

BEFORE THE  
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF A SHOW CAUSE ORDER )  
DIRECTED TO ENTERGY ARKANSAS, INC. )  
REGARDING ITS CONTINUED MEMBERSHIP )  
IN THE CURRENT ENTERGY SYSTEM ) DOCKET NO. 10-011-U  
AGREEMENT, OR ANY SUCCESSOR )  
AGREEMENT THERETO, AND REGARDING )  
THE FUTURE OPERATION AND CONTROL OF )  
ITS TRANSMISSION ASSETS )

ENTERGY ARKANSAS, INC.'S  
MOTION FOR FINDING OF COMPLIANCE WITH CONDITIONS  
AND FOR APPROVAL OF APPLICATION OR,  
IN THE ALTERNATIVE, PETITION FOR REHEARING

Comes Entergy Arkansas, Inc. (“EAI” or the “Company”), pursuant to Order No. 68,<sup>1</sup> Rules 2.11 and 3.16 of the Arkansas Public Service Commission (“APSC” or the “Commission”) Rules of Practice and Procedure, and Ark. Code Ann. § 23-2-422, and respectfully makes its Motion for Finding of Compliance With Conditions and for Approval of Application or, in the Alternative, Petition for Rehearing (“Motion for Compliance Finding” or the “Motion”), and in connection with such a finding, that the Commission approve EAI’s Application filed November 28, 2011 in this proceeding and its request to transfer control of its transmission assets contemplated therein. If the Commission concludes that the compliance plan set forth in this Motion, and in the supporting testimony filed by

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<sup>1</sup> In Order No. 68, the Commission takes administrative notice of and incorporates by reference APSC Order No. 54 filed October 28, 2011. Accordingly, EAI hereby incorporates by reference as if fully set out herein its Petition for Clarification or In the Alternative, Rehearing filed November 28, 2011 in this docket.

EAI President and Chief Executive Officer (“CEO”) Hugh T. McDonald, and in the testimony to be filed by the Midwest Independent Transmission System Operator, Inc. (“MISO”) does not satisfy the Commission’s conditions, EAI respectfully requests that the Commission grant a rehearing of Order No. 68 in this docket with respect to the conditions and EAI’s compliance with those conditions and all issues addressed herein concerning those conditions. In support thereof, EAI states as follows:

## **I. INTRODUCTION**

1. This proceeding originates from an investigation into EAI’s participation in the Entergy System Agreement,<sup>2</sup> a contract establishing a power pool among the Entergy Operating Companies<sup>3</sup> that has been the subject of litigation for more than 30 years. EAI’s participation in this contract ends December 18, 2013. In order to be able to continue to provide reliable electric service, at that time EAI must either integrate with MISO or operate its electric facilities on a stand-alone basis.<sup>4</sup> The record demonstrates that operation in MISO:

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<sup>2</sup> The System Agreement is a rate schedule approved by the Federal Energy Regulatory Commission and contract entered into among Entergy Services, Inc. (“ESI”) and the Operating Companies that requires the Operating Companies to plan, construct and operate their generation and bulk transmission facilities as a single, integrated electric system. On December 19, 2005, EAI gave notice that it will terminate its participation in the System Agreement effective December 18, 2013.

<sup>3</sup> The Entergy Operating Companies include EAI; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.

<sup>4</sup> The Southwest Power Pool (“SPP”) is developing a Day 2 Market, but it will not be operational when EAI exits the System Agreement. The SPP Integrated Marketplace is not scheduled to “go live” until March 2014, even under SPP’s most optimistic scenario, which is three months after EAI exits the System Agreement in December 2013. Monroe Surrebuttal Testimony at 14 (April 27, 2012).

- would eliminate the need for EAI to put in place a separate balancing authority (at a cost of \$21 million);<sup>5</sup>
- would avoid the need for EAI to acquire 400 MW of additional capacity due to higher reserve margin requirements (estimated at \$20 to \$43 million per year);<sup>6</sup>
- would prevent EAI from having to pass up savings that would benefit its customers from selling excess energy into the MISO Day 2 Market<sup>7</sup> (approximately \$20 million per year);<sup>8</sup>
- would prevent EAI customers from losing out on lower regulation and contingency reserve requirements (\$15 million per year);<sup>9</sup> and
- would provide less operational risk.

2. Order No. 68 states that it is intended to provide a “clear path forward toward the full integration of EAI as a member of MISO”<sup>10</sup> by setting forth conditions that EAI and MISO are required to meet. The order states that “[u]pon a finding by the Commission that EAI and MISO have, in fact, complied with the

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<sup>5</sup> Castleberry Supplemental Direct Testimony at 19 (June 22, 2011).

<sup>6</sup> EAI’s Response to Order No. 37 at 19 (July 15, 2011).

<sup>7</sup> Day 2 Markets are centralized region-wide markets operated by RTOs that include day ahead unit commitments, a real time balancing market, and an integrated ancillary services markets. In a Day 2 Market, generators are required to schedule or bid into the market, locational marginal prices are used to price the use of the transmission grid, congestion charges replace “first come, first served” transmission service, and financial transmission rights (“FTRs”) are used to hedge congestion. The “Day 2” label arose because these are things that RTOs began to implement after they initially began to operate, or in the “Day 2” of their creation.

<sup>8</sup> “An Evaluation of the Alternative Transmission Arrangements Available to the Entergy Operating Companies and Support for Proposal to Join MISO” (the “Evaluation Report”), Attachment TA-1 at 10 (May 12, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> Order No. 68 at 24.

conditions, the Commission will grant conditional approval of EAI's Application, as being in the public interest, and will authorize EAI to sign the MISO Transmission Owners' Agreement ("TOA") and move forward with the integration process."<sup>11</sup>

3. The APSC has determined that the transfer of functional control of EAI's transmission assets to an RTO is prudent.<sup>12</sup> However, in order for EAI to integrate with MISO by December 19, 2013, this determination should not simply be a hypothetical one, dependent on conditions that as written cannot be ordered or satisfied; such a determination would have no real meaning and would be useless to EAI, its customers, and market participants who need certainty now about post-System Agreement arrangements. Accordingly, EAI infers that the Commission intends for its prudence determination to have meaning and the conditions for joining MISO to be achievable, such that there is an actual path leading to EAI membership in MISO in December 2013.

4. Pursuant to Order No. 68, EAI files contemporaneously with this Motion the testimony of Mr. McDonald that demonstrates EAI's compliance with each of the conditions directed to EAI. In short order, MISO also will be filing testimony and corresponding motion demonstrating its compliance with the conditions directed to it. EAI's testimony along with that to be filed by MISO will

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<sup>11</sup> *Id.* at 1.

<sup>12</sup> Order No. 54 at 94, 96.

demonstrate compliance with all of the conditions posed by the APSC in its Order No. 68.

5. EAI's assertion of compliance, in some cases, is based upon EAI's understanding of the Commission's underlying concerns given that certain of the conditions, as written, are beyond the ability of EAI to satisfy and/or beyond the authority of the Commission to require. Accordingly, EAI has interpreted these conditions in light of their underlying purpose and consistently with applicable legal principles, such that, where possible, the conditions have been interpreted in a manner that would be within EAI's control to satisfy and to otherwise minimize potential conflicts with federal law. The Company has read Order No. 68 and developed its response to give full voice to the Commission's underlying concerns within the confines of applicable law and EAI's ability to satisfy the conditions set forth. As described in Section II below, the Company seeks a finding that the Company's compliance with those conditions is sufficient. In the alternative, to the extent the Commission disagrees with EAI's interpretation, the Company respectfully requests rehearing on these points because, as written, the conditions at issue would prevent EAI's joining MISO, thereby frustrating EAI's voluntary efforts to join the MISO RTO, in conflict with federal policy.

6. The U.S. Court of Appeals for the District of Columbia Circuit ("D. C. Circuit") issued a decision August 14, 2012, that upheld a prior Federal Energy Regulatory Commission ("FERC") ruling that EAI had the right to

withdraw from the System Agreement without any continuing obligations to the other Entergy Operating Companies following the required 96-month waiting period after EAI's termination notice.<sup>13</sup> The Court's decision stated in part:

Our decision today reaches only the obligation of withdrawing Companies under the [Entergy System] Agreement. As FERC noted, it must still review the post-withdrawal arrangements to ensure that they are just, reasonable, and not unduly discriminatory.<sup>14</sup>

7. EAI's final step in extricating itself from the litigation quagmire stemming from its participation in the System Agreement is to secure a finding from FERC that its post-withdrawal arrangements are just and reasonable and not unduly discriminatory. EAI's joining MISO would provide clear evidence that the Company's post-System Agreement arrangements meet that standard because federal law and FERC policy encourage utilities to voluntarily coordinate their transmission facilities through joining an RTO.<sup>15</sup> EAI requests in this Motion that the APSC find that EAI has met the conditions set forth in Order No. 68 and grant the Company approval of its Application so that it, and the cooperative electric utilities, municipal electric authorities, and Independent Power Producers that depend on EAI's transmission facilities to deliver power, can be prepared to integrate with MISO by December 19, 2013 and, in so doing, can have

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<sup>13</sup> *City of New Orleans v. FERC*, -- F.3d --, 2012 WL 3289799 (C.A.D.C.).

