



Martha S. Hogerty
Public Counsel

State of Missouri

Bob Holden
Governor

Office of the Public Counsel
Governor Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <http://www.mo-opc.org>
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

November 5, 2001

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

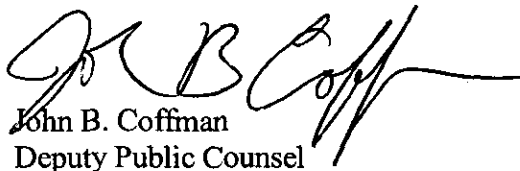
RE: Empire District Electric Company
Case No. EO-2002-24

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **PUBLIC COUNSEL RECOMMENDATION AND MOTION TO DISMISS**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,


John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

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

In the Matter of Empire District Electric)	
Company proposal to join the Midwest)	Case No. EO-2002-24
Independent Transmission System)	
Operator, Inc.)	

PUBLIC COUNSEL RECOMMENDATION AND MOTION TO DISMISS

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Recommendation and Motion to Dismiss states as follows:

1. On July 10, 2001, Empire District Electric Company (Company) filed its Request for Finding of Lack of Jurisdiction or, in the Alternative, Application. Empire states it has plans to transfer operational control over designated transmission facilities to the Southwest Power Pool (SPP), and requests a finding from the Commission that it has no jurisdiction over this transaction. Ibid, p. 3. Public Counsel contends that this case should be dismissed as moot, given the proposed consolidation of SPP and the Midwest Independent Transmission System Operator, Inc. (MISO). In the alternative, Public Counsel requests that the Commission acknowledge its jurisdiction over Company's proposal for RTO membership and set an evidentiary hearing in this case.

2. Although Company describes SPP as a Regional Transmission Organization (RTO), it has not been recognized as an RTO by the Federal Energy Regulatory Commission (FERC). Last month, SPP and MISO announced an agreement that had been reached for the consolidation of these two organizations with an expected closing on this consolidation in the first quarter of 2002. A joint press release announcing this agreement on consolidation is attached to this pleading as Attachment 1.

4

The details of the proposed consolidation are not yet known. The agreement and the fact that SPP is not currently an RTO renders Company's Application in this case moot.

3. In the event that this case is not dismissed, the Commission should recognize it has the jurisdiction and authority to grant or deny permission for regulated utilities to join RTOs pursuant to state law. Section 393.190.1 RSMo. 2000, states as follows:

No . . . electrical corporation . . . shall hereafter sell, **assign, lease, transfer, mortgage or otherwise dispose of** . . . the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it to do so. Every such sale, **assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation** made other than in accordance with the order of the commission authorizing same shall be void . . . (emphasis added).

Company's plans do indeed involve a transfer of control over its transmission assets that triggers this statute. The language of §393.190 suggests that the General Assembly intended the Commission to review any possible transaction which would significantly alter the control that an electrical corporation has over any part its system which is necessary or useful in meeting its obligations to the public.

4. Company's August 29, 2001, pleading points out that §393.190 RSMo. 2000 was enacted "in the early years of the previous century." Ibid, p. 4. While RTOs did not exist at that time, the drafters intended broad authority to review any type to future transfer that would involve handing over control of utility facilities which are necessary for the provision of service. The drafters of this statute understood that protecting the public could involve reviewing a broad variety of transactions that have the potential to impact the rates and service for monopoly customers. RTO membership

involves just such a transaction, and the Commission should review this transaction in order to ensure Missouri consumers are protected.

5. In analyzing whether the Commission has the jurisdiction and authority to approve or deny RTO membership, it should be noted that its statutory powers are intended to be broad enough to protect consumers. These powers include all powers expressly laid out in statute as well as implied powers that are necessary and proper to carry out its statutory obligations. Sections 386.040 and 386.250(7) RSMo. 2000.

6. The appropriate standard of review under Section 393.190, as interpreted by the Missouri Supreme Court, is that the transaction shall be approved if it can be proved that the transaction can be found to be "not detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. banc 1934). The burden of proof is borne by Company as the applicant in this matter. Section 386.430 RSMo. 2000; 4 CSR 240-2.110(5)(A). Therefore, Company bears the burden of proving in this case that its proposal to join the SPP would not be detrimental to the public interest.

