

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Ameren Transmission)
Company of Illinois for Other Relief or, in the Alternative,)
a Certificate of Public Convenience and Necessity)
Authorizing it to Construct, Install, Own, Operate,) File No. EA-2015-0145
Maintain and Otherwise Control and Manage a)
345,000-volt Electric Transmission Line in Marion)
County, Missouri, and an Associated Switching Station)
Near Palmyra, Missouri.)

APPLICATION FOR REHEARING

COMES NOW Ameren Transmission Company of Illinois (“ATXI”), by and through its counsel, and pursuant to § 386.500.1, RSMo,¹ and 4 CSR 240-2.160, respectfully applies for rehearing of the Commission’s Order Granting Certificate of Convenience and Necessity in the above-captioned proceeding which was issued June 2, 2015² (“Order”), and for its Application for Rehearing states as follows:

1. Commission decisions must be lawful (i.e., the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n*, 103 S.W.3d 753, 759 (Mo. banc 2003).

2. The Commission’s decision not to dismiss ATXI’s application on the grounds that the Commission did not have jurisdiction over ATXI because ATXI was not a “public utility” under Missouri law constitutes error under the above-stated standard of review.

3. In its Order, this Commission exercised jurisdiction over ATXI based upon the following conclusory explanation:

ATXI is an electrical corporation and a public utility subject to
Commission jurisdiction. ATXI’s Missouri facilities, according to its application,

¹ Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

² ATXI appreciates the Commission’s prompt entry of its Order given ATXI’s concerns regarding the project construction schedule.

are electric plant that will be used for the transmission of electricity that will be used for light, heat or power.

Order at p. 2. ATXI respectfully suggests that this is an insufficient basis for the Commission to exercise jurisdiction over an interstate transmission company that does not offer retail electrical service or otherwise hold itself out indiscriminately to provide electric service to the general public.

4. Foundational to the fact that the Commission does not have jurisdiction over ATXI is the basic principle of law that the Commission's jurisdiction is limited by statute:

The PSC "is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto." *State ex rel. Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943). "Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute." *State ex rel. Mo. Cable Telecomms. Ass'n v. Mo. Pub. Serv. Comm'n*, 929 S.W.2d 768, 772 (Mo. App. 1996).

State ex rel. Cass County, Mo. v. Pub. Serv. Comm'n, 259 S.W.3d 544, 547-48 (Mo. App. W.D. 2008) (holding that even where statute authorized the Commission to grant CCNs for construction of electric plants, it did not authorize it to do so *after* electric plant had been constructed); *see also Public Serv. Comm'n v. ONEOK, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009) (holding that absence of statute authorizing the Commission to receive by assignment causes of action of local gas distribution companies and to pursue those private actions for damages precluded it from doing so). This principle regarding the limits of the Commission's jurisdiction is well-settled. *See, e.g., State ex rel. Kansas City v. Pub. Serv. Comm'n*, 257 S.W. 462, 462-63 (Mo. 1923); *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 181 (Mo. App. W.D. 1960); *State ex rel. Pub. Serv. Comm'n v. Bonacker*, 906 S.W.2d 896, 898 (Mo. App. S.D. 1995). This is so even though the Commission's powers are an

extension of the state's sovereignty. *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). Accordingly, the Commission's jurisdiction is dictated by statute and not policy, and any authority for it to act must be exercised within the limits of its statutory authorization.

5. The question raised by ATXI's Application for a Certificate of Convenience and Necessity ("CCN") for the Illinois Rivers Transmission Project ("Project") was whether ATXI was an "electrical corporation" and "public utility" within the meaning of the PSC Law³ and, therefore, required to obtain approval of the Commission before it could begin construction of the Project under section 393.170, which states:

No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without having first obtained the permission and approval of the commission.

6. In its June 2, 2015 Order, the Commission baldly states that ATXI is an "electrical corporation and a public utility subject to Commission jurisdiction" and that ATXI's facilities in Missouri "are electrical plant that will be used for the transmission of electricity that will be used for light, heat or power." *Order* at p. 2, *citing* section 386.020(14), (15), and (43). The Order suggests that ATXI's status as a public utility subject to the Commission jurisdiction is simply a matter of applying statutory definitions to the facts before it. This is not the case, however; these statutory definitions have been interpreted by Missouri courts in a manner that is directory contrary to the Commission's application of them. The Commission's conclusory statements as to ATXI's status fail to provide any analysis to explain *why* ATXI is an "electrical corporation" and a "public utility" under Missouri law interpreting those statutes—law that the Commission itself has relied upon numerous times.

