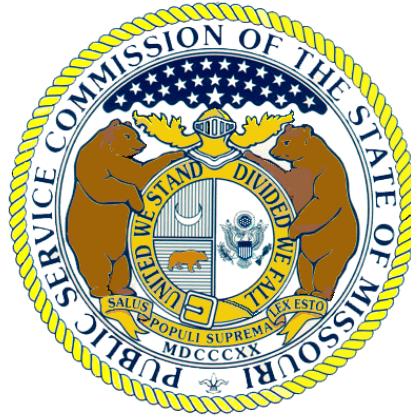


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the Application of Union Electric )  
Company for Authority to Continue the Transfer )  
of Functional Control of Its Transmission System )  
to the Midwest Independent Transmission System )  
Operator, Inc. )

**File No. EO-2011-0128**

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**REPORT AND ORDER**

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**Issue Date: April 19, 2012**

**Effective Date: April 30, 2012**

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In re: Union Electric Company's 2011 )  
Utility Resource Filing Pursuant to ) File No. EO-2011-0271  
4 CSR 240 – Chapter 22. )

## REPORT AND ORDER

### APPEARANCES

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For the Midwest Independent Transmission System Operator, Inc.

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For Southwest Power Pool, Inc.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**

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The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

**FINDINGS OF FACT**

**PROCEDURAL HISTORY**

On November 2, 2010, Union Electric Company, d/b/a Ameren Missouri, filed an application seeking authority to continue the transfer of functional control of its electric transmission system to the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Ameren Missouri filed an amended application on August 10, 2011. Ameren Missouri’s existing authority is set to expire on April 30, 2012.

The Commission gave notice of Ameren Missouri’s application and invited interested parties to intervene. The Commission allowed the following parties to intervene: Midwest ISO; The Empire District Electric Company; the Missouri Industrial Energy Consumers (MIEC); Southwest Power Pool, Inc.; and the Missouri Joint Municipal Electrical Utility Commission (MJMEUC).

The Commission established a procedural schedule that required the parties to prefile testimony and scheduled a hearing. The hearing was originally scheduled for

November 21 and 22, 2011, but on November 17, 2011, Ameren Missouri, Midwest ISO, MIEC, and the Commission's Staff filed a non-unanimous stipulation and agreement that purported to resolve all disputed issues between the signatory parties. At Public Counsel's request, the Commission postponed the hearing to allow the parties time to adjust their positions in response to the stipulation and agreement.

Ultimately, the Office of the Public Counsel and MJMEUC opposed the non-unanimous stipulation and agreement and the evidentiary hearing was held on February 9 and 10, 2012. Thereafter, the parties filed briefs on March 9 and March 23, 2012.

### **Pending Motion**

Before addressing the merits of Ameren Missouri's application, the Commission will address an evidentiary motion filed by Ameren Missouri on March 9, 2012. At the hearing, during its cross-examination of Ajay Arora, Ameren Missouri's witness, Public Counsel offered into evidence a portion of the transcript of the deposition of its witness, Ryan Kind.<sup>1</sup> Ameren Missouri objected that the portion of the deposition was hearsay and opposed its admission into evidence.<sup>2</sup> The presiding officer overruled Ameren Missouri's objection and admitted the offered portion of the deposition transcript as Exhibit 18.<sup>3</sup>

On March 9, 2012, Ameren Missouri filed a written pleading in which it renewed its objection to the admission of Exhibit 18 and asked the Commission to reverse the presiding officer's ruling and to strike Exhibit 18 as inadmissible hearsay. No party, including Public Counsel, has filed a response to Ameren Missouri's renewed objection and motion to strike.

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<sup>1</sup> Ameren Missouri took Kind's deposition on November 8, 2011.

<sup>2</sup> Transcript, Page 108.

<sup>3</sup> Transcript, Page 110.

Missouri law regarding the use of depositions at trial is clear, “when one party reads a portion of a deposition the opposition may read some or all of the remainder in explanation.”<sup>4</sup> In that circumstance, the opposing party is “entitled to utilize the deposition to clarify the situation, rebut the inferences to be drawn from the plaintiff’s exhibits, or explain its side of the controversy.”<sup>5</sup>

In this case, Mr. Arora, in his prefiled supplemental surrebuttal testimony,<sup>6</sup> quoted from Mr. Kind’s deposition to argue that Kind had agreed that his concerns about the impact of Midwest ISO’s capacity market on Ameren Missouri’s retail customers are only long-term concerns, not short-term concerns that would affect Ameren Missouri during the relatively short time it would be authorized to remain in the Midwest ISO under Ameren Missouri’s proposal. Public Counsel offered additional portions of Kind’s deposition to place the quotes extracted by Arora into context to rebut Arora’s contention that Kind agreed that his concerns are only long-term concerns.

