BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

COMMENTS OF KANSAS CITY POWER & LIGHT COMPANY AND KCP&L GREATER MISSOURI OPERATIONS COMPANY

In response to the April 6, 2018 Notice of Rulemaking Hearings issued by the Missouri Public Service Commission ("Commission" or "PSC"), Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, "Companies") provide the following comments in advance of the hearing scheduled for June 19, 2018.

I. Introduction

Although certain provisions in Proposed Rule 4 CSR 240-20.045 properly seek to clarify the Commission's authority to grant a certificate of convenience and necessity ("CCN") in light of judicial decisions over the past ten years, much of the proposal is contrary to law. Moreover, the Proposed Rule would create regulatory burdens, impose significant costs, and cause delays in the implementation of infrastructure projects that serve the public interest.

Most of the Proposed Rule has been drafted without regard to the purpose and language of Section 393.170[1] where the General Assembly specified the powers granted to the Commission regarding CCNs. As explained below, there is nothing in Section 393.170 that relates to the acquisition of utility assets in Missouri. There is nothing in Section 393.170 that pertains to the

[1] All statutory references are to the Missouri Revised Statutes (2016), as amended, unless otherwise noted.

construction of assets that are not located in Missouri. There is also nothing in Section 393.170 that mentions the rebuilding, improvement or retrofitting of a plant that already possesses a CCN.

Finally, there is no language in the statute that allows the Commission to impose a competitive bidding system on an applicant seeking a CCN. This is particularly true in light of the General Assembly's recent amendment to Section 393.170 in Senate Bill 564, which declined to mandate such a process for CCNs.

The courts have held that the Commission "has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature." State ex rel. Springfield Warehouse & Transfer Co. v. PSC, 225 S.W.2d 792, 794 (Mo. App. K.C. 1949). See Gee v. Department of Social Services, 207 S.W.3d 715, 719-21 (Mo. App. W.D. 2006) (agency exceeded its authority by adding requirements to its regulations contrary to state law).[2] Because most of the Proposed Rule goes far beyond the powers that the General Assembly authorized in Section 393.170, it should be withdrawn.

II. Section 393.170 Does not Grant the Commission Jurisdiction over a Public Utility's Acquisition of an Electric Generating Plant or a Substation

The Commission has a great deal of authority over its regulated public utilities, however, it cannot exercise jurisdiction that is not provided by statute. "The Commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted." State ex rel. PSC v. Bonacker, 906 S.W. 2d 896, 899 (Mo. App. S.D. 1995) ("Bonacker"), citing State ex rel. Util. Consumers Council of Mo., Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979) ("UCCM").

[2] Federal courts agree. FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 161 (2000) (FDA regulations exceeded authority granted by Congress); MCI Telecomm. Corp. v. AT&T, 512 U.S. 218, 228-29 (1994) (FCC's interpretation of law "not entitled to deference" where the agency's rule purporting to "modify" tariff filing requirements went "beyond the meaning that the statute can bear").

There is no language in Section 393.170 that requires utilities to obtain Commission approval to "acquire assets," as the Proposed Rule's Section (4) mandates. Furthermore, there is no statutory basis for a CCN rule that defines "acquire" or "acquisition," as Proposed Rule (1)(B) purports to do. Section 393.170.1 simply states that no electrical corporation "shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission [emphasis added]." Therefore, Section (4)'s attempt to require a CCN application to describe "asset(s) to be acquired," their "value," the "purchase price and plans for financing the acquisition," and "plans and specifications" for an unspecified "utility system, including as-built drawings" has no legal basis.

Because a utility is entitled to manage its own business, the PSC is barred from issuing orders that encroach on these matters. "It must be kept in mind that the commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." Bonacker at 899. The Commission has the power to monitor and oversee, but not to manage. "Those powers are purely regulatory. The dominating purpose of the Public Service Commission was to promote the public welfare. To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use." State ex rel. Harline v. PSC, 343 S.W.2d 177, 181 (Mo. App. K.C. 1960) (original emphasis).

The Proposed Rule contradicts this statutory purpose. Were the Commission to adopt a regulation that required electric utilities to obtain a CCN prior to acquiring any electric plant, substation or related gas transmission line, it would be directing a utility how to conduct its business when it buys property. The exercise of such power "would involve a property right in the utility. The law has conferred no such power upon the Commission." Id. Even considering the Commission's broad authority over public utilities, the Court of Appeals has held that the

PSC's powers do not "clothe the Commission with the general power of management incident to ownership." Id. at 182.[3] This is especially true with regard to the powers of Section 393.170.1 which relate exclusively to granting CCNs before a utility begins construction.

