

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

**ENTERGY MISSISSIPPI,
INC.
EC123-0082-00**

**TRANSMISSION COMPANY
MISSISSIPPI, LLC**

MID SOUTH TRANSCO LLC

ITC MIDSOUTH LLC

ITC HOLDINGS CORP.

Docket 2012-UA-358

**IN RE: JOINT APPLICATION FOR THE
TRANSFER OF OWNERSHIP
AND CONTROL OF ENTERGY
MISSISSIPPI INC.'S
TRANSMISSION FACILITIES
AND ASSETS TOGETHER WITH
RELATED CERTIFICATES,
FRANCHISES AND OTHER
PROPERTY RIGHTS TO
TRANSMISSION COMPANY
MISSISSIPPI, LLC AND
APPROVAL OF SUBSEQUENT
TRANSFERS OF OWNERSHIP
AND CONTROL**

FINAL ORDER

THIS CAUSE came before the Commission on the Joint Application of Entergy Mississippi, Inc. ("Entergy Mississippi" or "EMI"), Transmission Company Mississippi, LLC ("TCM"), Mid South Transco LLC, ITC Midsouth LLC and ITC Holdings Corp. ("ITC") (collectively, the "Applicants"), pursuant to Mississippi Code Annotated Section 77-3-1, *et seq.* (2009 and Supp. 2011) (the "Public Utilities Act") and Rule 8 of the Mississippi Public Service Commission's (the "Commission") Public Utilities Rules of Practice and Procedure (the "Procedural Rules"), requesting a finding by the Commission that the transfer of ownership and control of EMI's transmission facilities, and related certificates, franchises and other property rights

to TCM, and subsequent transfers of control of TCM to an operating subsidiary of ITC (the "Transaction") is in the public interest and requesting that said transfer be approved. The Commission, having considered the Joint Application and all evidence submitted, including all testimony and documents filed with the Commission, and being fully advised in the premises, and upon the recommendation of the Mississippi Public Utilities Staff ("MPUS" or "Staff"), finds that the proposed transfer is not in the public interest and the Joint Application is denied.

I. Summary of the Decision

1. The Commission must view the proposed Transaction for what it is: an attempt by Entergy and its shareholders to monetize its transmission assets and extract the excess value of the assets under the more generous FERC rate construct available to ITC. For its part, ITC is willing to pay a premium for Entergy's transmission assets in order to double the present size of ITC and take advantage of expected transmission growth in the Southeast.

2. While the Transaction would produce clear benefit to ITC, EMI and its shareholders, benefit to the Mississippi ratepayers is dubious. In fact, reasonable estimates place the value of the Transaction to Entergy shareholders at approximately \$2.5 billion in net benefits, while Mississippi ratepayers, at a conservative estimate, would pay an additional \$348 million over thirty years due to ITC's ownership of EMI's transmission assets.

3. The federal Department of Justice ("DOJ") has made known its desire to see Entergy divest its transmission assets and has gone so far as to publicly announce that should Entergy spin-off its transmission system to an independent transmission company, in addition to joining a regional transmission organization ("RTO"), this would address DOJ's concerns regarding Entergy's alleged anticompetitive behavior in managing its transmission system.¹

4. The federal government, through laws passed by Congress and implementation of policy by the Federal Energy Regulatory Commission ("FERC"), has in the recent past incentivized transmission build-out by favoring a regional and independent model for transmission operation, ownership and development.

5. Whether spurred by monetary incentive or litigation concerns or both, EMI and ITC stand before the Commission seeking approval of the Transaction, which offers with certainty only significant cost to ratepayers and complete loss of this Commission's rate jurisdiction over the transmission assets at issue.

6. As pointed out by MPUS witness Parker, the impact to Mississippi ratepayers from ITC's utilization of the FERC rate construct is conservatively estimated to be \$348 million over thirty years, assuming no growth in rate base. Any growth in rate base, however, would increase the impact of the FERC rate construct on Mississippi ratepayers. For example, assuming a 5% yearly increase in rate base over thirty years, ITC's ownership of EMI's assets would impact ratepayers by an additional \$813 million in nominal dollar terms. No one expects

¹ <http://www.justice.gov/opa/pr/2012/November/12-at-1360.html>

transmission rate base to remain fixed. To the contrary, the collective testimony of Applicants shows quite clearly that transmission build has grown and is expected to grow further.

7. As Moody's has recognized, "FERC's rate-making leads to higher costs for ratepayers, while the benefits to them are not immediately apparent."²

8. If approved, the Transaction would strip this Commission of effective regulation of the transmission assets in Mississippi currently owned by EMI and transfer this authority to the federal government. In turn, because the federal government through FERC allows ITC a more profitable rate construct, Mississippi ratepayers would pay more for transmission service than under Commission regulation. Federal regulation would lead to Mississippi ratepayers paying higher rates for the same service, provided by the same people, using the same assets.

9. The Commission finds (1) that state law prohibits such a result, (2) that the Applicants have failed to support their position with substantial evidence, and (3) that the Transaction is not in the public interest.

10. As a condition precedent to a finding that a transaction involving transmission is in the public interest, the Commission must be assured that native load customers will continue to have first priority of service *and* that native load customers "will be served on the same basis" as before the transaction.³

² Parker Direct at 42.

³ Miss. Code Ann. § 77-3-23.

11. The Commission finds that native load customers would not be served on an equivalent basis as before the transaction because approval would unbundle retail transmission service and upend the state mandated regulatory regime centered on Commission regulation of EMI as a vertically integrated monopoly, while raising rates and permanently ceding effective state authority to the federal government. Consequently, the Transaction must be denied for failure to satisfy the necessary prerequisite set forth in state law.

12. In their efforts to identify ratepayer benefits, that is, to proffer some evidence that the transaction might serve the public interest, Applicants asserted (1) that the independent transmission model would eliminate any lingering perception of bias attributed to Entergy, (2) that ITC's singular focus on transmission would improve service quality, operating performance and reliability, (3) that ITC's planning process and regional view would enhance the benefits of membership in the Midcontinent Independent System Operator, Inc. ("MISO"), and (4) that ITC's stronger balance sheet would better support future transmission spend while allowing EMI flexibility to manage spending for generation and distribution.⁴

⁴ By the Commission's count the Applicants submitted testimony from 17 witnesses. With the exception of Christopher Kapfer, each witness through direct, rebuttal, surrebuttal, and/or sur-surrebuttal testified to some extent on each of the four categories of purported benefits. Much of the testimony is cumulative, and all of it fails to quantify incremental benefits of the Transaction or to offer compelling proof of any qualitative benefits beyond what EMI could achieve as a member of MISO. Through the course of this Final Order, the Commission highlights certain testimony of the Applicants regarding each category of alleged benefits.

13. The Commission finds that the Applicants have failed to offer sufficient evidence that any of the alleged benefits would necessarily inure to Mississippi ratepayers or that what is offered is superior to what is presently had. Stated differently, the Applicants do not provide substantial evidence upon which this Commission could find that the transaction furthers the public interest. Rate increases are certain, but benefits are not, particularly the realization of benefits incremental to those arising from EMI's participation in MISO. Additionally, viewed in light of policy considerations and the Commission's complete loss of rate jurisdiction over the transmission assets, which loss increases the risks borne by ratepayers, the Commission finds that the Transaction is not in the public interest.

14. The Commission recognizes the importance of transmission and the value of regional coordination. This recognition, in part, led the Commission to approve EMI's move to MISO. But the case presented to the Commission in the MISO docket stands in stark contrast to the record regarding this Transaction. In the MISO docket, every expert that examined Entergy's move to an RTO identified significant potential benefits, both quantitative and qualitative, for each Entergy Operating Company ("EOC").⁵ Moreover, the Commission retained authority over retail transmission rates under MISO's bundled load exemption yet still imposed additional conditions to insure sufficient regulatory control and ratepayer

⁵ EMI is one of the EOCs. The EOCs are EMI, Entergy Arkansas, Inc. ("EAI"), Entergy Gulf States Louisiana, L.L.C. ("EGSL"), Entergy Louisiana, LLC ("ELL"), Entergy New Orleans, Inc. ("ENO"), and Entergy Texas, Inc ("ETI"). The electric generation and bulk transmission facilities of the six EOCs are operated on an integrated, coordinated basis as a single electric system and are referred to collectively as the "Entergy System" or the "System."

protections. MISO, and the RTO construct in general, presents an evolutionary model that has the potential to fairly balance the interests of regionalism with the local concerns held by each State and its citizens, to which each public service commission is answerable.

15. Here, the Commission would permanently lose its most effective regulatory tools, control over retail transmission rates and the ability to determine prudence. Additionally, the Commission finds no reliable evidence of quantifiable benefits, while ultimately the ratepayers face certain rate increases. The Commission also observes that the staff of every Entergy retail regulator, including the MPUS, has recommended that the Transaction be rejected.⁶

16. The independent transmission model may yet prove its advantages and become the norm rather than the exception, but for now, it is an experiment barely ten-years-old. This Commission looks forward to EMT's progression in MISO, but the Commission finds that the Transaction does not present benefits incremental to MISO membership.

17. The Commission does not find divestiture to be in the best interest of Mississippi ratepayers. With respect to potential investigation and action by DOJ, if Entergy violated the law, it should be charged as appropriate, and the case prosecuted as DOJ sees fit. If penalized, Entergy will bear the cost, not the

⁶ In Texas, the proceedings developed to the point where a 3-member panel of administrative law judges issued a Proposal for Decision recommending rejection of the Transaction, after which the Applicants withdrew the application and re-filed seeking direct Commission review. (PUCT Docket No. 41223)

ratepayers. In the case of divestiture, as proposed in this Transaction, Entergy shareholders would reap a windfall through higher rates made possible by the FERC rate construct at the expense of captive customers, who have borne the cost of transmission assets that may have been neglected or misused.

18. The Commission expects EMI to move beyond this Transaction. To this end, EMI is directed to work with the Staff to prepare and account for a plan for transmission investment, maintenance and operation, including identifying best practices and targeting performance goals, which will be developed in conjunction with EMI's restructuring post-system agreement. An initial plan shall be filed in MPSC Docket No. 2013-UA-28 within 90 days after EMI's integration in MISO.

II. Procedural History and the Parties

19. EMI and ITC filed the Joint Application on October 5, 2012.

20. EMI proposes to transfer ownership and control of its transmission system to TCM, which, following several steps in the proposed Transaction, would become ITC Mississippi LLC and be owned by ITC Midsouth, a direct subsidiary of ITC.

21. ITC is a Michigan corporation and a holding company and sole owner of the ITC operating companies: International Transmission Company d/b/a ITC Transmission ("ITCT"), Michigan Electric Transmission Company ("METC"), ITC Midwest LLC ("ITCMW") and ITC Great Plains ("ITCGP").⁷ ITC and its subsidiary

⁷ Joint Application at 11.

operating companies are engaged in the development, ownership and operation of electric transmission infrastructure. ITC's operating companies currently own and operate over 15,000 miles of electric transmission lines in Michigan, Iowa, Minnesota, Illinois, Kansas and Oklahoma.⁸

22. The Direct Testimonies of EMI witnesses Haley R. Fisackerly, Theodore H. Bunting, Jay A. Lewis, Michael L. Tennican, Dorman J. Davis, Richard C. Riley, J. Robbin Jeter, and John P. Hurstell, and the Direct Testimonies of ITC witnesses Joseph L. Welch, Cameron M. Bready, Jon E. Jipping, Thomas W. Vitez, Johannes P. Pfeifenberger, Thomas H. Wrenbeck, and Douglas C. Collins were filed with the Joint Application as ATTACHMENTS N through CC, respectively.

23. The following additional evidence was filed by EMI and ITC: Rebuttal Testimonies and/or exhibits of Haley R. Fisackerly, Theodore H. Bunting, Jay A. Lewis, Dorman J. Davis, Richard C. Riley, J. Robbin Jeter, and Richard P. Sergel, on behalf of EMI, and Rebuttal Testimonies and/or exhibits of Joseph L. Welch, Cameron M. Bready, Jon E. Jipping, Thomas W. Vitez, Johannes P. Pfeifenberger, Thomas H. Wrenbeck, and Christopher Kapfer, on behalf of ITC (filed July 19, 2013); Surrebuttal Testimonies and/or exhibits of Theodore H. Bunting and Richard C. Riley, on behalf of EMI, and Sur-surrebuttal Testimonies and/or exhibits of Cameron M. Bready, Jon E. Jipping and Thomas W. Vitez, on behalf of ITC (filed August 9, 2013); and an Affidavit of Jay A. Lewis on behalf of EMI (filed August 28, 2013).

⁸ Joint Application at 12.

24. Notice of the matter was given as required by law by publication on October 25, 2012, in *The Clarion-Ledger*, being a newspaper of general circulation published in Jackson, Mississippi, and by mailing such notice to each "interested person" as defined in Procedural Rule 2.115, said notice having been in strict compliance with the law and having been, in the judgment of the Commission, such reasonable notice to all persons interested therein as is necessary under the law and under the rules and regulations of the Commission. Additionally, notice was published in numerous publications throughout the state.

25. Motions and/or Petitions to Intervene were filed by Mississippi Power Company ("MPC") on October 16, 2012; by South Mississippi Electric Power Association ("SMEPA") on October 18, 2012; Louisiana Generating, LLC and NRG Power Marketing, LLC (collectively "NRG") on October 22, 2012; and by the Attorney General of the State of Mississippi. All requests to intervene were granted by the Commission.⁹

26. SMEPA is an electric generation and transmission cooperative that provides wholesale electric service to its 11 member distribution cooperatives that in turn serve more than 410,000 homes and businesses in 56 Mississippi counties. SMEPA owns a transmission network consisting of over 1,700 miles of line, and serves member load through its own system as well as through the transmission systems of EMI and MPC. A little under one third of SMEPA's total load is served

⁹ MPC and NRG did not submit evidence and did not advance any arguments with respect to the merits of the Joint Application.

directly from the Entergy transmission system under a Grandfathered Agreement ("GFA"). The GFA also includes service tariffs for transmission over the EMI and Entergy systems of power from SMEPA generating resources outside Mississippi. Along with EMI and the other EOCs, SMEPA will be integrated as a member in the MISO RTO in December 2013. The following testimonies and/or exhibits were submitted on behalf of SMEPA: Direct Testimony of Nathan L. Brown, and Direct Testimony and exhibits of J. Bertram Solomon (filed March 21, 2013); revised Direct Testimony of Nathan L. Brown (filed April 4, 2013).

27. Additional testimonies were submitted by consultants on behalf of the Public Utilities Staff: Direct Testimonies and/or exhibits of Seth Parker and Scott Hempling (filed June 20, 21013); Surrebuttal Testimonies and/or exhibits of Seth Parker and Scott Hempling (filed August 2, 2013).

28. Although not a part of the record in this proceeding and consequently not relied upon by the Commission in support of this order, the Commission and the MPUS held two workshops with the participation of EMI and ITC, and other parties, on February 28, 2013 and April 29, 2013.

29. The hearing in this matter was initially set for August 6 - 8, 2013. By a July 23, 2013, order of the Commission, that hearing was canceled. All parties to the proceeding joined in a Joint Stipulation of Parties filed on July 31, 2013, in which they agreed to an abbreviated proceeding pursuant to RP 15.101.3 of the Procedural Rules. The Joint Stipulation of Parties provided that all issues raised in this Docket would be submitted to the Commission on the written pleadings,

testimony, exhibits, stipulations, and any other documentation submitted and filed in this Docket. All parties retained their rights to challenge the filed testimony and other documentation in their post-hearing briefs. The Joint Stipulation of Parties further provided that all parties agreed that the abbreviated proceeding satisfied any requirement for a public hearing in this matter and that there was no need for a hearing to be held. The Commission adopted the Joint Stipulation of Parties by issuing through its designee the Second Amended Scheduling Order on August 1, 2013, and proceeded with an abbreviated proceeding in the Docket pursuant to RP 15.101.3. The Commission finds that this abbreviated proceeding has satisfied all requirement of public hearing because this order is supported by data, documentation, testimony and exhibits on file in this Docket.¹⁰

III. The Proposed Transaction

A. Summary of the Transaction Structure and Steps

30. The proposed Transaction is characterized as a “spin merge” or alternatively a “Reverse Morris Trust” (“RMT”), in which EMI’s transmission assets (along with those of the other EOCs) are first spun off to Entergy shareholders, and subsequently merged into a new ITC operating company, with Entergy shareholders compensated through receipt of just over half the outstanding common stock of ITC at closing.

¹⁰ The Commission finds also that oral argument is unnecessary.

31. The Transaction would be effected in several steps. EMI's transmission assets and liabilities would be transferred to TCM. The other EOCs would likewise transfer their transmission assets and related liabilities to corresponding wires subsidiaries. These wires subsidiaries would then be transferred to a newly created Entergy subsidiary, Mid South TransCo, consolidating the collective transmission business. EMI and the other EOCs would receive compensation for the transferred transmission assets with funds raised through the issuance of debt by Mid South TransCo. EMI's apportioned proceeds would be used to retire existing debt and preferred shares, such that EMI's resulting debt to capital ratio would be approximately the same as before the Transaction.¹¹

32. Entergy would then spin off its ownership interest in Mid South TransCo to Entergy shareholders via a "dividend," and the shareholders' ownership interest would be transferred to ITC in exchange for 50.1% of ITC's common stock.

