BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL POST-HEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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Introduction

In this Initial Brief, Public Counsel will discuss what conditions, in addition to those contained in the Nonunanimous Stipulation and Agreement filed on November 17, 2011, are necessary and appropriate in order to ensure that Ameren Missouri's continued participation in MISO is not detrimental to the public interest. Staff witness Adam McKinnie described the purpose of this case and the Commission's role as much more than simply saying "yes" or "no" to the application filed by Ameren Missouri, or to the Nonunanimous Stipulation and Agreement:

> Cases such as the instant one are about more than just whether Ameren Missouri is a member of MISO or some other RTO or an independent transmission entity. They are also about what terms and conditions, if any, should be placed on Ameren Missouri's participation in such organizations. The question for this case is not just, "Is MISO a good opportunity for Ameren Missouri and its ratepayers?" The Commission should also ask, "What is the best opportunity available for Ameren Missouri and its ratepayers?", and "How can the Commission ensure the proper protections for both Ameren Missouri stockholders and ratepayers." Although the current MISO membership option with the Day 2 market is a good option, it is prudent to consider other options, including whether MISO membership under a different set of terms and conditions would better protect the interests of ratepayers and stockholders. (Exhibit 7, McKinnie Rebuttal, page 15).

Public Counsel proposes three additional (or modified) conditions. The first is a simple, commonsense tweak that really should never have generated such opposition from Ameren Missouri. Public Counsel proposes that the Commission change the condition embodied in paragraph 10.a. of the Nonunanimous Stipulation and Agreement so that a party can seek re-examination of Ameren Missouri's participation in MISO **before** that participation has become detrimental. That provision currently requires that a party stand patiently by, watch the event happen and wait until participation "**has become** detrimental to the public interest," and only then petition for re-examination.

The second additional condition that Public Counsel submits is necessary to reduce the risk of harm to Missouri ratepayers is to require Ameren Missouri to seek to have its own representation in MISO rather than continue to be represented by Ameren Services, which currently represents all of the Ameren companies. There have been conflicts among the various Ameren subsidiaries and there will continue to be such conflicts. Stand-alone representation is the best way to make sure that Ameren Missouri's own interests and the interests of its customers are represented at MISO.

The third additional condition has to do with preserving the Commission's jurisdiction over the transmission component of bundled retail rates. A significant change has occurred since the first two unanimous agreements (allowing Ameren Missouri to participate in the MISO) were filed, and it is the inability of the parties to come together on how to address this changes (among other issues) that prevented another unanimous agreement. This significant change, of course, is Ameren's creation of Ameren Transmission Corporation (ATX), and its stated intent to have ATX construct and own major new (non-reliability) transmission projects. The creation and function of ATX profoundly impacts the way Ameren Missouri interacts with the MISO, and could if left unaddressed profoundly impact rates for Ameren Missouri's customers and the Commission's ability to regulate those rates. Of course there have been many other changes since the last time the Commission gave approval for Ameren Missouri's participation in MISO to continue.

But the Commission's decision in this case this case need not (and cannot) address all these changes. It only needs to address these changes to the extent they make the protection embodied in the first two unanimous agreements ineffective under the Nonunanimous Stipulation and Agreement. The Commission's decision in this case should simply modify the

conditions in the Nonunanimous Stipulation and Agreement so that the protection afforded Ameren Missouri's Missouri customers in the first two unanimous agreements continue to be afforded to those customers. The specific protection referred to here is the Commission's retention of jurisdiction over the transmission component of bundled retail rates. From that perspective, what appear to be big, intractable issues are really fairly narrow. And they boil down to: what conditions are necessary for the Commission to retain jurisdiction over the transmission component of bundled retail rates?

Ameren Missouri has acknowledged in the past that preserving the Commission's jurisdiction over the transmission component of bundled retail rates is "an important protection for rate payers." In the presentation of a unanimous Stipulation and Agreement in Case No. EO-2003-0271, counsel for Ameren Missouri stated:

> Another key feature of the service agreement that's built in deals with giving this Commission a voice in future transmission upgrades in Missouri that the IS0 might think is needed. Let me explain that just a little bit further. As you know, in Missouri, if we are going to build transmission within our existing certificated area, there's no requirement that we come and get Commission permission to do that. You probably also know that we meet semi-annually with Staff and Public Counsel for Resource Planning Briefings that deal with our resource generation and transmission.
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> The service agreement provides that if the ISO, for example, believes that transmission needs to be built in Missouri, and if that transmission is not within our resource plan, and even if that transmission would be within our existing certificated area, nevertheless, we would have to come to this Commission and obtain this Commission's approval of building that transmission, that gives you a voice and a measure of control over building transmission that, from a more of a top-down perspective, that the RTO believes may be needed by not necessarily been a part of Utilities Resource Plan, and we think that's an important protection for rate payers.

