

November 6, 2001

**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 Reply Brief of Union Electric Company, and in addition thereto the Company's Proposed Findings of Fact and Conclusions of Law.

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

**FILED<sup>2</sup>**  
NOV 07 2001  
Missouri Public  
Service Commission



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

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

**FILED<sup>2</sup>**

NOV 07 2001

Missouri Public  
Service Commission

**REPLY BRIEF OF UNION ELECTRIC COMPANY**

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November 7, 2001

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### **Summary of Union Electric Company's Reply Brief**

Counsel for the Missouri Industrial Energy Consumers ("MIEC") has erroneously asserted that the Company has failed to show that the Alliance RTO is better than Midwest ISO for AmerenUE's bundled retail customers in Missouri. In making its assertion, MIEC relies in part on an Order by the Federal Energy Regulatory Commission ("FERC") to show that the Midwest ISO will be better for the Company's bundled retail customers in Missouri. The FERC Order, however, unequivocally demonstrates the opposite. The FERC Order shows that the Midwest ISO Tariff will result in the continued imposition of pancaked transmission rates for Missouri's bundled retail customers. Therefore, the Company's continued participation in the Midwest ISO will result in higher transmission costs for the Company's bundled retail customers and cause the Company to be in violation of the Stipulation And Agreement in Case No. EM-96-149.

OPC also has failed to provide any credible evidence to support its assertion that the Company's participation in the Alliance RTO will be detrimental to the public interest. Its allegations are wholly unsubstantiated by evidence in the record and its assertions are conclusory in nature. The OPC has asserted that there are no conditions under which the Commission could approve the Company's request in this proceeding without causing significant harm to the public, however, OPC is unable to identify any specific, factual reasons for making this assertion.

Furthermore, OPC's synopsis of the Company's alleged motivations for proposing to switch RTO's is completely irrelevant and has no impact on whether the Company's

request to withdraw from the Midwest ISO to participate in the Alliance RTO is detrimental to the public interest.

The Staff of the Missouri Public Service Commission also has failed to provide any factual basis for determining that the for-profit governance structure of the Alliance RTO will be detrimental to the public interest. Moreover, the Staff has failed to provide any credible evidence to refute the fact that the Company's increased open access transmission revenue retention under the Alliance RTO tariff will have a lowering effect on the Company's bundled retail customer rates. Finally, Staff has failed to specifically identify how the lack of an independent board and stakeholder advisory committee has resulted in the Alliance Companies making decisions that are detrimental to the public interest.

For all of the foregoing reasons, the Company firmly believes that the other parties to this proceeding have overwhelmingly failed to provide any credible evidence to support an assertion that the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO would be in any way detrimental to the public interest.

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

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

**REPLY BRIEF OF UNION ELECTRIC COMPANY**

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

**I. Reply to Post-Hearing Brief Filed by the Missouri Industrial Energy Consumers ("MIEC")**

**A. MIEC erroneously asserts that the Company has failed to show that the Alliance RTO is better than Midwest ISO for AmerenUE's bundled retail customers in Missouri.**

The MIEC claims that the Company has not demonstrated that the Alliance RTO is *better than* the Midwest ISO for the Company's retail customers. (MIEC Post Hearing Brief at p. 4) This claim by MIEC incorrectly imposes a burden of proof upon the Company that is not supported in law. For it is well established that the Company does not need to show that the Alliance RTO is better than the Midwest ISO, the Company only needs to show that its requested transaction in this proceeding will not be 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))

**1. The FERC Order MIEC cites as proof that the Midwest ISO will be better for Missouri's bundled retail customers unequivocally demonstrates the opposite. The Order shows that the Midwest ISO Tariff will result in the continued imposition of pancaked transmission rates for Missouri's bundled retail customers.**

MIEC relies upon a recent FERC Order issued on October 11, 2001 in Docket Nos. ER-98-1438-000 et al. to support its assertion that the Midwest ISO will be better for the Company's bundled retail customers in Missouri. (See MIEC Initial Brief at p. 4) A copy of this Order has been attached to this Reply Brief as Attachment 1 for the Commission's reference.

The Company strongly disagrees with the conclusion MIEC draws from this FERC Order. In fact, the Company strongly urges the Commission to take judicial notice of the specific ruling made by FERC in this Order regarding the provisions of the Midwest ISO Tariff which prescribe conditions under which bundled retail load can be served under the Midwest ISO Tariff. (See Attachment 1 to this Reply Brief, Docket Nos. ER98-1438-000, et al. at pp. 8-10)

More specifically the FERC Order in Docket Nos. ER98-1438-000, et al. states:

"Section 37 of the Midwest ISO Tariff provides that during the [six year] transition period transmission owners may elect to take network service to serve bundled retail load only if they meet one of two conditions. They must either be transmission dependent utilities within a particular zone ... or they must operate in a state that requires them to take transmission service from Midwest ISO to serve bundled retail load. If they do not satisfy either of these conditions, they must take point-to-point service to serve these loads." (emphasis added) (Id at p. 9)

Since the Company does not satisfy either of these two criteria for taking network service under Section 37 of the Midwest ISO Tariff for serving its Missouri bundled retail load, the Company must take point-to-point transmission service to import wholesale power to serve bundled retail load in Missouri. By requiring the Company to purchase point-to-point transmission service to import wholesale power from third party suppliers, a phenomenon the office of Public Counsel has identified to be significantly on the rise in Missouri (See Office of the Public Counsel Initial Brief at p. 8), the Company's bundled



retail customers in Missouri will incur the cost of two transmission rates as a result of the provisions in the Midwest ISO Tariff. (See comments made by Consumers in Docket No. ER98-1438-000 et al., at pp. 9-10) The bundled retail customers in Missouri will incur a cost for the point-to-point transmission rate to import the wholesale power and they will incur the cost of the transmission component currently contained in their bundled retail rate. This is undeniably a preservation of pancaked transmission rates for the Company's Missouri bundled retail customers. FERC even acknowledges that this requirement to take point-to-point service to serve bundled retail load results in the preservation of pancaked transmission rates. (Id at p. 10) However, FERC justifies its decision based on the fact that the rate pancaking is only temporary (i.e. for six years). (Id.)

Because of this FERC Order preserving pancaked transmission rates within the Midwest ISO, the Company's continued participation in the Midwest ISO would be in violation of the Stipulation And Agreement entered into by the Company in Case No. EM-96-149. The Stipulation And Agreement in Case No. EM-96-149 clearly states that the Company's proposed merger with Central Illinois Public Service Company is approved on the condition that the Company "participate in a regional ISO that eliminates pancaked transmission rates and that is consistent with the ISO guidelines set out in FERC Order 888." (Emphasis added) (See MIEC Initial Brief at p. 1 and Office of the Public Counsel Initial Brief at p 2) Thus, the Commission's denial of the Company's request to withdraw from the Midwest ISO in this proceeding is tantamount to forcing the Company to violate the Commission's order in Case No. EM-96-149.

Moreover, unlike the Midwest ISO Tariff, the Alliance RTO Tariff does permit the Company to take network service to supply the Company's bundled retail customers in Missouri. Therefore, the Company can use network service to import wholesale power from third party suppliers to serve the Company's bundled retail load. As a result, the Alliance RTO Tariff design, which permits the use of network service, will result in lower transmissions costs to the Company's Missouri bundled retail customers.

**B. Counsel for MIEC erroneously asserts that granting the Company's application at this time to withdraw from the Midwest ISO to participate in the Alliance RTO would be detrimental to the public interest.**

To support this erroneous assertion, MIEC states that the Alliance RTO has failed to meet its obligations regarding congestion management as required by the FERC-approved settlement because the Alliance RTO has not pursued the *development* of a long-term congestion management system with the Midwest ISO Congestion Management Working Group. (MIEC Initial Brief, at p. 3) Moreover, MIEC asserts that compatible, long-term congestion management systems cannot occur in the Midwest ISO and Alliance RTO regions unless they are *developed* on a joint basis. (Id. at pp. 3-4)

By making these statements, MIEC in affect acknowledges that the long-term congestion management systems of the Midwest ISO and the Alliance RTO have not yet been finalized. In fact, the long-term congestion management systems of the Midwest ISO and the Alliance RTO are still being developed. If the long-term congestion management systems of the Midwest ISO and the Alliance RTO have not been finalized, then MIEC's assertion of incompatibility amounts to pure speculation. Consequently, MIEC has absolutely no factual basis at this time for asserting that the long-term

congestion management systems to be adopted by the Midwest ISO and the Alliance RTO will be incompatible.