33. The structure of the Transaction, and the similar size of capitalization of ITC and Mid South TransCo, would allow the transfer to be made tax-free. This is the essence of the RMT transaction and the reason for the multi-step transfer of ownership of the transmission assets first to Entergy shareholders and then to ITC, in contrast to a direct sale of the assets to ITC, which would be subject to taxation

¹¹ The proposed Transaction includes issuance of \$1.2 billion in debt by the Mid South TransCo wires subsidiaries and \$575 million of debt by Entergy Corporation. As detailed in Mr. Bunting's Rebuttal Testimony, these funds, along with an additional \$100 million from other Entergy Corporation sources, would be used to redeem approximately \$300 million in EOC preferred equity and to repay approximately \$1.575 billion in existing EOC debt so as to "right size" the EOCs' capital structures. Bunting Rebuttal Testimony at 30-31.

on any gain relative to book value. As discussed further, below, while EMI's transmission assets would technically transfer at net book value, the effective gain to Entergy shareholders in the value of ITC stock would substantially exceed the current book value of the transmission assets.

34. Following the Transaction, Entergy Corporation would continue to own EMI and the other EOCs and their respective generation and distribution businesses.

35. As part of this proceeding, EMI is also proposing to change its corporate structure to a limited liability company, and proposing that the membership interests of the new Entergy Mississippi, LLC, along with those of the other EOCs and their supporting affiliates, be owned by a new Entergy holding company and first-tier subsidiary of Entergy Corporation.

36. In addition to physical transmission assets and facilities, the assets that would be transferred to TCM include the rights of EMI under the certificates of convenience and necessity ("CCNs") and franchises granted to EMI by the Commission, by statute and by agreement for the construction, acquisition, extension and operation of the transmission assets.

37. After the ITC Transaction, EMI would continue to own and operate its distribution and generation businesses, and to provide electric service to its wholesale and retail customers.

B. ITC

38. ITC is a public utility holding company that is sole owner of the ITC operating companies: ITCT, METC, ITCMW, ITCGP. ITC was founded through the transfer of the transmission assets of Detroit Edison, related to electric industry restructuring in Michigan, and began operation as a fully-independent transmission company in 2003. Following subsequent acquisitions, ITC's operating companies now own and operate approximately 15,000 circuit miles of electric transmission lines in six states, serving a combined peak load of approximately 26,000 megawatts. ITC's transmission assets are comparable in size and extent to the combined transmission assets of the EOCs, which total approximately 15,700 circuit miles, serving a combined peak of about 22,000 megawatts. This comparability is a key factor allowing for the proposed "tax efficient" RMT transaction structure.

C. The FERC Rate Construct

39. A central feature of ITC's business model is reliance on a rate construct approved by FERC. Under this rate construct, the ITC operating companies, which, following the proposed Transaction would include the proposed ITC Mississippi transmission company, have a capital structure of 60 percent equity to 40 percent debt. With their transmission assets fully unbundled from generation and distribution, ITC's operating companies automatically have access to and receive the applicable FERC-approved rate of return on equity ("ROE"), which for almost all of ITC's current transmission assets, and for the prospective ITC

Mississippi, is the existing MISO rate of 12.38%. ITC recovers costs through MISO's FERC-approved, formula-based rate tariff, which ITC applies on a forward-looking basis with an annual true-up mechanism.

40. EMI's current capital structure is approximately 50% equity and 50% debt, with a Commission-allowed base ROE of 10.76%. As discussed further, below, ITC would likely be able to borrow at a lower interest rate than EMI, but the applicable weighted average cost of capital ("WACC"), and the resulting revenue requirement that EMI ratepayers would be required to support, would be higher under ITC ownership of transmission than under EMI ownership. In fact, ITC's lower borrowing cost is largely a function of its rate construct, not a distinct advantage that ITC offers.

D. Ratepayer Impacts

41. Applicants acknowledge that ITC's rate construct and resulting higher WACC, in addition to the effect of the accelerated elimination of Service Schedule MSS-2 under the Entergy Services Agreement ("ESA") would cause customer rates to increase. Applicants estimate modest rate impacts and offer rate mitigation in the form of specific near-term dollar offsets as well as a benefits test to determine possible extended mitigation to align costs with benefits. The MPUS witnesses estimate somewhat larger rate increases arising from the proposed transaction, and emphasize that a longer-term perspective on rate impacts is appropriate. As discussed further, below, Applicants argue that ITC's rate construct is essential to

support significant capital investments while maintaining strong credit quality to access lower-cost debt. The MPUS witnesses argue that the resulting increase in rates for Mississippi ratepayers would not be matched with certainty by incremental benefits, and that the Commission would lose all effective regulatory means to enforce transmission quality of service and the cost of service imposed on ratepayers.

E. Shareholder Compensation

42. In exchange for the transfer of the transmission assets of EMI and the other EOCs to ITC, Entergy shareholders would receive 50.1% of the outstanding common stock of ITC at closing. The magnitude of the potential financial gain to Entergy shareholders from the Transaction is debated, and estimates range from \$280 million by one estimation method,¹² to \$2.5 billion by an alternative method.¹³ For EMI's transmission assets separately, the estimated shareholder value range translates to roughly \$45 million to \$461 million.¹⁴ The Joint Applicants have argued that any potential gain to Entergy shareholders from the Transaction is uncertain, and in any case is irrelevant to the Commission's determination of whether the Transaction is in the public interest. As discussed further, below, it is a central concern in the Commission's assessment of the Transaction whether the

¹² Bunting Rebuttal at 26.

¹³ Parker Direct at 26

¹⁴ Based on EMI's transmission assets representing 16% of the value of the EOCs' total transmission assets. The 16% proportion is reported in Parker Direct, at 27, which in turn cites Entergy's 2012 Form 10-K.

higher customer rates expected under ITC ownership of EMI's transmission assets are matched or exceeded by expected benefits. While the potential gain by Entergy shareholders may not bear directly upon whether the Transaction is in the public interest, the negotiated terms of the Transaction indicate that Entergy shareholders can expect a significant financial gain, which is consistent with the fact that ITC can generate more revenue from those assets under the FERC rate construct than Entergy could under continued retail regulation. The higher revenue would be supported entirely by ratepayers. The estimated shareholder gain reinforces the conclusion that ratepayers would be forced to pay significantly higher rates over the long term.

F. Commission Jurisdiction

43. In the absence of the Transaction, with EMI entering and remaining in MISO as a transmission owner, the Commission would retain jurisdiction over transmission costs borne by retail customers of EMI as a result of the MISO Tariff's "bundled load exemption". Under this FERC-approved provision, a transmission owner providing bundled service – i.e., electric service including transmission – to retail load is exempted from certain transmission-related charges under the MISO Tariff, particularly those that recover the transmission revenue requirement based on the FERC rate construct. If EMI retains its transmission assets in MISO, the Commission would continue to determine the retail rate treatment of the

transmission assets, including authorized ROE, allowed capital structure, etc., that will establish EMI's transmission revenue requirement.

44. Under the proposed Transaction, in contrast, the Commission would no longer have jurisdiction over the rate construct that determines the rates Mississippi retail electric customers pay for transmission service. Under ITC ownership of EMI's transmission assets, FERC would have full jurisdiction over the transmission rate construct – the allowed ROE, authorized capital structure, and the use of forward-looking test years with an annual true-up – as well as determinations of prudence, and recovery of the costs of abandoned transmission assets. The Commission would no longer have jurisdiction over what transmission costs are passed through to Mississippi electricity customers.

45. Following the proposed transaction, the Commission would retain jurisdiction over the siting of transmission facilities, and ostensibly would retain jurisdiction to regulate the quality and reliability of transmission service. The effective degree of control the Commission would retain over quality of service and reliability is, however, in question.

G. Mitigation

46. To resolve this docket, Applicants have proposed a number of commitments, including rate mitigation for retail and wholesale customers to offset estimated WACC effects over the initial five year period following the close of the Transaction. Applicants also propose a test at the end of the initial five-year period

of ITC ownership to determine whether customer benefits exceed added costs.

Under this commitment, rate mitigation, up to the estimated excess of cost over benefit, would continue until such a test showed benefits equal to or greater than the added cost from the WACC effect.

IV. Matters of Law

47. In its regulatory capacity, the Commission exercises “exclusive original jurisdiction over the intrastate business and property of public utilities.”¹⁵ Specific to the proposed transfer of EMI’s transmission assets and associated certificates and franchises to ITC under consideration in the instant petition, state law provides as follows:

It shall be lawful, under the conditions specified below, for public utilities to sell, assign, lease, transfer or otherwise dispose, including, without limitation, any change in control of (a) certificates of public convenience and necessity issued to them under the provisions of this article, or (b) any substantial part of its property necessary or useful in the performance of its duties to the public, including corporate stock that is not publicly traded.¹⁶

48. Regarding any change of control related to facilities, and specifically as to transmission, state law requires that:

Whenever such a transaction involves facilities that are included in the rate base of a public utility, the commission shall include, as a prerequisite to its finding that the transaction is consistent with the public interest, a finding that, upon the consummation of the transaction proposed: (a)(i) the native load customers of the public utility will continue to have a first priority to the use and/or benefit of such facilities, or (ii) any loss of such first priority by native load

¹⁵ Miss. Code Ann. § 77-3-5.

¹⁶ Miss. Code Ann. § 77-3-23.

customers to the use and/or benefit of such facilities is not contrary to the public interest; and (b) any native load customers served by any transmission facilities shall be served on the same basis as before the transaction.¹⁷

49. If Applicants satisfy the statutory prerequisites, then they must prove that

the transaction proposed is in good faith, that the proposed . . . transferee, is fit and able properly to perform the public utility services authorized by such certificate and to comply with the lawful rules, regulations and requirements of the commission, and that the transaction is otherwise consistent with the public interest[.]¹⁸

50. In satisfying the statutory requirements, Applicants bear the burden of proof, and the Commission's decision must be supported by substantial evidence.¹⁹

V. Discussion

51. The Commission first addresses the legal prerequisites necessary for any sale or transfer of transmission assets contained in rate base. Then, the Commission addresses the public policy considerations provided by state law, particularly in light of this Commission's corresponding loss of rate jurisdiction over the transmission assets should the Transaction be approved.

52. Regarding the alleged benefits asserted by the Applicants, the Commission phrases the issues with respect to the instant petition as (1) whether, and the extent to which, ITC owning and operating Entergy's transmission assets

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Miss. Code Ann. § 77-3-59.

would provide benefits to ratepayers incremental to those from EMI's membership in MISO; and (2) whether, and the extent to which, such incremental benefits would be reasonably expected to exceed costs imposed on ratepayers.

53. In conclusion, the Commission considers, from a policy perspective, the Applicants request, at this point in time, to abandon the vertically integrated monopoly in favor of the independently owned transmission model.

A. Prerequisite Finding

54. If approved, the present Transaction would unbundle transmission from retail service and deprive this Commission of jurisdiction over retail transmission cost of service. Having broken up EMI's vertically integrated model, rate authority would pass to FERC and would have the effect of raising rates, both immediately and over the long term. Relative to ITC and its transmission assets, the Commission would have no authority over rates or ability to contain costs. This Transaction and its corresponding impact appears to be the precise harm that the Legislature sought to avoid when it amended the law to ensure that native load customers would continue to be served on the same basis as before an asset transaction, specifically when transmission assets are involved.

55. If a transaction involves transmission facilities included in a utility's rate base, the Commission must find all native load customers will "be served on the same basis as before the transaction."²⁰ Prior to a public interest finding, the

²⁰ Miss. Code Ann. § 77-3-23.

Commission must satisfy the statutory prerequisite.²¹ The relevant passage is relatively new,²² and has never been explicitly interpreted by the Commission or any Mississippi court. Noting the Legislature's specific emphasis on transmission facilities, the Commission endeavors to discern the meaning of the phrase as intended by the Legislature.

56. The primary objective of all statutory interpretation is to construe the statute consistent with the true meaning of the Legislature.²³ In search of the Legislature's intent, Mississippi courts look first to the language of the statute.²⁴ Words should be given their common and ordinary meaning unless defined elsewhere in the statute.²⁵ To determine a word's common and ordinary meaning, courts consult the work of lexicographers.²⁶

²¹ Miss. Code Ann. § 77-3-23. RP 8.103 ("[W]hen a transaction involves facilities that are included in the rate base of a public utility, the Commission shall include, as a prerequisite to its finding that the transaction is consistent with the public interest, a finding that, upon the consummation of the transaction proposed ... any native load customers served by any transmission facilities shall be served on the same basis as before the transaction").

²² The Legislature added this provision in 2003. See 2003 Miss. Laws Ch. 385 (H.B. 1040).

²³ *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1276 (Miss. 2006) ("[O]ur primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature." (quoting *Stockstill v. State*, 854 So. 2d 1017, 1022-23 (Miss. 2003))). See also *Marlow, L.L.C. v. BellSouth Telecommunications, Inc.*, 686 F.3d 303, 307 (5th Cir. 2012) ("In Mississippi, '[t]he primary rule of construction is to ascertain the intent of the legislature as a whole and from the language used therein.'" (quoting *DePriest v. Barber*, 798 So. 2d 456, 458 (Miss. 2001))).

²⁴ *Lawson v. Honeywell Intern., Inc.*, 75 So. 3d 1024, 1027 (Miss. 2011) ("To determine legislative intent, the Court first looks to the language of the statute." (citing *Pinkton v. State*, 481 So. 2d 306, 309 (Miss. 1985))); *Corporate Management, Inc. v. Greene County*, 23 So. 3d 454, 456 (Miss. 2009) ("When construing the meaning of a statute, we must look at the words of the statute." (quoting *Adams v. Baptist Mem'l Hosp.-Desoto, Inc.*, 965 So. 2d 652, 656 (Miss. 2007))).

²⁵ *Moore ex rel City of Aberdeen v. Byars*, 757 So. 2d 243, 247-48 (Miss. 2000) ("Where the legislature has not defined a term within the statutory scheme, we look to the term's common and generally accepted meaning." (citing *Corry v. State*, 710 So. 2d 853, 861 (Miss. 1998); *Buelow v. Kemp Co.*, 641 So. 2d 1226, 1228-29 (Miss. 1994); *Caldwell & Gregory, Inc. v. University of S. Miss.*, 716 So. 2d 1120, 1123 (Miss. Ct. App. 1998))). See also *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary

57. In addition to the language of the statute, courts often look to the statute's history and contemporaneous context at enactment.²⁷ "[S]tatutory language necessarily derives much of its meaning from the surrounding circumstances."²⁸ Courts have held that "a statute cannot be divorced from the circumstances at the time it was passed or from the evil which [the legislature] sought to correct and prevent."²⁹ This is particularly true when the statute uses general language³⁰ and "is not dispositive as to legislative intent."³¹

meaning." (quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91, 127 S. Ct. 638, 166 L.Ed.2d 494 (2006))).

²⁶ *Kerr-McGee Chemical Corp. v. Buelow*, 670 So. 2d 12, 19-20 (Miss. 1995) (*en banc*) (finding a court's use of dictionary to determine a word's common and ordinary meaning was proper absent any definition provided by legislature). See also *Thompson v. Goetzmann*, 337 F. 3d 489, 498 n. 20 (5th Cir. 2003) ("Dictionaries are a principle source for ascertaining the ordinary meaning of statutory language." (citing *Babitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 132 L.Ed.2d 597 (1995))).

²⁷ *Bailey v. Al-Mefty*, 807 So. 2d 1203, 1206 (Miss. 2001) ("[T]he court, in determining the legislative intent, may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished." (quoting *Clark v. State ex rel. Miss State Med. Ass'n*, 381 So. 2d 1046, 1048 (Miss. 1980))). See also *Walton v. Hammons*, 192 F.3d 590, 593-594 (6th Cir. 1999) ("The meaning of a statute's words can also be 'enlightened by their context and the contemporaneous legislative history,' as well as the 'historical context of the statute.'" (citing *Edwards v. Aguillard*, 482 U.S. 578, 594-95, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987))); *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3rd Cir. 2004) ("In matters of statutory construction, [courts] may consider ... the atmosphere in which [the statute] was enacted." (internal citation omitted)); *Jefferson County Bd. of Educ. V. Fell*, 391 S.W.3d 713, 724 (Ky. 2012) ("When interpreting a statute, it is appropriate to consider the contemporaneous facts and circumstances which shed intelligible light on the intent of the legislative body." (internal citation omitted)).

²⁸ *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 324, 81 S. Ct. 1611, 6 L.Ed.2d 869 (1961).

²⁹ *Atkins v. U.S.*, 439 F.2d 175, 177 (Ct. Cl.1971) (citing *United States v. Wise*, 370 U.S. 405, 82 S. Ct. 1354, 8 L.Ed.590 (1962); *Delta Air Lines, Inc.*, 367 U.S. 316; *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 71 S. Ct. 715, 95 L.Ed. 949 (1951)).

