BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF ENTERGY ARKANSAS, INC.

COMES NOW Entergy Arkansas, Inc. ("EAI"), pursuant to the Missouri Public Service Commission's ("Commission") Procedural Order of April 18, 2013, and submits its Post-Hearing Brief.[1]

I. BACKGROUND AND INTRODUCTION

A. PROCEDURAL HISTORY

On February 14, 2013, EAI, ITC Mid South LLC ("ITC"), and related applicants filed a Joint Application in File No. EO-2013-0396 (the "ITC Case") regarding the spin off and merger of EAI's interstate transmission facilities located in Missouri to ITC (the "ITC Transaction" or the "Transaction"). Therein, EAI and ITC reserved that EAI does not hold itself out as providing electric service to the general public in Missouri and has no retail customers in Missouri.[2] EAI and ITC set forth their position that the ITC

[1] EAI continues to object to the purported list of issues submitted by intervenors. The intervenors do not set out questions presented for decision as required by 4 CSR 240-2.080(19). Instead, they make various arguments with regard to the issue presented for decision which is clearly and concisely stated by EAI. EAI's Post-Hearing Brief addresses the issues and intervenors' arguments.

[2] At the hearing in this proceeding, the Commission inquired about why EAI filed for a certificate of convenience and necessity ("CCN") in File No. File No. EA-2012-0321 if EAI did not believe that it was subject to the Commission's jurisdiction with respect to these matters. As set forth in EAI's CCN application as well as its filings throughout File Nos. EO-2013-0396 and EO-2013-0431, EAI does not

Transaction does not fall within those transactions contemplated by Section 393.190.1, RSMo. Out of an abundance of caution and without waiving any assertion that the Commission lacks jurisdiction or that the FERC has preemptive jurisdiction over such matters, EAI and ITC sought the relief requested in the Joint Application in the ITC Case.[3]

On February 25 and 26, 2013, Empire District Electric Company ("Empire"), Missouri Joint Municipal Electric Utilities Commission ("MJMEUC"), and KCP&L and KCPL Greater Missouri Operations ("KCPL") (collectively, the "Intervenors") filed applications to intervene in the ITC Case, raising issues unrelated to the ITC Transaction and instead relating to EAI's separate decision to join the Midcontinent Independent System Operator, Inc. ("MISO") regional transmission organization (RTO). On March 7, 2013, EAI filed its response in opposition to the proposed interventions, and ITC also filed a motion to limit the scope of the ITC Case to issues relevant to the proposed ITC Transaction.

In direct response to the Intervenors' efforts to interject MISO integration issues into the ITC Case, on March 21, 2013, EAI filed its Notice of Intent to Change Functional Control of its Missouri Electric Transmission Facilities to MISO ("MISO Notice") initiating the present case. In its MISO Notice, EAI asked the Commission to

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hold itself out as offering service to the general public in Missouri and provides instead only interstate transmission service in Missouri subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). EAI's filings before this Commission were submitted out of an abundance of caution given the Commission's indications regarding its jurisdiction over transmission-only entities. For example, Commission Staff noted in its recommendation regarding EAI's CCN, "EAI addresses in its Application and Staff in its Memorandum that if the Commission deems that it has jurisdiction, EAI is seeking from the Commission a CCN to own, acquire, construct, operate, control, manage and maintain facilities for a new transmission interconnection point ***." (EA-2012-0321, Staff Recommendation at 8.) Although EAI invoked the question as to jurisdiction in its CCN application, the Commission did not address the issue and granted the CCN.

[3] Joint Application at 3.

determine that it lacked jurisdiction over EAI's integration into MISO on the narrow fact pattern presented.[4] Alternatively, EAI asked the Commission to determine that its integration into MISO was not detrimental to the public interest in Missouri.[5]

With respect to the alternative determination requested, EAI has demonstrated that the integration of its approximately 87 miles[6] of Missouri transmission lines into MISO is not detrimental to the public interest in Missouri. Commission Staff supports this conclusion.[7] Significantly, as discussed further below, the Intervenors' various allegations do not even relate to the integration into MISO of EAI's *Missouri* facilities. To the contrary, the Intervenors' allegations relate to EAI's facilities in Arkansas or those of other Entergy Operating Companies[8] in other states integrating into MISO – integrations which already have been approved by those companies' respective retail regulators and the Federal Energy Regulatory Commission (the "FERC").[9] The evidence shows that EAI's integration of its Missouri interstate transmission facilities into MISO is not detrimental to the public interest, and that there is no need to impose any conditions on any determination rendered herein by the Commission.

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4 EAI MISO Notice at 5.
5 *Id.* at 6.
6 As explained by EAI witness Richard Riley, EAI has approximately 87.34 miles of transmission lines in Missouri and 4 substations out of its 15,413 miles of transmission and more than 1,400 substations company-wide. (T-64, ll. 17-18, and on to T-65, l. 3.)
7 Staff Position Statement at 11-12.
8 The Entergy Operating Companies include EAI; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.
9 EAI MISO Notice at 2; 143 FERC ¶61,257, Docket Nos. ER12-2681-000, ER13-948-000, and ER13-782-000 (June 20, 2013).

