

**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)	

POST-HEARING REPLY 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 Reply Brief.

I. INTRODUCTION

As discussed in its initial brief, EAI filed its Notice of Intent to Change Functional Control of its Missouri Electric Transmission Facilities to MISO ("MISO Notice") initiating the present case, asking the Commission to determine that it lacked jurisdiction over EAI's integration into the Midcontinent Independent System Operator, Inc. ("MISO") regional transmission organization ("RTO") on the narrow fact pattern presented.¹ Alternatively, EAI asked the Commission to determine that the integration into MISO of EAI's approximately 87 miles of Missouri transmission lines² is not detrimental to the public interest in Missouri.³ Staff also recommended this result.⁴

¹ EAI MISO Notice at 5.

² As explained by EAI witness Richard Riley, EAI has 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.)

³ EAI MISO Notice at 6.

As discussed further herein, the briefs submitted by Empire District Electric Company (“Empire”), Missouri Joint Municipal Electric Utilities Commission (“MJMEUC”), and KCP&L and KCPL Greater Missouri Operations (“KCPL”) (collectively, the “Intervenors”) fail to establish any basis for their claims and seek unlawful relief from the Commission.

Intervenors wrongfully imply that they have a right to interstate transmission service from EAI under rates different from those set by the Federal Energy Regulatory Commission (“FERC”). Intervenors further ignore that the integration into MISO of EAI’s *Missouri* transmission facilities, the only property at issue in this proceeding, does not cause the harm Intervenors allege.

Based on such false premises, KCPL and Empire urge the Commission to assert jurisdiction over EAI’s move to MISO and to condition any approval upon an “acceptable” joint operating agreement between MISO and the Southwest Power Pool (“SPP”), an issue the FERC is currently addressing under its exclusive jurisdiction,⁵ as well as requiring EAI to hold KCPL and Empire harmless from projected changes in FERC-approved rates and terms of service.⁶ Yet, Intervenors provide no authority for the Commission to grant either request.

The Intervenors set forth no legal or factual basis justifying their claims that EAI’s move to MISO should be denied or otherwise conditioned.⁷ The evidence shows that EAI’s integration of its Missouri interstate transmission facilities into MISO is not

⁴ Staff Brief at 17. EAI addresses in this Reply Brief certain of Staff’s arguments as to jurisdiction, but otherwise EAI and Staff are aligned that the Commission should determine that EAI’s integration of its Missouri transmission lines into MISO is not detrimental to the public interest in Missouri.

⁵ KCPL Brief at 22; Empire Brief at 16.

⁶ *Id.*

⁷ EAI generally takes issue with the entirety of the positions set forth by KCPL and Empire, even if a particular point is not specifically addressed herein.

detrimental to the public interest, and that there is no basis to impose any conditions on any determination rendered herein by the Commission.

II. JURISDICTION

A. Section 386.030 RSMo

It is a fundamental principle that, as a creature of statute, administrative agencies have only those powers that are conferred by the statutes, and those reasonably necessary to perform their duties.⁸ Missouri courts have long held that neither convenience nor expediency authorizes Commission action where the statutes do not confer the power to act.⁹ On these principles, the Commission has no jurisdiction to make any determination regarding EAI's entry into MISO based on the narrow facts of EAI's case.

Although EAI agrees with certain points set forth by Staff in its brief, Staff's conclusion that this Commission derives jurisdiction from the mere ownership of electric plant is problematic. Staff incorrectly reasons that "this Commission has jurisdiction over the act of owning and operating an electric plant in Missouri and thus over the transfer of that plant, including the transfer of functional control of that plant."¹⁰ That conclusion is a material fallacy, a *non sequitur*; it is often an assertion of a conclusion that has no connection with the premises.¹¹ In this instance, if Staff's conclusion were correct, merely owning and operating an electric plant would be sufficient to confer

⁸ *State ex rel. MoGas Pipeline, LLC v. Public Service Commission*, 366 S.W.3d 493, 496 (Mo. banc 2012); *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

⁹ *State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544, 547 (Mo. App. W.D. 2008); *UCCM* at 49.

¹⁰ Staff Brief at 9.