³⁰ See *Graff Chevrolet Co. v. Campbell*, 343 F. 2d 568, 571 (5th Cir. 1965) ("This is one of those cases in which Congress has seen fit not to express itself unequivocally. It has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To that end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide." (quoting *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 260, 76 S. Ct. 814, 819, 100 L.Ed. 1151, 1159 (1956))).

³¹ *Chair King, Inc. v. Houston Cellular Corp.*, 131 F. 3d 507, 511 (5th Cir. 1997) ("If the language alone is not dispositive, we must delve into the history and purpose of the statute." (citing *Adams*

58. The requirement of service “on the same basis” as a precondition to any public interest finding proves that the requirement is meant as an additional ratepayer protection specific to transmission assets. The Commission finds that this protection must have real meaning and be applied as intended.

59. The Legislature, however, chose not to explicitly define the phrase “on the same basis,” choosing general language that could broadly serve ratepayers’ interests without inhibiting the Commission’s charge to implement public policy and regulate appropriately. To begin, the Commission construes the phrase in a manner consistent with its common and ordinary meaning.³²

60. Lexicographers have defined “same” as “identical, equal, [or] equivalent.”³³ The word “same” is often used to mean “of the kind or species, not the specific thing.”³⁴ “Basis” has been defined as “[a] fundamental principle; groundwork; support; the foundation or groundwork of anything; that upon which anything may rest or the principle components of a thing.”³⁵

Fruit Co., Inc. v. Barrett, 494 U.S. 638, 642, 110 S. Ct. 1384, 1386, 108 L.E.2d 585 (1990)), *abrogated by Mims v. Arrow Financial Services*, 132 S. Ct. 740, 747 (2012). *See also U.S. v. Williams*, 675 F. 3d 275, 277-78 (3rd Cir. 2012) (“Where the statutory language does not express Congress’ intent unequivocally, a court traditionally refers to the legislative history and the atmosphere in which the statute was enacted in an attempt to determine the congressional purpose.” (quoting *U.S. v. Gregg*, 226 F.3d 253, 257 (3d Cir. 2000)));

³² *Byars*, 757 So. 2d at 247-48; *Buelow*, 641 So. 2d at 1228-29; *Caldwell & Gregory, Inc.*, 716 So. 2d at 1123.

³³ *Black’s Law Dictionary* 1340 (6th ed. 1990). *See also Oxford American Dictionary of Current English* 710 (2d pocket ed. 2002) (defining “same” as identical; not different; unchanged)

³⁴ *Id.* at 1340. *See also Webster’s Third New International Dictionary* 2007 (1993) (defining “same” as “corresponding so closely as to be indistinguishable; closely similar; COMPARABLE”).

³⁵ *Black’s Law Dictionary* 151. *See also Oxford American Dictionary of Current English* 59 (2d pocket ed. 2002) (defining “basis” as “the foundation or support of esp. an idea or argument; the determining principle”). *Merriam-Webster Online* (defining “basis” as “the bottom of something considered as its foundation; the principle component of something; something on which something else is established

61. Judging from the plain language, the Legislature passed the provision at issue to guarantee Mississippi ratepayers would receive transmission service according to an equivalent foundation or framework following the sale or transfer of any transmission facilities as they received before the transaction.

62. While the language of Section 77-3-23 suggests the Legislature sought to ensure that ratepayers would receive service under an equivalent framework following the sale or transfer of transmission assets, the statutory text is not entirely dispositive on the question of legislative intent. The Legislature chose to convey its message in broad and general terms, which could be subject to different readings; therefore, the Commission, seeking clarity, considers the context in which the Legislature added the relevant provision to Section 77-3-23.³⁶

1. Rise of the Transco Model

63. For most of its history, the electric industry consisted solely of vertically integrated utilities which owned generation, transmission and distribution facilities and sold those services as a “bundled” package to wholesale and retail customers in a limited geographical service area.³⁷ Economic changes

or based; an underlying condition or state of affairs; the basic principle”), *available at* <http://www.merriam-webster.com/dictionary/basis>.

³⁶ *Tavarez*, 372 F.3d at 190 (“In matters of statutory construction, [courts] may consider ... the atmosphere in which [the statute] was enacted.” (internal citation omitted)). *See also Chair King, Inc.*, 131 F. 3d at 511 (“If the language alone is not dispositive, we must delve into the history and purpose of the statute.” (citing *Adams Fruit Co., Inc.*, 494 U.S. at 642), *abrogated by Arrow Financial Services*, 132 S. Ct at 747; *Bailey*, 807 So. 2d at 1206 (“[T]he court, in determining the legislative intent, may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished.” (quoting *Clark*, 381 So. 2d at 1048))).

³⁷ *Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Energy Regulatory Comm’n*, 272 F.3d 607, 610 (D.C. Cir 2001) (citing *Promotion Wholesale Competition Through Open Non-*

and technological advances in generation and transmission, however, allowed for new entrants in generation.³⁸ Vertically integrated monopolies, which controlled regional transmission, tended to favor their generation over the competition.³⁹

64. Finding such practices unduly discriminatory and anti-competitive, FERC issued Orders 888 and 889 in response.⁴⁰ Orders 888 and 889 forced public utilities to provide non-discriminatory open access transmission services, and “resulted in ... greater reliance on wholesale markets to provide generation resources,” and increased interregional electricity transfers, among other changes.⁴¹

65. Order 888 was particularly important to state regulators. In its Order, FERC set out three primary points, as recited by the U.S. Supreme Court:

First, FERC ordered “functional unbundling” of wholesale generation and transmission services. FERC defined “functional unbundling” as requiring each utility to state separate rates for its wholesale generation, transmission, and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others.

discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 60 Fed.Reg 17,622, 17,668 (proposed Apr. 7, 1995) (codified at 18 C.F.R. §§ 35.15, 35.26-35.29)).

³⁸ *Snohomish County*, 272 F.3d at 610.

³⁹ *Id.*

⁴⁰ Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed.Reg. 21,540 (1996), clarified, 76 F.E.R.C. ¶ 61,009, 1996 WL 363765 and 76 F.E.R.C. ¶ 61,347 (1996), on reh'g, Order No. 888-A, 62 Fed.Reg. 12,274, clarified, 79 F.E.R.C. ¶ 61,182, 1997 WL 257595 (1997), on reh'g, Order No. 888-B, 62 Fed.Reg. 64,688 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046, 1998 WL 18148 (1998); Open Access Same-Time Information System and Standards of Conduct, Order No. 889, 61 Fed.Reg. 21,737 (1996), on reh'g, Order No. 889-A, 62 Fed.Reg. 12,484 (1997), on reh'g, Order No. 889-B, 81 F.E.R.C. ¶ 61,253, 1997 WL 732418 (1997).

⁴¹ *Snohomish County*, 272 F.3d at 610-11 (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682 (D.C. Cir. 2000)).

Second, FERC imposed a similar open access requirement on unbundled *retail* transmissions in interstate commerce. . . . FERC ultimately concluded that it was “irrelevant to the Commission's jurisdiction whether the customer receiving the unbundled transmission service in interstate commerce is a wholesale or retail customer.”

Third, FERC rejected a proposal that the open access requirement should apply to “the transmission component of bundled retail sales.”⁴²

After Order 888, unbundled retail transmission service would be FERC-jurisdictional, while retail transmission service bundled with other retail service would remain state-jurisdictional.

66. To further promote regional transmission planning and operation and to strengthen competition in the wholesale electricity market, FERC promulgated Order 2000,⁴³ which was aimed at advancing the formation of RTOs.⁴⁴ FERC determined that RTOs would strengthen the transmission grid and eliminate lingering opportunities for transmission owners to discriminate against independent generators and favor their own activities.⁴⁵ FERC directed every utility that was not a member of an Independent System Operator (“ISO”) to file either a proposal to participate in an RTO or make an “alternative filing.”^{46, 47}

⁴² *New York v. F.E.R.C.*, 535 U.S. 1, 11-12 (2002) (emphasis in original) (internal citations omitted).

⁴³ See *Regional Transmission Organizations*, Order No.2000, FERC Stats. & Regs. ¶ 31,089 (1999), 65 Fed.Reg. 810 (2000) (“Order 2000”), *on reh'g*, Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092, 65 Fed.Reg. 12,088 (2000) (“Order 2000–A”) (codified at 18 C.F.R. § 35.34).

⁴⁴ *Snohomish County*, 272 F.3d at 611.

⁴⁵ *Id.* at 611 (citing Order 2000, ¶ 31,089 at 31,017).

⁴⁶ See 18 C.F.R. § 35.34(c). Utilities that were members of an ISO had to file a statement indicating either (a) it was participating in an approved ISO and an explanation of the extent to which the ISO has the characteristics and functions of an RTO; or (b) if the ISO did not conform to the requirements of an RTO, a statement which included either a proposal to participate in an RTO, to modify the ISO to conform to the requirements of an RTO, or an “alternative filing.” 18 C.F.R. § 35.34(h).

67. In the Southeast, FERC took an aggressive approach, ordering a fast-track mediation process designed to move southern electric utilities into an RTO.⁴⁸ Apart from the FERC mandated mediation, Entergy, and other southern utilities, sought permission from state commissions to transfer ownership of their transmission assets to a Transco⁴⁹ and simultaneously transfer control of the Transco transmission assets to an RTO or ISO.⁵⁰ In January 2001, Entergy Mississippi filed a petition to transfer its transmission assets to an independent Transco and join the Southwest Power Pool and operate as an RTO.⁵¹

68. Entergy's proposal, which would have unbundled retail transmission service with corresponding loss of state jurisdiction and rate increases, was not well-received by state commissions. Proceedings before the Louisiana Public Service Commission ("LPSC") were particularly pointed. Concluding that "[r]egardless of its jurisdiction, it is clear that the FERC will utilize every means

⁴⁷ An ISO is an earlier construct relative to an RTO; an RTO performs similar functions but has characteristics and obligations, particularly with respect to ensuring system reliability, that are defined with more specificity by FERC.

⁴⁸ In re: Rule to Show Cause Why Louisiana Transmission Owning Entities Should Not Be Enjoined From Transferring Their Bulk Transmission Assets to a Transco and Related Issues, LPSC Docket No. U -25965, at 7 (March 14, 2002) ("LPSC Order U-25965"), available at <http://lpsestar.louisiana.gov/star/ViewFile.aspx?Id=c07923cc-c59e-4091-a03b-7fd28b2e4cc0>.

⁴⁹ A Transco is an independent, for-profit transmission company that owns the current and future transmission assets otherwise owned by a regulated electric utility.

⁵⁰ Entergy Louisiana Inc. ("ELI") and Entergy Gulf States Inc. ("EGSI") sought permission from the Louisiana Public Service Commission (the "LPSC") to transfer its transmission assets to a for-profit Transco. LPSC Order U-25965. Florida Power Corporation, Florida Power & Light Company and Tampa Electric Company filed a petition with the Florida Public Service Commission to create an ISO and spin off their transmission to a Transco. See Order Finding Proactive Formation of GridFlorida Prudent and Requiring the Filing of a Modified GridFlorida Proposal, FPSC Docket Nos. 00824-EI, *et al.* (December 20, 2001) ("FPSC Order"), available at <http://www.psc.state.fl.us/library/filings/01/15875-01/15875-01.PDF>.

⁵¹ Petition of Entergy Mississippi, Inc., for Approval of the Transfer of Electric Transmission Assets and Related Certificate Rights to an Independent Electric Transmission Company, MPSC Docket No. 2001-UA-0059 (Jan. 23, 2001).

possible to force utilities into RTOs,”⁵² the LPSC ordered Entergy, among others, to show cause “[w]hy they should not be enjoined from transferring ownership or control of their bulk transmission assets, paid for by jurisdictional ratepayers, to a TRANSCO or any similar organization.”⁵³

69. After review of the evidence, the LPSC found that the transfer of ownership or control of Entergy’s transmission assets to an independent Transco or similar entity was presumptively not in the public interest and that any attempt to accomplish such task “shall be declared presumptively imprudent.”⁵⁴ After establishing its state-constitutional, and federally recognized, authority to regulate rates for bundled service and its control over any decision to join an RTO⁵⁵, the LPSC reasoned that the Transco model would not further the public interest due to problems inherent in the Transco model.⁵⁶

70. Among a Transco’s inherent issues, the LPSC identified (1) loss of commission ratemaking authority over transmission costs; (2) adverse rate impacts for Louisiana retail customers; (3) reduction of beneficial local utility and commission influences on transmission planning, maintenance, and investment decisions; and (4) higher retail transmission rates due to “the prospect of rolled-in revenue requirements.”⁵⁷ The LPSC further identified specific causes of expected adverse rate impacts, linking such likely outcome to (1) FERC ratemaking

⁵² LPSC Order U-25965 at 6.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 3-4.

⁵⁵ *Id.* at 11-15.

⁵⁶ *Id.* at 16-28.

⁵⁷ *Id.* at 16.

treatment that authorized higher returns, utilization of incentive rates, and use of automatic adjustment mechanisms for setting entire revenue requirements; (2) encouragement of over-investment in transmission to take advantage of incentive rates; (3) a conflict of interest between the Transco and the obligation to serve at the lowest reasonable cost; and (4) loss of economies of scope with the increase in costs associated with corporate overhead, engineering and operation efficiencies, and planning and maintenance functions after dismantling the integrated structure of Louisiana utilities.⁵⁸

71. The LPSC summed up its findings, as follows:

We find that the transfer of ownership or control of transmission assets to a Transco presumptively is not in the public interest. The Transco structure effectively strips this Commission of its authority to set the transmission component of the utility's bundled retail rate. This loss of jurisdiction likely will lead to higher rates for the Louisiana customers because of differing FERC ratemaking treatments, the incentive to over-invest in transmission, and the conflict of interest between the utility's economic interest as owner of the Transco and its obligations to obtain the lowest reasonable rates for its customers. Higher rates also may result through the cost shifting inherent in a Transco that owns assets from more than one company. The Transco structure also is likely to reduce the LPSC's authority to regulate service quality and reliability at the local level.⁵⁹

72. Like the LPSC, the Florida Public Service Commission ("FPSC") considered and rejected a Transco plus RTO structure presented by several Florida

⁵⁸ *Id.* at 22-27.

⁵⁹ *Id.* at 28.

electric utilities called GridFlorida.⁶⁰ Although the FPSC recognized the potential benefit of participating in an RTO or ISO, the FPSC rejected the Transco structure because the divestiture of the transmission assets would unbundle retail transmission service and thereby abrogate the commission's duty under state law to set fair and reasonable retail rates.⁶¹ The Commission concluded that a non-Transco structure was preferable so that it could "continue to set the revenue requirements needed to support retail transmission service and retain oversight over cost control and cost recovery."⁶²

73. GridFlorida argued that an independent Transco was the preferred model because it provided the greatest incentive for efficient operation by aligning ownership of transmission with the singular interests of transmission operation, planning, expansion, investment and recovery; but the FPSC rejected this reasoning, concluding that the same benefits (which were primarily qualitative) could be achieved in an ISO without transmission divestiture.⁶³

74. Even as it blessed the ISO/RTO endeavor absent a Transco, the FPSC found, among other things, that (1) the RTO's board should be independent but answerable to the commission, (2) the structure of the RTO could not be changed without FPSC approval, and (3) the commission should be able to retain greater

⁶⁰ Order Finding Proactive Formation of GridFlorida Prudent and Requiring the Filing of a Modified GridFlorida Proposal, FPSC Docket Nos. 00824-EI, *et al.* (December 20, 2001) ("FPSC Order"), available at <http://www.psc.state.fl.us/library/filings/01/15875-01/15875-01.PDF>.

⁶¹ FPSC Order at 15.

⁶² *Id.*

⁶³ *Id.* at 8, 12.

control over the cost of facilities included in an RTO and the recovery of those costs, so as to balance costs and benefits.⁶⁴

75. The FPSC concluded diplomatically:

As a policy matter, we support the formation of an RTO to facilitate the development of a competitive wholesale energy market in Florida. Given our responsibilities to regulate retail aspects of transmission, FERC's responsibilities to regulate wholesale aspect of transmission, and GridFlorida's effects on both, we believe that our decision contributes to the collaborative process necessary to ensure development of an RTO that satisfies both Federal and State policy concerns.⁶⁵

2. Mississippi's Response to the Transco Movement

76. As recounted above and explained in this docket by MPUS witness Hempling:

FERC's Order No. 888 interpreted the Federal Power Act to mean that unbundled transmission service is a FERC-jurisdictional service, regardless of whether the electricity transmitted is retail electricity or wholesale electricity. The U.S. Supreme Court upheld FERC's interpretation in *New York v. FERC*, 535 U.S. 1 (2002). FERC's Order 2000 found that when a vertically integrated, load-serving entity (LSE) joins an RTO, with the RTO taking functional control of the LSE's transmission system, the RTO becomes a "public utility" under the Federal Power Act. Transmission becomes an unbundled service, provided by the RTO to the former transmission owners under a FERC-jurisdictional tariff.⁶⁶

77. Mississippi and this Commission faced choices similar to those of Louisiana and Florida. As previously noted, soon after FERC adopted Order 2000, EMI, in January 2001, filed before this Commission a petition to divest its

⁶⁴ *Id.* at 19-20, 24-26.

⁶⁵ *Id.* at 26.

