BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of	)	
Union Electric Company for Authority	)	
To Continue the Transfer of	)	Case No. EO-2011-0128
Functional Control of Its Transmission	)	
System to the Midwest Independent	)	
Transmission System Operator, Inc.	)	

INITIAL POST-HEARING BRIEF OF AMEREN MISSOURI

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the 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.	))))))	Case No. EO-2011-0128

INTRODUCTION

The uncontroverted evidence in this case demonstrates that Union Electric Company d/b/a Ameren Missouri's (Ameren Missouri or Company) continued Midwest Independent Transmission System Operator, Inc. (MISO) participation provides very substantial benefits for the Company and its customers.[1] Those benefits total tens of millions of dollars per year – more than $100 million over the next three years alone. No party to this case suggests that this Commission should deny Ameren Missouri's request to continue its interim and conditional permission to participate in MISO for the term Ameren, the Staff, the Missouri Industrial Energy Consumers (MIEC) and MISO agreed upon in the November 17, 2011 Non-Unanimous Stipulation and Agreement (*Stipulation*).[2]

Consequently, the issue in this case – indeed the only proper issue in this case – is this: Is the Company's continued participation in MISO *on the terms and conditions that are being proposed* (i.e., on the terms reflected in the *Stipulation*) detrimental to the public interest? That question must be answered through the application of the legal standards that govern the Commission's decision in this Section 393.190.1, RSMo.[3] case. Under those standards, the

[1] By "participation" we mean the Company's transfer of functional control of its transmission system to MISO.
[2] That agreed upon term is until May 31, 2016, and any additional period necessary to enable the Company to re-establish functional control of its transmission system as an Independent Coordinator of Transmission (ICT) or transfer that control to another regional transmission organization (RTO).
[3] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

answer to that question is obviously "no"; that is, continued participation is clearly not detrimental to the public interest.

Notably, neither of the two parties that advocate for the imposition of additional conditions[4] on the Commission's approval of continued participation alleges that the absence of such conditions would (or is even likely to) render the Company's proposed participation detrimental to the public interest – i.e., they don't claim that the Company's ratepayers would not realize net benefits arising from that participation, even if their proffered conditions did not exist. To the contrary, what they argue is their view that participation would be even *more* beneficial if their preferred conditions were imposed. Even then, they are unable to quantify or define in any real way the increased benefits that would support these additional conditions.

Had the additional benefits been quantified, it would not matter. The Commission has no authority to impose conditions to satisfy those parties' preference that the Company's participation occur on what, in their view, are even more beneficial terms than the terms proposed and that are at issue here. The Commission lacks this authority because a utility has a constitutionally-protected right to transfer its property on the terms and conditions it determines are appropriate unless there is compelling evidence that doing so will directly and presently make the proposed transfer detrimental to the public interest. Stated another way, in the context of a Section 393.190.1 case, the question is only whether the proposed transfer is detrimental to the public interest – i.e., will it harm the ability of the utility's customers to continue to receive safe and adequate service, or will customers suffer direct financial harm because of the transfer (as compared to the case where no transfer occurs). Otherwise, the transfer is not detrimental to the public interest within the meaning of the statute, and the utility is entitled to transfer its property as it sees fit. On the record made in this case, there is absolutely no evidence of any

[4] Office of the Public Counsel (OPC) and the Missouri Joint Municipal Electric Utility Commission (MJMEUC).

such detriment. Consequently, there is no basis for this Commission to adopt any conditions beyond those reflected in the *Stipulation*. This means that the Commission must reject the additional conditions others advocate for and must approve the transfer as proposed.

THE STIPULATION

On November 17, 2011, the Company, the Staff, MIEC and MISO entered into the *Stipulation*. OPC and MJMEUC objected, meaning that under the Commission's rules, the *Stipulation* reflects the joint position of its signatories. As such, the *Stipulation* reflects, *in toto,* the terms and conditions on which Ameren Missouri proposes to continue its MISO participation, with those terms and conditions being supported by the Staff, MIEC and MISO.

The key provisions of the Stipulation are as follows:

Term (Section 9).

This provision provides for the Company's continued interim and conditional permission to participate in MISO through May 31, 2016, or, if necessary, for a period beyond that date long enough to allow the Company to re-establish functional control or transfer functional control to another RTO if the Company's permission to participate in MISO is not extended.

Material Change (Section 10(a)).

This provision creates a vehicle by which the Commission can open a future docket between now and 2016 to investigate whether there is a substantial risk that Ameren Missouri's MISO participation has become detrimental to the public interest. Some parties (most notably OPC) complain that the condition should have been broader; that is, that the condition should be triggered if a significant event "may" occur or if such an event is of such magnitude that it "may" present a substantial risk that the participation "may" become detrimental. A broadening of the provision as advocated for by OPC is neither necessary nor appropriate.

