BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

APPLICATION FOR REHEARING OF ENTERGY ARKANSAS, INC.

COMES NOW Entergy Arkansas, Inc. ("EAI"), pursuant to section 386.510, RSMo (Cum. Supp. 2011) and 4 CSR 240-2.160(1), and submits this application for rehearing of the October 9, 2013 Report and Order (the "Order") of the Missouri Public Service Commission ("Commission"). In support of its Application, EAI states as follows:

I. INTRODUCTION

EAI does not provide electric service to retail customers in Missouri, does not have Missouri-regulated tariffs that offer electric service to the general public in Missouri, and does not hold itself out to the public as providing utility service to Missouri retail customers within the jurisdiction of the Commission. EAI provides only interstate wholesale electric transmission service in Missouri, an activity that is beyond the Commission's jurisdiction under Missouri law and, in any event, as a matter of federal law, is within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").

These jurisdictional facts are not disputed. To the extent that the Commission's Findings of Fact and Conclusions of Law do not reflect these facts and the extensive FERC actions on the controlling issues in this case, they are inadequate to support the Report and Order. But, notwithstanding these facts, the Commission, in the Order, asserts jurisdiction over the integration of EAI's Missouri transmission facilities to the Midcontinent Independent System Operator, Inc. ("MISO") regional transmission organization ("RTO") and, as conditions of approval, (i) in effect orders discounts to the MISO wholesale transmission tariff for "non-MISO" retail customers of other utilities (*i.e.* the retail customers of utilities *other* than Ameren Missouri, and other utilities with retail customers in Missouri that are members of MISO) in Missouri, (ii) orders two RTOs, non-parties to this file, to enter into a revised seams agreement governing wholesale service that affects nearly 20 states, and (iii) orders EAI to submit annual reports concerning the economic viability of its participation in MISO.

EAI respectfully requests rehearing of the Order on the specific grounds set forth below, supported by lawful findings of fact and conclusions of law.

1. The Commission has no jurisdiction under RSMo § 393.190.1 to review or approve the integration of EAI's Missouri assets into MISO or to impose any conditions on such integration.

2. The Commission did not and cannot find any net detriment from EAI's integration of its Missouri assets into MISO and therefore under RSMo § 393.190.1 the Commission cannot impose any conditions upon such integration.

3. The Commission is preempted from imposing a hold harmless condition on EAI's integration of its Missouri assets into MISO.

4. The Commission is preempted from requiring the amendments to the Joint Operating Agreement ("JOA") between MISO and the Southwest Power

Pool, Inc. ("SPP") as a condition to EAI's integration of its Missouri assets into MISO.

5. The conditions imposed by the Commission on the integration of EAI's Missouri assets into MISO violate the Commerce Clause of the U.S. Constitution.

For these reasons, which are described in detail below, Rehearing should be granted, and the Commission should hold either that it has no jurisdiction over the integration of EAI's Missouri transmission facilities into MISO or that the unique facts of this case do not warrant application of any Commission jurisdiction under 393.190.1. Alternatively, if the Commission does assert jurisdiction, the Commission should hold that the integration should be approved without any of the three conditions that have been imposed or any other conditions.

II. BACKGROUND

In 1991, EAI's predecessor (Arkansas Power & Light Company or "APL") transferred its Missouri retail Certificate of Convenience and Necessity ("CCN") to Union Electric Company, cancelled its retail tariffs, and ceased providing utility service to the public in Missouri.[1] In approving this transfer, the Commission held that "Arkansas Power & Light Company [is] authorized . . . *to terminate its retail service to the public* in Missouri as an electrical corporation and public utility subject to the jurisdiction of the Commission and that . . . *the Commission's jurisdiction over Arkansas Power & Light [is] terminated hereby.*"[2]

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1 *Re Ark. Power & Light, Union Elec. Co. and Sho-Me Power Corp.,* MoPSC Case Nos. EM-91-29 and EM-91-404, 1 MoPSC 3d 96 (1991).

2 *Supplemental Report and Order and Order Amending Report and Order,* 1 MoPSC 3d 116, 118 (1991) (emphasis added).

Since 1991, EAI has conducted no public utility business in Missouri other than to own and operate approximately 87 miles of transmission lines (and four associated substations) used solely to transmit electric energy in interstate commerce subject to the exclusive jurisdiction of FERC. Although EAI sought under separate state law authority a Certificate of Convenience and Necessity (CCN) from the Commission in 2012 out of an abundance of caution in order to construct a new transmission substation,[3] the Commission has no jurisdiction over the wholesale transmission service provided by EAI over the facilities it owns in Missouri.[4]

Over the last several years, FERC has conducted a number of proceedings to consider whether EAI and the other Entergy Operating Companies[5] should participate in MISO and, if so, the appropriate terms and conditions for such participation. FERC generally has approved the jurisdictional rates, terms, and agreements associated with the Entergy Operating Companies' participation in MISO, which includes the participation of numerous smaller utility systems located in the Entergy Operating Companies' footprint—collectively consisting of over 30,000 MW of generation capacity[6] and over 15,000 miles of transmission facilities.[7] In addition to FERC's approval, the Entergy Operating Companies have obtained approvals from all five retail jurisdictions where the Companies provide retail utility service to the public.[8] And, as this Commission found in the Order, there are significant benefits to the retail customers of

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3 Tr. 111.