B. MATTERS NOT ARISING UNDER EAI'S MISO NOTICE

In light of certain questions raised by the Commission at the hearing in this matter, EAI believes it is important to clarify that EAI's MISO Notice does not involve questions as to the Commission's jurisdiction over safety or siting with respect to electric transmission facilities. EAI does not, as described further below, dispute that the Commission has some jurisdiction over EAI in these areas, but nothing in the present MISO Notice relates to that jurisdiction. EAI is not transferring to MISO control over safety functions or siting responsibility, and these matters must be distinguished from the alleged "safety" issues raised by the Intervenors, which are actually economic issues relating only to loop flows and congestion.[10] The Intervenors' alleged loop flow and congestion claims are the issues over which the FERC has exercised its jurisdiction.[11] As discussed further below, these are matters of interstate transmission that will be resolved in the ordinary course of business between the involved RTOs, and the FERC has already established its intent to supervise that process.[12] Thus, matters of the Commission's safety or siting jurisdiction over EAI are not implicated in this case.[13]

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[10] See, Locke Rebuttal, Ex. 19, p. 7, l. 10 – p. 10, l. 19; Tr. P. 196, l. 13 – p. 198, l. 20. No party has disputed that loop flow and congestion issues are exclusively FERC jurisdictional. Instead, Intervenors have attempted to recast these issues as "safety" matters. But responsibility for safety matters remains with the transmission owner, EAI, regardless of which FERC jurisdictional transmission provider it is operating under. Congestion on transmission is not a safety issue, but rather an issue governed by congestion management protocols governed by FERC-jurisdictional seams agreements and/or transmission line loading relief reliability standards subject to FERC's jurisdiction under FPA section 215.

[11] 143 FERC ¶61,257, para. 147-153, Docket Nos. ER12-2681-000, ER13-948-000, and ER13-782-000 (June 20, 2013).

[12] *Id.;* Tr. p. 201, l. 18 – p. 202, l. 6.

[13] Questions as to the Commission's safety jurisdiction were introduced at the hearing concerning an outage that occurred as a result of an ice storm that began on January 26, 2009. (Transcript at 90-113.) That storm occurred over areas of Oklahoma, Arkansas, Missouri, Illinois, Indiana, West Virginia, and Kentucky and resulted in widespread power outages for over 2 million people; according to one source, the hardest hit areas included Western Kentucky and northern Arkansas with 300,000 residences without power. (Wikipedia - January 2009 Ice Storm.) As set forth by EAI witness Richard Riley, EAI takes seriously matters as to safety and storm response. (Transcript at 110:2-110:23). Further, as reflected in

The foregoing notwithstanding, in an effort to respond more fully to the Commission's questions at the hearing, EAI provides the following information relating to two statements regarding state and federal jurisdiction that appear on the FERC website. The first statement is that "[o]nce Electricity projects become operational, safety is regulated, monitored and enforced by the state in which the project resides, with the exception of hydropower projects, for which FERC retains jurisdiction when they are operational." The second statement is that "[w]hile FERC has jurisdiction over hydropower projects, FERC has no authority over the construction or maintenance of power generating plants and has significant limited jurisdiction over transmission line siting." EAI does not disagree with these statements as a general matter, although certain clarifications are appropriate.

With respect to safety regulation, EAI agrees that safety regulation with respect to electric transmission and generation facilities generally resides with state agencies, not with FERC. However, it should also be noted that safety regulation does not extend to issues concerning the operation of the interstate transmission grid or wholesale power sales (including seams arrangements) that fall within FERC's exclusive jurisdiction.[14] No valid issue concerning safety has been raised in this case.

With respect to jurisdiction over "the construction or maintenance of power generating plants," EAI agrees that that these are matters generally regulated by state

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the public presentation ("The Master of Disaster: Perspectives on Disaster Preparedness…"), which was made on June 10, 2013, during the MARC Conference, EAI and the Entergy Operating Companies are proud to have won 19 Edison Electric Institute recovery or assistance awards since 1999 and to have been the only utility in the nation to have won the Edison Electric Institute's Emergency Response or Emergency Assistance Award all 15 years in which it was awarded. Additionally, the responsibility for storm recovery and restoration will continue to reside with EAI, not MISO, and any state authority over this function will be unaffected by the change of FERC jurisdictional transmission provider and tariff.

[14] *New York v. FERC*, 535 U.S. 1 (2002); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (FERC has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce").

agencies, not FERC. However, FERC's jurisdiction over wholesale rates does affect generation construction, investment, maintenance and cost allocation decisions.[15] No issue concerning generating plant construction or maintenance has been raised in this case.

Finally, with respect to transmission line siting, EAI agrees that the FERC possesses limited authority, with the exceptions being transmission line siting within national interest electric transmission corridors under FPA section 216 and the siting of transmission lines associated with hydroelectric projects.[16] No issue concerning transmission line siting has been raised in this case.

Like the safety and siting issues discussed above, EAI also clarifies that this case does not involve Commission jurisdiction over a Missouri-jurisdictional retail affiliate of EAI. Thus, there exist no issues whatsoever concerning EAI's bundled retail service. To that extent, this file is factually and legally different from the applications of Ameren Missouri, KCPL, and Empire – all Missouri retail electric public utilities – for Commission approval of those entities' voluntary elections to integrate into MISO (in the case of Ameren Missouri) or the Southwest Power Pool (in the case of KCPL and Empire).

C. ISSUES ARISING UNDER EAI'S MISO NOTICE

This case involves EAI's voluntary decision to integrate approximately 87 miles of Missouri transmission lines into MISO by entering into contractual agreements relating

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[15] *Conn. Dep't of Pub. Util. Control v FERC*, 569 F.3d 477, 482 (D.C. Cir. 2009); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978). For example, the FERC's jurisdiction over wholesale power arrangements, such as the Entergy System Agreement, gives it authority to allocate the costs of a particular generating plant. *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1104 (D.C. Cir. 1987);

[16] 16 U.S.C. § 797(e); 16 U.S.C. § 824p; *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

to the interstate transmission of electricity over EAI's interstate transmission system and the sale of electricity at wholesale—each of which is subject to the exclusive jurisdiction of the FERC. Section 201 of the FPA, 16 U.S.C. § 824(b), gives FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[17] The rates, terms and conditions of these contracts cannot be reviewed or second-guessed in state proceedings.[18]