First, there is no showing that the Company's participation will be detrimental to the public interest without imposition of the broader condition that OPC desires. Under the legal standards that govern the Commission's decision in this case, absent such a showing, the Commission has no authority to impose a broader condition.[5]

An even more fundamental flaw to a broadened condition is the obvious point that OPC's proposal would create a path wide enough to drive the proverbial truck through. Anything "may" happen. This means that anything could trigger a request (or many requests) for such a docket, with such a broad condition creating an expectation that such a docket might very well be opened. Indeed, if the condition—as OPC would draft it—were in place, any number of speculative events would justify a filing, forcing the Company and the Commission to perhaps regularly evaluate and reevaluate a myriad of uncertainties that "may" affect the relative costs and benefits of MISO participation. As Chairman Gunn rightly suggested through his questioning of counsel and witnesses during the evidentiary hearing, the practical reality is that this provision, as written, gives the Commission sufficient discretion to open a docket if one is truly needed.[6] The Staff, MIEC, MISO and the Company all agree that the condition, as written, is appropriate. Even OPC witness Ryan Kind admits that Section 10(a) "could be helpful in addressing some of the concerns of the parties to this case."[7] There is nothing but speculation to support the conclusion that this provision is inadequate in any way; nothing but speculation to support OPC's argument that the condition ought to be changed; and as noted, there exists no authority under the law for it to be changed.

[5] That the Company has agreed to such a condition, or has agreed to other conditions in past dockets, does not mean that the Commission had the authority to impose such conditions absent the Company's agreement.
[6] Tr. p. 41, l. 18 to p. 42, l. 12.
[7] Ex. 3 (Arora Supplemental Surrebuttal) p. 6, l. 10-12 (quoting Ex. 13 (Supplemental Kind Rebuttal, p. 23, l. 1-2)).

Cost-Benefit Study (Section 10(b)).

This provision requires that the Company perform an additional cost-benefit study, and file the results in a docket to be initiated just three and one-half years from now (by November 15, 2015), at which time the Commission will again examine the question of whether a continued transfer of functional control of the Company's transmission system to MISO is detrimental to the public interest.[8] Under this provision, the Company will perform a robust, "full-blown" cost-benefit study that accounts for, among other things, the MISO's capacity market construct and the Southwest Power Pool's (SPP) "Day Two" markets, all with substantial input from stakeholders, as has successfully been done in the past.

Some of OPC's questioning suggests that OPC isn't satisfied that the robustness of the study has been spelled out with sufficient specificity in the *Stipulation*. In fact, the *Stipulation* is just as specific as the cost-benefit provisions of the last stipulation (from Case No. EO-2008-0134), and the Staff, MIEC and MISO all agree that the *Stipulation* is sufficiently specific. But to address OPC's concerns, the undersigned counsel for the Company spelled out the Company's commitments regarding the study in substantial detail during his opening statement, making clear that:

- The study will not be an "update" of a prior study;
- The study will be similar to the full-blown study conducted by Charles River Associates in Case No. EO-2008-0134, the results of which were updated by the Company in this case;
- The study will look forward at least five but not more than ten years;

[8] It is possible that in such a docket the Company will propose to continue its MISO participation, or may propose another option. Indeed, a key purpose of performing the cost-benefit study is to inform that decision.

- The study will address the MISO's resource adequacy construct (RAC or capacity market) as it exists when the study is done, and as it might be reasonably proposed or expected to change during the five to ten year study period;
- The study will examine Southwest Power Pool, Inc. (SPP) participation as an option;
- The study will examine what is known about Entergy's entry (or proposed entry) into the MISO; and
- The study will examine general market conditions, regional transmission and cost allocation principles in light of FERC Order 1000.[9]

ATX Investigatory Docket (Section 10(i)).

This provision commits Ameren Missouri and Ameren Transmission Company (ATX) to participate in an investigatory docket that but for this provision ATX would not have to participate in, and commits Ameren Services Company and ATX to provide documents and information that otherwise would not be subject to discovery. It provides for this docket to take place over a 10-month period – nearly as long as an entire rate case takes – and would allow inquiry by the Commission into plans for any Ameren company to build transmission in Ameren Missouri's service territory over a long period of time (10 years). The point of this provision is to allow the Staff, OPC, MIEC, and other parties transparent access to the information they believe they may need to evaluate the transmission plans of Ameren Missouri and, more particularly, of other Ameren companies over the next 10 years. While the Company has never

[9] Tr. p. 24, l. 22 to p. 26, l. 18. The Company has no objection if the Commission desires to include these commitments as part of its order approving the Company's continued participation. While disagreements have arisen in past RTO participation dockets regarding various matters, there have been no material disagreements respecting the design and conduct of prior cost-benefit studies, and there is no reason to expect such disagreements about the next cost-benefit study.

believed (and still doesn't believe) that those issues have anything to do with the Company's continued MISO participation it acknowledges that other parties are interested in future transmission plans. Although the Company, Ameren Services Company, and ATX have been quite open about what the Company plans to build and what other Ameren entities plan to build, it has agreed to participate in this docket so that other parties, and the Commission, can gain a more complete understanding of those plans.

OPC says it has low expectations for this docket. Staff, MIEC, and MISO disagree, and so does the Company. OPC also raises technical issues about whether ATX is really bound to participate. Ms. Borkowski's Supplemental Surrebuttal Testimony, in which she speaks for all Ameren entities that would have any responsibility for transmission in Missouri – Ameren Missouri, Ameren Services Company, and ATX – should put that issue to bed.[10]

Rate Treatment – Affiliate Owned Transmission (Section 10(j)).