⁶⁶ Hempling Direct at 34-35.

transmission assets to a Transco and allow operation in the Southwest Power Pool, an RTO. By early 2002, as indicated above, the Transco movement in the Entergy territory faced significant opposition from state commissions, and EMI's petition to form a Transco was retired to the file.⁶⁷

78. In 2003, in the next legislative session after EMI ended its bid for divestiture to a Transco, the Mississippi Legislature amended § 77-3-23, adding the "on the same basis" language at issue here. The amended language originated in the Public Utilities Committee of the Mississippi House of Representatives, as a committee substitute, before being approved by the Senate Public Utilities Committee, passed by the Legislature, and signed into law;⁶⁸ thus, it is fair to assume that the Legislature was keenly aware of the national focus on transmission and the jurisdictional issues centered on the bundling or unbundling of transmission service. And it is highly likely that the Legislature was attuned to the drama playing out in neighboring states.

79. By enacting the "on the same basis" provision of Section 77-3-23, the Legislature sought to protect Mississippi ratepayers from the possible adverse consequences outlined above. The Transco model threatened to undermine the traditional electric utility scheme, wherein vertically integrated utilities were

⁶⁷Order Retiring to the File, MPSC Docket No. 2001-UA-0059 (Feb. 5, 2002).

⁶⁸ The provision at issue ("any native load customers served by any transmission facilities shall be served on the same basis as before the transaction") was not in the original bill. It was added after the bill was sent to the House Public Utilities Committee.

(<http://billstatus.ls.state.ms.us/documents/2003/pdf/HB/1000-1099/HB1040CS.pdf>).

The entire bill history can be found here:

<http://billstatus.ls.state.ms.us/2003/pdf/history/HB/HB1040.htm>.

subject to local regulation. Following Order 2000 and the Supreme Court's affirmation of Order 888, a sale or transfer of utility assets could significantly alter the framework under which ratepayers received service. They could receive service from a non-vertically integrated utility free from state regulation. By adding the subject amendment, the Legislature sought to ensure that any transfer of transmission assets would not alter the framework under which ratepayers receive service. Section 77-3-23 requires the Commission to find that Mississippi retail ratepayers would receive transmission service according to an equivalent framework following the sale or transfer of any transmission facilities before it can approve such a transaction.

80. "[T]he Public Utility Act of 1956 provides the *foundation* of [Mississippi's] public utility law."⁶⁹ It governs nearly every aspect of utility service in Mississippi. The structure of the Act is relatively straightforward. The Mississippi Public Service Commission sits at its center. The Act vests the Commission with "exclusive original jurisdiction over the intrastate business and property of public utilities,"⁷⁰ directs it to exercise that authority to advance certain legislative policies,⁷¹ and provides the Commission with several mechanisms to do so.

⁶⁹ Encyclopedia of Miss. Law § 61:2 (citing Rubel L. Phillips, "Mississippi Regulatory Policy in the Electric Utility Industry," 47 Miss. L.J. 645, 646 (1976)) (emphasis added).

⁷⁰ Miss. Code Ann. § 77-3-5.

⁷¹ Miss. Code Ann. § 77-3-2(2) ("To these ends, therefore, authority shall be vested in the [Commission] to regulate public utilities in accordance with the provisions of this title.")

81. The Act places particular emphasis on the rates utilities charge for their services. This emphasis reflects the Legislature's finding that the rates of public utilities are affected with the public interest.⁷² The Act requires public utility rates to be just and reasonable and free of "unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices."⁷³ It directs the Commission to set rates "consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy."⁷⁴ Furthermore, the Act requires the Commission to "continu[ally] study and research [] new and innovative rate-making procedures which will protect the state, the public, the ratepayers and the utilities, and where possible reduce the costs of the rate-making process."⁷⁵

82. The Act instructs the Commission to craft rates and grants it significant powers in order to do so. Under the federal regulatory regime, bundled retail service is the basis on which state jurisdiction over transmission rests. The potential loss, due to unbundling, of rate jurisdiction and the ability to protect native load customers, lay at the heart of the disputes in Louisiana and Florida.

83. The LPSC observed that "[t]he economic impact on native load customers should be a primary concern in selecting an appropriate RTO option."⁷⁶ Entergy argued before the LPSC that any transfer of control to an RTO would cause

⁷² Miss. Code Ann. § 77-3-2(1) ("The Legislature finds and determines that the rates ... of public utilities ... are affected with the public interest).

⁷³ Miss. Code Ann. § 77-3-2(1)(d).

⁷⁴ *Id.*

⁷⁵ Miss. Code Ann. § 77-3-2(1)(h).

⁷⁶ LPSC Order U-25965 at 4.

the LPSC to lose jurisdiction and that “native load customers must take transmission service from the RTO.”⁷⁷ Rejecting Entergy’s flawed argument, the LPSC explained that native load customers taking service from an RTO neither determines the cost to retail customers nor “displaces state regulation of the retail transmission rate.”⁷⁸

84. As correctly reasoned by the LPSC:

In Order 888, the FERC interpreted the Federal Power Act as preserving the States’ historical jurisdiction over the traditional monopoly arrangements under which retail customers buy electric energy, transmission service and local distribution service from a single supplier at a regulated rate. . . . It is only the transfer of assets to a Transco that may cause the LPSC to lose jurisdiction over the retail rate and lead to higher rates for Louisiana customers. For this reason, a Transco is not in the public interest.⁷⁹

85. The LPSC clearly identified unbundling transmission service as causing it to lose jurisdiction and oversight over bundled retail service, which was the traditional basis for serving native load customers.

86. The FPSC noted the same when GridFlorida sought to unbundle its transmission assets via the Transco plus RTO model.⁸⁰ Citing its obligation under state law to set fair and reasonable retail rates, the FPSC rejected the Transco proposal because “the transco model could be viewed as a voluntary unbundling . . . of transmission assets . . . away from the retail-serving utility.”⁸¹ The FPSC favored

⁷⁷ *Id.* at 18.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 20.

⁸⁰ FPSC Order at 15.

⁸¹ *Id.*

a model wherein the retail-serving utility continued to own its transmission assets so that the FPSC would “continue to set the revenue requirements . . . and retain oversight over cost control and cost recovery.”⁸² As did the LPSC, the FPSC noted bundled retail service as the basis of service for native load customers.

87. Currently, Mississippi ratepayers receive utility service subject to the framework established by the Act. The Act’s distinguishing feature is Commission regulation of public utilities geared towards ensuring Mississippians receive adequate utility service at a just and reasonable rate, and being responsive to local concerns through local accountability.

88. Under the Act, the regulated public utility has traditionally served native load customers under bundled retail service, over which the Commission has ratemaking and cost control jurisdiction, including over the retail component of transmission. Thus, in this instance, service on the same basis means serving native load customers on a retail bundled service basis, which ensures proper Commission authority over rates and costs.

89. Like the Louisiana and Florida orders discussed herein, the Commission’s recent order allowing EMI to transfer functional control of its transmission system to MISO (the “MISO Order”) provides an example of the type of transaction that satisfies the necessary prerequisites, public policy and the public interest. Among the Commission’s concerns in the MISO docket were diminution of Commission authority and the impact of congestion under MISO’s model on the

⁸² *Id.*

historic use of EMI's transmission system. Passing briefly over § 77-3-23 the Commission provided, as follows:

The Commission finds that increased costs associated with congestion, or other curtailment of EMI's historical use of its transmission system and generation resources, would be contrary to the prerequisite safeguards of § 77-3-23. Essentially, statutory law prohibits a transaction that would deliver the same service, using the same assets, for a higher cost to ratepayers, who had effectively paid for those assets through rates. Even if one were to read the protections of § 77-3-23 more narrowly, the public interest would still require ratepayer protection or mitigation against the uncertainty of congestion costs.⁸³

90. The Commission was concerned that congestion, as addressed through the MISO mechanisms, could have a negative impact on the availability of transmission service and its cost to native load customers.

91. To address these concerns, and others, the Commission conditioned the Order appropriately, including preservation of Commission authority over EMI. The Commission found that to satisfy the necessary prerequisites the "approval for EMI to join an RTO must be conditioned on allocation of congestion management rights sufficient to appropriately and fairly hedge against congestion costs."⁸⁴ Because MISO has a FERC-approved bundled load exemption, the Commission would maintain control of retail transmission cost of service, and therefore, possesses appropriate authority to ensure that EMI prudently pursues allocation of congestion management rights.

⁸³ Order, MPSC Docket No. 2011-UA-376, at 26 (Nov. 15, 2012).

⁸⁴ *Id.*

92. The MISO Order is replete with references and findings related to the need to condition any approval of MISO membership to preserve and ensure sufficient Commission authority over EMI.⁸⁵ For example, the Commission decreed that any diminution in its authority is, in the first instance, counter to the public interest, and such loss “must be offset by worthwhile benefits and preservation of sufficient regulatory authority[.]”⁸⁶

93. To that end, the Commission imposed multiple conditions on EMI⁸⁷, concluding that “[b]eyond participation and input, the Commission must retain authority to act decisively to protect the public interest should the need arise. . . . [T]his Commission must control whether EMI joins and remains a member of MISO.”⁸⁸ One such condition requires that EMI, after a 5-year transition period, must file a petition with the Commission to exit or remain in MISO.⁸⁹ This filing, which must be supported by substantial evidence, will provide an opportunity to judge whether the benefits provided outweigh the costs incurred. Because the Commission retains significant rate authority over EMI, including over retail transmission cost of service, the Commission has substantial tools to protect ratepayers from any imprudent conduct and to ensure that EMI’s actions in MISO are consistent with the public interest.

⁸⁵ *E.g., id.* at 25-27.

⁸⁶ *Id.* at 40.

⁸⁷ *E.g., id.* at 45-46, 49-52.

⁸⁸ *Id.* at 45.

⁸⁹ *Id.*

94. Gaining access to MISO's markets and efficient dispatch will bring some costs, but every expert that examined the proposal found that such costs would likely be more than fully offset by significant benefits. Properly conditioned, the Commission approved the application.

95. By contrast, the present Transaction, by unbundling transmission, would strip this Commission of its most effective regulatory tool: authority over retail transmission cost of service. Further, with EMI losing status as a transmission owner in MISO, the Commission's influence would be further reduced as EMI's influence would be reduced. Notably, the Commission's loss of jurisdiction would be permanent and would reduce the Commission's influence over transmission rates to that simply of a MISO stakeholder with recourse to protect ratepayers limited to litigation at FERC, a far cry from the authority and influence the Commission presently wields under the Act.

96. Unlike the MISO proposal, this Transaction would provide no reliably discernible benefits and would impose certain costs on ratepayers from ITC's use of the FERC rate construct. The increased rates would not result as a matter of better performance or new transmission construction, but would attach to assets already in place, which presently serve the native load customer at a lower cost. The present Transaction fails even a significantly restrained reading of the statutory prerequisites that would restrict higher cost to ratepayers for "the same service,

using the same assets, for a higher cost to ratepayers, who had effectively paid for those assets through rates.”⁹⁰

97. Before the Commission can approve the sale or transfer of a utility’s transmission assets included in its rate base, it must find that the utility’s customers will receive service under a similar framework as before the transaction. The Public Utilities Act of 1956 forms the framework of utility service in Mississippi. The hallmark of this structure is Commission regulation bent towards ensuring adequate, reliable service at a just and reasonable rates delivered on the basis of bundled retail service. Judging each transaction on a case-by-case basis, the present Transaction bears all the hallmarks of the harms the Legislature was trying to guard against.

98. The Commission must retain enough authority and oversight to ensure that the utility’s customers are provided adequate service at just and reasonable rates and local concerns are properly addressed. The Joint Application and associated Transaction, even with conditions, fails to ensure adequate Commission oversight and Mississippi ratepayer protections; and therefore, fails to satisfy the statutorily mandated prerequisite that native load customers be served on the same basis as before the transaction.

99. Having failed to satisfy the necessary prerequisite, the Joint Application must be denied. Even so, the Commission continues its analysis of the

⁹⁰ See *supra* note 83. Brown Direct at 11.

Transaction from the perspective of public policy and cost/benefit incremental to MISO membership.

B. Commission Jurisdiction and Public Policy

100. In the Joint Application, the Applicants asserted that the Transaction was consistent with the public interest and the public policy of the State of Mississippi for four reasons: (1) ITC's ownership of EMI's transmission assets would eliminate any perception of bias held by other market participants against Entergy because ITC is an independent transmission company, with no ownership in generation or distribution; (2) ITC's singular focus on transmission would provide a high level of quality of service and would improve transmission performance and reliability; (3) ITC would bring a regional view and broader planning perspective; and (4) the Transaction would strengthen the finances of both companies in the face of expected increases in capital expenditure requirements.⁹¹

101. While Staff and intervenors do not contest that Applicants acted in good faith and that ITC is capable of abiding by the law, the points of contention have focused on whether the Transaction is "consistent with the public interest."⁹² While neither statute nor case law defines what may be "consistent with the public interest," statutory guideposts offer insight. In vesting broad regulatory authority in the Commission, the Legislature found "that the rates, services and operations of public utilities . . . are affected with the public interest and that the availability of

⁹¹ Joint Application at 4-5.

⁹² Miss. Code Ann. § 77-3-23.

an adequate and reliable service by such public utilities to the people, economy and government of the State of Mississippi is a matter of public policy.”⁹³ Thus, the public interest encompasses the concerns and impacts upon the people, economy and government of the State; and the policy declarations of the Legislature identify, in part, the public interest.

102. First among the legislative declarations of public policy is “[t]o provide fair regulation of public utilities in the interest of the public.”⁹⁴ The Legislature vested authority to regulate public utilities in the Mississippi Public Service Commission, an entity whose existence is rooted in a state constitutional mandate.⁹⁵ Therefore, the very act of regulating by the Commission and the entrustment of regulation in the Commission serves the public interest.

103. The Legislature further identified certain other public interest policies that are pertinent to the proposed Transaction:

- (b) To promote the inherent advantage of regulated public utilities;
- (c) To promote adequate, reliable and economical service to all citizens and residents of the state;
- (d) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

⁹³ Miss. Code Ann. § 77-3-2(1).

⁹⁴ Miss. Code Ann. § 77-3-2(1)(a).

⁹⁵ Miss. Code Ann. § 77-3-2(2). *See Young v. South Cent. Bell Tel. Co.*, 303 So. 2d 464, 465 (Miss. 1974) (finding Commission constitutionally organized pursuant to Section 186 of Mississippi Constitution).

(f) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of service needed for the protection of public health and safety and for the promotion of the general welfare;

(g) To cooperate with other states and the federal government in promoting and coordinating interstate and intrastate public utility service and reliability;

(h) To encourage the continued study and research for new and innovative rate-making procedures which will protect the state, the public, the ratepayers and the utilities, and where possible reduce the costs of the rate-making process.⁹⁶

Because these interests may not always be in harmony or weigh equally, the Commission must balance these interests to best serve the public. "Additionally, what may serve the public interest in one context might not in another; therefore, the Commission may discern the public interest on a case-by-case basis, or a 'totality of the circumstances.'"⁹⁷

104. The regulatory regime established by the Legislature sets forth the Commission's value in regulating *per se* and vests authority in the Commission to pursue the public policies identified.⁹⁸ Recognizing the pivotal role of the Commission, the Mississippi Supreme Court has observed, as follows:

The duties of the Commission are awesome and their responsibilities great in a most difficult, ongoing situation. Mississippi Code Annotated, § 77-3-39 (1972), authorizes the Commission to establish

⁹⁶ Miss. Code Ann. § 77-3-2(2).

⁹⁷ Order, MPSC Docket No. 2011-UA-376 at 10 (Nov. 15, 2012).

⁹⁸ See *State ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 538 So. 2d 367, 373-74 (Miss. 1989).

rates that are just and reasonable to the ratepayers and which will yield a fair rate of return to the utility for its services. In effect the Commission is the counterpart of the market place by which other businesses are measured. This is so because public utilities are monopolies engaged in the business of furnishing necessary services to the public. Obviously, the legislative intent in creating the Public Service Commission was to interpose an authoritative body between the rate payers of the utility and the investors in the utility so that their respective interests, necessarily antagonistic, might be equitably served. The crucible of the competitive market place to which business concerns, other than monopolies, are necessarily exposed is thus avoided so that economic waste by overlapping and duplicating services will not occur.⁹⁹

105. Therefore, the Commission must act precisely and cautiously in balancing competing public policy objectives and benefits and must “preserve and ensure sufficient Commission authority over”¹⁰⁰ public utilities so as not to “act[] outside its statutory authority” or otherwise effect an “utter abrogation by the Commission of its statutory responsibilities and a relinquishment of control to the very entity the Commission is charged by law to regulate.”¹⁰¹

106. ITC's independence is touted as a virtue, but approval of the Transaction would leave ITC independent of the Commission and the local concerns of Mississippi ratepayers, the economy and the State. And the Commission notes from the outset that while public policy should promote service without unjust discrimination and undo preference or advantage, a “perception of bias” is not proof of bias, and there is simply no indication in the record that EMI's move to MISO is insufficient to both inhibit such conduct and the perception of it. Certainly, a

⁹⁹ *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 435 So. 2d 608, 612 (Miss. 1983).