³ The PSC Law is codified as Chapter 386 and, as applicable to electrical corporations and public utilities subject to the Commission's jurisdiction, as Chapter 393, RSMo.

The Commission does not have jurisdiction over ATXI because ATXI does not indiscriminately provide retail electric service to the general public in Missouri.

7. Section 386.020(15) defines “electrical corporation” as follows:

"Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

Excepting out rail corporations that generate electricity solely for their own purposes, the definition narrows the Commission’s jurisdiction to various entities that own, operate, control or manage any “electric plant.” Subsection (14) of this same statute defines "electric plant" to include property used “to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power” Appellate courts in Missouri have construed these definitions on several occasions, with the case law establishing that to be an electrical corporation under the jurisdiction of the Commission, the entity must serve or otherwise hold itself out to indiscriminately provide electric service to the general public at retail. *See State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm’n*, 205 S.W. 36 (Mo. 1918); *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 9 S.W.2d 589 (Mo. banc 1928); *Palmer v. City of Liberal*, 64 S.W.2d 265 (Mo. 1933); *see also, Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227 (Mo. App. W.D. 1995). The undisputed facts before the Commission are that ATXI does not serve or otherwise hold itself out to indiscriminately provided electric service to the general public at retail, and is indeed prohibited by its corporate charter from doing so.

8. In fact, the Commission recognized that ATXI would not be providing retail service to end-use customers when it granted ATXI’s request that the Commission waive the rate

schedule filing requirement of 4 CSR 240-3.145. *See Order* at ¶ 2, p. 3. As a matter of law, the Commission’s limited jurisdiction does not extend to ATXI, and the Commission’s Order concluding otherwise is unlawful.

The Commission’s jurisdiction does not extend to
electric transmission companies solely engaged in interstate commerce.

9. There is another reason ATXI is not subject to the limited jurisdiction of the Commission—why it cannot be “within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act.” *Danciger*, 205 S.W. at 19. The Commission’s jurisdiction is limited by statute to the *intrastate* operations of public utilities and does not extend to utilities engaged only in interstate commerce. PSC Law is explicit on this point.

10. Section 386.250(1) provides, in part: “The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter . . . [t]o the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, *within the state* . . .” (emphasis added). Even more to the point, section 386.030 provides:

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 insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

As the Missouri Supreme Court recently noted, enactment of section 386.030 by the Missouri legislature placed limits on the powers granted to the Commission “as to matters affecting interstate commerce.” *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm’n*, 366 S.W.3d 493, 498 (Mo. 2012).

11. As has already been demonstrated, nothing in Missouri’s PSC Law vests the Commission with jurisdiction over companies that are engaged only in interstate commerce through the transmission of electricity via interstate transmission facilities that would require the interstate transmission company to approach the Commission to request a CCN. Indeed, section 386.030 explicitly provides otherwise. Moreover, it is the FERC—and not the Commission—that has jurisdiction over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.

12. That it is the FERC that has jurisdiction over these interstate transmission facilities is made explicit by Section 201 of the FPA (16 U.S.C. § 824(b)) (“The provisions of this Part shall apply to the transmission of electricity in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . .”). And there is no question but that the lines ATXI will build and own are interstate transmission lines insofar as the United States Supreme Court has confirmed that this statute means what it says: “transmissions on the interconnected national grids constitute transmissions in interstate commerce.” *New York v. Federal Regulatory Energy Comm’n*, 535 U.S.1, 16 (2002). Not only does FERC have exclusive jurisdiction over the interstate transmission of the electricity itself, but it also has jurisdiction over these interstate transmission facilities, like the transmission lines ATXI will build and own. 16 U.S.C. § 824(b) (“The Commission [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy.”). Consequently, the only activity conducted by ATXI—transmission of electricity in interstate commerce using interstate facilities—cannot, under section 386.030, be regulated by the Commission because the activities are in interstate commerce.

WHEREFORE, for the foregoing reasons, ATXI respectfully requests that the Commission make and enter its order granting rehearing on the issue of its jurisdiction over ATXI, and that the Commission determine that it does not have jurisdiction over ATXI and dismiss ATXI's Application for a Certificate of Convenience and Necessity, for the reasons outlined above.

Respectfully submitted,

/s/ James B. Lowery

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the public version of the foregoing response has been e-mailed on June 11, 2015, to all parties of record.

/s/ James B. Lowery

**An Attorney for Ameren Transmission
Company of Illinois**