Moreover, the obligation to comply with the FERC-approved Settlement Agreement is a mutual obligation of the Midwest ISO and the Alliance RTO. (See generally Ex. 10) Because it is a mutual obligation, failure to comply with the FERC-approved Settlement Agreement is a failure of both parties, not the Alliance RTO alone. In addition, the Company finds it to be extremely paradoxical that MIEC, and other parties in this case, would hold out compliance with the Settlement Agreement provisions as a benchmark for determining whether the Company's participation in the Alliance RTO is in the public interest. Yet, at the same time, these parties want to ignore FERC's finding in the same Settlement Agreement that the Company's withdraw from the Midwest ISO and joining of the Alliance RTO is in the public interest. (See generally Ex. 10)

## **II. Reply to Initial Brief Filed by the Office of the Public Counsel ("OPC")**

**A. OPC has not provided any credible evidence to support its assertion that the Company's participation in the Alliance RTO will be detrimental to the public interest.**

The OPC concludes, in unsupported fashion, that "[t]he type of ISO or RTO in which AmerenUE is allowed to participate will determine the level and quality of competition in the wholesale market for electricity, and ultimately effect the level of rates paid by retail electric customers." (no citation provided by OPC) (OPC Initial Brief at p 9) The OPC goes on to state that "[i]f AmerenUE is permitted to switch its participation from the MISO to the Alliance RTO (as it is currently proposed), then wholesale electric markets in this area will suffer a loss of independence." (OPC cites Ex. 5, pp. 18-23) (Id.)

"It is this loss of independence that would cause the greatest detriment to the public if the Commission approves the Application." (Id.)

While the Company is unclear about the point OPC is attempting to make with these unsupported allegations, the Company assumes that OPC is trying to convince the Commission that because National Grid has not yet been approved by FERC as the independent managing member of the Alliance RTO, the wholesale energy market in this area cannot be independent. With all do respect to counsel for OPC, this assertion makes absolutely no sense whatsoever. Furthermore, it is absolutely preposterous for anyone to suggest that the FERC will permit any RTO to become operational if the RTO is not compliant with the independence requirement set forth in Order No. 2000. After all, one of the primary reasons for the creation of RTOs is to uncouple the provision of open access transmission service from vertically integrated utilities and place that responsibility with an independent entity. (See generally United States of America, Federal Energy Regulatory Commission, 89 FERC ¶ 61,285, December 20, 1999 (also known as Order No. 2000))

OPC goes on to state that even if National Grid is approved by FERC as independent, "it will not be permitted to act as an independent director." (OPC Initial Brief at p. 10) OPC's assertion is based upon a gross misinterpretation of the Term Sheet submitted into evidence as Ex. 11, where on page 1 of said term sheet it states: "Alliance LLC shall adhere to the protocols filed with FERC, including a pricing protocol, operating protocol, planning protocol and revenue distribution protocol." However, nowhere in this term sheet does it state, as OPC alleges, that the protocols filed at FERC can never be changed by the managing member. (See Generally Ex. 11) All the term

sheet says, is that "[t]he managing member will direct the business and affairs of the Alliance LLC pursuant to an LLC agreement" ... and as managing member of the Alliance LLC, National Grid shall ensure that the Alliance LLC adheres to the protocols that are filed at FERC. (Id. at p. 1) That is exactly what you would want the managing member of an RTO to do. You certainly don't want the RTO to violate the protocols filed at FERC. After all, the protocols are part of the Alliance RTO Tariff. (See generally Docket No. ER99-3144-001, filed September 15, 2000) The managing member's failure to comply with the protocols filed at FERC would be tantamount to failing to comply with the Tariff.

Finally, in its Initial Brief, OPC provides a list of what it believes are the factors of the Alliance RTO that would create a detriment to the public. First, OPC asserts that the Alliance RTO is inferior to the Midwest ISO because OPC's witness, Mr. Kind, says so. (OPC Initial Brief at p. 11) Of course Mr. Kind is the same witness that was asked three separate times at the evidentiary hearing by Commissioner Gaw to describe why the Midwest ISO is better for the Company's bundled customers than the Alliance RTO and each time Mr. Kind was unable to provide Commissioner Gaw with a credible answer, or any answer on point for that matter. (See Transcript at pp. 203-208) But OPC goes on in its Initial Brief to list three specific factors of the Alliance RTO that it alleges would create a detriment to the public: an alleged failure by the Alliance RTO to adequately address congestion management; an allegation that the Alliance RTO has inadequate provisions for balancing markets; and an allegation that the Alliance RTO has problems with its size and boundaries. (See OPC Initial Brief at p. 11) Once again, however, OPC fails to support any of these allegations with facts. They say nothing about why Alliance

RTO's congestion management proposal is inadequate, they say nothing about why the Alliance RTO's imbalance markets are inadequate, and they say nothing about why the Alliance RTO's size and boundaries are problematic. (See generally OPC Initial Brief) Thus, OPC's assertion that the Company's participation in the Alliance RTO would be detrimental to the public is completely unsupported by factual evidence. The Commission should ask themselves why the OPC, who states that there are no conditions under which the Commission could approve the Company's request in this proceeding without causing significant harm to the public, cannot point out any specific, factual reasons to support their assertion of public detriment.

**B. OPC's synopsis of the Company's alleged motivations for proposing to switch RTO's is completely irrelevant and has no impact on whether the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO is detrimental to the public interest.**

OPC exerts a great deal of effort in its Initial Brief trying to prove that the Company's decision to withdraw from the Midwest ISO was motivated by factors that differed from its stated rationales. (Id at pp. 11-14) Apparently, by the time OPC got around to writing this portion of its Initial Brief, it must have forgotten about the legal burden the Company has to meet in order to acquire approval from the Commission to switch RTOs. When one looks at the applicable standard of review in this proceeding, which was properly identified by the OPC earlier in its brief, it is clear that the Missouri Supreme Court determined, that to be approved, the requested transaction must not be detrimental to the public interest. (Id. at p 6) Nowhere in this standard, interpreted from Missouri statute by the Missouri Supreme Court, is there any reference to the "motivation" driving the transaction. The Supreme Court did not say that the motivation behind the transaction must be found to have not been detrimental to the public interest.

Thus, the alleged motivations asserted by the OPC for the Company proposing to switch RTOs has absolutely no relevance to the outcome of this proceeding. The Company's motivation is irrelevant because it does not factor into whether the Company's withdrawal from the Midwest ISO to participate in the Alliance RTO is detrimental to the public interest.

**III. Reply to Initial Brief Filed by the Staff of the Missouri Public Service Commission ("Staff")**

**A. The Staff has failed to provide any factual basis for determining that the for-profit governance structure of the Alliance RTO will be detrimental to the public interest.**

The Staff attempts to argue in its initial brief that the for-profit structure of the Alliance RTO will be detrimental because it will earn a profit on the transmission assets that the Alliance RTO owns. (Staff Initial Brief at p. 5) What the Staff must not remember, however, is that the Alliance RTO will not own the Company's assets because the Company does not intend to divest its assets to the Alliance RTO. (Ex. 1, p. 18, line 12) Therefore, whether the Alliance RTO earns a profit on the assets it owns has no bearing on the assets owned by the Company. Furthermore, if the Company were to remain a member of the Midwest ISO, the Company would earn a profit on its assets just like it will as a member of the Alliance RTO.

The next argument Staff attempts to make is that when the for-profit Alliance RTO finds that its profits are being squeezed due to expenses exceeding anticipated revenues, the Alliance RTO can be expected to raise rates. (Staff Initial Brief at p. 6) Staff acknowledges, however, that any rate increase requested by the Alliance RTO would be subject to regulatory scrutiny at FERC. (Id) I guess the Staff must think that when the not-for-profit Midwest ISO starts to incur expenses that are beyond the revenue

stream it is receiving for its services from its members, that the Midwest ISO will not request a rate increase. If this is true, and the Midwest ISO does incur expenses that exceed revenues, how will the not-for-profit Midwest ISO pay its bills? Will it continue to go further and further into debt just so it does not have to raise its rates? Assuming the Midwest ISO wants to avoid bankruptcy, I think it is safe to bet that it would follow the same course as the for-profit Alliance RTO and request a rate increase at FERC.

