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 Functional Control of Its Transmission System to the Midwest Independent Transmission System Operator, Inc.	)))))	**File No. EO-2011-0128**

STAFF'S INITIAL BRIEF

COMES NOW, Staff of the Missouri Public Service Commission ("Staff"), by and through the undersigned counsel of the Staff Counsel Department of the Missouri Public Service Commission ("Commission") and submits *Staff's Initial Brief*.

LIST OF ISSUES AND STAFF RESPONSES

1. Is an extension of the term of the Commission's permission for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO, on the terms and conditions set out in the Non-unanimous Stipulation and Agreement filed in this docket on November 17, 2011, not detrimental to the public interest?

Ans:

Yes, authorization for Ameren Missouri to continue to participate in the Midwest ISO, until May 31, 2016, under the terms and conditions of the *Non-unanimous Stipulation and Agreement* entered into by Staff, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), Midwest Independent Transmission System Operator ("Midwest ISO"), and Missouri Industrial Energy Consumers ("MIEC") filed on November 17, 2011 is not detrimental to the public interest and should be approved by the Commission. Study results presented by Ameren Missouri in its initial filing for the calendar years 2011 through 2013 (*Verified Application To Extend Permission And Authority For Participation In Regional Transmission Organization*, Attachment A) filed on November 1, 2010, reflected a three-year net present value benefit of approximately $70 million. The updated study addressed in the

Direct Testimony of Ameren Missouri witness Mr. Ajay K. Arora reflects a three year net present value benefit for calendar years 2012 through 2014 of approximately $105 million. (Ex. 1, Arora Dir., Sched. AA-1).

On September 14, 2011, the Staff filed the Rebuttal Testimony of Adam C. McKinnie proposing that the Commission authorize Ameren Missouri to continue to participate in the Midwest ISO based upon certain conditions set out in Mr. Kind's Rebuttal Testimony. On November 18, 2011, the Staff filed Mr. McKinnie's Second Supplemental Rebuttal Testimony And Testimony In Support Of The Non-unanimous Stipulation And Agreement. (Ex. 9, McKinnie 2nd Supp. Reb., pp. 4-6). In addition to responding to Commissioner questions, this Staff testimony was to provide Staff support for Ameren Missouri's continued participation in the Midwest ISO as not detrimental to the public interest, pursuant to the terms and conditions of the *Non-unanimous Stipulation And Agreement*.

On November 23, 2011, Public Counsel and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") filed objections to the *Non-unanimous Stipulation and Agreement*. (On November 18, 2011, Public Counsel filed *Office Of The Public Counsel's Motion To Continue Hearing And Request For Expedited Treatment*. Also on November 18, 2011, the Commission issued *Order Granting Public Counsel's Motion To Continue Hearing*.)

Staff witness Adam C. McKinnie's Second Supplemental Rebuttal Testimony And Testimony In Support Of The Non-unanimous Stipulation And Agreement (Exhibit 9) at pages 4 - 6, provides information regarding Staff's support for the *Non-unanimous Stipulation and Agreement*, addressing paragraphs (or sections) 10.b. Additional Analysis requiring a future cost-benefit study, 10.j. Rate Treatment (Incentive Adders) - Ameren Missouri Affiliate Owned Transmission and 10.c. Incentive Adders (Ameren Missouri Owned Transmission), and 10.i.

Investigatory Docket (Ameren Missouri Ten (10) Month Investigatory Affiliate Owned Transmission Docket). The *Non-unanimous Stipulation and Agreement* constitutes a change in position of the signatory parties, since the *Non-unanimous Stipulation and Agreement* is opposed by Public Counsel and MJMEUC. As a consequence, *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo.App. W.D. 1982)[1] and 4 CSR 240-2.115(2)(D), provide the procedure which must be followed.[2] On January 18, 2012, Public Counsel filed Mr. Kind's Supplemental Rebuttal Testimony. On February 6, 2012 the Staff filed the Surrebuttal Testimony of Mr. McKinnie and Ameren Missouri filed the Supplemental Surrebuttal Testimony of Ms. Borkowski and Mr. Arora in response to the Supplemental Rebuttal Testimony of Ryan Kind respecting the *Non-unanimous Stipulation and Agreement*.

Ms. Borkowski testified that she was named President and Chief Executive Officer of Ameren Transmission Company ("ATX") in August, 2010. (Ex. 5, Borkowski Sur., p. 2, lns. 13-14). Mr. Kind attached to his Supplemental Rebuttal Testimony as Attachment B a copy

[1] The Western District Court of Appeals held in part as follows:

> . . . it is clear that Section 386.410 did not authorize the limited hearing procedure utilized in this case. It does not as the Commission claims, give it unlimited discretion to conduct its hearings in any possible manner. . . .
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> . . . [Section 386.420] guarantees that Public Counsel and all other parties to a Commission proceeding have the right to be heard and to introduce evidence. . . .

645 S.W.2d at 42.

> 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. . . .

Id. at 43.

[2] As a matter of convenience, the parties have used the vernacular of referring to the *Non-unanimous Stipulation and Agreement* as the *Non-unanimous Stipulation and Agreement,* when the *Non-unanimous Stipulation and Agreement* itself constitutes a change in positions.

of an ATX Draft Business Plan dated March 25, 2010. (Ex. 13, Kind Supp. Reb., Attach. B, p. 1). He quotes from an Ameren Corp. press release that states that ATX was formed in August 2010 and will invest in and own new major electric transmission projects in Missouri and Illinois. (Ex. 11, Kind Reb., p. 8, ln. 17 - p. 9, ln. 5).

On July 20, 2006, the FERC issued Order No. 679, Promoting Transmission Investment Through Pricing Reform in Docket No. RM06-4-000, 116 FERC ¶61,057. In paragraph 1 of its Final Rule, the FERC stated that pursuant to the directives in Section 1241 of the Energy Policy Act of 2005, which added new Section 219 of the Federal Power Act ("FPA"), 16 USC §824s, the FERC was providing in the Final Rule incentives for transmission infrastructure investment that would help insure the reliability of the bulk power system and reduce the cost of delivered power to customers by reducing transmission congestion. Thus, Section 1241 of EPAct 2005, new Section 219 of the FPA, empowered the FERC to adopt Order No. 679 Promoting Transmission Investment Through Pricing Reform.

