

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

In the Matter of the Joint Application of Entergy Arkansas,)
Inc., Mid South TransCo LLC, Transmission Company)
Arkansas, LLC and ITC Midsouth LLC for Approval of) **File No. EO-2013-0396**
Transfer of Assets and Certificate of Convenience and)
Necessity, and Merger and, in connection therewith,)
Certain Other Related Transactions)

In the Matter of Entergy Arkansas, Inc.'s Notification of)
Intent to Change Functional Control of Its Missouri Electric)
Transmission Facilities to the Midwest Independent) **File No. EO-2013-0431**
Transmission System Operator Inc Regional Transmission)
System Organization or Alternative Request to Change)
Functional Control and Motions for Waiver and Expedited)
Treatment)

EMPIRE'S INITIAL BRIEF

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TABLE OF CONTENTS

I. JURISDICTION.....	3
II. STANDARD.....	5
III. FACTS RELATED TO EMPIRE’S ISSUES.....	5
IV. CONDITIONS CONCERNING IMPACTS OF FERC-APPROVED RATES.....	7
V. ISSUES IN CASE NO. EO-2013-0396.....	8
VI. ISSUES IN CASE NO. EO-2013-0431.....	13

COMES NOW The Empire District Electric Company (Empire), and, as its Initial Brief, states as follows to the Missouri Public Service Commission (Commission):

I. JURISDICTION

The list of issues proposed by Entergy Arkansas, Inc. and the Joint Applicants to Case No. EO-2013-0396¹ question as a preliminary matter whether the Commission has jurisdiction over these matters. Much has been written about this question in the prehearing phase of these cases in regard to intervention and the establishment of a procedural schedule. It appears that this issue has been ruled on by the Commission through its interlocutory matters. However, because discussion of intervention was prevalent in both the referenced lists of issues and the opening statements of applicant counsel, Empire will address jurisdiction in the Brief.

The notice concerning transfer of functional control of EAI's Missouri facilities to Midwest Independent Transmission System (MISO) (EO-2013-0431) and the proposed transfer of certain EAI Missouri facilities to ITC Midsouth (EO-2013-0396) both implicate Section 393.190, RSMo. Section 393.190.1, RSMo states, in part, as follows:

No . . . electrical corporation . . . shall hereafter *sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber* the whole or any part of its franchise, works or system, *necessary or useful in the performance of its duties to the public*, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person 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)

The transfer of ownership of EAI Missouri facilities from an existing electric corporation to another electric corporation triggers to the applicability of Section 393.190, RSMo. One

¹ Joint Applicants are Entergy Arkansas, Inc. ("EAI"), Mid South TransCo LLC ("Mid South"), Transmission Company Arkansas, LLC ("TC Arkansas") and ITC Midsouth LLC ("ITC Midsouth").

Commission case that is of particular relevance to this point is Commission Case No. EO-2007-0485. There, the Commission found it had jurisdiction over the transfer of certain ITC transmission facilities- approximately 9.5 miles of 161 kV transmission line in Clark County, which connected a transmission system in Keokuk, Iowa with Ameren’s transmission system near Wayland, Missouri. The Commission reported that “no Missouri retail customers [were] served by the transmission assets that the applicants proposed to transfer.” *Order Granting Certificate of Convenience and Necessity, Granting Variances from Certain Commission Rules, and Authorizing Sale of Assets*, Case No. EO-2007-0485 (August 30, 2007). However, the Commission still found that both the seller and buyer of the Clark County transmission line would be “electrical corporations” and “public utilities” and “subject to the jurisdiction of this Commission.” *Id.* Further, based on Section 393.190, RSMo, the Commission found that “before ITC may acquire the transmission line in Clark County, Missouri, the Commission must first authorize ITC to do so.” *Id.*

Section 393.190.1, RSMo has also been relied upon for the Commission to take jurisdiction over the proposed transfer of functional control of certain electric facilities to regional transmission organizations. *See* Commission Cases Nos. EO-2006-0141, EO-2006-0142, EO-2008-0134, EO-2009-0179, EO-2011-0128, EO-2012-0135, EO-2012-0136 and EO-2012-0269.