¹⁰⁰ Order, MPSC Docket No. 2011-UA-376 at 27 (Nov. 15, 2012).

¹⁰¹ *Pittman*, 538 So. 2d at 373.

perception of bias is undesirable, but divestiture of transmission assets is not the remedy promoted by public policy.¹⁰²

107. The proposed Transaction would eliminate Commission jurisdiction over the transmission rates paid by EMI's retail customers and would transfer such jurisdiction fully to FERC. As discussed further, herein, this is a fundamental feature of the Transaction that provides value to ITC and to Entergy shareholders but passes on additional cost to ratepayers with no reliably discernible benefits. MPUS witness Hempling describes that this is not a function of EMI entering MISO, since the MISO tariff contains a "bundled load exemption," under which the Commission would retain jurisdiction over EMI's transmission cost of service absent the ITC Transaction. However, if ITC acquires EMI's transmission assets, the bundled load exemption would not apply, and transmission cost of service would instead fall under FERC's jurisdiction.¹⁰³

108. The loss of Commission jurisdiction over retail transmission cost of service does not further any public policy of the State. To the contrary, such loss of jurisdiction and corresponding rate increase due to FERC policy choices is counter to the state's policies of promoting economical service, providing for just and reasonable rates and encouraging innovative rate-making procedures that would protect the state, the public and the ratepayer.

¹⁰² See Hempling Direct at 88-90.

¹⁰³ Hempling Direct at 35.

109. Applicants have no credible rebuttal to the fact that complete loss of Commission jurisdiction over cost of retail transmission service is counter to the public policy of the state. Equally, Applicants are unable to muster any credible counter to the fact that retail transmission rates would rise due to ITC's use of the FERC rate construct. Transmission service by ITC would cost the ratepayer more than transmission service provided by EMI, even though ITC would use the same facilities and the same personnel. The increased cost is not due to better performance or greater reliability; rather, the rise is due solely to the unbundling of EMI's transmission assets to ITC.

110. Although ITC offered rate mitigation for the first five years of ITC ownership, and a benefits test alleged to align benefits and costs, these offers are deficient, as discussed below, and they neither make up for the permanent loss of Commission jurisdiction over transmission cost of service nor guarantee against the prospect of future rate increases due solely to FERC policies, which may run counter to local state concerns. While some mitigation would be preferable to none, mitigation does not change the fact that independence is contrary to the public policy supporting commission ratemaking authority and the promotion of just and reasonable rates.

111. Moreover, ITC's independence runs counter to the stated policy of promoting the inherent advantage of regulated public utilities, here, a vertically integrated monopoly. EMI, which controls generation, transmission and distribution, is finely attuned to the needs and coordination of each. As Staff

witness Hempling observed, "The question is 'How do we best integrate transmission, distribution, generation, demand response and energy efficiency so as to produce reliable, high-quality service at lowest reasonable cost?'"¹⁰⁴ EMI, unlike ITC, has no inherent bias toward any particular solution or resource and is familiar with planning for each through its integrated planning process. While execution might not be perfect, with appropriate Commission oversight and involvement, there is an inherent advantage to the vertically integrated model, and the promotion of that advantage is part of this state's public policy objectives.

112. Taken at face value, ITC's claim of offering high quality of service and improved performance and reliability conforms to the state's policy of promoting reliable service. But the service must also be economical and cost effective.

113. As noted by Staff, "Under the status quo, the Commission can direct EMI in all actions relating to the reliability-cost tradeoff (consistent with NERC's standards). But after the transaction, ITC will control the proposals it makes, and FERC will decide."¹⁰⁵ Unlike the Commission, neither ITC nor FERC is closely attuned and accountable to those that ultimately pay for service. Removing cost of service jurisdiction from this Commission without knowing the costs of reliability and having guarantees for performance places too much risk on ratepayers and does not further the public policy of promoting adequate, reliable and economical service.

¹⁰⁴ Hempling Direct at 26.

¹⁰⁵ MPUS Post-Hearing Brief at 61-62.

114. ITC offers a regional, broad-based view to transmission planning and operations according to the Joint Application. But this same benefit was espoused and considered when the Commission approved EMI's move to MISO. In fact, the Commission found that EMI's integration into MISO would further the public policies of fostering continued service on a well-planned and coordinated basis and would promote the coordination of interstate and intrastate service and reliability.¹⁰⁶

115. Here, ITC has not shown that its regional view and broad-based planning approach would add any value incremental to MISO.¹⁰⁷ Moreover, divesting transmission assets to ITC and ceding cost of service jurisdiction to FERC can hardly be characterized as cooperation and coordination. To the contrary, the Commission finds it likely that significantly more planning and coordination would be necessary to overcome the challenges posed by the proposed Transaction, particularly in the area of storm restoration and recovery.

116. Improved financial strength and flexibility for an uncertain future is the last of the benefits set forth in the Joint Application, but divestiture for the sake of an unknown threat to the balance sheet does not appear as a public policy goal. One might argue that one of the inherent advantages of a regulated monopoly is having rates and recovery mechanisms set by a Commission rather than the

¹⁰⁶ Order, MPSC Docket No. 2011-UA-376 at 27 (Nov. 15, 2012).

¹⁰⁷ See Hempling Direct at 28-29 (reviewing testimony of Riley and Vitez and observing that, "Yes, ITC has 'regional focus and expertise,' but so has MISO (and MISO has it without a for-profit bias toward transmission). Yes, there will be a 'combination of ITC and MISO looking more broadly,' but this passage tells us nothing about whether that combination will be additive ('MISOs plus') or merely duplicative."

market; thus, public utilities in Mississippi do not often experience severe constraints to raising capital and earning a fair rate of return on their investment. The financial health of public utilities is important, but the Applicants have failed to demonstrate either that EMI's financial health is significantly at risk or that current regulatory mechanisms are inadequate to address and resolve any problem that does exist. The Commission does not find a public policy favoring the end of the vertically integrated monopoly, and corresponding loss of Commission jurisdiction, on the basis of a vaguely delineated and uncertain possibility of "potential significant capital spending."¹⁰⁸

117. Lack of Commission jurisdiction over retail cost of transmission service would hinder the Commission's ability to pursue the policy and regulatory ends dictated by state law because the Commission would be stripped of its ability to incentivize performance and impose consequences. As long as the Commission controls rates, it can warn EMI away from imprudent conduct and back such a warning with the possibility of rate consequences. Absent cost of service jurisdiction, Mississippi ratepayers are left with a public utility and federal regulator that are not immediately accountable to Mississippi and its citizens.

118. The Commission finds that the stated benefits of the Joint Application do not further the public policy interests as set out in statute. ITC's pursuit of independence, even from state regulators, drives a permanent loss of Commission jurisdiction, with unwarranted rate increases that result from federal ratemaking

¹⁰⁸ Joint Application at 5.

policies and incentives. Additionally, transmission independence, in this instance, necessitates the end of EMI's vertically integrated monopoly and its corresponding inherent advantages.

119. Although the Transaction is at odds with public policy, the Commission will nevertheless more closely examine the purported benefits of the Transaction to see whether the benefits are of such certainty and magnitude as to overcome the Transactions noted shortcomings.

C. Claimed Transaction Benefits Incremental to MISO Membership

120. Applicants assert that the Transaction offers a unique opportunity to meet challenges in planning and financing the strategic modernization of the EMI transmission grid. Applicants identified four key purposes that the Transaction serves that are consistent with the public interest and the public policy of the State of Mississippi. These purposes are, in summary:

121. One, the transfer of transmission assets to an independent transmission company would foster a robust wholesale market by eliminating any perception that transmission planning could be biased to promote other non-transmission interests of the system owner.¹⁰⁹

¹⁰⁹ Joint Application at 4.

122. Two, ITC has a singular focus on transmission and proven ability to provide a high quality of service and to improve transmission performance and reliability.¹¹⁰

123. Three, ITC would bring a more comprehensive planning process and a broader regional view that would enhance the benefits of EMI's membership in MISO.¹¹¹

124. Four, the Transaction would bring ITC's stronger, separate balance sheet to support projected escalating capital requirements for transmission investment, while allowing EMI financial flexibility to manage potential significant capital spending on its generation and distribution functions.¹¹²

125. The Applicants further support the Transaction rationale by arguing that short-term and longer-term benefits to ratepayers will exceed those expected from EMI's move to MISO alone; that the timing of the proposed Transaction is unique and compelling, given the transformative challenges facing the electric industry; and that the particular current circumstances of Entergy and ITC allow for the "spin-merge" structure of the Transaction with significant tax advantages that may not be replicable in the future.¹¹³

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 6.

¹¹² *Id.* at 7.

¹¹³ *Id.* at 8.

1. Independence

126. In support of its first category of benefit, Applicants provided testimony that independent ownership and operation of EMI's transmission assets by ITC would offer significant benefits over EMI's continued ownership, including the elimination of any lingering perception of bias relating to Entergy's use of its transmission system.¹¹⁴ ITC witness Welch testified that ITC's business is exclusively concerned with electric transmission, and through its internal policies and articles of incorporation is structured to be fully independent from entities that buy or sell energy – i.e., from market participants. Such independence allows ITC to operate, maintain and invest in its transmission assets without bias, or the perception of bias, for or against any market participant. Welch testified that such independence allows and incentivizes ITC to have a broader planning focus, which looks beyond any single service territory to consider transmission investments that could enhance the transmission system on a regional basis.¹¹⁵

127. Welch further stated that the advantages of ITC's independent planning go beyond what MISO can achieve through its own regional planning process, because MISO's regional plans are developed based on evaluation of projects proposed by the individual transmission owners. ITC witness Vitez testified that ITC's independence improves planning because all market

¹¹⁴ The claimed benefit of ITC's independence is intertwined with other asserted transaction benefits such as ITC's singular focus on transmission, its financial strength and regional planning perspective, which are treated separately herein.

¹¹⁵ Welch Direct at 24-25.

participants, and particularly generation developers, have greater confidence in the planning process and are comfortable sharing their generation plans with ITC. Vitez cited ITC's Thumb Loop and GPE projects as having benefited from such open communication with market participants.¹¹⁶

128. EMI witness Bunting asserted that, while Entergy conducts its transmission business in a prudent and non-discriminatory manner, other market participants perceive bias in Entergy's transmission practices. Bunting testified that the move to independent transmission would be the best way to eliminate the perception of bias arising from common ownership of transmission and generation.¹¹⁷

129. By contrast, MPUS witness Parker stated that the claimed advantages of ITC's independence in planning and eliminating the perception of bias have no solid foundation. "Once EMI joins MISO and is subject to MISO's transparent transmission planning and system operating rules, Entergy will have less ability to use its ownership of transmission to favor its own generation over its competitors'.¹¹⁸ Parker further noted that the Applicants have identified no anticompetitive behaviors that EMI would be able to engage in as a transmission-owning member of MISO and have not quantified any benefit to customers arising from the elimination of any actual or perceived bias.

¹¹⁶ Vitez Direct at 33.

¹¹⁷ Bunting Direct at 10-11.

¹¹⁸ Parker Direct at 8.

130. The question of whether ITC's independent ownership of EMI's transmission assets would offer any *incremental* benefit to Mississippi ratepayers beyond those that will be provided through EMI's membership in MISO is central to this Commission's consideration of the Joint Application. The Commission notes that the same benefits of independence – the independence of MISO as a system operator – were advanced in support of the application by EMI to join MISO (MPSC Docket 2011-UA-376). With respect to membership in MISO, the Commission was persuaded that implementation of MISO's independently-operated Day 2 Market in the Entergy region would likely provide significant immediate benefits to EMI ratepayers, including addressing concerns regarding perceived bias in Entergy's operation of the transmission system, and the Commission approved EMI's move to MISO. The Commission also found that there were likely longer-term benefits from MISO's independent regional transmission planning.

131. Applicants offer no evidence regarding what degree of perceived bias would remain absent the Transaction, i.e., with the EOCs remaining as transmission owners in MISO. The Applicants have presented no evidence that other market participants would have continued concern regarding Entergy's actions with the EOC's owning transmission in MISO and no support for the contention that any residual concern would have a significant impact on Mississippi ratepayers. The Commission concludes that both questions – whether any perceived bias persists, and whether such bias is significant to ratepayers – can be properly investigated only after observing the proper baseline, which is what

actually occurs with EMI and the other EOCs as transmission-owning members of MISO. There is no reliable basis in the case record from which to conclude that the Transaction would provide a public interest benefit in eliminating residual perceived bias.

132. Regarding the claimed incremental benefit of independent planning by ITC within MISO, the Applicants have not demonstrated either that ITC's planning would provide significant incremental value to the Entergy region under MISO's current planning framework or that ITC's planning would provide benefits under MISO's evolving planning capabilities pursuant to FERC's Order 1000. The Applicants acknowledge that under ITC ownership, planning for the Entergy region would continue to be performed by personnel who are currently Entergy employees, but would transfer to ITC when the Transaction closes. The Applicants make no claims regarding any particular transmission projects that ITC, by virtue of its independent perspective, would have proposed in the past, or would propose in the future that Entergy did not or would not. As discussed below, the illustrative projects presented in testimony by ITC witness Pfeifenberger in fact show no benefit for the EMI service territory. Even if the Commission were to grant the unsupported assertion that ITC's independence would support better planning under MISO's current planning process, the fact is that MISO's planning methods are changing. It is possible, and perhaps likely, that MISO's enhanced planning procedures pursuant to Order 1000 will reduce reliance on transmission owners as either sources of transmission plans or as conduits for information from other

market participants. This could reduce or eliminate any hypothetical advantage ITC would have as an independent owner / planner. Again, the Commission finds that the appropriate baseline for comparison – planning under MISO in coordination with the EOCs as transmission owners – is absent from the record, and this baseline cannot be evaluated reliably without actual experience in MISO in the absence of the Transaction.

133. Additionally, while the Applicants suggest that without ITC, planning for the Entergy region will be hindered by perceptions of Entergy bias, even within MISO, no consideration is given to the possibility that market participants – generators and load serving entities (“LSEs”) – might view ITC as having a bias in planning. For example, market participants might assume a bias on ITC's part for greater investment in transmission in place of investment in generation, or for large projects that might increase exports out of the Entergy region. The Commission finds the consideration of potential perceived bias in the record to be incomplete.

134. To the extent Bunting's testimony can be read to imply that a lingering perception of bias relates more to DOJ concerns than those of market participants, and that the Transaction is valuable because it would prompt DOJ to close its investigation of Entergy, this Commission does not find divestiture to be in the best interest of Mississippi ratepayers. If DOJ is persuaded that Entergy violated the law, the case should be prosecuted appropriately. If penalized, Entergy will bear the cost, not the ratepayers. In the case of divestiture, as proposed in this Transaction, Entergy shareholders would reap a windfall through monetization of

the higher rates made possible by the FERC rate construct at the expense of captive customers, who have borne the cost of transmission assets that may have been neglected or misused. The Commission's role is not to relieve Entergy of the consequences of its actions, particularly where ratepayer interests would suffer.

135. EMI's integration into MISO is only days away, and it will likely be some time, perhaps years, before the benefits of MISO membership can be evaluated reliably. Yet the Joint Applicants have argued in the instant proceeding that the proposed Transaction offers significant additional benefits deriving from ITC's independent ownership of transmission, above and beyond the benefits from MISO's independent operation of the system. As MISO will help plan and dispatch the system regardless of whether the Transaction proceeds, the Commission finds no reliable evidence in this record that ITC ownership will do more to eliminate bias than will be achieved through EMI's membership in MISO.

136. The Commission finds that the claimed incremental benefits of ITC's independent ownership of EMI's transmission assets are not demonstrated or sufficiently reliable to support approval of the Transaction on the basis that ITC ownership within MISO would do more to eliminate actual or perceived bias than EMI's continued ownership within MISO.

2. ITC's Singular Focus on Transmission

137. As a second category of benefits, Applicants point to ITC's singular focus on transmission, which drives operational excellence in transmission system performance that would improve reliability and enhance market competition to the

benefit of EMI ratepayers. In his direct testimony, ITC witness Jipping described how ITC's approach to preventive maintenance and proactive investment aims to improve system performance and reduce customer outages, with a goal of top decile system performance. Jipping reiterated the point that ITC has no incentive to bias its planning, operations, maintenance or investment to the advantage or disadvantage of any market participant. Jipping highlighted the performance of ITCT in eliminating a large backlog of maintenance projects inherited when it acquired Detroit Edison's transmission assets, and similar efforts following ITCMW's acquisition of the transmission system of Interstate Power & Light Company. Jipping cited improvements over time by ITCT, METC and ITCMW in reducing sustained system outages caused by transmission system equipment. While describing some benefits of reduced service interruptions as significant but difficult to quantify in dollar terms, Jipping presented an estimate of benefits from lower outage duration times for ITC's Michigan companies indicating millions of dollars per year in benefits.