With respect to the FERC's exercise of its jurisdiction on matters relevant to this case, on June 20, 2013, the FERC issued pertinent orders in separate proceedings regarding these interstate transmission facilities. In its June 20, 2013 decision, in Docket Nos. ER12-2681-000, ER13-948-000, and ER13-782-000, the FERC accepted the use of the MISO ROE of 12.38% for the Entergy Operating Companies, accepted the proposed formula rate protocols for use upon MISO integration subject to modification, and accepted the proposed transmission pricing zones for use upon integration into MISO.[19] The FERC declined to require the Entergy Operating Companies to hold parties harmless from potential parallel and loop flows, because RTOs have developed joint operating agreements with mechanisms and related procedures to address such matters. It encouraged parties to continue to work together

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[17] *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

[18] *Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

[19] 143 FERC ¶61,257, at para. 60, 78, 89, 99, and 122. In Docket Nos. EC12-145-000, EL12-107-000, the FERC approved the proposed ITC Transaction at issue in File No. EO-2013-0396 and concluded that it was appropriate to evaluate the ITC Transaction on its own merits, separately from consideration of the integration of the transmission facilities into MISO. (Id. para. 119). The FERC found that the increase in ROE "is a consequence of Entergy's integration into MISO rather than the Proposed Transaction", that the Entergy Operating Companies "would, under Commission precedent, be entitled to the MISO [12.38%] ROE as part of their formula rates," and that "likewise, since ITC Holdings will also become a MISO Transmission Owner with respect to the Entergy transmission facilities if the Proposed Transaction closes, the new ITC Operating Companies would also be entitled to the 12.38 percent MISO ROE as part of their formula rates." (*Id.* para. 120-121).

to resolve such issues, indicated its continuing interest in the status of negotiations, and directed MISO to report on the status of negotiations on or before November 1, 2013. It also noted MISO's obligation to comply with NERC's Reliability Standards.[20]

In the order issued on June 20, 2013, in Docket No. ER12-2682-000, the FERC conditionally accepted MISO's proposed new tariff provisions for provision of transmission services on the facilities during the time after the ITC Transaction closes and before integration of the generation and load within the Entergy Operating Companies' footprint into MISO's energy and operating reserves markets, subject to certain further compliance requirements.[21]

The FERC also accepted the Entergy Operating Companies' Notice of Cancellation of the current transmission tariff.[22]

D. APPROPRIATE ACTION WITH RESPECT TO EAI'S MISO NOTICE

On the narrow and distinct facts of this case, the Commission should dismiss the case for lack of jurisdiction, including holding that it need not issue any determination in this matter for the reason that EAI's joining MISO does not require Commission approval under Section 393.190.1, RSMo 2000. In the alternative, the Commission should find that EAI's joining MISO is not detrimental to the public interest in Missouri.

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[20] *Id*. para. 147-153.
[21] 143 FERC ¶61,258.
[22] 143 FEC ¶61,259 Docket No. ER12-2693-000.

II. JURISDICTION

A. LACK OF COMMISSION JURISDICTION OVER THESE MATTERS

1. Jurisdictional Issues Raised Prior to the Hearing

On May 10, 2013, the Commission ordered Intervenors "to state the legal authority the Commission has over EAI's desire to move to MISO, and the facts they assert are in dispute." The Intervenors filed responses on May 17, 2013, each failing to sufficiently address the Commission's legal authority over these matters.

To begin, KCPL suggested that to "own, operate, control and manage electric plant" is sufficient to attach the Commission's regulatory jurisdiction to persons and their property."[23] In so doing, KCPL ignored the Missouri Supreme Court's decision in *State ex rel. Danciger and Company v. Public Service Commission*, 205 S.W. 36 (Mo. 1918). In that case, the Court said:

> While the definitions quoted supra [now 386.020(14) and (15)] express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words "for public use" are to be understood and to be read therein. [Citation omitted] *For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with the public interest; otherwise, the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.* *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77. Since the sole right of regulation depends upon the public interest, subdivisions quoted above, and which define an electric plant and an electric corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity connoted and to be understood therein.[24]

Therefore, dedication to serve the public in Missouri is a necessary condition for the Commission's jurisdiction to attach to persons or property. KCPL did not dispute the

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[23] KCPL Response at paragraph 4.
[24] *Id.* at 40 (emphasis provided.) *State ex rel. Cirese v. Public Service Commission*, 178 S.W.2d 788, 790 (K.C. Court of Appeals 1944).

critical facts that EAI has no retail customers in Missouri, does not maintain a tariff in Missouri offering service to the general public in Missouri, and that there are no issues concerning EAI's bundled retail service present in this case.[25] Nor has any party to this proceeding contended that EAI holds itself out to provide intrastate service to the general public of retail customers in Missouri.

KCPL further confused the statutory criteria – which requires a showing of a duty that EAI has to the public in Missouri – with some duty that KCPL implies EAI may owe to KCPL's retail customers. For example, KCPL suggested that the Commission has jurisdiction over this matter due to KCPL's anticipated increases in transmission costs resulting from power imports and power sales transactions to customers "within or across the Entergy system."[26] Specifically, KCPL argued that the Commission should hear this matter because "once transmission that is currently under the Entergy Open Access Transmission Tariff is transferred to service under the MISO tariff, transmission rates will increase for transmission that sinks both within and external to the existing Entergy footprint" and because the alleged increase in transmission rates will lower the offer prices for KCPL it will decrease KCPL's off-system sales.[27] None of these alleged impacts confer jurisdiction on the Commission, and such bootstrapping arguments have no bearing on the applicability of Section 393.190.1. Further, KCPL's Response merely highlighted that its claims stem from federal tariffs that are under the exclusive jurisdiction of FERC, as KCPL has not denied.[28]

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[25] See, generally, KCPL's filings throughout File No. EO-2013-0431.
[26] KCPL does not clarify that these alleged impacts across what it calls the "Entergy system" would include other Entergy Operating Companies besides EAI that are not parties to this proceeding or otherwise that do not operate in Missouri.
[27] KCPL May 17, 2013 Response at paragraph 10; Carlson Rebuttal, Ex. 18, pp. 9, l. 5 – 10, l. 14.
[28] Locke Rebuttal, Ex. 19, pp. 7, l. 11 – 10, l. 23.

