BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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| In the Matter of the Amendment of the Commission's Rule Regarding Applications for Certificates of Convenience and Necessity | ) ) ) ) | File No. EX-2018-0189 |

**COMMENTS OF DOGWOOD ENERGY LLC**
**REGARDING PROPOSED RULE 4 CSR 240-20.045**

Dogwood Energy LLC supports the proposed rule regarding electric utility applications for certificates of convenience and necessity. Further, Dogwood suggests in these comments refinements to that proposal.

Dogwood has advocated for improvements to these rules since at least 2014, to better position the Commission to fulfill its duties under 393.170 RSMo. Dogwood submits herewith its comments from the immediately preceding rulemaking effort regarding these rules to provide context and to provide legal arguments in support of the Commission's proposed changes and these comments. The proposed rule that is the subject of this proceeding adopted many of the suggestions Dogwood offered in the prior round.

Also attached hereto is a redlined version of the current proposed rule, suggesting specific changes to the Commission's proposal. These changes seek to accomplish the following:

1. Directly state that these types of applications are required under 393.170 RSMo (see proposed new subsection (2)).

2. Avoid the confusion that could result from having "asset" defined in a way that does not refer to all pertinent assets – while also making clear with other edits throughout the proposal that there are different rules for different types of assets.

3. Clarify the limits of the exclusion of certain RTO transmission projects from the definition of construction (see proposed 6(C)).

4. Require evidence of competitive bid procedures for acquisitions consistent with the proposal for construction (see proposed (5)(E)).

5. Add references to leases in appropriate places, consistent with definition of "acquire" (see proposed (4)(E) and (5)(C).

6. Make clear that statutory provisions regarding municipal consent must be met (see proposed (3)(B) and (4)(F) and (G)).

7. Suggest other relatively minor clarifications throughout the proposal.

Dogwood also notes that by carving out "new transmission lines within an authorized service area" from the definition of construction, as currently proposed, the Commission would not have any oversight of route selection for such projects. This lack of oversight seems contrary to the intent of other parts of the proposed rule.

WHEREFORE, Dogwood asks that the Commission take these comments and the accompanying materials into consideration as it deliberates its final Order of Rulemaking,

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/Carl J. Lumley

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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was emailed, faxed or mailed by U.S. Mail, postage paid, this 13th day of June 2018, pursuant to the Commission's electronic filing system

/s/Carl J. Lumley

**Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT**
**Division 240—Public Service Commission**
**Chapter 20 — Electric Utilities**

**PROPOSED RULE**

**4 CSR 240-20.045 Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity**

*PURPOSE: This proposed rule outlines the requirements for applications to the commission, pursuant to section 393.170 RSMo, requesting that the commission grant a certificate of convenience and necessity to an electric utility for a service area or to acquire or to construct an electric generating plant, a substation, an electric transmission line, or a gas transmission line that facilitates the operation of an electric generating plant.*

(1) Definitions. As used in this rule, the following terms mean:

(A) Acquire or acquisition means obtaining full or partial ownership by purchase or capital lease.

(B) Asset includes electric generating plant, substation, switching station, electric transmission line, or gas transmission line that facilitates the operation of electric generating plant regardless of whether the item(s) to be acquired/constructed is located inside the electric utility's certificated service area or is located outside the electric utility's certificated service area but will be used to serve Missouri customers and paid for by Missouri retail ratepayers.

(C) Construction includes:

1. Construction of new asset(s) other than substation, electric transmission line or gas transmission line;
2. Construction of a new electric transmission line or a rebuild of such a transmission line that will result in a significant increase in the capacity of the transmission line, or a change in the route or easements;
3. Construction of a new substation or a rebuild of the substation that will result in a significant increase in the capacity and/or size of the substation;
4. Construction of a new gas transmission line that facilitates the operation of an electric generating plant or a rebuild of such a gas transmission line that will result in a significant increase in the capacity of the gas transmission line ~~that facilitates the operation of an electric generating plant~~, or a change in the route or easements of the gas transmission line; and
5. Improvement or retrofit of an electric generating plant that will result in:
    A. A substantial increase in the capacity of an electric generating plant beyond the planned capacity of the plant at the time the Commission granted the prior certificate of convenience and necessity for the electric generating plant;
    B. A material change in the discharges, emissions, or other environmental by-products of the electric generating plant than those projected at the time the prior certificate of convenience and necessity was granted by the commission for the electric generating plant;
    C. An increase in the useful life of an existing electric generating plant; or,
    D. A **10%** increase in rate base.

6. Construction does not include:

A. Construction of a new substation, switching station, electric transmission line or a new gas transmission line that facilitates the operation of electric generating plant if the assetline to be constructed is in the electric utility's Missouri certificated service area;

B. Periodic, routine or preventative maintenance or replacement of failed or near term projected failure of equipment or devices with the same or substantially similar items that are intended to restore the assetelectric generating plant or substation to an operational state at or near a recently rated capacity level; or,

C. Transmission projects where the only relationship to retail rates paid by Missouri ratepayers is through a regional cost allocation resulting fromthe regional transmission organization/independent system operator cost allocation process.