Because of Ameren's creation of ATX, that "important protection for rate payers" no longer operates if ATX builds transmission. The Commission must impose conditions that recreate this "important protection for rate payers."

Standard for Approval

There should be no disagreement among the parties or the Commission on the appropriate standard. The standard in Missouri has long been this: the Commission should only approve the transfer of functional control if it finds that there is not a significant possibility of a detriment to the public interest. There has been much discussion in this case – and in many others – about the distinction between "no detriment" and "a benefit." The distinction, in terms of the quantum of evidence, is vanishingly small. For example, in a multi-million dollar merger/acquisition/transfer of authority case, it would be almost impossible to meaningfully quantify the difference in the probative value of the evidence of one party who asserts $1,000,001 of benefits and $1,000,000 of detriments from the evidence of another party who asserts only $1,000,000 of benefits and $1,000,001 of detriments.

The real import of the case law distinction between the point on the spectrum at which there is "no detriment" and the adjacent point at which there is "a benefit" is not the weighing of evidence but rather the burden of proof. Even though the points may be adjacent on the evidentiary scale, as a practical matter the result of the 1934 St. Louis decision, *supra*, has been in practice in cases before the Commission to shift the burden of proof in property transfer cases away from the utility and to representatives of the public. In addition to the ever-widening chasm between the resources that a utility can afford to devote to a particular case and the resources that representatives of the public can devote to that case, many aspects of utility regulation have changed since 1934, including: 1) the increasingly complex business models employed by utility holding companies, their regulated utility subsidiaries, and their non-regulated subsidiaries; 2) the increasingly complex interaction between state regulators, federal regulators, and transmission system operators; and 3) the ability of holding companies and the

regulated utilities that they control to leverage 1) and 2) to their advantage and – despite the efforts of state regulators – to the disadvantage of captive retail customers.

The bottom line is that the Commission in this case should not simply throw up its hands and refuse to impose consumer-protection conditions because it is difficult to quantify the risk of harm and the consequences of harm from the transaction as proposed by the Nonunanimous Stipulation and Agreement. There are simple conditions that can be required by this Commission to greatly reduce the risk that Ameren Missouri's continued participation in MISO might cause harm to Missouri ratepayers, such as the harm from unnecessary rate increases. Ameren Missouri argues forcefully that such rate increases are unlikely to occur and would be very small even if they do occur. Public Counsel disagrees on both counts, but if the Commission takes Ameren Missouri's representation at face value, there is a benefit to ratepayers from eliminating this risk, and there should be very little downside to Ameren Missouri because (according to Ameren Missouri) both the risk and the possible consequences are trivial. Public Counsel is unable to reconcile Ameren Missouri's representations that the risks and the consequences are very small with its refusal to accept any conditions that would keep the risks and consequences with Ameren Missouri rather than shift them to Ameren Missouri's ratepayers.

Despite the changing regulatory environment, it is important to analyze this case in the context of historical Missouri precedents. These precedents date back to the early decades of utility regulation in Missouri. Citing to an even earlier Maryland case, the Missouri Supreme Court, over 75 years ago, established the Missouri standard for review of mergers:

> To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be

> benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. "In the public interest," in such cases, can reasonably mean no more than "not detrimental to the public."[1]

Public Counsel is by no means suggesting a departure from this standard. Rather, Public Counsel urges that the Commission, giving due regard to the increasing complexity of state and federal regulation and the interaction of the two, pay particular heed to aspects of the transaction under consideration that would deprive the Commission of its full ability to set retail rates for Missouri customers.