¹¹ *Logic for Lawyers*, pg. 11-28; Aldisert, Clark, Boardman and Callaghan, 1992.

jurisdiction on this Commission. Yet, that does not track considering that the Commission does not regulate municipal utilities, cooperatives, and facilities (such as interstate pipelines) used exclusively in interstate commerce. If the Staff were correct that merely owning and operating an electric plant was sufficient to confer jurisdiction over the transfer of that plant, then municipal electric systems and electric cooperatives would need this Commission's authorization to transfer property, which is also not accurate. Merely owning interstate transmission facilities in Missouri is not sufficient to confer Commission jurisdiction over EAI as Staff otherwise suggests.

The Commission has no jurisdiction to condition or limit the FERC's lawful orders pertaining to EAI's integration of its interstate transmission facilities into MISO. The Missouri General Assembly has recognized that limitation in its adoption of Section 386.030, RSMo, which states:

"Neither this chapter, nor any 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."

Where the federal government has acted, that statute does not authorize the Commission to act. Thus, pursuant to Section 386.030, RSMo, the Commission is not authorized to make any determination regarding EAI's integration into MISO.

B. Federal preemption of Intervenor's positions

With respect to EAI's integration into MISO, the Intervenor's take several positions that are preempted by federal law. The arguments fall into three categories: (i) requests that the Commission hold them harmless from FERC-jurisdictional rate impacts associated with MISO integration; (ii) arguments that the Commission condition or withhold approval to join MISO until SPP and MISO negotiate an "acceptable" Joint Operating Agreement ("JOA"); and (iii) requests that the Commission deny approval to join MISO because RTO participation is not in the public interest. Each argument is preempted and is addressed in turn.

1. Requests for Hold Harmless Relief

Empire argues that when EAI joins MISO, the FERC-approved transmission rate for Empire's deliveries from the Plum Point generating plant will increase.¹² Empire contends that the Commission has authority to "mitigate" this increase because "[t]he Commission has the authority to condition any approval it may grant in such way as it believes necessary to address any detriment to the public interest that would otherwise exist."¹³ Although Empire acknowledges that the transmission rate is subject to FERC jurisdiction, it argues that it is not "ask[ing] the Commission to change a FERC rate," but rather simply "to impose conditions that will mitigate" the effects of that rate.¹⁴ KCPL also complains that its FERC-jurisdictional transmission rates will "drastically"

¹² Empire Brief at 5-6.

¹³ *Id.* at 7.

¹⁴ *Id.*

increase,¹⁵ but is more coy regarding the Commission's jurisdiction. KCPL does not contend that the Commission has jurisdiction to "mitigate" that increase, perhaps because KCPL has contended in a different forum – a judicial one – that the Commission is preempted from denying the pass through of these very transmission costs.¹⁶ Rather, KCPL argues that the Commission does not have enough "information" regarding these rate impacts to approve EAI's joining MISO.¹⁷

These positions are preempted by federal law.¹⁸ The FERC has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."¹⁹ Under the filed rate doctrine, "the right to a reasonable rate is the right to the rate which the [FERC] files or fixes, and . . ., 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."²⁰

The Commission therefore cannot, as Empire contends, require EAI to charge a different rate to transmission customers as "mitigation" or, as KCPL suggests, deny

¹⁵ KCPL Brief at 9.

¹⁶ *State ex rel. KCP&L Greater Mo. Operations Co. v. Public Service Commission*, __S.W.3d __; 2013WL 1964835 (Mo. App. W.D. 2013)

¹⁷ *Id.* at 13 ("While it is true that determination of the transmission rates is under FERC jurisdiction, information regarding the retail rate impacts associated with the integration of EAI's transmission assets into MISO is necessary so the Commission and the parties can evaluate the potential impact of those cost increases on Missouri retail customers that result from EAI's voluntary choice").

