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.	))))	File No. EX-2015-0225

COMMENTS OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), and submits these comments on proposed amendments to 4 CSR 240-3.105, as requested by the Commission's Notice to Submit Comments, as follows:

I. Key Background to this CCN Rulemaking

1. This rulemaking concerns proposed amendments to what is commonly referred to as the Commission's certificate of public convenience and necessity, or "CCN" rule. The CCN rule implements section 393.170, RSMo. (2000) (the "CCN statute"). This rulemaking arose as outlined below.

2. On January 8, 2014, Dogwood Energy, LLC ("Dogwood"), a Maryland-based merchant generating company not subject to the Commission's jurisdiction, filed a petition asking the Commission, among other things, to amend the existing CCN rule to "clarify" that electric utilities must obtain advance approval from the Commission before acquiring a generating plant or before undertaking major renovations at the electric utilities' existing generating plants. Consequently, one of the key aspects of Dogwood's petition was that the phrase "begin construction" in section 393.170 was far broader than its plain meaning or longstanding construction and application by the Commission. The proposed rule, in part, also seeks to broaden the application of the CCN statute. These Comments will address why

Dogwood's attempt to re-write the statute (to the extent that attempt is reflected in the proposed rules) is unlawful because it amounts to broadening its scope in a manner not authorized by its terms.

3. Dogwood's petition also sought an amendment that would have imported into the CCN process a mandatory competitive bidding process, including the use of an "independent" monitor. A review of Dogwood's petition demonstrates that a key driver behind these efforts was Dogwood's dissatisfaction with The Empire District Electric Company's ("Empire") decision to convert its Riverton Unit No. 12 generating unit from a coal-fired unit to a combined cycle natural gas unit, with Dogwood contending that Empire should have instead bought Dogwood's merchant plant located in southwest Missouri.[1] Clearly, Dogwood's private financial interests as a merchant generator were the driver of the petition that ultimately led to this rulemaking.

4. The Commission's Staff, as well as Ameren Missouri, Kansas City Power & Light Company and KCP&L-Greater Missouri Operations Company (collectively, "KCP&L") and Empire, all responded to Dogwood's petition.

5. While the Staff agreed with Dogwood that legal issues arising from *StopAquila.Org v. Aquila, Inc.*[2] and *State ex rel. Cass County v. Public Serv. Comm'n*[3] may warrant *a* rulemaking to address amendments to the existing CCN rule that may be appropriate given those decisions, the Staff did not agree that Dogwood's petition should be granted. The Staff, in fact, disagreed with much of the language Dogwood proposed, as did the other entities that responded, including Ameren Missouri. Specifically, the Staff opposed including mandated

[1] Dogwood's *Rulemaking Petition*, File No. EX-2014-0205, filed January 8, 2014.
[2] 180 S.W.3d 24 (Mo. App. W.D. 2005).
[3] 259 S.W.3d 544 (Mo. App. W.D. 2008).

competitive bidding provisions in the CCN rule, stating that there are no such provisions in the Commission's integrated resource planning ("IRP") rules (but that there are provisions that ensure bidding is considered where appropriate), and that the "Staff does not consider such provisions any more appropriate for 4 CSR 240-3.105(1)(E) [the CCN rule] than for Chapter 22 [the IRP rule]."[4] In opposing the mandated competitive bidding provisions in the CCN rule, the Staff provided a significant explanation of the operation of the existing IRP rules and rebutted Dogwood's claims that a lack of mandated competitive bidding provisions (in the IRP rule or elsewhere) had led to an inappropriate resource decision by Empire relating to Riverton Unit No. 12.[5] Ameren Missouri, KCP&L and Empire also opposed Dogwood's petition, including the mandated competitive bidding procedures in the CCN rule, Dogwood's attempt to re-write the meaning of "begin construction" and Dogwood's attempts to impose the CCN statute beyond the state's borders. Indeed, Ameren Missouri respectfully suggests that Dogwood's push for mandated competitive bidding in the CCN rule, as well as its attempt to expand its scope beyond the CCN statute's terms, are truly solutions in search of a problem. Ameren Missouri does agree that there are aspects of the CCN rule that can be clarified in light of the rulings in *StopAquila* and *Cass County* and consequently supports a significant number of the amendments contained in the rulemaking proposal in this docket.