Both Case No. EO-2013-0396 and Case No. EO-2013-0431 concern matters over which the Commission has found itself to have jurisdiction. There is nothing new that should bring about a different result in these cases.

II. STANDARD

The Commission uses the standard of “not detrimental to the public interest” in analyzing applications under Section 393.190, RSMo. This standard applies to both Case No. EO-2013-0396 and Case No. EO-2013-0431.

III. FACTS RELATED TO EMPIRE’S ISSUES

Empire has a critical 161kV bulk electric system interconnection with EAI at Empire’s Powersite Substation located near the Ozark Beach Hydro Plant near Forsyth, Missouri. (Exh. 20, Warren Reb., p. 5-6; Exh. 21, Warren Reb., p. 6-7) Empire currently has Interconnection Agreements between itself, Arkansas Power and Light (now Entergy Arkansas, Inc.), Plum Point Energy Partners and Entergy Services. (*Id.*) Empire is a network integration transmission service member of the SPP RTO and a firm point to point transmission service customer of EAI, with both an ownership and purchase power share of the Plum Point coal fired power station, located near Osceola, Arkansas. (*Id.*) Such delivery of the Plum Point capacity and energy relies directly on the service availability of this 161kV interconnection that is one of the facilities subject to this Application (*Id.*) The maintenance and operation of this interconnection along with the overall EAI transfer of all of its transmission assets to ITC will directly affect the cost of power delivery to Empire’s retail customers. (*Id.*) Specifically, this described interconnection is required to be “in service” for the delivery of Plum Point Power Station capacity and energy to Empire and the Southwest Power Pool (SPP). (*Id.*) In addition to the direct interconnection facilities, any other EAI transmission facilities required to maintain a continuous path between the interconnection with Empire and the interconnection of the Plum Point facility in eastern Arkansas are required for Empire to deliver from the Plum Point facility to Empire. (*Id.*)

EAI's service impacts a great number of members of the general public in Missouri. (Exh. 21, Warren Reb., p. 5-6) EDE's receipt of capacity and energy from Plum Point is delivered from those facilities to the general wholesale market in the region and specifically to EDE's Missouri wholesale and retail customers. (*Id.*) Empire serves approximately 149,000 customers in Missouri. (Tr. 212, Warren)

Given the currently known MISO open access transmission tariff and ITC's plans for implementation of formula rates related to these facilities, these two transactions before the Commission – EAI sale to ITC, EAI/ITC transfer of functional control -- will “increase” costs to Empire. (Exh. 20, Warren Reb., p. 8)

There will be additional costs to be incurred by Missouri retail customers as a result of the transfer of ownership from EAI to ITC as a result of higher point to point transmission delivery services because of ITC's capital structure being more weighted with equity and the likelihood that ITC will be able to achieve a higher annual transmission revenue requirement for these same transmission facilities than EAI. (Exh. 20, Warren Reb., p. 12)

Empire's entitlements to Plum Point are base-load Designated Network Resources for Empire under the SPP Open Access Transmission Tariff. (Exh. 21, Warren Reb., p. 7-8) Since Plum Point is physically located on Entergy Arkansas's transmission system, Empire procured long term (20 years) point to point transmission service from Entergy Services, Inc. (*Id.*) The transmission service agreement (TSA) was entered into in August 2006 and accepted by FERC in Docket Number ER06-1436. (*Id.*) Transmission service pricing for this firm transmission service is based on the FERC accepted Schedule 7 of Entergy Services Open Access Transmission Tariff, which is currently approximately \$17.76/kW-year or \$1.8MM per year. (*Id.*) Empire's transmission service for Plum Point would be immediately converted to MISO's

Schedule 7 through and out transmission service, which is currently \$29.76/kW-year or \$2.976MM. (*Id.*) That is a difference of approximately \$1.2MM per year. (Exh. 20, Warren Reb., p. 10; Exh. 21, Warren Reb., p. 8) Empire's Missouri customers will see approximately 89% of those costs for an increase in costs of approximately \$1MM per year. (*Id.*)

IV. CONDITIONS CONCERNING IMPACT OF FERC-APPROVED RATES

The Commission has the authority to condition any approval it may grant in such way as it believes necessary to address any detriment to the public interest that would otherwise exist. In the face of detriment and the absence of mitigating conditions, the Commission is within its authority to deny the requested approval.

