BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the matter of Dogwood Energy, LLC's	)	
Petition for Revision of Commission Rule	)	File No. EX-2014-0205
4 CSR 240-3.105	)	

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

In response to the Commission's January 8, 2014 Order Directing Staff to Investigate, Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, "Companies") state that the changes proposed by Dogwood Energy, LLC ("Dogwood") to 4 CSR 240-3.105 are unnecessary and contrary to law. Because there is no need for the Missouri Public Service Commission ("Commission" or "PSC") to consider this proposal, given the nature and extent of its regulatory authority, it should reject Dogwood's petition.

The Commission lacks the legal authority to require a Missouri public utility to obtain a certificate of convenience and Necessity ("CCN") prior to its construction of an out-of-state facility because the PSC cannot second-guess a utility's prudent business decisions. The Commission also lacks the authority to enforce its statutes regarding the construction, improvement or acquisition of electric plant in another state. Under the current legal framework the Commission exercises wide authority over the prudence of a utility's construction programs through the rate case process which permits it to deny the recovery of imprudent costs or to determine an asset's rate base value, thus affording protection to ratepayers.

I. The PSC Lacks Authority to Implement the Proposed Rule

The Commission has a great deal of authority over its regulated public utilities, however, it cannot exercise jurisdiction that is not granted by statute or otherwise constitutional. "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." Public Service Commission v. Bonacker, 906 S.W. 2d 896, 899 (Mo. App. S.D. 1995) ("Bonacker").

Dogwood has asserted, without citation to supporting case law, that Section 393.170[1] requires utilities to obtain Commission approval to "acquire an interest" in a generation plant, and for "substantial capital items." See Dogwood Petition at 4, 8. Dogwood also claims that it is "irrelevant whether the utility builds the plant itself, acquires it from someone else, and/or delays proposed inclusion in regulated rate base." Id. at 9. Section 393.170.1 says no such thing. It provides that no electrical corporation and certain other public utilities "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]."

Despite Dogwood's desire for the statute to confer much broader authority, the Commission has only those powers specifically granted to it. Section 393.170.1 grants far narrower powers than those Dogwood asserts.

Contrary to Dogwood's claims, the PSC must allow the utility to manage its own business and 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 bounds of the Commission's authority are defined as monitoring or overseeing, and not management. "Those powers [expressly conferred by the Commission] 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

[1] All citations are to the Missouri Revised Statues (2000), as amended, unless otherwise noted.

to direct its use." State ex rel. Harline v. PSC, 343 S.W.2d 177, 181 (K.C. App. 1960) (original emphasis).

Dogwood's proposed rule contradicts this statutory purpose. Were the Commission to adopt a rule requiring prior approval of the acquisition or improvement of any property, even within the State of Missouri, it would clearly fall into the category of directing a utility's use of its property rights. "Exercise of the latter function 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 held that the PSC's powers do not "clothe the Commission with the general power of management incident to ownership." Id. at 182.

More recently, the Commission itself has recognized this legal limitation. In noting the reach of its powers, the Commission has noted that its authority "essentially includes everything except the power to operate and manage [a public utility] itself." In re Aquila, Inc., 2006 WL 1210882, *4 (Mo. P.S.C., April 20, 2006). More broadly, the Commission has noted: "The courts have held that the Public Service Commission's authority to regulate does not include the right to dictate the manner in which the utility company shall conduct business." In re Investigation into Public Utility Preparedness, 188 P.U.R.4th, 351, 353 (Mo. P.S.C., Aug. 28, 1998), citing Bonacker, 906 S.W.2d at 899.

Other courts have gone even further than this, holding that a public utility commission is not allowed to substitute its judgment for that of the utility, who are responsible for the rendition of service, unless the owners of the utility have abused their discretion. South Central Bell. Tel. Co. v. Alabama PSC, 425 So.2d 1093, 1096 (Ala. 1983). In the absence of abuse of discretion,

managerial decisions involving any action other than the abandonment of services are to be left to the utility. See 64 Am. Jur. 2d, *Public Utilities* § 151 (November 2013).

This analysis is equally applicable to Dogwood's request that the Commission require a competitive bidding component for selection of supply-side resources. Section 393.170.1 does not authorize the Commission to promulgate such a rule. As discussed above, the Commission enjoys only that power explicitly conferred on it by statute. Regardless of Dogwood's vague claims that other states may require competitive bidding, it is clear that this Commission has no such authority.

A rule that requires prior Commission approval before a Missouri utility is permitted to construct or improve an out-of-state facility would encroach on the business and management prerogatives of the utility. The Commission's authority to oversee and evaluate the decisions of a public utility is preserved, as it always has been, in the prudence review process that takes place during general rate cases. The pre-emptive review proposed by Dogwood is an encroachment on the day-to-day operation of the utility's business and is unlawful under Missouri law.