This provision reflects a concession by Ameren Missouri that means if one of its affiliates receives revenues from regional transmission cost allocations that include rate treatment that is different (i.e., more favorable from the transmission company's perspective) than Ameren Missouri would receive under state ratemaking, then (to the extent that more favorable treatment is reflected in charges Ameren Missouri pays MISO) Ameren Missouri will absorb the difference during the entire period of extended permission sought herein. Without getting into a detailed discussion of the filed-rate doctrine, Ameren Missouri would point out that this is a concession it does not believe it can be compelled to make. Despite this, the Company chose to make this

[10] Mr. Mills, in his opening statement, questioned whether Section 10(i) is "binding" since the *Stipulation* can't just be "adopted" by the Commission. This "concern" is a red-herring. It is the Company's expectation that the Commission would include, as conditions on its approval of the Company's continued MISO participation, all of the conditions contained in Section 10 of the *Stipulation*. OPC and all parties will have been given their Due Process via the hearing process, but that does not mean the Commission cannot or won't include, as conditions on the permission sought in this docket, the conditions that have been agreed upon in the *Stipulation*, based on the evidence of record in this case.

concession in the interest of properly extracting these "ATX issues" from this case so they can be dealt with under the investigatory docket called for in Section (10)(i).

ARGUMENT

I. Governing Legal Principles in Section 393.190.1 Cases.

Section 393.190.1 provides as follows:

> 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, public utility, without having first secured from the commission an order authorizing it to do so.

While the statute does not contain an explicit standard by which the Commission is to decide whether to grant authorization under the statute, Missouri courts have long held that the Commission's duty and authority under statutes such as Section 393.190 does not go so far as to ensure that the public *must benefit* from the transfer, or that they must benefit *more* than they would under the transfer as proposed (despite OPC's suggestions to the contrary):

> To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. "In the public interest," in such cases, can reasonably mean no more than not detrimental to the public.

State ex rel. City of St. Louis v. Pub. Serv. Comm'n, 73 S.W.2d 393, 400 (Mo. *banc* 1934), *citing Elec. Pub. Util. Co. v. Pub. Serv. Comm'n*, 140 A. 840, 844 (Md. 1928) (emphasis in original). Consequently, the Commission's authority in this case is limited to deciding, based upon the substantial and competent evidence of record, whether the proposed continuation of the transfer of functional control of Ameren Missouri's transmission system to MISO on the terms and

conditions proposed by Ameren Missouri is detrimental to the public interest.[11] Stated another way, the Commission must approve Ameren Missouri's continued participation in MISO if its continued participation would not be detrimental to the public interest.

Section 393.190.1 (like all of the statutes that require Commission permission before a utility can take some action) reflects the fact that a public utility, in exchange for its exclusive right to serve customers in its certificated service territory, is required to subject itself to a certain degree of control by the state's public utility authority. But that authority is limited; indeed, this Commission is a body of limited jurisdiction and has only those powers expressly given it by the Public Service Commission Law. *City of St. Louis*, 73 S.W.2d at 399. Where there is no detriment to the public, this Commission cannot act to deprive the owners of a utility the right to exercise an important incident to the utility's ownership of private property—that is, the right to manage its business. *Id*. at 400; *see also State ex rel. City of St. Joseph v. Pub. Serv. Comm'n*, 30 S.W.2d 8 (Mo. *banc* 1930) (holding that management of water company could not be interfered with as long as the result thereof did not affect public's rights); *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177 (Mo. App. W.D. 1960) (holding that regulatory power of Commission does not extend to the general management of the utility incident to ownership).

The right of a utility to transfer its property is an important incident of its ownership of property, which means that such a right cannot be denied "unless there is compelling evidence on the record showing a public detriment is likely to occur." *In re Kansas City Power and Light Co.*, Case No. EM-2001-464 (Order Approving Stipulation and Agreement and Closing Case, issued Aug. 2, 2001, 2001 Mo. PSC LEXIS 1657), *citing In re Missouri Gas Co.*, 3 Mo. P.S.C.3d 216, 221 (1994). Additionally, the detriment must be a "*direct* and *present* detriment" (emphasis added). *In re Kansas City Power and Light Co.*, Case No. EM-2001-464 (Order).

[11] Those terms are reflected in the *Stipulation*.

The burden to establish that the transfer is not detrimental to the public is on the Company, as the applicant. As earlier noted, the Company is not, however, required to demonstrate an affirmative benefit from the transfer – a principle this Commission has recognized. *See, e.g., In re Sho-Me Power Corp.*, Case No. EO-93-259 (Report and Order, issued September 17, 1993, 1993 Mo. PSC LEXIS 48).

The standard that asks the Commission to determine whether the proposed transfer is detrimental—rather than affirmatively beneficial—to the public makes sense. Requiring a utility to adjust a non-detrimental transaction to include conditions that the Commission believes would be more advantageous would constitute an encroachment of the right of the owners of the utility to manage the business they own, to exercise business judgment with respect to that management, and to exercise that important incident of its ownership of property – the right to transfer it *unless* there is compelling evidence that the transfer, as proposed, would be presently and directly detrimental to the public interest.