Staff has pointed out that the increased cost issue raised by Empire and other interveners concerns Federal Energy Regulatory Commission (FERC) rates. Based on this fact, Staff suggests that the cost issue is beyond the Commission's reach. (Staff's Statement of Position, p. 11-12 ("As to the matter of increased costs, FERC-approved interstate transmission rates are just and reasonable as a matter of law. They cannot be challenged before this Commission and this Commission should not consider them when determining the application."))

The issues raised by Empire do not, however, ask the Commission to change a FERC rate. Empire instead asks the Commission to impose conditions that will mitigate detriment by directing the applicants to address certain issues before the transaction is completed.

Such processes have been followed in other states as to FERC rates in regard to both the current ITC/EAI transaction and a prior ITC transaction. ITC witness Cameron M. Bready described in his Surrebuttal Testimony an \$85 million² Rate Mitigation Proposal being made with the context of the Arkansas ITC/EAI case (ASPC Docket 12-069-U). (Exh. 17, Bready Sur.,

p. 11-12; Tr. 165, Bready) That Rate Mitigation Proposal is designed to offset FERC rate impacts of the transaction in Arkansas. (Exh. 17, Bready Sur., p. 11-12; Tr. 164-165, Bready) Mr. Bready testified that a similar FERC rate mitigation processes have been utilized throughout the Entergy service territory in regard to this transaction. (Tr. 165, Bready)

ITC used a similar FERC rate mitigation process in an Iowa Utilities Board proceeding when it acquired the transmission assets of Interstate Power & Light. (Tr. 165, Bready) ITC was able to satisfy this state regulatory board condition even though implementation required interaction with FERC and FERC approval of a compliance plan. (Tr. 165-66, Bready) In fact, ITC is providing a rate rebate in Iowa today as a result of the rate mitigation condition imposed by the Iowa Board. (Tr. 166, Bready)

The Commission in this case need not pass on whether the subject FERC rates are just and reasonable; but, as a whole, determine whether the results of the transactions are detrimental to the public interest and, if so, whether conditions may be imposed to mitigate that detriment.

V. ISSUES IN CASE NO. EO-2013-0396

A. Have the Joint Applicants in Case No. EO-2013-0396 met their burden to provide sufficient information to the Commission so that the Commission may make a determination regarding whether the transfer of EAI's Missouri transmission assets and its certificate of convenience and necessity is not detrimental to the public interest?

B. Have the Joint Applicants in Case No. EO-2013-0396 demonstrated that there is no net detriment to Missouri customers that may result from the contemplated merger?

C. Have the Joint Applicants in Case No. EO-2013-0396 documented and supported the increase in transmission rates that is likely to occur as a result of the merger?

² Supplemental Testimony was recently filed by ITC in Arkansas PSC Docket 12-069-U increasing the Rate Mitigation funds from \$85 million to \$127 million. Supplemental Testimony of Cameron M. Bready filed July 9, 2013.

D. Have the Joint applicants demonstrated any quantifiable, incremental benefit to Missouri customers that will offset the projected long-term quantifiable increases in transmission rates caused by the increased ROE and higher equity component in capital structure associated with the transfer of its Missouri transmission assets to ITC?

E. Have the Joint Applicants adequately addressed the issues of safety and reliability that may arise as a result of the proposed transaction?

Costs

There is quantifiable financial detriment to Missouri customers as a result of the proposed ITC/EAI transaction. The testimony provided by Empire and KCPL/GMO shows that greater costs to Missouri customers should be expected as a result of the contemplated transaction due to the ITC capital structure. ITC admits that there will be an increase in costs for wholesale customers. (Tr.156, Bready) In fact, the five year Arkansas Proposed Mitigation Plan described by ITC witness Bready is designed to mitigate the “rate impact of the transaction.” (Exh. 17, Bready Sur., p. 11)³ This is partially due to the 8 percent increase ITC estimates will occur in 2014 due to the ITC/EAI transaction for any customer taking a network service under the new transmission pricing zone in Arkansas. (Tr. 158, Bready) This increase is due to moving from the capital structure EAI utilizes to the capital structure ITC has sought and is net of other ITC “expected” cost of debt benefits. (*Id.* at 158-160)