¹⁸ The Commission has previously recognized the limits of its authority to impose only reasonable conditions that alleviate specific detriments of a transaction, not conditions that lack any rational connection to the transaction. (See, e.g., *In re Union Elec. Co.*, File No. EO-2011-0128, Report and Order, p. 20 (2012)). This acknowledgment is consistent with constitutional limitations on agency actions. The United States Constitution precludes the Commission from conditioning its approval of EAI's move to MISO on matters that are beyond the Commission's jurisdiction or unrelated to EAI's Missouri operations. Imposed conditions must be a legitimate exercise of authority within the jurisdiction of the governmental body. (See, *Nollan v. California Coastal Commission*, 107 SCt 3141, 3148 (1987)). This doctrine is routinely applied in Missouri permit approval cases. (See, e.g., *Curry Investment Co v. Board of Zoning Adjustment of Kansas City*, 399 SW3d 106 (Mo App 2013) (conditions of approval must be both lawful and reasonable).) Intervenors acknowledge these limits on the Commission's authority to impose conditions of approval (KCPL Brief at 6; Empire Brief at 7), but nonetheless ignore them.

¹⁹ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

²⁰ *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951).

approval to join MISO unless EAI agrees to charge a different rate than the FERC-jurisdictional transmission rate. The U.S. Supreme Court has rejected similar attempts to make an end-run around the filed rate doctrine in numerous cases. For example, even where a state court has jurisdiction to determine that a FERC-jurisdictional contract has been breached, the Court has held a state court has no jurisdiction to award damages for that breach because “there can be no divided authority over interstate commerce.”²¹ The Court also has rejected attempts by state commissions to set retail rates that “pretend” the local utility is “paying less” than the FERC-approved rate requires it to pay.²² All of these decisions follow the same rule: “The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts” and “[t]he only appropriate forum for such a challenge is before the Commission [FERC] or a court reviewing the Commission’s [FERC’s] order.”²³

With respect to matters in separate File No. EO-2013-0396, Empire also suggests that its “mitigation” proposal is supported by the fact that Entergy Operating Companies and ITC have offered to mitigate certain transmission rate impacts in other state proceedings relating to the separate ITC Transaction.²⁴ This contention lacks any merit in this case, which concerns only the integration of EAI’s Missouri transmission lines into MISO. Unlike ITC, which has authority to propose changes to its own zonal transmission rates under FPA section 205, EAI has no authority to propose unilateral changes to modify MISO’s through and out rate (which is a rate based on the facilities of

²¹ *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981).

²² *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986); *see also Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354 (1988) (“MP&L”).

²³ *MP&L*, 487 U.S. at 375.

²⁴ Empire Brief at 7-8.

all MISO transmission owners and the revenues are credited to all transmission owners, not just EAI). A state commission cannot compel modification to a FERC-jurisdictional rate.²⁵

The arguments of Empire and KCPL are, therefore, impermissible collateral attacks on FERC's jurisdiction. FERC has considered the same arguments and has rejected them.²⁶ Empire and KCPL have sought rehearing from FERC,²⁷ which is the appropriate recourse.²⁸ They cannot, however, seek to evade FERC's jurisdiction by seeking the same relief from this Commission.

2. Requests to Compel Negotiation of an "Acceptable" JOA

Empire and KCPL also request that the Commission impose revisions to a FERC-jurisdictional contract (the Joint Operating Agreement) that manages congestion and loop flows between MISO and SPP.²⁹ Empire complains that the integration into MISO of the Entergy Operating Companies (which, with the exception of EAI, are not

²⁵ *Mass. Dep't Pub. Utils. v. FERC*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (rejecting state commission attempt to compel a section 205, holding that "Massachusetts' interpretation [of the FPA] threatens confusion, possibly chaos [because] [w]hat is to prevent each state in a multistate service area from requiring the utility to file a *different* set of 'reasonable' rate practices with FERC?").

²⁶ *ITC Holdings Corp.*, 143 FERC ¶ 61,257 (2013).

²⁷ KCPL/GMO Request for Rehearing, FERC Docket No. ER13-948-000 (filed July 22, 2013).

²⁸ *Montana-Dakota Utilities Co.*, 341 U.S. at 251-252 ("the right to a reasonable rate is the right to the rate which the [FERC] files or fixes, and . . ., 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.").