Public Counsel used the deposition of its witness in precisely the manner allowed under the law. The presiding officer appropriately allowed the exhibit into evidence. The Commission will deny Ameren Missouri’s motion to strike that exhibit.<sup>7</sup>

### **The Proposed Transfer of Control**

Ameren Missouri proposes to continue the transfer of functional control of its transmission system to the Midwest ISO. The Commission has previously authorized such

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<sup>4</sup> *Nugent v. Owens-Corning Fiberglas, Inc.*, 925 S.W.2d 925, 929 (Mo. App. 1996), quoting *Burrous v. American Airlines, Inc.*, 639 S.W.2d 263 (Mo. App. 1982).

<sup>5</sup> *Nugent v. Owens-Corning Fiberglas, Inc.*, at 929. See also, *Saddleridge Estates, Inc. v. Ruiz*, 323 S.W.3d 427 (Mo. App. 2010).

<sup>6</sup> Exhibit 3, Page 7-8, Lines 10-22, 1.

<sup>7</sup> The dispute about the admission of Exhibit 18 is largely academic. No party cited to that exhibit in its briefs and the Commission has not relied on that exhibit in reaching its decision.

a transfer of control until April 30, 2012. Ameren Missouri prepared a study in July 2011, which indicated a net present value benefit to customers from Ameren Missouri's continued participation in the Midwest ISO of approximately \$105 million from 2012 to 2014.<sup>8</sup> No party has challenged that calculation of net benefits.

### **The Uncontested Provisions of the Stipulation and Agreement**

The signatories to the nonunanimous stipulation and agreement, including Ameren Missouri, were able to agree that the Commission should impose numerous conditions on its approval of Ameren Missouri's continued participation in the Midwest ISO. Because the nonunanimous stipulation and agreement was opposed, the Commission cannot approve that document as a whole. However, according to the Commission's rule,<sup>9</sup> the nonunanimous stipulation and agreement continues to represent the joint position of the signatory parties unless they choose to renounce that position.

In this case, no party has opposed any of the conditions set forth in the nonunanimous stipulation and agreement. The parties that do object to the stipulation and agreement merely argue that some of the conditions should be modified and that an additional condition should be imposed. The unchallenged conditions are consistent with the testimony and evidence presented at the hearing and the Commission will include those conditions in this order.

### **The Contested Provisions of the Stipulation and Agreement**

The Commission will address in more detail the challenged conditions set forth in the nonunanimous stipulation and agreement.

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<sup>8</sup> Arora Direct, Ex. 1, Page 8, Lines 10-18.

<sup>9</sup> 4 CSR 240-2.115(2)(D).

## **Material Change**

The first challenged condition is paragraph 10.a of the stipulation and agreement. That paragraph indicates a stakeholder may request that the Commission establish an investigative case before November 15, 2015, “to investigate whether a material event occurring after this docket is of such a magnitude that it presents a substantial risk that continued participation in the Midwest ISO on the terms and conditions contained herein has become detrimental to the public interest.” The paragraph also recognizes that the Commission can initiate such an investigation on its own motion.

Public Counsel and MJMEUC are concerned that the proposed language would restrict the ability of stakeholders to bring concerns to the Commission until they could show that actual harm has already occurred. They suggest that the language in the paragraph should be changed to clarify that a stakeholder can request an investigation if it believes that a change has occurred that is likely to harm the public interest in the future, even if that harm has not yet happened.

In particular, Public Counsel and MJMEUC are concerned about how the FERC may deal with the Midwest ISO’s proposed Resource Adequacy Requirements Tariff. The FERC is currently considering that proposed tariff and there is concern that the FERC will push the Midwest ISO to make changes in that tariff that will make the tariff and the forward capacity market harmful to Ameren Missouri’s ratepayers.<sup>10</sup> If such changes are made to the tariff, Public Counsel and MJMEUC want to be able to bring those changes to the Commission’s attention without waiting for actual harm to occur.

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<sup>10</sup> Wilson Rebuttal, Ex. 17, Page 28, Lines 6-9.



The dispute about the language of section 10.a of the stipulation and agreement has become essentially moot because of the opposition to that stipulation and agreement. While the signatories to the stipulation and agreement could agree among themselves about when it would be appropriate to bring a particular concern to the Commission's attention, the enforceability of that agreement vanished when the stipulation and agreement was opposed. Far from restricting the ability of interested persons and entities to bring their concerns to the Commission's attention, the Commission wants to encourage such actions. After hearing such concerns, the Commission will decide for itself what issues it believes should be investigated and when such investigations should take place. Since anyone can ask the Commission to investigate anything, at any time, and the Commission alone will decide whether such an investigation is appropriate, the restrictive language found in paragraph 10.a of the Stipulation and Agreement is not necessary and will not be included among the conditions imposed by this order.