Empire reiterates that neither ITC nor EAI have provided evidence of any incremental, quantifiable benefits for Missouri customers that would offset these detriments. Nor have the parties proposed a rate mitigation process to address the long term increased costs to be experienced by Missouri customers. The Joint Applicants’ representation of qualitative benefits “are difficult to quantify in terms of economic benefit to customers,” as stated by ITC witness

³ Supplemental Testimony was recently filed by ITC in Arkansas PSC Docket 12-069-U increasing the Rate Mitigation funds from \$85 million to \$127 million. Supplemental Testimony of Cameron M. Bready filed July 9, 2013.

Bready (Tr. 163, Bready), and are too speculative to outweigh the quantifiable costs to Missouri customers.

Interconnection Agreement

The delivery of Plum Point Energy Station capacity and energy relies directly on the service availability of Empire's 161Kv interconnection with Entergy and that interconnection is critical to Empire's ability to supply safe and adequate service to its Missouri customers.

This interconnection is currently governed by an Interconnection Agreement between Empire and EAI that sets forth the responsibilities of the parties in regard to the Missouri interconnection. (Exh. 20, Warren Reb., p. 5-6) The Interconnection Agreement addresses subjects such as economic energy sales, the operating committee, service conditions, metering equipment and maintenance, billing, and liability. (Exh. 20, Warren Reb., Sch. BKW-1)

In spite of the sale of EAI's transmission assets, EAI witness Riley indicated that a new interconnection agreement would not be required and that no change to the Interconnection Agreement would be required. (Exh. 2, Riley, p. 5) His basis for this was that the "Empire Interconnection Agreement provides that it may be assigned without the consent of the parties and, as a result, a new interconnection agreement is not necessary." (Exh. 2, Riley, p. 5; Tr. 65-66, Riley) Consequently, Mr. Riley suggested "that the Empire Interconnection Agreement will be assigned to ITC upon the close of the Transaction." (Exh. 2, Riley, p. 5)

This suggestion, however, is inconsistent with Mr. Riley's own testimony. Mr. Riley also stated that "EAI will retain and continue to be responsible for the metering-related provisions of the Interconnection Agreement because EAI will retain ownership of its existing metering equipment following transfer of its transmission facilities to ITC." (Exh. 2, Riley, p. 5-6; Tr. 66, Riley) He further indicated that to the extent there are other non-transmission responsibilities

under the Interconnection Agreement; EAI will continue to undertake those non-transmission responsibilities after closing. (Exh. 2, Riley, p. 6; Tr. 66, Riley)

ITC similarly talks in terms of an assignment. However, it does not intend to take assignment of the Interconnection Agreement as a whole. ITC witness Wrenbeck stated that the Interconnection Agreement “addresses matters in addition to the interconnection of Empire facilities with those of EAI. ITC expects to assume the transmission related obligations of the agreement.” (Exh. 15, Wrenbeck, p. 5; Tr. 144, Wrenbeck) (emphasis added) Mr. Wrenbeck acknowledged that there are other provisions of the Interconnection Agreement for which ITC does not plan to be responsible. (Tr. 144, Wrenbeck) ITC only plans on a “partial assignment.” (Tr. 144-45, Wrenbeck) However, it does not know whether this is even possible. (*Id.*)

EAI witness Riley seemed to describe some result other than assignment when he stated as follows:

Some of the agreements to which ITC will succeed have obligations that will remain the responsibility of the Entergy Operating Companies following the close of the proposed Transaction, such as the provision of metering services. Those agreements will be amended and restated to identify ITC as the provider of transmission and transmission-related services and to identify the appropriate Entergy Operating Company as the provider of metering or other non-transmission services.