The incentives of FERC Order No. 679 are not limited to rate of return but include other ratemaking mechanisms. The following paragraphs of FERC Order No. 679 address the following ratemaking mechanisms available to public utilities, including transcos: paragraph 85 - Return on Equity ("ROE"); paragraph103 - Construction Work in Progress ("CWIP") and Pre-Commercial Expenses; paragraph 123 - Hypothetical Capital Structure; paragraph 135 - Accelerated Depreciation; paragraph 155 - Recovery of Costs of Abandoned Facilities; paragraph - 168 - Deferred Cost Recovery; paragraph 179 - Single-Issue Ratemaking. There are also paragraphs addressing incentives available solely to transcos: paragraph 206 - ROE Incentive; paragraph 242 - Accumulated Deferred Income Taxes ("ADIT"); and paragraph 251 - Acquisition Premiums for Transco Formation.

It appears that Mr. Kind's suggested language on page 13, lines 12-20 of his Supplemental Rebuttal Testimony (Ex. 13) is intended to cover items he lists on page 12, lines 15-17 of his Supplemental Rebuttal Testimony (abandoned plant recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses, and accelerated depreciation) in addition to capital structure, return on equity (ROE), and construction work in progress (CWIP).

After FERC's adoption of Order No. 679, Promoting Transmission Investment Through Pricing Reform, issued July 20, 2006, various parties in Case No. EO-2008-0134, Ameren Missouri's Midwest ISO case preceding Ameren Missouri's present Midwest ISO case, executed a Stipulation and Agreement in settlement of Case No. EO-2008-0134. The section on incentive adders in the Case No. EO-2008-0134 Stipulation and Agreement was no more specific than Section 10.c. in the present *Non-unanimous Stipulation and Agreement*. None of the particular FERC Order No. 679 incentive adders noted above is referred to in detail in the Case No. EO-2008-0134 Stipulation and Agreement. The words "incentive 'adders' for participation in an RTO or in an ICT to the rate of return allowed for providing Transmission Service to wholesale customers within the Ameren zone" appear in both documents:

> File No. EO-2011-0128 Non-unanimous Stipulation and Agreement:
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> 10.c. Incentive Adders. Ameren Missouri acknowledges that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load. Consistent with Section 3.1 of the Service Agreement and its primary function, to the extent that the FERC offers *incentive "adders" for participation in an RTO or in an ICT to the rate of return allowed for providing Transmission Service*[2] *to wholesale customers within the Ameren zone*, such incentive adders shall not apply to the transmission component of rates set for Bundled Retail Load by the MoPSC. [Italics emphasis added.]
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> [2] As that term is defined in the Service Agreement.

Case No. EO-2008-0134 Stipulation and Agreement:

> 17. Incentive Adders. The Signatories agree that the Service Agreement's primary function is to ensure that the MoPSC continues to set the transmission component of AmerenUE's rates to serve its Bundled Retail Load. Consistent with Section 3.1 of the Service Agreement and its primary function, the Signatories agree that to the extent that the FERC offers *incentive "adders" for participation in an RTO or in an ITC to the rate of return allowed for providing Transmission Service*[3] *to wholesale customers within the Ameren zone*, such incentive adders shall not apply to the transmission component of rates set for Bundled Retail Load by the MoPSC. [Italics emphasis added.]
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> [3] As that term is defined in the Service Agreement.

On January 27, 2009, all of the parties, including Public Counsel and Staff, in Case No. EO-2009-0179, *In the Matter of the Application of KCP&L Greater Missouri Operations Company for Authority to Transfer Functional Control of Certain Transmission Assets to the Southwest Power Pool, Inc.*, filed a Stipulation and Agreement. KCP&L Greater Missouri Operations Company ("GMO") and Kansas City Power & Light Company ("KCPL") are subsidiaries of Great Plains Energy, Inc., a holding company. Ameren Missouri and ATX are subsidiaries of Ameren Corp., a holding company. Paragraph II.B.(2) of the EO-2009-0179 GMO-SPP case Stipulation and Agreement contains the only language respecting the FERC incentive adders in the EO-2009-0179 Stipulation and Agreement and paragraph II.B.(2) does not contain the incentive adder protection found in the Stipulation and Agreement in Case No. EO-2008-0134. The Staff understands that the language of paragraph 17 in the Stipulation and Agreement in Case No. EO-2008-0134 is limited to that case but the incentive adder protection in that Stipulation and Agreement was available to be used in paragraph II.B.(2) in the Stipulation and Agreement in Case No. EO-2009-0179 instead of the language that does appear in paragraph II.B.(2), and it is the Public Counsel that is arguing, in essence in this proceeding, that a different settlement should be imposed on Ameren Missouri than the one that was negotiated by Staff and MIEC.

Paragraph II.B.(2) in the Stipulation and Agreement in Case No. EO-2009-0179 provides as follows:

> II. Stipulations
> B. Service Agreement
> (2) Purpose of Service Agreement
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> KCP&L-GMO, Staff, Public Counsel, Empire and Dogwood agree, and SPP acknowledges, that the Service Agreement's primary function to ensure that the MoPSC continues to set the transmission component of KCP&L-GMO's rates to serve its Missouri Bundled Retail Load.
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> **Relationship Between the Service Agreement and FERC Determined Incentives**
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> For example, in response to Section 1241 of the Energy Policy Act of 2005 ("EPAct 2005"), the FERC has conducted a rulemaking process (Docket No. RM06-4) that culminated in Order No. 679 and subsequent orders on rehearing, in which it identified financial incentives that the FERC may allow. These incentives include, among other things, certain incentives for investment in new transmission, investment in new transmission technologies, improvements in the operation of transmission facilities, and participation in a Transco[8] or a Transmission Organization.[9] *Consistent with section 3.1 of the Service Agreement and its primary function, KCP&L-GMO recognizes that the MoPSC has the sole regulatory authority to determine whether or not such incentives related to KCP&L-GMO's transmission facilities should be included in rates for Missouri Bundled Retail Load.* [Italics emphasis added.]
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> [8] In Order No. 679, FERC defines a Transco to mean "a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis." [Paragraph 201]
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> [9] In Order No. 679, FERC defines a Transmission Organization to mean "a regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities." [Paragraph 328]

(Vol. 3, Tr. 239, ln. 4 - Tr. 240, ln. 16). Paragraph II.B.(2) in the Stipulation and Agreement in Case No. EO-2009-0179 respecting GMO does not contain the incentive adder protection found in the Stipulation and Agreement in Case No. EO-2008-0134 respecting AmerenUE.