²⁹ Two years ago in *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 FERC ¶ 61,010 at 39 n.79, 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 JOA). (*Id.* at 64, 67.) 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." (*Am. Elec. Power Serv. Corp.*, 93 FERC ¶ 61,151 at 61,474 (2000).) 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 integration into MISO. (*Entergy Services, Inc.*, 143 FERC ¶ 61,257 at 131-135 (2013)). The FERC again rejected the arguments. (*Id.* at 150-151.)

parties to this proceeding and do not operate in Missouri) will create loop flows and, as a remedy, requests that the Commission “require that these [loop flow] issues be acceptably addressed by MISO and SPP” and “suspend or conditionally approve EAI’s transfer of functional control, subject to the negotiation of an acceptable Joint Operating Agreement between MISO and SPP that includes at a minimum, resolution of the unaccounted for loop flow issues and adequate compensation to SPP members, including Empire, KCPL and GMO.”³⁰ KCPL raises the same issue, arguing that the Commission must “review” the issue “because the safety and reliability of transmission facilities in Missouri are under its jurisdiction”; however, KCPL concedes that the matter of the JOA will be decided by FERC and therefore argues only that the Commission should issue “an Order that is conditional upon the final resolution of these issues *at FERC*.”³¹

These positions also are preempted by federal law. The Commission has no jurisdiction over the JOA; it is a rate schedule subject to FERC’s exclusive jurisdiction. In fact, the very loop flow claims made by KCPL and Empire in this proceeding, and related requests for “hold harmless” relief, have already been argued to, and rejected by, FERC.³² FERC has exclusive jurisdiction to oversee any renegotiation of the JOA and has exercised that jurisdiction, ordering MISO to report on the status of those negotiations later this year.³³ The suggestion by Empire and KCPL that any state commission in the SPP and MISO footprints can exercise authority over those negotiations is obviously wrong. “There can be no divided authority over interstate

³⁰ Empire Brief at 16.

³¹ KCPL Brief at 15 (emphasis added).

³² *Entergy Services, Inc.*, 143 FERC ¶ 61,257 at PP 131-135 (2013).

³³ *Id.*

commerce.”³⁴ With respect to multi-state arrangements, such as the JOA, “[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*.”³⁵

3. Requests To Deny EAI’s Voluntary Decision to Join MISO

MJMEUC and KCPL suggest that the Commission can prohibit EAI from joining MISO because joining an RTO may not benefit Missouri customers.³⁶ This contention is without merit.

Several public utilities operating in Missouri are members of an RTO, and there is, therefore, no merit to the suggestion that RTOs do not benefit customers. In this case, EAI witness Richard Riley has explained that the Entergy Operating Companies decided to join MISO in part because it is expected to produce the greatest benefits—including nearly \$1.4 billion in projected cost savings—to their customers across a multi-state region. The opposing parties do not contest this point, but rather urge the Commission to adopt the protectionist view that Missouri could and should thwart the achievement of these benefits simply because the FERC-approved transmission rates for KCPL will increase – costs which KCPL itself admits it cannot pass through to its

³⁴ *Ark. La. Gas Co.*, 453 U.S. at 580.

³⁵ *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898, 905 (4th Cir. 1986). The Federal Power Act closed the “*Attleboro* gap,” which was created when the Supreme Court ruled that states could not regulate wholesale electricity sales, by providing FERC with exclusive jurisdiction over wholesale electricity sales in interstate commerce. The FPA did more than close that gap, however. As the Supreme Court held in *New York v. FERC*, 535 U.S. 1, 6 (2002), “[w]hen it enacted the FPA in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated,” such as federal regulation of (1) wholesale interstate sales of electricity that had previously been subject to state regulation, and (2) interstate transmission of electricity that had not been at issue in *Attleboro*.

³⁶ MJMEUC Brief at 5; KCPL Brief at 11.

retail customers in Missouri at this time such that there can be no alleged detriment to the public in Missouri even under KCPL's inaccurate reflection of the standard.³⁷ These arguments are "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states."³⁸ They also conflict with the Federal Power Act by infringing upon EAI's voluntary decision with respect to interstate coordination. EAI's right to engage in voluntary coordination is protected by FPA section 202³⁹ and the law does not vest any state commission with authority to override that voluntary decision.⁴⁰

FERC also has authority under the Public Utility Regulatory Policies Act of 1978 ("PURPA") section 205(a) to preempt any such refusal to allow EAI to join MISO. Section 205(a) provides that the FERC "shall," upon application of any person, "exempt" an electric utility from "any State rule or regulation" that "prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if [FERC] determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area."⁴¹ FERC has already exercised this authority to preempt state laws that were preventing a subset of the facilities in a multi-state system from joining the PJM RTO.⁴²

³⁷ KCPL Brief at 9.

