

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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	)	<u>File No. EO-2013-0396</u>
Certificate of Convenience and Necessity,	)	
and Merger and, in connection therewith,	)	
Certain Other Related Transactions	)	

JOINT APPLICANTS' REPLY BRIEF

COME NOW Joint Applicants pursuant to the Commission's Procedural Order of April 18, 2013, and submit their Reply Brief.¹

1. Does the Commission have jurisdiction over this matter?

Joint Applicants fully addressed this issue in their Initial Brief.

2. Should the Commission find and conclude that the proposed transfer of EAI's transmission facilities in Missouri to ITC, including all the steps of the Transaction described in the Joint Application, is not detrimental to the public interest in Missouri?

Joint Applicants have more than met their burden of proving that the ITC Transaction is not detrimental to the public interest in Missouri. Intervenor ignores all the benefits identified by Joint Applicants and point to purported detriments that do not exist, are overstated, and/or are unrelated to the Transaction.

¹ Joint Applicants continue to object to the purported list of issues submitted by Intervenor. The Intervenor does not set out questions presented for decision as required by 4 CSR 240-2.080(19). Instead, they state various arguments they are making with regard to the issue presented for decision which is clearly and concisely stated by Joint Applicants as issue 2 in compliance with the rule. Joint Applicants' Reply Brief addresses the issues and Intervenor's arguments.

MJMEUC asserts that the Commission should consider the transfer of assets “in its totality” and not “only the aspects of the transfer that the Commission regulates.” (MJMEUC Brief, p. 1). But MJMEUC contradicts itself and argues that the Commission should ignore the undisputed benefits that the Transaction will deliver to the regional transmission system. (Id. p. 2). KCPL/GMO makes similar assertions and likewise contradicts itself. (KCPL/GMO Brief, p. 20). By law, the Commission must consider the benefits of the Transaction as a whole and how those benefits will positively affect customers served by the limited transmission facilities in Missouri.²

Intervenors also appear to concede in theory that the Commission can consider any and all forms of benefits,³ but nonetheless in practice wrongly encourage the Commission to ignore all the extensive and detailed evidence supplied by Joint Applicants in support of the Transaction. Intervenors summarily dismiss the evidence as “vague”, “nebulous”, “speculative”, and “unquantifiable”, but to the contrary, Joint Applicants have provided both quantitative and qualitative evidence that is clear and convincing and well exceeds the minimal standard of providing an “articulable and plausible reason to believe that the benefits are least roughly commensurate”. (Staff Brief, p. 18, citing Illinois Commerce Commission v. FERC, 2013 WL 2451766 (7th Cir. June 7, 2013)).

² The Missouri assets are not an “afterthought” as MJMEUC contends, but they are factually less than 1% of the total Entergy transmission system. (Riley Direct, p.4-7, Tr. 64-65, 76-77, 80-81,111).

³ See, e.g. State ex rel. AG Processing Inc. v. PSC, 120 SW3d 723, 737 (Mo. 2003).

Joint Applicants discussed all the evidence regarding the benefits of the Transaction thoroughly in their Initial Brief. As indicated in the Initial Brief, those benefits generally fall into four categories:

- 1) ITC's independence from all buyers and sellers of electric energy, results in pure and total dedication to being a good steward of the electric transmission grid;
- 2) ITC's singular focus on electric transmission drives a dedication to transmission service, operational excellence, and expertise in transmission;
- 3) enhancement of the benefits of RTO wholesale energy markets, through ITC's regional view, improvement of the transmission grid, and its structural separation from users of the transmission grid; and
- 4) ownership of the transmission business by a financially strong and capable entity, whose resources are fully dedicated to the capability and performance of the transmission system.

(Welch Direct, p. 17-18).