In what is probably the most significant Missouri judicial holding on utility mergers in decades, the Missouri Supreme Court rejected a Commission order authorizing the acquisition of St. Joseph Light and Power by UtiliCorp United Inc. The Court held that the Commission must consider and decide all issues that may be relevant to the determination of the "not detrimental" standard:

> 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. [Footnotes omitted.][2]

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[1] State ex rel. St. Louis v. Public Service Com., 335 Mo. 448, 459-460 (Mo. 1934)

[2] State ex rel. AG Processing, Inc. v. Public Service Commission, 120 S.W.3d 732 (Mo. 2003)

The Commission set out its understanding of how to analyze a pending merger application in a 2001 case involving Gateway Pipeline:

> Pursuant to Commission Rule 4 CSR 240-2.060(7) and/or (12), the applicants must show why the proposed transaction is not detrimental to the public interest. The right to sell property is an important incident of the ownership thereof and "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). "The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility." State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. See, In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-252 (Report and Order, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.
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> Under the pleading presenting the transaction between Gateway and UtiliCorp for the Commission's approval, the moving parties assert that the transaction presented will not be detrimental to the public. Therefore, they have the burden of proving that assertion. Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. banc 1991); see also Dycus v. Cross, 869 S.W.2d 745 (Mo. banc 1994).[3]

In a 2004 case in which Aquila, Inc. sought authority to assign, transfer, mortgage or encumber part of its system, the Commission explained its determination of the "not detrimental to the public interest" standard:

> The Commission concludes a detriment to the public interest includes a risk of harm to ratepayers. In reviewing a recent merger case involving the same parties,

[3] Case No. GM-2001-585; In the Matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and Missouri Pipeline Company and the Acquisition by Gateway Pipeline Company of the Outstanding Shares of UtiliCorp Pipeline Systems, Inc. 10 Mo. P.S.C. 3d 520; 2001 Mo. PSC LEXIS 1371, 5-7; Report and Order issued October 9, 2001.

> the Supreme Court of Missouri ruled that . . . "(w)hile (the Commission) 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 (the premium) … when evaluating whether the proposed merger was detrimental to the public." In other words, the Commission could not have known whether the acquisition premium would result in rate increases. But it should have looked at the premium's reasonableness. Likewise, the Commission cannot know whether the encumbrances will result in rate increases. But the Commission should look at the reasonableness of the risk of the increases. This analysis conforms to the concept that … "(n)o one can lawfully do that which has a tendency to be injurious to the public welfare."[4]

The Commission may approve a transaction (such as the transfer of functional control at issue here) subject to such conditions as are reasonably necessary to minimize any risk of the transaction being detrimental to the public interest. In a case typical of a series of streetcar cases in the 1930s, the Missouri Supreme Court found that the Commission could impose conditions precedent on the abandonment of streetcar lines:

> Here the Commission has the power in authorizing the street car company to abandon an existing line to require such company, as a condition precedent, to substitute bus service therefor; or at least the city has no right to object, though it may refuse to license such use of its streets.[5]

In a merger case, as in all of its actions, the Commission must bear in mind that its primary purpose is to protect the public from the monopoly power of the utilities it regulates:

> The act establishing the Public Service Commission . . . is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental.[6]

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[4] Case No. EF-2003-0465, In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber its Utility Franchise, Works or System in Order to Secure Revised Bank Financing Arrangements, Report And Order, 12 Mo.P.S.C.3d 375, 378 (2004); internal citations omitted.

[5] State ex rel. Kirkwood v. Public Service Com., 330 Mo. 507, 522 (Mo. 1932)

[6] State ex rel. Sikeston v. Public Service Com., 336 Mo. 985, 999 (Mo. 1935)

Argument

This section of this brief will address three areas in which the provisions of the Nonunanimous Stipulation and Agreement need to be strengthened: 1) changes to the provisions of paragraph 10.a of the Nonunanimous Stipulation and Agreement so that parties do not have to wait until after the damage is done to reexamine Ameren Missouri's participation in MISO; 2) separate representation of Ameren Missouri at MISO; and 3) retaining jurisdiction over the transmission component of bundled retail rates.

1. Modification of paragraph 10.a of the Nonunanimous Stipulation and Agreement so that will operate to prevent harm to Missouri ratepayers.

Public Counsel proposes that the Commission change the condition embodied in paragraph 10.a. of the Nonunanimous Stipulation and Agreement so that a party can seek re-examination of Ameren Missouri's participation in MISO **before** that participation become detrimental. That provision currently requires that a party stand patiently by, watch the event happen and wait until participation "**has become** detrimental to the public interest," and only then petition for re-examination. MJMEUC witness Wilson concurred that, at least with respect to capacity market design, the provisions of paragraph 10.a are inadequate because by the time they are triggered, "the damage will likely already have been done…." (Transcript, page 202).