4 EAI's CCN application, which was submitted pursuant to 393.170, questioned the Commission's jurisdiction. The Commission declined to issue a finding of jurisdiction in that proceeding and instead simply issued the CCN without addressing its jurisdiction to do so.

5 The Entergy Operating Companies include EAI; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

6 Tr. 72.

7 Tr. 65.

8 Order at 5.

the Entergy Operating Companies—approximately $1.4 billion in total projected production cost savings over a ten-year period.[9]

On March 21, 2013, EAI filed its Notice of Intent to Change Functional Control of its approximately 87 miles of Missouri electric transmission facilities (and associated substations) to MISO ("MISO Notice"). Because EAI provides no retail utility service in Missouri, and because EAI's integration into MISO is not within the type of asset transfers contemplated under RSMo § 393.190.1, EAI asked the Commission to determine that it lacked jurisdiction or that the statute had no application to the unique facts of EAI's case. Alternatively, EAI asked the Commission to determine that the integration of its Missouri transmission assets into MISO is not detrimental to the public interest in Missouri.[10] Although Staff ultimately disagreed with EAI's jurisdictional argument, Staff nevertheless recommended that the Commission find that the integration of EAI's Missouri transmission facilities into MISO is not detrimental to the public interest and should be approved without conditions.[11]

After conducting a hearing, the Commission issued the Order on October 9, 2013. Therein, the Commission asserted jurisdiction under Missouri state law over EAI's integration of its Missouri facilities into MISO and imposed conditions over such integration. Specifically, the Commission conditioned its approval on: (1) a requirement that EAI "hold harmless non-MISO Missouri retail customers[12] from all increased costs

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9 *Id.*

10 As explained by EAI witness Richard Riley, EAI has approximately 87.34 miles of transmission lines in Missouri and 4 substations out of the 15,413 miles of transmission and more than 1,400 substations collectively owned by the Entergy Operating Companies. Tr. 64:17-18 to Tr. 65:3.

11 Staff Brief at 17.

12 The Commission explained that this condition applies to the retail customers of Kansas City Power & Light Company ("KCPL"), KCPL Greater Missouri Operations Company ("GMO"), and Empire District Electric Company ("Empire"). Order at 12. As discussed in more detail below, however, the *(cont'd)*

due to Entergy's potential transfer of functional control of its transmission assets to [MISO]," (2) the "negotiation and approval of a revised [JOA] between [SPP] and [MISO], addressing, at a minimum, the loop flow issues and other altered flows related to the Missouri seam" between SPP and MISO, and (3) the filing of annual reports "concerning [EAI's] participation in [MISO]."[13]

III. ARGUMENT

A. The Commission Does Not Have Jurisdiction Under Missouri Law to Review or Impose Conditions on EAI's Transfer of Functional Control of Its Missouri Transmission Facilities into MISO

The Commission erred in asserting jurisdiction under Missouri law over EAI's integration of its Missouri facilities into MISO and then imposing three conditions on such integration. There are three independent reasons why this is so:

1. EAI is not a "Missouri regulated utility" subject to the Commission's jurisdiction

The Commission erred in finding that EAI is a "Missouri regulated utility,"[14] which is not a statutory term and has no application here in any event. The Commission's ruling appears to be based on the fact that EAI has a CCN pursuant to RSMo § 393.170.1 to construct new transmission facilities. However, at most, RSMo § 393.170.1 requires the Commission's approval to construct "electric plant,"[15] which is

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Commission failed to consider that GMO does not pass the transmission charges at issue through to its customers, and thus there is no impact on GMO's retail customers.

13 Order at 13.

14 Order at 11.

15 As noted above, EAI filed its CCN application out of an abundance of caution and included an argument as to why no CCN approval was required, an argument that the Commission never addressed in issuing the CCN.

defined as facilities "in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity."[16]

This certificate does not confer public utility status on EAI, however.[17] EAI neither offers nor provides any service to the general public in Missouri, but rather only provides wholesale transmission service. The fact that EAI has "electric plant" is irrelevant to whether it is a public utility subject to the Commission's jurisdiction; it is only service to the general public that confers such jurisdiction.[18]

2. EAI provides no service to the general public in Missouri and therefore RSMo § 393.190.1 does not apply to the transfer of functional control over EAI's Missouri facilities into MISO

The Commission's finding that "[a] Missouri regulated utility must obtain permission from the Commission to transfer functional control *of any part of its electric plant* to MISO"[19] is simply incorrect as a matter of Missouri law. RSMo § 393.190.1 does not apply to the transfer of "any part of [a utility's] electric plant." Instead, the statute unambiguously on its face requires the Commission's approval *only* for the transfer by an electric corporation of "the whole or any part of its *franchise, works or system, necessary or useful in the performance of its duties to the public*" (emphasis added).

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16 RSMo § 386.020(14).

17 Indeed, EAI notes that it is not included on the list of regulated public utilities on the Commission's own web site. *See* http://psc.mo.gov/Electric/. Nor is EAI included on the Commission's list of regulated and unregulated utilities providing service in Missouri. *See* http://psc.mo.gov/General/Find_A_Utility.

