**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| Midwest Independent Transmission System Operator, Inc. | ) | Docket No. ER08-296-000 |

**MOTION TO INTERVENE AND PROTEST OF UNION ELECTRIC CO. d/b/a AMERENUE**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. §§ 385.211 and 385.214, and the combined notice of filing issued by the Commission on December 7, 2007, Union Electric Company d/b/a AmerenUE ("AmerenUE") submits this Motion to Intervene and Protest in response to the December 3, 2007 filing of Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and certain Midwest ISO Transmission Owners (the "TOs")[1] (collectively "Applicants") in the captioned proceeding (the "Application").

The Applicants submitted proposed revisions to Section 37.3(a) of the Midwest ISO's Open Access Transmission and Energy Markets Tariff ("TEMT" or "Tariff"). In their filing, Applicants claim that "[t]he proposed revision is submitted to ensure that the Midwest

[1] The Midwest ISO Transmission Owners for the Application comprise: American Transmission Company LLC (ATCLLC); American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); Duke Energy Shared Services for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Indianapolis Power & Light Company; International Transmission Company, LLC (METC); Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.



Exhibit B

ISO's distribution of revenues from network integration transmission service ('NITS') to Transmission Owners is just, reasonable, and not unduly discriminatory or preferential following the end of the Midwest ISO rate 'Transition Period.'"[2] The proposed Tariff revisions, however, fail to achieve a just and reasonable result and would instead result in unduly discriminatory treatment. These proposed revisions should be rejected in favor of language that meets the statutory standard, as described below, or, at a minimum, should be set for hearing and sent to settlement proceedings.

Applicants' proposal violates the plain terms of the Commission-approved Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (the "TOA").[3] The TOA restricts the circumstances under which the TOs may propose changes to the methodology for distributing transmission revenues. The TOA prohibits such a change without the unanimous support of all of the TOs, such that a subset of the TOs may not change the distribution methodology in their favor, as proposed in the Application. Any abrogation of the terms of the TOA is subject to the *Mobile-Sierra* "public interest" standard of review.[4] Thus, the action proposed by Applicants, which would effectively alter the parties' rights under the TOA as agreed to by the parties and approved by the Commission, cannot be granted pursuant to the lower just and reasonable standard cited as a basis for the Application.

Indeed, Applicants' proposal to amend the Midwest ISO Tariff ignores the terms of other, inextricably linked agreements, including the TOA, that establish the rights of the

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[2] Midwest ISO, *Revisions to Section 37 of the Midwest ISO Energy Markets Tariff*, Docket No. ER08-296-000 (footnote omitted) (the "Application").

[3] The current version of the TOA can be found on the Midwest ISO's website: <<www.midwestiso.org>>.

[4] *See ExxonMobil v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005).

parties to the TOA with respect to distribution of transmission revenues. By failing to reconcile the contractual rights of AmerenUE with the competing claims of other TOs, and by treating Bundled Load in a manner so different from the treatment of carved-out Grandfathered Agreements (the "GFAs"), the proposal is plainly discriminatory. Indeed, the Applicants' proposal presents the Commission with an artificially narrow view of transmission revenue collection and distribution that is akin to "cherry-picking" or "single-issue ratemaking." This piecemeal approach is administratively inefficient and will create inconsistent obligations for the Midwest ISO and the TOs. Moreover, addressing the question in the proposed, limited fashion would operate as a *de facto* termination of terms of the approved, settled contracts between AmerenUE, the Midwest ISO and the TOs and should not be permitted.

For these and other reasons, as set forth below, the Commission should reject the proposed revisions to Section 37.3 of the TEMT, and instead order the Midwest ISO to develop Tariff provisions that conform with the existing contractual obligations imposed by the Commission-approved terms of the TOA. AmerenUE provides below for the Commission's consideration modified language for TEMT Section 37.3(a) that could meet this end.

Alternatively, the Commission should suspend this filing for the maximum statutory period and set the matter for hearing. If this matter proceeds to hearing to determine whether the Midwest ISO's Tariff is just, reasonable and not unduly discriminatory, the hearing should permit an evaluation of the revenue distribution issue raised by the Application in the overall context of the operation of the Midwest ISO Tariff. Before proceeding with a hearing, though, AmerenUE requests that the Commission hold the hearing in abeyance and order settlement judge procedures so that the parties can attempt to resolve the dispute on a similar basis without incurring the time and expense associated with a full-blown trial-type evidentiary hearing.

## I.
## COMMUNICATIONS

All communications concerning this filing and any other aspect of this proceeding should be addressed to the following persons:


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## II.
## BACKGROUND

### A. AmerenUE

AmerenUE is a wholly-owned subsidiary of Ameren Corporation, the ultimate corporate parent of the Ameren Companies.[5] AmerenUE, AmerenCILCO, AmerenCIPS and AmerenIP are each transmission owners within the Midwest ISO and take transmission service

[5] For the purposes of this pleading, the Ameren Companies include: AmerenUE, Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS and Illinois Power Company d/b/a AmerenIP.

under the Midwest ISO's Tariff to serve load and are subject to charges under that Tariff. The Ameren Companies, including AmerenUE, are also market participants within the Midwest ISO and buy and/or sell power in the Midwest ISO's energy markets subject to the terms and conditions of the TEMT.