138. EMI witness Riley testified that ITC's singular focus on transmission should lead to operational improvements on the Entergy system as best practices are identified and implemented.¹¹⁹ Riley acknowledged that, with the proposed transfer of Entergy transmission personnel to ITC, the same people would generally be planning, operating and managing the transmission assets under ITC ownership as under that of Entergy. Riley testified that implementation of ITC's Governance

¹¹⁹ Riley Direct at 9.

and Oversight model would lead to operational improvements enhancing the value of continuity in service and knowledge.¹²⁰ Ultimately, Riley concluded that ITC is better able to operate and maintain its systems because ITC does not suffer from internal competition for capital inherent in vertically integrated monopolies.¹²¹ Essentially, Riley concluded that ITC is able to spend more money on transmission, which translates to a more reliable system, because that is all ITC has to think about.

139. SMEPA witness Brown testified that outage rates and restoration times for SMEPA's delivery points in EMI's territory have gotten significantly worse in recent years, and that an increased focus on maintenance activities is necessary to improve reliability quickly.¹²² SMEPA generally supports the Transaction from a reliability and planning perspective and does not dispute claims that reliability on the Entergy transmission system could increase under ITC ownership. At the same time, SMEPA concludes that the proposed Transaction, including the rate mitigation plan submitted by the Applicants in rebuttal, is not in the public interest, and that any action by the Commission to approve the Transaction be accompanied by enforceable conditions to fully mitigate adverse rate impacts.¹²³ In addition, SMEPA argues that if the Joint Application is denied, the Commission

¹²⁰ *Id.* at 12.

¹²¹ Riley Rebuttal at 28.

¹²² Brown Direct at 6-7.

¹²³ SMEPA Reply Brief at 8-9.

could and should address deficient reliability by developing specific transmission improvement plans for the EMI system.¹²⁴

140. MPUS witness Parker assessed the Applicants' claims that ITC's singular focus on transmission would improve operational performance of the Entergy transmission system. Parker concluded that, while the three current ITC operating companies had better performance than EMI and the EOCs in aggregate, ITC had not demonstrated an improvement in the performance of its systems relative to the period before those systems were acquired. Parker also stated that ITC had not defined specific investments it would make in the EMI transmission system with specific performance improvements that would result.¹²⁵

141. Parker expressed concerns about the level of funding of EMI's transmission business, determining in particular that EMI's transmission O&M activities receive inadequate funding.¹²⁶ Parker concluded that ITC's singular focus is not necessary for EMI to improve its transmission performance, and that EMI could improve performance itself by applying adequate attention and funding.

142. MPUS witness Hempling questioned whether ITC's singular focus on transmission – and associated efforts to increase transmission investment and revenues – would necessarily be consistent with the welfare of EMI and its ratepayers.¹²⁷ Hempling stated that the Applicants “are asking the Commission to

¹²⁴ Brown Direct at 19.

¹²⁵ Parker Direct at 67.

¹²⁶ *Id.* at 71.

¹²⁷ Hempling Direct at 26.

endorse the transmission-only model as inherently better ... than the vertically integrated model,” but “[t]he record has no facts to support that finding.”¹²⁸

143. The Commission finds that the claimed benefits from ITC's singular focus on transmission do not provide compelling support for the Transaction. The record indicates that ITC may be capable, but the Applicants have not established what level of improvement would be achieved under ITC, or what value ratepayers could expect from such improvement. Nor have the Applicants demonstrated that ITC's singular focus is necessary to improve EMI's transmission system or that ITC ownership of the EMI transmission system is the most cost effective way to improve the system. Preventive maintenance and proactive investment may well deserve greater attention, but they also come at a cost. Certainly, no evidence was presented that ITC could increase reliability without increased expenditures.

144. Moreover, the proposed Transaction would remove this Commission's jurisdiction over what O&M activities and investments are appropriate and prudent, and what costs are reasonable to pass through to customers. Fundamental questions remain whether ITC's target of “top decile” performance for the transmission system is appropriate and how efforts to meet such a target should be balanced against the required costs. Riley's testimony focusing on the internal competition for capital and the increased funding he identified for EMI to reach top quartile performance suggests that the only impediment to improved performance is funding. These legitimate concerns, including the adequacy of funding levels and

¹²⁸ *Id.* at 26.

the appropriate consideration of benefits relative to costs, would be removed from the Commission's review if the Transaction were approved, to the detriment of protecting Mississippi ratepayer interests.

145. The Commission is also concerned that by transferring EMI's transmission assets to a separate corporate entity, singularly focused on transmission, the Transaction may increase the cost of improving reliability by increasing the costs of coordination between the transmission and distribution functions. Similarly, regardless of joint exercises and the best of intentions, the Transaction cannot help but increase the cost and/or decrease the effectiveness of storm preparedness, restoration and recovery.

146. The Commission finds that the record does not contain sufficient reliable evidence to show that ITC's singular focus on transmission would improve EMI's system to the benefit of ratepayers. The record far more clearly reveals that ITC is willing to spend a lot of money on its transmission system,¹²⁹ funded, of course, by ratepayers through the more profitable FERC rate construct, and beyond the reach of state commissions.

3. ITC's Broader Planning Perspective

147. For its third category of benefits, Applicants assert that ITC's independence and broader perspective on potential transmission solutions would provide significant benefits. ITC witness Welch stated:

¹²⁹ For example, Kapfer's rebuttal testimony reveals that ITC spends substantially more money per mile of transmission line than Entergy.

...as a result of our independent model, ITC looks at the transmission system broadly to evaluate the most efficient, long-term solutions for regional system needs. ITC looks within and outside of its own footprint for solutions that will benefit customers now and in the future, and this view plays an important role in defining the projects that ITC proposes in RTO planning processes. In contrast, a transmission owner who views planning narrowly, looking only within its footprint, may propose a project that is not regionally optimized because it does not have the broader view of regional possibilities in mind.¹³⁰

148. Welch opined that this broader planning approach “enhances wholesale electricity markets by creating more robust regional infrastructure that fosters greater market liquidity...”¹³¹ EMI witness Bunting reasoned that ITC’s broader regional approach to transmission planning would align with MISO’s broader regional economic dispatch, leading to lower cost of energy to customers over time.¹³²

149. ITC witness Pfeifenberger testified that a broader perspective in project identification and planning is a key advantage that ITC offers. Pfeifenberger presented an analysis of benefits from a hypothetical portfolio of “strategic” transmission projects – projects that he stated are representative of the sorts of projects ITC could identify based on its broader planning perspective, but that Entergy likely would not, based on its more narrowly focused planning process. Pfeifenberger’s assessment showed that, for EMI’s customers, the selected set of illustrative projects would not offer significant benefits, but Pfeifenberger asserted

¹³⁰ Welch Direct at 25.

¹³¹ *Id.* at 44.

¹³² Bunting Direct at 4.

that other strategic projects benefiting Mississippi would likely be identified by ITC when it implements its planning procedures in the EOCs' footprint.¹³³

150. EMI witness Riley suggested that

whereas the EOCs as transmission owners in MISO would evaluate economic projects individually for retail customers, wholesale transmission customers, and a broader set of customers through coordinated regional and inter-regional planning efforts, ITC analysis would continue, screening for possible benefits to other entities, for instance entities such as the Southwest Power Pool, the Southern Company, and the Tennessee Valley Authority.¹³⁴

151. While also claiming that the proposed Transaction would provide benefits from ITC's broad regional planning perspective, witness Vitez acknowledged that under FERC Order 1000, RTOs have been directed to take a more active role in regional planning, and that MISO has recently developed regional projects itself for evaluation in its transmission planning process. ITC witness Jipping cited ITC construction of several regional projects in MISO and SPP, but did not identify any regional projects that were initially proposed by ITC.

152. MPUS witness Hempling testified that the Applicants provided no facts to support the assumption that only ITC planning in MISO could provide benefits from regional planning and that planning by EMI/Entergy would not.¹³⁵ Hempling pointed to MISO's own regional perspective and the Order 1000 directive that RTOs play a greater role in regional planning, as well as a lack of basis for asserting what EMI and the other EOCs would or would not do within MISO.

¹³³ Pfeifenberger Direct at 8.

¹³⁴ Riley Direct at 38.

¹³⁵ Hempling Direct at 29-30.

153. MPUS witness Parker testified that Pfeifenberger's analysis assumptions and results were speculative, that benefits relative to costs were modest overall, and that for the particular hypothetical portfolio selected, costs for EMI customers would outweigh benefits.¹³⁶ Parker concluded from Pfeifenberger's analysis that under the hypothetical portfolio, "ratepayers would take on significant up-front costs and risks in order to obtain modest net benefits in the long run."¹³⁷ Regarding ITC's claims that the Transaction would enhance MISO wholesale market benefits, Parker concluded that the claimed incremental benefits "are uncertain and speculative, and ITC has made no commitment to support its claims."¹³⁸

154. On Rebuttal, Pfeifenberger contended that the MPUS witnesses misunderstood the point of his analysis, which was not to show what ITC would actually propose but was meant "to present an indicative analysis of the potential benefits of a portfolio of strategic transmission projects that are illustrative of the types of projects" that ITC might identify and pursue.¹³⁹ Pfeifenberger also criticized the MPUS witnesses for not considering the value of potential benefits that his analysis did not quantify.¹⁴⁰

155. Both the speculative nature of Pfeifenberger's analysis, which is evident from its qualified parameters, and its one-sided focus render the testimony

¹³⁶ Parker Direct at 34-40.

¹³⁷ *Id.* at 36.

¹³⁸ *Id.* at 7.

¹³⁹ Pfeifenberger Rebuttal at 8.

¹⁴⁰ *Id.* at 7.

nearly irrelevant. An analysis that looks only to what ITC might do without any consideration of what Entergy/EMI might do within MISO offers no useful basis of comparison. The results of such a one-sided analysis do not allow the Commission to compare the benefits of differing approaches and therefore present little, if any, value.

156. The MPUS witnesses cannot be faulted for pointing out that the Mississippi project identified by Pfeifenberger had a negative impact on Mississippi ratepayers as quantified by Pfeifenberger's own analysis, or that the benefits of the overall portfolio were only marginally higher than the cost. While it may be true that certain non-quantified categories, such as storm hardening and economic development, might provide additional benefits, those additional benefits would exist for many, if not all, new transmission projects. Additionally, the categories of benefits which Pfeifenberger did quantify in dollar terms are the ones typically used to evaluate the cost/benefit of projects precisely because those benefits are more easily quantified. In fact, justification of projects as providing regional benefits using more speculative or unquantifiable measures, such as "societal benefits," is a concern for this Commission that was expressed in the MISO proceedings. MISO itself relies on more concrete measurements, such as production cost savings, when evaluating project benefits, to avoid reliance on speculative measures and promote consensus.

157. The Mississippi substation project Pfeifenberger identified in his rebuttal only highlights the speculative nature of the portfolio and raises questions

about the touted benefits of ITC's broad-based planning approach. First, the substation upgrade program was identified by a consultant working with Entergy engineers and ITC staff, raising the question of whether ITC was in fact responsible for advancing the proposal. Second, as confessed by Pfeifenberger, neither Entergy nor ITC had ever pursued the type of substation upgrade identified, proving untenable Pfeifenberger's claim that the substation upgrade "is a good example of how ITC's broad-based, innovative approach" could provide significant value to Mississippi ratepayers.¹⁴¹

158. Ultimately, Pfeifenberger's testimony, like nearly all the testimony provided by Applicants, is rendered unreliable by its canon-like acceptance and nearly rote recitation of the unsupported virtues of ITC's independent model: singular focus on transmission and broad planning perspective. Unfortunately for the Applicants, they have been unable to muster any substantial evidence that ITC would perform better for Mississippi ratepayers than would EMI operating within MISO.

159. The Commission is not persuaded that ITC has a unique regional planning perspective that would provide reliable benefits to Mississippi ratepayers relative to EMI as the transmission owner within MISO. The very benefits touted in this docket were put forth and accepted by the Commission as justification for EMI's integration into MISO, and the Applicants have presented no reliable evidence that ITC would provide incremental benefits. In the MISO docket, the

¹⁴¹ *Id.* at 57-58.

Commission concluded that “[t]he record indicates that RTO membership has been widely acknowledged as an effective way to promote the transparent, reasonable and non-discriminatory access to utilities’ transmission systems, which promotes wholesale competition.”¹⁴² Additionally, the Commission heard and accepted significant evidence on the benefits of transmission planning in RTOs, as specifically set out in the following portion of the MISO order:

Regional transmission planning is often cited as one of the boons of RTO membership, and RTOs provide a ready-made vehicle to pursue compliance with FERC Order 1000, which requires incorporation of intra-regional and inter-regional considerations in transmission planning. Offering insight on transmission planning benefits, Staff witness Dr. Shirmohammadi testified that “[p]roperly implemented, regional transmission planning practices, heavily promoted by the FERC, provide significant net long term benefits for all parties despite some short term cost allocation issues for some specific jurisdictions within the region.” Dr. Shirmohammadi further testified that

[r]egional transmission planning benefits result from the ability of an RTO to develop transmission upgrades on a regional basis. When planning transmission on a regional basis it is often possible to find transmission upgrades that meet the multiple needs of the entire region. As a result, regional transmission planning invariably leads to more cost effective transmission solutions than if individual needs of individual members of the RTO were to be addressed using local planning and solutions.¹⁴³

160. In response to Order 1000, MISO is currently enhancing its own regional planning capabilities to support the identification and evaluation of Multi-Value Projects (“MVPs”) and Market Efficiency Projects (“MEPs”). This suggests any potential advantage that ITC has over EMI in applying a regional perspective

¹⁴² Order, MPSC Docket No. 2011-UA-376 at 10 (Nov. 15, 2012).

¹⁴³ *Id.* at 15-16 (internal citations omitted).

to planning will be reduced or entirely moot in the future. Again, the Applicants have asserted benefits from the Transaction beyond those from EMI's membership in MISO, but the baseline for appropriate comparison – the costs and benefits from EMI being in MISO, as a transmission owner – are unknown and highly uncertain.

161. Good regional planning may enhance the benefits of MISO membership, but the Applicants have not established either that regional planning would be different under ITC than under EMI ownership of transmission, or that any difference would necessarily accrue to the benefit of Mississippi ratepayers.

162. Moreover, planning based on a regional perspective beyond the Entergy system is not necessarily a good thing for EMI ratepayers. For example, a regional perspective might promote increased export capability from the Entergy system to the north. The Commission is mindful of this real-world issue, especially in light of massive coal retirements occurring in the traditional MISO footprint and concerns about natural gas infrastructure and available capacity. The Commission has been engaged on this issue with MISO through the Organization of MISO States ("OMS").

163. The Commission finds that the applicants have failed to present reliable evidence that ITC's regional and broad-based planning perspective would provide incremental benefits beyond Entergy's and EMI's participation in MISO.

4. Increased Financial Strength

164. EMI witness Bunting testified that EMI and the other EOCs, along with electric utilities nationally, face large capital expenditure requirements over

the next five to ten years, and that the ITC Transaction offered a way to help manage such challenges.

Multiple factors are coming together to create a need for capital investment that may be unprecedented and certainly has not been experienced since the construction of major base load nuclear and coal generation in the aftermath of the 1970s energy crisis. Going into that previous major capital expansion, utilities generally carried substantially better credit ratings than the EOCs and many utilities do today. Factors that may contribute to the EOCs' extraordinary need for capital investment include aging infrastructure across all utility functions; new requirements relating to reliability, security, and environmental compliance; and grid modernization expenditures for demand response, smart meters, and distributed generation. The ITC Transaction will allow the EOCs to focus their attention and capital on meeting these challenges in their respective distribution and generation businesses.¹⁴⁴

165. EMI witness Lewis testified that the ITC Transaction is important to maintaining the financial strength of EMI and the other EOCs in the face of substantial projected capital expenditure requirements. Lewis explained that, similar to other electric utilities nationally, the EOCs' capital spending has trended higher over the past decade and is expected to continue at high levels going forward. In the absence of the ITC Transaction, the EOCs expect the need to finance capital expenditures of nearly \$13 billion over the seven years 2012-2018, amounting to more than 80% of the 2011 aggregate rate base.¹⁴⁵ Lewis stated that the ITC Transaction would improve the EOCs' financial strength and flexibility by reducing capital spending requirements, strengthening cash positions and reducing debt levels.

¹⁴⁴ Bunting Rebuttal at 7.

¹⁴⁵ Lewis Direct at 6-7.