#### **Separate Representation of Ameren Missouri at the Midwest ISO**

When multiple subsidiaries of a single holding company are members of the Midwest ISO, that body's governing structure allows them collectively a single vote. Currently, four Ameren operating companies are members of the Midwest ISO; Ameren Energy Marketing Company, Ameren Illinois Company, Ameren Missouri, and Ameren Transmission Company of Illinois.<sup>11</sup> Ameren Missouri's interests at the Midwest ISO, including its vote, as well as the interests of the other three member operating companies, are represented by

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<sup>11</sup> Haro Surrebuttal, Ex. 4, Page 3, Lines 14-19.

employees of Ameren Services, whose costs are shared amongst the Ameren operating companies.<sup>12</sup>

Public Counsel is concerned that the various Ameren operating companies are involved in diverse business lines, subject to different regulatory frameworks. For that reason, they may have interests that diverge from those of Ameren Missouri and its ratepayers.<sup>13</sup> To deal with this possible divergence of interests, Public Counsel argues that the Commission should condition its approval of Ameren Missouri's continued membership on the Midwest ISO on Ameren Missouri obtaining separate representation at the Midwest ISO.<sup>14</sup>

In his opening statement at the hearing, Public Counsel appeared to soften this position to ask the Commission to require Ameren Missouri to "make its best efforts to become the representative in MISO".<sup>15</sup> Public Counsel's witness did not advocate that position in his prefiled testimony, or at the hearing. However, in its reply brief, Public Counsel once again referred to a requirement that Ameren Missouri make its "best efforts" to obtain separate representation.<sup>16</sup> It is therefore difficult to discern what exactly Public Counsel is advocating.

However, Public Counsel's witness conceded that it would be very difficult, if not impossible for Ameren Missouri to comply with a condition that would require it to change the Midwest ISO's voting structure to give Ameren Missouri separate representation.<sup>17</sup>

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<sup>12</sup> Haro Surrebuttal, Ex. 4, Page 4, Lines 1-7.

<sup>13</sup> Kind Rebuttal, Ex. 11, Page 15, Lines 16-22.

<sup>14</sup> Transcript, Page 252, Lines 21-24.

<sup>15</sup> Transcript, Page 65, Lines 14-17.

<sup>16</sup> Public Counsel's Reply Brief, 10<sup>th</sup> page.

<sup>17</sup> Borkowski, Supp. Surrebuttal, Ex. 6, Pages 10-11, Lines 14-30, 1-8, quoting the deposition of Public Counsel's witness, Ryan Kind.

Staff's witness, Adam McKinnie, also testified that it would be difficult for Ameren Missouri to require Midwest ISO to give it separate representation.<sup>18</sup> Furthermore, Public Counsel's witness conceded that he could cite no particular example of any harm to Ameren Missouri or its ratepayers resulting from Ameren Services' representation of Ameren Missouri at the Midwest ISO.<sup>19</sup>

Given the lack of evidence indicating actual harm to Ameren Missouri or its ratepayers, and given the practical barriers to Ameren Missouri's ability to obtain separate representation at Midwest ISO, the Commission will not order Ameren Missouri to pursue separate representation at Midwest ISO as a condition of approving Ameren Missouri's continued participation in the Midwest ISO.

As its alternative position, Public Counsel suggests the Commission order Ameren Missouri to make its best efforts to obtain separate representation at the Midwest ISO. The Commission shares Public Counsel's concern about potential conflicts of interest between Ameren Missouri and its affiliates regarding capacity markets and construction of transmission resources. However, a condition that would require Ameren Missouri to make its best efforts would be inexcusably vague and ultimately unenforceable, although it could generate pointless litigation about whether the company has really tried its hardest. The Commission will not impose a condition, but encourages Ameren Missouri to explore means of protecting its particular interests at MISO, and will encourage Public Counsel and Staff to continue to closely watch the representation that Ameren Missouri receives at the

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<sup>18</sup> Transcript, Page 171, Lines 4-14.

<sup>19</sup> Borkowski, Supp. Surrebuttal, Ex. 6, Page 10, Lines 1-6, quoting the deposition of Public Counsel's witness, Ryan Kind.

Midwest ISO. If necessary, the Commission may revisit this question when Ameren Missouri's authority to participate in the Midwest ISO expires in 2016.

### **Measures to Maintain Commission Authority Over the Transmission Component of Bundled Retail Rates**

Public Counsel, and other stakeholders, are concerned about the effect of changes in the way electric transmission projects to serve Ameren Missouri's customers are constructed. Under the traditional model, Ameren Missouri would build any transmission projects within its service territory needed to serve its customers. This Commission would then establish the rates by which Ameren Missouri would recover the cost of building the transmission project.

In 2010, Ameren Corporation formed a new subsidiary called Ameren Transmission Company (ATX).<sup>20</sup> Ameren Missouri's witness, Maureen Borkowski, testified that Ameren Missouri will continue to build transmission facilities in its service territory for reliability purposes related to serving its own retail load. However, ATX or another Ameren subsidiary would build other transmission in Missouri, including projects the Midwest ISO designates as Multi-Value Projects (MVPs), Market Efficiency Projects (MEPs) and Generation Interconnection and Transmission Service Projects built for customers other than Ameren Missouri. Those projects are included in the Midwest ISO's Transmission Expansion Plan for reasons other than the need to provide reliable service to Ameren Missouri's customers. Still, the Midwest ISO would allocate a part of the cost of those projects to Ameren Missouri, with the costs ultimately recovered from Ameren Missouri's ratepayers, although the costs would be shared with other entities.<sup>21</sup>

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<sup>20</sup> Dauphinais Rebuttal, Ex. 14, Page 5 Lines 10-20.