## B. Tariff and Agreements

### 1. The TOA and Tariff

The TOA sets forth the rules governing the relationship between the Midwest ISO and the TOs. It was approved by the Commission in 1998, several years prior to AmerenUE joining the Midwest ISO. *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231 (1998) ("TOA Approval Order").

Appendix C to the TOA sets forth terms for transmission pricing and distribution of transmission revenues among the TOs. The TOA divides such terms into two time periods: the "Transition Period" (*i.e.*, the period ending January 31, 2008), and the "Post-Transition Period" (*i.e.*, after January 31, 2008).

As the Application explains, the TOA provides that, during the Transition Period, all transmission revenue collected from NITS customers "shall be fully distributed to the Host Zone" (*i.e.*, the zone where the load is physically connected to the Midwest ISO transmission network, either directly or through a distribution system). TOA, App. C, § III.A.4. The TOA requires that all Transmission Owners shall take NITS service from the Midwest ISO, but exempts Bundled Load and Grandfathered Agreements. *Id.* §§ III.A.2 through III.A.4.

For the Post-Transition Period, the TOA provides that the Midwest ISO Tariff shall be applicable to all load, including Bundled Load and load served under Grandfathered Agreements. TOA, App. C, § III.B.2. The TOA further provides that, in the Post-Transition Period, each TO will receive monthly revenues based on its revenue requirement, *id.* § III.B.1,

and that revenue shortfalls will be apportioned proportionate to the revenue requirement, *id.* § III.B.2.

Section 37.3(a) of the TEMT currently provides that "Transmission Owners and ITC Participants taking [NITS] to serve their Bundled Load shall not pay charges pursuant to Schedules 1, 3 through 6 and Schedule 9," and that, in addition to not paying these charges, AmerenUE also shall not pay Schedule 2 charges. This provision does not comply with the requirements of the TOA for the Post-Transition Period, and would require revision in order to avoid creating conflicts beginning February 1, 2008. Instead of amending Section 37.3(a) to be consistent with the TOA, though, Applicants propose changes that will conflict with the TOA requirements for revenue distribution in the Post-Transition Period, as explained below.

**2. AmerenUE's Service Agreement and the Missouri Stipulation**

AmerenUE joined the Midwest ISO on May 1, 2004. *Midwest Indep. Sys. Op., Inc. and Ameren Services Co.*, 106 FERC ¶ 61,293 (2004). AmerenUE's membership in the Midwest ISO was approved by the Missouri Public Services Commission ("MoPSC") only upon certain conditions set forth in the "Missouri Stipulation," attached as Exhibit A. Specifically, the MoPSC allowed AmerenUE to join the Midwest ISO only for an initial five-year period, subject to renewal and, *inter alia*, only upon the condition that AmerenUE's retail customers would continue to pay transmission rates set by the MoPSC, and would not pay the Midwest ISO zonal transmission rates. *See Order Approving the Stipulation and Agreement*, MoPSC Case No. EO-2003-0271 (Feb. 26, 2004), attached as Exhibit B.

The Missouri Stipulation also required that AmerenUE's membership in the Midwest ISO incorporate this condition in a service agreement between the Midwest ISO and AmerenUE to ensure compliance with the Missouri Stipulation (the "Service Agreement," attached as Exhibit C). Section 3.1 of the Service Agreement states that AmerenUE will not pay

the fees set forth in Schedule 9 of the TEMT (for NITS) to serve its bundled retail load, but will include its bundled retail load in the total load used to calculate AmerenUE's zonal rate. The Service Agreement also provides that, consistent with Section 37.3(a) of the TEMT, AmerenUE will not pay charges pursuant to TEMT Schedules 1-6 (for ancillary services).

Section 6.2 of the Service Agreement provides that any modification to the Service Agreement must be made in writing and that any modification or change to the agreement "shall be valid and effective only if in writing and executed by both Parties and approved by the MoPSC and the FERC."

The Missouri Stipulation also states that if FERC orders any changes or modifications to the Service Agreement, then the parties must also obtain MoPSC approval for the changes; if MoPSC does not approve the changes, then AmerenUE's participation in the Midwest ISO is terminated. Mo. Stip. at 8-9. Similarly, other "unanticipated FERC actions," including orders having the effect of precluding the MoPSC from setting the transmission component of AmerenUE's rates to serve bundled retail load or the effect of materially changing the Service Agreement, provide a basis for requiring AmerenUE to withdraw from the Midwest ISO. *Id.* at 12-14. Subject to this early termination provision, the initial term of the Service Agreement is five years from the date AmerenUE joins the Midwest ISO, and is automatically extended from year to year unless either party gives the other six months' written notice of termination prior to the end of the initial term or any subsequent renewal term. Service Agreement, § 2.3.