The ability of Missouri public utilities to acquire electric generating plants in a timely and efficient manner without having to obtain a CCN or other approval from the Commission has served the public well. Moreover, the PSC has encountered no difficulty in reviewing the prudence of such decisions and determining how they should be reflected in rates. For example, as GMO and its predecessor Aquila, Inc. analyzed their resource options at length during the past decade, they determined that the 300 MW Crossroads Energy Center, at the time a merchant plant owned by a non-regulated affiliate, was the lowest cost option for meeting their requirements. See Report & Order at 78-85, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Electric Service, No. ER-2010-0358 (May 4, 2011). After Great Plains Energy Incorporated acquired Aquila in 2008, the Crossroads unit was transferred to the regulated books of GMO. Id. at 85. In GMO's 2010 general rate case, the Commission thoroughly reviewed the resource planning process that GMO had conducted and concluded that the decision to add Crossroads to its generating fleet was "prudent and reasonable." Id. at 99.

Any attempt to stretch the CCN process of Section 393.170.1 to the acquisition of a generating plant or substation would disrupt today's comprehensive process of evaluating potential purchases in the context of the Integrated Resource Planning ("IRP") framework under Chapter 22 of the Commission's regulations. See Comments of Burton Crawford, Rulemaking Hearing, Vol. 1 at 35-37, In re Proposed Amendments to 4 CSR 240-3.105 Filing Requirements for Elec.

[3] The Harline Court relied on both Missouri and federal decisions, including State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n of Missouri, 262 U.S. 276, 289 (1923), which stated: "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

Util. Applications for Certificates of Convenience and Necessity, No. EX-2015-0225 (May 12, 2016). Requiring an electric utility to obtain a CCN, in addition to the IRP process and the ultimate rate case proceeding that evaluates the prudence of a project and sets rates, would add a third set of requirements for an electric utility to meet. Adoption of the Proposed Rule will likely add at least seven to eight months to current asset purchase timetables, given that CCN proceedings are not governed by an operation-of-law date, and will result in more costs for customers. Id. at 36-37.[4]

III. Section 393.170 does not Grant the Commission Jurisdiction over a Public Utility's Acquisition or Construction of an Electric Generating Plant or a Substation that is not located in Missouri

The Proposed Rule seeks to regulate the acquisition or construction of electric generating plants and other facilities that are located outside Missouri. Section (1)(B) of the Proposed Rule defines "asset" as including electric facilities "regardless of whether the item(s) to be acquired/constructed … 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." [5] Section (2)(B) explicitly applies to "an asset to be acquired or constructed [that] is outside Missouri …."

As discussed in Section II, Section 393.170 does not grant the PSC any power to issue a CCN regarding the acquisition of property. There is also nothing in Section 393.170 that extends the Commission's CCN authority to infrastructure not located in Missouri. Any effort by the

[4] "[Y]ou're really tying the hands of utility management to make timely decisions where there's already the IRP process to review these decisions, there's already the rate case where it's already going to be reviewed. There's really no sense in setting up a procedure to do this … a third time where you potentially are going to result in more cost for retail customers."

[5] Section (1)(B) mischaracterizes the ratemaking process when it states that utility assets are "paid for by Missouri retail ratepayers." The phrase improperly implies that ratepayers acquire an ownership interest in an asset. Under Section 393.130.1 customers pay for the "service" that they receive from a public utility, pursuant to charges "that shall be just and reasonable and not more than allowed by law or by order or decision of the commission." Given that ratepayers have no property interest in existing rates, they clearly do not pay for or have a property interest in utility assets. See State ex rel. Jackson County v. PSC, 532 S.W.2d 20, 31-32 (Mo. en banc 1975).

Proposed Rule to extend the jurisdiction of the Commission beyond Missouri violates other provisions of the Public Service Commission Law and is contrary to longstanding federal and state judicial precedents.

A. Missouri Law and Precedent

The General Assembly established the "jurisdiction, supervision, powers and duties" of the Commission in Section 386.250. It stated explicitly in four subsections that jurisdiction "shall extend" to gas and electricity operations "within the state"; to telecommunications facilities and services "within this state"; to water corporations, and their property and operations "within this state"; and to sewer systems and their operations "within this state." See § 386.250(1)-(4).

This restriction of Commission authority to operations within Missouri is consistent with Section 386.030 which states: "Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except as permitted under the provisions of the Constitution of the United States or the acts of Congress [emphasis added]."