³⁸ *New England Power Co.*, 455 U.S. at 339-40. See also *Cent. Power & Light Co.*, 8 FERC ¶ 61,065 at 61,038 (1979) (holding that, under the Commerce Clause, Texas could not lawfully forbid the interconnection of utility affiliates on opposite sides of the ERCOT boundary because that would constitute "an embargo on interstate commerce").

³⁹ *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979).

⁴⁰ Congress' decision to make coordination a voluntary matter does not create a regulatory gap that allows states to prohibit that coordination. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409 at 422-23 (1986) (explaining that Congress's "decision to remove jurisdiction from FERC [over first sales of natural gas] cannot be interpreted as an invitation to the States to impose additional regulations").

⁴¹ 16 U.S.C. § 824a-1(a).

⁴² See *New PJM Cos.*, 106 FERC ¶ 63,029 (2004) (Cowan, ALJ), *aff'd* Opinion No. 472, 107 FERC ¶ 61,271 (2004).

III. NO PUBLIC DUTY

A critical point left unrebutted by Intervenor is that even if the Commission declines to dismiss EAI's MISO Notice for lack of jurisdiction, the integration of EAI's Missouri transmission lines into MISO does not require a determination by the Commission because the transmission facilities at issue are not "necessary or useful in the performance of [EAI's] duties to the public" within the meaning of Section 393.190.1, RSMo. As discussed in EAI's initial brief (at pages 16-21), 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.⁴³ These facts have not been rebutted.

Intervenor does not dispute that 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 that provide 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 contemplated by the Missouri General Assembly in 1913 and the Missouri Supreme Court in 1934⁴⁴ are of little relevance to the immediate issues in this case.

A reading of Chapters 386 and 393 *in pari materia* clearly shows that those statutes were 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

⁴³ Direct Testimony of Richard C. Riley of EAI in EO-2013-0431, page 7, line 15-19, page 9, lines 4, 9-13.

⁴⁴ *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).

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 has no “duties to the public” in Missouri, within the meaning of Section 393.190.1, RSMo. 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.⁴⁵

EAI’s integration into MISO does not require any determination or approval by the Commission, regardless of whether the Commission asserts that it 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. Further, the integration of EAI’s transmission facilities into MISO does not constitute the type of sale or encumbrance contemplated by Section 393.190.1, also a critical point not rebutted by the Intervenors.

IV. NO DETRIMENT TO THE PUBLIC INTEREST AND SATISFACTION OF THE CRITERIA OF §393.190

Assuming *arguendo* that the Commission asserts jurisdiction over EAI’s move to MISO and determines that Section 393.190.1 requires Commission approval, the

⁴⁵ This argument applies to either an RTO integration as is at issue here or to an actual sale (change of ownership) of transmission facilities by a transmission-only company. 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 contemplated by the express statutory language.

Commission should find that the move is not detrimental to the public interest. Intervenor has set forth no basis for determining otherwise.

In order to conjure detriment to EAI's move to MISO, KCPL estimates potential losses in off-system sales, while denigrating the benefits estimated by EAI's witness Mr. Riley. However, KCPL's estimates⁴⁶ incorrectly assume the continued availability of transmission service on the same terms now in effect and further fail to establish any causal relationship to EAI's limited Missouri transmission facilities, which are the only property at issue in this case. KCPL's assumption of constant transmission rates is unfounded in reality because the FERC has already approved cancellation of the current rates and imposition of new rates beginning in December 2013. KCPL further assumes, incorrectly, that absent the integration of the Entergy Operating Companies' transmission facilities into MISO, KCPL's off-system sales would remain at current levels, an assumption without evidentiary support.

