

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of South)
Central MCN LLC for Approval of Transfer of)
Assets and a Certificate of Convenience and)
Necessity)

File No. EA-2016-0036

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL DISPOSITION

Applicant, South Central MCN LLC (SCMCN), submits this memorandum in support of its Motion for Partial Disposition (Motion) to address a threshold question: Whether the Missouri Public Service Commission (the Commission) lacks jurisdiction under Section 393.190 RSMo. over the transaction (Transaction) that is the subject of SCMCN's application for a certificate of convenience and necessity (Application).

In its Application, out of an abundance of caution, SCMCN asked the Commission to disclaim jurisdiction under Section 393.190 RSMo. or, in the alternative, to approve the Transaction. In its order setting the Application for hearing, the Commission stated that it has jurisdiction, but did not expressly state the statutory provision under which it would exercise such jurisdiction. SCMCN does not now (and did not in its Application) dispute that the Commission has jurisdiction under Section 393.170 RSMo. to grant SCMCN a certificate to operate the transmission assets it seeks to acquire from the City of Nixa (the City). However, SCMCN disputes that the Commission has jurisdiction under Section 393.190 RSMo. over the City's *sale* of assets, and respectfully submits that the Commission's assertion of such jurisdiction will not aid the Commission in protecting the public interest, and will likely impose additional and unnecessary burdens on Staff and the Commission for this and future cases, as well as on applicants. SCMCN respectfully requests that the Commission grant SCMCN's Motion as soon as practicable so as to narrow the scope of issues that must be considered in this proceeding, thereby avoiding the further expenditure of resources and costs for both the state and ratepayers regarding this question of law.

I. BACKGROUND AND INTRODUCTION

On August 19, 2015, SCMCN filed its Application with the Commission pursuant to Section 393.170 RSMo. seeking a certificate of public necessity to own and operate an existing set of transmission lines. As stated in the Application, SCMCN and the City entered into an Asset Purchase Agreement (APA) on August 14, 2015 under which the City agreed to sell to SCMCN certain existing transmission assets comprised of a single transmission line operating at 69 kV with five segments which total 10.82 miles in length, and related facilities (the Assets). The Assets are located in Christian and Greene Counties.

Approval of the Application will allow SCMCN to take the next steps toward advancing its business model. SCMCN, which was formed to operate within the Southwest Power Pool, Inc. ("SPP") as a transmission-only company, has already entered into three long-term agreements to develop, own, and/or operate new or existing regulated transmission assets and is negotiating to enter into other similar agreements with cooperatives, municipally-owned electric systems, and joint action agencies (collectively, Public Power).¹ Under such agreements, SCMCN will act as agent for such Public Power utility (a Public Power Partner) in planning, constructing, and operating transmission facilities in SPP and, where new projects are approved by SPP, co-owning those projects with those Public Power Partners exercising their options to participate. As part of its strategy for start-up, SCMCN has offered to purchase existing assets of its Public Power Partners and/or their members, like the City's transmission assets at issue in this proceeding.

In accordance with the SPP Membership Agreement, SCMCN will, upon purchase of the Assets, execute SPP's standard functional control agreement by which SCMCN and SPP will agree to transfer the Assets to the functional control of SPP and to integrate the Assets into the SPP transmission system.

¹ SCMCN has executed similar agreements with Oklahoma Municipal Power Authority, another joint action agency, and Tri-County Electric Cooperative, Inc. SCMCN's sister company, Mid-Continent MCN LLC, operates in the Midcontinent Independent System Operator, Inc. (MISO) and is negotiating similar agreements with Public Power utilities in MISO.

Because the Assets will be owned by a transmission-only company with no retail customers, the Federal Energy Regulatory Commission (FERC) will have jurisdiction over the rates, terms and conditions of service over the Assets.

In the Application, in addition to seeking a certificate of convenience and public necessity under Section 393.170 RSMo. to own and operate the Assets, SCMCN also asks the Commission to disclaim jurisdiction over the transaction under Section 393.190 RSMo. or, if the Commission chooses to exercise jurisdiction pursuant to Section 393.190 RSMo., to approve the sale of the Assets. By this Motion, SCMCN requests that the Commission issue a decision early in the proceeding on the Section 393.190 RSMo. jurisdictional issue in the interest of regulatory efficiency. An early resolution of the threshold jurisdictional question regarding whether Section 393.190 RSMo. applies to the Transaction will potentially narrow the issues of the case and correspondingly promote efficiency, preserve Commission resources, and benefit ultimate consumers by eliminating unnecessary litigation costs that will be recovered through rates, both in this case and in future cases involving similar transactions.