18 *See State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm'n*, 205 S.W. 36, 40 (Mo. 1918) ("The electric plant must, in short, be devoted to a public use before it is subject to public regulation."); *State ex rel. Cirese v. Pub. Serv. Comm'n*, 178 S.W.2d 788, 790 (Mo. Ct. App. 1944) (citing *Danciger* for the proposition that a "corporation [that] had not, in any sense, engaged in business as a public utility . . . was, therefore, not subject to regulation by the Commission.").

19 Order at 17 (emphasis added).

This provision does not confer the Commission with jurisdiction here because EAI's Missouri facilities are not used to serve the general public in Missouri. This is a direct consequence of the fact that EAI maintains no retail tariff in this state. Without a retail tariff, an electric utility is not allowed to serve the general public in Missouri.

Instead, EAI's limited facilities located in Missouri are dedicated entirely to the provision of interstate wholesale transmission service pursuant to FERC-approved tariffs. Consequently, the transfer of functional control over these limited transmission facilities to MISO does not involve any property necessary or useful in the performance of EAI's duties to the public in Missouri. RSMo § 393.190.1, by its plain terms, therefore does not apply. There is no evidence on the record of this file to support any finding to the contrary.

This conclusion is further reinforced by the last sentence of RSMo § 393.190.1, which further emphasizes that the approval requirement applies only to property used to serve the public and only with respect to a specific type of transaction:

> *Nothing in this subsection contained shall be construed to prevent* the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection *of property which is not necessary or useful in the performance of its duties to the public.*

(emphasis added). EAI's Missouri transmission facilities are not necessary or useful in the performance of any duties that EAI has to the public in Missouri—because EAI has no such duties—and this sentence makes clear that the Commission has no authority to require its approval for any disposition of those facilities, much less the transfer of their functional control to MISO.

The lack of any provision of service by EAI to the public in Missouri also distinguishes this file from the other files in which the Commission has exercised

jurisdiction over the integration of facilities into the MISO and SPP RTOs, including the *Union Electric* decision cited by the Commission for the proposition that Commission approval is required to transfer functional control to an RTO.[20] In each previous case where the Commission's approval was sought, the utility applicant provided bundled retail service to the public in Missouri, and in each case the transmission facilities involved were necessary or useful to the utility's performance of its duties to the public that are regulated by the Commission. The Commission failed to acknowledge this distinction or to provide any reasoned basis for why section 393.190.1 applies when EAI does not provide retail service in Missouri.

3. EAI has not proposed to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber" its Missouri facilities, and therefore RSMo § 393.190.1 does not apply

Even if EAI were presumed to offer service to the general public in Missouri (which it does not), RSMo § 393.190.1 does not apply because EAI has not proposed to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber" its facilities. It is undisputed on the record of this file that EAI will continue to own and to operate its Missouri facilities after the integration and that MISO will have no interest in the facilities. The Commission itself recognized that "the direct, physical control of transmission facilities is retained by the transmission owners, such as EAI."[21]

The decision of the U.S. Court of Appeals for the D.C. Circuit in *Atlantic City*[22] is instructive by analogy. There, the D.C. Circuit reversed FERC's assertion of jurisdiction

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[20] *See In re Union Elec. Co.*, File No. EO-2011-0128, Report and Order (Apr. 19, 2012) (cited at page 12 n.45 of the Order).

[21] Order at 11.

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

over the transfer of functional control of transmission facilities to an RTO under Section 203 of the Federal Power Act ("FPA"). FPA Section 203 contains language almost identical to RSMo § 393.190.1 and gives FERC authority over a utility's proposal to "sell, lease, or otherwise dispose of" facilities subject to FERC's jurisdiction. The Court found that FERC's approval under FPA Section 203 is not required for the transfer of functional control to an RTO:

> FERC contends that the word ""dispose"" in section 203 can be construed broadly to include the transfer of supervisory operational responsibility over facilities to the ISO. We find such an interpretation to be inconsistent with a logical reading of the statute and an unexplained departure from past FERC practice.
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> First, the terms ""sell"" and ""lease"" in section 203 clearly contemplate a transfer of ownership or proprietary interests. *Id.* The expression ""otherwise dispose"" requires a similar interpretation under the principle *noscitur a sociis*. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (""words grouped in a list should be given a related meaning""); *Neal v. Clark*, 95 U.S. 704, 708-09 (1877) (""the coupling of words together shows that they are to be understood in the same sense""). Thus, the term ""dispose"" in section 203 can only reasonably be read to refer to changes or transfers in proprietary interests or something akin thereto.[23]

Similarly, here, the phrase "or otherwise dispose" in RSMo § 393.190.1 cannot logically be read to encompass a transfer of functional control, as EAI proposes with respect to MISO, but "can only reasonably be read to refer to changes or transfers in proprietary interests or something akin thereto."[24] The Commission therefore has no jurisdiction under RSMo § 393.190.1 because a transfer of functional control to MISO is not covered by the statute.[25]

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[23] *Atlantic City*, 295 F.3d at 11-12 (parallel citations omitted).

[24] *Id.* at 12.

