BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Amendment to Commission Rule 4 CSR 240-3.105, Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity	))))	Case No. EX-2015-0225

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

Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, "KCP&L") hereby submits comments in response to the Missouri Public Service Commission's "Commission") Notice to Submit Comments and Notice of Public Hearing included in the proposed rule published in the *Missouri Register*.

I. Introduction

It is important to remember that this rulemaking arose out of a petition filed by Dogwood Energy, LLC ("Dogwood") in January 2014 asking the Commission, among other things, to amend the existing Certificate of Convenience and Necessity ("CCN") rule so that electric utilities had to obtain advance approval before acquiring a generation plant or starting major renovations at existing plants. Dogwood also wanted the Commission to adopt a mandatory competitive bidding process before a generation plant was built or retrofitted. Dogwood's proposal appeared to be motivated by its dissatisfaction with Empire's decision to convert its Riverton unit No. 12, a natural gas fired combustion turbine, to combined cycle operation instead of purchasing Dogwood's southwest Missouri merchant plant.[1] The Commission rejected Dogwood's attempt to rewrite the CCN rule to benefit the private interests of a merchant

[1] *Dogwood Petition*, File No. EX-2014-0205.

generator but did open a workshop to address Commission Staff's suggestion that recent court decisions should be reflected in the CCN rule.[2]

KCP&L believes that some changes to the CCN rule (4 CSR 240-3.105) could be made to bring the rule in line with certain appellate court opinions[3] that address the certification of electric power production facilities and transmission and distribution infrastructure. However, many of the proposed changes go far beyond addressing these specific certification questions and attempt to expand the CCN process beyond the Commission's lawful authority by adding unnecessary and duplicative provisions regarding competitive bidding, retrofitting of and acquisition of generation resources.

While KCP&L's comments will address many of the specific provisions of the proposed rule, KCP&L believes that the additions are duplicative and unwarranted due to (1) the Commission's existing practice of determining the reasonableness and recoverability of costs only in ratemaking proceedings and (2) Commission Chapter 22 rules requiring the development of a utility's resource portfolio in the integrated resource planning process. Moreover, the proposed rule's definition of the term "construction" includes the acquisition of an electric plant as well as the rebuilding or renovation of such plant which vastly expands CCN requirements beyond those provided by law in Section 393.170. All of these areas are reserved to the informed judgment of the utility's management subject to the Commission's regulatory oversight, but the proposed rule needlessly and unlawfully inserts the Commission into the role of utility management. The Comments will also provide the Company's position on less-substantive changes to the rule.

[2] *Order Denying Petition for Revision of Commission Rule 4 CSR 240-3.105*, File No. EX-2014-0205.
[3] StopAquila.org v. Aquila, 180 S.W.3d 24 (Mo. App. W.D. 2005). ("Aquila I"); State ex rel. Cass County v. Public Service Commission, 259 S.W.3d 544 (Mo. App. W.D. 2008) ("Aquila II").

II. The Commission's Authority

The Commission has a great deal of authority over the public utilities it regulates, however, it cannot exercise jurisdiction that is not granted 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."[4]

The statutory requirement for a CCN is found in Section 393.170 RSMo. Section 393.170.1 provides that no electrical corporation "shall begin construction of a . . . electric plant . . . without first having obtained the permission and approval of the commission [emphasis added]." Section 393.170.2 provides that an electrical utility may not exercise any right or privilege under a municipal franchise without having first obtained the permission and approval of the Commission. Section 393.170.3 provides that the Commission may grant permission and approval for subsections 1 and 2 after "due hearing" and a finding that approval is "necessary or convenient for the public service." The Commission's governing statutes have been interpreted by the courts as explained below.

The Commission 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 to the Commission] are purely regulatory. The dominating purpose of the Public Service Commission

[4] Public Service Commission v. Bonacker, 906 S.W. 2d 896, 899 (Mo. App. S.D. 1995) ("Bonacker").