Without reiterating the entirety of Joint Applicants' Initial Brief, the specific benefits of the Transaction include:

- the undisputed transmission expertise of ITC and its subsidiaries that arises from their current operation of approximately 15,000 transmission line miles in seven states and two RTOs (MISO and SPP), serving a system peak load of over 26,000 MW. (Welch Direct, p. 21-22).
- The structural separation achieved by the independent transmission company model ensures market participants that an unbiased view of the needs of the

- grid will drive transmission investment and best aligns incentives for building needed transmission. (Welch Direct, p. 14-15).
- ITC's independence enables it to take action across utility and RTO boundaries to address inefficiencies in the grid, make needed repairs and upgrades, and connect lower-cost generation to the market. (Welch Direct, p. 16).
 - As shown by its investment of over 3 billion dollars in transmission from 2003 to 2012, which constitutes 60% of all investments in MISO, ITC's projects address system needs identified in an open and transparent planning process, that involves regulators and stakeholders and thereby eliminates any risk of overbuilding as well as the risks that attend failure to make such needed improvements. (Welch Direct, p. 36-45, 54).
 - Significant investment will need to be made in the regional transmission system. As the new owner of the system, ITC's sole focus will be to meet those needs. (Bready Direct, p. 36-37).
 - After acquisition of the EAI and other Entergy Operating Companies' transmission assets, ITC will not only continue to pursue the \$500 million annual capital investment needs identified by the Entergy Operating Companies but also identify other system needs. (Welch Direct, p. 36-45, 54; Vitez Direct p. 29-30).

- ITC achieves more robust results as a MISO member than retail utilities,⁴ having the ability to take a broader approach and achieve projects that cross boundaries, such as the Green Power Express project, which touches two RTO regions, as well as non-RTO regions, seven states, and twenty utility service territories. (Welch Direct, p. 45-48, 53-54).
- ITC delivers benefits beyond what would flow from EAI's membership in MISO, including how ITC not only plans well but then makes the needed investment. For example, ITC undertakes a more comprehensive N-1-1 analysis to develop a system with additional flexibility to address maintenance and upgrades. (Vitez Direct, p. 7-33).
- ITC enhances the benefits of wholesale markets such as the MISO Day 2 Market, reducing the delivered cost of energy by eliminating congestion, increasing reliability, and increasing access to generation. (Welch Direct, p. 45-48, 53-54).
- ITC's independence and singular focus allow it to achieve a stronger credit quality, attract capital at lower cost, and dedicate all of its resources to transmission. Entergy's transmission customers will benefit from ITC's lower borrowing rates and greater investment by realizing a stronger and more reliable system. (Welch Direct, p. 49-50).
- ITC is able to make sustained capital investments in transmission to meet regional needs, whether planned or unplanned/emergency, because of strong

⁴ ITC witness Collins provides a real world example of how much more ITC has done with the IPL system after acquisition, notwithstanding IPL having been a member of MISO. (Collins Direct, p. 11-12).

cash flow, access to capital, and liquidity related to revolving credit facilities.
(Bready Direct, p. 14-23).

- ITC's solid credit quality allows financing at lower rates, and is expected to improve because of the transaction. (Bready Direct, p. 14-23).
- The resulting debt cost savings is estimated to be \$127-151 million in NPV in the entire Entergy region over the first five years, with \$20 million of that in the EAI area. (Bready Direct, p. 14-23).
- ITC has been able to use its credit quality, access to capital markets, liquidity, and rate construct to make needed transmission investments of \$3.4 billion from 2003-2012, averaging nearly 2.0 times its operating cash flow over the past five years. ITC was able to continue with its programs even during the national financial crisis. (Bready Direct, p. 26-27).
- ITC will become even stronger by adding approximately 750 Entergy Operating Company / Entergy Services, Inc. employees and taking a "best practices" approach to the merger of systems. Further, ITC's experience will ensure a smooth transition into MISO membership. (Welch Direct, p. 54-56; Jipping Direct, p. 65-82).
- ITC delivers reliability benefits to customers by focusing on performance improvement, proactive, preventative maintenance, and planning. (Jipping Direct, p. 14-15).
- ITC builds the projects that it plans. "Gross investments in property, plant and equipment increased from \$41 million in 2003 to \$632.9 million in 2011.

Planned gross investment in property, plant and equipment for 2012 is \$730 to \$830 million.” (Jipping Direct, p. 15, Exhibit JEJ-2).

- ITC projects are successful, such as the Jewell to Spokane project in southeast Michigan, which cost \$10.2 million and delivered estimated annual net benefits of over \$60 million by relieving transmission constraints.