166. Lewis described that because of substantial projected transmission expenditure requirements and the relatively long life over which transmission assets are depreciated, the EOCs' transmission business is projected to cause negative cash flow in coming years, stressing the EOCs' balance sheets, reducing financial flexibility and putting the EOCs' credit ratings at risk.¹⁴⁶

167. Lewis stated that the ITC Transaction would improve EMI's cash flow and lower its debt obligations and thereby enable EMI to respond effectively to future capital investment challenges. The ITC Transaction would improve the financial position of the EOCs in aggregate, having a positive effect on EOC credit ratings and serving to reduce the likelihood of a credit downgrade that would increase borrowing costs.¹⁴⁷

168. ITC witness Bready testified that the Transaction would provide several significant financial benefits. Bready identified one immediate benefit from ITC's high credit quality, which would allow, as part of the Transaction, for the refinancing of debt currently held by EMI and the other EOCs at lower interest rates. Bready also stated that transferring the ownership of the Entergy's transmission assets to ITC would reduce the strain on the EOCs' collective balance sheets, and would increase Entergy's financial flexibility to fund its generation and distribution businesses. Bready asserted that ITC's business model was better equipped than Entergy's to address the significant projected transmission-related

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.* at 22-27.

capital investment requirements.¹⁴⁸ “ITC is better equipped than Entergy to meet the sustained and significant transmission investment requirements that are projected because of ITC’s rate construct and higher credit quality.”¹⁴⁹

169. Bready elaborated on the financial benefits directly attributable to ITC’s rate construct, including enhanced credit quality, greater access to capital, and improved liquidity. Bready testified that ITC’s solid investment grade credit ratings enable ITC to attract investors to invest in ITC and the debt of its operating companies, thereby allowing ITC access to lower-cost capital. Bready described two main reasons that ITC’s operating companies have better credit ratings than the EOCs and most vertically-integrated utilities:

First, ITC’s operating companies have predictable cost recovery mechanisms that ensure timely recovery, of and on, capital investment in the business and an ability to earn authorized returns. Second, ITC’s operating companies are more conservatively capitalized than the EOCs with equity ratios of up to sixty percent as a percentage of total capitalization versus approximately fifty percent for the EOCs.¹⁵⁰

170. Bready testified that he expected the new ITC operating companies created to own the transferred Entergy transmission assets would have lower debt costs than the EOCs. He calculated potential savings attributable to ITC Mississippi of \$18 million to \$22 million on an NPV basis over five years.¹⁵¹ These estimates are based on the assumption that long-term debt issued as part of the Transaction to retire existing EOC debt would be at market rates of approximately

¹⁴⁸ Bready Direct at 16.

¹⁴⁹ *Id.* at 17.

¹⁵⁰ *Id.* at 19.

¹⁵¹ *Id.* at 20.

3.5%, while the retired debt would be at a weighted average rate of approximately 6%. The analysis included an assumed interest rate advantage of 60 basis points (0.60%) for ITC Mississippi over EMI during the projected period.¹⁵²

171. Bready testified that ITC's access to capital would provide financial liquidity to fund expected and unexpected transmission investments, including those resulting from storm damage.

172. Bready explained that the ITC operating companies enjoyed strong credit ratings, low borrowing costs, access to capital and financial liquidity as a result of the ITC rate construct. The rate construct consists of FERC rate regulation, including MISO's formula-based rate tariff, which ITC applies on a forward looking basis with an annual true-up mechanism, MISO's 12.38% allowed ROE, and the FERC-approved capital structure for ITC's operating companies of approximately 60% equity and 40% debt. As described above, this rate construct differs significantly from that currently allowed by the Commission for EMI. Bready quoted the assessment of Mood's Investors Service from April 20, 2012: "[ITC Operating Companies] supportive regulatory framework provides a robust set of recovery mechanisms and healthy returns resulting in strong credit metrics...."¹⁵³ Bready further stated that "ITC's rate construct enables its operating companies to sustain significant levels of needed capital investments over long durations."¹⁵⁴

¹⁵² *Id.* at 21-23.

¹⁵³ *Id.* at 24.

¹⁵⁴ *Id.* at 36

173. MPUS witness Parker testified that the Applicants' claimed financial rationale for the Transaction is exaggerated and misleading. Parker stated that, "According to Entergy's Form 10-Ks over the past ten years, Entergy has not identified the need to raise significant amounts of transmission capital as a concern and has never mentioned an inability to fully fund its transmission investments."¹⁵⁵

174. Parker testified that most utilities in North America view transmission investments positively because transmission investments have low inherent risk, they diversify the overall risk of vertically integrated utilities, serve to stabilize revenue requirements, and provide an investment opportunity in a low growth economy.¹⁵⁶ Parker also asserted that the long depreciation period for transmission investments that Entergy witnesses identified as a source of prospective cash flow challenges is often viewed as an advantage by transmission owners and investors.

175. Parker acknowledged the potential that the EOCs' transmission business could have negative cash flow in coming years, as characterized by EMI witness Lewis. Parker stated that this would be true for any business in which investments with long depreciation periods are scheduled to rise over time, and that this is not unusual for transmission investments. Parker also testified that possible underfunding of the EOCs' transmission business from 2005 through 2009 may be partly responsible for the expected higher required investment levels and

¹⁵⁵ Parker Direct at 6-8.

¹⁵⁶ *Id.* at 49.

associated negative cash flow over the next few years.¹⁵⁷ Parker suggested that in the absence of the ITC Transaction, if EMI were concerned about potential financial strain it could request the Commission to allow a shorter depreciation period.

176. MPUS witness Hempling testified that the benefit claimed by Applicants from ITC's strong balance sheet and credit quality is not meaningful without a commitment from ITC to take no action that would weaken its balance sheet. Based on Hempling's testimony, the ITC Transaction cannot be construed to be beneficial in mitigating EMI's financial uncertainties if the source of that mitigation – ITC's strong balance sheet – is itself uncertain.¹⁵⁸ Hempling argued that ITC faces significant risk from the very business model it characterizes as an advantage. ITC's singular focus on transmission combined with dependence on the FERC-approved rate construct creates risk for ITC, as do the changes in FERC policy associated with Order 1000.¹⁵⁹

177. Hempling disputed the claimed Transaction benefit that ITC ownership of EMI's transmission assets would reduce competition for capital investment in transmission. Hempling observed that there is no evidentiary basis for assuming that transmission investments in Mississippi would not face competition for capital within ITC, or competition for capital inherent in the capital markets themselves, which affects EMI as well as ITC.

¹⁵⁷ *Id.* at 54.

¹⁵⁸ Hempling Direct at 62.

¹⁵⁹ *Id.* at 64.

178. EMI has characterized the Transaction as relieving it of the burden of addressing the combined challenges of meeting investment needs for transmission as well as generation and distribution. Yet it is essential to recognize that the transaction cannot relieve the burden on ratepayers of the combined investment needs. Moreover, the Transaction would eliminate the Commission's jurisdiction over determining what those needs are, how and when they should be addressed, and what costs should be borne by ratepayers.

179. EMI has indicated that it does not foresee difficulty accessing capital to meet its projected investment needs. The fact that significant investments in transmission could result in negative cash flow for EMI is a function of the long-depreciation period for such assets, and does not change the fact that they are investments that earn a regulated return at low inherent risk. EMI has not approached the Commission with concerns about cash flow challenges, and until the Commission is presented with a demonstration that there is a problem that needs to be addressed, it cannot conclude that the proposed ITC Transaction provides value in resolving such a problem, much less that it is the only or preferable solution.

180. ITC witness Bready's statement that "ITC is better equipped than Entergy to meet the sustained and significant transmission investment requirements that are projected because of ITC's rate construct and higher credit quality" concisely states the Applicants' argument, but at the same time demonstrates its essentially circular nature. To the extent that ITC enjoys any

greater financial strength than EMI and Entergy Corporation, it is the product of its “robust set of recovery mechanisms” that ensure higher revenue from its asset base and ongoing investments. Higher revenues require higher customer rates, so the alleged benefit of ITC’s financial strength is a direct function of higher rates and not a unique ITC attribute that provides value as a balance against increased rates. Similarly, to the extent that the favorable regulatory environment offered by FERC jurisdiction supports ITC’s credit rating, it comes at the expense of removing this Commission’s jurisdiction over what costs are passed through to Mississippi ratepayers.

181. The Commission also gives weight to MPUS witness Hempling’s concerns that ITC’s financial strength going forward is subject to significant uncertainty. ITC’s financial strength is fully dependent on continued favorable treatment under FERC regulation, and is highly exposed to any unfavorable changes to the FERC rate construct. The fact that ITC Mississippi would, like the other ITC operating companies, be capitalized via a highly leveraged holding company may bolster ITC Mississippi’s credit rating when ROE is high and interest rates are low, but would serve to increase exposure to adverse changes.

182. EMI witness Lewis asserted that the Transaction would provide greater financial flexibility in addressing capital expenditure challenges than alternative approaches, because “[t]he Transaction permanently relieves EMI of the

investment needs of the transmission function....”¹⁶⁰ This is true in a narrow sense, but in a broader one customers would *not* be relieved of supporting investment needs but would, rather, be required to support increasing transmission investments at a higher price, i.e., through rates reflecting ITC’s higher WACC.

183. Finally, EMI witness Lewis conceded that the present and expected challenges “are not unique” and that Entergy and EMI will be able to execute their spending plans, which would include all reliability projects, absent “unexpected circumstances.”¹⁶¹ Lewis reiterated that transmission and transmission investment is not a strain on Entergy absent unforeseen circumstances.¹⁶² He went on to note that EMI has engaged in prudent management of its transmission business and specifically cited robust transmission investment in EMI over the past 7 years.¹⁶³

184. Regarding flexibility in the face of changing circumstances, the Commission finds incredible Lewis’s testimony that the availability of riders and securitization to meet utility needs is hypothetical, considering EMI, as well as other public utilities, presently utilizes several riders often promoted as beneficial to EMI. Additionally, riders and securitization are used to prepare for and aid in storm recovery. Finally, recent history shows Mississippi’s willingness to use securitization to offset the cost of expensive projects.

¹⁶⁰ Lewis Rebuttal at 8.

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* at 15.

¹⁶³ *Id.* at 10-12.

185. Fundamentally, EMI's total capital expenditures are not constrained by the number of balance sheets available to support the expenditures, but by the customer rates deemed to be just and reasonable. The Commission finds that the Applicants have failed to advance reliable evidence that the Transaction would provide greater financial strength that would ultimately serve to further the public interest of Mississippi.

D. Costs, Benefits and Risks

1. Estimated Costs and Benefits to Ratepayers

186. ITC witness Bready testified that the move to the ITC rate construct would increase costs to EMI customers because it would increase revenue requirements on existing transmission assets, but that these cost increases would be offset by other benefits of the Transaction. However, Applicants, for the most part, fail to quantify these benefits and more particularly, fail to show how the purported benefits are incremental to Entergy's and EMI's membership in MISO. Additionally, even the quantified benefits, such as ITC's assumed lower cost of debt, do not fully offset the rate increase caused by the FERC rate construct.

187. EMI witness Lewis presented an estimate that the retail rate impact for EMI customers would be an increase of approximately \$70.8 million over the five years 2014-2018 on a nominal basis. "This is comprised of the retail WACC effects due to ITC's FERC rate construct, equaling \$49.5 million, in addition to the effects for EMI retail customers due to the accelerated elimination of Service Schedule

MSS-2, equaling \$21.3 million.”¹⁶⁴ EMI customers would also bear costs from the proposed shift to a forward-looking test year for transmission rate setting under ITC ownership.

188. MPUS witness Parker disputed several elements of the Applicants’ rate impact assessment. Parker testified that rather than the short-term, five-year horizon used by the Applicants in estimating rate impacts, a long-term analysis using a thirty-year time frame is the proper perspective for evaluating the effect of the proposed Transaction on customer rates. Parker also took issue with the debt rates assumed in the analysis presented by ITC witness Bready, and with the fact that Bready’s short-term analysis ignored effects from an increasing transmission rate base over the longer term. Parker presented the results of an alternative analysis over thirty years, with lower EMI debt rates (i.e., a smaller ITC debt cost advantage) for future transmission investments, and three rate base growth scenarios. Parker’s results indicated that the \$49.5 million nominal (\$39.0 million NPV) impact over five years indicated from Bready’s analysis would be \$348.2 million nominal (\$126 million NPV) measured over thirty years.¹⁶⁵

189. For scenarios with higher rate base growth, the impact on customer rates of ITC’s rate construct relative to EMI’s is much greater. For example, Parker noted that if EMI’s transmission rate base grew by 5% over a thirty year period under ITC ownership the rate impact would be an increase of approximately \$813

¹⁶⁴ *Id.* at 29.

¹⁶⁵ Parker Direct at 18.

million on a nominal basis or \$222 million NPV. While Parker's scenarios are meant to illustrate the ratepayer impact of the FERC rate construct with hypothetical rate base growth, judging by the collective testimony of Applicants, an increase in transmission rate base is a certainty; therefore, a greater impact to Mississippi ratepayers from ITC ownership is also a certainty.

190. Regarding the Transaction benefits estimated by ITC witness Pfeifenberger, Parker testified that these were speculative and uncertain, and noted that under Pfeifenberger's selected hypothetical set of strategic transmission investments, generation production costs for EMI are actually shown to *increase*. Parker acknowledged that there might be additional benefits to EMI under Pfeifenberger's hypothetical build scenario that were not quantified, but concluded that it was virtually certain that costs for EMI customers would outweigh benefits, since EMI would likely be allocated costs associated with the strategic projects that would offset the non-quantified benefits.¹⁶⁶

191. Additional rebuttal testimony, including new analysis, was submitted by Christopher Kapfer on behalf of ITC. Kapfer presented an analysis indicating potential cost savings from economies of scope and scale resulting from the Transaction. Kapfer evaluated projected savings in different cost categories for six past mergers that included transmission operations. Kapfer estimated that savings might range between \$12 million and \$28 million across the Entergy region.

¹⁶⁶ *Id.* at 40. The Commission has sufficiently addressed and rejected Pfeifenberger's testimony as previously discussed in more detail, *supra* at 67-69.

192. Parker critiqued the analysis and results presented by Kapfer, concluding that:

Kapfer's estimated cost savings are as uncertain and speculative as the Applicants' original estimates of ratepayer benefits because his estimated savings (i) are based on a very limited number of other systems, (ii) are based on estimated, not achieved, savings from other mergers, (iii) were not verified for Entergy, and (iv) ignored key factors that affect economies of scale and scope. (Parker Surrebuttal Testimony, at 3:12-16)

193. Parker pointed out a number of factors not accounted for in Kapfer's analysis that draw into question the potential for significant merger economies. Among these are the fact that the ITC MidSouth service territory would be physically distant from ITC's other transmission territories, and that transmission design criteria for the ITC MidSouth transmission system is different from ITC's other systems because of very different climatic conditions that the systems have to contend with.¹⁶⁷

194. The Joint Applicants have proposed a series of commitments including a near-term Rate Mitigation Plan, and an ITC Ownership Benefit Calculation that would be used to determine whether rate mitigation should be continued beyond an initial five year period (as detailed in Bready's Rebuttal Testimony). EMI and ITC have proposed to provide a total of \$74.1 million to offset the rate effects of the Transaction on Mississippi retail and wholesale customers over the first five years after the Transaction closes.¹⁶⁸ The Joint Applicants assert that this mitigation will

¹⁶⁷ Parker Surrebuttal at 9.

¹⁶⁸ Lewis Rebuttal at 29-31, and Lewis Affidavit at 3.

fully offset the rate effects of ITC's FERC rate construct over five years as well as the effect of accelerated elimination of Service Schedule MSS-2. In addition, EMI has proposed to provide bill credits to retail customers totaling \$6.7 million over a three-year period following closing of the Transaction, which is intended to compensate customers for the opportunity costs associated with moving to ITC's forward test year construct.¹⁶⁹

195. The proposed Ownership Benefit Calculation would be performed by a third party evaluator at a point near the end of the initial five year period, and would, for a given annual period, compare estimated benefits under ITC ownership to the impact of ITC's higher WACC (as well as the annualized cost of any transmission project proposed by ITC and approved by MISO as a Market Efficiency Project). If the calculation showed an annual benefit greater than cost when first performed, or at any subsequent calculation, performed at ITC's discretion, the Rate Mitigation Plan would terminate. Until benefits were shown to exceed costs by the proposed methodology, rate mitigation would continue at a level offset by calculated benefits.¹⁷⁰

196. The Commission considers it appropriate to evaluate the rate impacts of the Transaction over the longer term, as recommended by MPUS witness Parker. The Transaction would permanently remove the Commission's jurisdiction over the prudence of transmission expenditures and the related costs imposed on retail

¹⁶⁹ Lewis Rebuttal at 37.

¹⁷⁰ Bready Rebuttal at 28.

customers, and it would permanently enshrine FERC jurisdiction and the FERC rate construct. ITC is a confident and vocal advocate of its business model, and of the necessity of maintaining supportive regulatory treatment for independent transmission, so there is good reason to assume that the ITC rate premium would continue, probably permanently. Parker estimated that the gross impact on rates of the Transaction would be a minimum of \$348 million on a nominal basis and \$126 million net present value (NPV) over 30 years, because of the shift to the FERC rate construct; this amount would necessarily increase as the rate base grows. The Applicants disputed some of the assumptions underlying Parker's long-term rate impact analysis, but did not present a modified long-term estimate, and instead offered the rate mitigation plan described in Bready's Rebuttal Testimony.¹⁷¹ The Commission finds Parker's calculation to be reasonable as an estimate of long-term rate impacts, absent mitigation.

197. The Commission agrees with Parker, for the reasons identified in his rebuttal testimony, that the cost savings analysis of ITC witness Kapfer is uncertain, speculative and highly flawed. The Commission rejects Kapfer's testimony of cost savings as unreliable.