(2) An electric utility must obtain a certificate of convenience and necessity pursuant to Section 393.170 R.S.Mo prior to providing electric service to retail customers in a service area, prior to acquisition of an asset, and prior to construction of an asset, and must exercise the authority granted within two years from the grant thereof.

(32) In addition to the general requirements of 4 CSR 240-2.060(1), the following additional general requirements apply to all applications for a certificate of convenience and necessity, pursuant to Section 393.170 RSMo:

(A) The application shall include facts showing that granting the application is necessary andor convenient for the public service.

(B) Evidence that the electric utility has complied or will comply with all applicable municipal ordinances.

(C) If an asset to be acquired or constructed is outside Missouri, the application shall include plans for allocating costs, other than regional transmission organization/independent system operator cost sharing, to the applicable jurisdictions.

(D) If any of the items required under this rule are unavailable at the time the application is filed, the unavailable items may be filed prior to the granting of authority by the commission, or the commission may grant the certificate subject to the condition that the unavailable items be filed before authority under the certificate is exercised.

(E) The commission may, by its order, impose upon the issuance of a certificate of convenience and necessity such condition or conditions as it may deem reasonable and necessary.

(F) In determining whether to grant a cCertificate of cConvenience and nNecessity, the commission may, by its order, make a determination on the prudence of the decision to acquire or construct an assetelectric generating plant, a substation, an electric transmission line, or a gas transmission line that facilitates the operation of electric generating plant subject to the commission's post-construction review of the project.

(43) If the application is for authorization to provide electric service to retail customers in a service area for the electric utility, the application shall also include:

(A) A list of those entities providing regulated or nonregulated retail electric service in all or any part of the service area proposed, including a map that identifies where each entity is providing retail electric service within the area proposed;

(B) If there are ten (10) or more residents or landowners, the name and address of no fewer than ten (10) persons residing in the proposed service area or of no fewer than ten (10) landowners, in the event there are no residences in the area, or, if there are fewer than ten (10) residents or landowners, the name and address of all residents and landowners;

(C) The legal description of the service area to be certificated;

(D) A plat of the proposed service area drawn to a scale of one-half inch (1/2") to the mile on maps comparable to county highway maps issued by the state's Department of Transportation or a plat drawn to a scale of two thousand feet (2,000') to the inch; and

(E) A feasibility study containing plans and specifications for the proposed utility system and estimated cost of the construction of the utility system during the first three (3) years of construction; plans for financing and leasing; proposed rates and charges; and an estimate of the number of customers, revenues, and expenses during the first three (3) years of operations.

(F) The charter of the applicant.

~~(E)~~(G) A verified statement of the president or secretary of the corporation showing that it has received the required consent of the proper municipal authorities.

(54) If the application is for authorization to acquire an assets, the application shall also include:

(A) A description of the asset(s) to be acquired including location;

(B) The value of the asset(s) to be acquired;

(C) The purchase price and plans for financing the acquisition, or the terms of the proposed capital lease;

(D) Plans and specifications for the asset~~utility system~~, including as-built drawings;

(E) Evidence that an electric utility providing retail service utilized a non-discriminatory, fair, and reasonable competitive bidding process to evaluate whether the proposed construction or other alternatives such as purchased power capacity, or an alternative energy source would be the more reasonable resource.

(6~~5~~) If the application is for authorization to construct assets other than electric transmission line or gas transmission line, the application shall include:

(A) A description of the proposed route or site of construction;

(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross or share easement(s);

(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of ~~the~~ each asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~ once it is fully operational and used for service;

(D) The projected beginning of construction date and the anticipated fully operational and used for service date of each asset ~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant for which applicant is seeking the certificate of convenience and necessity~~;

(E) A description of any common plant included in~~n indication of whether~~ the construction project ~~for which the certificate of convenience and necessity is being sought will include common electric generating plant, or~~

~~common gas transmission plant that facilitates the operation of electric generating plant, and if so, the nature of the common plant~~;

(F) Plans for financing the construction of the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

(G) For ~~non-incumbent~~ an electric utility providing retail service~~providers~~, an overview of plans for operating and maintaining the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

(H) For ~~non-incumbent~~ an electric utility providing retail service ~~providers~~, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

(I) Evidence that an~~the~~ electric utility providing retail service utilized a non-discriminatory, fair, and reasonable process to evaluate whether the proposed construction or alternative solutions would be more reasonable; ~~distributed energy resources, energy efficiency, or renewable energy resources would provide a reasonable alternative to the construction proposed;~~

(J) Evidence that an~~the~~ electric utility providing retail service utilized a non-discriminatory, fair, and reasonable competitive bidding process to evaluate whether the proposed construction or other alternatives such as purchased power capacity or an~~suppliers of~~ alternative energy source would be the more~~a~~ reasonable resource ~~in lieu of the construction proposed~~; and

(K) Evidence that an~~the~~ electric utility providing retail service utilized or will utilize a non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~.