Likewise, the new Salem-Hazelton transmission line ITC is constructing in Iowa will address needs that had been identified before ITC acquired the system, and is expected to reduce annual load and production costs by approximately \$108 million.⁵ ITC is undertaking substantial and beneficial projects in Michigan, Iowa, Minnesota, and Wisconsin to advance regional, state and local economic development. It has interconnected over 16 new generators in the past four years, adding approximately 2,150 MW of renewable energy production capacity to the grid. (Vitez Direct, p. 21-26).

- ITC adds advanced technology to the transmission system, like computerized transformer monitoring and synchrophasers for rapid data collection and analysis. (Jipping Direct, p. 15-20).
- ITC’s commitment to safety places it at the top of the industry. It ranks in the top ten percent for having a low company-wide recordable incident rate and for having a low lost work day incident rate. (Jipping Direct, p. 21-24).
- ITC’s robust maintenance program focuses on proactive preventative work. (Jipping Direct, p. 25-34).

⁵ Witness Collins provides additional details regarding this project, which demonstrated ITC’s willingness to invest capital to build projects that have an economic benefit for customers and improve reliability. (Collins Direct, p. 23-26).

- ITC achieves exceptional operational performance while keeping costs in line with its peers. (Jipping Direct, p. 35-36).
- ITC has consistently improved the systems that it has acquired. As a result, the systems that it has owned for the longest time are among the best-performing systems, and its more recent acquisitions are steadily improving. (Jipping Direct, p. 37-43).
- When ITC's reliability is compared to the industry median, it demonstrates savings of \$150 million per year for end users in Michigan using the DOE Interruption Cost Estimator. (Jipping Direct, p. 43-45).
- ITC has proven its ability to restore service promptly after storms. (Jipping Direct, p. 50-56).
- ITC plans its transmission systems to:
 - (1) address local, state, and regional reliability needs;
 - (2) increase the economic efficiency of the overall grid; and
 - (3) respond to transmission needs identified in state and regional processes. (Vitez Direct, p. 7).
- ITC will:
 - enhance customer reliability by improving the transmission system's ability to serve load through upgrades that increase thermal capacity and keep the system within acceptable voltage, stability and short circuit limits as well as improve storm hardening and create additional paths for generation to reach load;
 - increase economic efficiency of the overall grid such as
 - reducing energy costs by removing transmission constraints that cause congestion and must-run commitments, particularly during challenging load, outage, and market conditions;

- reducing resource adequacy and operating reserve costs by decreasing system congestion and reducing the need for isolated areas to hold additional reserves and by broadening the pool of generating capacity that is accessible to meet resource adequacy requirements;
- reducing transmission line losses, resulting in less generation being needed to serve peak load;
- facilitating the development of competitive wholesale energy markets by increasing access to competing generation sources;
- improve optionality for utilities at a time of significant uncertainty due to new environmental regulations potentially impacting fossil-fuel-fired generation; and
- ensure adequate transmission capacity to advance state and federal policy objectives.

(Vitez Direct, p. 33-34).

- ITC's stakeholder and regulator outreach and advocacy efforts employ regularly-scheduled, face-to-face meetings and other forms of frequent communication to identify needs and address planned and unplanned outages, construction, new load growth, reliability, power quality, load and generation interconnection, and regional transmission planning. (Wrenbeck Direct, Ex. 14, p. 19-22).

Furthermore, as made plain by the testimony of ITC witness Collins – yet totally ignored by the Intervenor - the benefits of ITC ownership are proven by its track record regarding acquisition of the IPL system in 2007-08. (Collins Direct, p. 8-34). That system consists of 6,600 miles of transmission lines and 261 substations, with a service territory of 53,400 square miles. When ITC acquired the system, it was in need of significant maintenance and investment. ITC has invested approximately \$891 million as of March

2012 to improve the system. It completed 32 major substation upgrades and expansions, rebuilt 400 miles of existing lines (typically adding capacity), and replaced three major transformers. It built 26 new substations, 26 miles of new lines, and added four major transformers. It has started construction of a 345 kV line that is expected to reduce annual load and production costs by approximately \$108 million (for a one-time cost of \$123 million). It completed 16 new generator interconnects, adding 2,150 MW of renewable energy production capacity to the grid. It is rebuilding the 34.5kV system to 69 kV standards over 12 years, rather than the 60 years projected by IPL, to improve reliability and meet customer needs, with a moderate rate impact. It continues to meet its commitments to the regulators that approved the IPL transaction. (Collins Direct, p. 6-11, 20-30).