In the context of this proceeding, what "public" is the appropriate public to consider when determining whether a proposal is detrimental and what interest should be considered? The answer to this question can be found in the purpose of a Section 393.190.1 proceeding before the Commission, which is to "ensure the continuation of adequate service to the public." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. W.D. 1980). That the primary concern is the continuation of adequate service to the public is made clear in the Commission's own rules which require an electric utility to set out reasons why the proposed sale of an asset (here, transfer of functional control) is "not detrimental to the public." 4 C.S.R. 240-3.110(1)(D), 240-3.115(1)(D), 240-3.125(1)(C). If the primary interest is to ensure

continued service, then, the particular "public" to be considered is, logically, the customers *who are served by the facilities being transferred* (here, Ameren Missouri's retail customers).[12]

That the purpose of Section 393.190.1 is to ensure adequate service to retail customers is seen in *Environ. Util., LLC, v. Pub. Serv. Comm'n*, 219 S.W.3d 256 (Mo. App. W.D. 2007). In that case, the Commission had refused to approve a sale that did not dispose of all of the utility's operating assets because it would mean that the remaining distressed utility would be unable to "safely and effectively operate its current system." *Id*. at 263. The Western District of the Missouri Court of Appeals upheld the Commission's withholding of approval, finding that the partial sale was detrimental to the public interest because customers of the remaining utility would receive substandard service and these customers could see the cost of their service double. *Id*. at 266. No such consideration is at issue here. The result in *Environ Utilities* is in keeping with the Commission's general practice of considering the ability of the utility that is proposing to transfer its property to provide continued service to the public when it considers proposals under Section 393.190.1. *See, e.g., In re: Joint Application of Union Elec. Co. and Gasconade Elec. Coop. for an Order Approving a Change in Electric Service Supplier*, Case No. EO-2002-178, 2002 Mo. PSC LEXIS 130 at *9, 11 Mo. P.S.C. 3d 98 (Report and Order dated January 24, 2002) ("Second, the Commission will consider the ability of each party to the territorial agreement to provide adequate service to the customers in its exclusive service area.").

If the utility's retail customers constitute the "public" and continued service is the principal "interest" to be considered when determining whether a utility's proposal is *not*

[12] The relevant "public" is certainly not an entity such as MJMEUC, whose member municipal utilities do not take service directly from Ameren Missouri, but rather, take *FERC-jurisdictional wholesale transmission service* from MISO under MISO's FERC-approved tariff. Yet MJMEUC is raising its parochial concerns (about the possibility that a capacity market *that hasn't yet been proposed* may harm its members) before this Commission, apparently not having bothered to raise them before the FERC, which is the only body with jurisdiction to actually address MJMEUC's concerns.

detrimental to the public, then how is "not detrimental" to be measured? Other than the impact of the proposal on the utility's ability to continue providing safe and adequate service to its customers, another obvious consideration is whether those customers will be worse off from an economic standpoint after the transfer than before; i.e., will they suffer a direct and present economic detriment if the transfer, as proposed, occurs? *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. 2003) (holding that Commission erred by failing to consider recoupment of the acquisition costs "as part of the cost analysis when determining whether the proposed merger would be detrimental to the public"). On the record made in this case, there is simply no evidence that customers will be worse off from an economic standard if the transfer as proposed is made, versus the case where the transfer is not made at all; indeed, there is essentially uncontroverted evidence that they will be more than $100 million better off over just the next three years alone.

It is also important to note that while Ameren Missouri bears the burden of persuasion to show that the proposed transfer is not detrimental to the public interest as proposed, once Ameren Missouri makes a prima facie case (here, presents that evidence of more than $100 million of benefits from participation), it is those who assert that the transfer will be detrimental to the public interest (absent the conditions they advocate for) who must go forward with compelling evidence to support their assertion. *In re Gateway Pipeline Co., Inc.*, Case No. GM-2001-585 (Report and Order, issued October 9, 2001, 2001 Mo. PSC LEXIS 1371); *State ex rel. City of St. Louis*, 73 S.W.2d at 400; Section 386.430, RSMo.; *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. *banc* 1991) (the party asserting the affirmative of an issue [i.e., that the transfer <u>is</u> detrimental] bears the burden of proof on that issue). The

parties opposing the transfer on the conditions provided for in the *Stipulation* have failed to meet their burden of proof.

II. OPC's First Proposed Condition.

OPC claims that there are "detriments" unless two additional conditions are imposed on the permission sought by the Company in this case. OPC does not, however, propose that the Commission deny its permission for the Company's MISO participation to continue, and neither does MJMEUC. We address OPC's first condition now and will address the second one later.

OPC's first proposed condition has shifted as this case has progressed. It started out as a request that the Commission attempt to mandate that Ameren Missouri build all transmission facilities located within the physical boundaries of its certificated service territory unless (a) Ameren Missouri obtained permission from this Commission for another entity to build transmission facilities in that area and (b) that entity had a certificate of convenience and necessity from the Commission. Literally applied, this condition would have prevented an entity like Associated Electric Cooperative, Inc. (or its members) from building transmission in large swaths of Missouri.