II. ARGUMENT

A. The Commission Lacks Jurisdiction under Section 393.190 RSMo. Over the Transaction.

1. The City Is Not an “Electrical Corporation,” and the Commission Is Not Authorized to Exercise Regulatory Authority over Municipally-Owned Utilities.

Section 393.190 of the Missouri Revised Statutes requires Commission approval for sales or transfers of assets owned by “electrical corporations” over which the Commission has jurisdiction. Section 393.190.1 RSMo. Section 393.190.1 provides in pertinent part:

No gas corporation, *electrical corporation*, water corporation or sewer corporation shall hereafter *sell, assign, lease, transfer, mortgage or otherwise dispose of* or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Section 393.190.1 RSMo. (emphasis added).

By its express terms, Section 393.190.1 RSMo. only applies when the *transferor* in a transaction is an “electrical corporation.” The City is the transferor for purposes of the Transaction and, as a municipality and political subdivision of the State of Missouri, does not meet the definition of an “electrical corporation” for purposes of Section 393.190 RSMo.² The Commission’s lack of jurisdiction over municipally owned and operated electric utilities is clear from the history of the Commission’s statutes, from other relevant provisions governing municipally owned utilities, and from Commission precedent.

Nearly a century ago, the Missouri General Assembly granted the Commission the specific authority to regulate rates and services of municipally owned utilities. See *Forest City v. City of Oregon*, 569 S.W.2d 330, 332 (Mo. Ct. App. 1978). In the 1930s, however, the Missouri Supreme Court held that the statute granting the authority to the Commission to regulate municipally owned utilities was unconstitutional. *City of Columbia v. Public Service Commission*, 329 Mo. 38, 45, 43 S.W.2d 813 (1931); and *State ex rel. City of Sikeston v. Public Service Commission*, 336 Mo. 985, 997, 82 S.W.2d 104 (1935). In 1949, the Missouri General Assembly revised the statutes to reflect the Missouri Supreme Court decisions by omitting the reference to municipal utilities.³ Missouri law is therefore clear that the Commission lacks regulatory authority over the City, and the City cannot be considered an “electrical corporation” for purposes of Section 393.190 RSMo.

In addition, Missouri’s statutes governing municipally owned utilities make clear that most aspects of the operation of municipally owned and municipally operated electrical systems are exempt from the

² Under Section 393.120 RSMo., the definitions in Section 386.020 RSMo. apply to terms used in Sections 393.170 to 393.290 RSMo.

³ Revision comment to Section 393.130 states as follows: “As originally enacted, sections 5645, 5646, 5647, 5648 and 5659, R.S. 1939, empowered the Public Service Commission to regulate municipally owned and operated utilities. However, in *City of Columbia v. Public Service Commission*, 329 Mo. 38, 45, 43 S.W.2d 813, the Supreme Court ruled that the Commission did not have such power. Therefore these sections were repealed and reenacted as this section and Sections 393.140 to 393.160 omitting the reference to municipal utilities.” See also *Forest City v. City of Oregon*, 569 S.W.2d 330, 333 n.5 (Mo. Ct. App. 1978).

Commission's jurisdiction. Section 91.025.2 RSMo. grants the Commission the limited authority over municipally owned or operated electric power systems⁴ to order a change of suppliers upon application made by a customer, and expressly states that:

Except as provided in this section, nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any such municipally owned or operated electrical system, and nothing in this section 393.106 and section 394.315, shall affect the rights, privileges or duties of any municipality to form or operate municipally owned or operated electrical systems.

Section 91.025.2 RSMo. The statute clearly excludes core activities of municipally operated "electrical systems" – provision of service, rates and management – from the Commission's jurisdiction.

Because of these constitutional and statutory principles, the Commission has historically recognized the unique sovereign powers of municipal corporations and has declined to exercise jurisdiction over municipally owned electric companies. For example, in the case of *In re City of Springfield Utilities*, Docket No. AC-2003-0526, 2004 WL 319134 at *3 (Mo. P.S.C. March 1, 2004), the Commission found that the City Utilities division of the City of Springfield was not an "electrical corporation." In *In re City of Springfield Utilities*, the Commission reviewed a petition against the City of Springfield regarding rates that City Utilities charges to nonresidents for natural gas, electric, and water service. In its order dismissing the complaint, the Commission found that City Utilities "does not meet the definition of an 'electrical corporation'. . . and is not a 'public utility' subject to the Commission's regulatory jurisdiction, as those terms are defined under Sections 386.020." *Id.* Similarly, in the case of *Union Electric Company of Missouri*, 1951 WL 92048, at *1, Case No. 11,942 (Mo. P.S.C. Jan. 15, 1951), the Commission found that "municipally owned electric systems are beyond the jurisdiction of the Commission." *See also In the Matter*

