BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of GridLiance High Plains LLC, GridLiance GP, LLC, and GridLiance Holdco, LP ("GridLiance") NextEra Energy Transmission Investments, LLC, and NextEra Energy Transmission, LLC ("NextEra Entities") for approval of the Acquisition of GridLiance by the NextEra Entities	))))))))	Case No. EM-2021-0114

BRIEF OF JOINT APPLICANTS

NextEra Energy Transmission Investments, LLC and NextEra Energy Transmission, LLC (collectively, the "NextEra Entities") and GridLiance High Plains LLC ("GridLiance HP"), GridLiance GP, LLC, and GridLiance Holdco, LP (collectively "GridLiance"), together, "Joint Applicants," submit this brief pursuant to the Commission's January 5, 2021 Order directing the filing of briefs on whether the Commission has jurisdiction over the NextEra Entities' proposed acquisition of the upstream ownership interests of GridLiance (the "Proposed Transaction"). As set forth herein, the applicable law is clear that the Commission has no jurisdiction over the Proposed Transaction, and, therefore, the Joint Application should be expeditiously dismissed and the proceeding closed for a lack of jurisdiction.

I. Introduction

On October 20, 2020, Joint Applicants filed a Joint Application, which explained that the Proposed Transaction involves NETI, a non-regulated entity, acquiring the ownership interests in the non-regulated GridLiance holding companies: ". . . NETI will acquire one hundred percent of the limited partnership interests in GridLiance Holdco and one hundred percent of the membership interests in GridLiance Holdco's general partner, GridLiance GP, LLC." Joint Application at 6.

Because the Proposed Transaction involves the transfer of ownership interests between non-regulated entities, the Joint Applicants asserted:

> This acquisition will occur at the holding company level, and GridLiance HP will remain the operating public utility in Missouri. . . . . it is appropriate for the Commission to disclaim jurisdiction because GridLiance HP is presently a wholly-owned subsidiary of GridLiance Eastern Holdings LLC, which is a wholly-owned subsidiary of GridLiance Heartland Holdings LLC, which is a wholly-owned subsidiary of GridLiance Holdco. As a result of the Proposed Transaction, GridLiance Holdco and its general partner will merely have different equity owners.
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> In the instant proceeding, the Proposed Transaction involves the acquisition of a non-regulated entity by another non-regulated entity, and, therefore, Joint Applicants respectfully submit that the Commission should . . . disclaim jurisdiction of the Joint Application.

Id. at 1, 7, 8.

II. Standard of Review

The Commission is a creature of statute, and, therefore, the Commission's powers are limited to those expressed in a statute or by clear implication as needed to carry out the expressly granted powers in a statute. *See State ex rel. Mogas Pipeline LLC v. PSC*, 366 S.W.3d 493, 496 (2012); *State ex. rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (1943). Even though the Commission's statutes are to be liberally constructed pursuant to Section 386.610 RSMo, the Commission, like a court, has no authority to read into a statute a legislative intent that is not evident by the plain language of the statute. *See State ex rel. Mogas Pipeline LLC*, 366 S.W.3d at 469. Put plainly, "[i]f a power is not granted to the PSC by Missouri statute, then the PSC does not have that power." *Id.*

III. Argument

A. Section 390.190.1 does not apply to the Proposed Transaction

In 1929, the Missouri Legislature enacted a statute,[1] now Section 390.190.1, conferring on the Commission limited powers to pre-approve certain actions of electric corporations. The Proposed Transaction, however, does not involve any such action of an electric corporation. Therefore, a plain language reading of Section 390.190.1 requires a finding that the Commission has no jurisdiction to approve the Proposed Transaction. *See Dickemann v. Costco Wholesale* Corp., 550 S.W.3d 65, 68 (2018) ("'The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.'"), quoting *Wolff Shoe Co. v. Dir. of Revenue*, 726 S.W.2d 29, 31 (Mo. banc 1988).