<sup>14</sup> *Id.*

<sup>15</sup> See *Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

confidence that the final FERC hurdle for EAI to be free of obligations imposed by the System Agreement has been cleared.

## **II. EAI'S COMPLIANCE PLAN FOR CONDITIONS TO JOIN MISO**

### **A. Condition No. 1(a)**

8. Condition No. 1(a) states:

EAI shall negotiate individual, cost-based contracts with ESI or any other Entergy service company, separately from the other OpCos and with no cost allocations with other OpCos. EAI shall file in this docket a renegotiated agreement(s) with ESI, along with supporting testimony, explaining how such agreement(s) satisfy the Commission's concerns;<sup>16</sup>

9. EAI understands that the intent of this condition is to eliminate any reasonable argument that the use of a service company by EAI creates a basis for FERC to reallocate costs among the Operating Companies. This Motion for Compliance Finding addresses the potential impact of Condition No. 1(a) on EAI's use of ESI to provide services for generation planning and operations, EAI's use of ESI to provide administrative services in general, and EAI's use of Entergy Operations, Inc. ("EOI"), an affiliated service company, that provides nuclear services for the operation of Arkansas Nuclear One ("ANO").

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<sup>16</sup> Order No. 68 at 25.

i. **EAI Use of ESI for Generation Planning and Operations Services**

10. The basis for FERC's imposition of the Rough Production Cost Equalization standard among the Operating Companies was the joint planning required by the System Agreement, not services provided by ESI outside the System Agreement.<sup>17</sup> A recent order of the U.S. Court of Appeals for the D.C. Circuit confirmed this:

The requirement of rough equalization is rooted in the Agreement. Because rough equalization is tied to the Agreement, it was reasonable for FERC to conclude that once a Company leaves the Agreement, it need not continue to make the payments.<sup>18</sup>

11. EAI has taken steps to mitigate the risk of reallocation of production costs after EAI terminates its participation in the System Agreement. The Company has implemented a process that makes clear it is not continuing to participate in joint resource planning with the other Operating Companies beyond the point required by the System Agreement, and, has put in place a new mechanism, the Resource Planning and Operations Committee ("RPOC"), to help administer that process. EAI has replaced the joint planning requirement in the System Agreement with a planning process that focuses on the needs of

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<sup>17</sup> *City of New Orleans v. FERC*, -- F.3d --, 2012 WL 3289799 (D.C. Cir., Aug. 14, 2012). See, also, Transcript of Technical conference at 197 (August 19, 2011).

<sup>18</sup> *City of New Orleans v. FERC*, -- F.3d --, 2012 WL 3289799 (D.C. Cir., Aug. 14, 2012) *citing* *La. Pub. Serv. Comm'n v. FERC*, 551 F.3D 1042, 1043 (D.C. Cir. 2008) ("We have long viewed the System Agreement as requiring that affiliates share the costs of power generation in roughly equal proportion.").

EAI's customers,<sup>19</sup> rather than based on the collective needs of all the Entergy Operating Companies.

12. EAI has made sure that its future interactions with ESI are not a course of conduct that would support an argument -- no matter how attenuated -- that EAI conducts joint generation planning with the other Operating Companies. EAI has revised its contracts under which ESI provides generation planning and operations services to conform to the new, EAI-centric planning process. The Company previously provided a draft contract (EAI Exhibit KWC-9 to Mr. Castleberry's June 22, 2012 testimony) that will govern EAI's use of ESI for such services for EAI's post-System Agreement operations. These services will be provided pursuant to this cost-based,<sup>20</sup> individual contract with ESI for generation planning and operations services performed for EAI only and at EAI's direction. EAI will define the scope of ESI's generation planning and operations services to be provided to EAI.

13. In addition, in his compliance testimony, Mr. McDonald outlines additional risk mitigation measures that EAI intends to seek with respect to the EAI's use of ESI for generation planning and operational services:

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<sup>19</sup> McDonald Supplemental Direct Testimony at 4-6 (January 11, 2012), EAI Exhibit HTM-7 at 1, 3; Castleberry Supplemental Direct Testimony at 9-13 (January 11, 2012).

<sup>20</sup> Non-power goods and services are required to be provided at cost. 18 C.F.R. § 35.44(b)(3) provides: "A franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may only purchase or receive non-power goods and services from a centralized service at cost."

- a. EAI will file with the FERC its post-System Agreement arrangements and request that the FERC find the use of shared services does not, standing alone, provide a basis for reallocating production costs among the Operating Companies;<sup>21</sup> and
- b. EAI will have a generation planning and operations internal staff to manage and direct those functions. To date, EAI has hired two managers responsible for its generation planning and operations functions, and two additional analysts will be added to EAI's planning staff to provide further support for these activities. EAI also will add a transmission planning manager and analyst. With these additions, in total, EAI will have added seven employees dedicated to the specific purpose of conducting EAI's generation planning and operations and to evaluate and identify potential economic transmission upgrades that could serve to reduce costs for EAI's customers. These new employees will be in addition to the five employees that currently administer EAI's energy efficiency program development and administration, which represents a key aspect of EAI's Integrated Resource Plan and the planning activities conducted by Mr. Castleberry's organization.<sup>22</sup>

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<sup>21</sup> McDonald Compliance Testimony at 11-12.

<sup>22</sup> *Id.* at 7-8.

ii. **EAI Use of ESI for Administrative Services**

14. The scope of this condition in Order No. 68 includes all ESI services, not just those for generation planning and operations covered by the draft agreement provided in EAI Exhibit KWC-9. Condition 1(a)'s prohibition of cost allocations among Operating Companies would amount to a prohibition on EAI's using ESI because the basis for cost savings in a service company is the sharing or allocation of fixed costs among all the users. Such a broad prohibition is unreasonable and unsupported as a matter of fact and law.

15. Some retail regulators of the Operating Companies have pursued litigation at FERC seeking to reallocate production costs due to discrepancies in the production costs among the Operating Companies, particularly when natural gas prices are high. In contrast, all of the Operating Companies pay the same rate for administrative services provided by ESI based on the factors driving the costs to be incurred. While it is conceivable that a retail regulator could argue at FERC that the cost allocation method for ESI costs should be changed from a pro rata share to another allocation method, in the unlikely event such an argument were to prevail, the change to any individual Operating Company's costs would presumably be relatively small because the use of any reasonable alternative method for allocating ESI costs should not shift significant levels of costs.

16. The use of service companies is prevalent throughout the electric industry because they allow affiliated utilities to take advantage of economies of scale in the provision of services to the operating company.<sup>23</sup> ESI provides the same ability to reduce costs through sharing the cost of projects, technical and administrative experts, and the associated overhead costs. The APSC itself has recognized the value that ESI has provided and can provide to EAI's customers: "ESI and EOI were established in order to decrease costs to ratepayers and achieve more efficient operation for the Operating Companies."<sup>24</sup> Mr. McDonald cites in his compliance testimony a recent example of the cost savings that ESI can produce. EAI recently introduced new service options to allow its customers to receive and pay bills on line, and to receive real-time outage information on line and by text messaging on customers' mobile devices. Each of these initiatives was developed by ESI for use by all the Operating Companies. If EAI had developed these projects on its own, it would have paid something closer to the \$4.4 million that the development of these initiatives cost the combined Operating Companies, but it instead paid \$1.64 million as its share of the joint development cost. This cost-saving example is repeated many times over in

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<sup>23</sup> See e.g., Charles L. Phillips, Jr., *The Regulation of Public Utilities*, 575-76 (1988). *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 at P 169 (2005) ("[C]entralized provision of accounting, human resources, legal, tax and other such services benefits ratepayers through increased efficiency and economies of scale."); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 72 (2008)(footnote omitted) ("As we have previously stated, the at-cost pricing standard for transactions for non-power goods and services from centralized service companies to franchised public utilities with captive customers benefits ratepayers through economies of scale, and eliminates the speculative task of defining a market price in these instances.").

<sup>24</sup> Initial Brief of the Arkansas Public Service Commission in FERC Docket No. 07-682-002 at 30 (April 11, 2008).

EAI's use of the multiple information technology systems that ESI developed and that EAI uses to run its business, and in the ESI experts in accounting, tax, engineering, and other fields on which EAI relies. A prohibition on the use of ESI would deny these savings to EAI's customers and result in higher rates.

17. EAI Exhibit KWC-10<sup>25</sup> contains the cost-based contract between EAI and ESI that will govern the provision of services by ESI to EAI not related to generation planning and operations. EAI requests that this individual, cost-based contract be deemed to satisfy the conditions set forth in Order No. 68 with respect to other ESI services provided to EAI.

18. EAI recommends that if the Commission wishes to investigate further the contractual arrangements between the Company and ESI, it should initiate a separate proceeding because this issue does not form any reasonable basis for preventing EAI from joining MISO.