The intent of the General Assembly to maintain and preserve the language of these statutes was made clear in 2007 when Section 386.210 was amended. In authorizing the PSC to enter into agreements or contracts with the public utility commissions of other states, the Legislature declared that the Commission may do so if they are "in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties pursuant to section 386.250 as limited and supplemented by section 386.030 …." See § 386.210(6) [emphasis added].

Consistent with this statutory authority, the Commission has routinely allowed out-of-state facilities to come into rate base without even a suggestion that a CCN was required. For example, KCP&L did not apply for a CCN before the construction of the 100 MW Spearville Wind Energy

Project in western Kansas. This facility was placed in service in September 2006 and was included in rate base with Staff's concurrence in KCP&L's 2006 general rate case. See True-Up Direct Testimony of David W. Elliott at 1-3, In re Kansas City Power & Light Co., No. ER-2006-0314 (Nov. 7, 2006); Staff Cost of Service Report at 4, 104, 137, In re Kansas City Power & Light Co., No. ER-2009-0089 (Feb. 11, 2009).

Similarly, GMO did not apply for a CCN before acquiring the Crossroads Energy Center, a four-unit combustion gas turbine facility located in Clarksdale, Mississippi. The PSC agreed that GMO's decision to add Crossroads to its generation portfolio was prudent and valued the plant for purposes of rate base. See Report & Order at 98-100, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Elec. Serv., No. ER-2010-0358 (May 4, 2011), aff'd State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153 (Mo. App. W.D. 2013). While the parties disagreed on other issues, no one suggested that GMO should have obtained a CCN for Crossroads prior to acquiring it, or that GMO's predecessor Aquila, Inc. should have obtained a CCN prior to arranging for its construction.

The Commission has accorded similar treatment to other Missouri utilities' out-of-state facilities, such as Empire District Electric Company's Riverton Unit 12 in Kansas[6] and its ownership share in the Plum Point generating station in Arkansas,[7] as well as to Ameren's ownership of a variety of gas combustion turbine units in Illinois.[8] Given that Missouri courts should refrain from novel interpretations of longstanding Commission policies under State ex rel. Jackson County v. PSC, 532 S.W.2d 20, 29 (Mo. en banc 1975), the PSC itself should refrain from

[6] Order Approving Stipulation & Agreement at 2-3, In re Empire Dist. Elec. Co. Request for Auth. to Implement a Gen'l Rate Increase, No. ER-2016-0023 (Aug. 10, 2016).
[7] Order Approving Unanimous Stipulation at 2, In re Empire Dist. Elec. Co. for Auth. to File Tariff Increasing Rates, No. ER-2010-0130 (May 19, 2010).
[8] Report & Order at 59-67, In re Union Elec. Co. d/b/a/ AmerenUE's Tariffs Increasing Rates for Elec. Serv., No. ER-2007-0002 (May 22, 2007), aff'd, State ex rel. Pub. Counsel v. PSC, 274 S.W.3d 569, 577-80 (Mo. App. W.D. 2009).

a radical shift in its longstanding interpretation of Section 393.170 in the absence of a legislative amendment.

This unbroken line of decisions by the Commission since its creation is consistent with United States Supreme Court precedent that a state's authority stops at its borders. "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State … without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("State Farm"), quoting New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914). State Farm dealt with a calculation of punitive damages which the plaintiff alleged were necessary to rebuke State Farm for its "nationwide activities" beyond the jurisdiction of the state court in Utah where the trial occurred. State Farm, 538 U.S. at 420. In holding that a state cannot punish a defendant for conduct that was lawful where it occurred, the Court declared: "Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." Id., quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892).

B. Federal Cases from Other States

This extraterritorial nature of the Proposed Rule would likely violate the dormant Commerce Clause of the U.S. Constitution. Such a violation occurred in North Dakota v. Heydinger, 15 F. Supp. 3d 891, 897-98, 910-19 (D. Minn. 2014) ("Heydinger"), where Minnesota's New Generation Energy Act prohibited power sales from outside the state that would contribute to carbon dioxide emissions. State law that has an "extraterritorial reach" by having

"the practical effect of controlling conduct beyond the boundaries of the state" is per se invalid under the dormant Commerce Clause. Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995), citing Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989). In the Minnesota case, the District Court found that the state statute violated the extraterritorial doctrine by requiring businesses to conduct their "out-of-state commerce in a certain way." Heydinger, 15 F. Supp. 3d at 911-12, 918. It additionally held that actions by regulatory agencies, such as the Minnesota Public Utilities Commission, to enforce such extraterritorial provisions violated the Commerce Clause. Id. at 918-19.

