

**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.)	File No. EO-2013-0431
Regional Transmission System Organization)	
or Alternative Request to Change)	
Functional Control and Motions for Waiver)	
And Expedited Treatment)	

RESPONSE OF ENTERGY ARKANSAS, INC. TO KCPL/GMO REPLY

COMES NOW Entergy Arkansas, Inc. ("EAI"), and submits this Response to the Reply of Kansas City Power & Light Company and KCP&L Greater Missouri Operations (together, KCPL) to the Application for Rehearing of EAI. EAI's response is appropriate because, rather than responding to EAI's Rehearing Application based on the existing record in this File, KCPL has introduced new arguments, supported by highly misleading factual assertions, at this late stage of the proceeding.

This response is limited to addressing four misleading assertions by KCPL that relate to the federal preemption issues pending on rehearing. First, KCPL argues that, in approving the integration into the Midcontinent Independent System Operator, Inc. ("MISO"), the retail regulators of the Energy Operating Companies adopted certain conditions that relate to matters subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). KCPL argues that these conditions demonstrate that this Commission has authority to impose conditions that intrude on FERC's exclusive jurisdiction.¹ Second, KCPL argues that FERC has not yet ruled on KCPL's request to

¹ KCPL Reply at 6-8.

be held harmless from MISO's "regional through and out rate" ("RTOR") and, therefore, EAI's federal preemption argument is "premature as a factual matter."² Third, KCPL argues that the Entergy Operating Companies will receive an "unjust windfall" because they will pocket all increased revenue from the MISO RTOR.³ Fourth, KCPL argues that the Commission must assert jurisdiction over the MISO's Joint Operating Agreement with the Southwest Power Pool ("SPP") to preserve the "safety and reliability" of the transmission system.⁴ These arguments have no merit. EAI addresses each argument in turn.

I. CONDITIONS ADOPTED BY ENTERGY'S RETAIL REGULATORS

KCPL argues that the retail regulators of the Entergy Operating Companies adopted certain conditions that concern matters within FERC's jurisdiction and asserts that "Entergy did not raise a claim of federal preemption [in those state proceedings], as it has done in the Missouri proceeding."⁵ KCPL's assertion is highly misleading.

The conditions referenced by KCPL are distinguishable because they concerned issues affecting the Entergy Operating Companies' footprint only, not *regional MISO-wide* issues that affect every transmission owner and customer in MISO. Specifically, KCPL is referring to the fact that certain Entergy retail regulators conditioned their approvals on the Operating Companies filing at FERC to request their own "transmission pricing zones."⁶ This was an *intra-Entergy Electric System transmission system* issue that could be addressed by the Entergy Operating Companies through the

² *Id.* at 8-10.

³ *Id.* at 9.

⁴ *Id.* at 12.

⁵ *Id.* at 8.

⁶ *Id.* at 8.

exercise of their section 205 filing rights under the Federal Power Act.⁷ The Entergy Operating Companies, like all public utilities under the Federal Power Act, have the right to make such unilateral rate filings under section 205.⁸ Although the Operating Companies could not be compelled to make those filings,⁹ they agreed to make them because they were reasonable accommodations that affected only the Entergy Operating Companies' footprint—not the entire MISO footprint. The same is true for KCPL's reference to the conditions related to waiver of the mandatory purchase obligation with respect to qualifying facilities; the conditions related solely to the Entergy Operating Companies' footprint and could therefore be addressed by the Operating Companies exercising their statutory filing rights.

By contrast, the relief sought by KCPL is (i) to be shielded from paying the MISO ROTR, which is a *regional* transmission rate that is applied uniformly across the MISO footprint,¹⁰ and (ii) to force MISO to renegotiate its Joint Operating Agreement with the Southwest Power Pool ("SPP"), which concerns not only the *entire MISO footprint but the SPP region as well*. EAI has no rights under section 205 of the FPA with which it could seek to comply with either condition. EAI cannot file a change in the MISO ROTR and it cannot purport to modify MISO's Joint Operating Agreement with SPP. EAI is not even a party to either tariff or agreement. The only appropriate procedural avenue, if KCPL believes the MISO RTOR or MISO-SPP JOA should be changed (and can meet its burden of proof), is for KCPL to file a complaint under FPA section 206.

⁷ *ITC Holdings Corp.*, 143 FERC ¶ 61,257 (2013).

⁸ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002).

⁹ *Massachusetts Department of Public Utilities v. FERC*, 729 F.2d 886 (1st Cir. 1984).

¹⁰ The only exception, which is not relevant here, is MISO's electrical seam with the PJM RTO. Neither PJM nor MISO charge each other the otherwise applicable regional through and out rates.