In pertinent part, Section 390.190.1 reads:

> 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. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

Clearly, Section 393.190.1 contains no language that provides the Commission jurisdiction over the financial transactions, such as the Proposed Transaction, between non-regulated entities. Instead, the plain and unambiguous language of Section 393.190.1 is limited to prohibiting an electric corporation from taking certain actions with respect to its works, system, or franchises

[1] In 1929, the statute was known as Mo. Rev. Stat. § 5177.

without first securing a Commission order authorizing the electric corporation to proceed with that action. In the instant case, as shown by the following analysis of the actions enumerated in Section 393.190.1, the applicable electric corporation, GridLiance HP, is not taking any action that implicates Section 393.190.1.

The Section 393.190.1 actions that require Commission pre-approval are divided into two categories. Category one requires an electric corporation to secure prior Commission approval when the electric corporation proposes to "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." Likewise, category two requires an electric corporation to secure prior Commission approval when the electric corporation proposes to "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." In the instant case, however, GridLiance HP is not taking any of the enumerated actions, and, therefore, Section 393.190.1 is not applicable to the Proposed Transaction.

With respect to the category one actions, GridLiance HP is not selling, assigning, leasing, transferring, mortgaging, disposing, or encumbering its Missouri transmission assets (*i.e.*, works, system, or franchises). Instead, after the closing of the Proposed Transaction, GridLiance HP, an electric corporation, will continue, as it does today, to operate and maintain as a standalone electric corporation and public utility in Missouri the 11 miles of 69 kilovolt transmission facilities in Missouri. Joint Application at 2; Direct Testimony of Hooton at 2, 5, 7; Direct Testimony of Gleason at 7. Thus, after the Proposed Transaction closes, GridLiance HP will retain its works, system, and franchises. Accordingly, the Proposed Transaction does not implicate the category one actions.

Instructively, when analyzing an essentially identical statute involving the same category one actions enumerated in Section 393.190.1,[2] the Indiana Supreme Court held:

> On its face this section prohibits only actions by a 'public utility' that effect a 'transfer' etc., of the utility's 'franchise, works, or system.' Given this syntax, the appellants contend that section 83(a) does not apply to transfers of outstanding stock of a public utility for two reasons. First, the appellants argue that even if control of the utility is affected, Commission approval is required only if a 'public utility,' which is a defined term, proposes to transfer something. Second, they contend that the transaction does not transfer the 'franchise, works or system' of the public utility, all of which remain, as before, in Indiana Bell. . . Because ownership of the 'franchise, works, or system' of a utility rests in the utility, if the statute is read literally, it takes action by the utility to transfer them.
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> As a matter of grammar, the prohibition of section 83(a) operates on public utilities, not anyone else.

Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n, 715 N.E.2d 351, 355 (1999); *GTE Corp. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 360, 362 (1999) ("For the reasons explained in Indiana Bell, the proposed transaction involves neither action by a 'public utility' nor the transfer of the utility's 'franchise, works or system.' Accordingly, section 83(a) does not require Commission approval of this proposed transaction in the outstanding securities of these public utilities or their parents.").[3]

[2] "No public utility . . . shall sell, assign, transfer, lease, or encumber its franchise, works, or system to any other person, partnership, limited liability company, or corporation, or contract for the operation of any part of its works or system by any other person, partnership, limited liability company, or corporation, without the approval of the commission after hearing". Ind. Code § 8-1-2-83(a).

[3] Indiana's definition of public utility as it pertains to an electric company is similar to Missouri's definition of electrical corporation. Section 386.020(15) RSMo. defines an electrical corporation as "every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court . . . 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", while Ind. Code § 8-1-2-1 defines a public utility as "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the: … production, transmission, delivery, or furnishing of heat, light, water, or power ….").