In affirming the District Court's opinion, the Court of Appeals for the Eighth Circuit agreed that the Minnesota statute violated the Commerce Clause because of its extraterritorial reach. North Dakota v. Heydinger, 825 F.3d 912, 919-22 (8th Cir. 2016). The Eighth Circuit stated that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." Id. at 919 (citations omitted). A statute or a regulation that "has undue exterritorial reach" is per se invalid when it "requires people or businesses to conduct their out-of-state commerce in a certain way." Id., citing Cotto Waxo, 46 F.3d at 793. "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582 (1986).

In the Heydinger litigation, the Eighth Circuit found that "the challenged prohibitions apply to non-Minnesota utilities" and were unlawful. Heydinger v. North Dakota, 825 F.3d at 921. This is similar to the reach of the Proposed Rule which would require Missouri electric utilities to apply for CCN's if they wish to acquire or construct a non-Missouri facility. Such an extraterritorial reach would violate the Commerce Clause.

Similar efforts by states to control commerce beyond their borders have also been struck down. See Hughes v. Talen Energy Mktg, LLC, 136 S. Ct. 1288, 1297-99 (2016) (Federal Power Act preempts Maryland PSC order directing utilities to enter into contracts with new generating plants where FERC had approved PJM's wholesale electricity capacity auction to address resource adequacy issues); New Jersey Bd. of Pub. Util. v. FERC, 744 F.3d 74, 95-102 (3d Cir. 2014) (upholding FERC's elimination of generation exemptions granted by the New Jersey and Maryland Commissions regarding PJM capacity markets).

IV. Section 393.170 does not Grant the Commission Jurisdiction over a Public Utility's Rebuilding, Improvement or Retrofit of an Electric Generating Plant or a Substation

A. The Proposed Rule Exceeds the Authority of Section 393.170

There is nothing in Section 393.170 that gives the Commission authority over a public utility that rebuilds, retrofits, improves or increases the useful life of an existing generating plant that has already been granted a CCN. Therefore, the Proposed Rule's definition of "Construction" in Section (1)(C) and its five sub-parts is not authorized by law.

Section 393.170.1 declares that no electrical corporation or other public utility "shall begin construction of" a plant "without first having obtained the permission and approval of the Commission." Once that permission has been obtained with a CCN, construction may begin. As long as the authority conferred by the CCN is "exercised within a period of two years from the grant thereof," as provided in Section 393.170.3, there is no requirement for a public utility to return to the Commission for any additional or supplemental CCN authority.[9]

[9] There is also no requirement for a public utility to apply for a new or amended CCN under circumstances where a CCN was granted to a multi-site generating station, the first unit was constructed within two years, and a second unit is constructed years later. This proposition is reflected by the Commission's decision allowing the recovery of prudently incurred costs to construct Iatan 2 and to include the new unit in rates. See Report & Order at 20-77, In re Kansas City Power & Light Co., No. ER-2010-0355 (2011); Report & Order, In re Application of Kansas City Power & Light Co. and St. Joseph Light & Power Co. for Certificates of Pub. Convenience and Necessity to Construct an Elec. Generation Station in Platte County, Mo., No. 17,895 (1973).

The Commission has never disputed this proposition. In recent years the PSC has reviewed the multi-million dollar expenditures by a number of Missouri utilities to bring their generating units into compliance with environmental regulations, as well as to improve their operations and efficiency. There was never a suggestion by the Commission or by any of the multiple parties to these proceedings that an additional CCN was required before an air quality control system, selective catalytic reduction system, or other environmental control equipment became operational. See In re Kansas City Power & Light Co., Report & Order at 59-64, No. ER-2014-0370 (Sept. 2, 2015) (La Cygne Units 1 and 2); In re Ameren Missouri, Report & Order at 24-35, No. ER-2011-0028 (July 13, 2011) (Sioux Units 1 and 2); In re Kansas City Power & Light Co., Order Approving Non-Unanimous Stipulations and Agreements, No. ER-2009-0089 (June 10, 2009) (Iatan Unit 1).