[25] EAI recognizes that the Commission has asserted jurisdiction over the transfer of functional control by other Missouri utilities to MISO and SPP where those applications were voluntarily submitted by the utilities for consideration by the Commission and where the utilities did not challenge the *(cont'd)*

B. The Commission Did Not and Cannot Make the Finding of Net Detriment Required by Missouri Law

Even if the Commission had jurisdiction under Missouri law, the Commission erred in imposing three conditions on EAI's integration of its Missouri transmission facilities into MISO without making the findings required under Missouri law. The standard applicable to the Commission's review of a merger or transfer of assets under RSMo § 393.190 is whether the transfer is "not detrimental to the public interest."[26] As the Commission correctly noted, this standard requires the Commission to "engage in a cost-benefit analysis in which all of the benefits and detriments in evidence are considered."[27]

Here, of course, there are neither any detriments nor any benefits to EAI's Missouri retail customers because EAI *has no Missouri retail customers.* The infeasibility of applying a cost-benefit analysis to EAI's integration of its Missouri transmission assets into MISO when EAI has no retail customers highlights why the Commission does not have jurisdiction over the integration under Missouri law in the first place.

In any event, the Commission never made the finding statutorily required to impose conditions, *i.e.*, that, without conditions, the transaction would result in a net

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Commission's jurisdiction. However, in those cases the utilities did not challenge the Commission's jurisdiction and the question of the statute's applicability to participation in an RTO thus never arose. EAI submits that, for the reasons explained in this section, the Commission's application of RSMo § 393.190.1 to participation in an RTO is erroneous as a matter of law.

[26] *See State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Mo.*, 335 Mo. 448, 460, 73 S.W.2d 393, 400 (Mo. 1934) (en banc); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

[27] Order at 12 (citing *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732 (Mo. 2003) (en banc)).

detriment to the public interest, a longstanding requirement established by the Missouri courts.[28] Nor, for the reasons explained below, could such a finding be made. Consequently, the Commission should grant rehearing and approve the proposed integration without any conditions.

1. The Commission did not conduct the required cost-benefit analysis but instead applied an incorrect standard

In *AG Processing*,[29] the Missouri Supreme Court reversed an order of the Commission approving a transfer of assets under RSMo § 393.190.1. While affirming the standard of review, "not detrimental to the public,"[30] the court held that the Commission had not employed an adequate analysis under that 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.

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.[31]

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[28] *See City of St. Louis*, 335 Mo. at 460, 73 S.W.2d at 400; *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

[29] *AG Processing,* 120 S.W.3d 732.

[30] *City of St. Louis*, 335 Mo. at 460, 73 S.W.2d at 400 (citation omitted); *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

[31] *AG Processing,* 120 S.W.3d at 736 (footnotes omitted).

This standard was applied by the Commission in its decision reviewing Ameren's proposed transfer of certain facilities owned by Union Electric to a different Ameren subsidiary.[32] In that decision, the Commission said:

> The presence of detriments . . . 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 benefit of equal or greater value* or remedy a deficiency that threatens the safety or adequacy of the service.[33]

Applying this standard, the Commission went on to compare all of the proposed benefits and detriments that had been demonstrated on the record. Even though the Commission concluded that there were detriments totaling $5.928 million to $7.828 million, the Commission found that these detriments were outweighed by a greater amount of benefits.[34] Based on this analysis, the Commission held that there was no *net* detriment.

Here, the Commission acknowledged that it was obligated to conduct a cost-benefit analysis, stating that "[t]he Commission must engage in a cost-benefit analysis in which all of the benefits and detriments in evidence are considered."[35] However, instead of conducting the required cost-benefit analysis, the Commission instead went on to assert that "[i]f it is to adequately protect the public interest, the Commission must be able to impose conditions designed to alleviate specific detriments that otherwise

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[32] *In re Union Elec. Co.*, MoPSC File No. EO-2004-0108, Report and Order on Rehearing (Feb. 10, 2005).
[33] *Id.* at 49 (emphasis added).
[34] *Id.* at 67.
[35] Order at 12.

would result from the transfer, *even if the transfer overall would not be detrimental to the public*."[36]

This reasoning, if accepted, would allow the Commission, as it has done here, to ignore the benefits that a transaction might bring and focus solely on detriments, no matter how small, that might also result. Such an approach would render meaningless the "no net detriment" standard that has long been required under Missouri law, and would replace it with an absolute "no detriment" requirement. It also would eliminate the requirement that the Commission conduct a cost-benefit analysis. The fact is, however, that the standard for the Commission's review is whether a transaction results in *net detriments*, not whether there are detriments of any kind.

2. In any event, the Commission cannot find that the integration of EAI's Missouri (as opposed to non-Missouri) assets into MISO would result in detriments to the public

Furthermore, the "detriments" that the Commission identified in the Order do not result from the integration of EAI's Missouri assets into MISO. Consequently, the Commission's finding of detriments that require mitigation was erroneous under the applicable cost-benefit standard. Indeed, even if the Commission were correct that it need not find that the detriments of a transaction outweigh its benefits in order to impose conditions, the Commission still could not reasonably rely on the claimed detriments identified in the Order to justify the imposition of conditions.

In its Findings of Fact, the Order identifies three different types of harm that the Commission asserts will result from EAI's integration of its Missouri assets into MISO:

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[36] Order at 12 (emphasis added) (quoting *In re Union Elec. Co.*, MoPSC File No. EO-2011-0128, Report and Order at 20 (Apr. 19, 2012)).