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<sup>25</sup> See Castleberry Supplemental Direct Testimony (June 22, 2012).

**iii. EOI Services Provided to EAI**

19. The Company's compliance with this condition presumes that Order No. 68 intended to exclude EOI from the scope of Condition No. 1(a). EOI is a service company to the Entergy Operating Companies that provides nuclear services for the operation of nuclear plants owned by the Operating Companies, including ANO, owned by EAI, and the Grand Gulf Nuclear Station, from which EAI purchases power and which is owned by System Energy Resources, Inc., a subsidiary of Entergy Corporation. In Docket No. 89-128-U, the APSC found that transferring of ANO management functions from Arkansas Power and Light Company ("AP&L"), EAI's predecessor in name, to EOI was in the public interest.<sup>26</sup> That proceeding also included a review of the Operating Agreement that governs the relationship between EAI (then, AP&L) and EOI.<sup>27</sup>

**B. Condition No. 1(b)**

20. Condition No. 1(b) provides:

All members of the RPOC shall be direct employees of EAI. However, if ESI employees on the RPOC are necessary solely for their technical expertise and assistance, such ESI employees shall execute a legally binding agency agreement with EAI and shall participate in RPOC activities strictly as agents of EAI with the

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<sup>26</sup> Docket No. 89-128-U, Order No. 17, at 41-42 (April 2, 1990). The Commission concluded that "[the] consolidation of nuclear management functions within the Entergy System presents an opportunity for significant cost savings for AP&L and its ratepayers."

<sup>27</sup> The Commission noted in its Initial Brief filed in FERC Docket No. 07-682-002 on April 11, 2008 at page 30 that the APSC had recognized in its order regarding the formation of these service companies: "ESI and EOI were established in order to decrease costs to ratepayers and achieve more efficient operation for the Operating Companies."

attendant fiduciary responsibilities to EAI only and that all such services be performed under strict confidentiality.<sup>28</sup>

21. Mr. McDonald affirms in his compliance testimony that he will restructure the membership of the RPOC so that its members will be EAI employees only, with ESI employees serving only in a technical support role. Thus, EAI will comply with this condition.

**C. Condition No. 2**

22. Condition No. 2 states

Should EAI become a member of MISO, the following additional conditions must be complied with to ensure that EAI is operated independently of the other OpCos within MISO:

- a) EAI shall join MISO as a separate Transmission Owner, Load-Serving Entity, Asset Owner, and Market Participant and receive settlement statements separately and apart from the other OpCos;
- b) EAI shall sign the MISO TOA separately and apart from the other OpCos and vote separately from the other OpCos; and
- c) EAI shall be assigned, separately and apart from the other OpCos, to a Transmission Pricing Zone; Load Zone; Auction Revenue Rights Zone; and Local Resource Zone. EAI shall agree that the Commission, *sua sponte* or upon motion of any party to this proceeding, may reconsider any conditional approval of the transfer of control if FERC does not approve all of these separate EAI arrangements/zones.

Upon agreement to this condition by EAI and MISO, and upon a showing by MISO that has been assigned to such Zones separate and apart from the other OpCos, EAI and MISO will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.<sup>29</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 25-26.

23. Mr. McDonald's compliance testimony affirms that EAI will sign individually the MISO TOA, and not jointly with the other Operating Companies. With respect to the second part of Condition No. 2(b), however, EAI has previously described its authority and agreement to vote separately from the other Operating Companies on all matters except the six items subject to the vote of Owners in Article II, Section IX(c) of the TOA.<sup>30</sup> The TOA specifically defines "Owner" for purposes of the TOA and provides that a public utility holding company shall be regarded as a single owner. The result is that, pursuant to the TOA, there is one vote per holding company on the items set forth in Article II, Section IX(C) of the TOA.

24. Mr. McDonald's assertion that EAI has complied with this condition is based upon the assumption that the APSC meant to exclude these six categories from the requirement that EAI vote "separately and apart" from the other Operating Companies as a member in MISO.<sup>31</sup> Absent an amendment of the definition of "Owner" in the TOA, which neither the APSC nor EAI nor MISO can effectuate, EAI cannot vote separately and apart from the other Operating Companies as to items in Article II, Section IX(c) of the TOA. Thus, EAI seeks a finding that EAI has complied with Condition Nos. 2(a) and (b) as described above and that the Commission did not intend for EAI to secure such an amendment to the MISO TOA in order to comply with this condition.

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<sup>30</sup> Schnitzer Sur-Surrebuttal Testimony at 18-19 (May 11, 2012).

<sup>31</sup> McDonald Compliance Testimony at 17-18.

Alternatively, EAI seeks rehearing with respect to Condition No. 2(a) and (b). Requiring EAI to undertake acts beyond its control, would effectively prevent EAI from joining MISO, thereby frustrating EAI's voluntary efforts to join the MISO RTO, in conflict with federal policy.

25. With respect to Condition No. 2(c), in his Order No. 68 compliance testimony, Mr. McDonald affirms that EAI will propose to MISO and/or FERC that EAI be assigned to a separate TPZ, a separate Load Zone, a separate ARR Zone, and a separate LRZ.<sup>32</sup> The determination of the zones in question is not within EAI's unilateral control. The ultimate decision with respect to the above-mentioned zones and their application to EAI in MISO is subject to acceptance by MISO and/or the FERC.<sup>33</sup> MISO will address in its compliance testimony to be filed later how its plans for EAI's participation options, should EAI become a member of MISO, are consistent with this condition.

26. Moreover, with respect to MISO's determination that an EAI's Local Resource Zone is acceptable, under the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff ("MISO Tariff"), such final

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<sup>32</sup> McDonald Compliance Testimony at 17.

<sup>33</sup> *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49 (2003) (rejecting the contention that preemption did not apply because the filed rate "leaves the classification of ERS units to the discretion of the operating committee" and hence this "delegated discretion provided room for the [state]s finding of imprudence where a mandated cost allocation would not").

determination can be made only after EAI signs the TOA.<sup>34</sup> Yet, Order No. 68 states that “[u]pon a finding by the Commission that EAI and MISO have, in fact, complied with the conditions, the Commission will grant conditional approval of EAI's Application, as being in the public interest, and will authorize EAI to sign the MISO Transmission Owners Agreement (TOA) and move forward with the MISO integration process.”<sup>35</sup> Thus, read literally, Order No. 68 would require EAI to accomplish a task that the order does not authorize it to undertake. An interpretation that would require action by FERC prior to EAI's signing the TOA would effectively prevent EAI from joining MISO, thereby frustrating EAI's voluntary efforts to join the MISO RTO in conflict with federal policy.<sup>36</sup> The Company seeks a finding that it has complied with Condition No. 2 as described above. In the alternative, EAI respectfully requests rehearing with regard to the Commission's interpretation of this condition and EAI's ability to fulfill the literal wording of the condition.

**D. Condition No. 3**

27. Condition No. 3 states:

Should EAI become a member of MISO, during the Entergy/MISO transition period, to the extent that costs are incurred for transmission projects that terminate exclusively in the Second

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<sup>34</sup> As EAI and MISO explained in testimony and at hearing, the first step in the formal process of joining MISO is executing the TOA. This is a precondition to subsequent steps required for integration, including, pertinent here, determining the appropriate classifications for the Operating Companies with respect to zones and making the appropriate filings with FERC to approve those classifications.

<sup>35</sup> Order No. 68 at 1.

<sup>36</sup> See *infra* Section III.B.

Planning Region, EAI will not be allocated costs that exceed the benefits that EAI receives from such transmission projects.

28. This condition refers to transmission projects constructed within MISO South during the 5-year transition period. For these projects, MISO will allocate costs based on its existing FERC-approved methodologies reflected in the MISO Tariff, which vary depending on the type of project (e.g., Multi Value Project, baseline reliability project, market efficiency project, and generator interconnection). Each methodology has been approved by FERC as just and reasonable, and is consistent with the principle that cost responsibility should be roughly commensurate with economic and/or reliability benefit. Therefore, EAI believes that the MISO Tariff already complies with this condition. However, the MISO Tariff methodologies do not, in all instances, evaluate costs and benefits by individual utility, load serving entity, market participant, or on a project-by-project basis. To the extent the APSC is directing MISO to change its cost allocation criteria to perform such an entity-specific evaluation, and taking the position that FERC must approve such change before the Commission approves EAI participation in MISO, EAI respectfully requests that the Commission grant rehearing with respect to this condition because it conflicts with FERC's jurisdiction and is beyond EAI's control to effectuate.