As it stands, paragraph 10.a operates to impose a drastic remedy after drastic harm has taken place. It should instead operate as a mechanism to allow parties to alert the Commission of the potential for harm, and to allow the Commission to take action (for example, by modifying, adding, or removing conditions under which Ameren Missouri participates in MISO) short of requiring Ameren Missouri to withdraw from the MISO, and ideally before the harm occurs. Paragraph 10.a as filed states:

> Material Change. Notwithstanding the extended period of authority for Midwest ISO participation provided for in paragraph 9 of this 2011 Stipulation, a Stakeholder may request that the MoPSC initiate a docket (or the MoPSC may do so on its own motion) prior to 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 Commission should simply modify this provision by adding the language in **bold** and removing the word in [brackets] to state:

> Material Change. Notwithstanding the extended period of authority for Midwest ISO participation provided for in paragraph 9 of this 2011 Stipulation, a Stakeholder may request that the MoPSC initiate a docket (or the MoPSC may do so on its own motion) prior to November 15, 2015, to investigate whether a material event occurring **or expected to occur** 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] **may cause substantial harm to Ameren Missouri's ratepayers**.

2. Separate representation of Ameren Missouri at MISO.

Public Counsel believes that Ameren Missouri should seek to represent itself at MISO rather than continue to be represented by Ameren Services. Public Counsel witness Kind explained why this is necessary:

> Given the different business lines in which they are involved and differing regulatory frameworks that they operate under, it is clear that most, if not all, of these Ameren affiliates as well as their parent company, Ameren, have interests that are different from UE and UE's customers. UE and its customers cannot expect to have a representative that effectively communicates their unique interests and positions when that same representative is responsible for representing all of the other affiliates noted in the preceding paragraph. In fact, as Mr. Kramer acknowledged in his August 2, 2010 affidavit that was filed in support of the application of ATX and various Ameren operating companies in FERC Docket No. ELIO-80, he communicates "Ameren's corporate positions to Regional Transmission Organization (RTO) stakeholders and the Midwest ISO." (Exhibit 11, Kind Rebuttal, page 15).

Ameren Missouri acknowledges "the different business needs of our operating companies" with respect to MISO Module E. (Exhibit 12, Kind Surrebuttal, Attachment 2, page 84 of 113). As MISO continues to develop capacity markets, it is inevitable that these different business needs will intensify. Many questions from the bench at the evidentiary hearing explored the potential for conflicts in this area. (See, *e.g.*, Transcript, pages 115-116, 277-278)

To address this concern, Public Counsel suggests that this Commission take an approach similar to the one that the Arkansas commission took with respect to the participation of Entergy Arkansas in the MISO. The Arkansas Commission, in Docket No. 10-011-U, Order No. 54, issued October 28, 2011,[7] stated, among other similar conditions: "Participation as an independent, separate member on a single entity basis from the OpCos [other Entergy operating companies]or any other entity, including signing the TOA [Transmission Owners Agreement] on its own and, if needed, seeking a waiver from FERC or any other necessary regulatory body to allow EAI [Entergy Arkansas] to join an RTO on a separate basis, and remain a member on a separate basis from the OpCos…."

At the hearing, Mr. Kind elaborated on how the Entergy Arkansas approach would work:

> [H]olding companies that have operating companies in several states will -- and where those operating companies are vertically integrated utilities that include transmission, they will generally join MISO as -- as one -- one transmission-owning member.
> Q. Uh-huh.
> A. And that is -- I don't -- I don't believe that's the way the MISO transmission owners agreement was initially set up, but that's the way it is set up today. And so the Arkansas Commission has said you will -- that the Arkansas operating company, which is a subsidiary of the Entergy holding company, will sign the transmission owners agreement as a separate signatory and you will represent yourself separately in MISO matters, participate in MISO as a separate entity from the other Entergy affiliates.

