

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

In the Matter of the Joint Application of)
Entergy Arkansas, Inc., Mid South)
TransCo, LLC, Transmission Company)
Arkansas, LLC, and ITC Midsouth LLC,)
for Approval of Transfer of Assets and)
Certificate of Convenience and Necessity,)
and Merger and, in connection therewith,)
Certain Other Related Transactions.)

Case No. EO-2013-0396

In the Matter of Entergy Arkansas, Inc.'s)
Notification of Intent to Change Functional)
Control of Its Missouri Electric Trans-)
mission 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.)

Case No. EO-2013-0431

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and for its
Reply Brief, states as follows:

Introduction:

This *Reply Brief* concerns two related but not consolidated cases. In the first of them,¹ four Joint Applicants seek approval of the transfer of certain transmission facilities in Missouri from an Entergy subsidiary to an ITC subsidiary. In the second case,² the Entergy subsidiary that presently owns the assets in question seeks approval from the Commission to transfer functional control of them to MISO. In each case, the

¹ Case No. EO-2013-0396.

² Case No. EO-2013-0431.

Commission must approve the application unless it is convinced that approval would be detrimental to the public interest.³ The Commission has previously stated that “[a] detriment to the public interest includes a risk of harm to ratepayers.”⁴

The buying and selling of assets and subsidiaries, as well as mergers and reorganizations, are activities that businesses engage in from time to time in pursuit of some business advantage or profit. Where, as here, one or more regulated businesses are involved, permission to proceed must first be obtained from the appropriate regulatory authority.⁵ The duty that a regulated public utility owes to the public is to provide safe and adequate service at just and reasonable rates.⁶ This Commission has stated in the past that a detriment to the public interest exists where the transaction in question is likely to result in service that is less safe and less adequate, or rates that are not just and reasonable.⁷

The questions presented by these cases are:

- For each application, does this Commission have legal authority to grant, or to refuse to grant or to grant with conditions, the pending application?
- For each application, is it likely to result in service that is less safe and less adequate, or rates that are not just and reasonable?
- For each application, if there is likely to be a detrimental impact, are there conditions that could be imposed that would eliminate the detriment?

³ ***State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz***, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980); § 393.190.1, RSMo.

⁴ ***In the Matter of Union Electric Company doing business as AmerenUE***, 13 MoPSC3d 266, 292 (Feb. 10, 2005).

⁵ ***Fee Fee***, *supra*.

⁶ §§ 393.140, 393.270, RSMo.

⁷ ***Union Electric Company***, *supra*, 13 MoPSC3d at 293.

The Positions of the Parties:

The Joint Applicants urge the Commission to approve Entergy's sale of its Missouri transmission facilities to ITC, although they evidently believe that the Commission's jurisdiction over the transaction is limited.⁸ They do state that they "do not dispute aspects of the Commission's jurisdiction under Chapter 393 RSMo and section 215(i) of the Federal Power Act (16 USC § 824o(i)) over facility siting, quality of service and reliability, including any applicable ongoing reporting requirements, subject to any limitations of the mandatory reliability standards adopted by NERC and approved by FERC, or tariffs approved by FERC."⁹ They devote 29 pages of their brief to summarizing the testimony adduced as to the benefits of the transaction, with little quantification.¹⁰

Likewise, Entergy urges the Commission to either dismiss or approve its application for authority to transfer functional control over its Missouri transmission assets to MISO because it contends that the Commission has no relevant jurisdiction over the issue at all.¹¹

Staff argued in its *Initial Brief* that the Commission has jurisdiction over both of the applications that are the subject of these related cases and that the Commission should grant the applications.¹²

⁸ Joint Applicants' Initial Brief (Case No. EO-2013-0396), pp. 6-7: "Nonetheless, Joint Applicants recognize the Commission's prior orders in this proceeding and elsewhere show that it contemplates jurisdiction pursuant to Sections 393.170 and 393.190, RSMo. Accordingly, in addition to the approvals that have been obtained from the FERC regarding these interstate facilities, Joint Applicants continue to seek approval from this Commission"

⁹ *Id.*, at p. 7 n. 4.

¹⁰ *Id.*, pp. 7-36.

¹¹ *Post-Hearing Brief of Entergy Arkansas, Inc.*, p. 8.

¹² *Staff's Brief*, *passim*.

The Great Plains Energy Operating Companies contend that the Joint Applicants have not met their burden of showing that either the proposed sale transaction or the transfer of operational control are not detrimental to the public interest.¹³ They urge the Commission to either deny the applications or, alternatively, to grant them with conditions:¹⁴

- The negotiation of a Joint Operating Agreement between SPP and MISO addressing at least the loop flow issues and other altered flows related to the Missouri seam between SPP and MISO; and
- A requirement that the Joint Applicants “hold harmless” non-MISO Missouri retail consumers from all increased costs due to Entergy’s transfer of functional control to MISO.

Empire contends that the Commission has jurisdiction over both applications and suggests that the Commission grant them with conditions.¹⁵ Empire’s proposed conditions are:¹⁶

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

¹³ *Post-Hearing Brief of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company*, pp. 8-13.

¹⁴ *Id.*, at p. 22.

¹⁵ *Empire’s Initial Brief*, *passim*.

¹⁶ *Id.*, at p. 13.