6. The Commission denied Dogwood's petition, but ordered a workshop process largely on the basis of the Staff's suggestion that the recent court decisions warranted consideration of possible amendments to the CCN rules.[6]

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[4] *Staff Response to Commission Order Directing Staff the Investigate and File a Recommendation,* File No. EX-2014-0205, at 3 [EFIS Item No. 3].
[5] *See* the Staff's *Memorandum* from John Rogers dated February 14, 2014, which is attached to the Staff's Response and Recommendation as Attachment A.
[6] *Order Denying Petition for Revision of Commission Rule 4 CSR 240-3.105*, File No. EX-2014-0215 [EFIS Item No. 6].

7. Thereafter, the utilities, together with the Staff, the Office of the Public Counsel ("OPC"), consultants that typically represent the Missouri Industrial Energy Consumers ("MIEC") and Dogwood participated in a series of workshops, moderated by the Staff, as contemplated by the Commission's March 15, 2014 Order.

8. After obtaining the input of the workshop participants, the Staff brought a draft of a revised CCN rule to the Commission that suggested a number of changes to the rule, but which did not include some of the primary changes that Dogwood had originally advocated. The Staff draft omitted competitive bidding provisions (which as noted the Staff indicated were better addressed and already appropriately addressed in the IRP rules) and omitted attempts to extend the application of the CCN process beyond the state's borders. However, at the urging of at least some of the then-Commissioners at an agenda meeting, competitive bidding language was added into the version of the rule that was proposed and that is under consideration in this docket on the grounds that it would facilitate a discussion of the issue, although the agenda discussion appeared to reflect that the then-Commissioners were not endorsing competitive bidding provisions in the CCN rule but simply desired to engage in further discussion in the context of this rulemaking.

9. From Ameren Missouri's perspective and as indicated to the workshop participants by the Staff, the draft the Staff brought to the Commission reflected the workshop participants' consensus on many items, and on "contested" items, the Staff's draft reflected the Staff's judgment as to what was and was not appropriate for the CCN rule, or at least a starting point for what was appropriate.

10. As addressed in detail below, Ameren Missouri has little or no substantive objection to many of the proposed rule's provisions and supports amendments needed to update

the rules to account for the decisions in *StopAquila* and *Cass County*. It does, however, have significant substantive objections in three main areas, as follows: (a) the concept of importing mandated competitive bidding provisions into the CCN rule instead of continuing to apply the provisions of the IRP rules, which in no way have been shown to be flawed or inadequate; (b) the concept of attempting to turn the phrase "shall not begin construction" in section 393.170 into "shall not *acquire*"; and (c) the concept of also expanding the term "construction" in section 393.170 beyond its plain and ordinary meaning and beyond its historic construction and application by the Commission, so that it would include "rebuilding" or "renovation," or similar terms.

11. The rest of these Comments are organized by first addressing less-substantive (although important) changes that ought to be made to the proposed language in areas other than the three more substantive items (items (a) through (c)) listed in paragraph 10 above, followed by a detailed discussion of those three substantive items.

II. Ameren Missouri's Recommendations Regarding Less-Substantive Changes to the Proposal Rule

12. 3.105(B)2 – Ameren Missouri does not generally have concerns with the spirit of this provision, which Ameren Missouri believes is to give the Commission and parties to a CCN case a reasonable opportunity to understand the basic plans and specifications, cost estimate information and the expected in-service date of the construction project for which a CCN is sought. However, the language as written needs to be revised to reduce confusion, the potential for disputes and to recognize "real world," practical considerations in terms of how construction projects are actually developed. Revisions are also warranted to reflect, and to in effect codify, many years of application of the current rule's terms by parties, the Staff and the Commission.