(1) increased transmission rates paid by GMO[37] and Empire as a consequence of being required to pay the MISO through-and-out transmission rate instead of the Entergy Operating Companies' transmission rate;[38] (2) a reduction in the prices received by KCPL for off-system power sales to compensate for the same increase in transmission rates resulting from the switch from the Entergy Operating Companies' transmission rate to the MISO through-and-out rate;[39] and (3) increased loop flows resulting from the integration of the Entergy Operating Companies into MISO.[40]

None of these alleged harms, however, results from the integration of EAI's Missouri transmission facilities into MISO. Instead, the allegations are all based on claims of what will occur when the Entergy Operating Companies' *non-Missouri facilities* are integrated into MISO, and do not identify any harms resulting from the integration of EAI's *Missouri* transmission facilities. And the integration of the non-Missouri facilities will occur on December 19, 2013 regardless of whether or not the Missouri facilities are integrated into MISO. This is made clear by EAI's recent filing at FERC of an Open-Access Transmission Tariff ("OATT") applicable to EAI's Missouri facilities (the "Missouri OATT"). EAI filed the Missouri OATT "to ensure that all the Entergy Operating

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37 Furthermore, EAI notes that the Commission identified as a detriment GMO's assertion that it will be required to pay $6,095,917 more for certain transmission service under the MISO through-and-out tariff than it currently pays EAI for similar service. Order at 7. However, as KCPL' s testimony makes clear, GMO does not recover from its retail customers *any* of the costs that it identified. Carlson Direct Testimony, Exh. 18, at 6-7. Because the transmission costs are not passed on to retail customers, any increase in those costs cannot be considered a detriment to the public interest.

38 Order at 7-8.

39 *Id.* at 8.

40 *Id.* at 9.

Companies can integrate into MISO on December 19, 2013 as planned (with the sole exception being the Missouri Transmission Facilities)."[41]

Because the claims of detriment identified in the Order are related to the December 19, 2013 integration of the Entergy Operating Companies' non-Missouri assets into MISO, which will occur whether or not EAI's Missouri transmission facilities also are integrated, those detriments cannot be attributed to the integration of EAI's Missouri transmission facilities into MISO. The Commission therefore should grant rehearing even if it continues to assert jurisdiction over the integration. And, because there are no detriments attributable to the integration of EAI's Missouri transmission facilities, the Commission should withdraw the three conditions that it imposed and approve the integration without any conditions.

C. Federal Law Preempts Any Condition Purporting to Direct EAI to Hold the Retail Customers of KCPL and Empire Harmless from a FERC-Approved Rate

Rehearing also is appropriate because the Commission is preempted by federal law from ordering EAI to hold the retail customers of KCPL, GMO, and Empire harmless from the effects of the FERC-approved MISO through-and-out transmission rate.

Section 201 of the FPA[42] gives FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[43] FERC's exclusive jurisdiction over "the transmission of electric energy in interstate commerce"

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41 *Entergy Ark., Inc.*, Application for Approval of Missouri OATT, at 1-2, FERC Docket No. ER14-89-000 (Oct. 15, 2013) (footnote omitted).

42 16 U.S.C. § 824(b).

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

under FPA section 201 also includes the authority "to regulate the unbundled transmissions of electricity retailers."[44] In addition, FERC's jurisdiction is not limited to rates *per se*, but includes the allocation of electric capacity or transmission costs.[45]

FERC's exclusive jurisdiction over rates for interstate transmission and wholesale power sales, as well as agreements affecting those rates, fully occupies the field of regulation and preempts state regulatory authority that invades such areas or conflicts with federal objectives. The Supreme Court has definitively ruled on the preemptive sweep of the FPA. Because the FPA drew a "bright line" between federal and state authority, it left no room for states to regulate in areas committed to FERC's authority.[46] Thus, "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable."[47]

FERC's preemption of the field is confirmed by analogous Supreme Court precedents concerning state regulation of interstate natural gas pipelines, a closely related context where FERC likewise has exclusive jurisdiction.[48] EAI, like a natural gas pipeline, provides only wholesale service in Missouri and therefore FERC's jurisdiction preempts the entirety of the Commission's regulation with respect to EAI's Missouri

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44 *New York v. FERC*, 535 U.S. 1, 23-24 (2002); *id.* at 21 (explaining that "unbundled interstate transmissions of electric energy have never been 'subject to regulation by the States'").

45 *See, e.g., Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (explaining that FERC's authority is "not limited to 'rates' *per se*"); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009).

46 *Miss. Power & Light Co.*, 487 U.S. at 374.