Wholly consistent with the holdings in *Indiana Bell and GTE*, this Commission has concluded that the category one actions, as well as the category two actions, of Section 393.190.1 do not apply to a transfer of ownership interests between non-regulated entities, even when the non-regulated entity transferring its ownership interest holds a subsidiary that is regulated by the Commission. *See, e.g., In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp.,* Case No. EO-2002-1082 (June 14, 2002), ("The Commission determines that there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company. The Commission's past approach to transactions of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction, it will close this case."); *In the Matter of the Proposed Acquisition of Missouri-American Water Company and American Water Works Company by the German Corporation RWE AG, Order Closing Case*, Case No. WO-2002-206 (December 13, 2001); *In re Merger of American Water Works Co. with Nat'l Enterprises, Inc. and the Indirect Acquisition by American Water Works Co. of St. Louis Water Co.*, Case No. WM-99-224, (Mar. 23, 1999).

Similarly, when interpreting Section 392.300.1 RSMo. ("Section 392.300.1"), which also contains the same prohibition on a telecommunications company taking category one and category two actions without prior Commission approval,[4] the Commission has disclaimed jurisdiction over the transfer of ownership interests between non-regulated entities, even when a regulated telecommunications company subsidiary is held by the non-regulated entity transferring its

[4] Section 392.300.1, in pertinent part, reads: "No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities 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 line 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. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void."

ownership interests. *See, e.g., In The Matter of the Application of Tri-M Communications, Inc. d/b/a TMC Communications and 5LINX Enterprises, Inc. For Approval of a Stock Purchase Agreement*, Case No. XM-2011-0027 (Sept. 18, 2010); *In the Matter of the Joint Application of Broadview Networks Holdings, Inc. and ATX Licensing, Inc. for Approval of an Indirect Transfer of Control of ATX Licensing, Inc.*, Case No. TM-2006-0547 (July 25, 2006) ("Applicants state that although the proposed transaction will result in a change in the ultimate ownership of ATX, no transfer of certificates, assets or customers will occur as a result, and ATX will retain its authorization to provide intrastate telecommunications services in Missouri. . . . Consistent with the recommendations of its Staff and its previous decisions, the Commission concludes that it has no jurisdiction over the proposed transactions.") (footnote omitted); *Joint Application of Hypercube, LLC and KMC Data LLC for Grant of the Authority to Complete a Series of Transactions Resulting in the Transfer of Control of an Authorized Carrier*, Case No. TM-2006-0289 (Feb. 23, 2006) ("KMC Data and Hypercube concur, and state that the Commission previously ruled that Section 392.300.1 does not apply to the transfer of stock, and that the pending transaction, a transfer of ownership interests of a limited liability corporation, is akin to a stock transfer. . . . KMC Data will retain all of its assets, and will simply be owned by a different holding company. KMC Data is therefore not disposing of its franchise, facilities or system. Also, Hypercube is a holding company, not a telecommunications company, and it has no franchise, facilities or system to merge with KMC Data. Therefore, Section 392.300.1 does not apply to this transaction.").

Furthermore, the Commission's past rulings that the transfer of ownership interests of non-regulated entities does not involve the category two actions - "merge or consolidate [of] such works or system, or franchises" - are consistent with the definitions of merger and consolidation as

adopted by the Missouri Supreme Court. As explained in the seminal case of *Dodier Realty & Inv. Co. v. St. Louis Nat'l Baseball Club*, 283 S.W.2d 321, 324 (Mo. banc 1951), a consolidation involves the creation of a new corporation that assumes the liabilities of the former corporation, which are dissolved and cease to exist. As was the case in *Joint Application of Hypercube, LLC, supra*, the Proposed Transaction does not create a new company nor does it dissolve a company in order to consolidate any works, system, or franchises; instead, GridLiance HP will retain all of its works, system, and franchises. Therefore, under the plain language of Section 393.190.1 there is no consolidation as a result of the Proposed Transaction that confers jurisdiction on the Commission.

Dodier Realty & Inv. Co., 238 S.W.2d at 324-325 also explained that a merger involves a transaction in which one corporation continues and the other corporations are merged into it. Again, in the instant proceeding, there is no merger of GridLiance HP's works, system, or franchises with any company. As was the case in *Joint Application of Hypercube, LLC*, there is no other Missouri entity within the NextEra Entities or NextEra as a whole that is a Missouri electric corporation with works, system, or a franchise that could be merged with GridLiance HP. Hence, the Commission's past decisions disclaiming jurisdiction are fully consistent with the Missouri Supreme Court's definitions of consolidation and merger, and, therefore, provide additional support that the category two actions of Section 393.190.1 are not implicated by the instant Proposed Transaction.