(7~~6~~) If the application is for authorization to ~~acquire or~~ construct an electric transmission line or a gas transmission line, the application shall also include:

(A) A description of the proposed route or site of construction;

(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross or share easement(s);

(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of the ~~electric~~ transmission line once it is fully operational and used for service;

(D) The projected beginning of construction date and the anticipated fully operational and used for service date of the ~~electric~~ transmission line;

(E) A description of any common plant to be included in~~n indication of whether~~ the construction project ~~for which the certificate of convenience and necessity is being sought will include a common electric transmission line(s)~~;

(F) Plans for financing the construction of the ~~electric~~ transmission line;

(G) ~~For non-incumbent electric providers, a~~For an electric utility providing retail service, an overview of plans for operating and maintaining the ~~electric~~ transmission line;

(H) ~~For non-incumbent electric providers, a~~ For an electric utility providing retail service, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the ~~electric~~ transmission line;

(I) Evidence that an~~the~~ electric utility providing retail service utilized or will utilize a

non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the ~~electric~~ transmission line; and

(J) An affidavit or other verified certification of compliance with the following notice requirements to landowners directly affected by ~~electric~~ transmission line routes ~~or substation locations~~ proposed by the application, including. ~~The proof of compliance shall include~~ a list of all directly affected landowners to whom notice was sent;.

1. Applicant shall provide notice of its application to the owners of land, or their designee, as stated in the records of the county assessor's office, on a date not more than sixty (60) days prior to the date the notice is sent, who would be directly affected by the requested certificate, including the preferred route or location, as applicable, and any known alternative route or location of the proposed facilities. For purposes of this notice, land is directly affected if a permanent easement or other permanent property interest would be obtained over all or any portion of the land or if the land contains a habitable structure that would be within three hundred (300) feet of the centerline of ~~an electric~~ transmission line.
2. Any notice~~letter~~ sent by applicant pursuant hereto shall be on its representative's letterhead or on the letterhead of the utility, and it shall clearly set forth—
   A. The identity, address, and telephone number of the utility representative;
   B. The identity of the utility attempting to acquire the certificate;
   C. The general purpose of the proposed project;
   D. The type of facility to be constructed; and
   E. The contact information of the Public Service Commission and Office of the Public Counsel.
3. If twenty-five (25) or more persons in a county would be entitled to receive notice of the application, applicant shall hold at least one (1) public meeting in that county. The meeting shall be held in a building open to the public and sufficient in size to accommodate the number of persons in the county entitled to receive notice of the application. Additionally:
   A. All persons entitled to notice of the application shall be afforded a reasonable amount of time to pose questions or to state their concerns;
   B. To the extent reasonably practicable, the public meeting shall be held at a time that allows affected landowners an opportunity to attend; and
   C. Notice of the public meeting shall be sent to any persons entitled to receive notice of the application.
4. If applicant, after filing proof of compliance, becomes aware of a person entitled to receive notice of the application to whom applicant did not send such notice, applicant shall, within twenty (20) days, provide notice to that person by certified mail, return receipt requested, containing all the required information. Applicant shall also file a supplemental proof of compliance regarding the additional notice.

(8~~7~~) Provisions of this rule may be waived by the commission for good cause shown.

*AUTHORITY: section 386.250, RSMo 2000. * Original rule filed Aug. 16, 2002, effective April 30, 2003. *Original authority: 386.250, RSMo 1939, amended 1963, 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996; StopAquila.Org v. Aquila, Inc.,* 180 S.W.3d 24 (Mo.App. W.D. 2005); *State ex rel. Cass County v. Public Serv. C0712112'n,* 259 S.W.3d 544 (Mo.App. W.D. 2008); *State ex rel. Harlin v. Public Serv. Comm'n,* 343 S.W.2d 177 (Mo.App. K.C. 1960).

*PUBLIC COST.• This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars ($500) in the aggregate.*

*PRIVATE COST.• This proposed amendment will not cost private entities more than five hundred dollars ($500) in the aggregate.*

*NOTICE TO SUBMIT COMMENTS AND NOTICE OF PUBLIC HEARING: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Morris L. Woodruff Secretary of the Commission, PO Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the commission's offices on or before June 14, 2018, and should include a reference to Commission Case No. EX-2018-0189. Comments may also be submitted via a filing using the commission's electronic filing and*

*information system at http://www.psc.mo.gov/efis.asp. A public hearing regarding this proposed rule is scheduled for June 19, 2018, at 10.•00 a.m., in Room 310 of the Governor Office Building, 200 Madison St., Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule, and may be asked to respond to commission questions. Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 or TDD Hotline 1-800-829-7541.*

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

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| **In the matter of the proposed amendment of rule 4 CSR 240-3.105.** | ) ) ) | **Case No. EX-2015-0225** |

**COMMENTS OF DOGWOOD ENERGY, LLC REGARDING PROPOSED RULE AMENDMENTS**

Comes Now Dogwood Energy, LLC (Dogwood) and for its comments regarding the proposed amendments to rule 4 CSR 240-3.105, states to the Commission:

**Introduction**

1. Rule 4 CSR 240-3.105 addresses the critical issues of Commission review and authorization of substantial capital investments by regulated electric utilities. The Commission should ensure that the amended rule will enable it to perform all of its responsibilities under Section 393.170 RSMo. While the proposed rule addresses several important gaps in the current regulation, it still leaves a substantial hole regarding major projects of Missouri utilities that would be built outside the state. Accordingly, Dogwood supports the proposed changes (with some fine-tuning), but also urges additional measures to address this significant omission.