47 *Id.*

48 *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981) ("the relevant provisions of the two statutes [Natural Gas Act and Federal Power Act] 'are in all material respects substantially identical'" and "we therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes") (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

facilities. In *Schneidewind v. ANR Pipeline Co.*,[49] the Supreme Court considered Michigan's attempt to regulate the securities issuances of a natural gas pipeline. Even though "FERC is not expressly authorized to regulate the issuance of securities by natural gas companies," the Court held that that "the pre-issuance review of securities in which Michigan engages amounts to a regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy."[50]

Relevant here, Michigan's assertion of jurisdiction was struck down because the concerns underlying its regulation of securities were indirect attempts to regulate wholesale rates:

> Petitioners argue that, without Act 144, a company could take on so much debt through securities issuances that it would lack the resources to maintain its Michigan facilities properly. This could threaten the supply of gas to Michigan consumers, petitioners argue, lead to a rate increase, or hurt investors in the company. . . .
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> Each of these uses of Act 144, however, is an attempt to regulate matters within FERC"s exclusive jurisdiction. By keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a ""reasonable rate."" This is regulation of rates. The other aim of Act 144, seeking to ensure that a company is financed in a way that will allow proper maintenance of its facilities and continuance of its services, for the benefit of both ratepayers and investors, also falls within FERC"s exclusive purview since those facilities are a critical part of the transportation of natural gas and sale for resale in interstate commerce. In short, the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority.[51]

The holding applies with even greater force here because the Order represents a direct attempt to second-guess FERC's decisions concerning its exclusive jurisdiction over

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[49] 485 U.S. 293 (1988).
[50] *Id.* at 304.
[51] *Id.* at 307-308.

wholesale tariffs—*i.e.*, the MISO through-and-out rate (as to which the Order imposes a hold harmless condition) and the JOA (as to which the Order requires a renegotiation between MISO and SPP, subject to the Commission's approval).

The Order not only invades this fully occupied field, but also conflicts with FERC's jurisdiction by requiring a hold harmless payment that effectively modifies the FERC-approved transmission rates. Specifically, by requiring that EAI hold certain Missouri retail customers harmless from any cost increases resulting from EAI's integration of interstate transmission assets into MISO, the Commission's order effectively would lower the rate that is charged for providing transmission service that is subject to FERC's exclusive jurisdiction.[52] "Interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions."[53] This conflict is particularly apparent where, as here, it involves multistate regional agreements:

> Only 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*. No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination. ... Only FERC has the objectivity and comprehensive overview that transcends these local concerns.[54]

Missouri therefore cannot order wholesale rate discounts to the benefit of Missouri retail customers and thereby attempt to shift costs to other states—any more than any other

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[52] *Massachusetts Department of Public Utilities v. FERC*, 729 F.2d 886 (1st Cir. 1984), is instructive. There, the Massachusetts Department of Public Utilities ("DPU") had required a local electric utility make a FERC filing to change an interstate practice that the DPU did not support. FERC rejected the filing, concluding that the FPA does not permit a state regulator to mandate that a utility submit a rate filing. FERC's decision was upheld by the U.S. Court of Appeals for the First Circuit in a decision by Judge (now Justice) Breyer, which concluded that allowing "regulator-compelled" rate filings would undermine the regulatory scheme created by Congress in sections 205 and 206 of the FPA.

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

[54] *Appalachian Power Co.*, 812 F.2d at 905 (citation omitted).

state in SPP or MISO could lawfully purport to shift transmission costs to Missouri customers by action under state law.

Nor could Missouri prohibit EAI from recovering the costs of providing transmission service as determined by FERC, which is the result that would arise if EAI were to hold KCPL, GMO, and Empire retail customers harmless as required by the applicable condition of the Order.[55] EAI is entitled to receive its share of the revenues recovered by MISO under the applicable MISO transmission rate, but this condition effectively would prohibit EAI from thereby recovering the portion of its costs equal to the amount of the hold harmless payment.

In addition to these direct and irreconcilable conflicts, the hold harmless condition imposed by the Order applies to a wholesale rate that does not even involve an EAI tariff, but rather relates to service being provided pursuant to a MISO tariff. EAI has no practical ability to offer or even to request FERC approval of the rate discounts required by the condition imposed by the Commission, even if EAI chose voluntarily to offer rate discounts. The rate that is the subject of the Commission's condition is a *MISO* rate, not an *EAI* rate.

Nor could the Commission avoid preemption by attempting to force EAI to offer hold harmless relief in some sort of side deal in Missouri. The very animating purpose of the filed rate doctrine has been, for nearly 100 years, the prevention of discriminatory side deals. "In order to render rates definite and certain, and *to prevent discrimination* and other abuses, [Congress] required the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates; that is, those which

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[55] *See, e.g., Miss. Power & Light Co.*, 487 U.S. 354; *Nantahala Power & Light Co.*, 476 U.S. at 966.

must be charged to all shippers alike."[56] "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff" and those "rights . . . *cannot be varied or enlarged by either contract or tort of the carrier.* . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated."[57] The Order violates this longstanding rule by requiring special rate discounts—either directly or through a hold harmless payment made outside of the FERC rate—for Missouri-based utilities that have neither been filed with nor approved by FERC—and, in fact, are the very same special discounts FERC has already rejected.

Indeed, FERC not only rejected the same discounts ordered here, but specifically considered and declined to accept the rationale adopted by the Commission here for the hold harmless condition. In FERC Docket No. ER13-948-000, FERC considered the tariff sheets filed by MISO and the Operating Companies, including specifically EAI, to set the rates associated with the Entergy Operating Companies' integration into MISO. SPP and the SPP Transmission Owners interposed multiple objections to this proposal—one of which was a request by KCPL to be held harmless from any rate increases associated with the MISO through-and-out rate.[58]

FERC, which had rejected similar requests in the past,[59] did not accept KCPL's plea for special treatment.[60] KCPL subsequently sought rehearing, which remains

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56 *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932) (emphasis added).