**E. Condition No. 4**

29. Condition No. 4 states:

Should EAI become a member of MISO, EAI shall agree that it will not exit MISO without first filing an application with the Commission seeking its approval for a change of control of its transmission assets. EAI will otherwise retain all of its rights, state and federal, to appeal or seek review of or relief from the decision of the Commission.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.<sup>37</sup>

30. Mr. McDonald has affirmed on behalf of EAI that it will abide by this condition subject to a finding by this Commission, after notice and hearing, of a material adverse impact on EAI's retail customers if it exits MISO and with the understanding that EAI's federal rights include, but are not limited to, rights pursuant to Section 205 of the Public Utility Regulatory Policies Act ("PURPA").<sup>38</sup>

**F. Condition No. 5**

31. Condition No. 5 states:

Should EAI become a member of MISO, EAI shall agree that the Commission *sua sponte* or upon the motion of any party, after notice and hearing, may direct EAI to exit MISO under the terms of the Memorandum of Understanding or the TOA. EAI will otherwise retain all of its rights, state and federal, to appeal or seek review of or relief from the decision of the Commission.

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<sup>37</sup> Order No. 68 at 27.

<sup>38</sup> McDonald Compliance Testimony at 19-20.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.<sup>39</sup>

32. Mr. McDonald has affirmed on behalf of EAI that it will abide by Condition No. 5 subject to a finding by the Commission, after notice and hearing, of a material adverse impact on EAI's retail customers from a failure to exit MISO and with the understanding that EAI's federal rights include, but are not limited to, rights pursuant to Section 205 of PURPA.<sup>40</sup>

**G. Condition No. 6**

33. Condition No. 6 provides:

Should EAI become a member of MISO, EAI shall remain under the Commission's jurisdiction, to the extent not otherwise preempted by FERC, with respect to retail electric rates and all related electric facility operations, facility siting, financing, and reliability.

Upon agreement to this specific condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.<sup>41</sup>

34. Mr. McDonald has affirmed on behalf of EAI that it will abide by Condition No. 6.<sup>42</sup>

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<sup>39</sup> Order No. 68 at 27.

<sup>40</sup> McDonald Compliance Testimony at 20-21.

<sup>41</sup> Order No. 68 at 27.

<sup>42</sup> McDonald Compliance Testimony at 21-22.

**H. Condition No. 7**

35. Condition No. 7 provides:

Should EAI become a member of MISO, EAI shall agree that the Commission, *sua sponte* or upon the motion of any party to this proceeding, may, after notice and hearing, reconsider and, if necessary, reverse any approval of the transfer of control if:

a) The terms of FERC's approval of the modifications to the MISO Tariff to transition EAI into MISO are materially changed such that the revised terms will have a material adverse impact on EAI's retail ratepayers; or

b) Any of the foregoing conditions are not fully adopted, incorporated or realized.

Upon agreement to this condition by EAI, EAI will have sufficiently complied with this specific condition for purposes of conditional approval of EAI's Application.<sup>43</sup>

36. Mr. McDonald has affirmed on behalf of EAI that it will abide by Condition No. 7, which the Company understands to include that it would retain all of its rights, state and federal, to appeal or seek review of or relief from the decision of the Commission. Federal rights include, but are not limited to, rights pursuant to Section 205(a) of the PURPA.<sup>44</sup>

**I. Condition No. 8**

37. Condition No. 8 provides:

Should EAI become a member of MISO, EAI shall not unbundle transmission or seek to make basic changes to transmission service for retail ratemaking without prior APSC approval. EAI shall negotiate a transmission service agreement with MISO that

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<sup>43</sup> Order No. 68 at 28.

<sup>44</sup> McDonald Compliance Testimony at 22-23.

ensures that the APSC continues to determine the transmission component of the rates to serve EAI's bundled retail load.<sup>45</sup>

38. Mr. McDonald's compliance testimony affirms that EAI will abide by Condition No. 8.<sup>46</sup> EAI's affirmation is based upon an interpretation that this condition only applies to charges associated with transmission assets owned by EAI and subject to Schedules 1, 3 through 6, and 9 of the MISO Tariff, as the Bundled Load Exemption under the terms of the MISO Tariff applies to these schedules. Schedule 9 is the MISO schedule pursuant to which MISO collects in network service transmission rates the costs of transmission facilities that pre-existed a Transmission Owner's membership in MISO, as well as the cost of transmission facilities that are not subject to cost allocation outside of the situs transmission pricing zone.<sup>47</sup> Schedules 1-3 and 5-6 relate to ancillary services; Schedule 4 is for Energy Imbalance Service.

39. EAI's affirmation that it has complied with this condition also is based on the fact that the bundled load exemption is available to EAI pursuant to the express provisions of the MISO Tariff without the need to sign a transmission service agreement that differs from the standard Network Service Agreement

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<sup>45</sup> Order No. 68 at 28.

<sup>46</sup> McDonald Compliance Testimony at 23-24.

<sup>47</sup> MISO Tariff, Schedule 9 § 1 (network transmission service charges); *id.* Schedule 26 (Network Upgrade Charge for new transmission facilities); *id.* Attachment GG (recovery of new facility costs); *id.* Schedule 26-A (recovery of multi-value projects).

under the MISO Tariff.<sup>48</sup> EAI seeks a finding of compliance with Condition No. 8 and that EAI's assertion that it will not unbundle its transmission service costs in retail rates without prior Commission approval by exercising that right pursuant to Section 37.3 of the MISO Tariff sufficiently addresses this condition. In the alternative, EAI respectfully requests rehearing with regard to the Commission's interpretation of this condition and EAI's ability to fulfill the literal wording of the condition.

**J. Condition No. 9**

40. Condition No. 9 states:

Should EAI become a member of MISO, EAI shall be allocated no more than its load responsibility ratio for common transition costs, even if one or more of the other OpCos do not join MISO.<sup>49</sup>

41. Mr. McDonald affirmed in his compliance testimony EAI's agreement to this condition.<sup>50</sup> Mr. McDonald's assertion is based on an understanding that the allocation of these common costs of transitioning into MISO by load responsibility ratio is to those Operating Companies that are continuing to pursue membership in MISO. At this time, that includes all the Operating Companies. In the unlikely event that one or more Operating

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<sup>48</sup> See MISO Tariff, Section 37.3. MISO Tariff, Section 37.3(a). See EAI's Response to STAFF 54-1 filed April 25, 2012. EAI would qualify for the application of the bundled load exemption under the four transmission pricing zone proposal that the Entergy Operating Companies have put forward.

<sup>49</sup> *Id.*

<sup>50</sup> McDonald Compliance Testimony at 24-25. See *also*, Castleberry Sur-Surrebuttal Testimony at 12-13 (May 11, 2012). See Addendum 1 to EAI's Response to Staff DR 47-1 filed May 25, 2012.

Companies does not continue to pursue membership in MISO, then the remaining Operating Companies would be allocated the remaining going-forward costs of transition that are incurred from that point forward.

42. EAI is not paying the full cost of transitioning to MISO because other Operating Companies are sharing in the cost of the common tasks performed by ESI to date. These common costs are being allocated to each Operating Company using a reasonable, cost-based allocation method. Requiring another Operating Company to pay for transition costs incurred after it determined it would no longer pursue membership in MISO would be unreasonable and would exceed the Commission's authority. Such a requirement would be unreasonable because the Operating Company(ies) would be required to pay for incremental costs of a project that they have determined not to pursue. In addition, the APSC would be exceeding its authority in imposing such a condition because the allocation of costs among the Operating Companies is a matter within the jurisdiction of the FERC.<sup>51</sup> EAI seeks a finding that it has complied with Condition No. 9 as described above. To the extent the APSC determines that EAI has not complied with Condition No. 9, EAI seeks rehearing of this issue.

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<sup>51</sup> *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 113 FERC 61,248 at P 167 (2005).

**K. Condition No. 10**

43. Condition No. 10 states:

Should EAI become a member of MISO, EAI and MISO shall ensure that it will be allocated Auction Revenue Rights at a proportional level no less than current participants in MISO and adequate to hedge congestion costs.<sup>52</sup>

44. Mr. McDonald has agreed in his compliance testimony to fulfill the underlying purpose of Condition No. 10,<sup>53</sup> although compliance with its literal terms is impossible. EAI will abide by Condition No. 10 by ensuring that EAI will receive entitlements to nominate Auction Revenue Rights at a proportional level no less than current participants in MISO and adequate to hedge congestion costs. MISO will address this condition in more detail in its testimony to be filed later. It is impossible to ensure, in advance of the auction process, any specific allocation of ARRs. EAI's participation in the auction process will not take place until after EAI has been integrated into the MISO market.<sup>54</sup> EAI's interpretation of this condition, and Mr. McDonald's assertion that it will abide by the condition, is based on an interpretation that the Commission does not require the results of the auction process to be known in order to determine that EAI and MISO have met this condition, but rather the assurance that under the MISO rules, EAI will receive ARR nomination entitlements proportional to the ARR nomination entitlements received by current MISO members, and that this will result in

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<sup>52</sup> Order No. 68 at 29.

<sup>53</sup> McDonald Compliance Testimony at 25-26.

<sup>54</sup> EAI will receive an allocation of FTRs for purposes of hedging its energy needs during the interim period from the date of MISO integration until the first ARR auction after EAI's integration into MISO is completed.

adequate hedges for EAI customers. To interpret the condition otherwise would require that EAI join MISO to seek to meet this condition as written, but not join MISO unless this condition is met, a Catch-22 that would effectively prevent EAI from joining MISO, thereby frustrating EAI's voluntary efforts to join the MISO RTO in conflict with federal policy.