As stated in Joint Applicants' Initial Brief, since acquisition of the IPL system, ITC has:

- reduced sustained outages relative to IPL's last year of operations in 2008 by 50% in 2009, 24% in 2010 (a year of record severe weather), and 58% in 2011;
- implemented proactive maintenance and vegetation management programs which during 2009-2011 corrected more than 8700 safety code violations and handled vegetation issues on 108% of the system (i.e. more than a full cycle);
- achieved top decile performance in 2011 for momentary outages on 115kV and 161 kV systems;
- experienced no momentary outages on 345 kV facilities in 2011;
- achieved second quartile results for average circuit outage duration compared to peers; and

- achieved excellent storm response in collaboration with other involved entities and customers as well as alliance suppliers. (Collins Direct, p. 3-7, 12-19).

Furthermore, as stated in Joint Applicants' Initial Brief, ITC has remained focused on continued improvement of the IPL system. Mr. Collins identifies major projects that are now underway, as follows:

- 1) upgrading 80 miles of 115 kV line to 161 kV from Cedar Rapids, Iowa to Boone, Iowa due to age and condition of the line and to satisfy the need for new transmission capacity in the area (expected completion by year-end 2012);
- 2) constructing a new 11 mile 161 kV line loop in the core of Cedar Rapids, Iowa to improve system reliability (expected completion by year-end 2012);
- 3) building 10 miles of new 161 kV transmission line north of Cedar Rapids, Iowa, to support new load in the area (expected completion in 2013);
- 4) constructing a new 80 mile 345 kV line from Salem Substation to Hazleton Substation to improve reliability in eastern Iowa and improve market efficiency by reducing transmission constraints (expected completion in mid-year 2013);
- 5) rebuilding 28 miles of 161 kV line in Minnesota (at the same voltage) due to age and condition of the existing line (expected completion by year-end 2012); and
- 6) rebuilding 50 miles of 115 kV line to 161 kV from Marshalltown, Iowa to Iowa Falls, Iowa due to age and condition of the line and to provide needed capacity for new generation in the area (expected completion by year-end 2012).

(Collins Direct, p. 21).

Mr. Collins' testimony demonstrates that the Transaction benefits identified by the other witnesses in support of the Joint Application are real and will be realized in the Midsouth region, including the affected portion of Missouri.

In the face of all of the Transaction benefits, Intervenor raise individualized complaints of "detriments" that are unfounded and in some instances seemingly designed to create confusion.

Both Empire and KCPL/GMO complain about rate increases that they contend they will experience for transmission service to their generation plants **in other states**. First and foremost, regardless of disputes over the extent of any rate increase, the Commission should recognize that the Crossroads plant in Mississippi and the Plum Point plant in Arkansas will experience the results of Entergy Operating Companies integrating their transmission assets into MISO upon final approval by the FERC,⁶ because the Arkansas and Mississippi commissions, together with the other retail regulators of the Entergy Operating Companies, have already approved that integration. (Wrenbeck Surrebuttal, Ex. 15, p. 2-3, Riley Surrebuttal, p. 4, 8-9, 11-13). And if the last few miles of transmission lines in Missouri are not integrated into MISO, these companies would presumably have to pay something in addition to MISO rates to use them. None of this has anything to do with the ITC Transaction.

⁶ As discussed in detail in Joint Applicants' Initial Brief, the FERC has already approved many aspects of the integration of the Entergy Operating Companies' transmission system into MISO.

Moreover, contrary to KCPL/GMO's assertion, the ITC Transaction will not result in higher rates based on ROE. As MISO members, the Entergy Operating Companies will have interstate transmission rates for these facilities based on ROE of 12.38% without regard to the ITC Transaction. Likewise, after the ITC Transaction, ITC's ROE will also be 12.38%. (Bready Direct, p. 33-35, Surrebuttal, p. 6-10). The FERC made these points plain in its order approving the multistate ITC Transaction in Docket Nos. EC12-145-000 and EL12-107-000. The FERC expressly found the Transaction to be "consistent with the public interest." (143 FERC ¶61,256, at para. 4). The FERC found that the increase in ROE "is a consequence of Entergy's integration into MISO rather than the Proposed Transaction," that the Entergy Operating Companies "would, under Commission precedent, be entitled to the MISO [12.38%] ROE as part of their formula rates," and that "likewise, since ITC Holdings will also become a MISO Transmission Owner with respect to the Entergy transmission facilities if the Proposed Transaction closes, the new ITC Operating Companies would also be entitled to the 12.38 percent MISO ROE as part of their formula rates." (Id. para. 120-121).

