

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

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

**COMES NOW** The Empire District Electric Company (Empire), and, in response to the Application for Rehearing of Entergy Arkansas, Inc. (EAI), states as follows to the Missouri Public Service Commission (Commission):

## INTRODUCTION

On October 9, 2013, the Commission issued its Report and Order in this case.

Therein, among other things, the Commission decided as follows:

The Commission has jurisdiction over the applicants and the proposed migration of the functional control of EAI's transmission assets into MISO. EAI has a certificate of convenience and necessity with the Commission. EAI owns electrical plant in Missouri that is being used to serve the public, and EAI wishes to transfer functional control of that plant to MISO. As such, as stated in Section 393.190.1 RSMo, the Commission has jurisdiction over the transfer.

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 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.

On November 7, 2013, EAI filed its Application for Rehearing. The Commission later issued its Order Directing Filing on November 12, 2013, directing Staff, KCP&L, GMO and Empire to respond to the Application for Rehearing by November 21, 2013.

### **JURISDICTION**

The question of whether the Commission has jurisdiction over the subject transaction pursuant to Section 393.190.1, RSMo, has been thoroughly argued in motions, responses, briefs and reply briefs in this case. Neither the facts nor the arguments have changed in regard to this question. Empire's position is found in its Initial Brief and Reply Brief.

### **DETRIMENT/CONDITIONS**

In its Application for Rehearing, EAI alleges that the "Commission did not and cannot find any net detriment . . . ." It further alleges that the Commission is preempted from "*imposing* a hold harmless condition" and "from *requiring* the amendment to the Joint Operating Agreement" (emphasis added). EAI further alleges that the "conditions *imposed* . . . violate the Commerce Clause of the U.S. Constitution" (emphasis added).<sup>1</sup>

As an initial matter, the Commission did make findings as to detriment. Findings numbered 13, 17, 20, 21, 22, 23, and 27, in the Report and Order identify detriment to the Missouri public interest from the proposed transaction, without offsetting benefit. The Commission further stated that "[w]ithout such conditions, ratepayers of Missouri's non-MISO utilities, namely, ratepayers of Empire, GMO and KCP&L, could suffer 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. ” Report and Order, Case No. EO-2013-0431, p. 12-13. EAI does not challenge the existence of the identified detriments in its Application for Rehearing.

Section 393.190.1, RSMo, states, in part, as follows:

No . . . electrical 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.

The Commission found, as a matter of law, that “A Missouri regulated utility must obtain permission from the Commission to transfer functional control of any part of its electric plant to MISO.” Section 393.190.1 RSMo; *See In re Union Electric Company*, File No. EO-2011-0128, Report and Order (April 19, 2012).

“The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest.” *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980). Stated another way, “the standard implicit in the applicable statute [393.190.1] is the absence of public detriment. Like the standard, the authority to condition the transfer is not express. But guarding against public detriment implicitly includes conditions to that end, which is more efficient than denial of an imperfect application.” *In the Matter of the Application of Transource Missouri, LLC*, File No. EA-2013-0098 (MoPSC 2013).

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<sup>1</sup> The Entergy operating companies, including EAI, are no strangers to “conditional” orders related to the transfer of functional control to MISO, as they have gone to great lengths to comply with state commission “conditions” to effectuate such a transfer in several states.

The Report and Order refers to a prior Commission decision concerning a transfer of functional control of transmission assets to MISO, wherein the Commission stated that it:

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.

*Report and Order, citing In re Union Elec. Co.*, Commission File No. EO-2011-0128, Report and Order, p. 20 (April 19, 2012).

EAI's focus on the Commission's authority in regard to the conditions identified in the Report and Order is an example of "failing to see the forest for the trees." Conditions are only identified where the Commission has found a potential detriment to the public interest. Conditions identify methods that may be used to cure what would otherwise result in detriment to the public interest and allow the proposed transaction to proceed.

EAI's Application for Rehearing seems to instead suggest that if this Commission does not have authority to "order" the conditions, the transaction must move forward as proposed. The Commission's jurisdiction in regard to the conditions, however, is of limited import. If, for whatever reason, the identified conditions cannot be met, the consequence is that the proposed transaction will continue to be detrimental to the public interest and EAI would not have an order from the Commission authorizing the proposed transaction, which is required by law.

In other words, if EAI is right about the conditions, the proposed transaction MAY NOT move forward, as there will be detriment to the public interest and EAI will not have

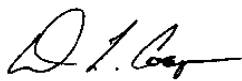
“secured from the commission an order authorizing it so to do.” Section 393.190.1, RSMo.

### **CONCLUSION**

Because these issues arise within a proceeding where the Commission’s approval of a proposed transaction is required, the Commission need not pass on the preemption question or U.S. Constitution issues raised by EAI. The Commission’s authority allows it to determine whether the results of the proposed transaction is detrimental to the public interest and, if so, whether conditions should be identified that will mitigate that detriment. If those identified conditions cannot be satisfied, the transaction may not move forward. Accordingly, to the extent the Commission may agree with the legal arguments raised by EAI in its Application for Rehearing, the Commission should grant rehearing and issue a modified order denying EAI permission to transfer functional control.

**WHEREFORE**, Empire prays that the Commission consider this response and, thereafter, deny the Application for Rehearing of Entergy Arkansas, Inc.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on November 21, 2013, to the following:

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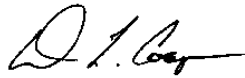
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