For many years, the CCN rule has provided for the submission of the "plans and specifications for the complete construction project and estimated cost of the construction project or a statement of the reasons the information is currently unavailable and a date when it will be furnished." That language remains in the proposed rule, but the words "scope of the" have been added between "complete" and "construction." Ameren Missouri does not view this as changing the meaning of the original language, but because every word in a rule (like a statute) is to be given effect, would ask that the Commission either delete this added language as unnecessary, or confirm that a change is not intended. Otherwise, the addition of the words "scope of the" could give rise to litigation later over what was intended. Importantly, the existing requirement for plans for the "*complete* construction project" by its express terms already does, by definition, require that there are plans for the "entire scope" of the construction project. This is because if it didn't, all that would be required is plans for a "partial construction project." "Complete" already covers this issue; adding "scope of the" simply confuses it. Consequently, Ameren Missouri recommends the words "scope of the" be omitted as unnecessary so as to avoid confusion and the potential for disputes over what it adds.

Ameren Missouri also suggests that the Commission take this opportunity to revisit the existing language of the rule to recognize how, in practice, construction projects develop and the timing of their development vis-à-vis the timing of required CCN cases. The "plans and specifications" for construction projects are not static but remain dynamic, even to the day the construction starts and often while the construction proceeds. For example, when a transmission line is to be built, the utility can early-on decide that it will be a line of a certain voltage, that it will be erected using a certain type of structure (wood "H-frame"; steel monopoles; lattice towers; some combination), and that it will involve one or more substations or substation

connections. The utility can then identify and provide basic "plans," including a reasonable estimate of the number of structures, basic substation configurations and main substation components, etc. The utility will know with a fairly high level of certainty the distance of the line. Using that information, the utility can develop "plans and specifications" and can develop an estimated cost.

However, plans and specifications[7] will continue to evolve and be refined to dates that, by definition, must be *after* a CCN is granted; indeed, part of the construction on a transmission line may start before the plans and specifications for the final, as-built project are done. This may also be true for the construction of generating plants because field conditions may require plan changes as the construction proceeds. This is owing to several factors.

First, truly final plans and specifications cannot be completed until all of the on-site survey, environmental and geotechnical work is done. Returning to the transmission line project example, the utility's plans during the CCN case might provide that it will have 500 poles and that it will use X number of angle structures and Y number of dead-end structures, but when it completes the on-site work it may need to increase or decrease the number of poles and change the mix of structures. However, most or all of this on-site work cannot occur until after right-of-way is obtained. In most cases, a utility is not going to obtain right-of-way before it receives a CCN because the CCN case could affect line routing.

Second, the fact that plans and specifications must of necessity evolve as the project "matures" means that cost estimates also evolve. The AACE International[8] is, as its name implies, an internationally-recognized association of engineers that specializes in cost and

[7] Each utility has "standard" specifications for various equipment – for H-frames, for certain kinds of transformers, for switches, for angle structures that attach to the poles, etc, but those too may change in some respects as a project proceeds.
[8] Originally known as the American Association of Cost Engineers.

schedule management on significant construction projects. AACE recognizes five "classes" of estimates, the accuracy of which depend in significant part on the percent of engineering complete at various stages of the project. A description of these classes is attached to these Comments as Exhibit A. It is not at all unusual at the time a CCN case needs to be completed in order to meet in-service deadlines for the available estimate to be a class 3 or 4 estimate and it is virtually never the case that a class 1 estimate can practically be achieved during the pendency of a CCN case. Consequently, the 100% final plans and specifications and cost estimates simply cannot be filed before construction must start and, of course, before the CCN is granted.