KCPL further recited the standard the Commission applies when making a determination pursuant to Section 393.190.[29] However, KCPL failed to cite any evidence that EAI's integration into MISO involves an agreement to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works, or system, necessary or useful in the performance of its duties to the public ***" – the statutory standard for Commission jurisdiction. In sum, KCPL failed to set forth any legal authority the Commission has over EAI's integration into MISO.

Next, Empire and MJMEUC contended a claim of Commission jurisdiction by relying on Case No. EO-2007-0485, *In the Matter the Application of Interstate Power & Light Company, f/k/a IES Utilities, Inc., and ITC Midwest, LLC for Approval to Transfer Certificate of Convenience and Necessity and Transmission Line Facilities in Clark County, Missouri, and Motion for Expedited Treatment.* However, in that case, IPL/ITC did not raise in their application the issue of Commission jurisdiction over the utilities or over the transaction. Although both the Staff recommendation and the Commission's report and order in that case addressed the standards applicable to the grant of CCNs pursuant to Section 393.170 and to the transfer of utility property pursuant to Section 393.190, neither the Staff nor Commission addressed the issue of Commission jurisdiction over entities providing only interstate transmission service subject to exclusive FERC regulatory jurisdiction. Further, that case did not address the applicants' integration into an RTO, which is the exclusive issue raised in this file - not the granting of a CCN or the transfer of utility property. In any event, such a prior case has no precedential value and otherwise cannot confer jurisdiction to the Commission.[30]

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[29] KCPL May 17, 2013 Response at paragraphs 5-8.
[30] *State ex rel. Utility Consumers Council of Missouri v. PSC*, 585 S.W.2d 41, 49 (Mo. banc 1979) (Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by

Commission reliance on the IPL/ITC application is not warranted or appropriate to determine a source of jurisdiction.

Additionally, Empire and MJMEUC cite *State ex rel. City of St. Louis v. Public Service Commission*, 735 S.W.2d 393, 399 (Mo. banc 1934) for the proposition that "the public served by the utility is interested in the service rendered by the utility and the price charged therefor; investing public is interested in the value and stability of the securities issued by the utility."[31] However, unlike the *City of St. Louis* case involving the predecessor of Laclede Gas Company, in EAI's case, the "public" served by EAI using these utility assets, is comprised exclusively of interstate transmission customers who take such service under tariffs approved exclusively by the FERC. Empire and MJMEUC have not suggested a jurisdictional basis for the Commission to interpose its state regulatory authority to limit or replace that of the FERC. In fact, the General Assembly has expressly forbidden this in Section 386.030.[32]

Empire and MJMEUC also cited to eight Commission cases[33] in which the Commission has relied on Section 393.190.1, RSMo, in reviewing the proposed transfer of functional control to RTOs. However, none of the cases cited by Empire and

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the above statutes, either expressly, or by clear implication as necessary.to carry out the powers specifically granted.); *State ex rel. MoGas Pipeline, LLC v. PSC*, 366 S.W.2d 493, 496 (Mo. banc 2012) (The PSC "is a creature of statute and can function only in accordance with" its enabling statutes.. . If a power is not granted by Missouri statute, then the PSC does not have that power.).

[31] Empire/MJMEUC Response at paragraph 13.

[32] "Neither this chapter, nor any other provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress." *See, State ex rel. MoGas Pipeline, LLC,* above, 366 S.W.2d at 496-97.

[33] Empire and MJMEUC May 17, 2013 Response at paragraph 6.

MJMEUC for legal authority is an appellate case, nor is any binding case law. Agency actions are not binding precedent with respect to future agency decisions.[34]

Moreover, Empire and MJMEUC neglected to mention that each of the cited cases was initiated by an electric corporation that provides Missouri-jurisdictional service to its Missouri retail customers. None of the utilities in those cases contested either the Commission's jurisdiction over the electrical corporation or the application of Section 393.190.1, RSMo. None of the cases is apposite on the facts or the law in this file, and Empire and MJMEUC's reliance on these cases is misplaced because they fail to distinguish the unique facts present in EAI's case from those of the other cases.

Only Missouri statutes confer the Commission's jurisdiction, and there simply is no statute conferring jurisdiction to the Commission under the distinct facts set forth in this matter.

2. <u>Jurisdictional Issues Raised at Hearing</u>

No issue raised at hearing implicates the Commission's jurisdiction under Missouri law.