The Service Agreement was submitted to FERC on February 19, 2004, and approved without modification by order issued in March 2004. *See Midwest Indep. Transmission Sys. Op., Inc*, 106 FERC ¶ 61,293 (2004) ("Service Agreement Approval Order"). In that Order, the Commission specifically noted the condition that AmerenUE would not pay

the zonal transmission rates for NITS (Schedule 9) or for Midwest ISO Schedules 1 through 6 services. *Id.* at P 21. Several of the Applicants intervened in the proceeding when AmerenUE and the Midwest ISO filed seeking approval of the Service Agreement, but none of the Applicants filed in protest, and none of the Applicants sought rehearing of the Service Agreement Approval Order. *See Midwest Indep. Transmission Sys. Op., Inc*, 107 FERC ¶ 61,167 (2004) (order clarifying the Service Agreement Approval Order).

**C. The Application**

On December 3, 2007, the Midwest ISO and certain Transmission Owners (*see* n.1, *supra*) filed under Section 205 of the FPA to modify Section 37.3(a) of the TEMT. Under the proposed modification, in the Post-Transition Period, the Midwest ISO is to take into account revenues that it "would have received but for the section 37.3(a) exclusion in its distribution of transmission revenues to [TOs] after the end of the Transition Period." The Midwest ISO is to determine hypothetically an amount of imputed revenues equal to revenues associated with Bundled Load and not paid to the Midwest ISO by all of the TOs, including AmerenUE, pursuant to Section 37.3(a). The Midwest ISO then is to deduct these imputed revenues from the revenues actually received by those same TOs. As a result, the proposed amendment to the TEMT would undo the terms of the Service Agreement and TOA, which together prohibit charging AmerenUE for such services. This proposal is based on a motion passed by a vote of 15 to 3 among the TOs with Section 205 filing rights in a meeting of the Transmission Owners' Committee held on November 13, 2007.

Notably, the motion underlying the Application was the *second* of two proposals presented to the Transmission Owners' Committee on November 13, 2007. The first was a proposed change to the TOA, which would have had the same ultimate effect as Applicants' proposal with respect to the allocation of revenues among the TOs, but would have taken the

direct approach of a modification of the TOA provision for distribution of transmission revenues among the TOs. The TOA requires *unanimous* support for such changes, though, as explained below. The first proposal – the direct approach – *failed* by a vote of 19 to 2 (with one abstention), so Applicants instead now pursue the same result by way of the end-run approach before the Commission in this proceeding.

## III.
## MOTION TO INTERVENE

AmerenUE is a Midwest ISO Transmission Owner and is subject to the Midwest ISO's governing documents, including the TEMT, the TOA and the Service Agreement. AmerenUE has been an active participant in the Midwest ISO Transmission Owners' Committee proceedings leading up to the filing of the Application. As a TO, AmerenUE is subject to the transmission revenue collection requirements of Section 37.3(a) of the TEMT and the revenue distribution methodology set forth in Appendix C of the TOA. AmerenUE therefore has interests that will be directly affected by the outcome of the captioned proceeding and cannot be represented adequately by any other party. AmerenUE requests that the Commission grant this motion and allow it to participate fully as a party in the captioned proceeding.

## IV.
## PROTEST

### A. The Application Would, If Approved, Constitute An Impermissible "End Run" In Violation Of The TOA's Unanimous Consent Rule For The Alteration Of Revenue Distribution

The Commission has stated that "the [Midwest ISO] TOs have a valid right to protect themselves against potentially unreasonable changes to the proposed revenue distribution methodology," and therefore allowed the TOs to maintain the requirement that any adjustment to

revenue distribution be made by a unanimous vote of the TOs.[6] The Applicants admit that the Application seeks to alter revenue distribution among the TOs. In the Application, the Applicants state that their proposal "*concerns the Midwest ISO's distribution to Transmission Owners of revenues it receives for transmission services provided under the [T]EMT . . . .*" Application at 2 (emphasis added). This admission demonstrates that Applicants are trying to accomplish indirectly what cannot be accomplished directly. Under Article II, Section IX.C.6 of the TOA, the "distribution of transmission service revenues . . . and the methodology for determining such distribution, as set forth in Appendix C . . . *shall not be changed except by unanimous vote of the Owners.*" *Id.* (emphasis added). There has been no unanimous vote to support alteration of the revenue distribution or the revenue distribution methodology,[7] so the instant filing should be viewed by the Commission for what it is – and for what the Applicants admit it is – an attempt to circumvent, or "end-run," the requirements of the TOA.

The Applicants seek to justify their filing by noting that "the right of a subset of the signatories to the TO Agreement to submit section 205 filings to modify provisions of the [T]EMT 'affecting transmission revenues' is recognized in Section II.K of Appendix K to the TO Agreement." Application at 6, n.13. But this provision is inapposite here. AmerenUE does not dispute the right of certain Transmission Owners to make a Section 205 filing to affect their own revenue requirements or rates, for example, changes that may "affect[ ] transmission revenues" by adjusting the TOs' rates. But the Application does not concern TOs' rates. The

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[6] *Order On Rehearing and Compliance Filing*, 103 FERC ¶ 61,169, 61,624 (2003) *citing Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001) (the "December 20 Order").