<sup>21</sup> Borkowski Surrebuttal, Ex. 5, Page 6, Lines 1-18.

The rates that ATX or other Ameren subsidiary would be able to charge to recover the cost of constructing those transmission service projects would be established by the FERC, not this Commission. Because the FERC wants to provide an incentive for companies to build more transmission, it has been willing to provide more generous rate treatment than has been afforded in the past by this Commission. Thus, Ameren Corporation would have a financial incentive to allow ATX or another affiliate to build transmission that might otherwise be built by Ameren Missouri and thereby receive more favorable cost recovery under the FERC's transmission ratemaking authority.<sup>22</sup>

Ameren Missouri would, of course, seek to recover from its ratepayers the share of the cost to construct those projects that are allocated to it by the Midwest ISO. Under the "filed rate doctrine", this Commission would likely not be able to look behind those allocated costs to deny Ameren Missouri's recovery of ATX's FERC established rates. As a result, Ameren Missouri's ratepayers could pay more for their electricity than they would have if Ameren Missouri had built the transmission project under this Commission's authority.

A provision of the stipulation and agreement is intended to deal with the concern that Ameren Missouri's customers could face higher rates if these transmission projects are built by an affiliate. Section 10.j of the stipulation and agreement, entitled "Rate Treatment – Affiliate-Owned Transmission" states:

With respect to transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by the Midwest ISO: Ameren Missouri agrees that for ratemaking purposes in Missouri the costs allocated to Ameren Missouri by the Midwest ISO will be adjusted by an amount equal to the differences between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's MoPSC-authorized ROE and capital structure had been applied and there had been no CWIP (if

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<sup>22</sup> Dauphinais Rebuttal, Ex. 14, Page 6, Lines 4-20.

applicable) applied to such facilities and (ii) the annual FERC-authorized revenue requirement for such facilities. The ratemaking treatment agreed to in this subparagraph j will, unless otherwise agreed, end with the MoPSC's next order (after its order resolving this docket) respecting Ameren Missouri's participation in the Midwest ISO, another RTO or operation as an ICT.

Furthermore, in section 10i of the stipulation and agreement, Ameren Missouri and ATX agree to participate in an investigatory case to investigate plans during the next 10 years for Ameren or another Ameren affiliate to build transmission in Ameren Missouri's service territory. Public Counsel is not satisfied with those provisions, arguing that they fail to adequately protect the interest of Ameren Missouri's ratepayers.

Public Counsel contends the Commission should impose a condition that would ensure that the Commission retains jurisdiction over the transmission component of bundled retail rates.<sup>23</sup> In making that argument, Public Counsel inadvertently misstates the issue. As Ameren Missouri points out,<sup>24</sup> the Commission has the jurisdiction that the legislature gives it through the controlling statutes. No agreement by the parties, or order of the Commission, can decrease or increase the Commission's jurisdiction. What Public Counsel is really trying to accomplish is to ensure that the transmission component of bundled retail rates remains subject to the Commission's existing jurisdiction. With that clarification, Public Counsel's goal is reasonable and is shared by the other parties and by the Commission.

To accomplish that goal, Public Counsel initially proposed that the Commission impose a condition that would require Ameren Missouri to construct and own any transmission projects proposed for Ameren Missouri's service territory unless this Commission approves the construction by another entity and grants a certificate of

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<sup>23</sup> Initial Post-hearing Brief of The Office of the Public Counsel, Page 4

<sup>24</sup> Reply Brief of Ameren Missouri, Page 9, Footnote 10.

convenience and necessity to the entity that will construct the project.<sup>25</sup> MIEC initially proposed the same condition.<sup>26</sup> Subsequently, Public Counsel, in its Second Statement of Position, modified its proposed condition to require Ameren Missouri to “make diligent efforts to construct and own any and all transmission projects” proposed for its retail service territory.<sup>27</sup> Finally, in its initial brief, Public Counsel advocated for a condition proposed by its witness, Ryan Kind, in his supplemental rebuttal testimony. That proposed condition would provide that any FERC transmission rate incentives would never apply to the transmission component of rates set for bundled retail load by this Commission.<sup>28</sup>

There are problems with all of the conditions proposed by Public Counsel. First, the initial proposal that would require Ameren Missouri to construct and own all transmission projects in its service territory unless otherwise ordered by the Commission would be inconsistent with federal law as established by the FERC. Under FERC Order 1000, a utility with a certificated service territory, such as Ameren Missouri, no longer has a right of first-refusal to construct transmission projects within its service territory if the reliability projects are subject to regional cost allocation. That means other transmission companies not affiliated with Ameren Missouri may be allowed to develop such projects within Ameren Missouri’s service territory.<sup>29</sup>

Public Counsel recognized the changes imposed by FERC Order 1000 when it proposed a modified condition in its statement of positions. At that time, Public Counsel proposed that Ameren Missouri should “make diligent efforts” to own and construct

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<sup>25</sup> Kind Rebuttal, Ex. 11, Page 13, Lines 22-28.