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."[5]

The proposed rule contradicts this statutory purpose. Were the Commission to adopt proposed subsection (1)(B)6 of the proposed rule – through which the Commission would effectively approve or reject design, engineering, materials procurement, or power supply bids from third party vendors – the Commission would be in the position of directing the subject utility's business decisions rather than determining the recoverability of costs or otherwise appropriately regulating its operations. Even considering the Commission's broad authority over public utilities, the Court of Appeals held that the Commission'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."[6] 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."[7]

III. The Commission's Existing Regulations and Practices Provide Substantial Oversight Which the Proposed Rule would Needlessly and Wastefully Duplicate

The proposed rule (section (1)(B)6) adds complexity to the CCN process by requiring that the utility show a competitive bidding process for the construction of the electric plant and for purchased power capacity in lieu of the construction of the electric plant. This addition is

[5] State ex rel. Harline v. PSC, 343 S.W.2d 177, 181 (K.C. App. 1960) (original emphasis)
[6] In re Aquila, Inc., 2006 WL 1210882, *4 (Mo. P.S.C., April 20, 2006).
[7] 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.

unnecessary as it is duplicative of the Commission's current regulations and practices. No showing has been made that the proposed competitive bidding additions are needed by the Commission to effectively regulate utilities.

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).

For a proposed IRP to be accepted a utility must design and evaluate 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).

In addition to the procedures outlined in the IRP rule, the Commission 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. The Commission has the authority in a rate case to review all costs incurred by a utility including the cost paid for power. The Commission can deny recovery of these costs if they are not prudently incurred. Prudence issues involving the construction of electric plant are also regularly addressed by the Commission in rate cases. The Commission already has the tools it needs to protect ratepayers and there is generally no need for prudence issues to be addressed in a CCN case.

Given the requirements of the IRP rule and the fact that the reasonableness and recoverability of costs is determined by the Commission only in general rate proceedings – and most definitely is not determined in CCN proceedings – what purpose is served by imposing competitive bidding requirements in the CCN rule? Imposing such a requirement would only result in needless and wasteful duplication and not serve the public interest.

IV. The Proposed Rule Unlawfully Expands the Definition of "Construction" and This Expansion Results in Waste and Duplication

Section 393.170 does not support the proposed rule's attempt to redefine the term "construction" in section (2)(C) and (2)(D). There is nothing in the statute which gives the Commission the authority to require a certificate for the purchase or capital lease of electric plant. The statute requires that a utility receive Commission approval before starting construction, not before purchasing existing electric facilities. There is nothing in the normal understanding of the word "construction" which can be construed to include acquisition by

purchase. As shown above, the Commission already has the authority to evaluate these types of acquisitions and improvements when the utility seeks to recover its costs in rates.

Statutory terms are to be given their plain and ordinary meaning. Black's Law Dictionary defines construction as "[t]he creation of something new, as distinguished from the repair or existence of something already existing." A utility cannot rebuild, renovate or retrofit something unless it already existed. Thus, the proposal to define "construction" in the CCN rule as "rebuilding, renovation, improvement or retrofit" changes the meaning of the word "construction" contained in Section 393.170. This redefinition is not possible since a rule can't change the meaning of a word contained in a statute.[8] The Commission has never construed the term "construction" in this manner.

There are also practical problems created when including plant improvements and retrofits in the definition of construction while at the same time requiring a utility to demonstrate that a competitive bidding process for purchased replacement capacity and energy was utilized to evaluate alternatives to such construction. One simple example is the recent retrofits at KCP&L's Montrose Station which were needed to ensure compliance with EPA's Mercury and Air Toxics Standard (MATS). While these retrofits cost approximately $18 million, the proposed changes to the CCN rule would have required KCP&L to issue and evaluate bids to replace the capacity and energy from Montrose in lieu of the retrofits. Since replacing the capacity and energy from this 338 MW coal-fired facility would cost well in excess of $100 million in just the near term, developing, issuing and evaluating bids for its replacement would be a significant waste of time and resources. In addition, in some cases the extra time required to develop, issue, and evaluate bids to replace a power plant's capacity and energy and

[8] *State ex. rel. Doe Run v. Brown*, 918 S.W.2d 303, 306 (Mo. App. E.D. 1996).

subsequently complete the CCN process could significantly delay a required environmental retrofit project such that tight environmental compliance deadlines are missed. Decisions to replace a generating station's capacity and energy are best evaluated in the IRP process and not as part of a CCN application.