[7] As explained in Part II.C above, the Motion that would have altered the revenue distribution methodology was presented to the Transmission Owners' Committee on November 13 and failed by a vote of 19 to 2 (with one abstention). *See also*, Attachment D to the Application.

Application acknowledges that the instant filing "will have no effect on transmission rates." Application at 2. Rather, the Application seeks to alter revenue *distribution*, which is not covered by the Appendix K language relied on in the Application, but instead is limited by the unanimous consent requirement of Article II. Applicants cite no other provision in the TOA as authority to support the Application.

Because of the lack of unanimous consent of all of the TOs to alter revenue distribution, the Applicants have created an artifice that would not collect, but simply impute, hypothetical revenues in place of actual revenues, then would deduct those hypothetical revenues from the amount of revenues collected (both real and imputed) prior to distribution under the TOA. This is an inappropriate attempt to use the Section 205 filing process to achieve indirectly an altered distribution of revenues which the Applicants are not authorized to propose directly. The courts have found that "FERC ha[s] no authority to do indirectly what it could not do directly." *Pub. Util. Comm'n of Calif. v. FERC,* 143 F.3d 610, 616 (D.C. Cir. 1998) (quotation marks omitted); see also, e.g., *Altamont Gas Transmission Co. v. FERC,* 92 F.3d 1239, 1248 (D.C. Cir. 1996); *Southwestern Pub. Serv. Co. v. FERC,* 952 F.2d 555, 560 (D.C. Cir. 1992). The same concept should guide the Commission here. The Commission should reject this transparent end-run, and instead should require the Applicants to abide by the Commission's ruling in the December 20 Order and the contractual obligations set out in Article II, Section IX.C.6 of the TOA.

### B. The Proposed Modification of TEMT Section 37.3 Is Contrary To The Conditions Of The Parties' Agreements And Would Create Irreconcilable Conflicts

The Application proposes to change one Tariff provision, but ignores other relevant contracts and therefore fails to implement a just and reasonable Post-Transition Period revenue distribution methodology, as established in the TOA. Presenting the transmission

revenue question to the Commission without reference to these related agreements precludes a non-discriminatory resolution and leads to an administratively inefficient proceeding. Because the proposed changes to Section 37.3 of the TEMT would create irreconcilable conflicts between the TOA and the TEMT, all elements of the existing agreements between the parties should be considered simultaneously. The Commission should not rule on one piece of the total contractual arrangement without considering the broader implications of all interrelated obligations.

If the Commission were to adopt the Application as presented, several inconsistencies would be created between the TOA and the TEMT. For example, Section II.B.2 of Appendix C to the TOA provides that Bundled Load will take service under the Tariff in the Post Transition Period and *will pay* the Tariff rate.[8] The proposed modification to Section 37.3(a) of the TEMT, in contrast, would *exempt Bundled Load from paying* the Tariff rate, and instead would simply impute, then deduct, hypothetical revenues for such service. Thus, Applicants' proposal is directly at odds with the methodology set by the TOA, a rate schedule currently on file with the Commission and deemed just and reasonable.

In another example of the inconsistencies between the Application and the Commission-approved TOA, Applicants propose to modify Section 37.3(a) of the TEMT such that revenue distribution would be based upon a formula where "the Transmission Provider shall deduct the imputed revenues attributed to each [formerly exempted] Transmission Owner and ITC Participant from the total Schedule 9 revenues that are due to that Transmission Owner or ITC Participant." Accordingly, rather than simply distributing revenues based on the TOs'

[8] Section II.B.2 of Appendix C also provides that Grandfathered Agreements "shall not be abrogated or modified" by this provision. Like the Grandfathered Agreements, a contractual obligation establishes that AmerenUE's Bundled Load must be exempted from this requirement, and that contract (the Service Agreement) may not be abrogated or modified absent a showing that it is contrary to the public interest. *See* Parts IV.C and D below for further explanation.

revenue requirements, as required by Section III.B.2 of Appendix C, the Applicants' proposal first would require an offset for imputed Schedule 9 charges, and then would distribute the remaining revenues by applying the formula in Appendix C to this depleted collection of revenues. Consequently, if the Commission approves the Application, Appendix C of the TOA will require one method of distributing revenues and the TEMT will require a completely different method.

This is so because Appendix C, Section III.B.2 of the TOA details the process for allocating excesses or shortfalls in transmission revenue among the TOs in the Post-Transition Period.[9] Under Section III.B.2 of Appendix C to the TOA, revenue shortfalls or excesses are to be distributed amongst the TOs "on a proportionate basis of revenue requirements." This language does not contemplate imputed revenues or a hypothetical allocation prior to distribution. Rather, the TOA provides that each TO will apply its Tariff rate to all uses of its transmission system, including Bundled Load, and if the total revenues collected are less than the TOs' collective revenue requirements, the shortfall will be shared proportionately.

Applicants attempt to justify their proposed scheme for imputing revenues and explain away these fundamental differences by misconstruing the language of the TOA. Applicants state that "the proposed modification to section 37.3(a) of the [T]EMT is consistent with the terms of the TO Agreement relating to the distribution of revenues after the Transition Period," because the TOA states that each TO "shall receive revenues, on a monthly basis, based on its revenue requirement calculated in accordance with a formula filed with the FERC" for the Post-Transition Period. Application at 7 (quoting in part TOA, App. C, § III.B.1). The language upon which Applicants rely, though, does not support their proposal for two reasons: First, the

[9] For example, where "an Owner whose revenue requirements are ten percent (10%) of the total Midwest ISO revenue requirements [that Owner] shall bear $1 million of a total $10 million shortfall." TOA, App. C, § III.B.2.

Application would change how revenues are *both collected and distributed*; but Section III.B.1 of Appendix C relates only to revenue *distribution*. Thus, the two are not the same. Second, use of the word "formula" in the quoted provision of the TOA, viewed in context, clearly refers to the revenue requirements formula that was filed with the Commission as Attachment O to the TEMT. The revenue requirements formula is a part of the overall revenue distribution methodology established by Section III.B.1, but that methodology may not be altered by Applicants merely because they have developed a new formula and filed it with the Commission. The Applicants' attempt to justify their proposal by conflating two entirely different formulas – the existing revenue requirements formula established in Attachment O to the TEMT (which is used to establish each TO's revenue requirement and subsequently used to distribute revenues under the TOA), and the formula for distributing transmission revenues pursuant to Section III.B.1 of Appendix III of the TOA (which Applicants impermissibly seek to usurp with their contrived formula for hypothetical transmission revenue distribution). This attempt should be rejected.

Instead of the conflicting and incomplete proposal in the Application, the Midwest ISO should have brought to the Commission a proposal to modify Section 37.3 of the TEMT in a manner consistent with the TOA. AmerenUE urges the Commission to so instruct the Midwest ISO.[10] In that regard, an appropriate solution would be to adopt the following language in the place of the first two sentences of current Section 37.3(a) of the TEMT, so as to

[10]"It is well-established that the Commission has broad discretion to fashion appropriate remedies unless the statute itself mandates a particular remedy." *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212, at P 87 (2007) (quotation marks omitted) (*quoting Connecticut Valley Elec. Co v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000)). In this case, the Commission should exercise its remedial discretion by requiring that the Midwest ISO modify its TEMT to conform to its Commission-approved TOA.

continue Post-Transition Period revenue distribution in a manner consistent with the Midwest ISO's existing obligations:

> Transmission Owners and ITC Participants taking Network Integration Transmission Service to serve their Bundled Load shall pay charges pursuant to Schedules 1 through 6 and Schedule 9, except to the extent that the Transmission Owner or ITC Participant, at the time that it joined the Midwest ISO as a Transmission Owner or ITC Participant, was expressly prohibited from paying such charges by order of a state regulatory authority to which the respective Transmission Owner or ITC Participant is subject and/or by order of the FERC.

This provision would carry out the terms of the TOA consistent with the Commission's orders approving the TOA and the Service Agreement.

### C. The Application Provides No Justification For Disregarding The Relevant Contract Terms And The Commission Orders Approving Those Contracts

For the reasons set forth above, the Application is nothing less than an attempt to circumvent the TOA provisions establishing the means by which revenue is allocated among the TOs and the means by which such revenue allocation may be modified.

Those TOA provisions were specifically approved by the Commission:

> The Owners' Committee consists of a representative from each Transmission Owner. Among other things, the Owners' Committee, under the ISO Agreement, *must unanimously approve changes to the pricing approach set forth in Appendix C of the ISO Agreement including the revenue distribution methodology* and repayment of start-up costs. These provisions may not be changed except by unanimous approval of the Owners' Committee.

TOA Approval Order, 84 FERC ¶ 61,231, at 62,149-50 (emphasis added; footnotes omitted).[11] The requirement of unanimous consent was an important element of the parties' agreement. Indeed, when the TOA was submitted to the Commission for approval, the unanimous consent requirement was emphatically supported by the TOs because it allowed each TO to retain full

[11] The "ISO Agreement" referred to in this quotation is the TOA. *See* TEMT § 1.158.

control over changes to revenue distribution going forward. Such control protected the TOs' "continuing ability to recover [revenues] as close as possible to their revenue requirements," a protection that was *"fundamental to their decision to transfer control of the transmission system to the ISO."* Midwest ISO Filing, FERC Docket No. ER98-1438, Attachment D, p. 8 (Jan. 15, 1998) (emphasis added). The unanimous-consent requirement is no less "fundamental" to the TOA today than it was in 1998; the Commission must not allow the Applicants to circumvent this bedrock element of the TOA through this Application.

Parties unsatisfied with the terms of the TOA and the Commission's Order approving the TOA enjoyed a statutory right to challenge the TOA and the Commission's Orders via protests of the original filings, requests for Commission rehearing, and petitions for judicial review under the FPA. *See* 16 U.S.C. § 825*l*(a), (b). Those parties are now categorically forbidden from challenging the Commission's orders by the present filing, for such a challenge constitutes an unlawful collateral attack. *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005). The same principle applies to the Service Agreement and the Commission's order approving the Service Agreement.

Moreover, given that the Tariff changes proposed in the Application conflict directly with the Commission-approved TOA and Service Agreement, any attempt to rewrite those agreements must be supported by a demonstration that the proposed change is required by the public interest. Under the *Mobile-Sierra* standard, such modification of Commission-approved contracts may occur only upon a showing that termination of contractual obligations is necessary to protect the public interest. *ExxonMobil v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005). The Application, based only on the just and reasonable standard, cannot provide such a demonstration.

## D. The Proposed Modification of TEMT Section 37.3(a) Improperly Upsets The Parties' Negotiated Agreements

The Application proposes to change the revenue collection and revenue distribution only for Bundled Load, not for other transmission customers which are similarly situated, such as the revenues associated with load served under carved-out Grandfathered Agreements (the "GFAs"). The Midwest ISO recently obtained approval to continue to maintain special treatment for load served by the carved-out GFAs in the Post-Transition Period, so that the settled economic expectations of the parties to the GFAs will be maintained. *See Midwest Indep. Transmission Sys. Op., Inc.*, 121 FERC ¶ 61,166 (2007) (approving continuation of GFA carve-outs in the Post-Transition Period).

Under the TEMT, the carved-out GFA load is exempted from paying the zonal transmission rates set by the Midwest ISO, and instead pays under the terms of its agreements that pre-date creation of or the decision to join the Midwest ISO. *See* TEMT § 38.8.4.6. The Applicants would preserve this exemption because the proposed amendment to Section 37.3(a) specifically applies only to Bundled Load, requiring imputed payment of Schedule 9 charges associated with Bundled Load, and does not require payment, imputed or real, for carved-out GFA load. *See* Application at Attachment A. Thus, the Midwest ISO will not collect any carved-out GFA transmission revenues. Yet, when transmission revenues are distributed under the TOA, nothing in the Tariff requires that a TO with GFA load deduct from its revenue requirement those revenues associated with the carved-out GFA service. Accordingly, even though TOs with GFAs will not contribute revenues for their carved-out GFA load, they may receive a distribution of revenues based on a revenue requirement that includes the cost of serving all load, including GFA load. This situation is the same as treatment of AmerenUE's Bundled Load under the Service Agreement, yet Applicants' proposal would affect just

AmerenUE. Accordingly, the impact of the proposed Tariff modification is discriminatory on its face.

Currently, approximately 6.7 percent of load in the Midwest ISO is served under GFAs, *see* 121 FERC ¶ 61,166 at P 45, and receives this treatment. The Commission has approved preservation of these "carve-outs" for the GFA load, using reasoning upheld by the Courts which supports the need to uphold the sanctity of contracts and to protect the economic bargains reflected therein. *See id.* at PP 15 n.24, 41, 44. As a result, by AmerenUE's estimate, the carved-out GFA load accounts for an estimated $140 million in annual revenue not collected or available to be distributed under the TOA (6.7% of the Midwest ISO load, priced at the average of the TOs' transmission rates of approximately $24,000 per MW-year). The Applicants propose no adjustment for this uncollected revenue. For comparison purposes, the AmerenUE Bundled Load is approximately 8 percent of the load in the Midwest ISO representing approximately $60 million of annual revenue. (AmerenUE's transmission rate is much lower than the average of the TOs' transmission rates). Thus, acceptance of the Applicants' proposed Tariff modification would deny AmerenUE the full benefit of its settled contract with the Midwest ISO (the Service Agreement), while permitting other existing agreements to continue to receive their negotiated benefits.

Further, under their proposal, Applicants would allow the estimated $140 million shortfall in transmission revenue from the carved-out GFAs to be borne on an equivalent basis by all TOs, including AmerenUE; but the Applicants would impute revenues to the $60 million attributed to the AmerenUE Bundled Load, in contravention of the contracts upon which AmerenUE's participation in the Midwest ISO is based. The Commission should reject this blatantly discriminatory treatment of similarly situated entities.

## E. The Application Violates The Service Agreement Between The Midwest ISO and AmerenUE

The Midwest ISO and AmerenUE have executed a contractual agreement, the Service Agreement, under which the Midwest ISO agreed that AmerenUE would not pay charges pursuant to Schedules 1-6 and 9 of the TEMT. Service Agreement, § 3.1. That Service Agreement, which has an initial term of five and a half years with automatic renewal absent six months' notice of intent to terminate,[12] was approved as just and reasonable by the Commission in 2004. *Midwest Indep. Transmission Sys. Op.*, 106 FERC ¶ 61,293, at 62,085 (2004). The Application, however, seeks to eliminate those contractual obligations by creating an entirely new revenue distribution framework under the Tariff that will result in phantom charges to be applied to Bundled Load and then deducted from the revenue to be paid to TOs under the TOA. These phantom charges are effectively fees, which are prohibited by the plain terms of the Service Agreement. In filing such proposed Tariff changes that directly contradict the express terms of the Service Agreement, the Applicants are seeking Commission approval for the *de facto* termination of those terms of the Service Agreement. Modification of the Section 3.1 of Service Agreement in this manner must be justified by a showing that the agreement violates the public interest pursuant to the *Mobile-Sierra* standard discussed above.

To the extent that the Application could be read to attempt to justify (*sub silentio*) this *de facto* termination of the Service Agreement, it does so only by reference to the lesser "just and reasonable" standard; thus, the Application's attempt to terminate the Service Agreement fails on its face. The Applicants may believe that the Midwest ISO has struck an "improvident bargain" in the Service Agreement but, absent the necessary showing of harm to the public

[12] Service Agreement, Art. II, § 2.3.

interest, as required by *Mobile-Sierra*, the Commission cannot eviscerate the just and reasonable terms of this Commission-approved contract.

Modification of the Service Agreement is further prohibited because alteration of any material terms of the Service Agreement by the Midwest ISO requires prior approval of the MoPSC. *See* Service Agreement, Art. II, § 2.3. This provision was approved by the Commission without modification in the Service Agreement Approval Order, and is subject to the public interest standard. Thus, the Midwest ISO must obtain approval of the MoPSC prior to implementing the proposed Tariff change, or must seek FERC authorization to be relieved of the obligation of MoPSC pre-approval based on a showing that the requirement violates the public interest. No such requests have been filed with the MoPSC and no one has even attempted to demonstrate to the Commission that any terms of the Service Agreements are contrary to the public interest.

### F. The End Result Of The Proposed Modified Tariff Should Be Considered, Not The Unacceptably Narrow View Presented In The Application

To the extent the Commission concludes that the issues surrounding the Application should be considered through settlement proceedings or a hearing, the Commission should apply the "end result" test to take into account the impact of the entirety of the Midwest ISO Tariff. "[W]hen the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the [Federal Power] Act. . . . Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (citations omitted). This standard, known as the "end result" test, has been adopted as a measure for the Commission's comprehensive evaluation of proposed rates and terms and

conditions for natural gas and electric service. The U.S. Court of Appeals for the District of Columbia has described the Commission's application of the *Hope* end result test as follows:

> In reviewing a rate order courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates. Moreover, an order cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result.

*Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (*en banc*). Accordingly, the Commission need not, and indeed cannot, consider the artificially narrow change proposed in this proceeding in isolation without also giving due consideration to the end result of this change.

On November 1, 2007, AmerenUE submitted to the MoPSC in Case No. EO-2003-0271, an Application and an RTO Cost-Benefit Analysis assessing its continued participation as a Midwest ISO TO. *See* Exhibit D. In that MoPSC Application, AmerenUE presented analysis showing economic benefits to such participation in comparison to participation in the Southwest Power Pool or formation of an Independent Transmission Company. On that basis, AmerenUE recommended that the MoPSC approve AmerenUE's continued Midwest ISO membership for an additional three years, through April 30, 2012. However, AmerenUE's Application noted several uncertainties that could significantly impact or change that recommendation, MoPSC Application at P 12, and stated that AmerenUE intends to engage in discussions with the Midwest ISO in order to mitigate some of these risks during the 2009 to 2011 time-frame. *Id.* at P 13. AmerenUE also committed to provide to the MoPSC a report on the progress of these discussions by June 1, 2008, and stated that AmerenUE may elect to return to the MoPSC with a request for permission to withdraw as a Midwest ISO TO prior to

April 30, 2012, if it appears that continued TO participation will become unfavorable to AmerenUE and its ratepayers prior to that time. *Id.* AmerenUE's analysis of the Applicants' proposal in this proceeding indicates a potential reduction in estimated revenues for AmerenUE of approximately $60 million per year. AmerenUE's cost-benefit analysis submitted to the MoPSC estimated the benefit of AmerenUE's Midwest ISO membership as compared to other alternatives to be $153 million over three years. *See* RTO Cost-Benefit Analysis at 5. In this circumstance, the Applicants' proposed changes to the Midwest ISO Tariff, if accepted by the Commission, could result in overall rates that are unjust, unreasonable, and unduly discriminatory and preferential which, when combined with other changes, could cause a re-evaluation of AmerenUE's recommendation to the MoPSC.

The "end result" of the Applicants' proposal is made particularly harmful for AmerenUE because a series of recent Tariff changes have had a disproportionately adverse effect on the interests of AmerenUE's ratepayers and investors. For example, in late 2006, the Commission issued an initial order approving the Midwest ISO's Regional Expansion Criteria Benefits ("RECB") plan for allocating the costs of transmission upgrades. At the time of the initial RECB filing, the Midwest ISO Transmission Expansion Plan ("MTEP") reflected approximately $3.5 billion of planned transmission projects, much of which was excluded from regional cost allocation. After just one year of RECB, though, the planned and proposed investment included in the MTEP has skyrocketed to as much as $20 billion. This dramatic jump is due in part to the Midwest ISO's broad interpretation of the transmission investment required to meet reliability standards, along with new state-mandated renewable resource requirements for certain Midwest ISO TOs. AmerenUE estimates that for every billion dollars of completed transmission investment in 345 kilovolt or higher transmission lines (which includes most of the MTEP), the increase in RECB allocations attributed to AmerenUE and its

customers will exceed $3 million per year. Because AmerenUE is on the western edge of the Midwest ISO grid, surrounded predominantly by non-Midwest ISO entities, and because AmerenUE has adequate transmission within its system and its interconnections to neighboring systems, it will enjoy no measurable benefit from these projects, but will still share a substantial part of the cost.