The next argument Staff attempts to make is that the not-for-profit Midwest ISO will not be responsible to shareholders but to its members. (Id) Staff goes on to state that the Midwest ISO's members will include transmission owners, power marketers, power producers and transmission-dependent utilities. (Id) Again, Staff is misguided. To be in compliance with Order No. 2000, the Midwest ISO must be independent of all market participants. (See United States of America, Federal Energy Regulatory Commission, 89 FERC ¶ 61,285, December 20, 1999) Thus, to be independent, the Midwest ISO, just like the Alliance RTO, cannot be directly responsible to any market participant. (Id) Thus, if the Midwest ISO or the Alliance RTO should decide to ignore the unanimous desires of all market participants to change one of their respective practices, the market participants cannot directly force either RTO to make the change. Only FERC has jurisdictional authority to order the RTO to change its practices upon receipt of a complaint by a market participant through FERC's administrative process. (16 U.S.C. 824)

The Staff also makes a number of arguments that are based solely on speculation. For instance, the Staff argues that the for-profit Alliance RTO's "goal of maximizing rate of return on transmission alone could well be incompatible with the overall goal of



developing efficient markets..." and "...will not necessarily produce a structure conducive to an efficient short-term system for congestion management. (See Staff Initial Brief at p. 7) It is obvious from the word choice underlined above that Staff is not sure themselves whether their arguments are true or will ever come to fruition. In fact, what is implied in the arguments from Staff quoted above is that the for-profit Alliance RTO's profit motives could well be compatible with the development of efficient markets and may actually produce a structure conducive to forming an efficient short-term congestion management system.

Staff further speculates that under a performance based rate scenario, "the Alliance RTO may be given a revenue cap to pay for such things as excess capacity." (Id) Staff goes on to speculate that "[i]n order to cut [the Alliance RTO's] costs and increase its profits, the ARTO has the incentive to lower its load forecast to cut its risks of having to pay for excess capacity, and thus it will have taken a position in the electricity market." (Id) With all do respect to the Staff, this PBR hypothetical makes absolutely no sense. Nor is this hypothetical an accurate depiction of how the Alliance RTO will deal with load serving entities that fail to schedule sufficient capacity to serve their load. The Commission cannot rely on these purely speculative, illogical arguments, but must instead base its determination on competent evidence in the record. (State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. Banc 1979))

Staff also speculates that rate of return maximization will cause the for-profit Alliance RTO to over-build the transmission system. (See Staff Initial Brief at p. 8) But Staff fails to describe how building transmission will increase the Alliance RTO's rate of

return. In fact, because of the three year rate moratorium in the Alliance RTO tariff (See Ex. 10 at p. 21), any construction of transmission will result in a reduction in the Alliance RTO's rate of return. Even after the moratorium, any additional transmission built will not result in an increased rate of return unless the Alliance RTO files for a rate increase at FERC. It should be noted that filing a rate case at FERC does not guarantee that the Alliance RTO will actually receive the rate of return sought. Thus, there is a substantial federal regulatory disincentive to building transmission facilities as a means to maximize or increase rate of return. Furthermore, to the Staff's credit, Staff acknowledges that the state commissions also will have the ability to keep any tendency to over-build transmission in check. (Id at p. 8) Given that most states, including Missouri, require a Certificate of Necessity be acquired before a transmission line can be built, the Alliance RTO and the Midwest ISO will each have to demonstrate the need for a given line before it can be built. Moreover, if the line is not needed or if there are cheaper generation related solutions available for relieving transmission system constraints at the time the state Certificate of Necessity is requested, such issues can be ferreted out through the state regulatory process.

**B. The Staff has failed to provide any credible evidence to refute the fact that the Company's increased open access transmission revenue retention under the Alliance RTO tariff will have a lowering effect on the Company's bundled retail customer rates.**

Staff argues that because the Company did not present any evidence in its testimony regarding an increase in generation costs to Missouri citizens as a result of the Settlement Agreement, it is impossible to determine whether the rate design set out in the Settlement Agreement will result in net benefits to Missouri customers. (See Staff Initial Brief at p. 9) The reason the Company did not provide any evidence of an increase in

generation costs in its testimony is because there will not be any as a result of the Company's participation in the Alliance RTO.

As was verified by counsel for OPC at the evidentiary hearing, the Company did not file for a zonal facilities charge rate increase at FERC to participate in the Alliance RTO. (See Transcript at pp. 151-153) Thus, no increase in the Company's zonal facilities charge will be incurred to deliver generation to the Ameren zone. Furthermore, because the Alliance RTO eliminates rate pancaking, generators throughout the Midwest ISO - Alliance RTO super-region wanting to serve load in the Company's service area will only pay one transmission rate -- the Ameren zonal rate. Therefore, generators currently located outside the Ameren control area will actually see a reduction in transmission costs to serve load in the Company's service area. This reduction in transmission costs should result in lower generation costs to the Company and its customers.

Staff also erroneously argues that the Alliance RTO tariff design perpetuates pancaked transmission rates because the *revenues* associated with pancaked transmission rates have been retained. (See Staff Initial Brief at p. 10) Staff has missed the point. First of all, the purpose for eliminating pancaked transmission rates was to put all generation on a level playing field. (See Transcript at p. 16) In other words, all generation competing to supply a load needs to have the same delivery costs to serve the load. (Id) Without question, this is precisely what the Alliance RTO tariff does. (See Transcript at p. 147-148) To the contrary, however, as pointed out earlier in this reply brief, the Midwest ISO tariff will not eliminate pancaked transmission charges for Missouri's bundled retail load. (See Attachment 1 at pp. 8-10) Therefore, if the Staff believes that

pancaked transmission rates will result in an overall detriment to generation markets (See Staff Initial Brief at p. 9), Staff should be concerned that the Midwest ISO tariff will have a detrimental impact on the generation market for serving the Company's bundled retail load.

**C. Staff has failed to affirmatively identify how the lack of an independent board and stakeholder advisory committee has resulted in the Alliance Companies making decisions that are detrimental to the public interest.**

The Staff states, for example, that "[t]he failure of the Alliance Companies to set up an independent Board of Directors has been both frustrating and discouraging." (See Staff Initial Brief at p. 12) The Company agrees but frustration and discouragement do not equate to detriment to the public interest. The Staff goes on to state that "[t]he Alliance Companies have yet to establish a Stakeholder Advisory Committee to [provide input to the independent board<sup>1</sup>.]" (Id at p. 13) The Staff further alleges that both of these failures have "allowed the Alliance transmission owners to exert undue influence on RTO decisions that will be harmful to the public interest." (Id at p 14) However, not one affirmative example of a 'harmful decision' made by the Alliance Companies has been identified by the Staff in its Initial Brief. If these alleged decisions are so harmful to the public interest, why has the Staff failed to identify in their rebuttal testimony, their testimony at the evidentiary hearing or in their Initial Brief at least one example of such a decision? The only reasonable conclusion that the Commission can draw from the noticeable absence of specific examples is that there are no decisions that have been made by the Alliance Companies that are detrimental to the public interest.

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<sup>1</sup> Staff did acknowledge that the Alliance Companies recently filed an Offer of Settlement to immediately form a Stakeholder Advisory Committee. This Offer of Settlement was submitted by the Company in this proceeding as a late filed exhibit. The Company's intent for making the filing was to provide the Commission with a status update on the Alliance RTO's remaining Order No. 2000 compliance issues.

Furthermore, if the Alliance Companies have made decisions that could be construed to be harmful, those decisions would have been codified in the Alliance RTO tariff filed at FERC. Once filed at FERC, absolutely nothing prevents this Commission or any other interested party from protesting the filings made at FERC. Moreover, if the decisions codified in the tariff are truly detrimental to the public interest, then FERC will not approve the filing absent modifications remedying such public detriment.

**D. Staff asserts that aside from the requirements set forth in the Stipulation And Agreement in Case No. EO-98-413, the Company must acquire the Commission's approval under section 393.190 RSMo. to withdraw from the Midwest ISO and join the Alliance RTO.**

The Company does not know why the Commission needs to determine the applicability of section 393.190 RSMo. in this proceeding. After all, the Company is before the Commission in this proceeding requesting approval of the Commission to withdraw from the Midwest ISO in order to participate in the Alliance RTO. Furthermore, the last sentence of the Company's application plainly requests that "the Commission enter an order granting all necessary permission, consent, approval and authority to AmerenUE to withdraw from the Midwest ISO in order to participate in the Alliance RTO." Consequently, it is the Company's opinion that if the Commission approves the Company's request in this proceeding, the Commission will have approved the Company's withdrawal from the Midwest ISO and it will have approved the Company's participation in the Alliance RTO. It would be illogical for the Company to assume otherwise.