2. The Commission should evaluate the proposed rule amendments by asking whether the revised rule will enable it to fulfill its mission to protect the public interest and ratepayers. Given the substantial investments and costs involved (electric utility plant construction routinely involves hundreds of millions of dollars), the Commission should make sure that the rule fully addresses the scope of its authority.

3. "The guiding star of the public service commission law and the dominating purpose to be accomplished by such regulation is the promotion and conservation of the interests and convenience of the public." State ex rel. Crown Coach Co. v. PSC, 179 SW2d 123, 128

(Mo App 1944). A remedial statute such as Section 393.170 should be liberally construed to fulfill its intended purpose. See, e.g., State ex rel Laundry Inc v PSC, 34 SW2d 37, 42-43 (Mo 1931). Any doubts about the applicability of such a remedial statute should be resolved in favor of applying it to protect the public interest, and exceptions should be narrowly construed. See Utility Service Co., Inc. v. Department of Labor and Industrial Relations, 331 SW3d 654, 658 (Mo. 2011). Accordingly, the Commission's authority to protect the public interest pursuant to Section 393.170 should not be artificially constrained by a narrow interpretation. Further, given that the Courts have held that the Commission has not been fully exercising its authority under Section 393.170, rule changes should be viewed as necessary, appropriate, and at this point overdue.

**Requirements of Section 393.170**

4. Pursuant to Section 393.170, an electric corporation cannot "begin construction of ... electric plant[1] ... without first having obtained the permission and approval of the commission." The Commission is authorized to approve such construction when it determines after "due hearing ... that such construction ... is necessary or convenient for the public service." The Courts have held that this part of the statute requires separate approval of any regulated utility production (generation) facilities, regardless of location, as well as transmission facilities outside of any previously approved service area. See State ex rel Cass County v. PSC, 259 SW3d 544, 549 (Mo App 2008); StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 35 (Mo App 2005).

5. Under the statute, an electric corporation also cannot exercise any franchise right or privilege "without first having obtained the permission and approval of the commission" as well as any required municipal consents. As with construction projects, the Commission must

[1] See definitions in Section 386.020.

hold any "due hearing" and determine whether the exercise of such rights and privileges "is necessary and convenient for the public service." The Courts have held that "service area" approval under this part of the statute includes the authority to install transmission and distribution facilities within that area. See State ex rel Cass County v. PSC, 259 SW3d 544, 549 (Mo App 2008); StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 35 (Mo App 2005).

6. The evaluation of necessity under the statute protects the public by making sure that a project is "an improvement justifying its cost." State ex rel Intercon Gas v. PSC, 848 SW2d 593, 597-98 (Mo App 1993).

7. Section 393.170 authorizes the Commission to impose "reasonable and necessary" conditions upon any approval of electric plant construction or any approval of franchise rights and privileges.

8. The statute further provides that any authority that is not exercised by an electric utility within two years from the grant thereof "shall be null and void." Accordingly, long-term plans cannot be approved, but rather only imminent projects.

9. The Courts have held that the Commission cannot approve construction of electric production plant by a regulated utility after-the-fact, but rather pursuant to Section 393.170 can only approve such construction in advance, based on a contemporaneous hearing and record. See State ex rel Cass County v. PSC, 259 SW3d 544, 549-50 (Mo App 2008). The Courts have explained the public policy behind this requirement at length:

> The language of subsection 1 [of 393.170] is clear and unambiguous. It refers only to pre-construction approval. The statute's plain terms refer to such pre-construction approval not once, but twice, specifying that a utility shall not "*begin* construction ... without *first* having obtained" the necessary authorization. The purposes of such pre-approval are obvious. The PSC is charged with considering and protecting the interests of the general public as well as the customers and investors of a regulated utility. It must balance those interests on a statewide basis, not merely considering a particular utility's operating area in

> isolation. {citation omitted](noting that "uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function"). This function requires a balancing of the needs and interests of ratepayers and investors. Although the PSC always has the power to disallow capital improvements in a utility's rate base, that *post hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors. [citation omitted](noting that compliance with subsection 1 allows for consideration of all the relevant constituencies and interests "without muddying the waters of a future rate case"). Subsection 1 [of 393.170] allows the PSC to consider and weigh all of these factors, as well as location and zoning, prior to construction.

Id. The Courts have observed further that:

> By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months *before* construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.

StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 37-38 (Mo App 2005).