Ameren Missouri knows that the Commission's Staff understands these facts and the dynamic nature of project development, and it has been the Company's experience that it has not had major disputes with the Staff over the level of completeness and specificity needed to constitute the current rule's "plans and specifications for the complete construction project" and "estimated cost" requirements. However, it has also been Ameren Missouri's experience that both utilities and the Staff have at times been uncertain about what those words mean because what exactly constitutes the "plans and specifications," and the level of development and refinement of the project cost estimate, has varied from CCN case to CCN case. In some cases, plans and specifications have been filed that are at an advanced stage of completeness, but in some cases plans and specifications have been much less complete with the cost estimates remaining at the class 3 or 4 level. While the Commission has been able to make CCN decisions across the spectrum of such cases, the rule should recognize the flexibility that has historically been employed through application of the current rule and the practicalities inherent in the development of plans, specifications and cost estimates. The Commission should guard against a rule that could be argued to be more rigid ("the" plans and specifications) so that, as an example,

those that oppose a CCN entirely are not able to use these informational requirements as a technical excuse for seeking denial of the CCN. In the end, the rules should provide flexibility to the utility and the Commission to determine what plans, specifications and cost estimates are sufficient for the ultimate granting of the requested CCN, in the CCN case at issue and given the overall evidence presented in the case, as well as the scope of the issues in the case.

To recognize how the current rule has been applied in practice and to provide that flexibility, Ameren Missouri recommends that the proposed language be revised to read as follows [**bold/underline language to be added**]:

> 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 **identificationes** 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 **in-service** ~~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]*

The foregoing changes do not handcuff the Commission's ability to ultimately make the determinations it must make in a CCN case, but they recognize the needed flexibility, and reflect longstanding practice in CCN cases. Parties could still claim that the plans or specifications or cost estimates or other descriptions called for by subsection 2 that have been provided are

substantively inadequate for the Commission to make a decision, or that the level of completeness of plans suggest the CCN should not be granted or that a CCN decision should be delayed until more refined plans or estimates can be provided. If such claims are made, the Commission will decide how to proceed; again, the Commission will not be handcuffed by a more flexible rule. However, by acknowledging in the rule that plans, specifications and cost estimates are necessarily dynamic and that such information in varying stages of completeness can be sufficient for making a CCN determination (as has always been the case), a weapon is removed from the arsenal of those who might simply want to oppose an otherwise meritorious CCN application based on a technical argument that "the 100% final" plans or cost estimates are not yet done.

13. 3.105(B)(4) & (5) – The question in a CCN case is whether permission to begin construction of a new facility is necessary or convenient for the public service. The statute does not purport to regulate the means by which it is later operated, maintained or repaired. The Commission has for decades processed CCN requests without enlarging the scope of the application to these matters. There is no reason to do so now, and subsections (4) and (5) should be omitted.

III. Ameren Missouri's Substantive Objections to the Proposed Rule

Substantive Objection No. 1 – Mandated Competitive Bidding in the CCN Rule

14. Competitive Bidding - 3.105(1)(B)6(a) – ***Design/Construction Procurement Issues***

Part (a) of the language contained in the proposed rule deals with the showing of "facts" relating to the use of competitive bidding to acquire design, engineering, procurement, construction management and construction contract services. Dogwood's petition in File No. EX-2014-0205 did not seek to inject these issues into a CCN case, nor did any party in the

workshop process that arose from the original Dogwood case advocate for such provisions. There has been no indication of, and Ameren Missouri is not aware of, any significant history of concerns in these areas that would suggest that such provisions are needed in any Commission rule, much less in a CCN rule that seeks permission to construct and that most often will precede the time when such service contracts are negotiated and signed. Indeed, throughout Dogwood's earlier case seeking its own amendment to the CCN rule, and during the workshops arising out of Dogwood's petition, there was simply no discussion about bidding relating to design, engineering, procurement, construction or construction management *at all*. While the complete lack of prior discussion of these issues may not preclude the Commission from considering them as a matter of law, it certainly is unusual for the Commission to initiate a workshop process and to have proposals flow from that process that were never discussed as part of the process.