Although it is not a formal proposal of Public Counsel, i.e., it is not reflected as a formal proposal of Public Counsel in Public Counsel's January 27, 2012 Second Statement of Positions of the Office of the Public Counsel, Mr. Kind did include in his January 18, 2012

Supplemental Rebuttal Testimony alternative language to paragraph 10.j. to the *Non-unanimous Stipulation and Agreement*, which Mr. Kind asserted would provide "long-term comprehensive rate protection to UE's retail customers." (Ex. 13, Kind Supp. Reb., p., 13, lns. 21-22). Regarding the last sentence in paragraph 10.j. of the *Non-unanimous Stipulation and Agreement*:

> . . . The ratemaking treatment agreed to in this subparagraph j will, unless otherwise agreed, end with the MoPSC's next order (after its order resolving this docket) respecting American Missouri's participation in the Midwest ISO, another RTO or operation as an ICT.

Mr. Mills in response to a question from Commissioner Kenney stated, in part, as follows:

> [Mr. Mills]: . . . Ameren Missouri's grant in paragraph 10(j) is for a very limited amount of time and for a very limited amount of dollars. The real money comes after this interim period.[3]

(Vol. 3, Tr. 71, lns. 18-21). Mr. Mills proposed a fix in his opening statement:

> [Mr. Mills]: . . . you could require the provision in the non-unanimous stipulation and agreement that's designed to expire at the end of the interim approval to -- to extend indefinitely. . . .

(*Id*. at Tr. 57, lns. 15-18). The Staff notes Public Counsel's suggestion that the Commission impose "indefinite" conditions on Ameren Missouri while Public Counsel opposed Ameren Missouri's August 10, 2011 *Amended Verified Application To Extend Permission And Authority*

[3] Ms. Borkowski testified that ATX's construction of transmission in Missouri during the proposed period of Ameren Missouri's continued Midwest ISO participation (Public Counsel's referenced "interim period" to May 31, 2016) would not render Ameren Missouri' continued Midwest ISO participation detrimental to the public interest from a purely "dollars and cents" perspective. She stated that the only relevant project is the "Mark Twain Project," a 345-kV transmission line multi-value project ("MVP") extending from the Iowa border north of Kirksville and then south and east to Associated Electric Cooperative, Inc.'s ("AECI's") Palmyra substation. The 2011Midwest ISO Transmission Expansion Plan ("MTEP") has this project in-service in 2020. Although ATX's projected cost to build this line is $200 million, Mr. Borkowski testified that the amount forecasted or budgeted to be spent by 2016 on the line by ATX is approximately $11 million. She noted regarding MVPs that Ameren Missouri is allocated 10% or less of the cost of the project. She then testified that assuming there is an incremental impact of ATX building the line rather than Ameren Missouri building the line (using the assumptions similar to those used by Mr. Dauphinais in his analysis in his Rebuttal Testimony (Ex. 14)), the net present value of the incremental impact to Ameren Missouri's customers over the 40-year life of the line of ATX building the line would be approximately $1.6 million. (Ex. 6, Borkowski Supp. Sur., p. 2, ln. 7 - p. 3, ln. 21; Ex. 5, Borkowski Sur., p. 6, lns. 16-18).

For Participation In Regional Transmission Organization.[4] Pursuant to paragraph 10.b. of the *Non-unanimous Stipulation and Agreement*, Ameren Missouri is to file by November 15, 2015 for continued authorization to participate in an Regional Transmission Organization / Independent Transmission System Operator ("RTO") / ("ISO") or as an Independent Coordinator of Transmission ("ICT") beyond May 31, 2016.

Public Counsel cross-examined Mr. McKinnie regarding the cost-benefit analysis required by Section 10.b. of the *Non-unanimous Stipulation and Agreement*. Mr. McKinnie testified in his Second Supplemental Rebuttal Testimony at page 4, line 22 to page 5, line 2 that this study should provide the stakeholders and Commission sufficient information regarding future Ameren Missouri participation in RTO / ISO organizations such as MISO and SPP. Public Counsel asked Mr. McKinnie if paragraph 10.b. allows Staff, Public Counsel, and perhaps some other entities to provide input on how the study is designed and conducted and whether it imposes any obligation on Ameren Missouri to incorporate these suggestions? Mr. McKinnie responded that paragraph 10.b. gives some parties substantive input, but no right to dictate:

> Q.[Mr. Mills]: Other than the requirement that Ameren take into consideration those comments in good faith, does it impose any obligation on Ameren to incorporate those suggestions?
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> A.[Mr. McKinnie]: Within the analysis that Ameren performs, no, I mean, I believe that Ameren is able to maintain its independence and control of the actual analysis as stated in paragraph (b) in the non-unanimous stipulation and agreement.

(Vol. 3, Tr. 161, lns. 1-8). There is no indication in this proceeding that the Staff is interested in dictating or securing any right of imposition respecting the Staff's suggestions concerning how

[4] Ameren Missouri filed a "traditional non-evergreen authorization" *Verified Application To Extend Permission And Authority For Participation In Regional Transmission Organization* on November 1, 2010 but well into the EO-2011-0128 docket, on August 10, 2011, Ameren Missouri filed an *Amended Verified Application* with a provision for evergreen Commission authorization to continue to participate in the Midwest ISO. Ameren Missouri first supported its *Amended Verified Application* "evergreen authorization" position by the Direct Testimony of Mr. Ajay K. Arora (Ex. 1) filed on July 29, 2011, and then moved off its *Amended Verified Application* "evergreen authorization" proposal in the Surrebuttal Testimony of Mr. Arora (Ex. 2) filed on November 1, 2011.

the study is designed and conducted. Mr. McKinnie testified that he assumed good faith on the part of Ameren Missouri in carrying out the terms and conditions of the *Non-unanimous Stipulation and Agreement*. (Vol. 3, Tr. 178, lns. 14-19). He also testified on February 9, 2012 on re-direct that it is still his position that the *Non-unanimous Stipulation and Agreement* is not detrimental to the public interest. (*Id*. at lns. 20-23).

Mr. McKinnie stated in his Supplemental Rebuttal Testimony that the *Non-unanimous Stipulation and Agreement's* provision for Ameren Missouri's participation in the Midwest ISO till May 31, 2016, will allow for one year of information regarding Southwest Power Pool, Inc.'s ("SPP") Day 2 Integrated Marketplace, expected to be online in April 2014, to be included in a cost-benefit analysis to be filed with the Commission by November 15, 2015. An extension of permission for Ameren Missouri to continue to participate in the Midwest ISO for a shorter period of time would not allow sufficient time to study the potential benefits of Ameren Missouri participating in the SPP Day 2 Integrated Marketplace. The cost-benefit analysis provided for in paragraph 10.b. of the *Non-unanimous Stipulation and Agreement* requires a cost-benefit analysis of not less than five (5) years, or more than ten (10) years, evaluating Ameren Missouri's continued participation in the Midwest ISO versus both (1) Ameren Missouri's participation in SPP and (2) Ameren Missouri's operation as an ICT. Mr. McKinnie supported just such a study in his Rebuttal Testimony, Exhibit 7, page 6, line 28, as providing the Commission and stakeholders sufficient information regarding future Ameren Missouri participation in an RTO / ISO. (Ex. 9, McKinnie, 2nd Supp. Reb., p. 4, ln. 7 - p. 5, ln. 2).

2. What constitutes proving "not detrimental to the public interest" in File No. EO-2011-0128?

(a) What "public" is the appropriate public?
(b) What "interest" is the appropriate interest?
(c) How is "not detrimental" measured?

Ans:

As the Commission is well aware, Section 393.190.1 RSMo. 2000 contains no express standard for the Commission's determination of whether to approve a request to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . ." The Commission is also well aware of the Missouri Supreme Court's holding in *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo. banc 1934) that "not detrimental to the public" is the appropriate standard:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public'".

If there are competing proposals and neither proposal is detrimental to the public interest, the not detrimental to the public interest standard of Section 393.190.1 requires the Commission to (1) determine which of the rival proposals is more / most in the public interest and (2) authorize which of the proposals is more / most in the public interest. Thus, if neither of the proposals on its own is detrimental to the public, can the Commission choose between the two proposals solely on the basis of which one is the better proposal? Would the Commission have to approve one of the two rival proposals as meeting the not detrimental to the public standard, as being more in the public interest? The answer is "yes." Also, if the transaction has been completed / consummated, but the Commission order authorizing the transaction is not

valid, the issue is not moot. When challenged, an invalid Commission order must be set aside by the court and there must be further proceedings before the Commission.

The Missouri Supreme Court's decision in *State ex rel. Consumers Public Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40, 44, 46 (Mo. banc 1944) ("*Consumers"*) is the basis for the discussion in the immediately preceding paragraph. While the Missouri Supreme Court *en banc* in 1934 in *City of St. Louis* called the appropriate standard to be used "not detrimental to the public interest," the Missouri Supreme Court *en banc* in 1944 in *Consumers* seems anomalously to call the standard to be used "in the public interest." In *Consumers*, the three interconnected companies Consumers Public Service Company ("Consumers Public Service"), Missouri Public Service Corporation ("MPS") and Missouri Power & Light Company ("MPL") (collectively, Intervenors) appealed from the judgment of the Circuit Court affirming an Order of the Commission authorizing the sale by Iowa Utilities Company ("Iowa Utilities") and the purchase by Grundy Electric Cooperative ("Grundy") of the electric system of Iowa Utilities in Missouri. Intervenors asserted that they were serving areas adjacent to the area served by Iowa Utilities, that they had ample generating plant and facilities for supplying the area in question, that the sale to Grundy would constitute an unwarranted invasion of the area served by them and that the sale to Grundy would frustrate their plans for the area, thus, resulting in injury to the electric service rendered to the public in the area. *Id.* at 41-43.

The Missouri Supreme Court related that the Iowa Utilities property was old, obsolete and in need of repairs and betterments to render adequate service to its customers. Grundy stated that necessary improvements would be made in order that better and more adequate service would be rendered. The rates charged by Grundy were shown to be slightly lower in most instances compared to the rates then charged by Iowa Utilities. At the date of the hearing,

95% of the then present customers of Iowa Utilities had made application for membership in Grundy and no customers of Iowa Utilities had entered a protest to the granting of the transfer to Grundy. 180 S.W.2d at 42.

Consumers Public Service maintained that its acquisition of the Iowa Utilities system would result in improved and adequate service to the public, but the offer of Consumers Public Service to purchase Iowa Utilities was conditioned on its ability to refinance itself. Also, there was evidence that in certain areas, service provided by Consumers Public Service was not satisfactory. MPL showed that it had ample and adequate sources of electric power for the area and that Grundy's acquisition of Iowa Utilities would interfere with the most practical methods of integration of facilities in northwest Missouri. 180 S.W.2d at 42-43.

Grundy filed a motion to dismiss the appeal on the grounds that, among other things, the appeal was moot because the sale had been fully consummated and that it, Grundy, was operating the purchased property. The Missouri Supreme Court held that the case was not moot because if the Commission Order authorizing the sale to Grundy was invalid, the Court must set it aside, and any further proceedings must be before the Commission. 180 S.W.2d at 44.

The Court held that when two utilities are vying to acquire a third utility, the utility whose operation of the area under all circumstances would best serve the public interest, and not just which utility could first obtain a contract for purchase, should be the basis for the decision regarding which utility should be authorized to engage in the transaction:

> Therefore, when two utilities can reasonably be said to be operating in the same general territory, and the question before the Commission is whether or not one of them should be allowed to take additional locations which either might make arrangements to serve, the other must be held interested in the matter in the sense the term "interested" is used in Section 5689. That was the situation in this case. Both the Cooperative and the Consumers Company had lines approximately seven miles of the property sought to be acquired. Both were operating in the same area, even in the same county, in which this property was located and both

> (according to the evidence) had negotiated to acquire it and could make arrangements to do so and to operate it. **The question of which one should be permitted to acquire it must be decided on the basis of whose operation of the area would best serve the public interest under all the circumstances and not merely upon which could first obtain a contract for purchase.** A contract found to be against public interest or the Commission's regulatory policy could not be permitted to stand in this situation any more than a contract for unapproved rates. We hold that Consumers Company was sufficiently "interested" to have the right to intervene and likewise the right to apply for a rehearing, when the Commission decided that a competitor could take over these new locations adjoining the general territory in which both were operating. Our conclusion also is that this company had the further right, because of such interest, to seek a review in the circuit court and appeal to this court from its adverse decision. The motion to dismiss must be overruled as to the Consumers Company.

180 S.W.2d at 46; Emphasis supplied.

Regarding the criteria for the approval of the proposed transfer, the Court further stated:

> …we think the Commission did consider and decide the question of whether, under the particular circumstances of this case, it would be in the public interest (including the interest of the public in the whole area involved) to approve or deny the proposed transfer, and that it based its approval upon the conclusion that this transfer would be in the public interest. Furthermore, we hold that such a conclusion was reasonable upon the evidence showing the rural character of the Missouri communities involved, their present poor service, the prospect of what better service might be reasonably expected from either applicant for the territory, the financial condition, management, and prospects of both, the sentiment of the people in these communities and their almost unanimous desire to become members of the Cooperative. . . .

180 S.W.2d at 48.

Analysis performed by the Commission when two utilities are seeking to acquire a third utility is which of the two vying utilities is more beneficial. The Commission has not taken the approach that the matter is solely for the selecting utilities to decide so long as the transaction with the prevailing utilities is not detrimental to the public. The Commission has looked to which of the possible transactions is more beneficial.

In an Aquila, Inc. application to participate in the Midwest ISO case, *In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks - MPS and Aquila Networks - L&P for*

Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc., Case No. EO-2008-0046, Report and Order, pp. 16 - 17 (Oct. 9, 2008), the Commission stated:

Conclusions of Law

* * * *

6. Clearly, "not detrimental to the public interest" is the standard by which this Commission must weigh Aquila proposal to transfer control of its transmission system to Midwest ISO.

7. In deciding whether a proposed transaction is "not detrimental to the public interest", the Commission must consider and decide all the necessary and essential issues.[53]

8. One necessary and essential issue the Commission must consider is the lost opportunity cost associated with allowing Aquila to join Midwest ISO instead of Southwest Power Pool.

9. When alternatives with economic impacts are presented, an evaluation of the detriments of a particular alternative to the public interest must include consideration of the opportunity cost of not pursuing any available alternatives. There do not appear to be any Missouri state court cases directly announcing this principle, but it is a well-established aspect of Federal administrative law.[54]

10. Missouri's Western District Court of Appeals has recently held that the Commission is not limited to narrowly considering the possible benefits of a presented alternative when other alternatives are also important. *In Environmental Utilities, LLC v. Public Service Commission*,[55] the court upheld the Commission's rejection of a proposed sale of a part of the sewer system of a troubled utility, because, while there were benefits to those customers who would be served by the purchaser, the benefits of the sale of the entire system would be greater, and would be lost if the incomplete transaction were allowed to proceed.

11. Obviously, if Aquila transfers its transmission system to Midwest ISO and joins that RTO, it cannot join Southwest Power Pool's RTO. Foregoing greater financial benefits that could be obtained from joining Southwest Power Pool to instead accept lesser financial benefits from joining Midwest ISO is a potential detriment to the public that the Commission must consider.

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[53] *State ex rel. AG Processing, Inc. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003).

[54] *For example see, Victor Broadcasting v. FCC*, 722 F2d 756 (DC Cir. 1983).

[55] 219 S.W.3d 256 (Mo. App. W.D. 2007).

In an earlier, but still fairly recent, Commission case, *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) ("Metro East Case"), the Commission stated:

> The Missouri Supreme Court did not announce a new standard for asset transfers in AG Processing, but rather restated the existing "not detrimental to the public" standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The AG Processing decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE's position, the AG Processing decision does not allow the Commission to defer issues with ratemaking impact to the next rate case. Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends.
>
> In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.
>
> 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.

Staff would also refer the Commission to: *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*, 848 S.W.2d 593 (Mo.App. W.D. 1993); *State ex rel. AG Processing, Inc. v. Public*

Serv. Comm'n, 120 S.W.3d 732 (Mo.banc 2003); *Re UtiliCorp United, Inc. and The Empire District Electric Co. for Authority to Merge*, Case No. EM-2000-369, Report and Order, 9 Mo.P.S.C.3d 512, 531-32, 537-39 (2000); *Re Union Electric Co. for Order Authorizing Certain Merger Transactions*, Case No. EM-96-149, Report and Order, 6 Mo.P.S.C.3d 28, 40-41 (1997); Sections 386.610 and 393.130.1 RSMo. 2000.

The Missouri Supreme Court visited the question of the breadth of the Commission's review in 1986 in *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482 (Mo. banc 1986)(*Love 1979 Partners*), and held the Commission appropriately looked broadly at the circumstances presented in making its determination to approve the transfer of Union Electric Company's steam system. *Love 1979 Partners* involved the sale of certain facilities of UE comprising part of its system necessary or useful in the performance of its electric utility service duties to the public and the whole of its system necessary or useful in the performance of its steam utility service duties to the public. The elements of the program were as follows: (1) UE's sale of its downtown St. Louis steam loop to Bi-State Development Agency (Bi-State), a public agency, (2) UE's sale of its Ashley plant to Thermal Resources of St. Louis, Inc. (Thermal), (3) the discontinuance of UE's steam distribution operation and its replacement by Bi-State as the supplier of steam to UE's steam customers, (4) Thermal's operation of the steam production and distribution facilities by contract with Bi-State, (5) the temporary supply of electric power from the Ashley plant until UE constructed alternate facilities and (6) the construction of a refuse-to-steam plant by Thermal. 715 S.W.2d at 485.

The steam customers that intervened argued, *inter alia*, that the program was not in the public interest because it was not feasible and economic. *Inter alia*, the Commission in granting the requested approval found that the overall plan was not detrimental to the public interest.

"It rejected the users' argument that the plan would produce an unreasonable increase in rates for steam, and held that the fact of an initial rate increase was not ground for disapproving the plan." 715 S.W.2d at 485-86. Certain steam customers obtained review by the Circuit Court, which set aside the Commission's Order. There was a direct appeal to the Missouri Supreme Court, which reversed the decree of the Circuit Court and sustained the Order of the Commission. *Id.* at 484.

The Court noted that "[t]he users have no right to the maintenance of the existing rate structure. There was strong likelihood that the rates would have been increased even if UE had remained the owner of the steam facilities." 715 S.W.2d at 487. The Missouri Supreme Court held in *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31-32 (Mo.banc 1975) that customers do not have a protected property interest in the present level of utility rates. In *Love 1979 Partners*, the Court further stated respecting the steam customers' suggestion that the governing contracts would subject steam customers to unreasonable rate increases, that in general, customers are not entitled to a guarantee of the status quo:

> The final suggestion is that the governing contracts will subject steam customers to unreasonable rate increases. **As we have said earlier, the customers are not entitled to a guarantee of the status quo in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE were to continue the operation.** It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. **The Commission might well conclude, however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.**
>
> This case is very different from one in which we review a civil judgment for damages, to make sure that each element is supported by substantial evidence. **The problems presented to the Commission involve subjective evaluations of economic factors.** There is no sure method for predicting whether a project will succeed. **Questions of analysis and judgment are committed by law to the decision of the Commission**, which has the assistance of a technically trained

> staff and is better equipped to make decisions of this kind than we are. **The users are asking us to substitute our judgment for its judgment. We decline to do this because we are persuaded that the Commission's decision is a permissible one under the record.** There are times when the courts must step in to protect the public against arbitrary or unauthorized administrative action, but the users do not persuade us that such intervention is necessary or proper in this case.

715 S.W.2d at 490; Emphasis added. The Commission's charge was not limited to determining whether the entities acquiring the facilities being transferred had the financial and technical capacity to carry through on the project. *Id.*

In *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary Of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, pp. 233-34 (2008), the Commission addressed, among other things, the definition of "public interest:"

> . . . The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission's authority.
>
> . . . Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, as noted the rights of individual groups are subservient to the rights of the public in general. [Footnotes omitted.]

3. May the Commission impose the conditions on such a transfer that are reflected at page 12, lines 22 - 28 of the Rebuttal Testimony of Ryan Kind? If so, should the Commission do so?

Ans:

Staff stated on January 27, 2012 in Staff's Statement of Positions in Response to Second Revised List of Issues and Order of Cross-Examination and First Revised Witness List and Order of Opening Statements that it does not support imposition by the Commission of the conditions that are reflected at page 12, lines 22 - 28 of the Rebuttal Testimony of Ryan Kind. As a signatory of the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011, it is the position of Staff that an extension of the term of the Commission's permission for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO on the terms and conditions set out in the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011 is not detrimental to the public interest. But Public Counsel on January 27, 2012 in its Second Statement of Positions of the Office of the Public Counsel tentatively changed its position from what had been its filed position since September 14, 2011 to the following:

> Yes, for the reasons set forth in Mr. Dauphinais' testimony and in the rebuttal testimony of OPC witness Kind at page 9, line 20, through page 13, line 9, although given FERC's Order 1000, the condition may need to be modified by adding the underlined qualifier and deleting the closing clause: "UE shall <u>make diligent efforts to</u> construct and own any and all transmission projects proposed for UE's certificated retail service territory, ~~unless UE requests and receives approval from the Commission for an entity other than UE to pursue, in part or in whole, construction and/or ownership of the proposed project(s), which entity shall have a certificate of convenience and necessity issued by the Missouri Public Service Commission for the proposed project(s).~~"

Public Counsel did not address its tentatively changed, intention laden position in the January 18, 2012 Supplemental Rebuttal Testimony of Mr. Kind and there is nothing in the transcript of the February 9-10, 2012 evidentiary hearing to explicate Public Counsel's tentatively changed, intention laden position.

It should further be noted that in his opening statement the Public Counsel said the parties to the *Non-unanimous Stipulation and Agreement* have settled on a short-term Band-Aid-type fix to the Commission's ability to set the transmission component of the Midwest ISO's bundled retail rates since the old arrangement which preserved the Commission's ability through paragraph 5.3 of the service agreement is no longer effective because of FERC Order No. 1000 and Ameren created ATX and charged ATX with constructing major new construction projects. (Vol. 3, Tr. 56, lns. 7-17 and Tr. 57, lns. 6-8). "Public Counsel instead recommends. . .the [above] condition it proposed in response to issue number three in the list of issues in this case." (*Id*., Tr. 57, lns. 11-13). Although Public Counsel's witness Mr. Kind does not acknowledge FERC Order No. 1000 in any of his prepared, pre-hearing filed testimony, Public Counsel does so in his January 27, 2012 tentative change of position and opening statement.

> For reference, Mr. McKinnie provided definitions for several common terms:
>
> nonincumbent transmission developer: (1) a transmission developer that does not have a retail distribution service territory or footprint; and (2) a public utility transmission provider that proposes a transmission project outside of its existing retail distribution service territory or footprint, where it is not the incumbent for purposes of that project. [FERC Order No. 1000, 136 FERC ¶ 61,051, Para. 225 (July 21, 2011)]
>
> incumbent transmission developer / provider: an entity that develops a transmission project within its own retail distribution service territory or footprint. [*Id*.]
>
> Federal "right of first refusal" ("RoFR"): the right of incumbent transmission owner to build projects interconnected to its existing system. [Various documents approved by FERC, including tariffs and other agreements subject to FERC jurisdiction. For example, it is in the Midwest ISO Transmission Owner's Agreement ("TOA") contained in the MISO Tariff at FERC as Rate Schedule 01.[5]]

[5] Article One Definitions, Section I, P. Owner. Version: 0.0.0 Effective: 7/31/2010 and APPENDIX B PLANNING FRAMEWORK. Version: 0:0:0 Effective: 7/31/2010. VI. Development of the Midwest ISO Transmission Plan.

Mr. McKinnie testified that FERC Order No. 1000 changes how transmission builders are selected by a RTO / ISO to build transmission projects, but the effect of the Midwest ISO TOA's definition of "owner," pre-dates, and is separate and apart from the effect of FERC Order No. 1000 on the determination of which entity / entities has the right to build a transmission project in an incumbent transmission owner's retail distribution service territory and may not have been appreciated or fully known by non-Ameren Missouri parties prior to this case. The term "owner," as defined in the Midwest ISO TOA,[6] gives the "owner" and other transmission owning members of a particular holding company system the right and obligation to build transmission interconnecting to the existing holding company system. (Ex. 10, McKinnie Sur., p. 2, ln. 55 - p. 3, ln. 31). Indicating that he was taking a post-FERC Order No. 1000 approach in his Rebuttal Testimony, Mr. Kind noted that Ameren Corp. under the terms of the TOA would be able to choose ATX, rather than Ameren Missouri, to build transmission projects in Ameren Missouri's retail distribution service territory / Missouri under the TOA definition of "owner." (Ex. 11, Kind Reb., p. 13, lns. 1-9). But as Ms. Borkowski first explained in her Surrebuttal Testimony (Ex. 5, Borkowski Sur., p. 8, ln. 21 - p. 9, ln. 2), even pre-FERC Order No. 1000, under the Midwest ISO TOA, each of the Ameren Corp. transmission-owning companies, Ameren Missouri, Ameren Transmission Company of Illinois ("ATXI"), and Ameren Illinois Company ("AIC"), have the right and obligation to build a transmission project that connects to the Ameren Corp. combined system:

> *Q. What about Ameren Missouri's responsibilities as a "Transmission Owner" ("TO") under the ISO Transmission Owner's Agreement ("TOA") under the so-called "right of first refusal" that was raised by Commission questions posed in this docket? Don't those responsibilities dictate that Ameren Missouri build all transmission located within its service territory or that connects to Ameren Missouri's system?*

[6] *Id.*

A.[Ms. Borkowski] No. They don't.

Q. Why not?

A.[Ms. Borkowski] . . . This is the so-called "right of first refusal," and pre-FERC Order 1000, it meant that an "Ameren" company participant in the Midwest ISO had the ability to connect to another Ameren company participant in the Midwest ISO's transmission system (i.e., to build the project) prior to any other TOs being afforded that opportunity. Under this construct, no other TO would be allowed to build the project, unless all of the Ameren transmission owning participants in the Midwest ISO declined to build a particular project, in which case one or more of the other TOs would build it. [Footnote omitted.]

(*Id*. at p. 8, ln. 1 - p. 9, ln. 8). She also provided a post-FERC Order No. 1000 explanation:

Q. You mentioned how this worked "pre-FERC Order 1000." What is the significance of that order [i.e., FERC Order 1000]?

A.[Ms. Borkowski] . . . While rehearing is being sought regarding certain aspects of FERC Order 1000, the Order is not stayed. If Order 1000's elimination of the right of first refusal stands, then once the compliance filings are made, other transmission companies will have the opportunity to build the kind of regional transmission projects that ATX plans to build and that others in this docket are focused on, whether those projects are inside or outside the Midwest ISO's footprint, and have a right to connect to the combined transmission systems owned by Ameren Missouri, ATXI, AIC and any other company.

(*Id*. at p. 9, lns. 9-20).

Mr. McKinnie related that the FERC staff in a briefing outlining FERC Order No. 1000 summarized FERC Order No. 1000 as eliminating the Federal RoFR with four caveats, the first limitation to the elimination of the Federal RoFR being a transmission facility that is not selected in a regional transmission plan for purposes of cost allocation:

Rule removes any federal right of first refusal from Commission approved tariffs and agreements with respect to new transmission facilities selected in a regional transmission plan for purposes of cost allocation, subject to four limitations [FERC Order No. 1000, Paras. 253, 313]:

– This does not apply to a transmission facility that is not selected in a regional transmission plan for purposes of cost allocation [FERC Order No. 1000, Para. 318]

– This does not apply to upgrades to transmission facilities, such as tower change outs or reconductoring [FERC Order No. 1000, Para. 319]

– This allows, but does not require, the use of competitive bidding to solicit transmission projects or project developers [FERC Order No. 1000, Para. 321 footnote 302]

– Nothing in this requirement affects state or local laws or regulations regarding the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities [FERC Order No. 1000, Para. 253 footnote 231]

(Ex. 10, McKinnie Sur., p. 4, lns. 1-26).

Ms. Borkowski testified in her Surrebuttal Testimony that Ameren Missouri intends to build the following projects in Missouri:

(1) Baseline Reliability Projects, designated by the Midwest ISO, being built for reliability purposes relating to serving Ameren Missouri's retail load.

(2) Generation Interconnection and Transmission Service Projects if the generation or transmission customer for whom the project is constructed is Ameren Missouri.

Ms. Borkowski testified in her Surrebuttal Testimony that ATX or another Ameren Corp. transmission owning subsidiary intends to build the following projects in Missouri:

(3) Multi-Value Projects ("MVP"), designated by the Midwest ISO, projects justified and approved for inclusion in the MTEP for reasons other than the need to provide reliable service to Ameren Missouri customers. Costs are primarily allocated to entities other than Ameren Missouri.

(4) Market Efficiency Projects ("MEP"), designated by the Midwest ISO, projects justified and approved for inclusion in the MTEP for reasons other than the need to provide reliable service to Ameren Missouri customers. Costs are primarily allocated to entities other than Ameren Missouri.

(5) Generation Interconnection and Transmission Service Projects if the generation or transmission customer for whom the project is constructed is other than Ameren Missouri. Projects justified and approved for inclusion in the MTEP for reasons other than the need to provide reliable service to Ameren Missouri customers. Costs are primarily allocated to entities other than Ameren Missouri.

(Ex. 5, Borkowski Sur., p. 6, lns. 3-18).

MIEC witness James R. Dauphinais testified that the *Non-unanimous Stipulation and Agreement* adequately addresses the concerns he raised in his Rebuttal Testimony about Ameren Missouri's continued participation in the Midwest ISO. (Vol. 3, Tr. 180, lns. 2-7). Mr. Dauphinais identified those concerns as (1) requiring Ameren Missouri to re-apply with the Commission to extend the Commission's authorization for Ameren Missouri to participate in the Midwest ISO rather than there being an "evergreen authorization" provision in the Commission's authorization requiring affirmative action on the part of the Commission or some entity forcing Ameren Missouri to reapply, as Ameren Missouri requested in its August 10, 2011 *Amended Verified Application To Extend Permission And Authority For Participation In Regional Transmission Organization*[7]; (2) provisions relating to the studies that might be required respecting Ameren Missouri reapplying for authority to continue to participate in a RTO / ISO; and (3) concerns relating to construction of transmission facilities by Ameren Missouri affiliates in Missouri. (*Id.* at lns. 10-23).

4. May the Commission impose the conditions on such a transfer that are reflected at page 17, lines 1 - 3 of the Rebuttal Testimony of Ryan Kind? If so, should the Commission do so?

Ans:

Staff does not support imposition by the Commission of the conditions that are reflected at page 17, lines 1 - 3 of the Rebuttal Testimony of Ryan Kind. As a signatory of the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011, it is the position of Staff that an extension of the term of the Commission's permission for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the

[7] Ameren Missouri filed a "traditional non-evergreen authorization" *Verified Application To Extend Permission And Authority For Participation In Regional Transmission Organization* on November 1, 2010 but as noted above filed an *Amended Verified Application* with an evergreen provision well into the EO-2011-0128 docket.

Midwest ISO on the terms and conditions set out in the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011 is not detrimental to the public interest.

Mr. McKinnie noted in his Surrebuttal Testimony that the Arkansas Public Service Commission ("Arkansas Commission") issued Order No. 56 in Docket No. 10-011-U subsequent to Order No. 54 cited by Mr. Kind, and in which the Arkansas Commission stated that it issued Order No. 54 providing guidance to Entergy Arkansas, Inc. and Order No. 54 is not a final decision. (Ex. 10, McKinney Sur., p. 16, ln. 25 - p. 17, ln. 13). Mr. Mills asked Mr. Dauphinais whether the Missouri Commission should impose on Ameren Missouri conditions respecting the Midwest ISO similar to those suggested by the Arkansas Commission on Entergy Arkansas in Order No. 54 and Mr. Dauphinais responded as follows:

> Q.[Mr. Mills] Okay. And would the imposition of conditions similar to those suggested by the Arkansas Commission be inconsistent with the protection of the public interest?
>
> A.[Mr. Dauphinais] Not necessarily, but again, I don't recommend that they're necessary at this time.

(Vol. 3, Tr. 183, lns. 15-19).

5. Can the Commission condition Ameren Missouri's participation in MISO on the application of the existing terms and conditions applied to Ameren Missouri transmission assets (e.g., Section 5.3 of the Service Agreement and paragraphs (b) through (h) at pages 9-14 of the Ameren Missouri Verified Application in File No. EO-2011-0128) to any affiliate to which Ameren Missouri seeks to transfer transmission assets? If so, should the Commission do so as recommended at page 22, lines 3-27 of the Rebuttal Testimony of Adam C. McKinnie?

Ans:

The *Second Revised List Of Issues And Order Of Cross-Examination And First Revised Witness List And Order Of Opening Statements* states that Staff does not agree with Public Counsel that the above item should be listed as an issue in this proceeding. Staff witness Adam McKinnie's Second Supplemental Rebuttal Testimony And Testimony In Support Of The

Non-unanimous Stipulation And Agreement (Exhibit 9) at pages 4 - 6 provides information regarding Staff's support for the *Non-unanimous Stipulation and Agreement* entered into by Staff, Ameren Missouri, Midwest ISO, and MIEC and filed on November 17, 2011 in particular as it differs from Stipulation and Agreements in prior AmerenUE application to participate in Midwest ISO cases. Since the Non-unanimous Stipulation and Agreement is opposed by Public Counsel and MJMEUC, the *Non-unanimous Stipulation and Agreement* constitutes a change in position of the signatory parties. On January 18, 2012, Public Counsel filed Supplemental Rebuttal Testimony of Ryan Kind respecting the *Non-unanimous Stipulation and Agreement*. Staff witness Mr. McKinnie prepared and caused to be filed on February 6, 2012 Surrebuttal Testimony in response to Mr. Kind's Supplemental Rebuttal Testimony.

Mr. McKinnie testified that with Staff being a signatory to the *Non-unanimous Stipulation and Agreement*, Staff is no longer proposing that the Commission impose the conditions at page 22, lines 3-27 or page 38, lines 29-33 of his Rebuttal Testimony. (Vol. 3, Tr. 133, lns. 5 - 14 and Tr. 178, lns. 7-9).

The matter of the need for ATX, any other Ameren Missouri affiliate, or any other entity seeking to construct, own, and operate certain transmission facilities in the State of Missouri needing a Commission certificate of convenience and necessity ("CCN"), pursuant to Section 393.170 RSMo. 2000, is not presently before the Commission. On February 9, 2012, Mr. Mills concurred that this issue is not presently before the Commission. (Vol. 3, Tr. 66, ln. 1 - Tr. 67, ln. 1).

6. If the Commission agrees that such extension of the term for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO should be granted on the terms outlined at page 19, line 19 to page 21, line 2 of Ajay Arora's Surrebuttal Testimony, should the conditions as proposed by Marlin Vrbas in his Rebuttal Testimony, pp. 13-16, be required of Ameren Missouri before any continued transfer of authority is granted? What continuing opportunities and mechanisms for re-examining

Ameren Missouri's participation in MISO, if any, should be granted to the parties in this case?

Ans:

Staff does not support imposition by the Commission of the conditions that are reflected at pages 13-16 of the Rebuttal Testimony of Marlin Vrbas. As a signatory of the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011, it is the position of Staff that an extension of the term of the Commission's permission for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO on the terms and conditions set out in the *Non-unanimous Stipulation and Agreement* filed in this docket on November 17, 2011 is not detrimental to the public interest.

Paragraph 10.a. of the *Non-unanimous Stipulation and Agreement* states as follows:

> 10.a. Material Change. Notwithstanding the extended period of authority for Midwest ISO participation provided for in paragraph 9 of this 2011 Stipulation, a Stakeholder may request that the MoPSC initiate a docket (or the MoPSC may do so on its own motion) prior to November 15, 2015, to investigate whether a material event occurring after this docket is of such a magnitude that it presents a substantial risk that continued participation in the Midwest ISO on the terms and conditions contained herein has become detrimental to the public interest.

WHEREFORE the Staff of the Missouri Public Service Commission, by and through the undersigned counsel of the Staff Counsel Department of the Missouri Public Service Commission, prays that the Commission, based on the competent and substantial evidence in this proceeding, approve the changed positions reflected in the *Non-unanimous Stipulation and Agreement* filed on November 17, 2011.

Respectfully submitted,

/s/ Steven Dottheim

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing of *Staff's Initial Brief* was served via e-mail on counsel for all parties of record on this 9th day of March, 2012.

/s/ Steven Dottheim