10. Thus, under Section 393.170 the Commission must review proposed construction of electric generation facilities by regulated utilities in advance, as to necessity, cost, location, and other relevant concerns. It must conduct such review of the prudence of the project based on contemporaneous facts, not long-term future projections. StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 34 (Mo App 2005). Such pre-approval is required because once the company builds the facilities and seeks to recover the costs in its rates, the Commission is not in a sound position to balance the interests of ratepayers and utility shareholders. Rather, one group or the other can be substantially harmed by an after-the-fact decision. See State ex rel Cass County v. PSC, 259

SW3d 544, 549 (Mo App 2008); StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 35 (Mo App 2005). Or as a prior Commission put it, an after-the-fact request for approval places "the Commission in a position where a meaningful decision cannot be made." In the matter of the application of Union Electric Co for permission and authority to construct, operate and maintain two combustion turbine generating units, Case No. EA-79-119, 24 MoPSC NS 72, 78 (1980).

**Dogwood's Involvement in Review of Current Rule**

11. Dogwood initially proposed substantive changes to rule 3.105 by petition filed on January 8, 2014 in Case No. EX-2014-0205. While the Commission denied that petition, it simultaneously opened a working docket to consider rule changes in File No. EW-2014-0239. After substantial industry collaboration in that working docket, Staff submitted the pending proposed amendments. The Commission then ordered publication and further proceedings in this matter.

12. Dogwood is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. Dogwood owns a majority interest in the Dogwood Energy Facility, a 650 MW natural gas-fired, combined cycle electric power generating facility located in Pleasant Hill, Missouri. The other owners of the plant include Missouri municipal utilities, such as the City of Independence and members of the Missouri Joint Municipal Electric Utility Commission. The Dogwood Energy Facility is the largest combined cycle plant in the state, and represents approximately 3% of the total generating capacity and 35% of the combined cycle capacity in the state. Dogwood is also a customer of KCPL GMO and a member of the Southwest Power Pool.

13. In its rulemaking petition, Dogwood cited several examples of utility projects which had evaded any pre-approval process due to lack of clarity in the Commission's current rules: (1) KCPL GMO's acquisition of contract rights regarding the municipal Crossroads generation plant, valued at $61.8 million after-the-fact by the Commission; and (2) Empire's $175 million conversion of its Riverton Unit 12 combustion turbine electric generation facility to a combined cycle facility. Dogwood explained that such gaps in regulatory oversight are contrary to the interests of ratepayers and shareholders, and also can have a direct negative impact on independent suppliers like Dogwood and its co-owners when unneeded generation is added to the market in lieu of more cost-effective options.

14. Monopoly utilities should not make major facility commitments without taking into account all relevant factors and options, or without allowing the Commission an adequate opportunity to make certain that such expensive commitments are in the public interest. Further, such utilities should not jeopardize the interests of shareholders by failing to obtain advance approval of major projects and by instead facing the risks that attend regulatory scrutiny after-the-fact such as the complete dismantling of a generation plant - as would have recently been required absent emergency legislation after a court decision. See StopAquila.org v. Aquila, Inc., 180 SW3d 24, 34 (Mo App 2005) and now repealed Section 393.171.

15. Dogwood fully participated in the Commission's rulemaking workshop meetings and filed several sets of comments on draft rule changes. The workshop process was ably administered by Staff and allowed for a great deal of industry collaboration. As a result, Dogwood largely supports the proposed rule changes now pending before the Commission. A well- clarified rule should minimize future rate case disputes (such as the lengthy litigation over

the Commission's after-the-fact rulings on GMO's Crossroads plant)[2] and thereby result in cost savings, rather than any negative fiscal impact. In rate cases subsequent to a pre-approval proceeding, Commission review can then focus upon the prudence of specific implementation costs, rather than the prudence of the utility's decision to move forward with a project (absent some extreme unforeseen development).

**Dogwood's General Support of Proposed Rule**

16. The proposed rule changes provide greater clarity as to the two types of applications that must be pursued under Section 393.170 by regulated utilities. As discussed above, such applications can either seek approval of specific plant construction or approval of a new service area. The "Purpose" provision of the proposed rule incorporates these aspects of the statute and the essence of prior court rulings in this regard, explaining that a service area approval includes authority to build transmission plant to serve customers in the authorized area and by underscoring that separate plant authorizations are required for all generation plant construction projects regardless of location relative to service area. Based on recent proceedings concerning substations, adding express references to such projects would seem beneficial. Further clarity could also be achieved by expressly stating that separate approval is required for transmission and substation plant that is outside the service area or not to be used to serve customers within the service area. Additionally, a reference to distribution and substation plant as part of service area authority could provide clarity.