The plans to extend the lives of these units were thoroughly discussed and evaluated in the Commission's IRP process, as set forth in the detailed regulations contained in 4 CSR 240-22. These regulations declare:

> The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all legal mandates, and in a manner that serves the public interest and is consistent with state energy and environmental policies. [4 CSR 240-22.010(2)]

Although a utility's compliance with these rules "shall not be construed to result in Commission approval of the utility's resource plans, resource acquisition strategies, or investment decisions" under 4 CSR 240-22.010(1), the Commission has considered such evidence in rate cases where the final determination of the prudence of these decisions is evaluated and determinations

to include prudent costs in rates are issued. See In re Kansas City Power & Light Co., Report & Order, ¶¶ 146-47 at 62, No. ER-2014-0370 (Sept. 2, 2015) (La Cygne Units 1 and 2).[10]

The Proposed Rule's definition of "Construction" in Section (1)(C) exceeds the authority of Section 393.170 and unlawfully injects the Commission into a public utility's strategic and business decisions. As discussed above, the state may regulate public utilities, but it "is not clothed with a general power of management incident to ownership." State ex rel. Southwestern Bell Tel. Co. v. PSC, 262 U.S. 276, 289 (1923). The Missouri Supreme Court has stated that "the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5,11 (Mo. en banc 1966). While other states may occupy a more intrusive role in public utility regulation, Missouri has steadfastly adhered to the proposition that the "PSC is a creature of statute and limited thereby." State ex rel. Mo. Cable Telecomm. Ass'n v. PSC, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996).

When the Court of Appeals concluded that a public utility was required by Section 393.170 to obtain a CCN prior to constructing a generating unit and a substation within its service area, it attempted to determine if "practices in other states" could provide guidance as far as "particular trends" regarding regulatory approval of new plants. See StopAquila.org v. Aquila, Inc., 180 S.W.3d 24. 38 (Mo. App. W.D. 2005) ("Aquila"). However, it found no guidance. The Aquila Court noted, for example, that in California "where seismic activity is rife, every electric plant

[10] "KCPL re-evaluated whether it was appropriate to retrofit the La Cygne units on four occasions, once each in 2012, 2013, 2014 and 2015, as part of KCPL's integrated resource planning ('IRP') process. … Witness Burton Crawford testified credibly that the results of each re-evaluation of the La Cygne analysis during the IRP processes demonstrated that continuing with the retrofit project resulted in lower overall costs than resource plans that included retiring those units."

construction or modification project of a certain size must be approved by that state's Commission …." Id. (emphasis added). Missouri has no language about "modification" projects.

In Iowa the has legislature specifically stated: "Any significant alteration, as determined by the [Iowa Utilities Board], in the location, construction, maintenance, or operation of a facility … shall require an application for an amendment to a certificate or a certificate whichever is appropriate." See § 476A.2, Subsection 2, Iowa Code (2018) (emphasis added). The term "significant alternation" is defined to include "a change in the type of fuel used by the major electric generating facility" (defined as 25 MW or more), as well as a change "that increases the maximum generator name plate capacity of the facility by at least 10% and at least 25 MW." See § 24.2(476A) definitions, Iowa Admin. Code. Missouri, by contrast, has no statutory language providing that a "significant alteration" to a generating unit or facility requires the Commission to issue a new or amended CCN.

The Aquila Court concluded that because "public utility laws vary so widely," it must return to Missouri law "where we began, with section 393.170.1" and its "plain and unambiguous language." Id. at 38-39. That is what the Commission must do here.

Any attempt by the Commission through this rulemaking proceeding to stray from Missouri law and to attempt to enlarge its jurisdiction would be unlawful. "If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power." State ex rel. MoGas Pipeline, LLC v. PSC, 366 S.W.3d 493, 494-95 (Mo. en banc 2012).

Additionally, the broad definition of "Construction" in Section 1(C) of the Proposed Rule, stating what it "includes"—not what it precisely means—could encompass other broad definitions of construction, such as in Section 290.210 relating to prevailing wage issues. That provision

states that "construction" includes "improvement, enlargement, alteration, painting and decorating," as well as "major repairs." See § 290.210(3).

Finally, the Proposed Rule's Section (1)(C)5.C defines "construction" to include "[a]n increase in the useful life of an existing electric generating plant." In this context, "an increase" in a plant's useful life means "any" such increase, which would include improvements or changes in operating procedures that increase the useful life of a plant. Such broad language goes far beyond a sensible definition of "construction."

B. The IRP Process is Comprehensive and Effective

The Commission's current regulations under Chapter 22 require that electric utilities prepare and submit an extensive and thorough Integrated Resource Plan to meet the fundamental objective of providing the public "with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all legal mandates." See 4 CSR 240-22.010(2). Compliance with this public policy goal requires regulated utilities to: "Consider and analyze demand-side resources, renewable energy and supply-side resources on an equivalent basis …." See 4 CSR 240-22-010(2)(A).