Likewise there is no merit to MJMEUC's contention that ITC will have a higher ROE as a MISO member than the Entergy Operating Companies. As confirmed by the FERC's order, ITC has not sought anything more than what the Entergy Operating Companies will already have in effect. Nor would there be any reason to, given both ITC's commitment to FERC to mitigate Transaction costs that exceed demonstrated Transaction-related savings for five years (Id. para. 63), and Joint Applicants' Rate Mitigation Commitments as proposed in Arkansas, which are discussed below.

The interstate rate impacts related to the ITC Transaction stem from ITC's different weighted cost of capital, which involves both a higher percentage of equity and a lower cost of debt. ITC's capital structure is essential to its ability to deliver the benefits of independent transmission ownership. (Bready Direct, p. 31, 35, Surrebuttal, p. 5). As Mr. Bready explains: "The 60% equity / 40% debt capital structure supports the creation of high credit quality operating companies with steady cash flows, strong liquidity, and access to the cost-effective capital needed to make transmission investments." (Bready Surrebuttal, p. 5). This capital structure properly balances the risks faced by shareholders and the impact of rates paid by customers. (Bready Surrebuttal, p. 5-7).

The FERC concluded that the interstate rate effects of ITC's proposed "use of an actual capital structure targeting 60 percent equity and 40 percent debt," including offsetting credit quality savings, "are offset by the benefits of independent transmission company ownership over the Entergy transmission facilities." In reaching this conclusion, the FERC identified numerous specific benefits of independent transmission ownership, including:

- more rapid and precise response to market signals indicating needed transmission investment, due to singular and unbiased focus on transmission;
- ITC's track record in prior transmission system acquisitions of completing capital projects targeted at remediating underinvestment and thereby improving reliability, providing non-discriminatory access to transmission, promoting competition in electric energy markets, and facilitating interconnection of new generation and load;

- ITC's track record of rapidly and efficiently improving transmission systems, thereby reducing sustained outages;
- ITC's greater financial strength for transmission investment;
- ITC's strong credit ratings resulting in critical access to debt capital markets at lower costs and therefore lower rates; and
- ITC's robust transmission planning and related communications among stakeholders.

The FERC found that the benefits of independent ownership by ITC “are benefits that are not attributable to Entergy’s integration into MISO.” Further, it found that “Applicants have not only demonstrated that the Proposed Transaction will result in benefits that offset the increase in gross revenue requirement due to the proposed capital structure, but that the Proposed Transaction will yield many different types of benefits.” (Id. para, 124-131).

As stated in Joint Applicants’ Initial Brief, the ITC Transaction will have a modest rate impact on “through and out” transmission service (transmission starting within and exiting the MISO territory). The through and out rates are based on the average of all transmission of all members in MISO, so any change related to differences between EAI and ITC revenue requirements will be diluted by such averaging. And again, because the Empire and KCPL/GMO generation plants are located **in other states**, and nearly all of the involved transmission facilities are also located in those other states, these rates will change for all but the limited Missouri portion upon approval of the ITC Transaction in those other states. (Wrenbeck Surrebuttal, p. 4).

As stated in Joint Applicants' Initial Brief, ITC estimates that its ownership would lead to an 8.1% increase for point-to-point transmission service within the Arkansas pricing zone in MISO over projected EAI wholesale rates in 2014.⁷ This increase is attributable solely to the difference in ITC's weighted average cost of capital, which takes into account both a 60% equity capital structure and offsetting debt cost savings. It does not result in any way from the application of the 12.38% ROE approved by the FERC, because as stated above, EAI will use the same ROE as a member of MISO. (Bready Direct, p. 33-35, Surrebuttal, p. 6-10).