There were three main categories of issues raised in testimony or cross-examination at hearing. First, the Intervenors complained of alleged wholesale rate effects that, as even they concede, arise under federal tariffs subject to the exclusive jurisdiction of the FERC. Moreover, as indicated above, the FERC has exercised its jurisdiction and approved the rate aspects of the integration of the Entergy Operating Company transmission system into MISO.[35] These concerns are therefore beyond the

[34] *State ex rel. GTE North v. PSC*, 835 S.W.2d 356, 371 (Mo.App. 1992); *State ex rel. AG Processing, Inc.v. PSC,* 120 S.W.3d 732, 736 (Mo. banc, 2003).
[35] 143 FERC ¶61,257, at para. 60, 78, 89, 99, and 122.

scope of this Commission's authority.[36] The filed rate doctrine does not permit collateral attacks in *any* state or federal proceeding of a FERC-approved rate or jurisdictional contract.[37]

Second, the Intervenors alleged that EAI's integration into MISO will cause "loop flows" over their system and have sought compensation for those flows. This issue too is a matter subject to FERC's exclusive jurisdiction and, indeed, FERC has already considered and rejected the same arguments. Two years ago in *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 FERC ¶ 61,010 at P 39 n.79, P 49 (2011), KCPL and SPP argued that the Entergy Operating Companies' integrations into MISO would create "massive" loop flows that would produce "great harm" to their systems. The FERC rejected these contentions as "speculative" and ordered MISO and SPP to negotiate any necessary revisions to their FERC-jurisdictional "seams" agreement (the MISO-SPP Joint Operating Agreement).[38] This action was consistent with FERC's longstanding policy that "[u]nauthorized power flows...are an unavoidable consequence of interconnected operations" and that "utilities themselves [must], in the first instance, work to resolve such issues."[39] Despite FERC's 2011 order, KCPL and other SPP members again made the same loop flow allegations when opposing the transmission rate filings by EAI and the other Entergy Operating Companies necessary to support

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[36] "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Miss. Power & Light Co.*, 487 U.S. at 374.

[37] *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981) ("*Arkla*") ("[T]he mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'"); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951) ("We hold that the right to a reasonable rate is the right to the rate which the [FERC] files or fixes, and that, except for review of the [FERC's] orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one").

[38] *Id.* at P 64, P 67.

[39] *Am. Elec. Power Serv. Corp.*, 93 FERC ¶ 61,151 at 61,474 (2000).

integration into MISO.[40] The FERC again rejected the arguments and again ordered SPP and MISO to negotiate any appropriate revisions to their FERC-jurisdictional seams agreement.[41] Underscoring its continuing oversight and jurisdiction over these negotiations, the FERC ordered MISO to file a status report on the status of the negotiations by November 1, 2013.[42] The FERC in particular denied KCPL's and SPP's request for "hold harmless" relief as unsupported by precedent.[43]

Third, questions were raised at hearing regarding the jurisdiction of the Commission over electric transmission line safety. As noted previously, EAI does not dispute that this Commission has some jurisdiction over safety issues, but those issues have nothing to do with this proceeding, and the MISO integration would not alter that jurisdiction in any way. Any state jurisdiction over safety matters will not be altered or affected by a change in FERC-jurisdictional transmission provider. EAI is not transferring to MISO *physical* control of its transmission system and the related responsibility for worker and public safety; rather, it is transferring only *operational* control. An RTO "must have operational authority for all transmission facilities under its control."[44] MISO exercises this operational authority through *functional* control of transmission, but the direct, *physical* control of transmission facilities is retained by the

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[40] *Entergy Services, Inc.*, 143 FERC ¶ 61,257 at PP 131-135 (2013).
[41] *Id.* at PP 150-151; *see also* P 128 ("we find that existing arrangements are in place that address power flows between MISO and certain neighboring regions" and "note that parties are currently negotiating potential amendments to existing joint operating agreements (JOAs) or entirely new JOAs, and find that concerns regarding parallel loop flow issues are more appropriately addressed through those negotiations").
[42] *Id.* at P 152.
[43] *Id.* at PP 148-149.
[44] 18 C.F.R. § 35.34(j)(3). *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (codified at 18 C.F.R. § 35.34), *appeals dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (per curiam). "Operational authority refers to the authority to control transmission facilities, either directly or through *contractual agreements* with the entities that do have direct control." Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,087 n.377 (emphasis added).

transmission owners such as EAI.[45] This direct, physical control includes the responsibility for safety—which is not being transferred to MISO.[46]

B. COMMISSION APPROVAL OR DISAPPROVAL IS UNNECESSARY

The integration of EAI's Missouri transmission lines into MISO does not require any determination by the Commission, under the explicit language of Section 393.190.1, RSMo, as discussed below.

Section 393.190 of the Revised Statutes of Missouri (RSMo) provides, in part, that:

> 1. No ... electrical corporation . . . shall hereafter ***sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber*** the whole or any part of its franchise, works or system, ***necessary or useful in the performance of its duties to the public,*** nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. . . . (Emphasis added).

Any such sale or merger *without* PSC approval, according to the same section, "shall be void."

In the instant case, the approximately 87 miles of transmission facilities at issue are not "necessary or useful in the performance of [EAI's] duties to the public" because

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45 *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231 at 62,160 (1998) ("Pursuant to the ISO Agreement, the Midwest ISO will exercise functional control over transmission facilities. Applicants define the functional control to mean *ISO employees will not perform the actual physical operations associated with transmission control.*") (emphasis added).

46 *PJM Interconnection, LLC.*, 139 FERC ¶ 61,183 at P 31 (2012) ("PJM lacks direct, physical control over the transmission grid, particularly during construction and maintenance.... PJM instead performs a planning and scheduling function to ensure compliance with reliability standards" and "once PJM has determined that a proposed schedule for maintenance is permissible to resolve a reliability problem, the responsibility for physically performing the maintenance, *and ensuring safety,* lies with the Transmission Owner") (emphasis added).

EAI has no "duties to the public" in Missouri within the meaning of the statute. The undisputed evidence in this case shows that EAI has no retail customers in Missouri and has no tariff on file with the Missouri PSC.[47] These facts have not been rebutted.