For a proposed IRP to be accepted, a utility must design and evaluate one or more alternate resource plans for review by Staff, as well as the Commission. See 4 CSR 240-22.060(1). The requirements that an electric utility must meet before beginning construction or adding a new generation resource are already comprehensive and require consideration of all alternatives. Some of the required considerations include the range of future load growth, cost of capital, changes in legal mandates, fuel prices, and siting and permitting costs and schedules for new generation and generation-related transmission facilities. See 4 CSR 240-22.060(5)(A)-(E). They also include an assessment of the construction costs for new facilities, fixed operation and maintenance costs for

new and existing generation facilities, purchased power availability, outage rates for new and existing facilities, and "[a]ny other uncertain factors that the utility determines may be critical to the performance of alternative resource plans." Id. at 22.060(5)(F)-(G), (I)-(J), (M).

As KCP&L witness Burton Crawford stated in comments to the Commission in an earlier rulemaking proceeding, applying Section 393.170 to environmental retrofits like the La Cygne generating station could double the price of the equipment (e.g., $50 million to $100 million), add seven to eight months to the project's schedule, and create tighter deadlines as far as environmental compliance.[11]

Given the relatively efficient process that electric utilities follow today in their resource decisions, adding a new process not required by law that would increase costs and delay implementation is contrary to the public interest. The Proposed Rule fails to consider these consequences that were previously expressed to the Commission, and its concluding statement that it "will not cost private entities more than five hundred dollars ($500) in the aggregate"[12] is both unfounded and preposterous.

V. Section 393.170 does not Authorize the Commission to Mandate a Competitive Bidding Process when a CCN is Required before a Public Utility can begin Construction on an Electric Generating Plant or a Substation

There is nothing in Section 393.170 to indicate that the General Assembly authorized or even contemplated that the Commission would engraft a competitive bidding process on to a determination that "such construction … is necessary or convenient for the public service." See § 393.170.3. Any attempt by the Commission through this rulemaking to impose competitive bidding on a straightforward determination of necessity or convenience would exceed the powers

[11] Comments of Burton Crawford, Rulemaking Hearing, Vol. 1 at 33-35, In re Proposed Amendments to 4 CSR 240-3.105 Filing Requirements for Elec. Util. Applications for Certificates of Convenience and Necessity, No. EX-2015-0225 (May 12, 2016).

[12] See Proposed Rule at 5 which states: "PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars ($500) in the aggregate."

granted to the Commission by the Legislature and be unlawful. State ex rel. MoGas Pipeline LLC v. PSC, 366 S.W.3d 493, 497-501 (Mo. en banc 2012).

The courts have noted that "the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is 'necessary or convenient for the public service' within the meaning of" Section 393.170. State ex rel. Ozark Electric Coop. v. PSC, 527 S.W.2d 390, 394 (Mo. App. K.C. 1975). Nevertheless, they have acknowledged that the Commission may properly evaluate matters related to the safety and adequacy of facilities, the relative experience and reliability of any competing suppliers, and the public interest. State ex rel. Intercon Gas, Inc. v. PSC, 848 S.W.2d 593, 597-98 (Mo. App. W.D. 1993).

The Commission has developed over the past twenty years a set of factors relating to the need, economic feasibility, operational qualifications, financial resources, and overall public interest to determine whether an application is necessary or convenient, and whether a CCN should be granted. In re Tartan Energy Co., 1994 WL 762882 at *6-*14, No. GA-94-127 (1994).

In applying these Tartan factors to recent CCN applications, the Commission has never complained that the lack of a competitive bidding process hindered its ability to evaluate whether a generation facility, a transmission line, or a substation was necessary or convenient for the public service under Section 393.170. See Order Approving Unanimous Stipulation & Agreement at 2-3, In re Ameren Trans. Co. of Illinois, No. EA-2017-0345 (Jan. 20, 2018) (granting CCN to electric transmission line project); Report & Order at 12-18, In re KCP&L Greater Mo. Operations Co., No. EA-2015-0256 (Mar. 2, 2016) (granting CCN to the Greenwood solar generation facility), aff'd, 515 S.W.3d 754 (Mo. App. W.D. 2016); Report & Order at 31-44, In re KCP&L Greater Mo. Operations Co., No. EA-2009-0118 (Mar. 28, 2009) (granting CCN to the South Harper natural gas generation facility, its associated substation, and the Peculiar Substation).