And also as stated in Joint Applicants' Initial Brief, recognizing that the benefits of the Transaction will be realized over time, Joint Applicants have proposed certain Rate Mitigation Commitments for the Arkansas pricing zone, again which includes the Missouri facilities. Since the hearing in this matter, Joint Applicants have introduced enhanced Rate Mitigation Commitments in the Arkansas PSC proceedings such that if the Transaction is approved and closes there would be rate mitigation funds for the first five years in the Arkansas pricing zone of \$127.5 million to offset the impacts of the change to ITC's weighted average cost of capital. Further, under the enhanced commitments, rate mitigation would continue beyond the first five years until an

⁷ Contrary to KCPL/GMO's Brief (p. 10), Mr. Bready made it clear that he was describing the impacts of the ITC Transaction, not the separate integration of Entergy Operating Companies' transmission assets into MISO. Hence, KCPL/GMO's assertions (Brief, p. 17, 20) that Joint Applicants did not quantify the rate impact of the ITC Transaction and were not "transparent" about such impacts are simply false.

independent evaluator confirms that the tangible and quantifiable benefits of the Transaction outweigh the cost of capital impacts.⁸

The FERC has ratemaking authority over the interstate transmission rates that will apply to these facilities. It has approved the Transaction, finding the rate impacts to be outweighed by the benefits of the Transaction. (Docket Nos. EC12-145-000 and EL12-107-000, 143 FERC ¶61,256, at para. 4, 119). The FERC found that “the Proposed Transaction will not have an adverse effect on competition, rates, or regulation ... [and] will not result in cross-subsidization.” (Id. para. 46). The FERC specifically relied on the applicants’ commitments to hold customers harmless from Transaction costs that exceed demonstrated Transaction-related savings for five years. (Id. para. 63). The FERC declined to impose “hold harmless” requirements as a condition of approval. (Id. para. 140).

Rate Mitigation Commitments have been made by ITC and Entergy Operating Companies in jurisdictions with either wholesale or retail ratemaking authority, and address the rate impact concerns expressed by Intervenors. However, it would be unlawful for this Commission to impose a duplicative ratemaking condition or “hold harmless” provision in conjunction with approval of the Transaction as proposed by Empire and MJMEUC, because the Commission has no related ratemaking authority with respect to EAI’s Missouri facilities. The rates that will apply to the Missouri transmission facilities will be those approved by the FERC from time to time. Moreover, whatever Rate Mitigation Commitments are established for the Arkansas pricing zone in

⁸ ITC continues to deliver on rate mitigation commitments made when it acquired the transmission assets of IPL in Iowa in 2007-08. (Bready Tr 165-66).

proceedings before the FERC will inescapably apply to the Missouri transmission facilities and customers served by those facilities.

Likewise, KCPL/GMO's proposal that approval of the ITC Transaction be conditioned upon a "hold harmless" provision relative to the separate MISO integration (Brief p. 22) lacks any nexus whatsoever and invites the Commission to make reversible error.⁹

The doctrine of unconstitutional conditions precludes the Commission from making its approval of the Transaction, and the related exercise of Joint Applicants' property rights, contingent upon matters that are beyond the Commission's jurisdiction or unrelated to the Transaction. This doctrine was recently applied by the United States Supreme Court in Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013). The doctrine "vindicates" constitutional rights, such as property interests, "by preventing the government from coercing people into giving them up." *Id.* at 2594. There must be a "nexus" and "rough proportionality" between the imposed conditions and the proposal under consideration. *Id.* at 2595. "[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* Furthermore, imposed conditions must be a legitimate exercise of authority within the jurisdiction of the governmental body. See Nollan v. California Coastal Commission, 107 S.Ct. 3141, 3148 (1987).

⁹ EAI discusses the other defects in KCPL/GMO's proposal in its separate brief in File No. EA-2013-0431.

This doctrine is routinely applied in Missouri permit approval cases. See, e.g., Curry Investment Co v. Board of Zoning Adjustment of Kansas City, 399 SW3d 106 (Mo App 2013)(conditions of approval must be both lawful and reasonable).

The doctrine of unconstitutional conditions applies coextensively with the overall limitations on Commission action, which must be both lawful and reasonable to withstand judicial review. See Section 386.510. Thus, it applies in the context of both statutes pursuant to which the Joint Application was submitted. The doctrine is expressly incorporated into Section 393.170, which only authorizes the Commission to impose reasonable and necessary conditions upon certificates of convenience and necessity. Likewise, it applies implicitly to action under Section 393.190.

