

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

In the Matter of Entergy Arkansas, Inc.'s)
Notification of Intent to Change Functional)
Control of Its Missouri Electric Trans-)
mission Facilities to the Midwest)
Independent Transmission System)
Operator, Inc., Regional Transmission)
System Organization or Alternative)
Request to Change Functional Control)
and Motions for Waiver and Expedited)
Treatment.)

Case No. EO-2013-0431

STAFF'S RESPONSE

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response* to the *Application for Rehearing* filed herein by Entergy Arkansas, Inc. ("EAI"), states as follows:

INTRODUCTION

The conditions imposed by the Commission:

On March 11, 2013, Entergy Arkansas, Inc., ("EAI") filed a Notification of Intent to change functional control of its Missouri electric transmission facilities to The Midcontinent Independent Transmission System Operator, Inc., ("MISO"). Following an evidentiary hearing convened upon due notice, the Commission issued its *Report & Order* on October 9, 2013, effective November 8, 2013, granting EAI authority to migrate its Missouri transmission assets into MISO subject to certain conditions; first, that MISO and Southwest Power Pool, Inc. ("SPP"), enter into a revised Joint Operating Agreement ("JOA") "addressing, at a minimum, the loop flow issues and other altered flows related to the Missouri seam between" MISO and SPP; second, a requirement

that EAI and/or ITC Midsouth, LLC,¹ “hold harmless non-MISO Missouri retail customers from all increased costs due to Entergy’s potential transfer of functional control of its transmission assets to [MISO]”; and third, that EAI shall provide an annual report to the Commission concerning the economic viability of its continued participation in MISO, the safety and reliability of its transmission services, and the status of the revised MISO – SPP JOA.

The grounds for rehearing asserted by EAI:

On November 7, 2013, EAI timely filed its *Application for Rehearing*, asserting that (1) the Commission lacks jurisdiction under § 393.190.1, RSMo., over EAI’s integration of its Missouri assets into MISO and thus cannot approve, deny or condition it; (2) that the Commission “did not and cannot” find any net detriment resulting from the integration and thus cannot impose conditions upon it under § 393.190.1, RSMo.; (3) that the Commission is preempted from imposing a hold harmless condition upon the integration; (4) that the Commission is preempted from requiring amendments to the MISO – SPP JOA as a condition to EAI’s integration of its Missouri assets into MISO; and (5) that the conditions imposed by the Commission violate the Commerce Clause of the United States Constitution and are thus unconstitutional.

Staff’s position in this case:

On November 12, 2013, the Commission ordered Staff and the non-MISO Missouri electric utility intervenors to respond to the *Application for Rehearing* by November 21, 2013. Staff’s *Statement of Positions* filed in this matter on June 14, 2013, was that the Commission should approve the proposed transfer without

¹ The proposed purchaser of EAI’s Missouri assets in a related proceeding.

conditions. Further, Staff advised the Commission that the opposing parties had not identified any detriments subject to mitigation by the Commission. Finally, Staff pointed out to the Commission that § 205(a) of the Public Utilities Regulatory Policies Act (“PURPA”), codified at 16 U.S.C. § 824a-1, authorizes FERC to “exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities . . . if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.” In its briefs, Staff advised the Commission to approve the proposed transfer without conditions and explained that FERC-approved transmission rates are just and reasonable as a matter of law.

Staff’s recommendation:

Although the Commission has jurisdiction over EAI and properly analyzed the proposed transfer under § 393.130.1, RSMo., it nonetheless is unable under the law to impose two of the three conditions imposed by the *Report and Order*, as follows:

- that MISO and SPP enter into a revised JOA “addressing, at a minimum, the loop flow issues and other altered flows related to the Missouri seam between” MISO and SPP; and
- a requirement that EAI and/or ITC Midsouth, LLC, “hold harmless non-MISO Missouri retail customers from all increased costs due to Entergy’s potential transfer of functional control of its transmission assets to [MISO].”

Staff therefore recommends that the Commission grant rehearing as to these two conditions.

ARGUMENT

I.

The Missouri Public Service Commission has jurisdiction over EAI's proposed integration of its Missouri assets into MISO and may thus approve, forbid, or condition the integration as best serves the public interest.