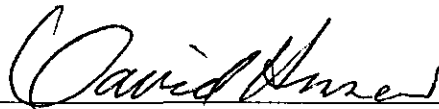
#### **IV. Conclusion**

For all of the foregoing reasons, the Company firmly believes that the other parties to this proceeding have overwhelmingly failed to provide any credible evidence to

support an assertion that the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO would be in any way detrimental to the public interest. Moreover, because the Company has identified a number of benefits to the Company's Missouri bundled retail customers that will be realized as a result of the Company's participation in the Alliance RTO, the Company's request in this proceeding should be granted.

Respectfully Submitted,

UNION ELECTRIC COMPANY d/b/a AmerenUE



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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Midwest Independent Transmission  
System Operator, Inc.

Docket Nos. ER98-1438-000  
ER98-1438-006  
ER98-1438-007  
ER01-479-000 and  
ER01-479-001

The Cincinnati Gas & Electric  
Company,  
Commonwealth Edison Company,  
Commonwealth Edison Company  
of Indiana,  
Illinois Power Company,  
PSI Energy, Inc.,  
Wisconsin Electric Power Company,  
Union Electric Company,  
Central Illinois Public Service  
Company,  
Louisville Gas & Electric Company,  
Kentucky Utilities Company

Docket No. EC98-24-000

OPINION NO. 453

OPINION AND ORDER AFFIRMING IN PART AND  
CLARIFYING IN PART INITIAL DECISION,  
ADDRESSING SEPARATELY BRIEFED ISSUE,  
AND ADDRESSING SUPPLEMENTAL FILINGS

(Issued October 11, 2001)

I. Introduction

This proceeding is before the Commission on exceptions to an Initial Decision  
(Midwest Independent Transmission System Operator, Inc., 89 FERC ¶ 63,008 (1999)).

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The proceeding concerns the initial application to form the Midwest Independent Transmission System Operator (Midwest ISO).

In addition to addressing the litigated issues from this proceeding, this opinion addresses a separately briefed issue and supplemental filings, all of which are components of the same proceeding, as discussed further below.

The Commission intends for this order to provide the Midwest ISO with the authority it needs to become operational as soon as possible. To date, no regional entity exists that performs the functions to be performed by the Midwest ISO in its region. The Commission believes that an operational Midwest ISO, as currently configured, will bring public interest benefits to its region that should not be delayed. These benefits include, among other things, reduced transmission rates, increased transmission system reliability, and increased competition in generation sales.

We note that during the pendency of this proceeding, much has changed. The Commission continues to examine developments in the Midwest,<sup>1</sup> and other regions of the country,<sup>2</sup> and may take further action on the matters addressed herein, as necessary, to assure appropriate structure and operations of proposed regional transmission organizations (RTOs).<sup>3</sup>

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<sup>1</sup>See Illinois Power Company, 95 FERC ¶ 61,183 (2001), reh'g denied, 95 FERC ¶ 61,026 (2001); see also, Southwest Power Pool, Inc. et al., 96 FERC ¶ 61,062 (2001).

<sup>2</sup>See GridSouth Transco, LLC, et al., 96 FERC ¶ 61,067 (2001) and related orders; see also PJM Interconnection, L.L.C., 96 FERC ¶ 61,061 (2001) and related orders.

<sup>3</sup>Midwest ISO's updated filing in Docket No. RT01-87-001 and other related filings are pending. The Commission is encouraged by developments related to the Midwest ISO, e.g., Midwest ISO's expanded membership and its settlement with the Alliance Companies addressing interregional coordination, and by Midwest ISO's efforts to be operational on or by December 15, 2001.



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## II. Procedural Background

On January 15, 1998, ten transmission-owning public utilities<sup>4</sup> (Applicants) filed an application under section 203 of the Federal Power Act (FPA), 16 U.S.C. § 824b (1994), for Commission approval of the transfer of operational control over their jurisdictional facilities to the Midwest ISO. Concurrently, in Docket No. ER98-1438-000, the entities establishing the Midwest ISO (Midwest ISO Participants)<sup>5</sup> filed under section 205 of the FPA for Commission approval of the Midwest ISO Tariff and the Midwest ISO Agreement.

By order issued September 16, 1998, the Commission conditionally authorized the establishment of the Midwest ISO and established hearing procedures.<sup>6</sup>

By order issued May 17, 1999, the Commission waived the issuance of an initial decision on the issue of return on equity.<sup>7</sup> The order approved a stipulated rate of return on equity floor of 10.5 percent and allowed the parties to directly brief the Commission on the issue of whether an upward adjustment to equity return should be provided as an incentive for membership in the Midwest ISO.

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<sup>4</sup>The Cincinnati Gas & Electric Company; Commonwealth Edison Company and Commonwealth Edison Company of Indiana (Collectively, Commonwealth Edison); Illinois Power Company; PSI Energy, Inc.; Wisconsin Electric Power Company; Union Electric Company; Central Illinois Public Service Company; Louisville Gas & Electric Company; and Kentucky Utilities Company.

<sup>5</sup>Those participating are listed in the filing as Cinergy Corp. (for Cincinnati Gas & Electric Company; PSI Energy, Inc.; and Union Light, Heat & Power Company), Commonwealth Edison, Wisconsin Electric Power Company, Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier), Wabash Valley Power Association, Inc. (Wabash), Ameren (for Central Illinois Public Service Company and Union Electric Company), Kentucky Utilities Company, Louisville Gas & Electric Company, and Illinois Power Company. Hoosier and Wabash did not file under FPA section 203 because they are not public utilities.

<sup>6</sup>84 FERC ¶ 61,231 (1998)(September 16 Order). The Commission analyzed Midwest ISO's proposal pursuant to the ISO principles laid out in Order No. 888. See 84 FERC at 62,142. See also Order on Motion for Reconsideration and Request for Clarification, 85 FERC ¶ 61,250 (1998), and Order on Rehearing, 85 FERC ¶ 61,372 (1998).

<sup>7</sup>87 FERC ¶ 61,189 (1999).

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Following a public hearing on the remaining issues, the Presiding Judge issued an Initial Decision on November 26, 1999.<sup>8</sup>

### III. Summary Affirmance Issues

The Initial Decision identified and resolved ten issues, identified therein as issues A through I.<sup>9</sup> We will adopt the Initial Decision's sequential identification of issues. In this opinion, we summarily affirm the Initial Decision, without discussion, on all issues except issues B and F which are addressed below. We find that the Initial Decision properly decided the issues that we are summarily affirming and the arguments on exceptions, to the extent there were any, have failed to convince us that the Initial Decision erred or that additional discussion is necessary.

Midwest ISO Participants also request that the Commission specifically approve two trial stipulations entered into prior to the hearing.<sup>10</sup> Specifically, Midwest ISO Participants seek clarification by the Commission that the rates, terms and conditions it is approving are those set forth in the original filing, as modified by Joint Stipulation and the Loss Stipulation and any other changes deemed necessary by the Commission in its opinion.<sup>11</sup> The Commission will so clarify.

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<sup>8</sup>99 FERC ¶ 63,008 (1999)(Initial Decision).

<sup>9</sup>The issues are: (Issue A) Loss recovery methodology; (Issue B) ISO Cost Adder; (Issue C) rate divisor for the Midwest ISO's network and point-to-point transmission services; (Issue D) whether to use distance-based transmission pricing; (Issue E) whether to use locational marginal pricing for congestion management; (Issue F) conditions under which bundled retail loads can be served under the Midwest ISO tariff; (Issue G) deadline for transmission owners to file for a determination of transmission/distribution classification of their facilities; (Issue H) levelized vs. non-levelized ratemaking methodology; (Issue I) penalty provisions; and (Issue J) Ancillary Service Schedule.

<sup>10</sup>See Joint Stipulation of the Midwest ISO Participants, the Commission Trial Staff, and other Undersigned Parties Regarding Certain Issues Set for Hearing (Joint Stipulation), Ex. S-20; see also Additional Joint Stipulation Between Midwest ISO Participants and the Commission Trial Staff Concerning Recovery of Losses (Loss Stipulation), Ex. S-21.

<sup>11</sup>Midwest ISO Participants Brief on Exceptions at 27-28.