In apparent recognition of the fact that Ameren Missouri has no power or authority to control what another company might or might not build (because of FERC Order 1000 or otherwise), OPC later changed its proposed condition to one that would require Ameren Missouri to "make diligent efforts to construct and own any and all transmission projects proposed for UE's certificated retail service territory."[13] This condition is similarly overbroad, and imposition of it would also exceed the Commission's authority. Moreover, even if the Commission

[13] *OPC's Second Statement of Position,* p. 2.

possessed the authority to impose such a condition, doing so on *this* record would be unreasonable.[14]

As stated above, the right of a utility to transfer its property is an important incident of its ownership of property and such a right should not be denied unless there is compelling evidence on the record demonstrating that a public detriment is likely to occur. Ameren Missouri does not dispute that in a proper case the Commission has the authority to adopt appropriate, reasonable conditions if the transfer, as proposed, is detrimental to the public interest, to the extent the conditions are necessary to render the transfer not detrimental. But when the transfer as proposed is already beneficial (i.e., not detrimental, as is the case here), there is no legal authority for the Commission to impose any additional conditions. Moreover, this is not a case where we are dealing with a "close call;" that is, where the benefits are marginal and where the Commission could reasonably conclude that a particular condition is indeed necessary to prevent the transfer from being detrimental to the public interest.

As the Commission has acknowledged in the past, even where it is *explicitly* authorized to impose conditions,[15] its authority to impose such conditions is *not absolute*, as OPC seems to assume. In *State ex rel. Webb Tri-State Gas Co. v. Pub. Serv. Comm'n*, 452 S.W.2d 568 (Mo. App. W.D. 1970), the appellate court affirmed the Commission's refusal to impose a condition on an area certificate which would require the applicant natural gas utility to reimburse intervenor liquid propane gas dealers for financial losses they might suffer. In affirming the Commission's order, the Western District Court of Appeals found *no legal authority* for the

[14] I.e., this record lacks substantial and competent evidence to support imposition of such a condition, and doing so would in any event be arbitrary, capricious and an abuse of the Commission's discretion. *See, e.g., State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n,* 301 S.W.3d 556, 564 (Mo. App. W.D. 2009) (a Commission decision is unreasonable if not supported by substantial and competent evidence, if it is arbitrary, capricious or unreasonable, or if it constitutes an abuse of discretion).

[15] There is no such explicit authorization in Section 393.190.1. *Cf.,* Section 393.170.3, RSMo.

Commission to impose such a condition and held that the condition was unenforceable; this was so even though Section 393.170 (under which the area certificate was sought) explicitly gives the Commission the authority to impose conditions. 452 S.W.2d at 588. Consequently, any condition proposed by certain parties in this action must be one which the Commission has the authority to enter and one which the Commission has the authority to enforce.

a. The Commission does not have the authority to order Ameren Missouri to "construct and own" or to use "diligent efforts" to construct all transmission projects located in its certificated retail service territory.

Ameren Missouri's statutory duty, as a public utility, is to provide safe and adequate service to retail customers located within its certificated service territory. Section 393.130.1, RSMo. As this Commission is well aware, that simply means that Ameren Missouri must provide service to all customers who desire service and who are located within that service territory. But that is the only obligation Ameren Missouri has to customers in its "certificated service territory." *How* Ameren Missouri provides service in its certificated service territory – what power plants it builds, which transmission lines it builds and at what voltages, where it locates substations, what kind of coal it buys, what kind of transformers it buys, what distribution lines it needs – is up to Ameren Missouri's management.

The bottom line is that the Commission has no authority to dictate to Ameren Missouri what assets it must build, or where they must be built. To do so would be a clear case of taking over the management of the public utility, a power that an unbroken line of case law in Missouri demonstrates the Commission does not have.[16] This is all the more true where the proposed condition, by its very terms, purports to dictate that Ameren Missouri use diligent efforts to build

[16] This limitation on the Commission's authority has been repeatedly recognized by the Commission, including quite recently in its Report and Order (at page 44) in the Company's last rate case, Case No. ER-2011-0028 ("However, the Commission, while it has the power to regulate Ameren Missouri, does not have the power to take over the management of the utility.") *citing State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 182 (Mo. App. W.D. 1960).

regional transmission lines even if Ameren Missouri does *not* need those lines to discharge its service obligation and even if it otherwise makes no sense for Ameren Missouri to build them. The proposed condition imposes this requirement on Ameren Missouri without regard to the Company's financial ability to construct transmission facilities even where those facilities are unnecessary for the Company to discharge its service obligation. Moreover, the condition would require the Company to spend its limited capital on transmission facilities, even when it might better serve its customers by spending its money on generation or distribution facilities that are directly used to serve them.

b. *OPC's proposed first condition is based on pure speculation.*

OPC theorizes that if Ameren Missouri does not build a regional transmission line but an Ameren Missouri affiliate builds it instead, this will mean higher overall costs (not quantified in any way) for consumers. Stated accurately, they theorize that it *could* mean higher overall costs. OPC has not said that it will, in fact, mean higher costs, nor can it make that statement because OPC does not know and cannot prove that this would be true. Further, OPC cannot say that even if there were higher costs that this would turn the huge benefit from MISO participation that is demonstrated by the Company's cost-benefit study into participation that is detrimental to the public interest. OPC speculates that this *could* be true, but that's all it is – rank speculation. As noted earlier, only if that participation is detrimental to the public interest may the Commission deny Ameren Missouri the right to transfer functional control of the transmission assets Ameren Missouri owns.

