

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

In the Matter of the Joint Application of)
Entergy Arkansas, Inc., Mid South)
TransCo, LLC, Transmission Company)
Arkansas, LLC, and ITC Midsouth LLC,)
for Approval of Transfer of Assets and)
Certificate of Convenience and Necessity,)
and Merger and, in connection therewith,)
Certain Other Related Transactions.)

Case No. EO-2013-0396

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 BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and for its
Brief, states as follows:

INTRODUCTION

This proceeding concerns two related cases that were heard together, but not formally consolidated.¹ Nonetheless, the Commission will likely dispose of them by a single order.

Case No. EO-2013-0396:

Case No. EO-2013-0396 concerns the application of Entergy Arkansas, Inc. ("EAI"), Mid South TransCo LLC, Transmission Company Arkansas, LLC ("TC

¹ See ***Order Granting Interventions and Setting Procedural Schedule***, issued April 18, 2013.

Arkansas”) and ITC Midsouth LLC (“ITC Midsouth”) (collectively, “Joint Applicants”), for approval of the transfer of ownership of the transmission assets of the Entergy Operating Companies² to a subsidiary of ITC Holdings Corporation (the “Transaction”).³ The Joint Applicants assert that the result of the Transaction will be ownership of the Entergy Operating Companies’ transmission assets by an independent, transmission-only company with no generation or distribution assets.⁴

EAI holds a certificate of convenience and necessity (“CCN”) granted by this Commission in Case No. EA-2012-0321 and operates certain electric transmission and distribution facilities in several Missouri counties.⁵ These facilities are used to furnish electricity at wholesale to various Missouri regulated utilities, municipalities and cooperatives under rates set by the Federal Energy Regulatory Commission (“FERC”) and to furnish electricity at retail to customers in northern Arkansas under rates set by the Arkansas Public Service Commission (“APSC”).⁶ EAI has no retail customers in Missouri.⁷

² The Entergy Operating Companies include EAI; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc. **Joint Application**, n. 1.

³ EAI is an Entergy Operating Company; EAI and Mid South TransCo are Entergy subsidiaries. TC Arkansas is a subsidiary of EAI. ITC Midsouth is a subsidiary of ITC Holdings Corporation. **Joint Application**, ¶¶ 3-6.

⁴ **Joint Application**, ¶ 1.

⁵ The application lists five: New Madrid, Dunklin, Oregon, Pemiscot, and Taney. EAI was formerly known as Arkansas Power & Light (“AP&L”) and operated in Missouri as a traditional, integrated and regulated public utility providing electric service to customers under tariffs approved by this Commission. In 1991, the Commission allowed AP&L to sell most of its Missouri facilities, including its Missouri retail electric business, to Union Electric Company, now doing business as Ameren Missouri, and to Sho-Me Power Corporation. AP&L, now EAI, retained the facilities that are the subject of this docket. As part of its final order in 1991, the Commission cancelled AP&L’s certificates and relieved it of its obligation to serve the public. EAI’s current CCN was granted in 2012 to cover both a new interconnection to a cooperative and EAI’s existing Missouri facilities. **Joint Application**, ¶¶ 3, 9, 10.

⁶ *Id.*

⁷ *Id.*

The Transaction contemplates that EAI will reorganize and will transfer its Missouri transmission facilities to its subsidiary TC Arkansas, which will then become a subsidiary of Mid South TransCo, which will be “spun off” and merged with ITC Mid South.⁸ EAI’s Missouri transmission facilities will be held by TC Arkansas under its new name of ITC Arkansas; the Joint Applicants request that the Commission grant a CCN to ITC Arkansas.⁹ EAI will retain its limited distribution facilities in Missouri for the purpose of serving its retail load in northern Arkansas. Out of an abundance of caution, the Joint Applicants seek the approval of this Commission, although they don’t really believe that they need it.¹⁰ Staff recommends that the Commission grant the requested authority, CCN and waivers and allow the Transaction to go forward as proposed.

Case No. EO-2013-0431:

Case No. EO-2013-0431 concerns EAI’s notice and application for authority to transfer functional control of its transmission facilities to the Midcontinent Independent System Operator (“MISO”), a Regional Transmission Organization (“RTO”).¹¹ EAI does not believe that it is necessary to obtain authority from this Commission for this transfer

⁸ *Id.*, ¶ 5.

⁹ *Id.*, ¶¶ 11, 12.

¹⁰ *Id.*, n. 4.

¹¹ **Notification of Intent**, ¶ 1. According to the United States Energy Information Administration (“USEIA”): “Ten Regional Transmission Organizations (RTOs) operate bulk electric power systems across much of North America. RTOs are independent, membership-based, non-profit organizations that ensure reliability and optimize supply and demand bids for wholesale electric power. In 2009, U.S. RTOs managed 60% of the power supplied to load-serving entities. In other parts of the country, electricity systems are operated by individual utilities or utility holding companies. RTOs first developed in the 1990’s to accommodate the Federal Energy Regulatory Commission’s (FERC) policy to encourage competitive generation through requiring open access to transmission. In the Northeast, the RTOs evolved from power pools that had coordinated utility operations for many decades. Elsewhere (the Midwest, California and Texas), RTOs grew up to meet both State and federal policies on competitive generation and open transmission access. RTOs have many different types of members: independent generators, transmission companies and load-serving entities, integrated utilities that combine generation, transmission and distribution functions, and other entities such as power marketers and energy traders.”

and urges the Commission to conclude that it lacks jurisdiction over the proposed transfer and to dismiss this docket.¹² EAI also states that it has obtained or is seeking authority for the transfer from the FERC and from five other state regulatory authorities, including the APSC.¹³ The Missouri transmission facilities involved are the same facilities that EAI seeks to transfer to ITC Arkansas. Staff recommends that the Commission grant the requested authority.

The Intervenor:

Opposing the Transaction and transfer of functional control to MISO are three Missouri-regulated public utilities and a public agency that represents the interests of a number of Missouri utilities. The public utilities are the Empire District Electric Company (“Empire”), Kansas City Power and Light Company (“KCPL”) and KCPL Greater Missouri Operations Company (“GMO”);¹⁴ the public agency is the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”). Each of the Intervenor uses transmission facilities that are part of the Transaction and their opposition is based primarily on their belief that their costs for the use of that transmission will increase. Thus, Empire states: “Empire’s testimony shows that greater costs to Missouri customers should be expected as a result of the contemplated transaction.”¹⁵ KCPL and GMO state, “KCP&L’s off-system sales margin will likely decrease, which will have a direct impact on Missouri retail customers, as such off-system sales are used to

¹² *Id.*, ¶ 4.

¹³ *Id.*, ¶ 1. Evidently EAI believes that those state regulatory agencies and the FERC do have jurisdiction over the proposed transfer.

¹⁴ KCPL and GMO are both subsidiaries of Great Plains Energy, a publicly-traded public utility holding company.

¹⁵ *Empire’s Statement of Position*, p. 2.

reduce power supply costs for Missouri retail customers.”¹⁶ MJMEUC goes so far as to urge the Commission to condition its approval on the Joint Applicants holding MJMEUC harmless from “the results of these transactions.”¹⁷

ARGUMENT

For convenience’ sake, Staff will address the issues raised by the two cases together.

Jurisdiction:

Does the Missouri Public Service Commission have jurisdiction to grant, deny or condition the Transaction and the transfer of functional control? The Joint Applicants take the position that the Commission lacks jurisdiction over both the Transaction and the transfer of functional control, but nonetheless have applied to this Commission for approval out of an abundance of caution. The Intervenor asserts that the Commission does have jurisdiction and urge it to deny the applications or grant them with conditions. It is Staff’s position that the Commission has jurisdiction over both matters and should grant the applications.

In Missouri, jurisdiction encompasses both the authority to hear and determine a case of the sort at bar and to grant the requested remedy.¹⁸ The Joint Applicants state in their application that EAI has a CCN granted by this Commission and, pursuant to that authority, owns and operates certain transmission and distribution facilities in several Missouri counties, although EAI does not serve any retail customers in Missouri

¹⁶ ***[KCPL & GMO] Statement of Position***, p. 3.

¹⁷ ***[MJMEUC] Statement of Position***, p. 3.

¹⁸ J. Devine, ***Missouri Civil Pleading and Practice***, § 9.1 (1986), citing ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 72 (Mo. banc 1982).

and has no Missouri tariffs.¹⁹ The Commission is a creature of statute and its jurisdiction, if any, in any situation must be found by reference to the plain language of the Missouri statutes.²⁰

Section 386.020(15), RSMo, defines an “electrical corporation” as: “every corporation . . . owning, operating, controlling or managing any electric plant”²¹

“Electric plant,” in turn:

includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power[.]²²

EAI’s Missouri facilities, according to its own statements in its application, are used for the transmission and distribution of electricity that is certainly used eventually for “light, heat or power.”²³ Pursuant to § 386.020(43), RSMo, EAI appears to be a “public utility” subject to the “jurisdiction, control and regulation” of this Commission. The Commission evidently recognized as much in 2012 when, without discussion, it granted a CCN in Case No. EA-2012-0321 to EAI covering both the proposed new interconnection that was the subject of that case and EAI’s existing Missouri facilities.²⁴ Although EAI has

¹⁹ **Notification of Intent**, ¶ 5.

²⁰ **State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission**, 585 S.W.2d 41, 47 (Mo. banc 1979).

²¹ With certain enumerated exceptions not pertinent here.

²² Section 386.020(14), RSMo.

²³ The application states that the transmitted and distributed electricity is sold at wholesale to Missouri municipalities and cooperatives, and used to serve their retail loads, and sold at retail to customers in Arkansas. It can thus be inferred that all of the electricity serves end users who use it for light, heat and power.

²⁴ **In the Matter of the Application of Entergy Arkansas, Inc.**, Case No. EA-2012-0321 (**Order Granting Certificate of Convenience and Necessity**, issued July 11, 2012).

no Missouri tariffs and serves no Missouri retail load, those facts are irrelevant to the cited statutes.

However, in an early case, ***State ex rel. M.O. Danciger & Co. v. Public Service Commission*** (1918), the Missouri Supreme Court added a gloss to § 386.020:²⁵

While the definitions quoted supra [of “electric plant” and “electrical corporation,” found now at §§ 386.020(11) and (12),] express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words “for public use” are to be understood and to be read therein. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.

The ***Danciger*** case involved a brewery in Weston, Missouri, that generated electricity for its own use and sold surplus power to friends of the proprietor that were invited to run a wire to the brewery and hook up.²⁶ One of these “friends” was the owner of the newspaper and, after he published an article contrary to the interests of the brewer, the latter cut off his power and refused to serve him further.²⁷ The Court found for the brewer on the grounds that he had never undertaken to serve the general public.²⁸ For this reason, he was not a public utility and had no corresponding duty to serve the public.²⁹

Danciger is still good law in Missouri but perhaps would be decided differently today. Staff suggests that it does not stand for the proposition that an electric corporation must sell electricity at retail to be subject to regulation by the Commission

²⁵ ***State ex rel. M.O. Danciger & Co. v. P.S.C.***, 257 Mo. 483, 205 S.W. 36, 39 (1918).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

because it expressly states that “[t]he electric plant must . . . be devoted to a public use before it is subject to public regulation.”³⁰ On the present record, while the electric plant in question is not used to make retail sales in Missouri, they are unquestionably devoted to a public use and are coupled with a public interest. In an Ohio case, the court stated: “it is not a controlling factor that the corporation supplying service does not hold itself out to serve the public generally. * * * Regardless of the right of the public to demand and receive service in a particular instance, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations.”³¹ The operations of the electric plant at issue here are necessarily a matter of sufficient public interest to support the imposition of regulation by the state of Missouri to protect that interest, to the extent that state regulation is not displaced by federal regulation.

On the present record, there is no question that the use of the transmission assets at issue in this case is subject to regulation by the FERC.³² The activities of transmitting and selling electricity at wholesale in interstate commerce are regulated by the FERC and not by state commissions.³³ The FERC’s jurisdiction extends to and includes the facilities used for these activities.³⁴ Nonetheless, the physical assets in question are located in Missouri and are thus subject to the police power of this state.³⁵ In our federal system, FERC regulation in some instances displaces regulation by this

³⁰ *Id.*

³¹ ***Industrial Gas Co. v. Public Utilities Commission***, 135 Ohio St. 408, ___, 21 N.E.2d 166, 168 (1939), and see ***Iowa State Commerce Commission v. Northern Natural Gas***, 161 N.W.2d 111 (Iowa 1968).

³² 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).

³³ *Id.*

³⁴ *Id.*

³⁵ ***New York v. FERC***, *supra*, 535 U.S. at 17-18, 122 S.Ct. at 1023, 152 L.Ed.2d at ___.

Commission and in others exists concurrently with it and in yet others leaves it undisturbed.³⁶ However, it is not necessary to parse precisely what jurisdiction this Commission retains over the assets in question in this case to conclude that the Commission has the authority to grant, deny or condition the two applications now before it. This Commission retains jurisdiction over the assets in question to the extent permitted by the Constitution and laws of the United States.

In pointing out that this Commission has jurisdiction over this matter, Staff is not unmindful of the fact that other regulatory bodies also have jurisdiction. The Arkansas PSC has jurisdiction over EAI's operations in that state; this Commission does not. FERC has jurisdiction over EAI's interstate transmission business, including its sale of electricity at wholesale to Missouri municipalities and cooperatives, while this Commission does not.³⁷ Nonetheless, this Commission has jurisdiction over the act of owning and operating electric plant in Missouri and thus over the transfer of that plant, including the transfer of functional control of that plant.³⁸

³⁶ 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.

³⁷ Section 386.030, RSMo, and § 394.160, RSMo.

³⁸ 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. PSC*, 259 Mo. 704, ___, 168 S.W. 1156, 1163 (banc 1914). Thus, while the Commission's ratemaking power over EAI's sales at wholesale to Missouri municipalities and cooperatives is pre-empted, the Commission retains the authority to prohibit EAI from ceasing such sales and EAI therefore needs the Commission to relieve it of its duty to serve.

The Applicable Standard:

Staff advises the Commission that it must grant the applications unless it determines that doing so would be detrimental to the public interest.

The Joint Applicants seek authority for EAI to reorganize and to transfer away some of its electric plant, and they seek a CCN for TC Arkansas/ITC Arkansas to own and operate that transferred electric plant, and also various waivers and other incidental authorities necessary to consummate the transaction. Because EAI is a Missouri public utility and TC Arkansas/ITC Arkansas will become a Missouri public utility should the Transaction be consummated, this Commission's approval is required for the Transaction to go forward. EAI will retain some of its electric plant and thus will continue to need its CCN to do so.

The Joint Applicants also seek authority to transfer functional control of that plant to MISO. It has been the Commission's position that a Missouri regulated electric utility must obtain permission from the Commission to transfer functional control of any part of its electric plant to MISO under § 393.190.1, RSMo.³⁹

What is the standard that governs the Commission's decisions on these applications? "Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission."⁴⁰ The Missouri Supreme Court has stated that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public."⁴¹ More emphatically, the

³⁹ See e.g. *In the Matter of the Application of Union Electric Company*, Case No. EO-2011-0128 (*Report and Order*, issued April 19, 2012), p. 19.

⁴⁰ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980); § 393.190.1, RSMo.

⁴¹ *State ex rel. City of St. Louis v. PSC*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934).

Missouri Court of Appeals held that “[t]he 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.”⁴² The electric plant in question is clearly necessary and useful to EAI, and presumably will be equally useful to its successor, in performing its duties to the public, namely, the Missouri citizens that rely on the electricity transmitted and distributed by EAI for light, heat and power.

A court has said of § 393.190.1, RSMo., that “[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.”⁴³ 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 assets safely and efficiently. Prior decisions of this Commission explain that denial requires compelling evidence on the record that a public detriment is likely to occur.⁴⁴ While the Joint Applicants have the burden of proof, those asserting a specific detriment have the burden of going forward as to that allegation.⁴⁵ The Joint Applicants are not required to show that the transfer is beneficial to the public.⁴⁶ The Commission must evaluate both the present and future impacts of a

⁴² *Fee Fee Trunk Sewer*, *op. cit.*

⁴³ *Id.*

⁴⁴ *In the Matter of KCP&L*, Case No. EM-2001-464 (**Order Approving Stipulation & Agreement and Closing Case**, issued Aug. 2, 2001).

⁴⁵ *Anchor Centre Partners, Ltd. v. Mercantile Bank, NA*, 803 S.W.2d 23, 30 (Mo. banc 1991); *In the Matter of Gateway Pipeline Co., Inc.*, Case No. GM-2001-585 (**Report & Order**, issued Oct. 9, 2001).

⁴⁶ *In the Matter of Sho-Me Power Corp.*, Case No. EO-93-259 (**Report & Order**, issued Sep. 17, 1993).

proposed transfer at the time it makes its decision.⁴⁷ What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered.⁴⁸ The Commission must weigh the risk of any future detriment, such as a rate increase, together with the other possible benefits and detriments of record and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public.⁴⁹

Should the proposed Transaction and Transfer of Control be approved?

Staff is of the opinion that the likely benefits of the Transaction and transfer of control outweigh the possible detriments and that the applications should therefore be approved.

Detriments

John Carlson testified that KCPL and GMO currently have four firm point-to-point transmission service requests on Entergy's system, totaling 300 MW, originating at GMO's Crossroads Generating Station in Clarksdale, Mississippi, and terminating eventually at GMO.⁵⁰ The Crossroads Station is a peaking facility and Carlson estimated the impact of MISO's higher transmission rates at about \$6.1 million annually, a 100% increase.⁵¹ Although the cost of wheeling power from the Crossroads Station to GMO is presently excluded from GMO's retail rates, this cost increase may impact Missouri ratepayers in the future if the Commission allows these costs into rates.⁵²

⁴⁷ ***AG Processing, Inc. v. PSC***, 120 S.W.3d 732, 736 (Mo. banc 2003).

⁴⁸ *Id.*

⁴⁹ ***Intercon Gas, Inc. v. PSC***, 848 S.W.2d 593, 597-98 (Mo. App., W.D. 1993).

⁵⁰ Ex. 18 HC, *Carlson Rebuttal*, pp. 3-4.

⁵¹ Ex. 18 HC, *Carlson Rebuttal*, p. 6; Tr. 2:184.

⁵² Ex. 18 HC, *Carlson Rebuttal*, pp. 6-7.

Even if not allowed in rates, the increased costs will put financial pressure on Great Plains Energy, GMO's owner, that may have a negative impact on Missouri ratepayers.⁵³ Mr. Carlson also testified that the applications, if granted, will decrease KCPL's off-system sales margin by perhaps \$2.0 million to the detriment of KCPL's Missouri ratepayers.⁵⁴ Mr. Carlson was not able to say whether the benefits of the proposed Transaction and transfer of control outweighed the detriments.⁵⁵

Charles Locke testified on behalf of KCPL and GMO that the Joint Applicants have not provided sufficient information for the Commission to evaluate whether the proposed Transaction and transfer of control are detrimental to the public interest.⁵⁶ In particular, Mr. Locke testified, additional information is needed as to potential impacts on Missouri customers due to changes in transmission rates that would result from either the merger contemplated in Case No. E0-2013-0396 or the transfer of functional control to an RTO contemplated in Case No. E0-2013-0431.⁵⁷ Mr. Locke also testified that "[t]here also are a number of unresolved issues and questions related to reliability, safety, and cost that would result from new power flows across Missouri transmission facilities when either the merger is completed or the transfer of functional control is completed even without the proposed merger."⁵⁸ Mr. Locke's safety and reliability concerns relate to new and altered flows of energy across the grid in Missouri.⁵⁹ Mr. Locke testified that rates for transmission services used by KCPL and GMO are likely to

⁵³ Ex. 18 HC, *Carlson Rebuttal*, p. 7.

⁵⁴ Ex. 18 HC, *Carlson Rebuttal*, pp. 9-10; Tr. 2:187.

⁵⁵ Tr. 2:188.

⁵⁶ Ex. 19, *Locke Rebuttal*, pp. 2-3.

⁵⁷ *Id.*, at p. 3.

⁵⁸ *Id.*; Tr. 2:194.

⁵⁹ Tr. 2:196-98.

increase if the applications are approved, perhaps by as much as 100%.⁶⁰ Mr. Locke was not able to quantify any of these concerns due, he said, to the insufficiency of the information provided by the Joint Applicants.⁶¹

Bary Warren testified on behalf of Empire District Electric Company that Empire is a firm point-to-point transmission services customer of EAI; that it is interconnected with EAI's facilities at the Ozark Beach Hydro Plant near Forsyth, Missouri; that this interconnection is necessary to bring about 100 MW of purchased and owned power to Empire from the Plum Point Power Station near Osceola, Arkansas; and that transfer of functional control to MISO and application of MISO rates to Empire's transmission services purchases will result in increased costs of about \$ 1.2 million annually, 89% of which cost increase – about \$1.0 million -- will necessarily be passed on to Empire's Missouri customers.⁶² Mr. Warren was not able to quantify the negative impact for Empire of the Transaction.⁶³ This amount likely will not represent all of the increased costs.⁶⁴ Increased costs would necessarily be passed on to Missouri customers.⁶⁵ Mr. Warren further testified that the Joint Applicants have not provided sufficient information for the Commission to evaluate whether the public interest impact of the proposed Transaction and transfer of control and that the Commission should therefore deny them.⁶⁶ Mr. Warren testified that Empire shares the concerns of KCPL and GMO as to

⁶⁰ *Id.*, at p. 4.

⁶¹ Tr. 2:193-94.

⁶² Ex. 21, *Warren Rebuttal*, pp. 6-8.

⁶³ Tr. 2:209-210.

⁶⁴ Ex. 20, *Warren Rebuttal*, pp. 10, 12.

⁶⁵ Tr. 2:215.

⁶⁶ Tr. 2:209.

reliability and safety.⁶⁷

Cameron Bready testified for ITC that he expected transmission rates in the Arkansas zone to increase by \$20.8 million or 8.1% as a result of the transactions.⁶⁸ This increase would be offset by a 5-year rate mitigation plan funded by EAI and ITC in the amount of \$85.0 million for customers in Arkansas and Missouri.⁶⁹ The rate mitigation plan would mitigate 58% of the rate increase impact.⁷⁰

Benefits

Based on the evidence adduced at the hearing, the Joint Applicants' witnesses showed that the Transaction will confer various qualitative benefits, including greater financial strength and an operator of demonstrated ability focused solely on maintaining, operating and enhancing the robustness of the transmission grid. For example, savings of \$6.0 million are predicted because of ITC's more robust credit quality.⁷¹ However, in general, the Joint Applicants were not able to quantify the benefits that the transaction would produce.⁷²

Many of them are difficult to quantify in terms of what the ultimate economic benefit is to customers. What's the cost of the avoided outage from a function of improving reliability, for example? It's a very difficult thing to quantify, but they are real and tangible benefits nonetheless.⁷³

Richard C. Riley testified for Entergy that the Entergy Operating Companies

⁶⁷ Tr. 2:213.

⁶⁸ Tr. 2:158-159, 171.

⁶⁹ Tr. 2:161, 172.

⁷⁰ Tr. 2:172.

⁷¹ Tr. 2:160.

⁷² Tr. 2:163.

⁷³ *Id.*

would realize benefits worth \$1.4 billion by joining MISO.⁷⁴ He further testified, “When you fold in the 30,000 megawatts of generation of Entergy into the MISO market, you have a diverse fuel mix that results in savings for everyone.”⁷⁵ Mr. Riley also testified that economies of scale offered by ITC would result in a reduction in the costs for various services.⁷⁶ He predicted that Missouri customers would enjoy some \$9 million in benefits.⁷⁷

At the request of Commissioner Jarrett, Natelle Dietrich of the Staff testified that EAI has not filed any infrastructure inspection or vegetation management reports as required by Commission rules.⁷⁸ Ms. Dietrich also testified about an ice storm in Southeast Missouri in January of 2009, when a downed, energized transmission line belonging to EAI blocked the entrance to a sewer facility in Portageville, Missouri.⁷⁹ As a result, sewer treatment service could not be restored.⁸⁰ For several days, Missouri authorities were unable to contact EAI and it required a personal call from Commissioner Davis to a member of the Arkansas Commission to finally induce a response from EAI.⁸¹ An additional benefit of approving the applications, therefore, will be placing the facilities in question in more responsible hands.

Several witnesses for ITC, including Joseph L. Welch, Jon Jipping and Cameron Bready, testified that, in their expert opinion, the likely benefits of the two transactions

⁷⁴ Tr. 2:72.

⁷⁵ Tr. 2:72-73.

⁷⁶ Tr. 2:73.

⁷⁷ *Id.* and p. 89.

⁷⁸ Tr. 2:90-91.

⁷⁹ Tr. 2:95-103.

⁸⁰ *Id.*

⁸¹ *Id.*

outweighed the possible detriments.⁸²

CONCLUSION

Staff advises the Commission to approve the applications. Although there will be rate increase impacts, these will be minimal when spread over the thousands of affected Missouri customers. The Intervenors have adduced no persuasive evidence of any likely reliability or safety detriments. In any event, increased costs must be weighed against the value of any benefits conferred.⁸³ Staff is convinced that tangible and valuable qualitative improvements in the transmission service will be conferred – certainly, ITC is likely to be a more responsive and responsible owner than was EAI. Reliability will be improved. It is Staff's opinion that the projected benefits of the Transaction and the transfer of control outweigh the likely costs.

In determining whether to allow a utility to sell or transfer its property, the Commission must find that the proposed transfer will not be detrimental to the public interest. The Missouri Supreme Court has stated:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state . . . said: . . . It is not [the Public Service 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.' [internal quotations omitted].⁸⁴

Missouri courts have consistently applied the not detrimental standard since 1934, and have recognized that "[t]he obvious purpose of [Section 393.190] is to ensure the

⁸² Tr. 2:118, 132, 173.

⁸³ *Intercon Gas, Inc. v. PSC*, 848 S.W.2d 593, 597-98 (Mo. App., W.D. 1993).

⁸⁴ *City of St. Louis v. PSC*, *op. cit.*

continuation of adequate service to the public served by the utility.”⁸⁵ In a decision approving the transfer of property from one utility to an affiliated utility, the Commission defined its role under Section 393.190:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that [the utility] provides safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable.

The presence of detriments, thus defined, is not conclusive to the Commission’s ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.⁸⁶

With these principles in mind, Staff contends that the Commission should approve the transactions. Despite having every opportunity and motivation, the Intervenor has shown no detriment but a mild rate increase. As the Seventh Circuit pointed out, if the Joint Applicants cannot quantify the benefits but leave the Commission with an “articulable and plausible reason to believe that the benefits are at least roughly commensurate . . . then fine; the Commission can approve” the applications on that basis.⁸⁷

WHEREFORE, Staff prays that the Commission will approve the applications.

⁸⁵ *Fee Fee Trunk Sewer*, *supra*, 596 S.W.2d at 468.

⁸⁶ *In the Matter of Union Electric Co.*, Case No. EO-2004-0108 (*Report and Order on Rehearing*, issued Feb. 10, 2005) p. 49.

⁸⁷ *Illinois Commerce Commission v. FERC*, 2013 WL 2451766, *5 (7th Cir., June 7, 2013).

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **15th day of July, 2013**, on 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.

s/ Kevin A. Thompson