Additionally, the doctrine of legislative acquiescence supports the Commission's continued interpretation of the plain and unambiguous language of Section 393.190.1 as not applying to the Proposed Transaction. In the context of the Commission's prior rulings that Section 393.190.1, and its sister statute, Section 392.300.1, do not apply to non-regulated entities

transfers of ownership interests, the doctrine of legislative acquiescence stands for the principle that if the Missouri Legislature viewed the Commission's rulings as inconsistent with the intent of these statutes, the Legislature would have acted and amended the statutes.[5] The Missouri Legislature has taken no such action with respect to these statutes since their original enactment. To the contrary, as recent as 2013, the Missouri Legislature reviewed and amended Section 393.190 by adding two additional sections related to the acquisition of stock in water and sewer corporations, but left untouched Section 393.190.1.[6] Thus, although the application of the doctrine of legislative acquiescence is not in-and-of itself dispositive of legislative intent, it provides an additional basis that the Commission's past decisions disclaiming jurisdiction are squarely consistent with the Missouri's Legislature's intent with respect to Section 393.190.1.

In sum, a plain language reading of Section 393.190.1 requires that the Commission disclaim jurisdiction over the Proposed Transaction, a reading that is entirely consistent with the Commission prior rulings on the applicability of Section 393.190.1.

[5] In the context of state utility commissions, state courts have employed the doctrine of legislative. *See e.g. Mathis v. Iowa Utilities Board*, 934 N.W.2d 423, 433 (2019) ("Further, it is supported by a longstanding IUB administrative interpretation, apparent legislative acquiescence in that interpretation, and the legislature's endorsement of a similar standard in a different wind-energy statute."); *Indiana Bell*, 715 N.E.2d at 358 ("Commission rulings are relevant here not as binding precedent, but as confirmation of a clear legislative choice. We are not dealing with a subject the legislature left unaddressed. . . . The debate over how much and how to regulate public utilities and their holding companies has been a matter of front page concern for decades. The conclusion is inescapable that Indiana's legislature has resolved this issue, and not left it open to court or administrative interpretation.") *Capital Elec. Coop. v. N.D. Public Serv. Comm'n*, 534 N.W. 2d 587, 592 (1995) ("Our interpretation of the Act also is consistent with the PSC's prior construction. . . . We decline to defer to the PSC's recent reinterpretation of its authority, because that construction contravenes the statutory framework and purpose of the Act. . . . Instead, we believe the PSC's prior longstanding interpretation of the Act is consistent with the language and purpose of the Act and has been acquiesced in by the Legislature.")

[6] The 2013 amendment, by H.B. 142, added Sections 3 and 4, and redesignated former Section 3 as Section 5.

B. The Commission's rulings in the Invenergy Transmission and Great Plains Energy cases have no bearing on the Commission disclaiming jurisdiction over the Proposed Transaction

The Commission's rulings in the Invenergy Transmission or Great Plains Energy Incorporated ("GPE") cases have no bearing on the Commission disclaiming of jurisdiction over the Proposed Transaction. The Invenergy Transmission case involved the category one action of the electric corporation, Grain Belt Express Clean Line LLC ("Grain Belt") selling its assets (*i.e.*, works, system, and franchises), and not the transfer of ownership interests between non-regulated entities. *See In the Matter of the Joint Application of Invenergy Transmission LLC, Invenergy Investment Company LLC, Grain Belt Express Clean Line LLC and Grain Belt Express Holding LLC for an Order Approving the Acquisition by Invenergy Transmission LLC of Grain Belt Express Clean Line LLC*, Case No. EM-2019-0150 Amended Report and Order at 1, 7-9 (Sept. 11, 2019) (. . . "Invenergy Transmission entered into a Membership Interest Purchase Agreement (the MIPA) with Grain Belt Express Holding to acquire Grain Belt, which is the owner of all of the assets comprising the Grain Belt Express Project.").