45. EAI's assertion of compliance with this condition also interprets "adequate" hedge not to mean that each EAI would never face congestion charges. There may be instances where EAI would be subject to net congestion charges. For example, the Company may make purchases that result in payments of net congestion charges (i.e., congestion charges net of revenues from congestion hedges are positive). However, EAI would only make such a purchase when the expected total benefit exceeds the total expected cost.

46. EAI seeks a finding of compliance with Condition No. 10 that the Commission did not intend to require the results of the ARR auction to demonstrate compliance with this condition because any other interpretation would set up an impossible situation for EAI to meet and otherwise conflict with FERC's exclusive jurisdiction or to require that EAI would never be subject to congestion charges. In the alternative, EAI respectfully requests rehearing with regard to the Commission's interpretation of this condition and EAI's ability to fulfill the literal wording of the condition.

**L. Condition No. 11**

47. Condition No. 11 states:

Should EAI become a member of MISO, the Commission shall retain full audit rights for costs associated with EAI's membership in MISO.<sup>55</sup>

48. In his compliance testimony, Mr. McDonald affirmed on behalf of EAI that the Company would abide by Condition No. 11. EAI's assertion is based upon an interpretation of this order that audit rights means that EAI will provide information upon request by the Commission related to the costs incurred as a result of EAI's participation in MISO that are reflected in the Company's rates.<sup>56</sup> EAI's assertion is not intended to grant the Commission any authority it does not currently have under state law nor give up any rights that EAI may have under federal or state law. EAI seeks a finding from the Commission that it has complied with Condition No. 11 as described above. To the extent the Commission disagrees with EAI's interpretation of "audit rights," EAI seeks rehearing of Order No. 68 on this issue.

**M. Condition No. 12**

49. Condition No. 12 states:

Should EAI become a member of MISO, MISO shall provide Entergy retail regulators, during the Entergy/MISO transition period, with the same governance authority as now possessed by the

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<sup>55</sup> Order No. 68 at 29.

<sup>56</sup> McDonald Compliance Testimony at 26-27.

ERSC, including, but not limited to, the ability to take action on transmission planning and associated cost allocation issues by simple majority vote.<sup>57</sup>

50. The current authority of the Entergy Regional State Committee (“E-RSC”), as set forth in its bylaws, requires that any exercise of the E-RSC’s authority be by unanimous vote.<sup>58</sup>

51. EAI’s interpretation that it has complied with this condition is based upon its assertion that the Company will support any action by the E-RSC to revise its voting process on such issues, including to allow such actions to be taken on a vote that is less than unanimous.<sup>59</sup> More than that, EAI cannot do. Neither EAI nor MISO can unilaterally satisfy Condition No. 12 if it is interpreted to require EAI or MISO to accomplish a change to the E-RSC’s bylaws or put in place new bylaws, applicable during the period after EAI’s integration into MISO. Only the E-RSC members can do that. EAI seeks a finding that by supporting any such change it has complied with Condition No. 12 and that the Commission did not intend to require EAI or MISO to modify the E-RSC’s by-laws or adopt new bylaws to allow for a simple majority vote to exercise its authority if EAI joins MISO. In the alternative, EAI respectfully requests rehearing with regard to the Commission’s interpretation of this condition and EAI’s ability to fulfill the literal wording of the condition.

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<sup>57</sup> Order No. 68 at 29.

<sup>58</sup> Art. IV, Section 8(e).

<sup>59</sup> McDonald Compliance Testimony at 28.

**N. Condition No. 13**

52. Condition No. 13 states:

Should EAI become a member of MISO, MISO shall agree to provide to the MISO OMS, effective on the first day of the Entergy post-transition period, full legally recognized Section 205 Federal Power Act (FPA) filing rights with regard to the following regulatory activities: a) determining regional proposals regarding transmission planning and cost allocation, including whether and to what extent participant funding will be used for transmission enhancements; b) directing MISO to construct transmission upgrades; and c) choosing the approach to be used for assessing resource adequacy, if any, across the entire RTO region; and d) In addition: i) action by OMS will be taken by a simple majority vote of the retail regulatory representatives; and ii) as OMS reaches decisions on the methodology that will be used to address any of these issues, MISO shall file that methodology pursuant to Section 205 of the FPA.

53. MISO addresses in its compliance testimony its interpretation of this condition and, based on its interpretation, MISO's actions demonstrating compliance. EAI respectfully requests a finding that it is in compliance with Condition No. 13 as described for the reasons set forth in MISO's compliance filing. To the extent the Commission disagrees with MISO's interpretation of, and compliance with, this condition, EAI respectfully requests rehearing with respect to this condition and the Commission's interpretation of this condition as neither EAI nor MISO is able to fulfill the literal wording of the condition.

54. It would exceed this Commission's jurisdiction to dictate the terms of RTO governance and thereby effectively compel public utilities throughout the

MISO Region to relinquish or share their Federal Power Act (“FPA”) Section 205 rights. Indeed, neither this Commission nor the FERC may compel utilities to surrender or share their filing rights under Section 205.<sup>60</sup> Of necessity, that means a state may not force public utilities to share or give up those rights, nor compel utilities to make filings with FERC under Section 205 of the FPA.<sup>61</sup> It should also be noted that the condition, as drafted, describes an RTO governance structure that does not exist. Neither the MISO Organization of MISO States (“OMS”) nor the SPP Regional State Committee (“RSC”), for example, has the authority “to direct [the RTO] to construct transmission upgrades.” The E-RSC has that authority today with respect to ESI as a Transmission Provider, and under the Operating Companies’ proposal would have it during the transition period to MISO, with respect to the Entergy Operating Companies as Transmission Owners under the MISO Tariff. But that is not a type of authority possessed by the MISO OMS or the SPP RSC.

**O. Condition No. 14**

55. Condition No. 14 provides:

Should EAI become a member of MISO, no later than three years after joining MISO and every two years thereafter, assuming EAI continues as a MISO member, EAI shall file with the Commission a detailed report providing the following information:

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<sup>60</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-11 (D.C. Cir. 2002).

<sup>61</sup> See *W. Mass. Elec. Co.*, 23 FERC ¶ 61,025 (1983), *aff’d sub nom. Mass. Dep’t Pub. Utils. v. FERC*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (“[T]he net effect of accepting Massachusetts’ argument is to allow a state to do what FERC itself cannot, namely, to change an interstate rate practice that FERC has not found unreasonable.”).

a. The quantified historical net benefits of MISO membership for EAI, as compared to the stand-alone option, as of the date of each of the reports described above;

b. The projected net benefits of MISO membership for EAI, as compared to the stand-alone option, for the post-transition period on a bi-annual basis beginning one year after the end of the transition period;

c. Any significant changes in FERC RTO policies, rules or regulations, MISO requirements, Day 2 market conditions, or other regulatory or market structure components; and

d. An estimate of the costs to exit MISO after the end of the five-year transition period or a specified time thereafter and to transition to a new operating environment such as a different RTO.<sup>62</sup>

56. Mr. McDonald has affirmed on behalf of EAI that it will comply with this condition.<sup>63</sup>

**P. Condition No. 15**

57. Condition No. 15 states:

EAI's President shall continue to provide monthly reports to the Commission demonstrating EAI's progress on the following issues: a) generation planning activities; b) Development of a revised ESI service agreement; c) FERC Order No. 1000 compliance plans and activities; d) Development of a true stand-alone option with further detail on costs, coordination agreements, transmission planning, and critical path implementation activities; implementation costs and deferrals; EAI's or Entergy's filing to FERC seeking approval of the terms under which EAI will, consistent with this Order, join MISO and the outcome of FERC's rulings on the filings, including any appellate review; and g) Development of a new Independent Coordinator of Transmission contract.<sup>64</sup>

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<sup>62</sup> Order No. 68 at 30-31.

<sup>63</sup> McDonald Compliance Testimony at 30-31.

<sup>64</sup> Order No. 68 at 31-32.

58. As Mr. McDonald affirms in his compliance testimony, EAI agrees to continue providing monthly status reports supported by sworn testimony.<sup>65</sup> The Company seeks a finding the EAI is in compliance with Condition No. 15 and that, where appropriate, the testimony may be sponsored by subject-matter experts within Mr. McDonald's span of control who have greater knowledge of the topics addressed in the testimony.

**Q. Condition No. 16**

59. Condition No. 16 states:

EAI shall agree that upon the issuance of any final and non-appealable order by the FERC or any Entergy retail regulatory body addressing the transfer of control of Entergy transmission assets to MISO, through stipulation or otherwise, which provides benefits to Entergy ratepayers in any jurisdiction or imposes conditions on the OpCos that would benefit the ratepayers of any jurisdiction, such net benefits and conditions will be extended to EAI ratepayers and/or this Commission to the extent necessary to achieve equivalent net benefits and conditions to EAI ratepayers and/or this Commission.