But more fundamentally, in order to deny permission for the transfer (i.e., continued MISO participation), it is the *transfer* for which permission is sought that must cause the detriment, and as this Commission has recognized that detriment must be direct and present.

Kansas City Power and Light Co., *supra*, *citing In re Missouri Gas Co.*, supra. In other words, even if OPC has issues with (or objects to) the operation in Missouri of an Ameren Missouri affiliate that builds regional transmission projects, those issues have nothing to do with this case unless (a) the detriment about which they are concerned would occur because of the transfer and not because of something else, and (b) there is a direct and present detriment arising from that operation that renders the transfer (for the limited term at issue here) detrimental to the public interest. Neither condition (a) nor (b) is satisfied here.

With respect to condition (a), it appears OPC's theory (that there could be a detriment if an Ameren Missouri affiliate builds regional transmission and that this detriment has something to do with Ameren Missouri's MISO participation) arises from what is sometimes referred to as a "right of first refusal" (ROFR) in the MISO's Transmission Owner's Agreement (TOA). More specifically, OPC's theory arises from its apparent belief that the ROFR in the TOA somehow gives Ameren Missouri a superior right (over one of its affiliates) to build transmission projects in its service territory. It appears that OPC then theorizes that Ameren Missouri can use the ROFR to preclude others (i.e., an Ameren Missouri affiliate or, presumably, even an unrelated third party) from building transmission in Missouri. Because OPC theorizes that this power stems from the TOA, they then tie their attempt to preclude operation in Missouri by an Ameren Missouri affiliate to Ameren Missouri's request for continued MISO participation. OPC's theories are flawed in at least two respects.

First, OPC's assumption that Ameren Missouri, as a MISO participant, has a superior or exclusive right to construct transmission facilities in Missouri is simply wrong. This is because under the ROFR in the MISO TOA, *any* transmission owner that is owned by the same holding company itself has the right to build regional projects approved by MISO as well as the right to

connect to the transmission systems of its affiliated transmission owners. Specifically, an Ameren Missouri affiliate who is a transmission owner (e.g., an ATX subsidiary that joins MISO) has such a right.[17] Because all MISO participants owned by the same holding company have equal rights, one cannot preclude another from exercising that right. Furthermore, even if the TOA could be interpreted to provide such a superior right for Ameren Missouri, this superior right no longer exists under FERC Order 1000 (issued in July 2011) because FERC Order 1000 has essentially eliminated the ROFR.[18] Whether Ameren Missouri participates in MISO or not, it holds no superior right to construct transmission in Missouri.

Simply put, if Ameren Missouri is in MISO, Ameren Missouri has no right to tell an affiliate that is also a MISO transmission owner that it can't build a regional project in Missouri; if Ameren Missouri is not in MISO, Ameren Missouri still has no such right. Even if the overall rates Missouri customers might pay could be higher if an Ameren Missouri affiliate builds the project as opposed to Ameren Missouri, this consequence does not itself occur *because of the transfer of functional control* of Ameren Missouri's transmission system to MISO. In other words, even if Ameren Missouri is ordered by this Commission to end its MISO participation tomorrow, this same consequence (construction of transmission facilities in Missouri by an affiliate or by a third party) could occur. As a result, OPC's proposed condition requiring Ameren Missouri to exercise a right or power it does not possess is wholly ineffectual in preventing the "harm" OPC seeks to avoid.

Second, even if one assumed that pre-FERC Order 1000 Missouri could avoid its share of regionally beneficial transmission projects approved after Ameren Missouri leaves the MISO,

[17] Ex. 5 (Borkowski Surrebuttal) p. 8, l. 1. 1 to p. 9, l. 8.
[18] *Id.* p. 9, l. 9-21. Under the terms of FERC Order 1000, the elimination must take place by October 2012.

this is not now the case, as Ms. Borkowski explains in her surrebuttal testimony.[19] Post-FERC Order 1000, if regionally beneficial transmission projects are built and if Missouri benefits, Missouri will have to pay its fair share of the cost of those projects *regardless of whether Ameren Missouri participates in MISO*.[20] That means that *if* (and a big "if" it is) Missouri's share of the cost of regional transmission projects that are approved during the extended permission term sought in this case (net of the benefits the projects bring to Missouri) ends up exceeding the huge benefits of MISO participation over that period of time, this will not have been because *Ameren Missouri continued the transfer of functional control* to MISO. To the contrary, it will be *because FERC Order 1000 doesn't allow Missouri to avoid paying for regionally beneficial transmission projects* regardless of whether Ameren Missouri (or any Missouri utility) participates in MISO.[21] Because there is no relationship between regional cost allocation and Ameren Missouri's MISO participation (and because the transfer as proposed is otherwise beneficial in any event), there is no basis to impose OPC's proposed condition.