Moreover including the acquisition of existing electric generating plants in the definition of "construction" while at the same time requiring a utility to demonstrate that a competitive bidding process for purchased replacement capacity and energy was utilized to evaluate alternatives to such "construction" will likely lead to missed opportunities for electric utilities in Missouri. One simple example is in the acquisition of an existing wind facility. If and when such an opportunity arose, a utility would evaluate the economics of the specific opportunity to determine if the acquisition was in the best interests of its retail customers. However, under the proposed CCN rule, the utility would also be required to develop, issue, and evaluate alternatives to the capacity and energy created by the wind facility through an RFP process and then subsequently request a CCN. In the time it would take to complete this process, the original acquisition opportunity may have been missed as the facility gets sold to another interested party. The proposed rule would make the acquisition of generating resources in Missouri less attractive as compared to those in other states.

For these legal and practical reasons, proposed subsections (1)(B)6, (2)(C) and (2)(D) should not be included in the final rule.

V. Comments on Other Rule Revisions

Subsection (1)(A) appears to be materially unchanged and the Company has no issue with the proposed additions.

Subsection (1)(B)2 includes new requirements for the estimation of construction costs for a new generation plant. The Company appreciates the need for the CCN case parties to gain an understanding of the plans and specifications, cost estimate information and the expected in-service date. The proposed language, however, needs to be re-written to reduce confusion and recognize the realities of how large scale construction projects are developed. The Company believes that the language below would balance the interests:

> 2. A description of *[T]the* plans and specifications ~~for the complete scope of the construction project~~ and estimated cost **for the complete construction project available as of the time of filing the application** ~~of the construction project *[or]*~~, **and a** ~~which also clearly~~ clear **identification**~~s~~ of the operating and other features of the electric generating plant(s), electric transmission line(s), and gas transmission line(s) to facilitate the operation of the electric generating plant(s), when the construction is fully operational and used for service; the projected beginning of construction date and the anticipated fully operational and used for service date of each electric generating plant, each electric transmission line, and each gas transmission line to facilitate the operation of each electric generating plant for which the applicant is seeking the certificate of convenience and necessity; and **an identification** of ~~identify~~ whether the construction project for which the certificate of convenience and necessity is being sought will include common electric generating plant, common electric transmission plant, or common gas transmission plant to facilitate the operation of the common electric generating plant, and if it does, **an identification** of ~~then identify~~ the nature of the common plant. If this information is **not available at the time of the application** ~~currently unavailable~~, then a statement of the reasons the information is ~~currently~~ unavailable and a date when it will be *[furnished] filed*. **The utility, by filing the same in the docket created by the application, shall supplement the information required by this subsection 2 if there are material changes to such previously-filed information**;*[and]*

Subsections (1)(B)4 and (1)(B)5 are not appropriate and should be deleted. Plans for operating and maintaining electric plant and restoration plans are not discussed in Section 393.170 and are beyond the CCN process. The Commission has the authority to address these issues when it regulates a utility's quality of service and reliability.

Subsections (2)(A) and (2)(B) appear to be good clarifications of the Commission's authority after the Aquila I and II cases.

VII. Conclusion

Other than clarifying the impact of the Aquila decisions, the proposed rule changes are not needed for the Commission to effectively regulate electric utilities. Mandated competitive bidding in the CCN rule and the redefinition of the term "construction" are costly solutions in search of a problem that has yet to be articulated. Competitive bidding requirements will also delay a utility's efforts to improve generation and the transmission grid. Does the Commission really want to promulgate a revised rule which simply increases the time and cost required to obtain resources necessary to serve Missouri customers when no meaningful benefits have been shown to result from the increased time and cost?

Given the powers that the Commission has exercised in the public interest, consistent with Missouri law for over a hundred years, much of the proposed rulemaking—in reality, a misguided effort to remake the business environment for the benefit of merchant generators—is unworkable and unnecessary. The Commission should not adopt proposed revisions 3.105(1)(B) 6, 3.105 (2)(C) and (D) or (E) (which becomes unnecessary) and should adopt the alternative language set forth herein for 3.105(B)(2).

Respectfully submitted,

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