Apparently unwilling to seek such relief, KCPL asks this Commission to usurp FERC's jurisdiction.¹¹ But, particularly when regional transmission agreements are at issue, "[o]nly FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro*."¹²

Worse yet, KCPL is also collaterally attacking FERC decisions addressing and rejecting the very same relief it seeks here. The FERC has already rejected requests from existing transmission customers on the Entergy Electric System to exempt them from paying the MISO RTOR.¹³ FERC has also rejected KCPL's request (submitted along with the other SPP transmission owners) that it be held harmless from loop flows and that FERC adopt unilateral modifications to the MISO-SPP JOA.¹⁴ FERC decisions cannot be collaterally attacked here. "Interstate power rates filed with FERC or fixed by

¹¹ The Commission has, in other contexts, recognized that it cannot assert jurisdiction over an RTO's regional transmission rates. Report and Order at 14, File No. EO-2011-0128, *In the Matter of Application of Union Electric Company for Authority to Continue the Transfer of Functional Control of its Transmission System to the Midwest Independent Transmission System Operator, Inc.*, (MoPSC April 19, 2012) ("the 'filed rate doctrine' means that this Commission will not be able to deny Ameren Missouri the ability to recover in rates the amounts that it must pay to transmission owners for FERC-established rates for power transmission, even if those FERC-established rates are higher than would have been approved by this Commission.").

¹² *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 905 (4th Cir. 1987).

¹³ In *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 171 (2013) ("*Entergy-MISO Rate Order*"), KCPL and other existing Entergy transmission customers had objected to paying the MISO RTOR. Although FERC did not address KCPL by name, it rejected the same discriminatory discount sought by another customer, finding that the customer "is being treated comparably with other similarly situated customers, *i.e.*, those customers requesting drive-through service on MISO's transmission system, because any other transmission customer seeking drive-through service across Entergy's transmission system would be charged the same rate that [the customer] will be charged." *Id.* at P 171. This was not a novel holding. The FERC had previously rejected similar requests for discriminatory discounts for the same reason. *PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,012 at P 37 (2004) (emphasis added) ("We will reject SEFPC's request that it be granted a preferential rate for its transactions that exit PJM. SEFTP will not pay rates unique to its customers, but rather, a regional rate that is applicable to all services exiting in the RTO region, which has already been accepted by this Commission. For this fee, SEFPC will obtain use of the entire PJM region, not just the Dominion control area, as before.").

¹⁴ *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at PP 148-49.

FERC must be given binding effect by state utility commissions.”¹⁵ The Commission’s Staff agrees with EAI on this point.¹⁶

II. THE STATUS OF FERC PROCEEDINGS ON THE RTOR ISSUE

KCPL also raises the new argument that FERC has not yet addressed its request to be held harmless from MISO’s RTOR. KCPL argues that it recently raised the RTOR issue in a new FERC proceeding, which remains pending, and therefore the federal preemption issue is “premature as a factual matter.”¹⁷

KCPL is correct that it has *alleged* in recent FERC filings that FERC has not yet addressed the MISO RTOR issue. In fact, KCPL and Empire have now asked FERC to rule on the same RTOR issue in *four different FERC proceedings*.¹⁸ But these rehashed arguments make it even clearer that *FERC*, not this Commission, has jurisdiction over the issue. The fact that FERC has not yet ruled on these rehashed arguments does not make the preemption issue “premature.”¹⁹ Preemption is not a *timing* issue. The Supreme Court has “long rejected” the “view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings.”²⁰ The Federal Power Act drew a “bright line”

¹⁵ *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003) (quoting *Nantahala Power & Light Co.*, 476 U.S. at 962).

¹⁶ Staff Response at 13-16.

¹⁷ KCPL Reply at 10.

¹⁸ The issue was first raised by KCPL and Empire and other parties in Docket No. EC12-145-000, and FERC ruled on the issue in *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 171 (2013). Both KCPL and Empire sought rehearing of that ruling. More recently, however, KCPL and Empire have argued that the FERC never addressed the issue and that it should be addressed in three new FERC proceedings. See Motion to Intervene and Protest of Empire District Electric at 12, FERC Docket No. ER14-89-000 (Nov. 5, 2013) (Empire arguing this is “first time” the RTOR issue will be “squarely presented” to FERC); Motion to Intervene and Protest of KCP&L and KCP&L GMO at 1, Docket No. ER14-107-000 (Nov. 6, 2013) (KCPL arguing that “[i]t appears that this is the proceeding” in which the RTOR and JOA issues should be raised); Motion to Intervene and Protest of KCP&L and KCP&L GMO at 1, Docket No. ER14-148-000 (Nov. 12, 2013) (KCPL arguing that the Commission must decide the RTOR issue before it can accept the filing).

¹⁹ KCPL Reply at 10.