60. Mr. McDonald affirms in his compliance testimony that EAI previously has agreed that it will provide to the Commission, and to its customers, if applicable, any contingencies, conditions, and benefits that are either a part of any order or a part of any stipulation or agreement in any other Entergy Operating Company's retail or wholesale jurisdiction addressing a request to transfer control of certain transmission facilities to MISO that has not

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<sup>65</sup> McDonald Compliance Testimony at 31-33.

been ordered by the ASPC or adopted as part of an agreement or stipulation in APSC Docket No. 10-011-U.<sup>66</sup> However, EAI's agreement to this condition is based upon an interpretation that includes the following: To the extent that any Entergy Operating Company has provided any contingencies, conditions, and benefits in exchange for cause or consideration related to such contingencies, conditions, and/benefits, EAI must receive from the APSC comparable cause/consideration in order for the APSC to receive such benefits.<sup>67</sup>

61. A condition of this nature is typically called a "most favored nation" clause and is frequently included in the resolution of proceedings involving a single subject matter that affects each of the Operating Companies. EAI's assertion that it has complied with this condition is based on the recognition that in the resolution of a regulatory proceeding by settlement agreement, an Operating Company may agree to confer a benefit on another party in exchange for a provision that represents a benefit to that Operating Company. The most favored nation clause exercised reasonably and fairly would extract the net benefit of the other jurisdiction's settlement agreement (including both the benefit and the consideration given in exchange for that benefit).

62. EAI's interpretation of this condition is that the Company's express condition stated in paragraph 55 above is inherent in the Commission's

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<sup>66</sup> McDonald Compliance Testimony at 33-34.

<sup>67</sup> See Sur-Surrebuttal Testimony of Hugh T. McDonald at 20-21 (May 11, 2012). See, also, Addendum 1 to EAI's Response to STAFF Data Request 56-1.

statement of the most favored nation clause in Condition No. 16. An interpretation otherwise would be unfair and unreasonable. Therefore, the Company seeks a finding that it is in compliance with Condition No. 16 and that Condition No. 16 should be properly read to include the Company's condition on the most favored nation clause that recognizes any net benefit conferred in another jurisdiction as consideration for a particular provision or condition that may be adopted by the APSC would also be extended to EAI. In the alternative, EAI respectfully requests rehearing with regard to this condition.

**R. Condition No. 17**

63. Condition No. 17 provides:

The Commission will address EAI's requests for deferral of its transition costs by subsequent order.<sup>68</sup>

64. With its filing today, EAI has renewed its request that the Commission allow the Company to defer its costs related to the transition to post-System Agreement operations in its order responding to the Company's response to Order No. 68.<sup>69</sup>

**S. Condition No. 18**

65. Condition No. 18 provides:

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<sup>68</sup> Order No. 68 at 32.

<sup>69</sup> McDonald Compliance Testimony at 34.

The prudence of all MISO integration costs will be considered in a later proceeding when such costs will be incorporated into rates.<sup>70</sup>

66. Mr. McDonald has agreed to Condition No. 18 on behalf of EAI.<sup>71</sup>

**T. Condition No. 19**

67. Condition No. 19 provides:

If Entergy and EAI intend to pursue the sale of its transmission assets to ITC Holding, Inc. (ITC), then EAI forthwith shall file an application seeking Commission approval to divest its transmission assets to ITC.<sup>72</sup>

68. Mr. McDonald has affirmed that nothing in the APSC's decision on the MISO change of control will in any way affect the Commission's ability to subsequently render a decision on whether the proposed spin-off and merger of EAI's transmission assets with ITC is in the public interest. The contract between Entergy Corporation and ITC that sets the terms for this transaction requires that the Operating Companies have received the necessary regulatory approvals to join an RTO. EAI plans to file a joint application requesting approval of the ITC Transaction at the end of September.

69. ITC's chief executive officer, Joseph L. Welch, affirms in his affidavit attached as EAI Exhibit HTM-9 ITC's intent to maintain the Transmission

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<sup>70</sup> Order No. 68 at 32.

<sup>71</sup> McDonald Compliance Testimony at 35.

<sup>72</sup> Order No. 68 at 32.

Pricing Zone approved by FERC for EAI and ITC's plan to file its Joint Application with EAI for approval of the transaction with the APSC no later than September 30, 2012..<sup>73</sup>

### **III. PETITION FOR REHEARING**

70. Should the Commission determine that EAI is not in compliance with the conditions above resulting in the imposition of unreasonable conditions that are not within EAI's and MISO's control or within the Commission's authority to impose, EAI seeks rehearing of Order No. 68 to determine whether any unmet conditions represent an unlawful impediment to EAI's decision to join an RTO and exceed the Commission's authority. A timely resolution of EAI's Motion is needed to remove the risk of increased costs and service reliability for EAI's customers and the customers of all other utilities dependent on EAI's

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<sup>73</sup> McDonald Compliance Testimony at 35-36.

transmission facilities due to the uncertainty over how to plan for operations beginning December, 2013.<sup>74</sup>

**A. Condition No. 1**

71. For the reasons set forth above, EAI's plan for compliance with Condition No. 1(a) and 1(b) meets the Commission's overarching objective to limit EAI's litigation risk associated with its post-System Agreement operations.

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<sup>74</sup> Following the first APSC Show Cause Hearing conducted on March 11-12, 2010, the Commission issued Order No. 11 directing EAI to give "serious and fair consideration to the option of restructuring EAI as a stand-alone Op Co becoming a member of SPP **or MISO** (Order No. 11 at 19 (emphasis added)). Mr. McDonald subsequently filed supplemental direct testimony on May 3, 2010, in which he asserted EAI's intention to discuss and analyze further the costs and benefits of EAI membership in the MISO RTO (McDonald Supplemental Direct Testimony at 4 (May 3, 2010)). At that time, Mr. McDonald also alerted the Commission that EAI had requested that the MISO alternative be evaluated as an addendum study by Charles Rivers Associates (*Id.*). On May 10, 2010, the APSC issued Order No. 15 responding as follows: "The Commission views EAI's request that the MISO third-party alternative be evaluated as an addendum study by CRA as a positive development. As such, pursuant to the provisions of Order No. 13 of Docket No. 08-136-U and Order No. 6 of this Docket, EAI is authorized to include the incremental costs of the CRA MISO addendum study within the regulatory asset authorized by those orders" (Order No. 15 at 1). On August 31, 2010, the APSC issued Order No. 20, in which the Commission directed EAI to "file its final assessment and recommendations regarding each of the viable strategic reorganization options studied by EAI" (Order No. 20 at 24 (footnotes omitted)). The date for compliance with the Commission's Orders was ultimately scheduled for May 12, 2011 (Order No. 29 at 3). Accordingly, on May 12, 2011 EAI filed "An Evaluation of the Alternative Transmission Arrangements Available to the Entergy Operating Companies and Support for Proposal to Join MISO" pursuant to Order Nos. 20, 27, and 29. Pursuant to Order No. 29, an evidentiary hearing was conducted on September 7-9, 2011, and on October 28, 2011, the Commission issued Order No. 54, which stated: "Regarding EAI's proposal to join an RTO, regardless of which one EAI joins, RTO membership is a positive development that represents a prudent course of action based on the evidence presented in this Docket" (Order No. 54 at 109). The Commission further stated that "[i]f EAI should choose to join an RTO, its Petition for Change of Functional control Over its Transmission Facilities should be filed within thirty (30) days of the date of this Order" (*Id.* at 110). Accordingly, in its Application filed November 28, 2011, EAI sought a finding from the Commission that transfer of functional control of its transmission assets to MISO is in the public interest. Pursuant to order No. 57, an evidentiary hearing was conducted on May 30-31, 2012. Finally, on August 3, 2012, the APSC issued Order No. 68, stating that "the Commission is unable, at this time, to reach a finding that EAI's Application is in the public interest. Upon a finding by the Commission that EAI and MISO have, in fact, complied with the conditions, the Commission will grant conditional approval of EAI's application, as being in the public interest, and will authorize EAI to sign the MISO TOA and move forward with the MISO integration process" (Order No. 68 at 33).

In this respect, it should be recognized that no scenario, including the complete elimination of use of ESI services by EAI, will eliminate all risk of litigation. EAI's proposed compliance plan appropriately balances litigation risks and the benefits to be obtained from using ESI services.

72. In the event that the Commission does not accept EAI's compliance plan, EAI respectfully requests rehearing on this issue. In the first place, the Company respectfully submits, these conditions have no necessary relationship to EAI's joining MISO or any other RTO and so have no rational basis as conditions thereto. Moreover, as EAI explained in its Motion for Clarification and Petition for Rehearing of Order 54 in this proceeding,<sup>75</sup> the Commission does not have the authority to dictate terms of a contract between EAI and a consultant performing services for the Company. Imposing a condition requiring EAI to restructure its administrative services contracts with ESI would be unreasonable because it would exceed the Commission's authority. The discharge of the Commission's responsibilities with respect to public utility regulation focuses on whether the rates charged by EAI are just and reasonable and the costs incurred are prudent and service is provided to all customers in a safe and reliable manner. It does not extend to the procurement of administrative services.