17. The proposed rule changes also provide greater clarity regarding the type of electric generation plant project that requires pre-approval. By adding a definition of "construction", the Commission will make clear that any substantial project must be approved in

[2] See Case Nos. ER-2012-0356 and ER-2013-0175, and related appeals at 408 SW3d 153 (transfer denied by Mo Sup Ct and cert denied by US Sup Ct) and unreported second appeal WD76166/76167.

advance, consistent with the requirements of Section 393.170. Environmental upgrades and generation plant fuel source conversions or other conversions can involve hundreds of millions of dollars and require as much scrutiny as original plant construction in order to protect the interests of all concerned. Likewise, the proposed rule properly recognizes that financing methods should not interfere with Commission review; capital leases can be included in rate base and should be examined in advance. Similarly, monopoly utility acquisition of electric plant built by others must be reviewed, to prevent unlawful avoidance of Commission scrutiny.[3] The proposed rule also properly addresses these points.

18. The proposed broad definition of "construction" appropriately follows the principles laid down in the prevailing wage statutes, which also apply to regulated utilities, by distinguishing between construction and maintenance. See Sections 290.210-340 RSMo. Under these statutes, "public works" construction includes "any work done directly by any public utility company when performed by it pursuant to the order of the public service commission" other than maintenance. By including an appropriate definition of "construction", the proposed rule properly follows court guidance that the word should be given similar meaning throughout various overlapping statutory schemes. See Hadel v. Board of Education of School District of Springfield, 990 SW2d 107, 112-13 (Mo. App. 1999)(Word "construction" should be interpreted consistently in all statutes governing entity subject to prevailing wage law); State ex rel Smithco Transport v. PSC, 316 SW2d 6, 11-13 (Mo 1958)(PSC statutes should be interpreted and applied consistent with other applicable statutes); Utility Service Co. Inc v. Depart of Labor and Industrial Relations, 331 SW3d 654, 660 (Mo 2011)(term "construction" should be broadly

[3] Some such transactions would also be subject to review under Sections 393.190-393.220, but all should be reviewed by the Commission under Section 393.170. The rationale for Commission review remains the same: an ill-advised major transaction or project poses substantial risks for Missouri ratepayers.

construed in statutes that protect public interests); Warren Davis Properties, LLC v. United Fire & Casualty Co., 111 SW3d 515, 522 (Mo App 2005)(renovation is construction).

19. The proposed rule appropriately requires utilities to demonstrate that they have considered all reasonable alternatives to the proposed major capital investment, and used competitive bidding practices in that process. The Commission cannot effectively evaluate a major construction project without being able to determine that the proposed costs are reasonable. A requirement of competitive bidding practices is consistent with the mandates of the Commission's integrated resource planning rules regarding supply side facilities, 4 CSR 240-22.070(6)(E), and its affiliate transaction rules, 4 CSR 240-20.015(3)(A), as well as state purchasing practices under Section 34.040 RSMo. It is also consistent with regulatory practices in other states. See, e.g., Arkansas (Admin Code 126.03.14), Connecticut (RCSA 16-244c-1 et seq), Indiana (IC 8-1-8.5-5), Iowa (IAC 476.53), Maryland (COMAR 20.40.02 et seq, 20.52.04.01 et seq)), New Jersey (NJAC 14:4-3.3), Oklahoma (OAC 165.35-34-1 et seq), Pennsylvania (52 PC 57.34), and Texas (16 TAC 25.272 et seq).

20. Improper influence, whether from affiliated relationships or less formal connections, is an insidious thing – it can be hard to identify, hard to prove, and hard to undo. Monopoly utilities must be required to use competitive bidding procedures when evaluating major capital projects to guard against improperly influenced deals. The risks of harm to the public are too great, given the large dollar amounts involved in electric plant projects.

**Key Omission from Proposed Rule - Review of Out of State Projects**

21. While the foregoing aspects of the proposed rule are all beneficial and important, the proposed rule still does not fully address the scope of the Commission's authority and responsibility under Section 393.170. Throughout the proposed rule changes, the language

purports to limit the Commission's authority to consider proposed electric plant construction to projects that are located "in Missouri." This geographic limitation is not lawful.

22. The Commission has jurisdiction over all public service activities of an electric utility that is subject to its regulation, which includes all generation plants built by or for such monopoly utilities. See, e.g. State ex rel. and to Use of Cirese v. PSC, 178 SW2d 788, 790 (Mo. App. 1944); see also Sections 386.020, 386.030, and 386.250. In general, generation plants are not subject to federal regulation. See 16 USC 824. Hence, absent Commission advance review, both ratepayers and investors will face the substantial risks posed by an adverse after-the-fact ruling when the Commission must decide whether to allow substantial plant construction costs to be recovered in rates. As the Missouri Courts have held, Section 393.170 must be applied to prevent such a collision of ratepayer and investor interests.[4] Physical location of a plant outside the state does not preclude a utility from seeking rate recovery, nor does it lessen the Commission's duty to examine the project in advance under Section 393.170.

23. The Commission has authority to examine all "methods, practices, regulation and property employed by public utilities." State ex rel Laclede Gas v. PSC, 600 SW2d 222, 228 (Mo App 1980). The statutes governing the Commission and public utilities establish a "complete scheme for the supervision and regulation of **all** the activities of an electric utility by the commission." PSC v. Kansas City Power, 31 SW2d 67, 71 (Mo 1930)(emphasis added).