Because *Invenergy* involved the selling of an electric corporation's assets and not the transfer of ownership interests between non-regulated entities, the challenge to the Commission's jurisdiction in that case turned on whether Grain Belt, at the time of the selling of its assets, was an electric corporation, and not whether the transaction was a non-jurisdictional transfer of ownership interests.[7] Therefore, because the Invenergy transaction involved the selling of an electric corporation assets that case has no import on the Commission's rulings that disclaim jurisdiction over the transfer of ownership interests between non-regulated entities.

[7] *E. Mo. Landowners All. v. PSC*, 604 S.W.3d 634, 643 (W.D., Div. 3 2020) (affirming the Commission's determination that Grain Belt is an Electric Corporation and that Invenergy Transmission's acquisition of the direct ownership interest in Grain Belt was subject to the Commission's authority).

Additionally, the GPE proceeding involved a Commission determination that GPE was not in compliance with a 2001 agreement approved in connection with the reorganization of Kansas City Power & Light Company, because GRE did not file for Commission approval of the merger with Westar Energy, Inc. ("Westar") *See Midwest Energy Consumers Group, Complainant, v. Great Plains Energy Incorporated, Respondent*, Case No. EC-2017-0107, Report and Order at 20-22 (Feb. 22, 2017). The Commission's finding of jurisdiction over GPE's the merger with Westar turned on the exercise of its powers under its reorganization statute, Section 393.250 RSMo ("Section 393.250") and not Section 393.190.1. In fact, the Commission distinguished the GPE case from past rulings disclaiming jurisdiction under Section 393.190.1:

> [T]he examples referenced by GPE in its Initial Brief are not comparable to the facts presented here. GPE cites cases where the Commission stated that nothing in the statutes conferred jurisdiction over the merger of two non-regulated parent corporations. The current case is distinguishable from those examples because this dispute involves the Commission's authority to enforce the terms of a prior Commission order and a settlement agreement in a reorganization case where Section 393.250 required Commission approval. For reasons already discussed, the Commission does have statutory authority to enforce its prior orders and the 2001 Agreement.

(Footnotes omitted). *Id*. at 19.

Furthermore, unlike the GPE proceeding, there is no reorganization in this instant proceeding that would implicate Section 393.250.1,[8] because, as explained in the Joint Application, there is no reorganization of GridLiance HP:

> The Proposed Transaction will leave in place the direct and indirect wholly-owned subsidiaries of GridLiance Holdco, including GridLiance HP, and all intermediary holding companies, and all of the subsidiaries' licenses, registrations, permits, personnel, facilities, and credit facilities.

[8] Section 393.250.1 reads: "Reorganizations of gas corporations, electrical corporations, water corporations and sewer corporations shall be subject to the supervision and control of the commission, and no such reorganization shall be had without the authorization of the commission."

Joint Application at 2.

Hence, the Commission's rulings in the Invenergy Transmission and GPE proceedings are entirely consistent with the Commission's prior rulings that it has no jurisdiction to approve transfers of ownership interests between non-regulated entities under Section 393.190.1.

IV. Conclusion

The plain and unambiguous language of Section 393.190.1 does not apply to the Proposed Transaction. Indeed, the Commission has properly applied the clear language of Section 393.190.1 in past cases to disclaim jurisdiction over the transfer of ownership interests between non-regulated entities, even when the entity transferring its ownership interest holds a regulated company. The Commission, therefore, should follow a plain language reading of Section 393.190.1, and its prior rulings, and disclaim over the Proposed Transaction which also involves the transfer of ownership interests between non-regulated entities.

WHEREFORE, for the reasons herein, Joint Applicants request that the Commission expeditiously dismiss the Joint Application and close the proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by e-mail or U.S. mail, postage prepaid, this 19th day of January, 2021.

/s/ Anne E. Callenbach

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