57 *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922) (emphasis added) (citations omitted).

58 Comments of KCPL Greater Missouri Operations Company at 3, FERC Docket Nos. EC12-145-000, et al. (Jan. 22, 2013) ("GMO therefore urges the Commission to require, as part of any approval, that Entergy and MISO agree to hold GMO harmless for any increased Crossroads transmission service costs and any quantifiable transmission flow/congestion costs to be caused by such Entergy/MISO integration").

59 *PJM Interconnection, LLC*, 106 FERC ¶ 61,252 at P 16 (2004).

pending at FERC.[61] Now, in an attempt to circumvent FERC's decision, KCPL has simply reasserted the very same claim in this file. Regrettably, the Commission adopted KCPL's request and, in so doing, created a facial conflict with FERC's orders. That action is plainly preempted.[62]

The Order goes on to make a factual finding that the hold harmless relief it has required is akin to the rate mitigation plan in "a similar case pending in Arkansas."[63] However, the rate mitigation plan cited by the Order is not related to EAI's plan to integrate into MISO; rather, it involves the separate merger transaction between the Entergy Corporation and ITC Holdings Corp.. ("ITC"). EAI did not offer and otherwise was not ordered by the APSC to hold harmless any entities with respect to any FERC-approved MISO rates in the APSC's MISO integration docket.

The Entergy Corporation-ITC merger transaction has nothing to do with EAI's separate decision to integrate into MISO. It has no connection to this file, the evidence was not introduced in this file, and the Commission itself held that "although this case is set for hearing simultaneously with file No. EO-2013-0396, these cases are *not* consolidated."[64] Consequently, the Commission's citation to the rate mitigation evidence presented by ITC in that file is misplaced and does not support imposition of a hold

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(cont'd from previous page)

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

61 Request for Rehearing and Clarification of KCPL and Empire District Electric at 3, FERC Docket Nos. EC12-145, et al. (July 22, 2013) (arguing that FERC ignored its request and asking FERC to "find that the application of the MISO RTOR to transmission service transactions through or out of Entergy is unjust and unreasonable, and on that basis should grant the relief requested by the SPP TOs and GMO" and that the FERC "further should find that existing transmission service agreements should be grandfathered at existing rates").

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

63 Order at 8.

64 *Order Directing Filing* at 1, File No. EO-2013-0431 (May 10, 2013).

harmless condition applicable to EAI's integration of its Missouri transmission assets into MISO.

D. The Commission Is Preempted from Requiring MISO and SPP to Negotiate an "Acceptable" Joint Operating Agreement

The Order's second condition requires the negotiation and approval of a revised JOA between SPP and MISO, entities that are not parties to this file and over which EAI has no control. This condition is preempted for the same reasons as the first condition and EAI specifically incorporates the foregoing arguments herein. Just like the first condition, the second condition purports to exercise jurisdiction over an interstate transmission agreement that falls within FERC's exclusive jurisdiction. Just like the MISO through-and-out transmission rate, the JOA is a rate schedule subject to FERC's exclusive jurisdiction. And, just like KCPL's recycled claims for hold harmless relief regarding the through-and-out rate, FERC has already considered and rejected the very arguments from KCPL, Empire, and the other SPP Transmission Owners concerning the alleged deficiencies in the MISO-SPP JOA.

Responding to these very arguments, FERC held that "we find that existing arrangements are in place that address power flows between MISO and certain neighboring regions"[65] and explained the comprehensive scope of those FERC-filed agreements:

> [T]o address issues such as [loop flows], RTOs have developed joint operating agreements, with mechanisms to coordinate parallel flows, such as the coordination in the Congestion Management Process, which is used in a number of seams agreements between the RTOs and their neighbors. The Congestion Management Process forms the basis for

[65] *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 128.

> coordination of parallel flows between MISO and SPP under the MISO-SPP JOA, and is included in the seams service that MISO offers under Module F of its Tariff to all of its neighboring utilities, including TVA and Associated Electric Cooperative, on a non-discriminatory basis. The Congestion Management Process, further enhanced by market-to-market coordination, is also included in the MISO-PJM JOA. The Congestion Management Process requires, among other things, the identification of impacted flowgates, and the allocation of the capacity of those flowgates based on historic use to serve native load, and requires each entity to respect those allocations in the dispatch of their systems, or, where market-to-market coordination is in place, compensate the other party for redispatch costs of market flows in excess of the allocation.[66]

FERC also rejected requests by SPP and the SPP Transmission Owners that FERC impose certain one-sided, unilateral changes to the MISO-SPP JOA, finding instead that the two RTOs should meet and discuss any changes in good faith and report to FERC on their progress.[67] SPP and the SPP Transmission Owners have sought rehearing[68] and requests for rehearing remain pending before FERC.

Although the JOA is subject to FERC's exclusive jurisdiction, EAI believes that MISO would be willing to make an informational presentation to the Commission regarding the status of its negotiations with SPP on the loop flow issue. However, the Commission is barred from countermanding or otherwise interfering with the negotiations ordered by FERC or requiring that any resulting FERC-jurisdictional amendment to the JOA be submitted to the Commission for its "approval." FERC has exclusive jurisdiction over the JOA, which is a multistate agreement that affects nearly 20 states. "Only FERC, as a central regulatory body, can make the comprehensive

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66 *Id.* at PP 148-49.