<sup>26</sup> Dauphinais Rebuttal, Ex. 14, Page 7, Lines 15-22.

<sup>27</sup> Second Statement of Positions of the Office of the Public Counsel, filed January 27, 2012.

<sup>28</sup> Kind Supplemental Rebuttal, Ex. 13, Page 13, Lines 12-20. Mr. Kind modified the language of the proposed condition at TR 229.

<sup>29</sup> Borkowski Surrebuttal, Ex. 5, Page 11, 1-12.

transmission projects in its service territory. As the Commission previously indicated regarding the proposal that Ameren Missouri make its best efforts to obtain separate representation at MISO, such an indefinite requirement would be inherently vague and unenforceable and would be an invitation to future litigation about whether Ameren Missouri had complied with the condition.

The final version of the condition suggested by Public Counsel is also problematic. That provision would require Ameren Missouri to forever relinquish recovery of extra costs associated with the recovery of transmission rate incentives allowed by the FERC on transmission projects developed by any company, whether or not affiliated with Ameren Missouri. Such a condition would clearly be contrary to the filed-rate doctrine, which prevents a state regulatory agency from looking behind a federally approved rate to deny a state regulated utility's recovery of costs incurred due to payment of that rate.

As previously described, Ameren Missouri and the other signatories to the stipulation and agreement were able to agree on two conditions to address the question of continued Commission authority over the transmission component of bundled retail rates. One condition would limit the amount of transmission costs Ameren Missouri could pass through to its ratepayers during the time that the extension of authority to remain in MISO granted in this order would remain in effect. The other condition would have the Commission open an investigative case to consider how those transmission costs might be recovered in the future.

Public Counsel criticizes the first condition found at section 10j of the stipulation and agreement as inadequate because it would limit Ameren Missouri's cost recovery only until 2016 when the extended authority to remain in the Midwest ISO expires. Certainly, the



costs associated with new transmission projects could extend well beyond 2016. However, because the authority the Commission is granting will expire in 2016, the Commission will once again be able to examine this question before the authority expires. If the Commission finds that additional or more restrictive conditions are required to make the further extension of authority comport with the public interest, it may impose such conditions at that time. But it is unnecessary and ineffective for this Commission to seek to impose a condition that would attempt to bind that future Commission in its treatment of a possible further extension of authority.

Public Counsel also criticizes the limited number of possible FERC incentives that are described in the limitations imposed by section 10j of the stipulation and agreement. The limitations in that section would apply only to Ameren Missouri's Missouri Commission-authorized return on equity (ROE) and capital structure and to the exclusion of construction work in progress (CWIP). Public Counsel's witness points out that there are other possible FERC transmission rate incentives that could be passed through to Missouri ratepayers under this condition, including "abandoned plant recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses, and accelerated depreciation."<sup>30</sup>

There is no evidence in the record to demonstrate how much impact these additional FERC incentives could have on Missouri ratepayers. However, in her supplemental surrebuttal testimony, Ameren Missouri's witness, Maureen Borkowski, explained that Ameren Missouri agreed to the provisions of section 10j to "eliminate whatever very small rate impact the FERC rate treatment of an ATX investment in Missouri could have during

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<sup>30</sup> Kind Supp. Rebuttal, Ex. 13, Page 12, Lines 12-17.

the period of the extended permission to participate in the Midwest ISO...<sup>31</sup> Since Ameren Missouri has agreed that its goal was to eliminate the entire rate impact of FERC rate treatment, the Commission will hold it to that agreement by adding restrictions on the recovery of the additional possible costs identified by Mr. Kind on behalf of Public Counsel.

Finally, Public Counsel criticizes the geographical restrictions of the rate treatment provisions of section 10j of the stipulation and agreement in that the section would apply only to “transmission facilities located in Ameren Missouri’s certificated service territory” and not to transmission projects that ATX might develop outside Ameren Missouri’s service territory or even in another state.<sup>32</sup> Public Counsel does not explain why this Commission should attempt to assert control over, or limitations on, transmission projects that an unregulated company such as ATX might seek to develop outside Ameren Missouri’s service territory. The Commission finds no basis for such an assertion of authority and will not modify the condition in the manner proposed by Public Counsel.

After considering Public Counsel’s criticisms, the Commission finds that the stipulated conditions found in sections 10i and 10j of the stipulation and agreement are reasonable and are in the public interest as modified in this order. The Commission will adopt them as modified.

#### **Additional Analysis Regarding Ameren Missouri’s Post-2016 Participation in the Midwest ISO**

In section 10b of the stipulation and agreement, the signatory parties agreed to a process by which Ameren Missouri would consult with various stakeholders to review the additional analysis necessary to determine whether Ameren Missouri should remain in the

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<sup>31</sup> Borkowski Supp. Surrebuttal, Ex. 6, Page 4, Lines 8-11.

<sup>32</sup> Kind Supp. Rebuttal, Ex. 13, Page 12, Lines 18-25.

Midwest ISO beyond May 31, 2016. MJMEUC expressed concern that, since it is not a retail customer of Ameren Missouri, the stipulation and agreement did not allow it sufficient opportunity to participate in that review process.

At the hearing, Ameren Missouri's witness, Ajay Arora, when asked whether Ameren Missouri would have any objection to MJMEUC being involved in the modeling analysis of the review process, testified that so long as the modeling analysis is controlled by Ameren Missouri's management for the purpose of judging the benefits and costs to Ameren Missouri's retail customers, the company is willing to consider suggestions from MJMEUC about topics for analysis. Ameren Missouri's response satisfies MJMEUC's concern and no modification of the stipulated condition is necessary.

## **CONCLUSIONS OF LAW**

1. Ameren Missouri is an "Electrical Corporation" as defined by Section 386.020(15), RSMo (Supp. 2010) and is subject to the general jurisdiction of the Commission pursuant to Section 393.140, RSMo 2000.

2. Pursuant to Section 393.190, RSMo 2000, Ameren Missouri must obtain permission from this Commission to continue the transfer of its transmission system to the control of the Midwest ISO.

3. In determining whether to allow a utility to sell or transfer its property, the Commission does not need to find that the proposed transfer will benefit the public. Rather, according to the Missouri Supreme Court:

It is not [the 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. 'In the

public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'<sup>33</sup>

Missouri's courts have consistently applied the not detrimental standard since 1934.<sup>34</sup>

4. Despite having agreed to several conditions in the stipulation and agreement, Ameren Missouri argues that the Commission has no authority to impose any conditions on the transfer of utility property unless there is evidence to establish that the benefits of the transaction are outweighed by the detriments. In other words, since the net monetary benefit of the proposed transaction in this case is \$105 million, according to Ameren Missouri, the Commission cannot impose any conditions on the transfer unless it finds that there are additional detriments amounting to more than \$105 million.

5. The Commission disagrees with Ameren Missouri's conclusion. Clearly, the Commission cannot impose conditions designed to make the transfer more beneficial for the public. However, the Commission is not limited to a simple thumbs up or thumbs down ruling on the transfer as a whole. If it is to adequately protect the public interest, the Commission must be able to impose conditions designed to alleviate specific detriments that would otherwise result from the transfer, even if the transfer overall would not be detrimental to the public.

6. Ameren Missouri and other parties have presented the Commission with a nonunanimous stipulation and agreement that would impose various conditions on the proposed transfer. Public Counsel and MJMEUC objected to that stipulation and agreement. Commission Rule 4 CSR 240-2.115(2)(D) provides:

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<sup>33</sup> *State ex rel. City of St. Louis v. Pub. Serv. Com'n*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934), quoting, *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, 844 (1928).

<sup>34</sup> For example, see, *State ex rel AG Processing v. Pub. Serv. Com'n*, 120 S.W.3d 732 (Mo. 2003).

A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

Therefore, at this time, there is no stipulation and agreement for the Commission to approve or disapprove, merely a joint position of some of the parties. The Commission can accept some or all of those joint positions, depending upon the evidentiary record that has been presented.

7. The “filed-rate doctrine” holds that states may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. The United States Supreme Court has held:

The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. ... Such a ‘trapping’ of costs is prohibited.<sup>35</sup>

For purposes of this case, the “filed-rate doctrine” means that this Commission will not be able to deny Ameren Missouri the ability to recover in rates the amounts that it must pay to transmission owners for FERC-established rates for power transmission, even if those FERC-established transmission rates are higher than would have been approved by this Commission. That will also be true even if the transmission owner with a FERC-established rate is affiliated with Ameren Missouri.

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<sup>35</sup> *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 970, 106 S.Ct. 2349, 2359 (1986).

## DECISION

The Commission finds that Ameren Missouri's continued participation in the Midwest ISO through May 31, 2016 is in the public interest, subject to the conditions described in this order.

### THE COMMISSION ORDERS THAT:

1. Ameren Missouri's Renewal of Objection and Motion to Strike is denied.
2. Ameren Missouri's authority to continue the transfer of functional control of its transmission system to the Midwest Independent Transmission System Operator, Inc. is granted subject to the following conditions:

A. The Commission approves, on an interim basis, Ameren Missouri's continued RTO participation in the Midwest ISO during a term ending May 31, 2016, provided that if the Commission has not by May 31, 2016, further extended its approval of Ameren Missouri's participation in the Midwest ISO, Ameren Missouri shall be deemed to have Commission approval to continue its Midwest ISO participation for the additional time necessary to re-establish functional control of its transmission system so that it may operate the same as an ICT, or to transfer functional control of its transmission system to another RTO. The extended permission granted in this order is also subject to the provisions of paragraph 2.O of this order. (from paragraph 9 of the stipulation and agreement)