[7] http://www.apscservices.info/pdf/10/10-011-u_655_1.pdf

> Q. So Entergy Arkansas, Incorporated would have one vote separate and apart from Entergy Mississippi and Entergy New Orleans, Entergy Texas, Entergy -- so you'd have really five or six different Entergy -- Entergy New Orleans. So each one of them would have -- would be a vote, would be a transmission-owning entity?
> A. No, I think actually what would happen, unless other states that have Entergy operating companies took -- gave the guidance similar to the guidance that's been provided by the Arkansas Commission, and I'm not aware of that happening in any of the other jurisdictions where Entergy has operating companies. I think what would happen is that you'd essentially have two Entergy groups at MISO. You would have Entergy Arkansas as a transmission owner and then you would have all the other Entergy affiliates lumped together as a transmission --
> Q. Why would they ever agree to that? If Entergy Arkansas carves out a special deal for itself, why would not all of the other operating companies request the same treatment?
> A. Well, I think -- I don't think they would request the same treatment. I think that that -- such an arrangement would have to be spurred by the regulators who oversee those other affiliates, and I haven't -- I haven't seen that happening. (Transcript, pages 253-254).

At the hearing, Judge Woodruff asked Mr. Kind whether Public Counsel's proposal would give the Ameren Companies and extra vote, which could be detrimental to the ability of Public Counsel to influence MISO policies. Mr. Kind explained why that was not the case:

> I think what we've done is we've made it more transparent what exactly is Ameren Missouri supporting at MISO. And I think actually that transparency could be helpful in -- you know, in us understanding exactly how -- how the Missouri regulated utility is putting forth its views at MISO. (Transcript, page 258).

In addition to this transparency, of course, is the benefit that Ameren Missouri would then be free to vote in its own best interests and its customers' best interests.

Commission Staff witness Adam McKinnie agrees that there "are certainly a few" situations in which "there's definitely a difference in" the interests of Ameren Missouri and other companies within the Ameren family of companies. (Transcript, page 166). Mr. McKinnie also conceded that there is nothing in the Nonunanimous Stipulation and Agreement that would prohibit an Ameren Services representative at MISO from voting in a way that's in conflict with

Ameren Missouri's best interests, and that there would be no remedy under the Nonunanimous Stipulation and Agreement unless the result of that vote were to cause Ameren Missouri's participation to be detrimental to the public interest. This is a huge loophole, because a lot of harm can be done to Missouri ratepayers before the entire participation becomes detrimental. The Commission should take steps (ordering Ameren Missouri to seek to represent itself directly at MISO) to prevent the risk of this harm.

3. Measures to maintain jurisdiction over the transmission component of bundled retail rates.

Public Counsel's most significant concern about the inadequacy of the conditions in the Nonunanimous Stipulation and Agreement (as compared to past unanimous agreements) derives from Ameren's creation of its new subsidiary, ATX. Loss of jurisdiction over part of the ratemaking process ought to cause grave concern for the Commission as well. Public Counsel witness Kind summarized the issues that have arisen from Ameren's creation of ATX:

> The primary issues associated with Ameren's stated intention to have ATX or its subsidiaries build and own the majority of new transmission facilities in Missouri that are part of the MISO transmission expansion plan are:
>
> - The loss of Missouri PSC jurisdiction over the transmission component of UE's bundled retail rates for providing service to native load customers leading to higher rates (relative to the level of UE's rates if jurisdiction is not lost) for UE ratepayers; and
> - The loss of effectiveness of the customer protection provided in Section 5.3 of the Service Agreement which required UE to "obtain the approval of the MoPSC prior to AmerenUE undertaking the construction of Transmission Upgrades in Missouri if the Transmission Upgrades are not required to support AmerenUE's specific Resource Plans but rather result from other Transmission Upgrade requirements." (Kind Supplemental Rebuttal, Exhibit 13, page 6).

Mr. Kind goes on to discuss the ways in which paragraph 10.j of the Nonunanimous Stipulation and Agreement attempts – inadequately – to address these issues:

Q. HOW DOES SUBSECTION 10.J ATTEMPT TO ADDRESS THE LOSS OF JURISDICTION THAT WOULD OCCUR IF ATX BUILDS NEW TRANSMISSION FACILITIES IN MISSOURI THAT ARE PART OF THE MISO TRANSMISSION EXPANSION PLAN INSTEAD OF UE?