The Commission has previously recognized the limitations of the doctrine of unconstitutional conditions, and the limits of its authority to impose only reasonable conditions that alleviate specific detriments of a transaction, not conditions that lack any rational connection to the transaction. See, e.g., In re Union Elec. Co., File No. EO-2011-0128, Report and Order, p. 20 (2012).

Intervenors acknowledge these limits on the Commission's authority to impose conditions of approval (KCPL/GMO Brief, p. 6, Empire Brief, p. 7), but nonetheless ignore them. A condition regarding the level of wholesale interstate rates which are outside the Commission's jurisdiction would be an unlawful condition that would in effect purport to override the FERC's ratemaking authority. A condition regarding the impacts of a separate and distinct transaction would have no nexus and, therefore, would be unlawful and unreasonable. Yet, these are the unlawful conditions that Intervenors propose.

In any event, appropriate rate increases are not actually a detriment. Rather, according to the Commission, “a detriment ... is any direct or indirect effect of the transaction that tends to make rates less just or less reasonable.” In Re Union Elec. Co., EO-2004-0108, Report and Order on Rehearing, p. 49 (2005). As Staff has observed (Tr. 58), the FERC has already found the rate impacts of the Transaction to be reasonable and outweighed by the benefits of the Transaction. (Docket Nos. EC12-145-000 and EL12-107-000, 143 FERC ¶61,256, at para. 124-131). Reasonable rates necessary to achieve the benefits are not a detriment.

Beyond rate impacts, the Intervenor does not identify any purported detriment that warrants consideration by the Commission or that supports the imposition of any condition of approval.

Empire unjustifiably seeks to obtain veto authority over the Transaction by proposing that the Commission impose a condition of approval that would require Joint Applicants to successfully negotiate a new interstate interconnection agreement with Empire for service to the Plum Point plant in Arkansas. But the interstate interconnection agreement at issue is subject to FERC authority. Further, the FERC expressly declined to make negotiation of a new agreement a condition of its approval of the Transaction. Instead, the FERC accepted ITC’s commitment to honor all existing transmission agreements (Wrenbeck Surrebuttal, p. 4-5, Riley Surrebuttal, Ex 2, p. 4-7), noting that notices of succession would have to be filed and parties could present any concerns to the FERC at that time. (Docket Nos. ER12-2681-000, ER13-948-000, and ER13-782-000, 143 FERC ¶61,257, at para. 177).

Empire apparently has been satisfied with this interconnection arrangement since 1941 (Tr. 67) and obtained FERC acceptance of the arrangement again in 2006 (Warren Rebuttal, p. 7-8). Further, Joint Applicants have committed to satisfy any legitimate concerns of Empire (Riley Surrebuttal, p. 6, Tr. 67-68). Nonetheless, if Empire decided to make other arrangements with another provider, that should not provide a basis for it to veto the Transaction. The FERC deemed it sufficient for such matters to be resolved separately pursuant to its jurisdiction by means of notices of succession. (143 FERC ¶61,257, at para. 177). The doctrine of unconstitutional conditions precludes the Commission from second-guessing the FERC's authority and judgment by imposing conditions regarding interstate interconnection arrangements.

There is absolutely no basis whatsoever for KCPL/GMO's assertion that acquisition of the assets by ITC implicates any reliability or safety concerns. As reiterated above, ITC's reliability and safety record is exemplary. Nor do the purported concerns of KCPL/GMO about loop flows have anything to do with the ITC Transaction.

Empire acknowledges that its professed concerns about loop flows between MISO and SPP do not relate to this proceeding. (Empire Brief, p. 15). KCPL/GMO presents these concerns in the portion of its Brief regarding the separate MISO integration (p. 13-16), but then inexplicably proposes that such concerns be addressed in a condition of approval regarding the ITC Transaction (p. 22). As Mr. Jipping explains, these concerns about new power flows are matters strictly related to EAI's MISO membership and unrelated to the ITC Transaction. (Jipping Surrebuttal, p. 4). Accordingly, any condition of approval in this proceeding regarding such matters would be unlawful and unreasonable.