67 *Id.* at PP 131-135. MISO's most recent report was filed at FERC on October 31, 2013.

68 Request for Clarification and Motion for Settlement Judge Proceedings or, in the Alternative, Request for Rehearing of the SPP Transmission Owners, FERC Docket Nos. EC12-145, et al. (July 22, 2013).

public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro*."[69]

E. The Order Violates the Commerce Clause

The Order also violates the Commerce Clause of the U.S. Constitution because it attempts to exercise jurisdiction over interstate agreements in an effort to benefit local, in-state consumers to the detriment of consumers in other states. The Commerce Clause vests Congress with the power to "regulate Commerce ... among the several States."[70] "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[71] This "'negative' aspect" of the Commerce Clause,[72] is often referred to as the "dormant Commerce Clause."[73]

State laws conflict with the Commerce Clause if they unjustifiably discriminate on their face against out-of-state entities,[74] or "th[ey] impose burdens on interstate trade

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69 *Appalachian Power Co.*, 812 F.2d at 905. The "*Attleboro* gap" was created when the Supreme Court ruled in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that states could not regulate wholesale electricity sales in interstate commerce. The Federal Power Act closed this gap by providing FERC with exclusive jurisdiction over wholesale electricity sales in interstate commerce. Congress did more than simply close that gap, however. As the Supreme Court held in *New York v. FERC*, 535 U.S. at 6, "[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*.

70 U.S. CONST. Art. I, § 8, cl. 3.

71 *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

72 *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

73 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337-38 (2007).

74 *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

that are 'clearly excessive in relation to the putative local benefits.'"[75] With respect to the regulation of electricity in particular, the U.S. Supreme Court has long held that the Commerce Clause bars any state regulation of interstate wholesale agreements.[76] It has therefore long been clear that "interstate transmissions of electric energy have never been 'subject to regulation by the States.'"[77]

The federal courts have therefore not hesitated to strike down state attempts to assert jurisdiction over interstate wholesale agreements or transactions. For example, in *New England Power Co. v. New Hampshire*, the Supreme Court invalidated New Hampshire's attempt to prohibit hydroelectric exports as "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states," explaining that "the Commerce Clause—independently of the [FPA]—restricts the ability of the states to regulate matters affecting interstate trade in hydroelectric energy."[78]

Particularly pertinent here is the Eighth Circuit's decision in *Middle South Energy, Inc. v. Arkansas Public Service Commission*.[79] In that case, the Arkansas Public Service Commission ("APSC") had argued before FERC for a particular cost allocation methodology in a multistate power agreement entered into by EAI's predecessor AP&L.[80] FERC rejected the APSC's position, but the APSC then sought to effectively impose the same result in pending state proceedings. The Eighth Circuit issued a preliminary injunction that struck down those state proceedings, holding that this protectionist collateral attack on FERC's jurisdiction was *per se* unlawful under the

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75 *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (*quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (parallel citations omitted).
76 *Attleboro*, 273 U.S. 83.
77 *New York*, 535 U.S. at 21 (quoting 16 U.S.C. § 824(a)).
78 455 U.S. at 339-43.
79 772 F.2d 404, 412 (8th Cir. 1985).
80 *Id.* at 413.

Commerce Clause.[81] In words equally applicable to this Commission's effort to tilt MISO's through-and-out rate and its JOA to the advantage of Missouri customers to the detriment of consumers in other states, the Court held: "Given free rein, the APSC would shift this burden [of the power allocation agreement] to the citizens of Mississippi and Louisiana, citizens who are powerless to directly influence Arkansas' internal affairs."[82]

Indeed, the Order would run afoul of the dormant commerce clause even if it did not represent an attempt to favor Missouri retail customers at the expense of other states. The Federal Power Act was enacted in 1935 in response to the U.S. Supreme Court's holding in *Attleboro* that the states were prevented by the dormant commerce clause from regulating electric transactions in interstate commerce.[83] Yet, as explained in detail in Sections III.C and III.D above, the conditions imposed by the Commission in its Order do precisely that. The Order places conditions on EAI's integration of its Missouri transmission facilities, which operate in interstate commerce, that affect rates charged for the transmission of electricity in interstate commerce by MISO, an interstate RTO that, with the Entergy Operating Companies, is made up of participants in 15 different states. The Order also attempts to dictate the provisions contained in an agreement that addresses coordination issues between two multistate RTOs—in particular the provisions of that agreement addressing loop flows of electricity in interstate commerce.

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81 *Id.* at 416-417.
82 *Id.*
83 *New York*, 535 U.S. at 6.

IV. CONCLUSION

For the reasons described above, EAI respectfully requests that the Commission grant rehearing and hold that it has no jurisdiction to review or approve the integration of EAI's Missouri facilities into MISO or that, to the extent that it believes it has jurisdiction, the unique facts of this case do not warrant application of the statute to this transaction. Alternatively, should the Commission continue to assert jurisdiction, EAI requests that the Commission grant rehearing and approve the integration without any of the three conditions that were specified in its Order or any other conditions.

Respectfully submitted,

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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 7th day of November, 2013.

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