BEFORE THE PUBLIC SERVICE COMMISSION
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 SUMMARY DISPOSITION

Intervenor, City of Springfield, Missouri, through the Board of Public Utilities (hereinafter "City Utilities"), in support of its Motion for Summary Disposition, as a result of Applicant's failure to provide the consents required by Section 393.170 R.S.Mo., as set forth in 4 CSR 240-3.105(1)(D) and (2), provides the following for consideration by the Commission.

1. Background. As set forth in the affidavit of Steven Stodden (Exhibit 5), City Utilities' Associate General Manager of the Electric Supply Division, more than 10 years ago the City of Nixa approached City Utilities with Nixa's desire to build a transmission line to connect to Nixa's electric distribution facilities. The proposed line would cross City Utilities' property within the City of Springfield and connect to the City Utilities' substation at the James River Power Station. City of Nixa was concerned by its costs incurred as a result of its connection with the Southwest Power Administration. City Utilities was reluctant to provide access across its property, but ultimately agreed to support its fellow municipal utility. City Utilities agreed to the interconnection with Nixa, but required that the various implementing agreements be structured so as to protect the interests of its customers. As a result, the Interconnection Agreement, Exhibit 1, Maintenance Agreement, Exhibit 3, and, perhaps most significantly, the License Agreement, Exhibit 2, allowing access across City Utilities' property, were either made

revocable by City Utilities, made subject to the consent of City Utilities to any assignment by the City of Nixa. In particular, the real estate access authorization granted by City Utilities for the occupation of 9.53 acres of its property by Nixa's transmission facilities (Exhibit 2) is in the form of revocable license, and not the more standard easement.

In its Application, SCMCN, joined by Intervenor City of Nixa, attempts to either ignore or disregard these carefully protected infrastructure and real estate interests of the customers of City Utilities. This, of course, cannot be done.

2. Authority. Section 393.170 R.S.Mo. is implemented by 4 CSR 240-3.105(1)(D) and (2), setting forth the regulation prohibiting the trampling of interests protected by governmental entities. Neither the certified copy of documents granting consent or franchise by a city, nor affidavit of the Applicant that consent has been acquired, as provided by 4 CSR 240-3.105 (1)(D)1, have been provided as part of SCMN's Application; nor has a certified copy of any such approval been obtained per subparagraph (D)2.

3. Protecting the Public Interest. The division of responsibility between the Commission and governmental entities, including cities, has long been understood. Beginning with the Missouri Supreme Court decision in *City of Columbia v. State Public Service Commission,* 43 S.W.2d 813 (Mo. 1931), the import of then Article 10, section 12a of the Constitution of the State of Missouri has been described. The funding and fixing of rates to be charged by a municipality owning and operating an electric plant is "positive and vital", but not conferred upon the Commission. 43 S.W.2d at 817. Pursuant to current Article 6, section 27 of the Missouri Constitution, and Chapter 91 of the Revised Statutes of Missouri, the authority to acquire, operate and maintain such electric light plants by a municipality is vested in the city itself. The right of any city to build its own plant, and to furnish electricity to its people at such

rates under such conditions as it sees fit, subject only to the regulation of the will of its own citizens, is a recognized safeguard of the public interest. *State ex rel. City of Sikeston v. Public Service Commission of Missouri,* 82 S.W.2d. 105,111 (Mo. 1935).

4. The Consent Requirement Protects Municipal Customers' Property. In recognition of the public interest protected by cities and other governmental entities, the statutes applicable to the Commission, and its implementing rules, respect the authority of those governmental bodies vested with the rights and ability to protect the interests of their constituents. As such, applicants for a certificate of convenience and necessity under Section 393.170.1 R.S.Mo. are required by that statute, and the Commission's implementing regulations (4 CSR 240-3.105(1)(B) and (D)), to obtain the consents of affected governmental entities, before the Commission may grant the requested certificate. *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 549-550 (Mo. App. W.D. 2008); *KCP&L Greater Missouri Operations Co.*, Case No. EA-2009-0118, 2009 Mo. PSC LEXIS 200 at *42-*44, *70 (2009) (identifying applicable local regulatory requirements). The fact that the specific authorizations lacking from the Application involve the use of City Utilities' property, as distinct from the public right-of-way over which Missouri municipalities exercise state-delegated authority,[1] is of no decisional significance. As admitted in the Application, Paragraph I.2 and Appendix A (even though all necessary consents are not identified by Applicant as required by the regulations cited above), such consents have not been obtained.[2] Further, as indicated by the affidavit of City Utilities' Associate General Manager

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1 *Missouri Utils. Co. v. Scott-New Madrid-Mississippi Elec. Coop.*, 475 S.W.2d 25, 31 (Mo. 1971), *quoting Holland Realty & Pwr. Co. v. City of St. Louis*, 282 Mo. 180, 189-191, 221 S.W. 51, 54 (Mo. 1920).