A. The "rate treatment" provision applicable to affiliate built transmission would temporarily mitigate some the harm resulting from the FERC tariffed cost recovery associated with Missouri transmission facilities built by ATX but that mitigation would end in just a few years "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." This would only mitigate the increased rate impacts due to all of the FERC incentive rate treatments for a very limited period of the depreciable life of the new transmission investments but the harm to customers from the loss of jurisdiction and FERC incentive rates would continue for the life of the transmission assets (up to 50 or 60 years.).

…

Since UE does not own these facilities, there will be a revenue requirement calculation associated with these facilities for ATX or its subsidiary instead of having the revenue requirement associated with these facilities as part of the UE revenue requirement. When the revenue requirement for these new Missouri transmission facilities is collected on behalf of ATX through formula rates in Attachment O of the MISO tariff, UE customers will arguably be subject to these Attachment O charges in MISO rates for these facilities. These charges will reflect the 12.38% return on equity (ROE) that Ameren transmission assets receive under the MISO tariff instead of the generally lower ROE (by 200 basis points or more) that is part of revenue requirement calculations for UE in Missouri rate cases.

Additional FERC incentives may apply if requested and approved by FERC including the various FERC transmission rate incentives that may be sought pursuant to Section 219 of FERC Order No. 679. These transmission rate incentives include Construction Work in Progress (CWIP), Abandoned Plant Recovery, Hypothetical Capital Structure, recovery on a current basis instead of capitalizing pre-commercial operations expenses, and accelerated depreciation. Ameren Services (on behalf of ATX and other specified Ameren affiliates) submitted a Petition for Declaratory Order for Incentive Rate Treatment on August 2, 2010 in FERC Docket No. EL10-80-000. On May 19, 2011 FERC issued its Order on Transmission Rate Incentives in that docket which approved the request for certain rate incentives for a couple of major transmission

projects and denied, without prejudice, the requests pertaining to two other projects.[8]

Q. WOULD THE RATE TREATMENT PROVISIONS IN SUBSECTION 10.J OF THE AGREEMENT INSURE THAT UE'S MISSOURI RETAIL CUSTOMERS ARE HELD HARMLESS FROM THE ADVERSE IMPACTS OF ALL INCENTIVE RATE TREATMENTS THAT FERC MAY HAVE APPROVED FOR ATX OR ANOTHER AMEREN AFFILIATE THAT CONSTRUCTS AND OWNS FACILITIES IN MISSOURI THAT ARE PART OF THE MISO TRANSMISSION EXPANSION PLAN?

A. No. First of all, as I previously noted, the rate protections in Subsection 10.j are only effective for a few years, during the time in which the extension of the interim approval for UE to participate in MISO provided for in the Agreement is in effect. Charges that would impact UE's retail customers for the remainder of the life of the transmission assets would not be adjusted pursuant to Subsection 10.j and UE's Missouri ratepayers would still be subject to these charges, inflated by the FERC ROE and possibly additional Transmission Rate Incentives, for the life of the transmission assets.

In addition, the Transmission Rate Incentives that are addressed in Subsection 10.j are limited to the FERC ROE, hypothetical capital structure, and CWIP. The increased charges that could be imposed on UE's Missouri retail customers from other possible FERC Transmission Rate Incentives including Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses, and accelerated depreciation are not addressed by Subsection 10.j.

The other way that Subsection 10.j falls short of providing full rate protection to UE's Missouri retail customers, even for the limited time that it would be in effect, is the geographical restriction on the rate treatment provisions. The rate treatment provisions are only effective for "facilities located in Ameren Missouri's certificated service territory." This could exclude portions of major transmission upgrades included in MISO's most recent transmission expansion plan such as the Mark Twain project which according to Ameren's December 8, 2011 press release (See Attachment A) regarding ATX projects that have been approved by MISO is "preliminarily estimated to cost $230 million" and "will span 89 miles in Missouri of new 345-kilovolt transmission line from the Iowa border to Adair, Mo., on to Palmyra, Mo." (Kind Supplemental Rebuttal, Exhibit 13, pages 6-7; 11-13).