(Exh. 2, Riley Sur., p. 7; Tr. 68-69, Riley) (Emphasis added)

EAI witness Riley agreed that the situation he has described is exactly the circumstance surrounding the Empire Interconnection Agreement. (Tr. 69) That is, the Empire Interconnection Agreement will have to be amended to address the fact that some responsibilities are planned to go to ITC and some responsibilities under that existing agreement will stay with Entergy. (*Id.*)

EAI witness Riley stated that Entergy and ITC are still working through the existing agreements that are impacted by the proposed transaction and that will move “in whole or in part” to ITC and that EAI wants to get customers “comfortable” with that process. (Exh. 2, Riley Sur., p. 6; Tr. 67-68, Riley) EAI’s goal is to have the new agreements in place prior to closing. (Tr. 68, Riley)

The 161Kv Empire interconnection with the EAI facilities is critical to the reliability of the Empire system and directly impacts the costs to Empire’s retail consumers in Missouri when the interconnection is out of service. (Exh. 20, Warren Reb., p. 7-8) EAI and ITC (and MISO, for that matter) have no vested interest in the delivery costs of capacity and energy to Empire’s wholesale and retail customers in Missouri. (Id.) Additionally, as EAI witness Riley suggested, the Interconnection Agreement “was originally written in 1941, and there’s a number of 6 provisions that probably could be cleaned up.” (Tr. 67, Riley)

Additionally, there is a question as to the enforceability of a partial assignment of an executory contract. EAI witness Riley states his understanding that “Empire’s consent to assign the agreement is not required under Arkansas law in order for the transaction to close.” (Exh. 2, Riley Sur., p. 5) This statement brings up an additional legal question based on conflict of laws. It is not clear that Arkansas law would apply to an assignment. There does not appear to be a choice of law provision in the contract. Thus, the first issue would be whether Missouri or Arkansas law should be applied to any assignment. Once decided, the applicable law would have to be determined in regard to the proposed partial assignment of duties under a contract still being performed (and executor contract). ITC witness Wrenbeck had no opinion as to whether a partial assignment of the Interconnection Agreement could be accomplished. (Tr. 145, Wrenbeck) All of these are issues that can be avoided if the parties negotiate new

interconnection agreement(s), rather than attempting to execute a unilateral, partial assignment of the agreement.

Given these circumstances and the EAI and ITC admissions that the current Interconnection Agreement does not reflect how they intend to operate on a going-forward basis, the Commission should ensure that the terms and conditions of performance related to this important interconnection are acceptably addressed prior to the transfer of the subject facilities. (Exh. 20, Warren Reb., p. 7-8)

Conditions

If the Commission should approve the ITC transaction, it should include at least two conditions:

- 1) That Empire be “held harmless” from increased costs due to this transaction, as ITC and EAI have similarly done in several states; and,
- 2) The negotiation of a new Interconnection Agreement to ensure that responsibilities for Empire’s critical interconnection with EAI are addressed prior to any closing of this transaction.

VI. Issues in Case No. EO-2013-0431

A. Has EAI met its burden to provide sufficient information to the Commission so that the Commission may make a determination regarding whether the transfer of functional control of EAI’s Missouri transmission assets to Midwest Independent System Operator Inc. (MISO) is not detrimental to the public interest?

B. Has EAI documented and supported the significant increase in transmission rates that is likely to occur as a result of the transfer of functional control to MISO?

C. Has EAI adequately addressed the issues of safety and reliability that may arise as a result of the proposed transaction?

D. Has EAI demonstrated that there will be no net detriment to Missouri transmission operations and the power market seam in Missouri as a result of the proposed transaction?

E. Has EAI demonstrated any quantifiable incremental benefit to Missouri customers that will offset the projected increases in transmission rates caused by the application of Through and Out rates as a result of transmission service moving to the MISO Tariff, as well as unaccounted for loop flow impacts to Missouri customers resultant of EAI's integration into MISO?

F. Has EAI demonstrated a net benefit to Missouri customers that will offset the rate impacts to such customers as a result of the decrease in KCP&L's off-system sales margin?

G. Has EAI demonstrated that KCP&L, GMO, Empire and MJMEUC will be held harmless with respect to cost compensation due to EAI's voluntary choice to place its transmission assets under MISO?