The bottom line is that Ameren Missouri opposes the apparent showing contemplated by part (a) of this subsection as being unnecessary. The lack of necessity is shown by, among other reasons, the fact that no one has brought up any past problems or need in this area. Moreover, such requirements are impractical given the timing of most CCN cases vis-à-vis the timing a great deal of the design and engineering that must be completed, and all of the construction.

With respect to the timing issue, Ameren Missouri understands (based upon discussions with the Staff, which included competitive bidding provisions related to purchased power agreements at the request of Commissioners, as earlier noted) that the intention of the "and/or being the projected process" language is to attempt to address timing concerns such as those just expressed. Ameren Missouri engaged in discussions with the Staff to clarify the intention because the language, as written, was not, at least to Ameren Missouri, clear. The intention, as Ameren Missouri understands it, is that there would not need to be any factual showing that any

competitive bidding on the project that is the subject of the CCN application *has already* occurred at the time of the CCN case, but that instead the applicant could simply provide facts showing that the applicant had a "projected process" for later utilizing competitive bidding.

While the "and/or being the projected process" language (if it were properly clarified) presumably mitigates the timing problems, it does not solve other concerns, nor does it change the fact that there has been no showing of any need for such a requirement in the first place. Lack of a mandate in the CCN rule relating to competitive bidding for design, engineering, construction services, etc. has not meant and will not mean that competitive bidding won't often be used for many goods and services that will be needed on construction projects. Very often it will be. Indeed, Ameren Missouri has detailed policies for procurement of goods and services, including for major construction projects, that call for extensive use of competitive bidding where appropriate. Ameren Missouri is sure that all Missouri electric utilities do. While competitive bidding is often used, there are exceptions which have arisen through decades of experience in what works best to obtain the goods and services that are needed at the most reasonable cost given the needs of the project.

Competitive bidding isn't always the prudent way to obtain goods and services, and taking bids and making goods and services decisions based upon the absolute lowest cost bid is not always prudent. This can be true in all areas of procurement, but is especially true in the areas of engineering and design. Just as most individuals and entities do not choose their attorneys or doctors or specialized consultants via bidding processes based on cost, utilities (or other industrial firms that engage in substantial construction) generally don't choose designers and engineers through competitive bids. The paramount considerations in those areas are experience in general, past experience with the particular type of job, past experience by the

utility with the particular engineer or designer, and the particular personnel who will make up the design/engineering team. Is cost important? Yes, it is, but these other considerations are more important, and there is no way to rank competitors on those other considerations through a bid process that would have to rest on some kind of objective measure that simply doesn't fit those considerations well.

In any given case, if the issue of how goods or services will or should be obtained arises (to Ameren Missouri's knowledge, that issue has either not arisen at all or has not been an important one in past CCN cases), the Commission would have full authority to direct the applicant to explain how it intends to procure needed goods and services, assuming that such an explanation is somehow pertinent to the CCN decision to be made. Respectfully, Ameren Missouri doesn't believe a CCN determination needs to implicate the particular means by which goods and services will be obtained. That this is true is evidenced by the fact that the Commission has been deciding CCN cases for decades and Ameren Missouri does not believe this has been much of an issue, if it has been an issue at all. For example, the undersigned counsel for Ameren Missouri has been involved in many CCN cases himself, and has reviewed CCN case files and decisions in literally dozens of others. To the undersigned counsel's knowledge (and to the knowledge of other Company personnel with substantial experience in CCN cases over a long period of time), the Commission has never needed to have information about procurement of goods and services to decide a CCN case, including to apply the *Tartan* criteria.[9]

In addition, as discussed later in these Comments, when (and whether) competitive bidding ought to be employed to acquire particular goods or services is quite arguably a

[9] *In Re Tartan Energy*, Case No. GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994).

management decision within the prerogative of utility management. As also discussed later in these Comments, this does not mean that the Commission lacks authority to ensure that imprudently incurred costs are not included in rates. If a utility imprudently fails to competitively bid procurement of a good or service, then the Commission can disallow the costs to the extent that imprudence increased costs. The Staff or other parties can obtain whatever information they need in any rate case where the project costs are impacting the revenue requirement, including about competitive bidding, or lack of it. But that is where the debate – if there is to be a debate –ought to take place. There is no need to burden a CCN case with it.