Staff witness McKinnie identified just two mechanisms to address these issues: 1) the fact that an entity such as ATX would be legally required to seek a Certificate of Convenience

[8] See also Transcript, page 316, lines 3-17.

and Necessity from the Missouri Commission; and 2) paragraph 10.j. of the Nonunanimous Stipulation and Agreement. There are significant flaws in each of these mechanisms that prevent them from adequately protecting the public from potential detriments arising from Ameren Missouri's participation in MISO. Mr. McKinnie recognized that the effectiveness of the requirement that ATX seek a CCN is limited by a large number of factors:

> Q. Now, with respect to the -- the whole concept that the Commission maintains jurisdiction through conditions that it can impose in future CCN cases, would the effectiveness of that jurisdiction necessarily depend upon future Staff members or some other party raising such issues in CCN cases?
>
> A. I would assume that that would have a large effect on what conditions came out. I believe there may be other factors at play.
>
> Q. Okay. Would it also not depend on future Commissions being willing to order such conditions?
>
> A. Yes, that would be one of the other factors at play.
>
> Q. So the effectiveness of this future CCN case depends on, one, the accuracy of the opinion that current law requires a CCN for transmission; is that true?
>
> A. Yes, that would be one factor.
>
> Q. Okay. Does it also depend on the current law not being changed?
>
> A. I would assume that would be a factor as well.
>
> Q. Okay. Does it also depend on Staff or some other party advocating for appropriate conditions on a CCN?
>
> A. That would be -- that would be a factor that could influence the outcome. I believe there would be other factors, of course, as well.
>
> Q. Okay. If no party is advocating for conditions, how -- how would it come up in such a case?
>
> A. Again, not a lawyer, but I'm not sure whether or not the Commission could issue one on its own, if it developed some sort of record or did something of that nature. But that was one of the things that we -- that we discussed earlier. It would be based on the willingness of the Commission to effectuate such a condition. (TR. 145-147)

Any one of these factors could render the CCN requirement ineffective as a protection for Ameren Missouri's Missouri ratepayers, and the fact that there are so many of them makes the "protection" shaky at best.

Two of these factors merit further discussion: the question of whether current law requires a transmission company such as ATX obtain a CCN from the Missouri Commission for projects such as the Mark Twain project; and the question of whether the current law will remain unchanged. Not only has Ameren Missouri has not conceded in this case that current law would require a CCN for projects like the Mark Twain project, Ameren Missouri and all of Ameren question whether a CCN would be required. Ameren Missouri witness Borkowski testified that the state of the law with respect to CCNs for transmission construction needs "clarification … at a later date…." She also testified that "within all of Ameren … [it is thought to be] unclear what the – what the law states at this point." (Transcript, pages 300, 302). With respect to the second factor (whether the law will remain the same) the Commission is respectfully directed to pages 15 of 45 and 16 of 45 of Attachment B to the Highly Confidential Supplemental Rebuttal Testimony of Ryan Kind (Exhibit 13). In order to keep this entire brief free of Highly Confidential information, this factor will not be further discussed herein.

If ATX builds transmission projects and receives "bonus" rates (high returns on equity, Construction Work in Progress, accelerated depreciation, etc.) from FERC, and indirectly (through MISO-approved charges) passes those higher rates to Ameren Missouri's Missouri customers, it is arguable that the filed rate doctrine[9] would prohibit the Missouri Commission from adjusting Ameren Missouri's retail rates to eliminate those bonus rates. If Ameren Missouri itself – the only entity existing or even contemplated to exist in the previous unanimous agreements – built the same facilities and received the same bonus rates, there is no question that

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[9] See, *e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 and Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354.

the Missouri Commission could adjust Ameren Missouri's retail rates to eliminate those bonus rates. Staff witness McKinnie discussed the Commission's disparate abilities with respect to Ameren Missouri and ATX, and recognized that nothing other than the limited protections in paragraph 10.j. of the Nonunanimous Stipulation and Agreement would allow the Commission to adjust bonus rates granted to ATX and passed on to Ameren Missouri:

> A. With regard to things that exist currently absent paragraph (j), I would say that the Commission would retain jurisdiction over Ameren Missouri's -- I'll say transmission component of the bundled retail rate when Ameren Missouri builds. But other than that, it -- it, again, would be difficult for the -- for the Commission. I cannot identify another existing -- existingly effective item that would permit the Commission to retain jurisdiction. (TR. 157-158)

Ameren's decision to form ATX creates the very real risk that rates for Ameren Missouri's Missouri retail customers will be higher because ATX will be building transmission projects rather than Ameren Missouri. The Commission must impose conditions on Ameren Missouri's participation in MISO that will eliminate this risk.