In another example, AmerenUE is pursuing an equitable structure of the revenue sufficiency guarantee ("RSG") charges that have been pending before the Commission for several years in Docket Nos. ER04-691, and EL07-86, *et al.* AmerenUE has made numerous filings with the Commission over the last three years, including responses to compliance filings and requests for rehearing, when appropriate, demonstrating the unjust impact of the current RSG charges. In November 2007, the Commission found that the Midwest ISO's existing RSG cost allocation methodology may not be just and reasonable, set a refund effective date of August 10, 2007, and set the matter for paper hearing and investigation to review evidence and to establish a just and reasonable RSG cost allocation methodology. *See Ameren Services Co.,* et al. *v. Midwest Indep. Transmission Sys. Op.*, 121 FERC ¶ 61,205 (2007). The Commission held that hearing in abeyance for a limited time pending the outcome of current stakeholder negotiations. *Id.* at P 4. AmerenUE is hopeful that those negotiations will result in a more reasonable sharing of RSG costs going forward, but has suffered significant financial effects prior to the new August 10, 2007 refund effective date as a result of the current form of RSG charges.[13]

[13] AmerenUE does not have all of the information necessary to make a precise estimate, but AmerenUE's best estimate is that the potential impact to AmerenUE of the RSG implementation will be a cost of between $20 million and $30 million, depending on the outcome of matters pending before the Commission.

Further, as discussed above, AmerenUE has no carved-out Grandfathered Agreements and thus will subsidize the TOs that have such agreements still in operation in the Post-Transition Period if the Applicants' proposed Tariff change, which only changes revenue collection associated with Bundled Load and not that associated with carved-out GFAs, is accepted.

In light of the significant financial impact for AmerenUE that may result from Commission approval of the instant Application, in combination with the negative impact of the shift in costs and benefits to AmerenUE resulting from other Midwest ISO developments over the last three years and other imminent economic risks, AmerenUE intends to file a request that the MoPSC hold in abeyance the proceeding to consider AmerenUE's continued Midwest ISO membership pending the outcome of the instant Application. AmerenUE is no longer certain whether it will be able to support the recommendation of continued membership pending before the MoPSC on the basis of the filed cost-benefit analysis. Accordingly, in order to preserve its options should the MoPSC proceeding dictate termination of AmerenUE's Midwest ISO membership, AmerenUE has sent to the Midwest ISO a notice of intent to terminate AmerenUE's status as a Midwest ISO Transmission Owner.

In these circumstances, the Commission has an obligation to consider not just the narrow Tariff revision proposed by the Applicants, but also whether the end result from implementation of the Applicants' proposed Tariff modification will be unjust and unreasonable and unduly discriminatory and preferential. The Commission must make this determination of the end result of the entirety of the rate "based upon substantial evidence in the record." *Washington Gas Light Co., Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950). This may be done by ordering a hearing or initiating an investigation into whether the Applicants' proposal is just, reasonable and not unduly discriminatory when taken as a whole.

## V.
## CONCLUSION

As explained above, the Commission should reject the Application because the proposed TEMT changes were filed in contravention of the unanimous consent requirements of the TOA and would create irreconcilable conflicts between the TOA's requirements for revenue distribution and the proposed terms of the TEMT. The Application should further be rejected because the proposed change would effectively abrogate the terms of the TOA and of the Service Agreement between AmerenUE and the Midwest ISO. Both the TOA and the Service Agreement were approved by the Commission and cannot be altered without a showing that such change is required to protect the public interest. In the alternative, if the Commission determines that evidence must be taken in order to resolve the factual issues raised in this Protest with regard to the justness and reasonableness of the Midwest ISO Tariff, it should suspend the proposed Tariff change and set the matter for hearing to collect evidence and support for the ultimate findings as to whether the end result of the proposed Tariff revisions would be just, reasonable and not unduly discriminatory in the context of the Midwest ISO Tariff. Before expending resources on an evidentiary hearing, though, the Commission should order that the hearing be held in abeyance pending settlement judge procedures where the parties can attempt to resolve the dispute on a similar basis.

Respectfully submitted,

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# LIST OF EXHIBITS

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| Exhibit A: | AmerenUE's Motion to Approve Stipulation and Agreement, filed Feb. 9, 2004, MoPSC Case No. EO-2003-0271. |
| Exhibit B: | Order Approving the Stipulation and Agreement, MoPSC Case No. EO-2003-0271 (Feb. 26, 2004). |
| Exhibit C: | Filing of Agreement for the Provision of Transmission Service to Bundled Retail Load, filed Feb. 19, 2004, FERC Docket No. ER04-571. |
| Exhibit D: | Application of AmerenUE and RTO Cost-Benefit Analysis, filed Nov. 1, 2007, MoPSC Case No. EO-2008-0134. |

# EXHIBIT A