15. Competitive Bidding - 3.105(1)(B)6(b) – ***Purchased Power Agreement ("PPA") Issues***

There are three fundamental flaws that underlie efforts by merchant generators like Dogwood to inject a mandatory competitive bidding process for PPAs into a CCN case. First, such efforts are premised on a false equivalence; that is, those who advocate for such a requirement act as though reliance by an electric utility on PPAs for the capacity and energy needed to provide service to customers is the same as reliance by that utility on generation capacity that the utility owns, operates and controls. To the contrary, PPAs and utility-owned, operated and controlled generation are not equivalent, as outlined further below.

Second, evaluation of and debate about important resource decisions has for years been, and should remain, within the Commission's robust IRP process. Resource decisions involve significant complexity over long planning horizons. IRPs reflect detailed, multi-faceted analyses documented in multiple IRP report chapters that reflect the conclusions reached from those analyses, and are backed by still more workpapers and backup information. IRP dockets typically involve a broad array of parties, which could in proper cases include merchant generators, and detailed consideration is given to the resource options, alternative plans and

preferred plans chosen by the utility. In fact, IRP dockets effectively begin before the IRP is even filed because of the requirements for a collaborative stakeholder process in advance of the filing. There are robust provisions in the IRP rules for the identification and resolution of deficiencies and concerns. There are requirements to file annual IRP update reports and to make filings if the preferred resource plan changes between triennial IRP filings. Stakeholders and parties are given opportunities to comment on these annual update filings and on any changes to the preferred resource plan, and the Commission itself has ongoing jurisdiction over the utilities it regulates. Ameren Missouri addresses the IRP process and how it already properly considers PPAs in greater detail, below.

Third, it is also unnecessary, unwise and impractical to clog CCN proceedings with a time-consuming mandatory competitive bidding process, and doing so injects the Commission into the area of managing the utility effectively putting the Commission in the business of making resource decisions. The Commission has never dictated to utilities the resources the utility should utilize to discharge their service obligations and instead has consistently judged the propriety of resource decisions as part of its review of the prudence of utility investments or expenses in the general rate proceedings when those investments or expenses are considered as the basis for new rates.

Technical Issues – PPA Bidding

Before getting further into the substantive problems with mandated competitive bidding for PPAs in the CCN rule, Ameren Missouri first desires to address the language used in the proposed rule in 4 CSR 240-3.105(1)(B)6, because even if it were appropriate (it is not), as written it makes no sense, at least as to one area. The proposed language is as follows:

> The facts showing . . . (b) the utilization of a non-discriminatory, fair, and reasonable competitive bidding process for purchased power capacity and energy

> from alternative suppliers, reviewed by the electric utility at an identified time(s) as a possible resource(s) in lieu of the construction of electric generating plants(s), *electric transmission line(s)*, or gas transmission lines to facilitate the operation of electric generating plant(s). (emphasis added)

The mandated competitive bidding issue raised by Dogwood (and that has been the subject of proposed legislation in the Missouri General Assembly in recent years) does not involve a contention that PPAs for capacity and energy should be considered "in lieu of" needed electric transmission lines, nor does such a concept make sense for an integrated utility like the electric utilities in Missouri. Transmission lines are not a resource for capacity and energy, but rather, are part of the overall grid needed to reliably move energy from generators to load. While a utility could contract for capacity and energy through a PPA, the idea that a utility would contract with an entity not under its control to build, own and operate the transmission system that is critical to the ability of the utility to keep the lights on is not only patently unwise, but to Ameren Missouri's knowledge, is not being advocated for in this or any other docket.