Public Counsel witness Kind also addresses this question:

> Q. DO YOU BELIEVE THE INCLUSION OF THE RATE TREATMENT PROTECTION PROVISION IN SUBSECTION 10.J IS CONSISTENT WITH THE VIEWS OF THE SIGNATORIES EXPRESSED IN THE AGREEMENT THAT THE COMMISSION HAS: (1) JURISDICTION OVER THE TRANSMISSION COMPONENT OF AMERENUE'S RATES TO SERVE ITS BUNDLED RETAIL LOAD; AND (2) THE ABILITY TO SET THE TRANSMISSION COMPONENT OF AMERENUE'S RATES?
> A. No. If the Commission truly retained this jurisdiction and rate-setting capability despite the prospect of ATX building major transmission facilities in Missouri (included in the MISO transmission expansion plan) instead of UE, then there would be no need for the limited customer rate protections that are afforded by Subsection 10.j. Subsection 10.j. is essentially a Band-Aid. It is designed to last for just a few years and ignores the harm from the loss of jurisdiction that will last for decades. (Kind Supplemental Rebuttal, Exhibit 13, page 10).

In its opening statement, Ameren Missouri very briefly touched on this issue, stating that:

> even if one were to accept OPC's unproven premise that if ATX were to build a line in Missouri, a regional line in Missouri, that Ameren Missouri's rates could be higher than if Ameren Missouri built it. Even if you accepted that premise, which we don't, but even if you accepted it, the evidence will show that whatever that impact would be, would be so immaterial, particularly if you're looking at what we're looking at here, MISO participation for the next few years, that it would barely impact the overwhelming benefits of MISO participation. It certainly comes nowhere close to turning that participation into a detriment to the public interest.[10]

Public Counsel submits that Ameren Missouri's opening statement is wrong on several levels. First, Ameren Missouri presented no evidence to counter this fairly obvious premise. It certainly refused to "put its money where its mouth is" and commit to absorb any such rate impacts. If these higher rates won't occur, or if they will be immaterial if they do occur, why won't Ameren Missouri just agree never to pass them through to Missouri customers?

But Ameren Missouri knows that: 1) rates could very well be higher; 2) that the impact on Missouri ratepayers could very well be significant; and, because of 1) and 2), returns to the Ameren holding company could be impacted if Ameren Missouri agreed. Since Ameren Missouri will not voluntarily agree to reasonable conditions, the Commission must impose them to prevent Missouri ratepayers from paying higher rates because of Ameren's decision to create ATX and Ameren Missouri's refusal to agree to protect Missouri ratepayers from that decision.

In his Supplemental Rebuttal testimony, Mr. Kind outlines a condition that would serve to both (1) provide long-term and comprehensive rate protection to UE's Missouri retail customers and (2) not diminish the Commission's jurisdiction over the transmission component of the rates set for Bundled Retail Load. Such an additional condition modeled on the approach

[10] Transcript, pages 28-29.

used in paragraph 10.c. of the Nonunanimous Stipulation and Agreement, which is not limited in time or geographic scope, was delineated by Mr. Kind:

> Transmission Rate Incentives. Ameren Missouri acknowledges that the Service Agreement's primary function is to ensure that the MoPSC 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 "Transmission Rate Incentives" pursuant to Section 219 of FERC Order No. 679 as part of the revenue requirement for providing Transmission Service (as that term is defined in the Service Agreement) to wholesale customers within the Ameren zone, such "Transmission Rate Incentives" shall not apply to the transmission component of rates set for Bundled Retail Load by the MoPSC. (Exhibit 13, Kind Supplemental Rebuttal, page 13).

Conclusion

The Missouri Public Service Commission has twice in the past approved Ameren Missouri's participation in the MISO, both times pursuant to unanimous agreements. In this case, some of the parties settled on an agreement that has demonstrably less effective protection for ratepayers. Public Counsel was not willing to settle for weakened consumer protections, and neither should the Commission. The Commission should allow Ameren Missouri's continued participation in the MISO, but only subject to the conditions outlined herein.

WHEREFORE, Public Counsel respectfully offers this Initial Post-hearing Brief and prays that the Commission conform its decision in this case to the arguments contained herein.

Respectfully submitted,

OFFICE OF THE Public Counsel

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By:______________________________

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 9th day of May 2012.