2 Section 393.170.1 literally applies to construction of utility facilities, but "has been interpreted as applying to a utility's initial entry into public service," and thus governs SCMCN's proposed acquisition of the Nixa Transmission Assets. *Missouri American Water Co.,* Case No. WA-2001-288, 2002 Mo. PSC LEXIS 100 at *19; 11 Mo. P.S.C. 3d 84, 91 (2002).

Steven Stodden (Exhibit 5), such consents are not at this point forthcoming. As a result and at a minimum, the Commission has no authority to approve the Application, pursuant to the regulation, "if any of the items required by this rule are unavailable at the time the Application is filed, they shall be furnished prior to the granting of the authority sought." 4 CSR 240-3.105(2).

It is "axiomatic" that when a utility does not wish to sell its property there will be no contract or approval or board resolution to attach to any application. *City of O'Fallon v. Union Electric Company,* 462 S.W.3d 438,443 (Mo. App. WD 2015), Motion for Rehearing and/or Transfer Denied. *See also Missouri Cities Water Co. v. Hodge,* 878 S.W.2d 819, 825 (Mo. Banc 1994) (state law does not grant authority to condemn property already dedicated to public use). The Commission's powers are limited to those conferred by statute either expressly or by clear implication as necessary to carry out its powers, and the Commission's authority does not permit the Commission to order a utility to sell its property. *City of O'Fallon,* 462 S.W.3d at 443-444. To grant the Application without the consent of City Utilities to the assignment of its agreement to interconnect and the continued occupancy of its real property in the face of the imposition of well over $1 million per year in unrecoverable costs on its customers would effectively require City Utilities to convey or assign property interests, which assignment the Commission has no authority to order. The Commission "does not have the power to direct the use of a utility's property." *City of O'Fallon,* at 444. Section 393.170 and the Commission's implementing regulations (4 CSR 240-3.105(1) (B) and (D)) assure that protection for customers of municipal utilities.[3]

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[3] SCMCN's Application gains no vitality from the assertion of SCMCN witness Williams (Direct at 8:1-3) that City Utilities "is obligated to participate in coordinated operation of SPP's Electric Transmission System, which [he] understand[s] requires CU to interconnect with other Transmission Owners." Without burdening this memorandum with an extended discussion of the many particulars in which Mr. Williams's testimony on this point is mistaken, it suffices to say

The limits on Commission authority with regard to the property and business of a municipal utility are well established. "An examination of the findings of this Commission for many years back will show that the Commission has consistently required a showing that the applicant has secured the consent of what is considered proper municipal authority before granting authority to own, lease, construct, maintain, and operate any water, gas, electric or telephone system as a public utility." *State ex rel. Public Water Supply District No. 2 of Jackson County, Missouri v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964). To grant the application herein would attempt to divest the applicable governmental authority, City of Springfield, Missouri, through its Board of Public Utilities, of its right to control and manage its municipal utility. The Commission lacks the authority to so impose that result.

For the reasons stated herein, Intervenor City Utilities of Springfield, Missouri requests the relief requested in its Motion for Summary Disposition.

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that – while City Utilities will unquestionably do what it is required to do under the SPP Tariff and related agreements – Mr. Williams's testimony simply underscores yet another respect in which SCMCN's Application lacks the support required by 4 CSR 240-3.105(1)(B) and (D).

Respectfully submitted,

/s/ John P. Coyle

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ATTORNEYS FOR CITY UTILITIES OF SPRINGFIELD

Dated: February 12, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of City Utilities' Memorandum in Support for Motion For Disposition, was sent to the following parties via ( ) U.S. Mail, postage prepaid, ( ) facsimile, (x) electronic transmission, and/or ( ) hand delivering this 12th day of February, 2016:

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