EAI contends that the Commission lacks jurisdiction for three reasons. First, because it is not a public utility subject to regulation by the Commission in that, although it owns and operates “electrical plant” and holds a Commission-issued Certificate of Convenience and Necessity (“CCN”), it does not serve the general public in Missouri or hold itself out as willing to do so.² Second, since it is not a public utility subject to regulation by the Commission, it follows that § 393.190.1, RSMo., does not apply to its proposed transfer of functional control to MISO.³ Third, because the proposed transfer of functional control to MISO is not within the intendments of “sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber,” it is not within the plain language of § 393.130.1, RSMo.⁴

Is EAI a public utility subject to regulation by the Commission?

The Commission found that EAI operates nearly 90 miles of high voltage transmission lines in Missouri under a Commission-issued Certificate of Convenience and Necessity (“CCN”), and that EAI is therefore an electrical corporation and a public utility for the purposes of Missouri law.⁵ EAI counters that a CCN merely authorizes it to construct electrical plant and does not, in and of itself, make it a public utility subject to

² Relying on *State ex rel. M.O. Danciger & Co. v. P.S.C.*, 205 S.W. 36, 40 (Mo. 1918).

³ Based on the plain language of § 393.190.1, RSMo., read in the light of *Danciger*, *supra*.

⁴ Relying upon *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir., 2002).

⁵ *Report & Order*, p. 5, ¶¶ 1-3, p. 11, ¶ 9.

Commission regulation. That status, EAI asserts, is a consequence of providing electrical service to the public in Missouri, or offering to do so, neither of which behaviors EAI engages in.

The record shows that EAI is the successor to Arkansas Power and Light Company (“APL”), which transferred its Missouri retail electric operations to Union Electric Company in 1991 and surrendered its CCN.⁶ APL retained certain transmission and distribution assets and substations, which are the subject of this proceeding. In 2012, EAI sought and obtained a CCN from the Commission for all of its Missouri operations “out of an abundance of caution.”⁷ EAI uses its Missouri facilities to engage in FERC-regulated interstate sales of electricity at wholesale to Missouri municipalities and cooperatives, FERC-regulated interstate firm point-to-point transmission services for non-MISO Missouri electric utilities, and distribution to retail customers in Arkansas.⁸ Additionally, the Entergy system has provided Missouri non-MISO electric utility Kansas City Power and Light Company (“KCP&L”) with a valuable market for off-system sales, the net proceeds of which serve to reduce the revenue requirement that KCP&L’s Missouri ratepayers must provide through rates.⁹ Thus, EAI uses its facilities either to directly serve its own retail customers in Arkansas or to provide electricity to utilities, municipalities and cooperatives that serve retail customers in Missouri – which Missouri utilities, municipalities and cooperatives are part of the general public. Based on these facts, the Commission did not err in concluding that EAI’s assets are dedicated to the

⁶ *Application for Rehearing*, p. 3.

⁷ *Id.*, p. 4. EAI states that it “questioned the Commission’s jurisdiction” in this proceeding.

⁸ Direct Testimony of Richard C. Riley, pp. 7-8; Rebuttal Testimony of Bary K. Warren, pp. 4-8; Rebuttal Testimony of John R. Carlson, pp. 3-8.

⁹ Rebuttal Testimony of John R. Carlson, pp.8-11.

public service and that EAI is a public utility. Indeed, EAI is regulated by FERC as a public utility.¹⁰

EAI's reliance on **Danciger** is misplaced. **Danciger** turned upon the distinction between common carriers and private or contract carriers, a distinction that is without relevance in the context of this case.¹¹ The relevant question in this case is *who* regulates EAI? The record shows that EAI is regulated by FERC for some purposes and by this Commission for others¹² -- EAI has itself admitted: "EAI does not . . . dispute that the Commission has some jurisdiction over EAI in these areas [i.e., siting and safety], but nothing in the present MISO notice relates to that jurisdiction."¹³ The activities of transmitting and selling electricity at wholesale in interstate commerce are

¹⁰ Direct Testimony of Richard C. Riley, pp. 7-8.

¹¹ **Danciger**, *op. cit.*, 205 S.W. at 42:

"The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract.' This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.' " 1 Wyman on Pub. Service Corps. 227.

¹² On its official website, FERC states that it regulates the transmission and sale at wholesale of electricity; reviews certain mergers and other transactions of electricity companies; reviews siting applications for electric transmission projects "under limited circumstances"; protects the reliability of the high voltage interstate transmission system through mandatory reliability standards; and monitors and investigates energy markets; FERC further states that it does not regulate the sale of electricity at retail; approve the construction of generation facilities; regulate municipal power systems or rural electric cooperatives; or regulate nuclear power plants. www.ferc.gov/about. The transfer of operational control to an RTO such as MISO is not listed.

¹³ *Post-Hearing Brief of Entergy Arkansas*, p. 4. The Commission retains jurisdiction over other aspects of the electric plant in question as well, and over the activities of the public utility that owns and operates it. See §§ 386.310.1, RSMo; 393.130.1, RSMo, and 393.140(5), RSMo (safety, reliability and adequacy). The Commission has "plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it." **State ex rel. Missouri Southern Railway Co. v. P.S.C.**, 259 Mo. 704, ___, 168 S.W. 1156, 1163 (banc 1914).

regulated by the FERC and not by state commissions.¹⁴ The FERC's jurisdiction extends to and includes the facilities used for these activities.¹⁵ Nonetheless, the physical assets in question are located in Missouri and are thus subject to the police power of this state.¹⁶ Under federal law, EAI's proposal to transfer operational control to MISO is a voluntary decision of the utility.¹⁷ This Commission has consistently held that a Missouri public utility's exercise of this discretion is subject to Commission regulation.¹⁸ No court has ever held otherwise.

Does § 393.190.1, RSMo., apply to EAI's proposal to transfer functional control to MISO?

The Commission has, from time-to-time, considered cases of this sort since the middle-to-late 1990s,¹⁹ and has consistently both analyzed the proposed transfer of functional control under § 393.190.1, RSMo, and exercised its authority to impose conditions designed to protect the interests of Missouri ratepayers. EAI makes two arguments against the application of this section: first, that it is not subject to regulation by this Commission at all and, second, that its proposal to transfer functional control is not within the plain-language intendments of the statute.

Section 393.190.1, RSMo, provides in pertinent part that:

¹⁴ 16 U.S.C. § 824(b) (Federal Power Act, § 201(b)); ***New York v. FERC***, 535 U.S. 1, 6-7, 122 S.Ct. 1012, 1017, 152 L.Ed.2d 47, ____ (2002).

¹⁵ *Id.*

¹⁶ ***New York v. FERC***, *supra*, 535 U.S. at 17-18, 122 S.Ct. at 1023, 152 L.Ed.2d at ____.

¹⁷ See, e.g., ***Public Utility District No. 1 of Snohomish County, Washington, v. FERC***, 272 F.3d 607, 614 (D.C. Cir. 2001).

¹⁸ E.g., ***In the Matter of Union Electric Company***, 8 MoPSC3d 160 (Case EO-98-413, May 13, 1999) (Ameren Missouri's initial application for authority to participate in the Midwest ISO ("MISO")).

¹⁹ *Supra*, note 18.

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

EAI contends that, since it is not subject to regulation by this Commission at all, in that it does not serve the public in Missouri, then it is not subject to § 393.190.1, RSMo., because no part of its system is “necessary or useful in the performance of its duties to the public[.]” But EAI *does* serve the public in Missouri in the form of utilities, cooperatives and municipalities. As discussed already, the record shows that EAI is a public utility, subject to regulation by this Commission and by the FERC, and all of its activities in Missouri serve the public, either indirectly in Missouri or directly in Arkansas, its lack of a Missouri tariff notwithstanding. It cannot evade § 393.190.1, RSMo., on that basis.

EAI relies on a federal case for the proposition that its proposed transfer of functional control does not fall within the plain language of the statute, relying on a federal case, ***Atlantic City Electric Company v. FERC***.²⁰ In that case, the D.C. Circuit Court of Appeals explained that § 203 of the Federal Power Act²¹ does not confer on FERC jurisdiction over a public utility’s decision to join or exit an ISO by the words, “[n]o public utility shall sell, lease, or otherwise dispose of” jurisdictional facilities whose value exceeds \$50,000 “without first having secured an order of the Commission authorizing it

²⁰ See note 4, *supra*.

²¹ Codified at 16 U.S.C. § 824b(a).

to do so,” because no transfer of ownership or physical control occurred.²² The language of § 393.190.1, RSMo., EAI asserts, is so similar that it, too, cannot be construed to extend to and include a transfer of operational or functional control such as that contemplated here. EAI is wrong.

The construction of a dissimilar federal statute by a federal court of appeals is not in any way controlling here. Section 393.190.1, RSMo., is a *Missouri* statute and its construction by *Missouri* courts is controlling. In the absence of a controlling judicial interpretation, the Commission is entitled to construe and apply the statute and its interpretation is entitled to great weight.²³ This Commission has repeatedly analyzed cases involving the transfer of functional control to an ISO or RTO under § 393.190.1, RSMo. Until a court holds otherwise, the phrase “otherwise dispose of or encumber” in Missouri extends to and encompasses a transfer such as that at issue here.

II.

The Missouri Public Service Commission was authorized to impose conditions on the transfer of operational control because it found that the proposed transaction would be detrimental to the public interest unless mitigating and protective conditions were imposed.

EAI argues that the Commission was not authorized to impose conditions on the proposed transfer by § 393.190.1, RSMo., because it did not find that, in the absence of the conditions, the transfer would result in a net detriment to the public interest. EAI contends that the Commission applied the wrong standard by failing to conduct the cost-benefit analysis required by § 393.190.1, RSMo., as explained by the Missouri

²² 295 F.3d at 11.

²³ *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972).

Supreme Court in ***AG Processing, Inc. v. P.S.C.***²⁴ EAI also contends that the various detriments identified by the Commission are irrelevant because they will not result from the integration of EAI's *Missouri* assets into MISO, but rather from the integration of EAI's *non-Missouri* assets into MISO.

Did the Commission apply the correct standard?

Contrary to EAI's assertion, the Commission did apply the correct standard, that is, the cost-benefit analysis described in ***AG Processing*** in its analysis under § 393.190.1, RSMo. In Findings of Fact 5, 6, 9, 10, and 11, the Commission described the likely benefits of the proposed transfer of control: reduced risk;²⁵ “nearly \$1.4 billion in estimated production cost savings,” of which \$263 million would benefit EAI's retail customers;²⁶ “[g]reater economies of scale resulting from the integration of the Entergy Operating Companies into MISO,” resulting in “a positive impact of more than \$100 million annually on existing MISO members,” of which \$9 million would benefit Ameren Missouri;²⁷ and, finally, “more efficient commitment and dispatch, lower reserve margin requirements, lower ancillary service requirements, and lower administrative fees.”²⁸ In summary, predicted benefits *for Missouri* amount to only \$9 million plus non-monetary benefits including greater efficiency, reduced reserve margin requirements, and the like.

²⁴ 120 S.W.3d 732, 736 (Mo. banc 2003). The Court explained that the Commission erred by not considering the acquisition premium that Aquila proposed to recover from ratepayers in rates: “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.”

²⁵ *Report & Order*, Finding of Fact (“FOF”) 5.

²⁶ *Id.*, FOF 6. On EAI's own admission, none of these retail customers are in Missouri, so this amount is hardly a benefit for the *Missouri* Commission to consider.

²⁷ *Id.*, FOFs 9 and 10.

²⁸ *Id.*, FOF 11.

The Commission described the likely detriments in FOFs 13, 17, 18, 20, 21, 22, 23, 25, 26, 27, and 28.²⁹ These include costs of \$6,095,917 to non-MISO Missouri electric utility KCPL Greater Missouri Operations Company (“GMO”);³⁰ an annual increase of \$1 million to the customers of non-MISO Missouri electric utility The Empire District Electric Company (“Empire”);³¹ a 100% or more increase in transmission rates;³² an annual reduction in KCP&L’s off-system sales margin of \$2 million;³³ and greatly increased energy flows across the MISO – SPP seam in Missouri, exacerbating the existing loop flows problem.³⁴ The detriments enumerated by the Commission amount to somewhat more than \$9 million plus the exacerbated loop flows. Although the Commission did not spell it out in its *Report and Order*, it clearly found and concluded, after its consideration of all of the benefits and detriments in evidence, that the proposed transfer of control would likely result in a net detriment for Missouri. It expressed as much in the Decision section of its *Report and Order*.³⁵

Such a migration is not detrimental to the public interest if the Commission imposes conditions upon it so that Missouri ratepayers are held harmless and so that safety and reliability of the transmission grid in Missouri is ensured.