EAI's predecessor (Arkansas Power & Light Company) last had retail tariffs on-file with the Missouri Commission in 1991, when its retail CCN was transferred to Union Electric Company and AP&L's retail tariffs were cancelled.[48] In its *Supplemental Report and Order and Order Amending Report and Order* in that case (at 1 MoPSC 3d 116, 118), the Commission stated, in *ORDERED 6*:

> That upon the closing of the transaction approved herein, **Arkansas Power & Light Company be authorized hereby to cancel its rate schedules, rules, regulations and other tariffs on file with the Commission and to terminate its retail service to the public in Missouri** as an electrical corporation and public utility subject to the jurisdiction of the Commission and that in conjunction therewith, Arkansas Power & Light Company be relieved hereby of any public utility obligations pursuant to these rate schedules, rules, regulations and other tariffs and certificates of convenience and necessity, **and that any other duties, obligations or conditions which have resulted from or have been imposed because of the Commission's jurisdiction over Arkansas Power & Light be terminated hereby.** (Emphasis added.)

These facts demonstrate that EAI has not been offering service to "the public" since that time, nor could EAI offer service to "the public" since it had (and has) no Missouri tariff under which electric service could be offered to "the public." In 2012, EAI was granted a CCN in order to recognize the Commission's siting authority under Section 393.170, RSMo, particularly in relation to construction of a new interconnection

[47] Direct Testimony of Richard C. Riley of EAI in EO-2013-0431, page 7, line 15-19, page 9, lines 4, 9-13.
[48] *Re Arkansas Power & Light, Union Electric Company and Sho-Me Power Corporation,* MoPSC Case Nos. EM-91-29 and EM-91-404, 1 MoPSC 3d 96 (1991). *See* Ordered Sections 1 and 14-16 in the Report and Order (at 1 MoPSC 3d 103 and 105).

in Missouri to serve a new AECI substation near Steele, Missouri. However, this CCN did not change the fact that EAI had and has no Missouri retail customers and no Missouri tariff.

The basic provisions of Chapters 386 and 393, RSMo, have not changed since the Commission was established on April 15, 1913. The provisions governing Commission approval of a transfer of assets, and the legal standard for approval of transfers, contemplate in-state, retail electric utilities, providing electric service directly to retail customers. The idea of FERC-regulated Independent System Operators and RTOs, or transmission-only companies ("Transcos"), was decades away. So, the "public interest" concerns that the Missouri General Assembly in 1913 and the Missouri Supreme Court in 1934[49] had in mind are of little relevance to the immediate issues in this case.

A reading of the Missouri Public Service Commission Law *in pari materia* shows that it was written and intended to apply to retail electric utility companies providing electric service directly to retail customers in the state. "The public" within the meaning of Chapters 386 and 393 is made up of those retail customers in Missouri. EAI provides only unbundled transmission services to wholesale customers in Missouri in interstate commerce, subject to the jurisdiction of the FERC; any state jurisdiction or authority over EAI is not affected by a change in a FERC jurisdictional transmission service provider. Accordingly, EAI is a "transmission-only company" in Missouri. EAI has no "duties to the public" in Missouri, within the meaning of Section 393.190.1, RSMo. In fact, as suggested above, it does not "serve the public" in Missouri because its CCN

[49] *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. Banc 1934).

applies to interstate transmission facilities, and EAI has no retail tariffs on file with the Commission. Therefore, the applicable EAI facilities are not "necessary or useful in the performance of [EAI's] duties to the public" within the meaning of Section 393.190.1, and no Commission approval or other determination is required.[50]

There are established Commission cases in recent years for transmission-only CCNs. EAI, a transmission-only company in Missouri, already holds a CCN from the Commission and files an annual report with the Commission (although that report shows zero Missouri-jurisdictional revenues). There is no issue pending in this case concerning a CCN for a transmission-only company. The Commission does not have plenary jurisdiction over every entity that comes under some part of its statutory jurisdiction. For instance, all provisions of Chapters 386 and 393 apply to retail electric utilities in Missouri. However, the Commission "has jurisdiction" over Rural Electric Cooperatives and municipally-owned utilities as to safety and as to territorial agreements, but does not have broader jurisdiction over these entities. Thus, most provisions of Chapter 393 do not apply to such entities.

Likewise, it is clear that numerous provisions of Chapter 393, RSMo, have no practical or legal applicability to a transmission-only company such as EAI. The Commission could not, under any circumstance, have the same degree of "jurisdiction" over EAI (or any other transmission-only company) that it does over retail serving electric utilities. For example, under Section 393.140, the Commission could not argue that it has "general supervision" over a transmission-only company incorporated in

[50] This argument applies to either an RTO integration as is at issue here or to an actual change of ownership of transmission facilities by company that only provides transmission services in Missouri. Nevertheless, it is worth noting that on these facts, the statute is further inapplicable for the reason that there is no evidence to support that the integration of EAI's Missouri facilities into MISO is the type of asset sale or encumbrance called for under the express statutory language.

another state providing only unbundled wholesale, FERC-regulated transmission services in Missouri.

Other specific provisions of Chapter 393 also cannot apply to a transmission-only company, such as setting rates (393.150), phasing-in a rate base addition (393.155), financial approvals and depreciation accounts (393.240) and notifying cities and counties of rate increases, since only the FERC has rate-making authority over them. Likewise, Sections 393.260 and 393.270 are clearly pointed at retail electric service (consumer complaints regarding quality and price).

To-date, the Commission has ruled on RTO integrations of electric transmission facilities of Commission-regulated, retail electric utilities, treating them as transfers of assets under Section 393.190.1, RSMo. Up until recently, however, most of the transfer of control cases have resulted in a Stipulation and Agreement among the parties that was approved by the Commission.[51] Although the Commission has, to-date, assumed and exercised jurisdiction over RTO integrations, EAI submits that it has not done so on the unique facts presented in this case and further that the Commission is not bound by *stare decisis.*[52]

In the current context, at least two questions can be raised about the application of Section 393.190.1, RSMo, to the unique facts of this case: (1) whether the EAI facilities in question are necessary or useful in the performance of any EAI duty to the public in Missouri as discussed above, and (2) whether, in fact, there is a sale or

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[51] The Aquila to MISO application in MoPSC Case No. EO-2003-0566 was closed without resolution in 2005. In EO-2011-0128 (Ameren to continue in MISO), a non-unanimous Stipulation and Agreement was opposed by OPC and MJMEUC but was approved, after addressing proposed modifications to the conditions imposed, after hearing.