With respect to condition (b), even if somehow construction of regional projects in Missouri by an Ameren Missouri affiliate were assumed to have something to do with the transfer of functional control at issue in this case, there has been no showing that any alleged detriment relating to the construction of a regional transmission line in Missouri by an Ameren Missouri affiliate would come anywhere near to turning this beneficial transfer into a transfer that is detrimental to the public interest. That the cost would be greater, or that it would be greater by enough to turn Ameren Missouri's MISO participation to being detrimental is

[19] Ex. 5, p. 9, l. 21 to p. 10, l. 20.
[20] Even pre-FERC Order 1000, it is difficult to conceive of a federal transmission policy that would require that certain transmission facilities be built and then force customers in only some locations to bear the entire cost of those facilities even though customers in other locations also benefit.
[21] This largely moots as an issue in this case the allocation of costs of regionally beneficial projects because a cost-benefit study addressing which RTO Ameren Missouri should participate in or whether to participate in no RTO at all can no longer assume that not participating in a particular RTO will allow one to avoid a fair share of the costs of regionally beneficial transmission projects.

extremely speculative (even if one assumed that MISO participation has anything to do with this issue, which it does not).

In summary, continuing the *transfer of functional control* is not the act or event that leads to the speculative detriment OPC is apparently trying to mitigate with the proposed condition. Ameren Missouri is going to have to pay its fair share of the costs of regionally beneficial transmission projects, whether there has been a transfer or whether there has not been a transfer of functional control of its transmission facilities to MISO. Not only does the "ROFR" in the TOA not give Ameren Missouri the power or right to prevent an affiliate from building Missouri transmission, FERC Order 1000 eliminates any ROFR that could have existed. Moreover, even if it were true that construction of regional transmission in Missouri by an Ameren Missouri affiliate would lead to higher rates, there is no evidence what the increased costs would be or that such costs would wipe out the huge benefit derived from Ameren Missouri's continued MISO participation. At bottom, the drivers behind the proposed condition have nothing to do with the issue in this case: whether the continuation of the transfer of control (that all agree should be continued) itself is detrimental to the public interest.[22]

III. OPC's Second Proposed Condition.

OPC also seeks to impose a condition on Ameren Missouri's continued participation in MISO relating to how Ameren Missouri participates on the numerous committees and stakeholder groups that are created by MISO's corporate governance structure. Specifically,

[22] Finally, given that the obvious purpose of the proposed condition is to give this Commission the ability to in effect dictate what entity (Ameren Missouri or an Ameren Missouri affiliate) is to build a particular regional transmission line, depending on whether this Commission believes it ought to be built, and depending on what the cost allocations related to such a project will be if Ameren Missouri or one of its affiliates builds it, the condition raises serious questions of federal preemption. *See* pages 17 through 21 of the Company's *Statement of Position* filed on November 17, 2011. As discussed there, it is highly questionable whether states can usurp the FERC-approved process for approval of regionally beneficial transmission projects or for the allocation of the costs of those projects by dictating who builds regional transmission that is part of the interstate electric transmission system.

OPC originally asked the Commission to impose a condition on Ameren Missouri that would require it to "cease having Ameren Services represent it at MISO and instead have its own representative actively participating in the MISO Transmission Owners Committee and as needed in other MISO stakeholders groups." OPC no longer seeks the imposition of that particular condition and now apparently advocates for a condition that would require that Ameren Missouri make its "best efforts" to become its own representative at MISO.[23]

OPC's proposed condition (in whatever form it is cast) is unlawful, ill-advised and unreasonable for three reasons. First, as explained in detail above, this Commission does not have the authority to dictate the management decisions of Ameren Missouri. Directing Ameren Missouri to have a particular representative at MISO blatantly violates its right to govern itself in its business dealings.

Second, OPC's proposed condition is impossible to carry out under the terms of MISO's governing documents by which Ameren Missouri must abide. Those documents provide that when there are multiple MISO members owned by a single holding company, those members collectively have only one vote, with very limited exceptions.[24] In other words, Ameren Missouri does not have its own vote to cast apart from the other Ameren companies that are MISO members; consequently, the proposed condition is unenforceable. Even OPC acknowledges that its originally proposed condition would be nearly impossible to put into effect.[25] As the court in *State ex rel. Webb Tri-State Gas Co.*[26] held, the inability to enforce a particular condition is a valid ground for rejecting that condition.

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[23] Tr. p. 65, l. 14-17 (Mr. Mills' response to a question from Chairman Gunn).
[24] Ex. 4 (Haro Surrebuttal) p. 3, l. 13-19.
[25] Ex. 6 (Borkowski Supplemental Surrebuttal) p. 10, l. 14 to p. 11, l. 8 (quoting Kind Deposition (Nov. 8, 2011) p. 90, l. 10-18). Moreover, no one testified that this "best efforts" condition would in fact be effective and indeed the testimony that was elicited on that point strongly suggested that it would not be; that is, that the MISO governance structure would not be successfully changed.
[26] 452 S.W.2d 568, *supra*.