MJMEUC also contends that the Joint Applicants have failed to carry their burden to show that granting the applications would not be detrimental to the public interest.¹⁷ MJMEUC states that “the most likely item that the average Missouri citizen will ever notice from this proposed transaction is a higher monthly utility bill.”¹⁸ Presumably, MJMEUC wants the Commission to deny both applications. MJMEUC does not address the issue of jurisdiction.

Jurisdiction:

With respect to the proposed transfer of transmission assets from Entergy to ITC, even the Joint Applicants grudgingly admit that this Commission has jurisdiction.¹⁹

With respect to the proposed transfer of functional control, applicant Entergy Arkansas states:

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.²⁰

Entergy then goes on to explain that it is not a public utility under the rule of ***State ex rel. M.O. Danciger & Co. v. Public Service Commission***²¹ because it has no Missouri retail customers and has no Missouri retail tariffs and has not held itself out as serving the public in Missouri.²² Entergy argues further that this Commission has no jurisdiction

¹⁷ *Initial Brief of the Missouri Joint Municipal Electric Utility Commission, passim.*

¹⁸ *Id.*, at p. 4.

¹⁹ *Joint Applicants’ Brief*, at pp. 6-7.

²⁰ *Post-Hearing Brief of Entergy Arkansas*, p. 8.

²¹ ***State ex rel. M.O. Danciger & Co. v. P.S.C.***, 257 Mo. 483, 205 S.W. 36, 39 (1918).

²² *Id.*, at pp. 9-13.

where FERC has exclusive jurisdiction.²³ Entergy makes these arguments while at the same time admitting that the Commission over siting and safety: “EAI does not, as described further below, dispute that the Commission has some jurisdiction over EAI in these areas [i.e., siting and safety], but nothing in the present MISO notice relates to that jurisdiction.”²⁴

Entergy’s arguments are confused. The rule of ***Danciger*** has no application here; that case goes to the issue of whether or not a business is a public utility. There is no question that Entergy is a public utility; the question is whether this Commission may regulate it with respect to the transfer of operational control to MISO. As Entergy notes, this Commission has exercised jurisdiction over such transfers in the past.²⁵ Entergy dismisses the relevance of those cases and asserts, “there simply is no statute conferring jurisdiction to the Commission under the distinct facts set forth in this matter.”²⁶

As noted, even the Joint Applicants (including Entergy) concede that the Commission has jurisdiction under § 393.190.1, RSMo, over the transfer of the transmission assets from Entergy to ITC.²⁷ That statute is the same one that the Commission has relied on in previous transfer of functional control cases, the very ones dismissed by Entergy as meaningless. The inevitable conclusion is that, if the Commission has jurisdiction over either of these applications, then it necessarily has jurisdiction over both.

²³ *Id.* and pp. 13-16.

²⁴ *Id.*, at p. 4.

²⁵ *Id.*, at p. 12.

²⁶ *Id.*, at p. 13.

²⁷ *Joint Applicants’ Brief*, at pp. 6-7.

Are the Applications Detrimental to the Public Interest?

Staff has advised the Commission to approve the applications before it on the basis that the likely benefits of the transfer of assets and transfer of control outweigh the possible detriments and that the applications should therefore be approved.

The only significant detriments identified by any witnesses are increases in the costs incurred by KCP&L, GMO and Empire to use transmission services subject to MISO tariffs. The Federal Power Act grants FERC “exclusive authority to regulate the transmission and sale of electric energy in interstate commerce.”²⁸ FERC is obligated to ensure that transmission and wholesale power rates are “just and reasonable.”²⁹ States are not permitted to regulate in areas where FERC has exercised its jurisdiction to determine just and reasonable rates.³⁰ “The right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission'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 rate.”³¹ “Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”³²

²⁸ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

²⁹ Federal Power Act (“FPA”), 16 U.S.C. § 824d(a), (d).

³⁰ See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988).

³¹ *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

³² *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (quoting *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16, 84 S.Ct. 644, 11

The Filed Rate Doctrine requires “that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.”³³ When the Filed Rate Doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause.³⁴ It is well-established that FERC-approved rates cannot be second-guessed by state regulators.³⁵ It follows that, while the Commission has jurisdiction to act on Entergy’s application to transfer functional control, it may not deny it solely because MISO’s FERC-approved transmission rates are higher than those that previously applied.

WHEREFORE, Staff prays that the Commission will approve the applications.

Respectfully submitted,

s/ Kevin A. Thompson
KEVIN A. THOMPSON
Missouri Bar Number 36288
Chief Staff Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-6514 (Voice)
573-526-6969 (Fax)
kevin.thompson@psc.mo.gov

Attorney for the Staff of the Missouri Public Service Commission.

L.Ed.2d 638 (1964)); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACOR Inc.*, 379 F.3d 641, 646-47 (9th Cir.2004).

³³ *Nantahala*, *supra*, 476 U.S., at 962, 106 S.Ct. 2349, 90 L.Ed.2d ____.

³⁴ *Entergy Louisiana v. Louisiana Public Service Comm’n*, 539 U.S. 39, 47, 123 S.Ct. 2050, 2056 156 L.Ed.3d 34, ____ (2003); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-582, 101 S.Ct. 2925, ____, 69 L.Ed.2d 856, ____ (1981).

³⁵ See *Entergy Louisiana*, *supra*.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **5th day of August, 2013**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson