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.	)	

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

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March 23, 2012

Introduction

This brief will address arguments raised in the initial briefs of the Staff of the Commission and Union Electric Company d/b/a Ameren Missouri. In general, both of those parties (Ameren Missouri more so than Staff) take the position that the Commission's sole choice in this case is whether to adopt the Nonunanimous Stipulation and Agreement. Such a "take it or leave it" approach is, of course, inconsistent with the Missouri Court of Appeal's directives in the Fischer[1] case. Although it was the Commission itself in that case rather than one of the parties that determined that it would adopt a "take it or leave it" approach, the Court's holding is very relevant to the Commission's decision here:

> The hearing procedure followed in this case failed to satisfy the due process requirement. Although Public Counsel was allowed to present his rate design proposal and to cross-examine the opposing witnesses, the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement. In light of this decision, the hearing afforded Public Counsel was not meaningful, **in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal.**[2]

The Commission in this case should similarly be focused on what conditions are necessary to protect the public from possible detriments, not just on whether to adopt the Nonunanimous Stipulation and Agreement.

Such an approach is also required by the Missouri Supreme Court's ruling in AGP:[3]

> 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

[1] State ex rel. Fischer v. Public Service Com., 645 S.W.2d 39 (Mo. Ct. App. 1982)

[2] *Ibid*., at 43.

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

> 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.[4]

Just the Commission sought to put off considering the acquisition premium in AGP, the Commission may be tempted to put off until a later case the question of its loss of jurisdiction over the transmission component of bundled retail rates. Fischer and AGP instruct us that the Commission may not do so.

The Commission has previously recognized and applied its authority to impose conditions on mergers in order to further and protect the public interest. In Case No. EM-96-149 (the merger of Union Electric Company and CIPSCO Incorporated that resulted in the Ameren holding company structure that continues today), the Commission was presented with an unopposed Stipulation and Agreement that the signatory parties (including Union Electric, the Staff and Public Counsel) believed resolved all issues. Under the Commission's rules, the Stipulation and Agreement was considered to be unanimous. Despite the agreement, the Commission *sua sponte* imposed additional conditions on the merger and required Union Electric to consent to them. The Commission did so, not on the basis that these particular conditions were precisely tailored to exactly tip the balance from "detrimental" to "not detrimental," but simply because "The Commission [found that] there are sufficient facts in evidence to be concerned about the potential increase of market power from the proposed merger" and because "The Commission [found that] there are sufficient facts in evidence to be

[4] *Ibid*., at 736; citations omitted.

concerned about horizontal market power for both generation and aggregation." (EM-96-149, Report and Order, effective March 4, 1997, pages 15 and 17). The additional condition that the Commission imposed on Union Electric was not trivial: the Commission required Union electric to join a regional Independent System Operator. The present Commission should not be timid about exercising its authority in a similar fashion to protect the public interest.

As part Ameren Missouri's general approach that the Commission only choice is whether or not to adopt the Nonunanimous Stipulation and Agreement, Ameren Missouri takes the position that the Commission does not have any authority to impose conditions beyond those that Ameren Missouri explicitly agrees to. To create a simple example for illustrative purposes, what Ameren Missouri posits is this: If a transaction is expected to result in $100 of benefits and $101 of detriments, the Commission can impose whatever conditions (which are within its authority and are reasonable) it believes are necessary to mitigate or eliminate the detriment. But if the transaction is expected to result in $100 of benefits and $99 of detriments, the Commission cannot impose **any conditions at all**. Does that make any sense? Of course not; such a circumscribed role for the Commission is neither sensible nor established by the case law, but that is exactly what Ameren Missouri insists the Commission must do in its order in this case.

Reply to Ameren Missouri

As its first condition, Public Counsel proposes a modification to 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. The vehemence with which Ameren Missouri defends the proposition that it **must be able to cause harm to ratepayers** before the Commission can intervene should alarm the Commission as much as it alarms Public Counsel. This condition was addressed in Public

Counsel's initial brief, and nothing in Ameren Missouri's initial brief should give the Commission pause in adopting it.

The case cited in the last paragraph on page 10 of Ameren Missouri's initial brief is not a court case; it is a Commission order in Case No. EM-2001-464. Indeed, there don't appear to be any court cases that use the phrase "compelling evidence," nor do there appear to be any that say "direct and present detriment." The only actual court cases cited by the Commission in EM-2001-464 for these extreme statements are City of St. Louis and Fee Fee Trunk Sewer. Those cases do not use such extreme language. The section of the Commission's order in Case No. EM-2001-464 in which it discusses the court cases that lead it (wrongly) to its conclusions about "compelling evidence" and "direct and present detriment" is as follows:

> The Missouri Supreme Court, in State ex rel. City of St. Louis v. Public Service Commission, stated that, in considering such cases, the Commission must be mindful that the right to transfer or encumber property is an important incident of the ownership thereof and that a property owner should be allowed to do such things unless it would be detrimental to the public. The same standard is applied to proposed mergers and reorganizations. The Missouri Court of Appeals has stated that "[t]he obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility." This is the standard by which public detriment is to be measured in such cases. The Commission notes that it is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record showing that a public detriment is likely to occur.
>
> **The Commission reads State ex rel. City of St. Louis v. Public Service Commission to require a direct and present public detriment.** For example, where the sale of all or part of a utility's system was at issue, the Commission 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. In the present case, there is no evidence of a direct and present public detriment in the record and the parties believe that none is posed by the proposed reorganization. If the reorganization is approved, KCPL will still be a vertically-integrated public utility subject to regulation by this Commission; it will still serve the same customers with the same system pursuant to its existing tariffs.[5]

[5] 2001 Mo. PSC LEXIS 1657, 15-17 (Mo. PSC 2001); emphasis added.

There are a number of reasons for the Commission to be very skeptical of the above language from Case No. EM-2001-464. First, the underlying court cases give no cause for the Commission to "read" standards into them that are not actually in the cases. Moreover, the decision in AGP, *supra*, by the Missouri Supreme Court tells us just the opposite: the Commission must examine all possible detriments and take them into account, not just direct and present detriments. Second, the circumstances of Case No. EM-2001-464 were quite different from the instant case (reorganization vs. transfer of control; unopposed settlement vs. opposed settlement; etc.). Finally, the Commission is not bound by its prior orders[6] and should give no weight to these gratuitous and over-reaching extensions of the case law.

One of the cases (discussed first at page 15 of Ameren Missouri's initial brief) that Ameren Missouri appears to find particularly compelling is Webb Tri-State.[7] The Webb Tri-State decision is a very short one, and it doesn't take much study to realize that Ameren Missouri invests way too much import in its holding. The entire analysis in that case is as follows:

> All of the towns were represented at this hearing by counsel and by interested citizens who gave testimony in support of applicant's position. All had adopted franchise ordinances and all urged that applicant be permitted to serve the entire area shown on the map filed by applicant.
>
> The only opposition offered came from officers and employees of various LPG companies, serving the area. The tenor of the evidence from that standpoint is that the LPG dealers had built their businesses at considerable expense and that they will lose their investments. This is evidenced by the fact that applicant would service customers with natural gas at a price approximately 50% of that now being paid for LPG.

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[6] State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n, 835 S.W.2d 356, 371 (Mo. App. 1992); Cent Hardware Co., Inc. v. Dir. Of Revenue, 887 S.W.2d 593, 596 (Mo. banc 1994).

[7] State ex rel. Webb Tristate Gas Co. v. Public Service Com., 452 S.W.2d 586 (Mo. Ct. App. 1970)

> It is because of this situation that protestants urged that conditions be imposed on the certificate so as to relieve from this financial loss. It does not appear exactly how such a condition could be enforced; and we are cited to no legal authority for such action by the commission. We think the commission properly rejected this contention. LPG must give way to natural gas just as the mule breeding business vanished upon the advent of the farm tractor and truck; just as wood stoves gave way to LPG. Such casualties are the price paid for "progress".
>
> It is clearly established that the inhabitants of the mentioned towns will be far happier, better and more cheaply served by natural gas. It isn't just that they should be denied this service, or penalized on account of it, in order to reimburse a group of dealers in LPG who, in turn, ousted the wood stove and fuel dealers from the community, without, so far as is shown, having paid damages to them.[8]

The sole and explicit purpose of the "condition" that the Commission rejected in Webb Tri-State was to protect liquid propane dealers from the financial impacts of a new service that was going to make customers "far happier" and serve them "better and more cheaply." That is a far cry from the conditions that Public Counsel proposes herein, which are all designed to protect customers of the applicant utility from possible adverse impacts resulting from the transaction at issue.

Ameren Missouri turns again to Webb Tri-State, *supra*, at page 22 of its initial brief, this time for the dubious proposition that the Commission does not have the legal authority to require Ameren Missouri to seek to represent itself at MISO. As Public Counsel stated at the hearing, Ameren Missouri cannot unilaterally change the MISO Transmission Owners' Agreement, but that doesn't mean that the Commission cannot require Ameren Missouri to seek changes. Indeed, if both Ameren Missouri and Entergy Arkansas proposed changes, MISO and the other Transmission Owners would have to seriously consider that proposal. In its initial brief at page 12, Public Counsel cited to the order of the Arkansas commission in which the Arkansas commission set, as a condition for allowing Entergy Arkansas to participate in the MISO, the

[8] *Ibid*., at 587-588

requirement that Entergy Arkansas participate as a stand-alone entity. While that order is not final for purposes of appeal, there is no reason to believe (and certainly no evidence in this case) that the Arkansas commission has abandoned its goal of having Energy Arkansas represent itself at MISO, just as Public Counsel urges this Commission to do with Ameren Missouri.

At page 17 of its initial brief, Ameren Missouri faults Public Counsel for not providing a precise amount by which Missouri ratepayer rates would go up. But Ameren Missouri does not dispute the fact that there is a very real risk that rates will be higher than they otherwise would have been if Ameren had not created ATX. This risk of higher costs, which is unique to this case because of the creation of ATX, is what Public Counsel seeks to address through its third proposed condition, discussed at pages 14-21 of Public Counsel's initial brief.

Ameren Missouri's long discourse at pages 17-18 of its initial brief obscures rather than enlightens. The issue arising in this case is simple: Ameren's creation of ATX has rendered previous protections ineffectual, and the intended replacement (paragraph 10.j of the Nonunanimous Stipulation and Agreement) is insufficient. Because Ameren created a new subsidiary that is not subject to the Commission's jurisdiction, the Commission is facing an issue that has not arisen in any of the previous cases for any of the Missouri utilities: the issue of the Missouri Commission's loss of jurisdiction over the transmission component of Ameren Missouri's bundled retail rates.

If ATX builds a transmission line instead of Ameren Missouri, and that causes Ameren Missouri's ratepayers to pay higher rates, that is a detriment caused by the transaction at issue here, and it is a detriment that the Commission can address in this case. In the first case in which UE was allowed to participate in the MISO, the Missouri Commission was so concerned with preserving its jurisdiction over the transmission component of bundled retail rates that it

required FERC approval of the Service Agreement as a condition of approval – even though the cost-benefit analysis in that case showed significant benefits as well. If preserving authority over the transmission component of bundled retail rates was so important then, is it any less important now?

The foregoing paragraphs highlight a significant flaw in Ameren Missouri's approach to this case: Ameren Missouri fails to realize that it has the burden of proving that the proposed transaction is not detrimental to the public interest. The Commission has recognized this burden: "In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant."[9] For the second and third additional conditions proposed by Public Counsel (separate representation and the preservation of the Commission's authority of the transmission component of bundled retail rates), Ameren Missouri concedes that there is some risk of harm. For the first condition (changes to paragraph 10.a of the Nonunanimous Stipulation and Agreement), the language of the condition of which Public Counsel seeks modification explicitly acknowledges the risk of harm. It is incumbent on Ameren Missouri, which bears the burden of proof, to show that these detriments (the acknowledged risks of harm) are outweighed by the benefits. Ameren Missouri has failed to carry this burden.

Indeed, it only made an attempt at quantification of one of these detriments (increased rates to Missouri customers because of the loss of the Commission's authority over the transmission component of bundled retail rates), and that attempt considers only short-term impacts and ignores longer-term impacts. Ameren Missouri witness Borkowski did a cursory

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[9] In the Matter of the Application of Union Electric Co., d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, etc. to Central Illinois Public Service Co., d/b/a AmerenCIPS, Case No. EO-2004-0108, Report and Order on Rehearing, 13 Mo.P.S.C.3d 266, 293 (Feb. 10, 2005)

analysis of the possible rate increases to Missouri customers due to ATX building transmission facilities. (Exhibit 5, Borkowski Surrebuttal Testimony, page 13) Ms. Borkowski calculated (using assumptions with which she did not necessarily agree) a possible impact of $2.5 million per year. Assuming that these transmission assets have a forty year life, that is a cumulative impact of $100 million – very close to the $105 million of benefits that Ameren Missouri asserts will be achieved over the next three years.

With regard to Public Counsel's proposed condition of separate representation, Ameren Missouri never says that it is impossible to use its best efforts, so this is not an impossible condition. Ameren Missouri states at page 23 of its initial brief, that: "There is no evidence before this Commission, other than Mr. Kind's rank speculation, that the nature of Ameren Missouri's representation at MISO poses any particular detriment to its continued participation." To the contrary, there is substantial and competent evidence that conflicts exist – and will continue to exist – between Ameren Missouri's interests and the interests of Ameren and other Ameren subsidiaries. Attachment 2 to Public Counsel witness Kind's Surrebuttal Testimony (Exhibit 12), comprised of Ameren Missouri and Ameren documents, provides ample evidence.

For example, pages 62-64 of Attachment 2 acknowledges "conflicting internal concerns" "conflicting business unit viewpoints," and "inherent conflicts:"

> Addressing conflicting internal concerns such as negative political and regulatory treatments, or the fact that net revenues provided via the MISO market is not providing efficient incentives for investment in or retirement of resources, seem to be the culprit(s) of the team's inability to agree to a final "Ameren" proposed Module E construct.
> …
> The team has put aside the conflicting business unit viewpoints (described herein and which we are asking you to resolve)….
> …
> The team's concern is not about the details of the proposal; but it is about the **inherent conflict** between the Illinois contingent (energy only construct and regulatory/political consequences) versus our generation operating units (a long-

> term, transparent, centrally cleared capacity market (think PJM) providing the proper price signal and cost recovery to resources. [emphasis added]

These conflicts have arisen among other areas, and persist, in the context of MISO's proposed resource adequacy construct, addressed in the Surrebuttal testimony of Public Counsel witness Kind. There Mr. Kind stated:

> Ameren affiliates are either providing luke-warm support or opposition to the opt out and self-scheduling provisions in the MISO Resource Adequacy proposal in FERC Docket No. ER-11-4081. Ameren Energy Marketing (AER) joined in a filing by "Capacity Suppliers" in Docket No. ER-11-4081 that opposed the opt out provision of the Resource Adequacy proposal stating that it is "unjust and unreasonable" and should be rejected. As I stated above, the filing of other Ameren affiliates (including UE) in this docket provided only luke-warm support of the opt out and self-scheduling provisions in the MISO Resource Adequacy proposal. (Kind Surrebuttal, Exhibit 12, pages 6-7)

Mr. Kind also discussed these inherent conflicts with Commissioner Kenney at the evidentiary hearing:

> Q. Okay. Thank you. That's helpful. Moving to a different direction now, but related. Do you perceive any inherent problems between Ameren -- in having Ameren Services act or speak for Ameren Missouri and Ameren Illinois? Is there an inherent problem with that structure?
> A. I think there is a problem with what you've cited of Ameren Services speaking on behalf of both the operating companies in Missouri and Illinois. So in Missouri, the operating company is vertically integrated electric, Union Electric. In Illinois, it's really just the distribution-only companies. But the bigger problem I see, frankly, has to do with having the same representative of -- that represents the interests of Ameren Transmission Service and Ameren Missouri, and the same representative that represents the interests of Ameren Energy Marketing, the power marketing branch of Ameren, and Ameren Energy Generation and the other merchant generation affiliate that Ameren has. Because those -- there's a clear interest, I believe, in Ameren with their planning process in trying to execute plans that will most benefit their shareholders. And in order for them to do that, they really have the only -- a limited level of earnings that they can make from their regulated activities in Missouri and Illinois, yet the earnings that they can make in FERC-regulated markets or FERC-structured markets -- I think to say FERC-regulated is kind of a stretch -- but the interest they have in making earnings from those markets where earnings would never really be capped by state regulators, I think leads them at the holding company level to take positions that are going to try and best enable earnings opportunities at those unregulated

> affiliates, which would include ATX, Ameren Energy Marketing and Ameren Energy Generation Company.
> Q. I mean, so are you going so far as to say that they would make decisions that would be detrimental to Ameren Missouri in favor of ATX and Ameren Energy Services and the marketing firm?
> A. I think that they essentially have a fiduciary responsibility to their shareholders to do so, yes. (Transcript, pages 248-249)

Moreover, Ameren Missouri does not suggest that further conflicts will not arise, and never disputes the premises that Ameren's representation is designed to further Ameren's interest and that Ameren's interest would trump Ameren Missouri's interest if conflicts did arise.

Reply to Staff

In general terms, Staff's initial brief is much more balanced than Ameren Missouri's. Ameren Missouri's brief stridently proclaims its constant refrain to the Commission ("The Commission lacks statutory authority to take 'X' action in response to Ameren Missouri's proposal to take anti-consumer action 'Y.'") Staff discusses a number of cases that generally reinforce the point that the Commission is not, as Ameren Missouri claims, powerless to protect the public interest in transactions for which approval is sought under Section 393.190.

Staff discusses at length (pages 4-8) the issue of transmission incentive adders, concluding with a discussion of the provisions of the Unanimous Stipulation and Agreement in the last KCPL-GMO case that approved GMO's participation in the SPP (Case No. EO-2009-0179). Although it is unclear for exactly what purpose Staff cites it, Public Counsel submits that the quoted provision – and especially the portion that Staff italicizes – is a very good example of the kind of condition that Public Counsel seeks in this case. In fact, it accomplishes exactly what Public Counsel seeks, and a very similar condition imposed in this case would greatly mitigate the detriment that arises from the formation of ATX and the resulting loss of the Commission's jurisdiction over the transmission component of bundled retail rates. The Commission could

simply state that Ameren Missouri's continued interim participation in the MISO is conditioned upon: "Ameren Missouri recognizing that the MoPSC has the sole regulatory authority to determine whether or not such incentives[10] related to Ameren Missouri's or ATX's transmission facilities should be included in rates for Missouri Bundled Retail Load."

Staff's discussion of the Consumers Public Service[11] case at pages 12-14 appears to reinforce the point, with which Public Counsel agrees, that the Commission has considerable discretion to examine the public interest involved in a transaction for which approval is sought under Section 393.190.

One of the more interesting cases discussed in Staff's brief (and studiously ignored in Ameren Missouri's) is Environmental Utilities.[12] Environmental Utilities stands for the proposition that the Commission can reject a proposed transaction because of the potential for future harm – even if that harm is unquantified:

> The standard governing the Commission's review of an application for sale of assets is set forth in Fee Fee Trunk Sewer, Inc. v. Litz: "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." 596 S.W.2d 466, 468 (Mo. App. 1980). The decision of the Commission is reasonable where the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious or where the Commission has not abused its discretion. This court accords evidentiary determinations by the Commission a strong presumption of validity. Friendship Village, 907 S.W.2d at 349.
>
> EU argues that the Commission's findings in its June 9 order dismissing the application were unreasonable in that the Commission "failed to establish any evidentiary basis upon which it . . . could make a determination that the proposed sale of assets to Missouri-American Water Company was detrimental to the public interest." This court, therefore, reviews the record to determine if the decision was supported by substantial, competent evidence in the record.
>
> The evidence in the record indicated that the parties proposed a sale of only part of Osage Water's assets leaving the bulk of the sewer customer to be

[10] Defined, as in EO-2009-0179, as "Financial incentives identified in FERC Order 679."
[11] State ex rel. Consumers Public Service Co. v. Public Service Com., 352 Mo. 905 (Mo. 1944)

[12] Envtl. Utils., LLC. v. PSC of Mo., 219 S.W.3d 256 (Mo. Ct. App. 2007)

> served by the distressed utility. As proposed by the Application, some customers would continue to receive substandard service from a distressed utility. The rest of the customers, those absorbed into MAWC's system, could conceivably see the cost of sewer service double. The Commission could well determine that such a sale was detrimental to the public, consistent with the requirement of Fee Fee Trunk Sewer, 596 S.W.2d at 468. The Commission's dismissal was well supported by sufficient evidence in the record and was, therefore, reasonable.[13]

Conclusion

None of the cases cited in Staff's initial brief (and in fact, upon close reading, none of the cases cited in Ameren Missouri's initial brief) support the slavish reliance upon precise quantifications of benefits and detriments for which Ameren Missouri advocates. The purpose of the Public Service Commission Act is a remedial one, and at its heart it is intended to afford the Commission the authority to regulate the conduct of utilities under the Commission's jurisdictional in order to protect the public. A utility's right to encumber its property is an important one, but it is not immune to the Commission's duty to protect the public.

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

[13] *Ibid*., at 265-266

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 23rd day of May 2012.