Without such conditions, ratepayers of Missouri’s non-MISO utilities, namely, ratepayers of Empire, GMO and KCP&L, could suffer

²⁹ *Id.*, pp. 7-9.

³⁰ *Id.*, FOF 13. EAI’s assertion, at *Application for Rehearing*, p. 15 n. 37, that this amount cannot be considered a detriment to the public interest because GMO does not recover these costs in rates is absurd; the public interest extends to and encompasses the financial health of Missouri’s electric utilities.

³¹ *Id.*, FOF 17.

³² *Id.*, FOF 20.

³³ *Id.*, FOFs 21-23.

³⁴ *Id.*, FOFs 25-28.

³⁵ It is the Decision section of the *Report & Order*, and not Conclusion of Law 16 – quoted by EAI in its *Application for Rehearing* – that expresses the results of the cost-benefit analysis.

financial harm and have their electrical service disrupted. The lack of those conditions would be contrary to the Commission's statutory mandate of ensuring that Missourians receive safe, adequate and reliable utility service at just and reasonable rates.³⁶

EAI's charge that the Commission did not apply the **AG Processing** test is simply wrong. The Commission specifically found that the transfer of control would be detrimental in the absence of mitigating conditions: "Such a migration is not detrimental to the public interest if the Commission imposes conditions upon it so that Missouri ratepayers are held harmless and so that safety and reliability of the transmission grid in Missouri is ensured."³⁷

Did the Commission consider the wrong detriments?

EAI also argues that the Commission considered the *wrong* detriments: "[n]one of these alleged harms, however, results from the integration of EAI's Missouri transmission facilities into MISO . . . the allegations are all based on claims of what will occur when the Entergy Operating Companies' *non-Missouri facilities* are integrated into MISO[.]"³⁸ But the Commission is obliged by **AG Processing** to consider *all* of the detriments in evidence, and it did so. Additionally, the transfer of EAI's Missouri facilities is part and parcel of the larger scheme that will cause the detriments enumerated above.³⁹ While the Missouri Commission cannot prevent the transfer of

³⁶ *Id.*, pp. 12-13.

³⁷ Although its imposition of conditions in this case was based upon a finding of net detriment, it is the Commission's position, as well as Staff's, that no such finding is required in order for the Commission to impose conditions on a transfer: "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." *Report & Order*, p. 12.

³⁸ *Application for Rehearing*, p. 15.

³⁹ And by EAI, *id.*

EAI's non-Missouri facilities, it *can* impose otherwise lawful conditions designed to protect Missourians from the transfer's detrimental effects.

III.

Federal law pre-empts the Commission from requiring EAI to hold harmless the retail customers of the non-MISO Missouri electric utilities from rate increases resulting from the transfer of control.

The arguments advanced and authorities cited by EAI under this point are correct and rehearing should be granted on this point. Staff stated as follows in its *Reply Brief* filed in this matter:

The Federal Power Act grants FERC "exclusive authority to regulate the transmission and sale of electric energy in interstate commerce."⁴⁰ FERC is obligated to ensure that transmission and wholesale power rates are "just and reasonable."⁴¹ States are not permitted to regulate in areas where FERC has exercised its jurisdiction to determine just and reasonable rates.⁴² "The right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable rate."⁴³ "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all

⁴⁰ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

⁴¹ Federal Power Act ("FPA"), 16 U.S.C. § 824d(a), (d).

⁴² See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988).

⁴³ *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”⁴⁴

The Filed Rate Doctrine requires “that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.”⁴⁵ When the Filed Rate Doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause.⁴⁶ It is well-established that FERC-approved rates cannot be second-guessed by state regulators.⁴⁷ It follows that, while the Commission has jurisdiction to act on Entergy’s application to transfer functional control, it may not deny it solely because MISO’s FERC-approved transmission rates are higher than those that previously applied.

Likewise, the Commission cannot impose any condition designed to reduce or evade those rates.

IV.

The Commission cannot require MISO and SPP to negotiate a revised JOA because they are not parties to this matter and are not entities subject to regulation by this Commission.

Rehearing should be granted on this point because neither MISO nor SPP are parties to this case or otherwise within the jurisdiction of this Commission. The Missouri

⁴⁴ *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (quoting *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964)); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACOR Inc.*, 379 F.3d 641, 646-47 (9th Cir.2004).