EAI witness Mr. Riley detailed the benefits of EAI's joining MISO in his direct testimony,⁴⁷ his surrebuttal testimony,⁴⁸ and at hearing.⁴⁹ He 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, 2013.⁵⁰ As EAI's retail regulator, the Arkansas Public Service Commission ("APSC") has determined that EAI's joining the MISO RTO

⁴⁶ It must be noted that KCPL included in its brief the unsworn testimony from its witness Mr. Carlson "quantifying" alleged impacts on KCPL at \$5.5 million per year. KCPL Brief at 12. This unsworn testimony is submitted untimely and not subject to cross examination by other parties. Thus, the Commission may not consider such an ex-record presentation in any form and should strike same in its entirety. *Stanley v. City of Independence*, 999 S.W.2d 485, 488 (Mo. banc 1999)

⁴⁷ Exhibit 3 at 21-22.

⁴⁸ Exhibit 4 at 23-24 and Exhibit B.

⁴⁹ Tr. 72:4 -75:2.

⁵⁰ Riley Direct Testimony in File No. EO-2013-0431, Ex. 3 at 9-10.

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.⁵¹

In April 2011, 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.⁵² Those benefits include nearly \$1.4 billion in estimated production cost savings (\$263 million to EAI's retail customers)⁵³ and a proven track record of operating Day 2 Markets throughout a large geographic region.⁵⁴ 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 the Operating Companies' respective transmission assets into MISO.⁵⁵ Because EAI is 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.⁵⁶

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.⁵⁷ These benefits would result from: (1) more efficient commitment and

⁵¹ Ex. 3 at 10, ll. 4-9.

⁵² Ex. 3 at 11, ll. 13-16.

⁵³ These benefits are calculated as Net Present Value over 10 years. T-87, ll. 9-22.

⁵⁴ Ex. 3 at 11, l. 16 through 12, l. 3.

⁵⁵ EAI MISO Notice at 2. Ex. 3 at 12, ll. 3-5.

⁵⁶ *Id.*, ll. 14-18.

⁵⁷ Riley Surrebuttal Testimony in File No. EO-2013-0431, Ex. 4 at 24, l. 14 through 27, l. 4, and Exhibit B to Exhibit 4, entitled, *Entergy Integration Benefits All Members* at T-72, T-73, T-74, and T-75.

dispatch; (2) lower reserve margin requirements; (3) lower ancillary service requirements; and (4) lower administrative fees.⁵⁸ Mr. Riley testified that folding in the 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.”⁵⁹ Ameren Missouri customers, more than half of all Missouri electric customers,⁶⁰ could experience \$9 million of these annual benefits.⁶¹

The benefits quantified by EAI more than demonstrate that EAI's MISO Notice is not detrimental to the public interest in Missouri. Intervenors have failed to rebut these benefits and instead argue, without any lawful basis, that they are somehow entitled to never-changing transmission rates and that an increase in FERC-approved just and reasonable tariffed rates should be considered as a detriment *per se*. Further, the Intervenors failed to demonstrate any way in which these alleged “detriments” bear any causal relationship to the integration of EAI's *Missouri* facilities into MISO. Very simply, Intervenors have failed to demonstrate any basis for finding that integration of EAI's transmission facilities in Missouri with MISO is detrimental to the public interest in Missouri and certainly have shown no detriment over and beyond the benefits to Missouri clearly set forth by EAI.

The standard of review for Commission approval of matters properly subject to Section 393.190.1 RSMo – assuming for argument's sake only that this case were such

⁵⁸ Ex. 4 at 25-26.

⁵⁹ T-72, I at 11 through T-73, I. 10.

⁶⁰ 2012 Annual Report of the Missouri Public Service Commission at 30.

⁶¹ T-74, II. 14-24.

a matter- is that the transfer is “not detrimental to the public interest.”⁶² The Missouri Supreme Court has made it clear that, in applying Section 393.190.1, it is not the Public Service Commission’s “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*.”⁶³

In *AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003), the Missouri Supreme Court reversed an order of the Commission approving a transfer of assets under Section 393.190.1. While affirming the standard of review, “not detrimental to the public,” the Court held that the Commission had not employed an adequate analytical use of the standard. The Court held that the Commission was required to use a cost-benefit analysis in which all of the benefits and detriments in evidence are considered.

