Based on the foregoing, the Company firmly believes that this aspect of the Settlement Agreement is beneficial in that it allowed the Midwest ISO to avoid bankruptcy.

## IV. Conditions for approving the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO.

[4] Ameren's payment under the Settlement Agreement to the Midwest ISO was actually $18 million. $12 million of the $18 million was allocated to Union Electric.

While the Company firmly believes the evidence provided in the record alone is sufficient to warrant immediate approval of the Company's request by the Commission, the Company would not object to the Commission conditioning its approval provided such conditions are just, reasonable and within the statutory authority of the Commission.

**a. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company agreeing, in the event FERC orders a single RTO in the Midwest, to take whatever actions are necessary and appropriate to participate in the single RTO.**

If at any time, the FERC elects to order the Midwest ISO and the Alliance RTO into mediation to form one RTO in the Midwest, the Company requests that the Commission deem the Company's request to withdraw from the Midwest ISO approved on the condition that the Company participates in the RTO that is ultimately formed (or survives) through the mediation process, and further provided that the Company participates in the single RTO in a manner that will not result in pancaked rates to the Company's bundled retail customers.

**b. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Alliance RTO receiving an order from FERC that the Alliance RTO complies with the requirements of Order No. 2000.**

Most of the other parties in this proceeding have generally requested, at a minimum, that should the Commission approve the Company's request in this proceeding, the Commission should condition its approval on the Alliance RTO receiving a FERC order, prior to the Alliance RTO operation date, acknowledging that the Alliance RTO is in compliance with the requirements of Order No. 2000[5]. (Ex. 3, p. 46, line 19;

[5] The Staff identified as a separate condition that the Commission condition its approval on the Alliance RTO having a FERC-approved independent Board of Directors in place and a Stakeholder Advisory Committee making recommendations to that Board by December 15, 2001. Since these are both

Ex. 6HC, p. 3, lines 3-6; Ex. 5P, p. 3, lines 18-19) The Company does not object to the Commission conditioning its approval in this manner. In fact, the Company does not believe that the Alliance RTO can begin operating until such approval from FERC is received.

Dr. Proctor, however, has intimated in his rebuttal testimony that the Commission's approval should be conditioned such that the Company's request would effectively be denied solely on the basis of the Alliance RTO failing to acquire by December 15, 2001, a FERC order acknowledging compliance with Order No. 2000. (Ex. 3, p. 46, line 19) The Company would strongly oppose such a condition. First of all, the FERC approved Settlement Agreement effectively authorizes the Midwest ISO and the Alliance RTO to start their operations on January 15, 2002 without any repercussion. (Ex. 10, p. 20, Article 7.1(i)) Secondly, under questioning by Commissioner Murray, Dr. Proctor admitted that there really is no basis for imposing such a condition other than the Company's request to receive an order from this Commission by December 15, 2001. (See Transcript at p. 173, lines 3-25 and p. 174, lines 1-23) Because no other legitimate purpose has been provided by Dr. Proctor for imposing this condition, the Company respectfully requests that the December 15, 2001 restriction imposed in this condition be denied.

Notwithstanding the Company's willingness to accept this Commission conditioning its approval on a FERC order declaring the Alliance RTO FERC Order No. 2000 compliant, if the FERC elects to order the Midwest ISO and the Alliance RTO into

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requirements of FERC Order No. 2000, the Company does not see the necessity to identify this as a separate condition. Furthermore, the OPC identified as a separate condition that the Commission condition its approval on the Alliance RTO satisfying several FERC compliance issues by December 15, 2001.

mediation to form one RTO in the Midwest prior to the Alliance RTO being declared FERC Order No. 2000 compliant, the Company requests that the Commission deem the Company's request to withdraw from the Midwest ISO approved on the condition that the Company participates in the RTO that is ultimately formed (or survives) through the mediation process, and further provided that the Company participates in the single RTO in a manner that will not result in pancaked rates to the Company's bundled retail customers.

**c. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Alliance RTO and the Midwest ISO being declared by FERC to be in substantial compliance with the IRCA.**

The Company does not oppose the Commission conditioning its approval on the determination by FERC that the Alliance RTO and the Midwest ISO are in substantial compliance with the IRCA[6]. However, the Company would like to point out to the Commission that substantial compliance with the IRCA is required in order for the Midwest ISO to be declared by FERC to be in compliance with FERC Order No. 2000. (See Ex. 13, Status Report of the Midwest ISO, Inc., p. 3) Nonetheless, the Company firmly believes the Alliance RTO and the Midwest ISO have already overwhelmingly demonstrated their respective commitment to be in compliance with the IRCA as evidenced by the status report each of them submitted to FERC on October 9, 2001. (See generally Ex. 13)

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Again, since compliance issues identified by OPC are captured by being in compliance with FERC Order No. 2000, the Company does not see the necessity to identify this as a separate condition.

[6] Dr. Proctor and Mr. Kind would also require that the Alliance RTO and the Midwest ISO be in substantial compliance with the IRCA by December 15, 2001. The Company would oppose such a restriction based on the same reasoning set forth in the condition for being FERC Order No. 2000 compliant -- there is no purpose for such a restriction.

However, as stated earlier, if the FERC elects to order the Midwest ISO and the Alliance RTO into mediation to form one RTO in the Midwest, thereby obviating IRCA compliance, the Company requests that the Commission deem the Company's request to withdraw from the Midwest ISO approved on the condition that the Company participates in the RTO that is ultimately formed (or survives) through the mediation process, and further provided that the Company participates in the single RTO in a manner that will not result in pancaked rates to the Company's bundled retail customers.