II. The Commission's Regulations Provide Substantial Oversight

The Commission's current regulations under Chapter 22 require that electric public utilities in Missouri prepare and submit an extensive and thorough Integrated Resource Plan ("IRP") 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). Under the current regulatory scheme,

Dogwood's facility must be given fair consideration with all other facilities, regardless of whether they are in-state or out-of-state.

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 (such as from Dogwood), 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).

In addition to the procedures outlined in the regulations, the PSC has the general authority under Section 393.130(1) to set just and reasonable rates and determine which costs proposed by the utilities will be included in rate base and charged to consumers. As Dogwood noted in its petition, the Commission recently disallowed certain costs associated with the Crossroads plant and sets its valuation under this authority in GMO's general rate case, File No. ER-2012-0174. While GMO strongly disagrees with these decisions, the Commission's action demonstrates that the Commission does not believe that it lacks the tools necessary to protect ratepayers.

III. The Commission Should Adhere to its Current Practices

As Dogwood has pointed out, there have been several instances in which electric utilities have either constructed or acquired generation facilities outside Missouri without first obtaining a CCN. While carefully evaluating these actions and making certain adjustments, the Commission has overall found each of these transactions to be prudent (or not imprudent) and has added the plants to rate base.

The Commission has routinely allowed out-of-state facilities to come into rate base. As Dogwood noted in its Petition, GMO did not apply for a CCN before adding the Crossroads plant, located in Clarksdale, Mississippi, to its portfolio of regulated resources. Similarly, The Empire District Electric Company ("Empire") did not apply for a CCN regarding its Riverton Unit 12 facility located in Riverton, Kansas. The Commission allowed both plants to come into rate base and found no violation of Section 393.170.1.

Additionally, the Commission has allowed the following non-Missouri facilities to be included in utility rate without a CCN proceeding: (a) Empire's ownership interest in the Plum Point Energy Station in Osceola, Arkansas; (b) KCP&L's Spearville I and II wind farms in Lincoln County, Kansas; (c) GMO's ownership interest in the Jeffrey Energy Center in St. Mary's Kansas and (d) Ameren's Goose Creek and Raccoon Creek plants, both located in Illinois. 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. banc 1975), the Commission itself should refrain from a radical shift in its longstanding interpretation of Section 393.170.1 in the absence of a legislative amendment. This is particularly true where it appears in this case that Dogwood is simply attempting to improve its competitive position with the state's regulated public utilities.

IV. The Commission Lacks Constitutional Authority to Enforce Regulations Beyond its Borders

As an agency of the State of Missouri, the Commission's authority is limited to the borders of its state. Under Section 386.030: "Neither this chapter, nor any provision of this chapter, except where 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 …." Clearly, the General Assembly did not intend for the Commission's authority to reach beyond its borders and purport to preempt or regulate construction projects in another state.

This is in accordance with longstanding 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, 123 S. Ct. 1513, 155 L. Ed. 585 (2003) ("State Farm"), quoting Huntington v. Attrill, 146 U.S. 657, 669, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). State Farm case dealt with a calculation of punitive damages which the plaintiff alleged were necessary to rebuke State Farm for its "nationwide activities." State Farm, 538 U.S. at 421.

In holding that a state cannot punish a defendant for conduct that may have been legal 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. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-822, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985).

The proposed rule would violate this precedent by effectively extending the reach of Section 393.170 beyond Missouri's borders to any state in which a utility sought to construct, acquire or even upgrade a facility.

In reaffirming that states lack any authority to enforce their laws beyond their borders, courts have held that a strong presumption exists against extraterritorial authority. For example, the State of Wisconsin was rebuked for a law that required a pharmacy to charge the same prices for its products in every other state that it charged in Wisconsin. The U.S. Court of Appeals for the Seventh Circuit observed: "One staple in the interpretation of federal law is that statutes presumptively govern only conduct in the United States. States lack any comparable power to reach outside their borders, making the presumption of exclusive domestic application even stronger." K-S Pharmacies, Inc. v. American Home Products Corp., 962 F.2d 728, 730 (7th Cir. 1992). In this proceeding, there is similarly no basis for the Commission to exercise prior review authority over a project being constructed, improved or acquired outside of Missouri.

V. Conclusion

Neither the Commission's detailed and comprehensive regulations, Missouri law, nor the United States Constitution contemplate the PSC issuing rules that would overlay, override or nullify another state's laws and procedures. This is the effect that the Dogwood proposal would have.

Given the powers that the Commission has exercised in the public interest, consistent with Missouri and federal law for over a hundred years, Dogwood's proposal—in reality, a feeble effort to remake the competitive business environment—is unworkable and unnecessary. Its petition for rulemaking should be dismissed.

Respectfully submitted,

/s/ Roger W. Steiner

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ATTORNEYS FOR
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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 February, 2014 to all counsel of record in this case.

/s/ Roger W. Steiner

Roger W. Steiner