73. The Commission's Affiliate Transactions Rules recognize such transactions as "shared services" and specifically exempt them from the rules,

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<sup>75</sup> EAI's Petition for Clarification, or in the Alternative, Rehearing at 13-19 (November 28, 2011).

indicating recognition of the benefits of shared services among affiliates, a conclusion that would be inconsistent with prohibiting such sharing. The Court of Appeals for the District of Columbia Circuit addressed the question of a regulatory agency improperly inserting itself into the management of a utility's business affairs, including contracting for services, in *California Independent System Operator Corp. v. FERC*.<sup>76</sup> There, the FERC had sought to dictate the composition of a public utility's board to ensure that it was "independent," but the Court found no statutory jurisdiction for FERC "or any other similar federal regulatory body" to exercise such jurisdiction over the affairs of a regulated utility.<sup>77</sup> In a passage relevant here, the Court also observed:

If FERC can remove a board of directors and dictate the method of choosing a new one because the method of selecting the old one might have made it appear discriminatory, or have even given cause to fear future discrimination, then it would seem that FERC could also dictate the choice of CEO, COO, and the method of contracting for services, labor, office space, or whatever one might imagine, assuming FERC made the appropriate finding.<sup>78</sup>

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<sup>76</sup> 372 F.3d 395 (D.C. Cir. 2004).

<sup>77</sup> *Id.* at 398.

<sup>78</sup> *Id.* at 403.

EAI therefore respectfully submits that the Commission's jurisdiction does not extend to managing the affairs of EAI's business.<sup>79</sup>

74. The Commission lacks jurisdiction to compel a change in service company cost allocation method or to require that EAI obtain a special, preferential rate from ESI. As the FERC explained in Order No. 667:

[T]he Commission has a responsibility to ensure that the costs of non-power goods and services provided by a traditional, centralized service company to public utilities within the holding company system are just, reasonable, and not unduly discriminatory or preferential. This can arise in the context of a review of the prudence of costs incurred when a public utility seeks to flow through the costs in jurisdictional rates or a general review of the justness and reasonableness of the public utility's costs. It can arise in the context of an individual public utility within the holding company system or in the context of the appropriate nondiscriminatory allocation among multiple public utilities within the same holding company system.<sup>80</sup>

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<sup>79</sup> See, also, *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289 (1923) (It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company*, 291 Ill. 209, 234. 'The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by corporate officers.'" As noted by Arkansas Electric Cooperative Corporation in its Appellant's Opening Brief and Abstract in Docket No. 90-205-R, "Courts and commissions in several other states have recognized that the management function of a public utility is beyond commission regulation. See *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954); *Central Maine Power Co. v. Pub. Utils. Comm'n*, 153 Me. 228, 136 A.2d 726 (1957); *Northwestern Bell Tel. Co. V. Hagan*, 234 N.W.2d 841 (N.D. 1975); *Re Kentucky Utils. Co.*, 22 Pub. Util. Rep. 3d 113 (Ky. P.S.C. 1958); *Application of Diamond State Tel. Co.*, 48 Del. 317, 103 A.2d 304 (1954), rev'd in part on other grounds, 48 Del. 497, 107 A.2d 786 (1954); and *Re Promotional Practices of Elec. & Gas Utils.*, 65 Pub. Util. Rep. 3d 405 (Conn. 1966).

<sup>80</sup> *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 113 FERC 61,248 at P 167 (2005).

75. In Order No. 667, the FERC also specifically declined several requests to find that its jurisdiction over service company allocations would not preempt conflicting state laws. Recognizing that the Energy Policy Act of 2005 had expanded FERC jurisdiction in this area, “[a] number of commenters expressed concern about the potential preemptive effect of Commission [FERC] review of cost-allocation agreements” and, “[i]n order to avoid any preemption issue.”<sup>81</sup> The states had proposed that the FERC clarify “that a Commission-approved allocation should bind Commission ratemaking but not state ratemaking.”<sup>82</sup> The FERC declined, finding that “we believe that issues related to preemption are more appropriately addressed on a case-by-case basis to give the Commission the opportunity to consider the potential preemptive effect of [FPA] section 1264 in specific circumstances.”<sup>83</sup>

76. EAI’s interpretation of Condition Nos. 1(a) and 1(b) addresses the apparent underlying concern or objective of those conditions without running afoul of applicable law or other limitations on EAI’s ability to fulfill the literal wording of the conditions.

With respect to Condition No. 1(a), the Company seeks confirmation that:

- the APSC did not intend to prohibit EAI from using ESI to provide technical and administrative services; and
- that the Commission did not intend to include services provided by EOI within the scope of the conditions in Order No. 68.

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<sup>81</sup> *Id.* at 176.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 180.

With respect to Condition No 1(b), the Company requests a finding that EAI's commitment to restructure the membership of the RPOC so that its members will be EAI employees only, with ESI employees serving only in a technical support role, satisfies Condition No. 1(b).

77. The Company respectfully requests a finding that EAI has complied with Condition Nos. 1(a) and (b) as described above, satisfying Order No. 68. In the alternative, EAI respectfully requests rehearing with regard to any reading of this condition that is unlawful and/or impossible for EAI to satisfy.

**B. Federal Law Governance Over Voluntary Coordination**

78. Congress and the federal courts have made clear that voluntary coordination is a federal matter, and one that is reserved in the first instance to the discretion of public utilities, subject to oversight by FERC over the rates, terms and conditions of jurisdictional practices.<sup>84</sup>

79. Congress made clear in FPA Section 202 that the "coordination of facilities for the generation, transmission, and sale of electric energy" shall be

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<sup>84</sup> Although not listed as conditions for joining MISO, Order No. 68 also purports to impose conditions requiring EAI "(1) to continue to pursue all activity necessary to operate as a true stand-alone electric utility on December 19, 2013, and (2) pursue all activity necessary to maintain the timely viability of the SPP RTO option in the event EAI is not able to become a MISO member for any reason." Order No. 68 at 25. These same conditions were set forth in the guidance provided by the Commission in Order No. 54. See Order No. 54 at 109. EAI incorporates herein by reference its Petition for Clarification or in the Alternative for Rehearing of Order No. 54 wherein EAI asked for clarification or rehearing with respect to these same conditions. Petition for Clarification or, in the Alternative, for Rehearing at 6-11.

“voluntary.”<sup>85</sup> This voluntary coordination extends to the choice of RTO<sup>86</sup> and it extends to other pooling and coordination agreements as well.<sup>87</sup> The Commission cannot override Congress’ direction and prohibit EAI from voluntarily coordinating with the other Operating Companies, with MISO, or with the other transmission owners in MISO—or otherwise impose conditions that impede voluntary coordination. “[Congress’] decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations.”<sup>88</sup> This rule applies with greatest force to members of a multi-state utility system. If this Commission could exercise jurisdiction over how EAI coordinates with the other Operating Companies, so could the other retail jurisdictions with respect to the utility subject to their retail jurisdiction, thereby creating irreconcilable conflicts among the states. As the U.S. Court of Appeals

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<sup>85</sup> 16 U.S.C. § 824a(a).

<sup>86</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002) (rejecting FERC’s attempt to control RTO entry and exit decisions, holding that “[FPA] Section 202 . . . has been definitively interpreted to make clear that Congress intended coordination and interconnection arrangements be left to the ‘voluntary’ action of the utilities”); *Duke Energy Ohio, Inc.*, 133 FERC ¶ 61,058 at P 48 (2010) (“We also reiterate that RTO participation is voluntary”).

<sup>87</sup> *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979) (“Given the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the [coordination] Agreement”). See, also, Entergy Arkansas, Inc.’s Continuing Objection to Order No. 1.

<sup>88</sup> See *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, at 422-423 (1986); *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (“[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much preemptive force as a decision *to regulate*”); see also *Entergy La.*, 539 U.S. at 50 (“[T]he ‘view that the pre-emptive effect of FERC jurisdiction turns on whether a particular matter was actually determined in the FERC proceedings’ has been ‘long rejected.’”) (citation and alterations omitted) (quoting *Miss Power & Light*, 487 U.S. at 374); *Mass. Dep’t of Pub. Utils. v. United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (“the Supreme Court has forbidden others to exercise powers denied FERC but within FERC’s general area of authority”) (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579-80 (1981)).

for the Fourth Circuit held in rejecting a state's attempt to find its local utility imprudent for executing a multi-state transmission agreement with its affiliates:

Contrasted with this broad public interest protected by federal regulation is the narrower state public interest advanced by PSC regulation. Because the prudence inquiry is inseparable from an inquiry into the [Transmission Equalization Agreement's] justness and reasonableness, FERC and the PSC would be making identical, independent inquiries regarding the merits of the TEA but from the perspective of different public interests. It is possible that FERC and the PSC would reach conflicting conclusions regarding the impact of the agreement on their respective publics. Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro*. No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination. The likelihood of conflict in allowing each state to consider the TEA separately is highlighted by the conflicting contentions of the various states represented before the FERC proceedings regarding the TEA. Consumer groups and commissions from the various states associated with the AEP system claim that their states' citizens are unduly burdened relative to other states. Only FERC has the objectivity and comprehensive overview that transcends these local concerns.<sup>89</sup>

80. Congress also gave FERC specific authority to override state restrictions on voluntary coordination. Section 205(a) of PURPA directs FERC, upon the request of any party and under certain limitations, to override any state law, rule, or regulation that "prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission

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<sup>89</sup> *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898, 905 (4th Cir. 1986).

determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.”<sup>90</sup>

81. EAI has sought in good faith to comply with the conditions discussed in Section II in order to address the concerns expressed by the Commission in Order Nos. 54 and 68. The Commission should recognize that it is in the public interest for EAI to sign the MISO TOA and continue with its integration efforts and grant rehearing of any condition that presents an obstacle to EAI’s right to coordinate with the other Operating Companies, with MISO, or with the other transmission owners in MISO and eliminate any such obstacle.