B. Assuming that Ameren Missouri has not earlier requested withdrawal or that withdrawal has not otherwise occurred, by September 30, 2014, Ameren Missouri shall contact and consult with interested persons or entities to review with those stakeholders the additional analysis Ameren Missouri believes is appropriate

and necessary regarding Ameren Missouri's continued participation in an RTO after May 31, 2016, or its operation as an ICT. Such study, at a minimum, shall examine continued participation in the Midwest ISO versus participation in Southwest Power Pool and continued participation in Midwest ISO versus operation as an ICT. Such study shall examine a period after May 31, 2016, of not less than five years or more than ten years. (from paragraph 10.b of the stipulation and agreement)

C. After taking into consideration in good faith the comments and input from the stakeholders regarding the tentative analysis, Ameren Missouri shall, by December 1, 2014, advise the stakeholders of the specific parameters, (including the minimum requirements provided for above) of the analysis Ameren Missouri intends to conduct. (from paragraph 10.b of the stipulation and agreement)

D. By November 15, 2015, Ameren Missouri shall file a pleading, along with the results of its actual analysis regarding its continued RTO participation or its possible operation as an ICT after May 31, 2016. That pleading shall also address, among other things, whether the Service Agreement or similar mechanism for the provision of transmission service to Missouri Bundled Retail Load should continue to remain in effect between Ameren Missouri and any RTO in which Ameren Missouri may participate after May 31, 2016. (from paragraph 10.b of the stipulation and agreement)

E. Ameren Missouri shall work with interested individuals and entities, and give them substantive input regarding the development of the specific methodology, inputs, outputs, and other features to be included in the November 15, 2015 actual analysis. Furthermore, Ameren Missouri shall advise and update the

Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

F. To maintain its independence and control of the actual analysis, Ameren Missouri (or Ameren Services on its behalf) shall act as the project manager for such analysis and shall engage and direct the work of Ameren Missouri or Ameren Services employees or consultants assigned or retained to perform the actual analysis. (from paragraph 10.b of the stipulation and agreement)

G. Subject to any applicable privilege recognized by law and the provisions of the Commission's rule regarding confidential information, stakeholders shall be given meaningful and substantial access to data necessary for, and used in, preparing the actual analysis, shall have access to employees or consultants utilized by Ameren Missouri to perform the actual analysis, and shall be given the opportunity to have meaningful input in the preparation of the actual analysis. Furthermore, Ameren Missouri shall advise and update the Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

H. Ameren Missouri shall provide regular reports regarding the progress and, if requested, reasonable details of the actual analysis to any party to this case that requests such updates or information. (from paragraph 10.b of the stipulation and agreement)

I. If any difference of opinion regarding the scope, particular details or preliminary assumptions that are necessary to and part of any supporting analysis to be performed by Ameren Missouri arises, Ameren Missouri shall ultimately have



responsibility for, and the burden of presenting an analysis in support of whatever position it deems appropriate and necessary at the time of its November 15, 2015 filing. Accordingly, Ameren Missouri is entitled to maintain a level of independence and control of any such analysis, while other parties retain their right to oppose Ameren Missouri's positions or to provide alternative positions. (from paragraph 10.b of the stipulation and agreement)

J. Ameren Missouri shall acknowledge that the Service Agreement's primary function is to ensure that the Missouri Public Service Commission continues to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load. Consistent with Section 3.1 of the Service Agreement and its primary function, to the extent that the FERC offers incentive "adders" for participation in an RTO or in an ICT to the rate of return allowed for providing Transmission Service, as that term is defined in the Service Agreement, to wholesale customers within the Ameren zone, such incentive adders shall not apply to the transmission component of rates set for Bundled Retail Load by the Commission. (from paragraph 10.c of the stipulation and agreement)

K. Currently, FERC requires Bundled Retail Load served by Midwest ISO Transmission Owners to take Transmission Service under the Midwest ISO's Energy Markets Tariff (EMT). If, at some point, Ameren Missouri is not required to take Transmission Service for Bundled Retail Load under the EMT, the Service Agreement shall be terminated concurrently with the point in time when Ameren Missouri is no longer required to take Transmission Service for Bundled Retail Load under the EMT. Termination of the Service Agreement under this provision shall not

affect Ameren Missouri's membership participation status in the Midwest ISO and the Commission shall continue to have jurisdiction over the transmission component of the rates set for Bundled Retail Load. As a participant in the Midwest ISO, Ameren Missouri may remain subject to charges from the Midwest ISO for Bundled Retail Load under the EMT that are assessed ratably to all load-serving utilities who are participants in the Midwest ISO, but who are not taking Transmission Service for their Bundled Retail Load under the EMT. No ratemaking treatment has been adopted for these changes. (from paragraph 10.d of the stipulation and agreement)

L. The Service Agreement (unless it is terminated pursuant to its terms) shall continue in its current form; provided that the Commission may rescind its approval of Ameren Missouri's participation in the Midwest ISO and may require Ameren Missouri to withdraw from participation in the Midwest ISO on any of the following bases:

- (i) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of precluding the Commission from continuing to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load; or
- (ii) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of amending, modifying, changing, or abrogating in any material respect any term or condition of the Service

Agreement previously approved by the Commission and by  
FERC

Ameren Missouri shall immediately notify the stakeholders if Ameren Missouri becomes aware of the issuance of any order, rule, or regulation amending, modifying, changing, or abrogating any term or condition of the Service Agreement. Any stakeholder is free to make a filing with the Commission as a result of an action by FERC as described in this provision, but must do so within 90 days after Ameren Missouri has provided notification under this provision of such FERC action. Any stakeholder not making a filing within the 90-day time frame shall be deemed to have waived its right to make a filing with the Commission in response to such FERC action. (from paragraph 10.e of the stipulation and agreement)

M. Any order issued by the Commission that, on a basis provided for in paragraph L(i) or L(ii), terminates the Commission's approval of Ameren Missouri's participation in the Midwest ISO shall be effective when Ameren Missouri has re-established functional control of its transmission system as a transmission provider or transfers functional control to another entity depending on further orders of the Commission and the FERC. (from paragraph 10.e of the stipulation and agreement)

N. Notwithstanding any term or condition provided for in paragraphs L or M, any termination of the Service Agreement that might occur under Section 2.4 of the Service Agreement shall not constitute an action of the FERC described in L(i) and L(ii) and shall not trigger the Commission's right to require Ameren Missouri to withdraw from the Midwest ISO. (from paragraph 10.e of the stipulation and agreement)

O. If Ameren Missouri withdraws from Midwest ISO, or if the authority granted in this order is not extended beyond May 31, 2016, Ameren Missouri will have to re-establish functional control of its transmission system as a transmission provider, or, depending upon further orders of the Commission and the FERC, may have to transfer functional control of its transmission system to another entity. In either case, Ameren Missouri would have to give notice to the Midwest ISO of its withdrawal. Under Article Five of the Service Agreement, such notice shall not be effective before December 31 of the calendar year following the calendar year in which notice is given by Ameren Missouri to the Midwest ISO. For a possible withdrawal from the Midwest ISO to occur no later than May 31, 2016, the Commission will need to issue a decision with respect to Ameren Missouri's continued participation in Midwest ISO no later than December 15, 2015. (from paragraph 10.f of the stipulation and agreement)

P. If Ameren Missouri desires to securitize the revenues associated with its transmission system, it shall obtain additional prior permission and approval from the Commission. (from paragraph 10.g of the stipulation and agreement)

Q. If Ameren Missouri decides to seek any fundamental change in its membership participation or membership status in the Midwest ISO, it shall seek prior approval from the Commission no later than five business days after its filing with the FERC for authorization of that change. (from paragraph 10.h of the stipulation and agreement)

R. Ameren Missouri and Ameren Transmission Company (collectively Ameren) shall participate in an investigatory case that the Commission will initiate

within 60 days after the effective date of this order. In that case, the Commission will investigate plans during the next 10 years for Ameren, or another Ameren affiliate, as defined in the Commission's affiliated transaction rules for electric utilities, to build transmission in Ameren Missouri's service territory. Ameren Missouri shall not object to discovery requests relating to plans during the next 10 years for Ameren or another Ameren affiliate to build transmission in Ameren Missouri's service territory on the grounds that: (i) the discovery does not seek information that is relevant to such transmission issues; or (ii) the data request seeks information that is not in Ameren's possession if the information is in the possession of an Ameren affiliate. By participating in the case, Ameren is not waiving any applicable privilege and retains the right to object if a discovery request asks for opinions (not facts or existing data), asks for legal conclusions, asks Ameren to perform analyses that do not already exist, or is vague, unduly burdensome, or overly broad. The Commission will close the investigatory case no later than ten months after it is initiated. Neither ATX, nor any Ameren affiliate that provides information in connection with the investigatory case shall be deemed to have thereby conceded that the Commission has jurisdiction over them, or could otherwise compel them to participate in the investigatory case or to provide such information, absent their agreement to do so. (from paragraph 10.i of the stipulation and agreement)

S. For transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by the Midwest ISO, for ratemaking purposes in Missouri,

the costs allocated to Ameren Missouri by the Midwest ISO shall be adjusted by an amount equal to the difference between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's Commission-authorized ROE and capital structure had been applied and there had been no CWIP (if applicable), or other FERC Transmission Rate Incentives, including Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities and (ii) the annual FERC-authorized revenue requirement for such facilities. The ratemaking treatment established in this provision will, unless otherwise agreed or ordered, end with the Commission's next order regarding Ameren Missouri's participation in the Midwest ISO, another RTO, or operation as an ICT. (from paragraph 10.j of the stipulation and agreement)

3. This order shall become effective on April 30, 2012.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Gunn, Chm., Jarrett and Kenney, CC., concur;  
and certify compliance with the  
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,  
on this 19<sup>th</sup> day of April, 2012