[52] *State ex rel. GTE North v. PSC,* 835 S.W.2d 356, 371 (Mo.App. 1992); *State ex rel. AG Processing, Inc.,* 120 S.W.3d 732, 736 (Mo. Banc, 2003).

assignment of the facilities, within the meaning of the statute, considering that EAI will continue to hold title to the transmission facilities in question following its integration into MISO. The uncontroverted evidence overwhelmingly establishes that the answer to both questions is "no."

EAI's integration into MISO does not require any determination or approval by the Commission, regardless of whether the Commission has siting, safety or other forms of jurisdiction over transmission-only assets, because EAI's facilities in question are not "necessary or useful in the performance of [EAI's] duties to the public" within the meaning of Section 393.190.1, RSMo. and further because the integration does not constitute the type of sale or encumbrance contemplated thereunder and will not alter any existing jurisdiction the Commission may have over the EAI facilities in Missouri.

III. EAI'S JOINING MISO IS NOT DETRIMENTAL TO THE PUBLIC INTEREST IN MISSOURI

EAI has established that its integration into the MISO RTO is not detrimental to the public interest in Missouri and further that the alleged complaints of the Intervenors do not support a different conclusion for the reason that the claims do not relate to the integration of the Missouri facilities into MISO. In particular, the benefits to Missouri are detailed in Mr. Riley's testimony (Tr. 72:4 -75:2); his direct testimony (Exhibit 3, p. 21:8 – 22:6); and his surrebuttal testimony (Exhibit 4, p. 23:6 – 24:12 and Exhibit B). He estimated $9 million in savings to Missouri utilities and their customers.

Specifically, EAI witness Richard C. Riley, Vice President of Energy Delivery for Entergy Services, Inc., testified that EAI decided to join MISO after an extensive analysis and regulatory review begun in 2005, after determining at that time that EAI should terminate its participation in the Entergy System Agreement effective December 18, 2013.[53] The Arkansas Public Service Commission ("APSC") has determined that EAI's joining the MISO RTO is in the public interest for EAI's retail customers and that EAI may discontinue the pursuit of the other potential post-System Agreement operating arrangements it had been exploring in order to focus its efforts on integration into MISO.[54]

In fact, in April 2011, all the Entergy Operating Companies announced, after extensive study, that they had chosen to integrate into MISO because that option would provide the greatest benefits and least risk to their retail customers.[55] Those benefits include nearly $1.4 billion in estimated production cost savings ($263 million to EAI's retail customers)[56] and a proven track record of operating Day 2 Markets throughout a large geographic region.[57] All five retail regulators having jurisdiction over the retail rates of the Entergy Operating Companies have now granted, subject to conditions, the requests to integrate their respective transmission assets into MISO.[58] Because EAI is the only Entergy Operating Company terminating its participation in the System Agreement on December 18, 2013, EAI must integrate into MISO on December 19, 2013, so that it can operate its electric facilities outside of the System Agreement.[59]

The North American Electric Reliability Corporation ("NERC") requires all transmission owners to designate a reliability coordinator. MISO would serve as the

[53] Riley Direct in 0431, Ex. 3, p. 9, l. 21 through p. 10, l. 4.
[54] Ex. 3, p. 10, ll. 4-9.
[55] Ex. 3, p. 11, ll. 13-16.
[56] These benefits are at Net Present Value over ten years. T-87, ll. 9-22.
[57] Ex. 3, p. 11, l. 16 through p. 12, l. 3.
[58] EAI MISO Notice at 2. Ex. 3, p. 12, ll. 3-5.
[59] *Id.*, ll. 14-18.

reliability coordinator for EAI's transmission facilities and would have the authority to resolve any potential reliability conflicts related to planned outages.[60] Upon integration into MISO, EAI would take transmission service under the MISO Tariff and MISO would be responsible for scheduling service and performing any security functions, such as transmission outage scheduling.[61]

In addition to the benefits of MISO's experience and expertise as an Independent System Operator and RTO and its proven track record of operating Day 2 Markets throughout a large geographic region, greater economies of scale resulting from the integration of the Entergy Operating Companies into MISO would have a positive impact of more than $100 million annually on existing MISO members, including Ameren in Missouri.[62] These benefits would result from: (1) more efficient commitment and dispatch; (2) lower reserve margin requirements; (3) lower ancillary service requirements; and (4) lower administrative fees.[63] Mr. Riley testified that folding in the 30,000 megawatts of Entergy Operating Company-wide generation into the MISO market would produce a diverse fuel mix that increases cost savings, and that, by having a "bigger footprint for the market, the ancillary services, the costs for those services such as regulation and reserves will go down."[64] In Missouri, Ameren could experience $9 million of these annual benefits.[65]

Although KCPL and Empire contend there will be a detriment to the public interest in Missouri merely by virtue of EAI's limited Missouri transmission lines being

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[60] Ex. 3, p. 18, ll. 14-17 and footnote 12.
[61] Ex. 3, p. 18, l.19 through p. 19, l. 3.
[62] Riley Surrebuttal in 0431, Ex. 4, p. 24, l. 14 through p. 27, l. 4, and Exhibit B to Exhibit 4, entitled, *Entergy Integration Benefits All Members*, T-72, l. 14 through T-73, l. 10, T-74, l. 15 through T-75, l. 2.
[63] Ex. 4, p.25, l. 14 through p. 26, l. 3.
[64] T-72, l. 11 through T-73, l. 10.
[65] T-74, ll. 14-24.