H. Are there conditions that the Commission could impose on this transfer that would allow for a finding that the transfer of functional control is not detrimental to the public interest?

Costs

Empire's testimony has identified quantifiable increased transmission costs it will incur as a result of the transfer of functional control over the EAI Missouri assets to MISO. Those increased costs will total approximately \$1.2 million on an annual basis (\$1 million of which will flow through to Missouri customers). KCPL witness Carlson testified that it expects transmission rates to double, an increase of approximately \$6 million, as a result of the EAI move to MISO. (Tr. 184-85, Carlson) There appears to be no dispute among the parties that such an increase will be incurred by Empire and ultimately paid by Empire's Missouri customers. On the other hand, there is no suggestion that the transfer of functional control will have any offsetting quantifiable benefit for these customers.

There has been some suggestion that this question of increased cost is not appropriate for the Commission's consideration. However, the Commission should not and need not ignore this

obvious detriment to the Missouri public interest. As explained above in Section IV – Conditions Concerning Impacts of FERC-Approved Rates, the Commission may address the rate impacts of this transaction without challenging the just and reasonable nature of FERC-approved rates. ITC has provided with just such an example in regard to the ITC/EAI Arkansas proceeding.

Joint Operating Agreement

Within the eastern electrical interconnection within the United States, loop flows between electric systems are common and in the past have been presumed to be de minimus for the most part. (Exh. 21, Warren Reb., p. 10) However, there are circumstances where balancing authorities and transmission operators agree that the unscheduled flow of energy is significant and requires mitigation in some form between the entities. (*Id.*) Such mitigation could include the installation of electrical equipment to limit the unscheduled or unaccounted for flows between the systems and/or a financial agreement is reached to compensate the party being negatively impacted or harmed due to the loop flows. (*Id.*)

In Empire's situation, based on "today's" experience between the SPP and MISO, a significant quantity and frequency of unaccounted for loop flows are occurring on the SPP member systems from the MISO system which negatively impact Empire and SPP members. (*Id.*) The negative impact could be limitations imposed by NERC or Reliability Coordinators on Empire and SPP members to receive economic power or be required to generate its high cost units in order to resolve congestion created due to these loop flows. (*Id.*) Due to the undisputed fact that Entergy's lack of physical electrical interconnection between MISO/Ameren and Entergy Arkansas, loop flows between SPP and MISO will only be exasperated to the further detriment of Empire's Missouri retail customers and general public in western Missouri. (*Id.*)

These issues have not been resolved or addressed by SPP and MISO. (Exh. 21, Warren Reb., p. 10-11)

Prior to authorizing the transfer of functional control over the EAI Missouri facilities and creating an additional seam in Missouri, the Commission should require that these issues be acceptably addressed by MISO and SPP. Failure to do so, will exasperate the overall public detriment, as well as safety and reliability issue that should be of great interest to the Commission.

Conditions

Any Commission approval of the transfer of functional control of EAI's Missouri transmission assets to MISO should be conditioned.

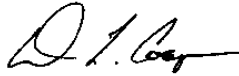
First, the Commission should suspend or conditionally approve EAI's transfer of functional control, subject to the negotiation of an acceptable Joint Operating Agreement between MISO and SPP that includes at a minimum, resolution of the unaccounted for loop flow issues and adequate compensation to SPP members, including Empire, KCPL and GMO related to the Missouri seam between SPP and MISO. (Exh. 21, Warren Reb., p. 11)

Second, the Commission should require EAI and/or MISO to "hold harmless" non MISO Missouri retail consumers from all increased transmission costs due to Entergy's proposed voluntary transfer of functional control to MISO. (Exh. 21, Warren Reb., p. 12)

Lastly, if the Commission believes it needs additional information concerning these subjects, it should order its Staff to investigate this matter and report to the Commission its position on the issues/concerns raised by Empire, KCPL, and stakeholders. Such a report could include whatever conditions, if any; Staff believes are necessary to protect Empire and Missouri retail customers. (Exh. 21, Warren Reb., p. 12)

WHEREFORE, Empire prays that the Commission consider this Initial Brief and, thereafter, issue such orders as it shall find to be just and reasonable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on July 12, 2013, to the following:

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