⁴⁵ *Nantahala*, *supra*, 476 U.S., at 962, 106 S.Ct. 2349, 90 L.Ed.2d ____.

⁴⁶ *Entergy Louisiana v. Louisiana Public Service Comm’n*, 539 U.S. 39, 47, 123 S.Ct. 2050, 2056 156 L.Ed.3d 34, ____ (2003); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-582, 101 S.Ct. 2925, ____, 69 L.Ed.2d 856, ____ (1981).

⁴⁷ See *Entergy Louisiana*, *supra*.

Supreme Court has repeatedly had occasion to point out that the Commission is a creature of statute, vested only with those powers expressly granted by the Public Service Commission Law or conferred by clear implication as necessary to carry out the powers specifically granted.⁴⁸ Nothing in the Public Service Commission Law purports to grant the Commission authority to require MISO and SPP to revise their JOA. Likewise, neither MISO nor SPP are parties to this matter and the Commission therefore lacks jurisdiction to order them to do anything.⁴⁹

V.

The hold-harmless condition imposed by the Commission violates the “dormant” Commerce Clause.

EAI’s “dormant” Commerce Clause argument is correct. The mere existence of the Commerce Clause,⁵⁰ even in the absence of affirmative federal enactments, is considered to prohibit the states from discriminating against interstate commerce for the purpose of favoring local interests.⁵¹ Dormant Commerce Clause analysis asks whether the state action discriminates against interstate commerce; if it does, then it is invalid unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. On the other hand, if it is not discriminatory,

⁴⁸ ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission***, 585 S.W.2d 41, 47 (Mo. banc 1979); ***State ex rel. City of West Plains v. Public Service Commission***, 310 S.W.2d 925, 928 (Mo. banc 1958).

⁴⁹ ***Kassebaum v. Kassebaum***, 42 S.W.3d 685, 698 (Mo. App., E.D. 2001) (court erred by ordering a non-party to act).

⁵⁰ Art. 1, § 8, clause 3, U.S. Const.

⁵¹ ***Tarrant Regional Water Dist. v. Herrmann***, ___ U.S. ___, ___, 133 S.Ct. 2120, 2136-2137, 186 L.Ed.2d 153, ___ (U.S. 2013).

then it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.⁵²

Applying this analysis here, it is apparent that the hold-harmless condition impermissibly discriminates against interstate commerce for the forbidden purpose of conferring a rate advantage on Missouri utilities. The same is not true of the JOA condition, which, while *ultra vires*, cannot be said to create any local advantage. Its purpose, rather, is a matter of health, safety and welfare in that it is intended to mitigate the issue of damaging loop flows.

The third condition imposed by the Commission:

EAI does not directly attack the third condition imposed by the Commission on the transaction, but Staff believes that a word on this topic is necessary. That condition, requiring EAI to file an annual report, is entirely lawful and is imposed by statute and Commission rule on every Commission-regulated electric utility.⁵³ The Commission is also authorized to require any regulated electric utility to answer specific questions posed to it and to file periodic reports.⁵⁴ Since, as has been shown above, EAI is a Missouri-regulated electric utility, this condition is entirely lawful.

WHEREFORE, by reason of all the foregoing, Staff prays that the Commission will grant rehearing as to two of the three conditions imposed on the transfer of control; and grant such other and further relief as is just in the premises.

⁵² ***Department of Revenue of Kentucky v. Davis***, 553 U.S. 328, 337-341, 128 S.Ct. 1801, 1807-1810, 170 L.Ed.2d 685, ___-___ (U.S. 2008).

⁵³ Section 393.140(6), RSMo., and Commission Rule 4 CSR 240-3.165.

⁵⁴ Section 393.140(9), RSMo.

Respectfully submitted,

s/ Kevin A. Thompson

KEVIN A. THOMPSON

Missouri Bar Number 36288

Chief Staff Counsel

Missouri Public Service Commission

P.O. Box 360

Jefferson City, MO 65102

573-751-6514 (Voice)

573-526-6969 (Fax)

kevin.thompson@psc.mo.gov

Attorney for Staff of the

Missouri Public Service Commission.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by First Class United States Mail, postage prepaid, on this **21st day of November, 2013**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, a copy of which is attached hereto and incorporated herein by reference.

s/ Kevin A. Thompson