integrated into MISO, their witnesses both had to carefully word their claims in recognition of the fact that there would be positive benefits to Missouri from EAI integration into MISO.[66] For example, KCPL witness Mr. Locke, on page 7 of his rebuttal testimony, makes a vague reference to Ameren's retail customers[67] experiencing some benefits from the proposed MISO integration, and Empire witness Mr. Warren carefully alleges harm only to "non-MISO" Missouri retail customers.[68] Indeed, the filed testimony of both KCPL and Empire implicitly acknowledges that there may be benefits to retail customers in Missouri of MISO-member load serving entities in Missouri such as Ameren. Such benefits contradict the Intervenors' own claims that EAI's MISO integration is detrimental to the public interest in Missouri.

Further, there is no support for the Intervenors' claims that the Commission should require EAI to "hold them harmless" with respect to decisions that ultimately result from their voluntary selection of RTOs. Such an allegation does not involve a criterion under Section 393.190 RSMo, which directs the Commission to evaluate the *public interest*, not the *private rights* of the individual Intervenors. The standard of review for MoPSC approval of a merger or transfer of assets, within the meaning of Section 393.190.1, is that the transfer is "not detrimental to the public interest."[69] To deny a property owner the opportunity to dispose of such assets, in the absence of a showing of detriment to the public, would be to deny the property owner an important aspect of property ownership.[70] Moreover, as indicated above, the Intervenors' "hold

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[66] Ex. 4, p. 23, ll. 6-19.

[67] Ameren Missouri has 1,921,827 Missouri jurisdictional customers. 2012 Missouri Public Service Commission Annual Report, page 30.

[68] *Id.*

[69] *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. Banc 1934). State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980).

[70] *State ex rel. City of St. Louis v. Public Service Commission of Missouri, Ibid.*

harmless" claims are preempted under federal law because the FERC has exclusive jurisdiction over the wholesale rates charged to the Intervenors, and those rates cannot be collaterally attacked in state proceedings.[71]

Finally, the Intervenors' claims do not establish that EAI's MISO integration is detrimental to the public interest in Missouri for the reason that the claims do not occur as a result of the integration of EAI's *Missouri* facilities into MISO. To the contrary, the claims relate to transmission paths from generation assets located in other states (e.g., Mississippi and Arkansas) and, in any event, concern wholesale arrangements subject to FERC's exclusive jurisdiction.[72] Given that both the FERC and the APSC have approved the integration of EAI's transmission lines into MISO as noted, the Intervenors do not account for the possibility that they could actually be harmed by a failure to also integrate EAI's limited Missouri facilities into MISO. As explained by EAI witness Mr. Riley, "[T]he requirement for Empire to pay the MISO through and out rate occurs as a result of the integration of EAI's Arkansas transmission assets into MISO, which integration has already been approved by the APSC. So, even assuming arguendo that an increase in a FERC-jurisdictional rate for Empire would be a basis for concluding the proposed MISO integration is detrimental to the public in Missouri, Empire has provided no evidence to show that it will experience a higher transmission rate as a result of the integration of the limited EAI Missouri facilities into MISO."[73] The same may be said with respect to KCPL's rate increase allegations.

[71] Similarly, the Intervenors' allegations regarding seams congestion and loop flow concerns also are without merit for the reasons previously addressed. FERC's exclusive jurisdiction over transmission congestion cannot be altered by an attempt to portray transmission congestion as a safety issue.
[72] FERC also has jurisdiction to exempt EAI from state laws that prevent EAI from effectuating its voluntary decision to join an RTO. *See* Public Utility Regulatory Policies Act ("PURPA") section 205(a), 16 U.S.C. § 824a-1(a); *New PJM Companies*, 106 FERC ¶ 63,029 (2004) (Cowan, ALJ), *aff'd* Opinion No. 472, 107 FERC ¶ 61,271 (2004).
[73] Exh. 4, p. 8, ll. 2-10

The evidence overwhelmingly supports that to the extent the Commission makes a determination in this matter, EAI's integration of its *Missouri* transmission lines into MISO is not detrimental to the public interest in Missouri and otherwise should not be conditioned.

IV. CONCLUSION

Based on the foregoing, the Commission should hold that under the unique facts of this case it does not have jurisdiction over EAI's integration into MISO, including determining that it need not issue any approval under the provisions of section 393.190 RSMo. Alternatively, the evidence supports the Commission's finding that EAI's joining MISO is not detrimental to the public interest in Missouri and otherwise need not be conditioned.

BLITZ, BARDGETT & DEUTSCH, L.C.

/s/ Thomas R.Schwarz, Jr.

By: ______________________________

Thomas R. Schwarz, Jr., #29645
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone: 573/634-2500
Facsimile: 573/634-3358
Email: tschwarz@bbdlc.com

Attorneys for Entergy Arkansas, Inc.,

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the above and foregoing has been served upon counsel of record by forwarding the same by electronic mail and/or first class mail, postage prepaid, this 12th day of July, 2013.

Office of the Public Counsel
PO Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Office of General Counsel
Missouri Public Service Commission
PO Box 360
Jefferson City, Missouri 65102
staffcounselservice@psc.mo.gov

Roger W Steiner
1200 Main Street, 16th Floor
P.O. Box 418679
Kansas City, MO 64105-9679
roger.steiner@kcpl.com

Douglas Healy
939 Boonville Suite A
Springfield, MO 65802
doug@healylawoffices.com

Dean L Cooper
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

/s/ Thomas R. Schwarz

Thomas R. Schwarz