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**IV. Issues for Discussion**

Issue B      Whether the ISO cost adder proposed by the Midwest ISO Participants is just and reasonable and what, if any, changes should be made to such ISO cost adder?

Schedule 10 of the Midwest ISO Tariff proposes to charge transmission customers a rate adder that will recover the Midwest ISO's costs associated with investment and expenses to run the ISO. The ISO Cost Adder is based on the budgeted expenses to be recovered that month divided by the MWh of transmission service expected to be provided under the Midwest ISO Tariff during the same period, subject to a true-up.

During the six year transition period,<sup>12</sup> the ISO Cost Adder is capped at fifteen cents per MWh. Any costs in excess of the cap will be deferred and amortized monthly over the first five years following the transition period, and recovered from customers taking service under the tariff.

**Initial Decision**

The Initial Decision concluded that the ISO Cost Adder is unjust and unreasonable because: (1) the calculation of the ISO Cost Adder during the transition period fails to include existing bundled retail load and any grandfathered wholesale load not served under the tariff;<sup>13</sup> (2) the Midwest ISO fails to propose either a rate cap, with related cost support, or a formula rate to be implemented in the ISO Cost Adder after the transition period; therefore, it is unclear what charges will apply; and (3) the Midwest ISO failed to explain how the Midwest ISO will apportion the deferred costs among the customers served under the Midwest ISO Tariff after the transition period ends.<sup>14</sup>

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<sup>12</sup>Initially, all new wholesale and unbundled retail transmission service is placed under the Midwest ISO Tariff. Existing wholesale loads, bundled retail load and grandfathered agreements that are not released under state retail access programs will be placed under the Midwest ISO Tariff in six years.

<sup>13</sup>The Initial Decision stated that because all of the Midwest ISO Participants' transmission customers will benefit from the Midwest ISO's operational and planning responsibilities for the transmission system as well as increased grid reliability, these loads should be included in the divisor to develop the ISO Cost Adder.

<sup>14</sup>The Initial Decision also stated that the Midwest ISO has not provided a means  
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The Initial Decision further stated that the imposition of additional charges to recover the deferred costs from the transition period would result in a rate change and, therefore, at the end of the transition period, the Midwest ISO must make a section 205 filing detailing the apportionment of deferred cost and providing full cost support for any additional cost adder to be charged.

#### Exceptions

Midwest ISO Participants argue that bundled load should not be assessed the ISO Cost Adder during the transition period because during this period (1) bundled load will not take service under the Midwest ISO Tariff and (2) bundled load will not receive direct benefits from the ISO. According to Midwest ISO Participants, with the exception of the reliability function, most of the ISO's assigned functions do not apply to bundled customers and, in fact, only benefit transmission customers under the tariff.<sup>15</sup>

Midwest ISO Participants state that by assigning cost responsibility equal to the proportion of bundled loads in the ISO Cost Adder rate divisor, transmission owners will face a trapping of costs and thus bear a large part of the ISO's administrative costs during the transition period. Midwest ISO Participants claim that these additional ISO costs cannot be recovered absent contract modification to grandfathered agreements and transmission owners may have difficulty in some states recovering additional ISO costs in retail rates.<sup>16</sup>

Midwest ISO Participants state that if the Commission concludes that bundled loads and grandfathered contracts should be included in the divisor for recovery of the ISO's administrative costs, then the Commission should clarify: (1) that ISO costs assigned to grandfathered wholesale load will not be collected from customers taking service under those contracts until the Commission approves the pass through of those costs to those customers; and (2) that any ISO costs assigned to bundled retail load not

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<sup>14</sup>(...continued)

to amortize and collect deferred costs for formerly bundled customers who become unbundled within the transition period.

<sup>15</sup>These functions include transmission service to eligible customers, implementing and administering OASIS, offering ancillary services, serving as regional security coordinator, and engaging in a collaborative planning process.

<sup>16</sup>Midwest ISO Participants Brief on Exceptions at 18-19.

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taking service under the tariff should be accounted for but deferred and collected after the transition period.<sup>17</sup>

Consumers Energy Company (Consumers) argues that it is inconsistent to impose the ISO cost adder on bundled retail load while restricting the transmission owners from taking network service from the Midwest ISO for power purchased on behalf of their bundled retail load during the transition period. Consumers states that the only way to make all bundled load responsible for the cost adder is to allow all such load to take network service from the ISO on a non-discriminatory basis.<sup>18</sup>

IMEA states that because retail bundled load benefits from the creation of the Midwest ISO, they should be assessed a portion of its start-up costs.

Trial staff disagrees that the formation of the Midwest ISO only provides limited benefits to bundled retail and grandfathered loads as Midwest ISO Participants suggest. Trial staff argues that transmission customers taking service under the Midwest ISO tariff should not subsidize the bundled retail and grandfathered loads that are part of the network load of each transmission customer. As an option, trial staff suggests that costs attributable to these loads be deferred until the end of the transition period, at which time an additional cost adder component under the tariff would apply to these loads.<sup>19</sup>

#### Discussion

The Commission will affirm the presiding judge's finding that the Midwest ISO Cost Adder must include all existing bundled retail load and any grandfathered wholesale load. We agree with the presiding judge that all users of the grid operated by the Midwest ISO will benefit from the Midwest ISO's operational and planning responsibilities for the Midwest ISO transmission system, as well as increased grid reliability of the transmission system. Therefore, to ensure that loads will properly bear a fair share of the Midwest ISO's costs, all long-term firm, bundled retail, and grandfathered load should be included in the divisor in developing the Cost Adder.

The above discussion, moreover, highlights a more fundamental problem in the proposed design and operation of the Midwest ISO. The Midwest ISO's origin dates back

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<sup>17</sup>Midwest ISO Participants Brief on Exceptions at 24-26.

<sup>18</sup>Consumers' Brief on Exceptions at 20.

<sup>19</sup>Trial staff Brief On Exceptions at 15.

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to January 15, 1998, when it filed with the Commission in Docket Nos. EC98-24-000 and ER98-1438-000 for Commission approval of the Midwest ISO Tariff and Midwest ISO Agreement. In that Agreement, the Midwest ISO proposed to not place existing bundled retail load and any grandfathered wholesale load under the Midwest ISO's Tariff for at least a six year transition period. In the context of an ISO, the Commission accepted the Midwest ISO's proposal in its September 16 Order.<sup>20</sup> Now, however, the Commission must review its proposal in the context of Order No. 2000.<sup>21</sup>

As we explained in Southern,<sup>22</sup> Order No. 2000 and section 35.34(k) of the Commission regulations require that an RTO be the only provider of transmission services over the facilities under its control. Section 35.34(k)(1)(i) provides that:

The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to receive, evaluate, and approve or deny all requests for transmission service. The Regional Transmission Organization must have the authority to review and approve requests for new interconnects.<sup>23</sup>

The Commission therefore directs Midwest ISO to revise its Midwest ISO Agreement and Tariff, as necessary, to place and provide all load under the Midwest ISO's Tariff. Further, the Commission intends to initiate a rulemaking proceeding on market design and market structure to translate the RTO functions into concrete protocols that RTOs will follow in providing transmission services and administering or monitoring certain energy markets and the decisions we make here will be subject to that rulemaking.

Issue F	Whether the Provisions of the Midwest ISO Agreement and the Midwest ISO Participants' Proposed Tariff, Which Prescribe Conditions Under Which Bundled Retail Loads Can Be Served Under the Midwest ISO Tariff, Are Just And Reasonable?
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<sup>20</sup>84 FERC ¶ 61,231 at 62,167-68 (1998).

<sup>21</sup>Midwest ISO's compliance with Order No. 2000 will be more fully addressed in Docket Nos. RT01-87-000 and RT01-87-001.

<sup>22</sup>See Southern Company Services, Inc., 94 FERC ¶ 61,271 (2001).

<sup>23</sup>18 C.F.R. § 35.34(k)(1)(i) (2000).

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Section 37 of the Midwest ISO Tariff provides that during the transition period transmission owners may elect to take network service to serve bundled retail load only if they meet one of two conditions. They must either be transmission dependent utilities within a particular rate zone (i.e., their transmission facilities within a zone are insufficient to serve their load in that same zone) or they must operate in a state that requires them to take transmission service from Midwest ISO to serve bundled retail load. If they do not satisfy either of these conditions, they must take point-to-point service to serve these loads.<sup>24</sup>

#### Initial Decision

The presiding judge found that the conditions under which bundled retail loads can be served under the Midwest ISO Tariff (not including the MAPP member exemption which was filed later) are just and reasonable because allowing all transmission owners to elect network transmission service for their bundled load would disrupt the negotiated revenue distribution that was key to the formation of the Midwest ISO.<sup>25</sup> The presiding judge also found that it would be unjust to upset the consensus reached by the Midwest ISO Participants on this point in order to appease the two parties (Consumers and Detroit Edison) who objected to these provisions, because they were not participants of the Midwest ISO.