**C. The Commission’s Authority To Regulate RTO Governance**

82. An interpretation of Condition Nos. 2(b), 3, 8, 10, 12, and 13 in Order No. 68 that is contrary to the interpretation provided by EAI in Section II above would require EAI to modify FERC-approved tariffs or MISO’s discretion in implementing them. Any such requirement would plainly exceed the APSC’s authority. First, as explained above, the Commission does not have jurisdiction over voluntary coordination between EAI and MISO or the other Transmission Owners within MISO. The Commission therefore cannot lawfully require that the terms of that coordination under MISO’s governance structure be changed. Second, MISO’s cost allocation, market design and governance is established

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<sup>90</sup> 16 U.S.C. § 824a-1(a); see *New PJM Cos.*, 106 FERC ¶ 63,029 (2004) (Cowan, ALJ), *aff’d* Opinion No. 472, 107 FERC ¶ 61,271 (2004).

through rate schedules filed with, and accepted by, FERC pursuant to FPA Section 205.<sup>91</sup> The FERC has exclusive jurisdiction over these rate schedules and, hence, they cannot be altered by this Commission<sup>92</sup>

83. Even FERC cannot compel MISO or its Transmission Owners to relinquish Section 205 rights and cede authority to a regional state organization or otherwise compel them to share their section 205 rights with others.<sup>93</sup> The same holds true with respect to a state commission. A state cannot force a public utility to make filings with FERC, much less to relinquish or share its Section 205 rights, particularly as it relates to multi-state cost allocation.<sup>94</sup>

84. In Order No. 54, the Commission recognized these limits on its authority when addressing other matters subject to FERC jurisdiction. For example, the Commission held that “the potential waiver of certain cost allocation provisions to facilitate Entergy’s membership in MISO...is outside this

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<sup>91</sup> 16 U.S.C. § 824d.

<sup>92</sup> Because Congress drew a “bright line” between federal and state authority as to such matters, “interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.” *Entergy La., Inc.*, 539 U.S. 39, 47 (2003) (quoting *Nantahala Power & Light*, 476 U.S. at 962). “States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair.” *Miss. Power & Light Co.*, 487 U.S. at 371.

<sup>93</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002) (“FERC cannot point to any statute giving it authority for its unprecedented decision to require the utility petitioners to cede rights expressly given to them in section 205 of the Federal Power Act”); *Midwest Indep. Transmission System Operator, Inc.*, 122 FERC ¶61,283 at PP 65-66 (2008) (denying OMS’s request for section 205 filing rights).

<sup>94</sup> *Mass. Dep’t of Pub. Utils. v. United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (“Massachusetts’ interpretation threatens confusion, possibly chaos. What is to prevent each state in a multistate service area from requiring the utility to file a *different* set of ‘reasonable’ rate practices with FERC?”) (emphasis in original).

Commission's jurisdiction and control."<sup>95</sup> It also held that matters affecting bilateral wholesale agreements were beyond its jurisdiction: "Concerning the PCITSA [the Power Coordination, Interconnection, Transmission Service Agreement between EAI and the Arkansas Electric Cooperatives] and other GFAs [grandfathered agreements], while the Commission appreciates the difficulty these issues present for the affected Parties, such matters are beyond the scope of the Commission's jurisdiction and could be addressed in filings before FERC."<sup>96</sup>

**D. The Public Interest Support for Expedient Approval of EAI's Motion**

85. Evidence in the record supports timely approval of EAI's Motion. A delay in EAI's joining MISO also delays the opportunity for EAI and other market participants to secure for their customers the benefits of participating in MISO's Day 2 Market and will impose unnecessary costs on all their customers. The Company must put in place the people, systems, and processes needed to operate its electric facilities outside the System Agreement by December 19, 2013. EAI would have to invest an additional estimated \$21 million and spend an additional \$20 to \$43 million per year just so it could provide electric service to its customers until it joined MISO.<sup>97</sup> In addition, EAI would lose the savings of lower

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<sup>95</sup> Order No. 54 at 104.

<sup>96</sup> *Id.* at 105; *see also id.* at 103 (loop flow and seams issues are "outside this Commission's jurisdiction").

<sup>97</sup> Castleberry Supplemental Direct Testimony at 19 (June 22, 2011); EAI Responses to Order No. 37 at 19 (July 15, 2011.).

regulation and contingency reserves in the MISO market, estimated to be \$15 million per year.

86. Moreover, Order No. 68's lack of a decision creates inherent uncertainty not just for EAI, but also for the other Operating Companies, and other utilities and municipalities interconnected to EAI's transmission facilities that need time to prepare for operating in whatever arrangement follows the System Agreement.<sup>98</sup> MISO witness Clair J. Moeller testified during the September 2011 hearing, that 18 months is the optimal period in order to ensure that MISO is able to complete the training necessary for these entities to be prepared to participate in the MISO markets, as well as begin the process of working on their respective IT systems.<sup>99</sup> As stated by Mr. Castleberry in testimony before the Commission:

To receive full training on participation in the MISO markets that AECC, Jonesboro, and the other co-owners have been seeking takes a significant amount of time. Training is just one element, however. These entities will also need to make several of the same equipment and software commitments that EAI will be required to make in order to participate in the MISO Day 2 Market.<sup>100</sup>

The longer there is uncertainty regarding EAI's operating arrangement after it leaves the System Agreement, the less likely that EAI and other Arkansas market participants will be able to make a smooth transition into MISO.

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<sup>99</sup> Hearing Transcript at 601-02 (September 9, 2011).

<sup>100</sup> Castleberry Sur-Surrebuttal Testimony at 7 (May 11, 2012).

WHEREFORE, for the reasons stated above, EAI requests that the Commission:

1. Find that EAI is in compliance with the conditions enumerated in Order No. 68 as described in the Compliance Testimony of Hugh T. McDonald and herein;

2. Grant conditional approval of EAI's Application as being in the public interest;

3. Find that it is in the public interest for EAI to sign the MISO TOA and move forward with transferring functional control of EAI's transmission assets in the context of the MISO integration process;

4. Grant EAI's request to defer the costs of integrating into MISO until such time as these costs can be reflected in the Company's rates; or

5. Alternatively, grant EAI's Petition for Rehearing.

6. EAI respectfully requests an expeditious resolution of its Motion for Finding of Compliance with Conditions and for Approval Of Application within 30 days, as provided by APSC Rules of Practice and Procedure, Rule 3.16(a), given that the Company and other entities that depend upon EAI's transmission lines need definitive action as soon as possible in order to take appropriate steps for their respective post-System Agreement operations. Should the Commission decline to approve this Motion, EAI respectfully requests that the Commission

grant its Petition for Rehearing within 30 days of its filing as provided by APSC Rules of Practice and Procedure, Rule 3.16(a).<sup>101</sup>

Respectfully submitted,

ENTERGY ARKANSAS, INC.

By     /s/ Tucker Raney      
Tucker Raney  
Assistant General Counsel

Matthew R. Suffern  
Assistant General Counsel

N. Wesley Hunt  
Counsel

Entergy Services, Inc.  
425 West Capitol Avenue  
P. O. Box 551  
Little Rock, AR 72203  
Telephone: (501) 377-3500

Scott Trotter  
Perkins & Trotter, PLLC  
101 Morgan Keegan, Suite A  
Little Rock, Arkansas 72202  
Telephone: (501) 603-9000

N. M. Norton  
Wright, Lindsey & Jennings  
200 West Capitol Avenue, Suite 2200  
Little Rock, Arkansas 72201  
Telephone: (501) 371-0808

ATTORNEYS FOR ENTERGY ARKANSAS, INC.

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<sup>101</sup> See Section III.C. *supra*.

CERTIFICATE OF SERVICE

I, Tucker Raney, do hereby certify that a copy of the foregoing has been served upon all parties of record by forwarding the same by electronic mail and/or first class mail, postage prepaid this 24th day of August, 2012.

/s/ Tucker Raney  
Tucker Raney