In applying the Missouri Supreme Court’s ruling in *AG Processing*, in MoPSC File No. EO-2004-0108 (AmerenUE Transfer of Assets to CIPSCO, *Report and Order on Rehearing*, February 10, 2005), the Commission stated:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. **A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable.** The presence of detriments, thus defined, is not conclusive to the Commission’s ultimate decision because detriments can be offset by attendant benefits. **The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a**

⁶² *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).

⁶³ *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, at 400.

benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service. (Emphases added.)

No evidence has been presented in this case even suggesting that EAI's integration into MISO would tend to make the power supply less safe or less adequate. Other than arguing about issues which are in the exclusive jurisdiction of the FERC, such as loop flows and seams issues, Intervenor's opposition to the instant application is simply that it could result in incrementally higher interstate transmission rates. However, as the Commission said in the Ameren-CIPSCO case quoted above, "the mere fact that a proposed transaction...will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value"⁶⁴

As acknowledged by KCPL, the netting of benefits and detriments is "not purely mathematical, but rather may require a more subjective weighing of factors."⁶⁵ In this case, positive benefits of a transfer of functional control of EAI transmission assets to MISO are both quantitative and qualitative. They include:

- Nearly \$1.4 billion in estimated production cost savings (\$263 million to EAI's retail customers);⁶⁶
- More efficient commitment and dispatch;
- Bigger footprint for the market;
- Lower regulation costs;
- Lower reserve margin requirements;
- Lower ancillary service requirements;
- More diverse fuel mix increasing cost savings;
- Lower administrative fees;
- Benefit of \$9 million per year to the State of Missouri because Ameren's customers will realize savings from the increased economies of scale created by the Entergy operating companies joining MISO;

⁶⁴ *Id.*

⁶⁵ KCP&L Initial Brief at 5, citing the *Union Electric-CIPSCO* case, EO-2004-0108, cited above.

⁶⁶ These benefits are calculated as Net Present Value over 10 years. T-87, ll. 9-22.

- MISO's proven track record of operating Day 2 Markets throughout a large geographic region;
- Provision of the structure for EAI to operate outside of the Entergy System Agreement when its participation terminates on December 18, 2013;
- Experience and expertise of MISO for scheduling service and performing any security functions, such as transmission outage scheduling; and
- Enhanced reliability and adequacy of service as a result of these benefits of joining MISO.

EAI need not show net benefits to the public in order for the Commission to approve the proposed integration of EAI transmission facilities into MISO. However, the enumerated benefits of that integration clearly demonstrate that the integration into MISO is not “detrimental to the public interest” and should be approved by the Commission.

The Commission Staff, the neutral party to this proceeding, agrees. In its initial brief, Staff stated the following as to Case No. EO-2013-0431: “Staff recommends that the Commission grant the requested authority.”⁶⁷ Staff went on to state, at page 17:

Staff advises the Commission to approve the applications. Although there will be rate increase impacts, these will be minimal when spread over the thousands of affected Missouri customers. The Intervenors have adduced no persuasive evidence of any likely reliability or safety detriments. In any event, increased costs must be weighed against the value of any benefits conferred. [citing *Intercon Gas, Inc. v. PSC*, 848 S.W.2d 593, 597-98 (Mo. App., W.D. 1993).] Staff is convinced that tangible and valuable qualitative improvements in the transmission service will be conferred Reliability will be improved. It is Staff's opinion that the projected benefits of the Transaction and the transfer of control outweigh the likely costs.

The competent and substantial evidence upon the whole record of this case proves that the proposed transfer of functional control of EAI's transmission assets to MISO will not be detrimental to the public interest. Therefore, EAI's MISO Notice in File No. EO-2013-0431 should be granted.

⁶⁷ Staff Brief at 17.

V. CONCLUSION

For the reasons set forth above, the Commission should find and conclude that it has no jurisdiction to consider EAI's MISO Notice, or that the facilities at issue are not "necessary or useful" within the meaning of Section 393.190.1, or, in the alternative, should approve without conditions the integration of EAI's transmission facilities in Missouri into MISO as not detrimental to the public interest in Missouri.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: /s/ Thomas R.Schwarz, Jr.

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 2nd day of August, 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
staffcounsellservice@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