It is noteworthy that during the General Assembly's 2018 session it considered a wide range of amendments to the Public Service Commission Law, including whether to amend Section 393.170 and whether to require a competitive bidding process for utility infrastructure projects. However, when Senate Bill No. 564 was finally passed by the House of Representatives on May 16, 2018, subsequent to the Senate's approval earlier in February, only a minor change was made to Section 393.170. That amendment related only to Section 393.170.1, where the General Assembly added a phrase stating that a CCN would not be required for "an energy generation unit that has a capacity of one megawatt or less."

The Legislature did, however, consider the topic of competitive bidding, but not with regard to Section 393.170. Instead, the General Assembly enacted new Section 393.1650 which only applies to an electrical corporation "with more than one million Missouri retail electric customers" (i.e., Ameren Missouri), and applies only to a "competitive bidding process for providing construction and construction-related services for distribution system projects." See Senate Bill No. 564, § 393.1650.1(2)-.2. Given the numerous references to competitive bidding in subsections 2 through 4 of Section 393.1650, it is clear that the Legislature considered issues related to requiring a competitive bidding process for public utilities.

However, it declined to amend Section 393.170 with regard to CCNs and the process by which the Commission evaluates applications for permission to construct electric plant. The General Assembly's decision to add only a minor amendment to Section 393.170 indicates that the Commission's Proposed Rule requiring a competitive bidding process far exceeds the powers that the Legislature has granted to the Commission. State ex rel. Harline v. PSC, 343 S.W.2d 177, 181-82, 185 (Mo. App. K.C. 1960) (no additional CCN required to construct transmission line within a utility's service area).

The Proposed Rule imposes competitive bidding on three separate electric utility decisions.

(a) Resource Decision: An application "to construct assets … shall include" under Section (5)(J) evidence that the electric utility utilized a "competitive bidding process to evaluate whether purchased power capacity or suppliers of alternative energy would be a reasonable resource in lieu of the construction proposed; …."

(b) Plant Construction Decision: Under Section (5)(K) such an application must include evidence that the electric utility "utilized or will utilize" a "competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant."

(c) Transmission Acquisition or Construction Decision: Finally, under Section (6)(I) if the application is for "authorization to acquire or construct an electric transmission line," it must include evidence that the electric utility "utilized or will utilize" a "competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric transmission line; …."

Given that in 2018 the General Assembly saw no need to expand the Commission's authority in Section 393.170, and, to the contrary, made clear that generating units under one MW are not required to seek its permission and approval, the Proposed Rule's Section (5)(J)-(K) and Section (6) far exceed the powers granted to the Commission.

Moreover, even if such an attempt were permitted by statute, it would needlessly duplicate portions of the Commission's existing IRP process set forth in Chapter 22 of the Commission's regulations, and could significantly increase the cost and delay the construction of new plants,

improvements, and retrofits. The IRP rules require a public utility to develop and adopt a Resource Acquisition Strategy that must include an Implementation Plan "which shall contain" seven components, including: "A description of adequate competitive procurement policies to be used in the acquisition and development of supply-side resources; …." See 4 CSR 240-22.070(6)(E). For the reasons noted above, there is no need to expand the regulatory requirements for electric utilities seeking a CCN, given the detailed IRP process that is in a state of continuous analysis and refinement.

Therefore, any reference to the imposition of a competitive bidding process with regard to an electric plant or transmission line, as proposed in Section (5)(J)-(K) and Section (6)(I) should be withdrawn.

VI. Additional Comments regarding Proposed Rule Sections (2), (4), (5) and (6)

The Companies offer the following specific comments regarding certain sections of the Proposed Rule.

A. Section (2)

Section 2(C) properly clarifies that if any item to be provided to the Commission under the rule is unavailable at the time the application is filed, a CCN may be granted subject to the applicant providing the item "before authority under the certificate is exercised."

Section (2)(E) states that in deciding whether to grant a CCN the Commission "may … make a determination on the prudence of the decision to acquire or construct" the facility in question. However, it states that such decision is "subject to the commission's post-construction review of the project." The failure of the Proposed Rule to define the nature of a "post-construction" review leaves open to speculation whether it is referring to a subsequent or ancillary proceeding to the CCN application, a subsequent general rate case where the cost of the facility will be considered, or some kind of new proceeding.

The Companies recommend that the Commission add language at the end of Section 2(E) stating: "… which shall occur during the subsequent general rate case where the cost and other matters related to the project will be considered."