#### Briefs on and Opposing Exceptions

On exceptions, Consumers argues that the Initial Decision erred by failing to require the Midwest ISO to allow bundled retail load to be served under its Tariff. Consumers asserts that allowing some transmission owners to have this option and not others is discriminatory. This, Consumers argues, derives from the fact that using network service to serve bundled retail load will remove a "virtual" rate pancake that

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<sup>24</sup> After the issuance of the Initial Decision, in Docket No. ER01-479-000, Midwest ISO proposed to add Section 37.5 which provides a special exemption from these restrictions to certain members of Mid-Continent Area Power Pool (MAPP). This will be discussed further below.

<sup>25</sup> Appendix C to the Owners Agreement requires that revenue from network service be distributed to the transmission owners based on what zone a load is located in while revenue from point-to-point service is distributed based 50 percent on transmission investment and 50 percent on power flows. Accordingly, a relaxation of the transition conditions on who can take network service to serve bundled retail load would alter the overall revenue distribution to transmission owners.

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otherwise applies when the point-to-point service rate is combined with the transmission costs included in the bundled retail rate. Consumers argues that allowing this type of disparate treatment will lead to improper price signals and the encouragement of inefficient power decisions. Consumers also asserts that this proposal contravenes the requirements of ISO Principle No. 3 which calls for non-discriminatory open access to an ISO's systems and all services under its control at non-pancaked rates. Finally, Consumers rejects the presiding judge's rationale that preserving the negotiated revenue distribution is sufficient reason to allow some transmission owners to take network service to serve bundled retail load while denying the same benefit to other transmission owners.

In their Brief Opposing Exceptions, Midwest ISO Participants answer that there is no rate pancake in the filed proposal, the presiding judge's attempt to preserve the negotiated revenue distribution is appropriate, and the Commission has already approved this revenue distribution method. Accordingly, the Midwest ISO Participants argue that the Commission should affirm the presiding judge and reject Consumers' proposal to upset that revenue distribution method.

Commission trial staff, in its brief opposing exceptions, states that the Commission already addressed this issue in the September 16 Order and accepted the proposed transition period restrictions on using network service to serve bundled retail load.

#### Discussion

The Commission will affirm the presiding judge's finding on this issue. The Commission recognizes that a great amount of work and negotiation went into the voluntary attempt to organize the Midwest ISO. We recognize that efforts to mitigate cost shifts, including the negotiated revenue distribution, were essential to the process of reaching a voluntary consensus among the great number of participants in those negotiations, and that rejecting the proposed conditions on use of network service to serve bundled retail load will upset that negotiated revenue distribution. Finally, we recognize that the conditions that Consumers opposes only exist during the transition period. On this basis, we hereby approve the transition conditions on use of network service to serve bundled retail load. These conditions are temporary, they are consistent with the wishes of the Midwest ISO Participants, and we believe that the public interest benefits of Midwest ISO operation will far outweigh any temporary drawback attributable to these transition conditions.

#### V. Separately Briefed Issue (Return On Equity Adjustment)

##### Background



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On April 16, 1999, the Midwest ISO Participants, Wisconsin Public Service Corporation, Wisconsin Public Power, Inc., the Illinois Municipal Electric Agency, the City of Hamilton, Ohio and the Commission staff filed a joint motion to waive an initial decision on the issue of rate of return on common equity. The motion was filed as a result of a joint stipulation dated April 6, 1999 among the parties. The Joint Stipulation states in pertinent part:

The Midwest ISO Participants, Staff and any other signatories agree to the following procedure for the purposes of avoiding or minimizing the burdens and risks of litigation with respect to the issue of rate of return on equity. First, a rate of return on equity floor of 10.50 % shall be established. Second, the Midwest ISO Participants as well as others will be allowed to argue to the Commission for an increase in the rate of return on equity from 10.5% to up to 11.50% to reflect their participation in the Midwest ISO. . . . The parties shall not be permitted to address in their briefs any other issues as to the return on equity. Thus, all issues pertaining to return on equity are resolved except the issue of whether an upward adjustment to equity return should be provided as an incentive for membership in the Midwest ISO. Nothing herein shall preclude the Midwest ISO Participants from supporting the request for an 11.50% return by arguing that the facts and circumstances would warrant an even higher return; provided that no such return higher than 11.50% shall be requested to be approved in this proceeding.

By order issued May 17, 1999,<sup>26</sup> the Commission granted the motion to waive the Initial Decision on the issue of return on equity. In doing so, the Commission also approved the rate of return on equity floor, stating that the 10.50 percent agreed to in the joint stipulation is fair and reasonable and in the public interest and is, therefore, approved. The Commission further stated that the sole issue to be briefed is "whether an upward adjustment to equity return should be provided as an incentive for membership in the Midwest ISO."

#### Pleadings

On August 2, 1999, Blue Ridge Power Agency (Blue Ridge), Wisconsin Public Service Corporation (WPSC), Midwest ISO Participants, Consumers and Joint Consumer

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<sup>26</sup>87 FERC ¶ 61,189 (1999).

Advocates<sup>27</sup> (Joint Consumers), respectively, filed initial briefs on the establishment of the return on equity for the Midwest ISO. On September 16, 1999, Blue Ridge, WPSC, Midwest ISO Participants and Consumers, respectively, filed reply briefs. On September 16, 1999, trial staff filed a reply brief and motion to disregard allegedly improper arguments made by Midwest ISO Participants, Consumers, and WPSC, and extra-record testimony filed by Midwest ISO Participants. On the same date, Blue Ridge filed a motion to strike the same arguments and extra-record testimony of Midwest ISO Participants. On October 1, 1999, Midwest ISO Participants filed an answer in opposition to motions to strike or disregard portions of its initial brief.

#### Initial Briefs

Midwest ISO Participants state that a return on equity of at least 11.50 percent is necessary to encourage continued and expanded ISO participation. Because the Midwest ISO will provide substantial benefits such as lower transmission rates, more reliable service, and independent administration of a region-wide transmission tariff, the Midwest ISO Participants state that the Commission should affirmatively reward the participating transmission owners. According to the Midwest ISO Participants, an increase in the return on equity will counter the reduction in revenues that Participants will experience, and may facilitate the construction of transmission facilities needed to maximize ISO benefits.

Midwest ISO Participants argue that increased risks and cost under-recovery associated with participation also justify a higher return on equity. Midwest ISO Participants argue that transmission owners will face increased financial risk because transmission owners will be required to incur costs at the direction of the ISO, some of which may not be fully recovered in rates. Transmission owners will also face increased operational risks because they will bear the obligations of ownership such as debt costs while the Midwest ISO will direct operation of the transmission facilities. Moreover, according to Midwest ISO Participants, the transmission owners may face liability which extends beyond their existing service territories to include the territory served by the ISO.

WPSC and Consumers also agree that an upward adjustment to the equity return should be provided. They contend that a higher return is needed to (1) encourage the participation by a large number of transmission owners throughout the region, (2) reflect a return more in line with existing state commission allowed returns, and (3) provide

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<sup>27</sup>Joint Consumer Advocates consist of the Pennsylvania Office of Consumer Advocate, the Ohio Consumers' Counsel, the Missouri Office of Public Counsel, the Indiana Office of Utility Consumer Counselor, and The Citizens Utility Board.