⁴ A "municipally owned or operated electric power system" is defined as "a system for the distribution of electrical power and energy to the inhabitants of a municipality which is owned and operated by the municipality itself, whether operated under authority pursuant to this chapter or under a charter form of government." Section 91.025.2 RSMo.

of an Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale and Transfer of Certain Assets of AmerenUE to St. James Municipal Utilities and Rolla Municipal Utilities, Case No. EO-2010-0263, 2010 WL 3454148, at *3 (Mo. P.S.C.) (“[O]ther than to order a change of electrical supplier upon proper application of a customer, the Commission has no jurisdiction over the service, rates, financing, accounting or management of any municipally owned or operated electrical system.”) (citing Section 91.025.2 RSMo.); *In re City of Rolla*, Case No. EA-2000-308, 2001 WL 527088, at *13 (2001) (“The Missouri Public Service Commission regulates municipal utilities only with respect to territorial contests with other utilities. Section 91.025.”); *Matter of Kansas City Power & Light Co.*, Case no. EM-86-121, 1986 WL 293043, at *4, 28 Mo. P.S.C. (N.S.) 498 (June 2, 1986) (“The City is exempt from the Commission’s jurisdiction since it operates as a municipal electric corporation.”).

Perhaps because of this Missouri Supreme Court precedent, and the omissions and expressions of the Missouri General Assembly in other statutory provisions, there does not appear to be any Commission precedent in which the Commission sought jurisdiction to approve a transfer of electric transmission or generation assets owned by a non-jurisdictional municipality under Section 393.190 RSMo. SCMCN respectfully asserts that the Commission should not attempt to extend its jurisdiction to approve the transfer of assets by non-jurisdictional municipalities, for the first time, in this transaction. Such an assertion of jurisdiction would contradict clear case precedent and statutory authority and infringe on the sovereignty and authority of municipalities. The Commission should take care to consider whether it wants to enter into the business of approving how Missouri municipalities manage and dispose of their electrical system assets before it decides to assert Section 393.190 RSMo. jurisdiction in this case.

2. Section 393.190 RSMo. Applies to Sellers, Not the Purchaser or the Transaction Itself.

By its terms, Section 393.190 RSMo. applies when the transferor in a transaction is an “electrical corporation.” It does not apply to the purchaser or the transaction itself. The fact that the purchaser is not a municipally owned electric utility does not give separate authority to the Commission over the sale. To apply Section 393.190 RSMo. to SCMCN as the purchaser of the Assets in this Transaction on the grounds that SCMCN will not be exempt from Commission jurisdiction not only is against the plain language of Section 393.190 RSMo. but would represent an unwarranted bootstrap considering that the Commission lacks jurisdiction over the City, the transferor, as well as over the operation of municipally operated electrical systems.⁵

3. The Transaction Does Not Implicate the Recognized Purpose of Section 393.190 RSMo.

There is no policy basis for an expansive reading of Section 393.190 RSMo. because the Transaction for which SCMCN seeks approval in its Application does not implicate the purpose underlying Section 393.190 RSMo. The Commission has recognized that the purpose of Section 393.190 RSMo. is “to ensure the continuation of adequate service to the public served by the utility.” *Matter of Kansas City Power & Light Co.*, Case No. EM-86-121, 1986 WL 293043, at *5 (June 2, 1986). The transferring “utility” in this case is the City. As discussed previously, the Commission lacks jurisdiction over the City, so the Transaction does not implicate Section 393.190 RSMo.’s purpose “to ensure the continuation of adequate service to the public served by the [City].” The City has already decided to sell the Assets to SCMCN, and

⁵ *Accord Union Electric Company of Missouri*, 1951 WL 92048, at *5, Case No. 11,942 (Mo. P.S.C. Jan. 15, 1951) (“The Supreme Court in *City of Columbia v. Public Service Commission*, 43 SW(2d) 813, has held that this Commission does not have authority under the law to regulate municipally owned electric light plants. Since the law allows municipalities to own and operate electric plants and systems for the purpose of serving its inhabitants, and as such are not subject to regulation by this Commission, to refuse to permit a utility under our jurisdiction able and willing to contract with the municipality to furnish service thereto on the sole ground that it would injure or harm another utility furnishing service to said municipality would in effect be doing indirectly what the law will not permit us to do directly—that is, exercising jurisdiction over the territory within the exclusive control of the municipality.”).