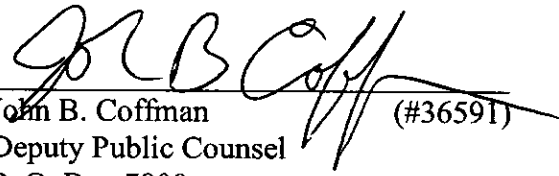
7. At a minimum, the members of the "public" that the Commission must protect in this case include Company's ratepaying customers. However, the public that could be detrimentally impacted by the proposed membership is much broader, including electric consumers throughout Missouri and the Midwest region. If Company cannot prove with competent and substantial evidence that its participation in the SPP would produce no detriments for the public, the Application must be denied.

8. The issue of the Commission's jurisdiction over RTO membership is currently the subject a proceeding initiated by Union Electric Company d/b/a AmerenUE, in Case No. EO-2001-684.

WHEREFORE, Public Counsel respectfully requests the Commission dismiss this case as moot, or in the alternative, to recognize its jurisdiction over Company's proposal to join the SPP, and further requests a hearing.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By:  (#36591)
John B. Coffman
Deputy Public Counsel
P. O. Box 7800
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 5th day of November 2001:

General Counsel

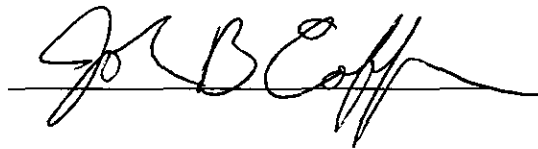
Missouri Public Service Commission
P O Box 360
Jefferson City MO 65102

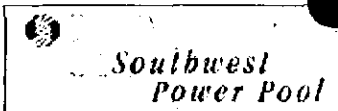
Gary Duffy

Brydon Swearengen & England PC
P O Box 456
Jefferson City MO 65102

Stuart Conrad

Finnegan Conrad & Peterson LC
3100 Broadway
Suite 1209
Kansas City MO 64111

A handwritten signature in black ink, appearing to read "J. B. Coffey", is written over a horizontal line.



CONTACT: Nick Brown, Sr. Vice President
SPP
501-664-0146 x213

Mike Holstein, CFO
MISO
317-249-5525

FOR IMMEDIATE RELEASE
Friday
October 19, 2001

SOUTHWEST POWER POOL and MIDWEST ISO REACH AGREEMENT ON CONSOLIDATION STRUCTURE

Boards of Directors Give Direction to Proceed

October 19, 2001—Southwest Power Pool, Inc. (SPP) and Midwest Independent Transmission System Operator, Inc. (MISO) have reached agreement on terms for the consolidation of the two organizations and the respective Boards of Directors have directed the management of each company to complete definitive agreements. Following the approval of the definitive agreements by both boards of directors and receipt of required regulatory and member approvals, a closing of the combination is expected in the first quarter of 2002.

A new name will be developed for the resulting organization which will operate in all or part of 20 US states and 1 Canadian province. Offices will be located in Carmel, Indiana, Little Rock, Arkansas and St. Paul, Minnesota. The new organization will operate an interconnected transmission system encompassing over 120,000 megawatts of generation capacity.

"SPP and MISO each bring strengths to the new entity," said John Marschewski, President of SPP. "The combined organization will be more effective in its efforts to provide services to our customers and work to the benefit of the wholesale electric market."

The new organization will be led by MISO's Jim Torgerson as Chief Executive Officer and SPP's Nick Brown as Chief Operating Officer. Marschewski will stay on for a period of time to ensure a smooth transition. He then plans to retire from the organization following over 36 years in the electric utility industry.

"We are very excited about the consolidation with SPP," said Jim Torgerson, President and CEO of MISO. "This will be beneficial to the entire energy market in the mid-section of the country as federal and state level deregulation continues."

Southwest Power Pool, Inc. and the Midwest ISO have members comprised of investor-owned utilities, municipal systems, generation and transmission cooperatives, state authorities, federal agencies, wholesale generators, and power marketers. SPP coordinates, promotes, and communicates about reliability in all aspects of the electric energy business. The Midwest ISO, based in central Indiana, is an independent transmission system operator that, when operational in December, will provide non-discriminatory bulk electric transmission service throughout much of the Midwest.

###