²⁰ *Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354, 374 (1988).

between federal and state authority and, consequently, "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."²¹

III. REVENUES ASSOCIATED WITH MISO'S RTOR RATE

KCPL also attempts to tar EAI with a new equitable argument by claiming that Entergy Operating Companies will receive an "unjust windfall" from the RTOR because they will retain all the increased revenues.²² This claim is false. To support this same provocative claim at FERC (which is the only citation given by KCPL here), KCPL omitted a direct quotation from MISO that makes clear that the Entergy Operating Companies will split the revenues with the other MISO transmission owners, not retain all those revenues.²³ There is therefore no "windfall." KCPL is simply distorting the facts.

²¹ *Id*; see also *New York v. FERC*, 535 U.S. 1, 21 (2002) ("unbundled interstate transmissions of electric energy have never been 'subject to regulation by the States'"). Empire offers the unhelpful syllogism that, if the Commission is required under state law to consider "detriments" but cannot remedy a "detriment" that falls within FERC's exclusive jurisdiction, then it is required to deny approval of MISO integration. Empire Response to Application for Rehearing at 4-5. Empire cites no authority for this end run around FERC jurisdiction and there is none. Empire also fails to recognize that, with respect to state law, in order to make any finding of a detriment, the Commission must establish that it has jurisdiction over the matter in the first instance, which cannot be done on the unique facts of EAI's case. Finally, if Empire's circular proposition were true, then states could always deny recovery of FERC-approved costs they deemed "unreasonable" because, under state law, they can only pass through "reasonable" costs. But that, of course, is not the law. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) ("When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.").

²² KCPL Reply at 9.

²³ Section III.A.7 of Appendix C of the MISO Transmission Owners Agreement provides that revenues from the MISO RTOR will be split among the MISO transmission zones 50% based on relative revenue requirements and 50% based on power flow impacts. MISO TOA, Appendix C, Section III.A.7. See also *Midwest Indep. Transmission System Oper., Inc.*⁸⁴ FERC ¶ 61,231 at 61,166 (1998) ("Revenues for through and export point-to-point service will be distributed to transmission owners 50% on the basis of relative revenue requirement and 50% on the basis of power flow impacts").

IV. SAFETY AND RELIABILITY

KCPL argues that the Commission must assert jurisdiction over the MISO-SPP Joint Operating Agreement to “preserve the safety and reliability” of the transmission system.²⁴ There is no substance to this assertion for four reasons. First, FERC has exclusive jurisdiction over the JOA, which is an inter-regional transmission agreement affecting nearly 20 states.²⁵ This Commission therefore has no jurisdiction over the JOA.²⁶ Second, KCPL’s loop flow claim is an economic issue, not a safety or reliability issue. KCPL wants to be paid for all loop flows associated with MISO integration, but FERC has already rejected the claim.²⁷ Third, as it relates to “safety,” MISO integration does not cause any change in the manner in which the safety of EAI’s transmission system is maintained. EAI will continue to physically operate and maintain its facilities, just as it does today, in ensuring worker and public safety.²⁸ Finally, as it relates to “reliability,” the reliability issues associated with MISO integration have already been addressed in an inter-regional agreement filed with, and accepted by, FERC.²⁹

²⁴ KCPL at 12.

²⁵ FERC has “exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.” *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see also New York v. FERC*, 535 U.S. 1, 21 (2002) (“unbundled interstate transmission of electric energy has never been ‘subject to regulation by the states’”).

²⁶ “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; *see also id.* at 377 (Scalia, J., concurring) (“It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.”).

²⁷ *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 148 (rejecting claims that Entergy and MISO “hold parties harmless from potential parallel and loop flows”).

²⁸ MISO has “functional” control over the regional transmission grid, but the individual transmission owners retain physical operation and control over their facilities. MISO Transmission Owners Agreement, Appendix E. This division of responsibility is consistent with the nearly uniform approach of every RTO. *See PJM Interconnection, LLC*, 139 FERC ¶ 61,183, at P 30 (2012) (“each Transmission Owners shall continue to direct the physical operation and maintenance of its transmission facilities”).

²⁹ *Midcontinent Indep. System Oper., Inc.*, 145 FERC ¶ 61,032 at P 49 (2013) (approving reliability coordination agreement among MISO, SPP, the Southern Company, Tennessee Valley Authority, and other entities that “will support a reliable transition” to integration of the Entergy Operating Companies into MISO).

Tellingly, KCPL does not identify a single specific reliability issue that remains unaddressed.³⁰

V. CONCLUSION

For the reasons set forth above and in EAI's Application for Rehearing, the Commission should grant rehearing of its Report and Order.

Respectfully submitted,

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³⁰ In fact, in comments submitted to FERC on the reliability coordination agreement, KCPL and the other SPP transmission owners did not raise any reliability concerns, but rather simply repeated their requests for loop flow compensation. *Id.* at 52.

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 25th day of November, 2013.

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