the Commission should not seek to expand its jurisdiction over the City by second-guessing the City's decision.⁶

B. Asserting Jurisdiction Over the Transaction Under Section 393.190 RSMo. Is Unnecessary.

Declining to extend the Commission's Section 393.190 RSMo. jurisdiction to the Transaction will not allow the proposed Transaction to proceed without any review whatsoever. To the contrary, the Commission must determine pursuant to Section 393.170 RSMo. that granting a certificate to SCMCN is in the public convenience and necessity. In addition, the Commission will retain certain other jurisdiction over SCMCN should the sale of the assets be consummated.⁷

In any event, the public interest will be protected with respect to any rate impact of the Transaction by the other authorities with jurisdiction over SCMCN's rates. As a transmission-only company, SCMCN will not be rate-regulated by the Commission.⁸ Rather, SCMCN's rates, which are connected with the provision of electric transmission in interstate commerce, will be governed and determined by FERC and SPP. Inclusion of SCMCN's transmission facilities in the appropriate SPP rate zone is exclusively a wholesale issue that is SPP's responsibility under the Membership Agreement and OATT, and is subject to FERC approval. Pursuant to Order 2000 and FERC's regulations, 18 C.F.R. 35.34(j)(l)(iii), SPP "must have exclusive and independent authority under section 205 of the Federal Power Act to propose rates, terms and conditions of transmission service provided over the facilities it operates." SPP has the independent authority to integrate the Nixa transmission lines into an existing rate zone under the Tariff, when appropriate. *Southwest Power Pool, Inc.*, 120 FERC 61,297 at PP 12, 22 (2007) (finding that it was

⁶ Moreover, the continued adequacy of service over the approximately 10 miles of transferred transmission lines will be subject to FERC jurisdiction and oversight.

⁷ For example, the Commission will retain jurisdiction over SCMCN for purposes of the requirement at 4 CSR 240-3.190(3)(E) to report loss of transmission capability that could limit the output of a generating plant; and the requirement at 4 CSR 240-3.190(4)&(5) to submit reports and updates regarding accidents.

⁸ Missouri law expressly prevents the Commission from extending its jurisdiction over interstate commerce. See 386.030 RSMo.

appropriate to integrate Westar facilities into the OG&E zone, thereby creating a multi-owner zone); *Southwest Power Pool, Inc.*, 106 FERC 61,110, P 96 (2004) (“[O]nly SPP may design and file the rates that customers will pay under the SPP OATT.”).

Indeed, in one PSC precedent involving an application by a transmission-only company for approval to own and operate a transmission line, when the rates for that transmission line were regulated by another entity, PSC Staff recommended that the Commission grant the requested certificate of convenience and necessity, and commented with respect to rates that:

No Missouri retail electric customers are served from the transmission line IPL seeks authority to transfer to ITC. The transmission rates for delivery of energy to IPC customers will be subject to Federal Energy Regulatory Commission (FERC) regulations. Recovery of such transmission costs would be part of the retail rate regulation before the Iowa Utilities Board, not this Commission.

Id. See Staff’s Recommendation to Authorize Transfer of Line, Grant Certificate of Convenience and Necessity and Grant Variances from Commission Reporting Rules, *ITC Midwest* (Aug. 17, 2007) at Appendix A pg. 3.

The Commission will retain jurisdiction over the Transaction under Section 393.170 RSMo. and over SCMCN’s operation of the assets, and FERC’s and SPP’s regulatory authority over the Assets will preserve the public interest. The Commission’s exercise of jurisdiction under Section 393.190 RSMo. is therefore unnecessary and will contribute nothing more to preserving the public interest.

III. CONCLUSION

The transferor of the transmission assets in question, the City of Nixa, is a municipality over which the Commission has only limited jurisdiction. It is not an “electrical corporation” – the type of selling entity to which Section 393.190 RSMo. applies. As a result, the Commission lacks jurisdiction over the proposed sale of the City’s transmission assets to SCMCN. In addition, asserting jurisdiction over the Transaction will not aid the Commission in protecting the public interest. Accordingly, SCMCN respectfully requests

that the Commission grant SCMCN's Motion and declare that the Commission lacks jurisdiction under Section 393.190 RSMo. over the Transaction. SCMCN also requests that the Commission grant the Motion as soon as practicable because doing so will narrow the scope of issues that must be considered in this proceeding, conserve Commission resources, and will allow for a more efficient and expeditious review of SCMCN's Application pursuant to Section 393.170 RSMo.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon all parties of record by forwarding the same by electronic mail or U.S. Mail, postage prepaid, this 18th day of December, 2015, to the following:

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