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sufficient return to encourage and fund needed construction. WPSC states that by joining the Midwest ISO, a transmission owner accepts considerable risk including loss of control over assets and reduced transmission revenues associated with the elimination of rate pancaking.<sup>28</sup> Consumers argues that a true incentive for voluntary Regional Transmission Organization (RTO) formation is a positive adjustment to an existing authorized return. Consumers states that a RTO's initial return on equity should be no lower than one percent above the highest currently authorized return on equity of the individual RTO transmission owners.<sup>29</sup>

Blue Ridge and Joint Consumers oppose an unconditioned increase to the return on equity as an incentive to join the Midwest ISO. According to Blue Ridge, because the Midwest ISO is a transmission-only utility, it is a low-risk regulated monopoly that cannot be bypassed by its transmission dependent utilities or customers. Therefore, Blue Ridge argues that the return on equity should be lower than a return on equity for a vertically integrated utility to reflect this decreased risk. Blue Ridge asserts that, since no downward adjustment was made, the proposed return on equity already contains an incentive.<sup>30</sup>

Joint Consumers also opposes the use of a rate of return on equity adjustment to encourage or reward participation in the Midwest ISO. Joint Consumers states that the incentive mechanism is unnecessary and would result in rates that are unjust and unreasonable, particularly for those Midwest ISO Participants who have already voluntarily committed to participate. An upward adjustment increases transmission rates without providing any other benefit to consumers. In addition, Joint Consumers argues that a rate of return adder will increase transmission rates and serves to move regulated transmission rates further from marginal cost and economic efficiency. According to Joint Consumers, with an excessive rate of return, a utility has the incentive to overinvest in transmission utility plant in order to maximize excess profits.<sup>31</sup>

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<sup>28</sup>WPSC also states that it faces an immediate reduction in revenues if it follows the Wisconsin requirement that all transmission service including that for bundled retail load be taken from the ISO.

<sup>29</sup>According to Consumers, the Commission should grant the Midwest ISO a return on equity between 15.23 percent and 17.23 percent. Consumers' Initial Brief at 7.

<sup>30</sup>Blue Ridge Initial Brief at 9-10.

<sup>31</sup>Joint Consumers favors a generic policy proceeding to address how to set an appropriate rate of return for an RTO.

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Trial staff differentiates between payment for the acceptance of risk and payment in the form of an incentive for the purpose of encouraging companies to participate in the ISO. Trial staff states that Midwest ISO Participants, Consumers, and WPSC violated the Joint Stipulation by failing to restrict their arguments to reasons why an adder should be allowed in order to encourage transmission owners to join the Midwest ISO.<sup>32</sup>

#### Midwest ISO Participants' Response

Midwest ISO Participants state that the majority of Midwest ISO customers recognize that any increase in rates resulting from an 11.50 percent return on equity is offset by the elimination of rate pancaking and the larger the Midwest ISO becomes, the greater the transmission cost savings and other benefits will be to consumers.<sup>33</sup> They state that Blue Ridge and Joint Consumers ignore substantial disincentives to Midwest ISO participation, including reduced revenues and increased risks which are somewhat mitigated by the 11.50 percent return. They also fail to recognize that a return of at least 11.50 percent is the minimum return required as a starting point to encourage needed investment in transmission facilities.

Midwest ISO states that the joint stipulation is a compromise which establishes a 10.50 percent "floor" or lower limit on the equity return for the Midwest ISO. The fact that the parties agreed to support the 10.50 percent floor return on equity as just and reasonable (and the Commission found that return "fair and reasonable and in the public interest") does not mean that a higher return cannot be justified under the Commission's established rate of return standards. In fact, the joint stipulation specifically provides that the Midwest ISO Participants may argue that the "facts and circumstances" warrant a

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<sup>32</sup> Trial staff requests that the Commission disregard certain inappropriately made arguments, such as the extra-record testimony attached to the Midwest ISO Participants' Brief on Exceptions. In the alternative, trial staff requests that the Commission set for hearing the issue of what the Midwest ISO's market-required return on equity would be. Trial staff Reply Brief at 5.

<sup>33</sup> According to Midwest ISO Participants, the issue before the Commission is whether the compromise 11.50 percent equity return should be adopted as an incentive for membership in the Midwest ISO or to lessen the disincentives of joining, which is separate from the issue of whether or not some form of performance-based regulation should apply after the ISO is formed and operational.

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higher return.<sup>34</sup> Midwest ISO Participants also point out that an 11.50 percent return cannot serve as an incentive for overinvestment because the Midwest ISO, not the transmission owners, will decide on the planning and construction of transmission facilities.

In addition, Midwest ISO Participants argue that Blue Ridge offers no evidence to support its assertions that as a transmission-only utility, Midwest ISO faces less risk than a vertically integrated utility. To the contrary, Midwest ISO Participants state that those entities like the Midwest ISO will be subject to increased risks that warrant higher returns on equity. In addition to the loss of transmission revenues from the elimination of rate pancaking, transmission owners may need to collect from retail ratepayers substantial monies that are incurred by the ISO actions.<sup>35</sup>

#### Discussion

The Commission finds that the proposed adjustment to ROE to incent membership in the Midwest ISO constitutes an innovative rate proposal as defined in Order No. 2000.<sup>36</sup> Under the innovative rate requirements of Order No. 2000 and the Commission's regulations promulgated thereunder,<sup>37</sup> the Midwest ISO must first qualify as an RTO in order to receive approval of an innovative rate proposal. The determination of whether or not the Midwest ISO qualifies as an RTO will be made in a subsequent order.<sup>38</sup> While we are hereby rejecting the proposed 100 basis point adjustment to ROE, our rejection is without prejudice to Midwest ISO making a new rate filing supporting an innovative rate proposal consistent with the Commission's requirements for innovative rates. We endorse

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<sup>34</sup>Midwest ISO Participants Reply Brief at 29.

<sup>35</sup>For example, the transmission owner may need to recover costs from bundled retail load of constructing facilities required by the Midwest ISO which the owner would not have constructed as a non-participant.

<sup>36</sup>Regional Transmission Organizations, Order No. 2000, 65 FR 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 FR 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), petitions for review pending sub nom, Public Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir.).

<sup>37</sup>See, 18 CFR § 35.34(e) (2000).

<sup>38</sup>See Docket Nos. RT01-87-000, et al.

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the concept of innovative rates where supported and will give our prompt consideration to an innovative rate proposal by Midwest ISO.<sup>39</sup>

VI. Supplemental Filing in Docket No. ER98-1438-006 (Loss Factors)

Background

The proposed loss recovery methodology was Issue A from the Initial Decision. As noted earlier, prior to the hearing, Midwest ISO Participants and Commission trial staff entered into a Loss Stipulation pursuant to which the parties agreed that the proposed loss recovery methodology is appropriate but also agreed that one of the originally filed inputs to the methodology required recalculation. The parties agreed that the transmission owner loss factors, as originally filed, were not consistent with the assumptions of the proposed loss recovery methodology and agreed that the Applicants would submit revised loss factors in a subsequent filing. The presiding judge accepted the proposed loss recovery methodology in light of the Loss Stipulation, and we have summarily affirmed that action above. In Docket No. ER98-1438-006, the Midwest ISO Participants filed their revised loss factors.

Applicants' Representations

Applicants state that the revised loss factors were calculated using a uniform methodology that was applied to all of the companies. This methodology included a thorough evaluation of all of the different components of losses and took into consideration parallel flows on the Midwest ISO system.

Intervention and Answer

WPPI submitted a motion to intervene and limited protest. WPPI does not challenge the underlying methodology used to calculate the loss factors, but instead challenges the output of that methodology for two of the twelve transmission owners involved: Northern States Power (NSP) and Alliant Energy Operating Companies (Alliant). WPPI suggests that the calculation, in these two instances, may have been flawed in two ways. First, WPPI argues that a double-recovery of losses could occur

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<sup>39</sup> At that time the Midwest ISO may also wish to revisit the issue of whether its base ROE of 10.5 percent properly reflects its financial requirements in light of the many changes that have transpired since the issue was stipulated. However, we emphasize that we are not requiring Midwest ISO to revisit that issue and we see no reason why it may not begin operating under the base ROE of 10.5 percent.

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because NSP and Alliant receive loss compensation for certain MAPP-related transactions. Second, WPPI asserts that an over-recovery of losses could occur as a result of NSP's and Alliant's reciprocity or dynamic scheduling arrangements. WPPI maintains that these errors should be corrected.

In their answer, Applicants state that there can be no MAPP-Midwest ISO double-recovery of losses because once NSP and Alliant transfer control of their transmission facilities to Midwest ISO, all transmission service over those facilities will be provided under the Midwest ISO Tariff. Thus, the MAPP loss recovery procedure will no longer apply to NSP and Alliant and there will be no MAPP-related double recovery. Next, Applicants state that all control area loads and losses will be properly matched, including those under dynamic scheduling and reciprocity arrangements. Accordingly, there will be no over-recovery on this account either.

#### Discussion

The Commission will approve the proposed loss factors. No party challenges the methodology used to calculate these loss factors and Applicants' response to WPPI sufficiently addresses WPPI's concerns regarding the output of the methodology.