B. Section (4)

Under Section (4)(D) the term "utility system" is not defined, and is not used in the proposed definition of "asset" in Section (1)(B).

C. Section (5)

The term "non-incumbent electric providers" is not defined in Sections (5)(G) or (5)(H), and appears to apply to entities that are not subject to the Commission's jurisdiction.

Missouri courts have long held that a public utility must offer its services generally to the public. Otherwise, the provider of electricity is not an "electrical corporation" or "public utility" under the Public Service Commission Law, and is not subject to PSC authority. State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918); Hurricane Deck Holding Co. v. PSC, 289 S.W.3d 260, 264 (Mo. App. W.D. 2009); Osage Water Co. v. Miller County Water Auth., Inc., 950 S.W.2d 569, 574 (Mo. App. S.D. 1997).

D. Section (6)

The notice and public meeting provisions in Section (6)(J) regarding electric transmission lines are unclear and inconsistent. The term "landowner" or "landowners" should be used throughout, and not the term "persons." Where the term "notice" is intended to mean "notice of the application," the complete phrase should be used in Section (J) and Section (J)(1).

The phrase "Any letter" that begins Section (J)(2) should be deleted and the phrase "Notice of the Application" used. Subsection (J)(2) should be revised so that the term "applicant" is used throughout, instead of the term "utility."

Section (J)(3) should distinguish between a "public meeting" where landowners are informed about the proposed project, and a "public hearing" or "local public hearing" that is conducted in the course of a formal Commission proceeding.

Finally, as discussed above with regard to Section (5), the term "non-incumbent electric providers" is also not defined in this section and appears to apply to entities that are not subject to the jurisdiction of the Commission.

VII. Conclusion

The majority of the Proposed Rule's provisions are unlawful. They are a misguided effort to stretch Section 393.170 beyond its clear and simple language. The General Assembly has granted the Commission extensive powers in Chapters 386 and 393 to oversee and regulate Missouri's electric utilities. The PSC "is merely the instrumentality of the Legislature" which "alone has the power to declare the general law relating to" regulatory subjects. "If the interests of the public require a change in the law …, then it is a matter for appropriate action by the Legislature …." State ex rel. Springfield Warehouse & Transfer Co. v. PSC , 225 S.W.2d 792, 795 (Mo. App. K.C. 1949). See Tetzner v. Department of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) ("a basic tenet of administrative law" is that "an agency only has such jurisdiction that may be granted by the legislature").

Section 393.170 contains no direction to the Commission to issue rules, unlike other provisions of the PSC Law.[13] The general authority of the Commission extends under Section 386.250(6) only to "the adoption of rules as are supported by evidence as to reasonableness."

[13] See § 386.266.9 (fuel adjustment and rate adjustment mechanisms). Section 393.140(11) "empowers the PSC to establish rules and regulations relating to any rate change in a utility's schedule." State ex rel. Office of the Public Counsel v. PSC, 331 S.W.3d 677, 687 n.10 (Mo. App. W.D. 2011). No provision of Section 393.170 relates to rate schedules.

However, significant parts of the Proposed Rule go well beyond the language of Section 393.170 and constitute de facto legislation far beyond any reasonableness standard.

Moreover, the proposal attempts to provide a bureaucratic "solution" to an electricity resource adequacy problem that does not exist in Missouri. Over the years the Commission has wisely exercised its powers by not imposing onerous rules that infringe on the right of electric utilities to manage their business. As a result, Missouri has not and does not face the resource adequacy shortfalls and other capacity problems encountered by other states whose legislatures and commissions have enacted zero emission credit ("ZEC") proposals and other programs to attempt to address such issues. See Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1294-97 (2016) (striking down Maryland PSC generation order designed to remedy supply shortfalls); Coalition for Competitive Elec. v. Zibelman, 272 F. Supp. 3d 554, 560-63 (S.D.N.Y. 2017) (upholding N.Y. PSC ZEC program), appeal docketed, No. 17-2654 (2d Cir., Aug. 25, 2017); Village of Old Mill Creek v. Star, 2017 WL 3008289 (N.D. Ill. 2017) (upholding Illinois ZEC statute), appeal docketed, No. 17-2433 (7th Cir., July 17, 2017). There is simply no need for the Proposed Rule which, if adopted, will hinder Missouri's ability to acquire and build infrastructure in a cost-effective and timely manner.

Therefore, with the exceptions noted above, the Proposed Rule should be withdrawn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, this 14th day of June, 2018 to all counsel of record in this case.

/s/ Robert J. Hack

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