The FERC concluded that such matters will be resolved in the ordinary course of interstate business between the RTOs. Accordingly, it declined to require ITC and/or Entergy to hold parties harmless from potential parallel and loop flows, because RTOs have developed joint operating agreements with mechanisms and related procedures to address such matters. The FERC encouraged parties to continue to work together to resolve such issues, indicated its continuing interest in the status of negotiations, and directed MISO to report on the status of negotiations on or before November 1, 2013. It also noted MISO's obligation to comply with NERC's Reliability Standards. (Docket Nos. ER12-2681-000, ER13-948-000, and ER13-782-000, 143 FERC ¶61,257, at para. 147-153). As with interstate ratemaking, the Commission has no authority or basis to override the judgment of the federal agency with jurisdiction over these matters.

Finally, the Commission should reject KCPL/GMO's argument (Brief p. 20-22) that the Commission should ignore the evidence presented to it in this proceeding and in some manner yield its decision-making authority to ALJs and/or Staff witnesses in other states. The facts and circumstances are very different in other states, wherein Entergy Operating Companies also have retail operations, and the legal approval standards are different. (Jipping Surrebuttal, p. 3-4). Further, the testimony referenced by KCPL/GMO was fully rebutted by ITC witnesses in the other states. (Jipping Surrebuttal, Ex JEJ-SR-1; Bready Surrebuttal, Ex CMB-10; Vitez Surrebuttal, Ex TWV-SR-1). But there is no need to examine testimony submitted in another state. This proceeding must be resolved based on the record developed before this Commission regarding the Missouri assets. And the Commission's own staff supports approval based on the evidence presented in this state. (Staff Brief).

As discussed above and in Joint Applicants' Initial Brief, the FERC has already approved the ITC Transaction. Joint Applicants continue their efforts to obtain approvals in all other jurisdictions. The Missouri situation is unique, given the very limited set of transmission facilities and the absence of EAI retail operations. As a practical matter, it is very unlikely that the Transaction would occur relative to the Missouri assets absent approval in Arkansas. On the other hand, there is no basis for this Commission to disapprove the Transaction. A failure to approve would be detrimental to the public interest, preventing the benefits of the ITC Transaction from being achieved in Missouri.

The proposed Transaction is separate and distinct from EAI's plan to integrate its transmission facilities into MISO (EA-2013-0431). The FERC concluded that it was appropriate to evaluate the ITC Transaction on its own merits, separately from consideration of the integration of the transmission facilities into MISO. (Docket Nos. EC12-145-000 and EL12-107-000, 143 FERC ¶61,256, at para. 119). Notwithstanding KCPL/GMO's confusing assertions to the contrary (Brief p. 20), other states are also evaluating the ITC Transaction separately from their prior proceedings considering the Entergy Operating Companies' integration into MISO. Likewise, this Commission should reject Intervenor's efforts to conflate the two proceedings. Further, notwithstanding Staff's remark (Staff Brief p. 1), the Commission should address each proceeding by a separate order, given that the cases have not been consolidated other than for the purpose of the hearing.

The evidence shows that no detriment will result from the Transaction, and further shows that the public will benefit from ITC acquiring these limited Missouri assets in connection with the overall Transaction. Accordingly, Staff supports approval.

(Staff Brief). Based on the evidence, and consistent with the FERC's decisions and the recommendation of its Staff, the Commission should determine that the Transaction is not detrimental to the public interest in Missouri and approve it without any conditions.

3. Should the Commission grant TC Arkansas a certificate of convenience and necessity with respect to the transmission assets located in Missouri that are to be transferred from EAI to ITC, grant TC Arkansas waivers of 4 CSR 240-3.145, 3.165, 3.175, and 3.190(1)&(3), and authorize TC Arkansas to change its name to ITC Arkansas LLC in conjunction with completion of the Transaction?

No party has disputed the propriety of granting a certificate to TC Arkansas, authorizing it to change its name to ITC Arkansas, LLC in conjunction with completion of the Transaction, and granting the requested waivers (as previously clarified).

4. Should the Commission approve a partial transfer of EAI's existing certificate, or issue a new certificate, to Entergy Arkansas LLC to operate its remaining limited distribution facilities located in Missouri?

No party has disputed the propriety of granting a revised certificate to EAI in conjunction with completion of the Transaction.

WHEREFORE, Joint Applicants request that the Commission grant the relief sought in the Joint Application, by separate order from that to be issued in File No. EA-2013-0431.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the above and foregoing has been served upon counsel of record by forwarding the same by electronic mail and/or first class mail, postage prepaid, this 2d day of August, 2013.

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