**d. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company and its parent, Ameren Corporation, agreeing to hold all Missouri ratepayers harmless from any adverse rate effects that could result from the transfer of its transmission assets to the Alliance RTO or some other entity at market value.**

The Company strongly opposes this condition because it is unjust, unreasonable and an irrelevant issue in this proceeding. It is irrelevant because the Company is not requesting to sell or divest its transmission assets to the Alliance RTO or another entity in this proceeding. (Ex. 1, p. 18, lines 17-19) Moreover, the Company has no immediate intentions of divesting its transmission assets to the Alliance RTO or to any other entity. (Ex. 1, p. 18, lines 15-17) In the future, should the Company desire to sell or divest its transmission assets to the Alliance RTO or some other entity, the Company agrees to seek all approvals that are necessary in accordance with Missouri law. (Id. at p. 18, lines 13-15) Moreover, whether such a sale or divestiture of transmission assets by the Company is in the public interest would be more properly determined at the time of such request and any hold harmless requirement on the part of the Company at this time would be premature, unjust and unreasonable.

**e. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company and its parent, Ameren**

**Corporation, agreeing not to transfer ownership of its transmission assets, regardless of any future changes in state law, unless such ownership transfers are approved by this Commission.**

The Company strongly opposes this condition because it is unjust, unreasonable and potentially an improper extension of Commission authority. As stated above, if the Company decides in the future to sell or divest its transmission assets to the Alliance RTO or some other entity, the Company agrees to seek whatever approvals are necessary at the time of such ownership transfer in accordance with Missouri law. (Id.)

**f. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company and its parent, Ameren Corporation, agreeing that they will hold all Missouri ratepayers harmless from, and never seek recovery, either directly or indirectly, of the $18 million exit fee that Ameren paid to the Midwest ISO.**

The Company strongly opposes this condition because it is unjust, unreasonable and an irrelevant issue in this proceeding. As the Company has already stated, the Company firmly believes that its withdrawal from the Midwest ISO is in the public interest. If the Company can show that the benefits to the Company's ratepayers exceeds the exit fee paid to the Midwest ISO, then the exit fee paid to the Midwest ISO is by definition a prudently incurred regulatory expense that should be recoverable. (Ex. 1, p. 19, lines 9-10) However, the Company is not seeking recovery of the exit fee paid to the Midwest ISO in this proceeding. (Ex. 1, p. 19, lines 11-12 and Ex. 2, p. 15, line 20) The Company believes that such a determination is best made within the confines of a rate case before the Commission, where an appropriate analysis can be performed by the Company to validate whether the expense was in fact prudently incurred.

**g. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company agreeing to abide by the applicable terms and conditions of the Stipulation And Agreement in Case No. EO-98-413, as if the Alliance RTO was the Midwest ISO.**

While the Company would prefer to renegotiate the terms and conditions in the Stipulation And Agreement agreed to in Case No. EO-98-413 so that they can be tailored specifically to the situation that exists today, the Company does not conceptually oppose the Commission conditioning its approval in this manner. The Company would point out to the Commission, however, that there are a number of provisions in the Stipulation And Agreement that would be inapplicable to the Alliance RTO. Mr. Dauphinais admitted to this fact under questioning from Commissioner Murray. (See Transcript at pp. 215-217) Therefore, at a minimum, the terms and conditions identified by Mr. Dauphinais under questioning by Commissioner Murray would need to be modified. (Id.)

**h. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Alliance RTO receiving an order from FERC that the Alliance RTO complies with the requirements of Order No. 2000 by December 31, 2002.**

The Company would support the Commission conditioning its approval such that the Company's request would be deemed denied if the Alliance RTO has not received from FERC an order declaring the Alliance RTO to be in compliance with FERC Order No. 2000 by December 31, 2002. However, as previously mentioned, if the FERC elects to order the Midwest ISO and the Alliance RTO into mediation to form one RTO in the Midwest prior to the Alliance RTO being declared FERC Order No. 2000 compliant, the Company requests that the Commission deem the Company's request to withdraw from the Midwest ISO approved on the condition that the Company participates in the RTO that is ultimately formed (or survives) through the mediation process, and further provided that the Company participates in the single RTO in a manner that will not result in pancaked rates to the Company's bundled retail customers.

**i. Conditioning the Commission's approval of the Company's request to withdraw from the Midwest ISO on the Company agreeing to withdraw from the Alliance RTO should the Alliance RTO ever be granted a Performance Based Rate (PBR) incentive to take a position in the energy market.**

While the Company understands the concern that Dr. Proctor has expressed regarding the Alliance RTO requesting a PBR that rewards the Alliance RTO for taking a position in the market, the Company does not believe it could comply with this condition if it were adopted by the Commission. First of all, the Company's withdrawal from the Alliance RTO would require FERC approval. If FERC approves an Alliance RTO request for a PBR incentive to take a position in the market, then the FERC must have determined that such PBR incentive was in the public interest. Consequently, the Company acquiring an approval from FERC to withdraw from the Alliance RTO based on something the FERC has determined to be in the public interest is not likely to occur.

Furthermore, the possibility of FERC providing an incentive to the Alliance RTO to become a market participant, which is contrary to the independence characteristics that FERC has established for RTOs in FERC Order No. 2000, simply defies all reasonable logic. (Ex. 2, p. 6, lines 9-12) Even Mr. Dauphinais acknowledged, under questioning by Commissioner Lumpe, that "independence is the bedrock of ISOs and RTOs." (See Transcript at p. 226, lines 16-17) Thus, in order for the FERC to approve a PBR that provides an incentive to the Alliance RTO to take a position in the market, FERC will have to ignore the very bedrock upon which RTOs were formed.

## V. Conclusion

For all of the foregoing reasons, the evidence clearly demonstrates that the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO

should be approved because the Company has shown it will not be detrimental to the public interest.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent by overnight mail via Federal Express to the following parties of record on this 26th day of October, 2001:

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