198. MPUS witness Parker provided a critique of the ITC Ownership Benefit Calculation, and itemized certain methodological flaws and lack of specificity in the implementation protocol that would bias the calculation in ITC's

¹⁷¹ Both Parker and SMEPA witness Solomon took issue with ITC's cost of debt assumptions relative to EMI.

favor.¹⁷² The Commission agrees that certain particulars of the methodology are problematic. The overarching problem with the proposed benefit calculation is that it assumes that any transmission project implemented beyond the portfolio specified for the Economic Base Case would not have been pursued under EMI ownership of the transmission system. In fact, MISO could identify the project and require ITC to build it (or even require another entity to build it), and it would still be counted to ITC's benefit in the proposed calculation. MPUS witness Hempling argued that Applicants have failed to establish that the *status quo* requires improvement, yet assume that any future improvement proposed by ITC would not be identified by EMI or MISO in the absence of the Transaction.¹⁷³

199. The Commission finds that this failing alone makes the proposed benefit test unacceptable for determining the applicability of extended rate mitigation. Since future modifications to the current transmissions plan are inevitable (under ITC or under EMI), the complete and thenceforward permanent shift to the FERC rate construct is likewise inevitable under the proposal, whether calculated benefits result from ITC actions or not.

2. Value of the Transaction to ITC and to Entergy Shareholders

200. The Applicants do not address directly why ITC is pursuing the Transaction, but its value to ITC and current ITC shareholders can be inferred from the fact that ITC Holdings will approximately double the size of its aggregate

¹⁷² Parker Surrebuttal at 7-8.

¹⁷³ Hempling Surrebuttal at 5.

business, and from the fact that the negotiated compensation in ITC stock that would be issued to existing Entergy shareholders represents a value significantly above the book value of Entergy's transmission assets. As described by MPUS witness Hempling, the Transaction allows ITC to "unlock" a higher profit potential in transmission assets historically used for state-jurisdictional bundled service by unbundling them and moving them to FERC jurisdiction. This jurisdictional shift to the FERC rate construct instantly increases revenue, supported by retail and wholesale customers of the EOCs, without any immediate change to the transmission service provided to those customers. It also provides the opportunity to earn the higher FERC-approved revenue rates on future investments in the EOCs' service territories, possibly including FERC incentives under FERC Order No. 679.¹⁷⁴

201. A consequence of the fact that ITC would be able to generate greater revenue from the transmission assets than Entergy is that the assets are worth more to ITC than they are to Entergy. It is therefore to be expected that ITC would be willing to pay, and Entergy would demand, a premium for the assets.

202. MPUS witness Parker estimated that based on May 1, 2013 closing stock prices of \$90.94 per share for ITC and \$71.39 for Entergy, the Transaction would provide Entergy shareholders with a net benefit of \$2.5 billion.¹⁷⁵ According to ITC's SEC filing associated with Amendment No. 2 to the Transaction

¹⁷⁴ Hempling Direct at 63.

¹⁷⁵ Parker Direct at 21-26.

agreement, dated January 18, 2013, ITC estimated that at Transaction close 52,786,090 ITC shares would be issued to Entergy shareholders, representing 50.1% of outstanding ITC shares. The fair value of the shares was estimated as the then current ITC stock price of \$78.98 per share, less \$13.59 per share to account for the approximately \$700 million recapitalization that ITC would effect prior to closing, for a net value of approximately \$60.50 per share. This fair value times the number of shares gives a total value of shares to be received by Entergy shareholders of \$3.40 billion.

203. Of course, Entergy would be transferring its transmission assets to ITC at the same time, so Entergy's stock price would be expected to fall, resulting in a partial offset in value to Entergy shareholders. Based on data filed with the SEC on the value of Entergy's transmission assets, Parker estimated that transmission assets make up approximately 12.5% of Entergy's total asset value. Parker assumed that equity investors would value transmission assets the same as other corporate assets, and that Entergy's stock price would therefore fall by 12.5% at Transaction close. At January 19, 2013, the value of such a reduction would be \$1.42 billion, implying a net value gain to Entergy shareholders from the Transaction of \$1.98 billion ($=\$3.40 \text{ billion} - \1.42 billion). Parker also performed the calculation as of May 1, 2013, finding an implied gain to Entergy shareholders of \$2.5 billion. Given subsequent movements in ITC and Entergy stock prices, the net gain would be even higher as of December 1, 2013.

204. EMI witness Bunting testified that there were various methods that could be used to estimate the Transaction value to Entergy shareholders, including some that would produce much lower values. Actual results would depend on the respective stock prices for ITC and Entergy at Transaction close, and other factors than the Transaction itself could affect the price levels.

205. EMI witness Lewis asserted that tying the rate effects of the Transaction to the gain that would be experienced by Entergy or ITC shareholders “is patently false.”¹⁷⁶ EMI further argued that potential shareholder benefit “has no bearing on the public interest considerations applied by the Commission in previous transfer cases.”¹⁷⁷

206. The Commission cannot accept Lewis’s flat denial that Entergy shareholders stand to gain because ITC can generate more revenue from Entergy’s transmission assets under the FERC rate construct. Lewis’s categorical statement is contradicted by the evidentiary record, basic economic reasoning and his own fiduciary responsibilities to Entergy shareholders. The Commission is fully persuaded that ITC’s rate construct will generate more revenue from EMI’s transmission assets than EMI could expect with the assets under continued state jurisdiction. The Commission concludes that ITC has the incentive to negotiate, and did negotiate, to pay a premium for the transmission assets relative to what they are worth to Entergy shareholders. Likewise, the Commission finds that

¹⁷⁶ Lewis Rebuttal at 25.

¹⁷⁷ EMI Post-Hearing Brief at 16.

Entergy had appropriate understanding of the value of the assets to ITC, the fiduciary requirement to negotiate commensurate compensation for its shareholders giving up ownership of the assets, and that Entergy did negotiate the Transaction terms in this manner. The fact that there is no literal payment, and no actual asset sale, because of the way the RMT transaction is structured makes no difference to the common sense understanding of this Commission that EMI and the other EOCs are in fact selling their transmission assets to ITC and that shareholders will be well-compensated.

207. The Commission recognizes that there is some uncertainty regarding what financial gain Entergy shareholders could expect to realize from the Transaction. However, the Commission rejects the contention of the Applicants that the magnitude of the gain is so uncertain that it is not reasonably knowable, or that gain is likely to be minimal. The Commission finds Parker's methodology to be straightforward, his reliance on relevant data from SEC filings by ITC and Entergy to be appropriate, and his assumptions to be reasonable. The Commission concludes that the net value to Entergy shareholders from the Transaction would be greater than \$2 billion, and perhaps significantly greater.

208. The Commission agrees that the gain expected by Entergy shareholders does not in itself weigh against the Transaction being in the public interest. It is nonetheless relevant to the matters under consideration for several reasons. It provides confirmation that Entergy has ample financial motivation to pursue the transaction, and it provides evidence that Entergy has been diligent in

ensuring that shareholders would benefit from the Transaction. This is in stark contrast to the lack of evidence that Entergy or ITC have properly evaluated the effect of the Transaction on ratepayers. The extent to which Entergy shareholders stand to gain from the Transaction also corroborates that the EOCs' transmission assets are worth more to ITC than to Entergy, and is consistent with the conclusion that the assets will produce significantly greater revenue under the FERC rate construct. The estimated benefit to Entergy shareholders provides important supporting evidence that under the ITC Transaction EMI ratepayers would pay higher rates for transmission service over the long term.

4. Apportionment of Risk

209. MPUS witness Parker concluded that under the ITC Transaction "[t]he increase in transmission revenue requirements and rates is certain, and is in contrast to the claimed ratepayer benefits that are uncertain, speculative, and have no company commitment behind them."¹⁷⁸ Parker further testified that he is not convinced that EMI needs to transfer its transmission system to ITC to achieve better performance.

210. Parker explained that the risk of the claimed benefits of the Transaction not being achieved would be shifted to EMI ratepayers.

Under the proposed Transaction, ITC shareholders will be entitled to the FERC-approved rate construct and resulting revenues regardless of actual performance. Hence, ITC shareholders bear minimum risk associated with not achieving the benefits under the current FERC rate construct, while ratepayers bear the entire risk that the claimed

¹⁷⁸ Parker Direct at 5.

benefits will never materialize, or appear later and lower than hoped for. In fact, desirable results in terms of improved reliability, congestion relief, line loss reduction, and access to renewable generation may never be achieved, but ITC shareholders will enjoy higher revenues due to the ITC rate construct. Without tangible and measurable milestones, performance standards, and other requirements for ITC Midsouth, this transaction raises rates without compensating benefits.¹⁷⁹

211. MPUS witness Hempling similarly pointed to cost increases that are certain for EMI ratepayers following the ITC Transaction, and the potential for additional increases in rates relative to continued EMI ownership as the rate base grows, while claimed future savings from operational and market efficiencies are vague, generic and non-committal.¹⁸⁰ Hempling stated that the FERC-jurisdictional formula rate that would apply under ITC ownership of transmission would weaken ITC's incentive to reduce operating costs, because, even if FERC directs MISO to amend its rate protocols to facilitate challenge,¹⁸¹ challenges to the costs flowing through the rate formula would be labor-intensive and expensive.¹⁸²

212. As discussed above, Kapfer provided testimony that the Transaction could provide millions of dollars in benefit through economies of scope and scale in the combination of the Entergy transmission business with ITC's. Parker testified that Kapfer's estimates were flawed and highly uncertain.

¹⁷⁹ Parker Direct at 41.

¹⁸⁰ Hempling Direct at 50.

¹⁸¹ Such modification of the MISO rate protocols is a possible outcome under the open FERC Docket No. EL12-35-000.

¹⁸² Hempling Direct at 53.

213. In his rebuttal testimony, EMI witness Bunting disagreed with the MPUS witnesses' critique of the Transaction as imposing certain costs and uncertain benefits.

The MPUS witnesses are attempting to impose a certainty requirement that is impossible to meet, and which obscures the plain fact that the benefits of congestion relief are real and valuable. Quantifying congestion relief benefits would require ITC to predict the future, which it cannot do.¹⁸³

214. ITC witness Pfeifenberger defended his analysis of benefits resulting from a hypothetical set of strategic projects that ITC might be more likely to pursue than EMI. Pfeifenberger quoted from a recent U.S. Court of Appeals decision that upheld the portion of MISO's tariff that apportions costs for so-called multi-value projects ("MVPs"). The quote from the decision is:

Other benefits of MVPs, such as increasing the reliability of the grid, also can't be calculated in advance, especially on a subregional basis, yet are real and will benefit utilities and consumers in all of MISO's subregions.¹⁸⁴

215. The Commission has concluded that there is ample evidence that the Transaction will result in higher customer rates for transmission service over the long term. It is also an undisputed fact the Transaction will remove this Commission's jurisdiction over EMI's transmission assets and move those assets under FERC jurisdiction, which provides ITC with its favorable regulatory

¹⁸³ Bunting Rebuttal at 9.

¹⁸⁴ Pfeifenberger Rebuttal at 37. Footnote reference: United States Court of Appeals For the Seventh Circuit, Nos. 11-3421, 11-3430, 11-3584, 11-3585, 11-3586, 11-3620, 11-3787, 11-3795, 11-3806, 12-1027 (Petitions to Review Orders of the Federal Energy Regulatory Commission, Nos. ER10-1791-000, ER10-1791-001, ER10-1791-002), Argued April 10, 2013-Decided June 7, 2013, pp. 12-13.

treatment. Applicants have argued that any increase in rates will be at least matched by benefits in increased reliability and enhanced benefits of MISO system operation and markets, and that ITC's proposed Rate Mitigation Plan and Ownership Benefits Test will ensure this. The Commission finds that the Applicants have not presented adequate evidence to demonstrate that the benefits to ratepayers of ITC ownership of transmission would exceed the imposed increase in rates. As discussed above, the proposed Rate Mitigation Plan and Ownership Benefits Test are deficient and unreliable as means to ensure the public interest. The overarching failing of the proposed benefits test is that it cannot determine whether any future transmission benefits are uniquely the result of ITC ownership. In the absence of Commission authority to determine whether future investments and operating costs are justified and appropriately borne by ratepayers, the Commission cannot now conclude that costs would likely be matched by benefits in the long term, and that achieving those prospective benefits *requires* the Transaction.

216. While ratepayer net benefits are in doubt, there is substantial certainty that the transmission assets are worth more to ITC than to Entergy and that the Applicants have negotiated the Transaction to compensate Entergy shareholders commensurately. There is also absolute certainty that the Transaction would remove the Commission's jurisdiction over transmission cost of service. The Commission consequently agrees with the MPUS witnesses that the

Transaction would result in ratepayers shouldering the lion's share of risk, and finds that this is not in the public interest.

VI. Conclusion

217. An examination of state law, public policy and the costs/benefits of the Transaction compared to EMI's membership in MISO lead this Commission to the conclusion that the Joint Application should be denied.

218. Even given the clear impediments to approval, Applicants take their arguments a step further to assert that, beyond the quantifiable and qualitative benefits and costs of the Transaction, there is an overarching policy question that should guide the Commission in determining whether the Transaction is in the public interest. This policy question is the desirability of moving to a new paradigm for electric transmission in the Entergy region – that of independent ownership and operation. EMI witness Bunting states:

The Commission's role in evaluating transactions like the one in this case necessarily involves policy considerations and application of vision and judgment about benefits that cannot be definitively quantified.¹⁸⁵

219. ITC witness Bready opines:

The nature of the benefits stemming from the transaction reflect the fact that the ultimate outcome will be far more than simply the transfer of ownership of transmission facilities, but rather a significant strategic realignment that will better position that region to meet its energy challenges for the future. Analyzing this transaction only from the perspective of quantitative benefits versus quantifiable costs really misses the point of the transaction, to the detriment of customers in Mississippi.¹⁸⁶

¹⁸⁵ Bunting Rebuttal at 2.

¹⁸⁶ Bready Rebuttal at 15.

220. Just as straightforwardly as Applicants make their claim, Staff witness Hempling points out that there is simply no evidence in the record to support Applicants claim that the independent model is superior to the vertically integrated model.¹⁸⁷

221. Contrary to Applicants' claim, Hempling, in asking this Commission to consider the question of what is the public interest in transmission ownership, has, through his examination of the attributes of good transmission regulation, revealed the shortcomings of the independent model (of which ITC is the exemplar) and by inference the vitality of the vertically integrated model.¹⁸⁸ The Commission finds his view compelling.

222. The Commission approved EMI's move to MISO and continues to view the integration as a prudent transitional approach to regional concerns while maintaining the necessary oversight and appreciation for local matters and local accountability. Therefore, the Commission declines the Applicants invitation to abandon the vertically integrated model and will deny the Joint Application. For the reasons state herein, it is therefore,

ORDERED that the Joint Application be, and is hereby, denied. It is further,

ORDERED that EMI shall work with the Staff to prepare a plan for transmission investment, maintenance and operation, including identifying best practices and targeting performance goals, which will be developed in conjunction

¹⁸⁷ Hempling Direct at 26.

¹⁸⁸ Hempling Direct at 8-13.

with EMI's restructuring post-system agreement. An initial plan shall be filed in MPSC Docket No. 2013-UA-28 within 90 days after EMI's integration in MISO. It is further,

ORDERED that EMI shall be allowed to re-file, in MPSC Docket No. 2013-UA-28, its proposal to change its corporate structure to a limited liability company, and that the membership interests of the new Entergy Mississippi, LLC, along with those of the other EOCs and their supporting affiliates, be owned by a new Entergy holding company and first-tier subsidiary of Entergy Corporation.

SO ORDERED this the 10th day of December, 2013.

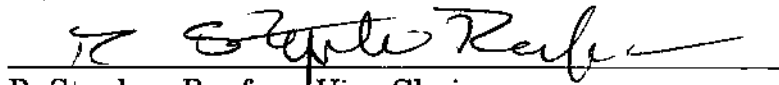
This Order shall be deemed issued on the day it is served upon the parties herein by the Executive Secretary of this Commission who shall note the service date in the file of this Docket.

Chairman Lynn Posey voted AYE; Vice Chairman R. Stephen Renfroe voted AYE; and Commissioner Brandon Presley voted AYE

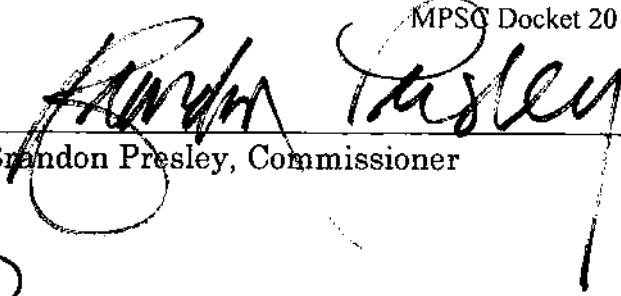
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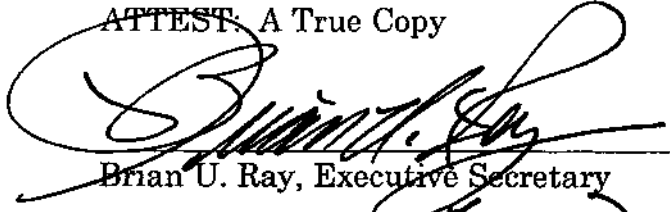
Lynn Posey, Chairman



R. Stephen Renfroe, Vice Chairman


Brandon Presley, Commissioner

ATTEST: A True Copy


Brian U. Ray, Executive Secretary

Effective this the 10th day of December 2013.