24. The Commission has recognized that it has full authority to examine all major utility actions that could have a detrimental impact on ratepayers, such as acquisition of a utility that only operates in another state. See, e.g. In the Matter of the Application of The Kansas Power and Light Company and KCA Corporation for Approval of the Acquisition of All Classes

[4] See State ex rel Cass County v. PSC, 259 SW3d 544, 549 (Mo App 2008); StopAcquila.org V. Aquila, Inc., 180 SW3d 24, 35 (Mo App 2005).

of the Capital Stock of Kansas Gas and Electric Company, to Merge with Kansas Gas and Electric Company, to Issue Stock, and Incur Debt Obligations, Case No. EM-91-213, 1 MoPSC3d 150, 159 (1991).

25. The Commission has exerted authority over the proposed sale of generation facilities located in Illinois by Ameren under Section 393.190. See In the Matter of the Application of Union Electric Company Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easement and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and in Connection Therewith, Certain Other Related Transactions, Case No. EO-2004-0108, 13 MoPSC 3d 266, 289-90 (2005). The Commission expressly held therein that the governing statutes do "not make any distinction as to the location of the property, whether in Missouri or elsewhere." The Commission based its conclusion on AmerenUE's status as an electric corporation and public utility subject to Commission regulation under Chapters 386 and 393. The Commission found that the proposed transaction had both direct and indirect impacts on Missouri operations, including reduction of native load. See 13 MoPSC 3d 266, 289-90 (2005). The Commission has likewise previously exercised its jurisdiction over Empire's interest in the Plum Point generation plant in Arkansas. See, e.g., Case EF-2006-0263 (approval of construction financing); Case EO-2010-0262 (approval of construction accounting).

26. In the case regarding Ameren's Illinois generating plants, when Ameren raised questions about the Commission's jurisdiction, the Staff strongly disagreed, and pointed to prior examples of Ameren and KCP&L assets located in other states over which the Commission had asserted jurisdiction. Specifically, Staff pointed to Case Nos. EM-92-225, EM-92-253, EM-91-213, and EF-87-29. See Staff Reply Brief, p. 8-9, Case No. EO-2004-0108. Staff argued for a

broad interpretation of Commission jurisdiction, "to protect the public from self-interested actions of a monopoly utility company." Id at 10-11.

27. If a Missouri-regulated utility proposes to construct an electric generating unit in another state, such a project could certainly impose detrimental impacts on Missouri ratepayers. An imprudent project could impact the utility's overall ability to render safe and adequate service, could increase rates, could increase administrative and capital costs, or have other impacts in Missouri. Id. Additionally, even if there is no initial plan to include part or all of the plant in Missouri rate base for ratemaking purposes, such plans could change at any time and the Commission would be faced with a post-construction issue contrary to the provisions of Section 393.170. See State ex rel Cass County v. PSC, 259 SW3d 544, 549-50 (Mo App 2008).

28. If a utility holding company segregates its operating entities by state, with each operating entity standing on its own, then the Commission would only be concerned with the operations of the Missouri operating entity (including of course affiliate transactions). But when a single utility entity chooses to conduct operations in Missouri and other states, it must expect scrutiny from all the involved states including this Commission.

29. The Commission recently authorized GMO to construct and operate a 3 MW solar plant with a relatively small cost and minimal ratepayer impact, after a careful examination of the necessity of the project. See File No. EA-2015-0256. The proposed rule on its face would require a utility that only provides service in Kansas to obtain Commission approval to build a plant in Missouri, whether small or large. Yet, according to the rule as proposed, a Missouri utility could build a billion dollar speculative plant several feet outside the Missouri state line without preapproval and without any examination of necessity or the Tartan factors applied by

the Commission in such matters,[5] as exemplified in the recent GMO small solar facility case. Nonetheless, the utility could later seek to include such a plant in rates after-the-fact. Such an approach would be directly contrary to the provisions and purposes of Section 393.170 as explained by the Missouri Courts.

30. The Commission has jurisdiction under Chapters 386 and 393 over a regulated electrical utility and its construction, acquisition, financing, and other activities, including such activities outside the state. These statutes make plain that major decisions of a utility are to be reviewed in advance, notwithstanding its general managerial discretion (that remains subject to after-the-fact review in ratemaking cases). Thus, under Section 393.170, the Commission has jurisdiction and responsibility to examine in advance any major activities, such as construction projects proposed by a Missouri utility in another state, to protect Missouri ratepayers. While such projects may also be examined by the regulatory commission in the other state, that is a product of the utility choosing to have multi-state activities under a single entity. But again, the FERC generally does not have authority over generation facilities. See 16 USC 824.

31. For purposes of pre-approval of construction, consideration should be given both to overall impact on the regulated utility and its ability to serve the public (i.e. prudence), as well as potential rate impacts on Missouri ratepayers. Even if the utility has no current plans to put a plant to be built in another state into its Missouri rate base, if the project is speculative or beyond the means of the utility it could nonetheless have a negative impact in this state.