#### VII. Supplemental Filings in Docket Nos. ER98-1438-007 and ER01-479-000

##### Background

In Docket No. ER01-479-000, the Midwest ISO filed amendments to the Midwest ISO Tariff and Owners Agreement to: (1) modify the membership of the Midwest ISO Advisory Committee, and (2) to allow some additional Transmission Owners, who are members of MAPP, to take Midwest ISO network service for their bundled retail customers.<sup>40</sup> Simultaneously, in Docket No. ER98-1438-007, the Midwest ISO filed a reformatted Midwest ISO tariff and Owners Agreement to conform with the requirements of Order No. 614. Midwest ISO proposed an effective date of November 20, 2000, for both filings.

##### Interventions and Answer

Motions to intervene in Docket No. ER01-479-000 were filed by Western Area Power Administration (WAPA), Midwest ISO Transmission Owners, Commonwealth

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<sup>40</sup>By letter dated June 4, 2001, designated Docket No. ER01-479-001, the Midwest ISO requested expedited action on the filing in Docket No. ER01-479-000.

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Edison, MAPPCOR, and the Illinois Commerce Commission. Motions to intervene in Docket No. ER98-1438-007 were filed by Commonwealth Edison, GEN-SYS Energy, and Dairyland. In addition, Consumers filed a protest<sup>41</sup> and WAPA, Midwest ISO Transmission Owners, and Commonwealth Edison filed comments.

Midwest ISO filed a Motion for Leave to Answer and Answer.

### Discussion

With respect to Docket No. ER01-479-000, WAPA's comments included a request that Midwest ISO add certain additional language to the Midwest ISO Tariff in order to allow federal entities to participate in the Midwest ISO. In its answer, Midwest ISO committed to make the requested changes, with minor modifications, in a later filing. Similarly, Midwest ISO agreed with the comments of Midwest ISO Transmission Owners that the proposed changes to the Midwest ISO Tariff are not effective until the transfer date. Regarding Consumers' Protest,<sup>42</sup> Midwest ISO noted that the proposed modification was made to accommodate MAPP members that contemplated joining the Midwest ISO and if the option to take network service to serve bundled retail load during the transition period is a necessary condition for Consumers to join the Midwest ISO as a transmission owning member, the Midwest ISO would consider the same flexibility for Consumers.

We find that the proposed modifications to the Midwest ISO Tariff and Owners Agreement are acceptable in light of our affirmance of the presiding judge's findings on the issue of network service for bundled retail load during the transition period. The proposed change to the membership of the Midwest ISO Advisory Committee is unopposed and appears reasonable as well.<sup>43</sup> Accordingly, we will grant an effective date of November 20, 2000, for the reformatted and revised Owners Agreement, and make the reformatted and revised Midwest ISO Tariff effective on the transfer date, as requested.

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<sup>41</sup>Because the subject matter of that protest actually applies to one of the changes submitted in Docket No. ER01-479-000, we will deal with it as though it were filed in Docket No. ER01-479-000.

<sup>42</sup>In its protest, Consumers basically cited the same arguments it made on Exceptions to the Initial Decision.

<sup>43</sup>We will deal with Midwest ISO's filing to incorporate the proposed WAPA language once it is filed.



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The only comments that dealt with the Order No. 614 compliance filing were from Commonwealth Edison. Commonwealth Edison argued that the reformatted Midwest ISO Tariff should be made effective on the date that the Midwest ISO takes operational control of member transmission systems. In its answer, Midwest ISO agreed. We will accept the filing in Docket No. ER98-1438-007. In light of our approval of the proposed changes in Docket No. ER01-479-000 which are incorporated in this filing, our review indicates that the proposed modifications in Docket No. ER98-1438-007 comply with the requirements of Order No. 614.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part and clarified in part, as discussed in the body of this order.

(B) Prior to the end of the transition period, the Midwest ISO/Midwest ISO Participants shall make a section 205 filing with the Commission detailing and supporting a post-transition period ISO Cost Adder and detailing how deferred costs from the transition period will be apportioned among all customers under the Midwest ISO Tariff following the end of the transition period.

(C) The rates, terms and conditions hereby approved are set forth in the Midwest ISO Participants original filing as modified by the Joint Stipulation and the Loss Stipulation, and further modified by this Order.

(D) The proposed adjustment to the stipulated return on equity floor is hereby rejected as discussed above.


(E) The proposed loss factors filed in Docket No. ER98-1438-006 are hereby approved, however, as the proposed tariff sheets associated with the revised loss factors do not conform to the requirements of Order No. 614, they must be refiled consistent with the Order No. 614 requirements.

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(F) The proposed modifications, and associated designations, filed in Docket Nos. ER98-1438-007 and ER01-479-000 are hereby approved as filed and Docket No. ER01-479-001 is hereby terminated.

By the Commission.

(S E A L)

  
David P. Boergers,  
Secretary.

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

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

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNION  
ELECTRIC COMPANY**

COMES NOW Union Electric Company d/b/a AmerenUE ("Company", "UE" or "AmerenUE") and for its Proposed Findings of Fact and Conclusions of Law states the following:

**FINDINGS OF FACT**

1. 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.

2. 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.)

3. 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.

4. 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)

5. 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.

6. 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.

7. 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.

8. 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 assess the Midwest ISO and Alliance RTO situation further and make one last effort at resolving their differences before the FERC rules in this proceeding.

9. 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. The Settlement Agreement, among other things, authorized Ameren to withdraw from the Midwest ISO and approved its participation in the Alliance RTO. The Settlement Agreement also required Ameren to pay \$18 million (\$12.5 million from AmerenUE, \$5.5 million from AmerenCIPS) to the Midwest ISO.

10. 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. None of the comments submitted by the Missouri Public Service Commission or the Missouri Office of Public Counsel expressed opposition to approval of the Settlement Agreement.

11. 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.

12. 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.

13. 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.

14. 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.

15. In its Direct Testimony, its Rebuttal Testimony and in its Initial Brief, Union Electric Company ("Company" or "AmerenUE") has unequivocally demonstrated that the

Company's request to withdraw from the Midwest ISO in order to join the Alliance RTO will not be detrimental to the public interest.

16. 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.

17. The Company's withdrawal from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest 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. Because of this, the Company's bundled retail customers will benefit from the lowering effect this retained revenue has on bundled retail rates.

18. The Company's withdrawal from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest because Ameren has not filed to increase its transmission rate. Thus, there will not be any adverse transmission rate impact from the Company's participation in the Alliance RTO.

19. The Company's withdrawal from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest because 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.

## CONCLUSIONS OF LAW

1. 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))
2. 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))
3. 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))
4. 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)
5. Provided that the Alliance RTO is in compliance with the requirements of FERC Order No. 2000 prior to becoming operational, the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest.
6. Provided the Alliance RTO has in place an independent Board of Directors and a Stakeholder Advisory Committee providing advice to the Board prior to the Alliance RTO becoming operational, the Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest.
7. Provided the Alliance RTO and the Midwest ISO have substantially implemented the Inter-RTO Cooperation Agreement prior to the Alliance RTO becoming operational, the

Company's request to withdraw from the Midwest ISO to participate in the Alliance RTO is not detrimental to the public interest.

8. 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.

9. 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.

10. This Commission may not act in any way inconsistent with the FERC's order because 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). 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.

11. This Commission may not act in a manner inconsistent with FERC's May 8, 2001 order based on the doctrines of estoppel and waiver. 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. 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).

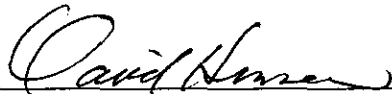


12. The rule of estoppel by record bars this Commission from a second action against the Company on an issue necessarily raised and decided in the first action. Drainage District No. 1 v. Matthews, 234 S.W.2d 567, 572 (Mo. 1950).

13. The Commission has waived any right it might otherwise have possessed to issue an order in the present proceeding that is inconsistent with the FERC order under the doctrine of waiver. 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. The Commission did not do so and therefore waived its rights to do so in this proceeding.

Respectfully Submitted,

UNION ELECTRIC COMPANY d/b/a AmerenUE



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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 6<sup>th</sup> day of November, 2001:

General Counsel  
Missouri Public Service Commission  
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Jefferson City, MO 65102

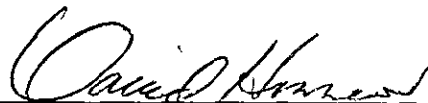
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