Third, the proposed condition is unnecessary. There is no evidence before this Commission, other than Mr. Kind's rank speculation, that the nature of Ameren Missouri's representation at MISO poses any particular detriment to its continued participation. While Mr. Kind admits that he can cite no specific example of any harm arising from Ameren Services' representation of Ameren Missouri at MISO, the testimony of Ameren Missouri witnesses Jaime Haro and Maureen Borkowski convincingly demonstrates that representation of Ameren Missouri by Ameren Services has benefitted Ameren Missouri. The imposition of a condition based upon some speculative conflict arising from the "divergent interests" of the different Ameren entities is not the substantial and competent evidence necessary to support the imposition of this condition on Ameren Missouri's continued participation in the Midwest ISO.[27]

IV. MJMEUC's Position.

A reading of the testimonies of MJMEUC's witnesses reveals that MJMEUC's real concern arose from the Company's proposal, made in its Amended Application filed on August 23, 2011, to continue its MISO participation indefinitely without a defined date for conducting and filing an additional cost-benefit study or for further Commission examination of whether participation should continue. The Company submits that those issues are completely resolved by the *Stipulation.*

Indeed, MJMEUC's *Second Revised Statement of Position* doesn't even raise those issues, but instead only states that it supports the concept that "any party to this case should be allowed the future opportunity to petition the MoPSC to open a docket to investigate an event that could cause continued participation in MISO by Ameren to be detrimental to the public

[27] Not only could OPC cite no instance where Mr. Kind's theory of "divergent interests" had actually harmed Ameren Missouri or its customers, Ameren Missouri's witnesses presented undisputed testimony that there had never been a vote taken where Ameren Missouri's interests were misaligned with other Ameren companies. Ex. 5, p. 23, l. 9 to p. 26, l. 9; Ex. 4, p. 3, l. 20 to p. 7, l. 21.

interest." This is essentially the same position OPC takes regarding *Stipulation* Section 10(a); that is, that it should be triggered if certain things "may" happen. In MJMEUC's case, the "may" is clearly grounded in MJMEUC's dislike of (any mandatory capacity market in MISO and, in particular, MJMEUC's concern that the MISO RAC, as proposed, *could – at some point –* become something that it is not proposed to be. The Company has already addressed the fact that conditions intended to address what "may" or "could" happen may not be imposed, and it won't repeat that discussion here.

Indeed, MJMEUC's counsel admits that MJMEUC's issues do not provide a basis for concluding that Ameren Missouri's MISO participation is detrimental to the public interest:

> Q. [by Commissioner Jarrett]: But as it stands today, and FERC not having even approved the proposed capacity construct or research [sic] adequacy construct, is there any – would that be basis – would that be basis by itself to make a determination that it's [Ameren Missouri's participation in MISO] detrimental to the public interest?
>
> A. [by Mr. Healy]: I don't believe so, no. [28]

Moreover, MJMEUC's concerns have no place in this docket in any event. As explained earlier, MJMEUC's members are not the "public" with which the Commission is concerned in a Section 393.190.1 case. Rather, it is Ameren Missouri's own retail customers who constitute the relevant public. Incredibly, MJMEUC (although it has members who are MISO members) has apparently not taken its concerns directly to the MISO, nor has it even petitioned the FERC to address its concerns.[29] Instead, MJMEUC is before this Commission making the speculative claim that Ameren Missouri's MISO participation is detrimental to its own interest because the FERC might adopt a capacity market in MISO different than the one MISO has proposed. But rather than appear in the proper forum and tell FERC of its concerns, MJMEUC appears here and takes the position that the more than $100 million of benefits that MISO participation provides

[28] Tr. p. 79, l. 11 – 17.
[29] Tr. p. 189, l. 20-23; p. 190, l. 7-9; p. 192, l. 13-21; p. 213, l. 18-25.

for Ameren Missouri's retail customers be ignored. MJMEUC's own parochial concerns are utterly speculative in nature and provide no basis for the imposition of any conditions beyond those agreed on by the Company, Staff, MIEC and MISO in the *Stipulation.*

CONCLUSION

The proposed continued transfer of functional control of the Company's transmission system provides huge benefits to customers. There is no evidentiary basis, and no legal authority, to adopt additional conditions proposed by OPC (or to somehow address MJMEUC's parochial concerns). Those conditions are an attempt to make the proposed transfer more beneficial (from their perspective) than it already is. Given that the Commission has no authority to insist that a transfer provide any benefit at all (i.e., it must approve the transfer *unless* it is detrimental to the public interest), the Commission certainly has no authority to interfere with the Company's right to control and manage its property by continuing the transfer of functional control of its transmission system to MISO on the terms it (and Staff, MIEC and MISO) have agreed are appropriate. Moreover, the "detriments" OPC and MJMUEC raise are grounded in rank speculation.

For these reasons, the Commission should approve the continued transfer of functional control of the Company's transmission system to MISO, on the terms and conditions provided for in Section 10 of the *Stipulation*.

Respectfully submitted,

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Dated: March 9, 2012.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record to this case, on this 9th day of March, 2012.

/s/James B. Lowery
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