32. Thus, by purporting to limit Commission review under Section 393.170 to electric generation plant built in Missouri, the proposed rule unlawfully fails to meet the full requirements of the statute, unlawfully ignores prior Court rulings, and unlawfully ignores the Commission's prior exercise of jurisdiction over plants outside the state. As made plain by the

[5] In the Matter of the Application of Tartan Energy Company, 3 MoPSC 3d 173, 177 (1994)

Courts, the Commission has authority to prevent imprudent projects at any location by regulated utilities operating in Missouri. The Courts rejected the idea that regulated utilities could be given "carte blanche authority to build wherever and whenever they wish". Under the statute, the Commission is not merely charged with examining utility site selections in Missouri locations. See State ex rel Cass County v. PSC, 259 SW3d 544, 549 (Mo App 2008); StopAcquila.org V. Aquila, Inc., 180 SW3d 24, 35-37 (Mo App 2005).

**Additional Proposed Edits**

33. Finally, there are a few additional aspects of the proposed amendments that could be fine-tuned. In subsection 1(B)2, the word "identify" in two places should be "identifies", and the last sentence should be deleted as duplicative of subsection 3. In subsection 1(B)6, the phrase "and/or being the projected process of identifying" seems out of place. The proposed rule does not address the two-year "use it or lose it" provision of Section 393.170 or the related concept of seeking approval only for imminent projects. The proposed rule also does not address the ability of the Commission to conclude that a project does not require its approval.

**Conclusion**

34. In **Exhibit A** attached hereto, Dogwood shows the changes to the proposed rule that it recommends for the reasons stated herein.

35. The proposed rule with the changes set forth in **Exhibit A** will eliminate the uncertainty that has apparently, at least until recently (in the past several years the number of applications for approval of regulated utility construction projects has dramatically increased), caused regulated utilities to refrain from seeking advance approval of major electric plant projects from the Commission. Further, the rule will require such companies to fully evaluate

alternatives and thereby provide the Commission with sufficient information in order to make a decision as to whether or not such projects are in the public interest.

WHEREFORE, Dogwood Energy LLC asks the Commission to incorporate its recommended changes as shown in **Exhibit A** attached hereto into the final new version of rule 4 CSR 240-3.105 and thereupon approve and publish such final rule, and for such other relief as the Commission deems meet and proper.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document was served upon the parties listed below on this 29 day of April, 2016, by either e-mail or U.S. Mail, postage prepaid.

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**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| **In the matter of the proposed amendment of rule 4 CSR 240-3.105.** | ) ) ) | **Case No. EX-2015-0225** |

**DOGWOOD ENERGY, LLC'S MOTION FOR LEAVE TO PROVIDE NOTICE OF NEW AUTHORITY REGARDING PROPOSED RULE AMENDMENTS**

Comes Now Dogwood Energy, LLC (Dogwood) pursuant to 4 CSR 240-2.050(3)(B) and 4 CSR 240-2.180 and for its motion for leave to provide notice of new authority regarding the proposed amendments to rule 4 CSR 240-3.105, states to the Commission:

1. In its previously submitted comments, Dogwood demonstrated that under Section 393.170, the Commission has jurisdiction and responsibility to examine in advance any major activities of a Missouri regulated utility, such as construction projects proposed in another state, to protect Missouri ratepayers.

2. On June 8, 2016 the Commission issued its Order Granting Leave to File Reply Late, Granting Staff's Motion to Open an Investigation, and Directing Filing, in Case No. EM-2016-0324, In the Matter of Great Plains Energy, Inc's Acquisition of Westar Energy, Inc., and Related Matters. In that Order, the Commission held (as it has on prior occasions as cited by Dogwood in its comments), that it has authority regarding the major activities of a Missouri regulated utility outside the state because of potential impacts on Missouri ratepayers.

3. Specifically, regarding GPE's pending acquisition of Westar in Kansas, the Commission held that it has jurisdiction to investigate the transaction due to potential impacts on GPE subsidiaries KCP&L and GMO and their Missouri ratepayers.

4. The Commission stated on page 5 of the Order:

> Moreover, even absent the conditions that GPE sought and the Commission ordered, Staff and OPC allege an independent basis for an investigation: that the transaction has already had a negative effect on the credit outlooks of GPE, KCPL, and GMO. GPE's unsupported reassurance, that a downgraded credit outlook is insignificant, is not persuasive. The Commission is aware that a reduced credit rating is likely to increase the cost of capital. And an increased cost of capital is likely to increase rates for Missouri ratepayers.

5. Because this Order has just been issued in Case EM-2016-0324 and could not have been cited in Dogwood's prior comments, Dogwood seeks leave pursuant to 4 SCR 240-2.050(3)(B) for good cause to file this notice of new authority in this matter so that the record remains current.

WHEREFORE, Dogwood Energy LLC asks the Commission to accept this filing and notice of new authority which supports Dogwood's recommended changes to the proposed rule as shown in **Exhibit A** attached to Dogwood's prior comments.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document was served upon the parties listed below on this 9th day of June, 2016, by either e-mail or U.S. Mail, postage prepaid.

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