Ameren Missouri assumes that when the italicized language in the proposed rule was included it was included by error and was simply a "holdover" from earlier phraseology in the proposed rule that requires that a CCN be obtained for generation, and for transmission outside the utility's service territory, and for gas lines to supply generation if outside the utility's service territory, which the *Harline* and *StopAquila* decisions indicate is required by section 393.170.[10] Consequently, even if a competitive bidding rule were otherwise appropriate, it should not include the phrase ", electric transmission line(s),".

Substantive Issues – PPA Bidding in the CCN Rule

[10] For example, the phrase "electric generating plant(s), electrical transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plants in Missouri" in proposed 4 CSR 240-3.105(1)(B) makes sense because it is defining the scope of the projects to which the CCN rule applies. That same phraseology does not make sense in this context, however.

As noted above, the premise advanced by those who advocate for mandated competitive bidding for PPAs in the CCN rule is that PPAs can simply be substituted for utility owned and operated generation – i.e., substituted for "steel in the ground" – and that if the bare contract price for energy and capacity under a PPA is lower than the cost of utility owned and operated generation a PPA should be chosen. In fact, that premise is a false one. There are many complex differences between a PPA and utility-owned and operated generation that prevent them from being acceptable substitutes for one another, and the CCN process is ill-suited to deal with and resolve those issues.

a. There is less control and accountability when PPAs are used.

First, PPAs are typically with merchant generators over which the Commission has no jurisdiction or control. The Commission cannot require those generators to provide the significant operational information that Ameren Missouri and the other electric utilities in Missouri must provide about their generating plants and their operation under 4 CSR 240-3.190. This means the Commission has no ability to monitor or exert any measure of control over the operation of the units. The merchant generator is not required to inform the Commission if there are operational issues, such as de-rates or outages; is not required to inform the Commission of citations or notices of violations; is not required to report accidents or fuel supply disruptions; and is not required to report transmission capability losses that might affect the output of the plant. Similarly, the Commission has no safety-related jurisdiction over merchant plants, and cannot require that it be informed of electrical contacts resulting in serious injury or other such significant events, as it does for plants owned and operated by the utilities over which it does have jurisdiction. The lack of jurisdiction reflects a general lack of control, both on the part of

the utility who is simply in the position of the buyer of a product (capacity and energy) and on the part of the regulator.

Second, Merchant generators also have little or no incentive to operate the plant in a manner that effectuates a reduction in the overall cost of purchased and self-generated power *for the utility*. For example, plant expansions can't be required, nor can environmental retrofits, etc. Nor does the utility or the regulator retain any control over operation or future capital investments in the merchant plant necessary to ensure its reliable operation or to meet environmental requirements.

Third, with the fixed energy and capacity payments typical of PPAs, if the merchant generator can gain efficiencies in the makeup of the asset or its operations, it is the *merchant generator* that enjoys the additional profits. In contrast, if a utility owns generation and gains efficiencies, those get passed on *to customers*. For example, greater output resulting in higher off-system sales are passed to customers through Ameren Missouri's fuel adjustment clause, as are lower fuel costs driven by improved unit heat rates or reductions in fuel supply costs. Aside from off-system sales of energy is the value to the utility (and its customers) from owning the generator, as evidenced by the fact that for 2015-2016 and 2016-2017 Ameren Missouri has received or will receive approximately $60 million of revenues from capacity sales arising from its owned generation in the Midwest Independent System Operator, Inc.'s capacity markets.

Capturing these factors in a bidding process is difficult and perhaps impossible. As discussed below, it is not the case that the use of PPAs is not considered, robustly, by utilities; indeed, under the IRP rules such considerations must occur as part of the overall resource planning process, but wisely, the Commission has not mandated (in the IRP rules or otherwise)

that the resource decision come down to a head-to-head comparison of PPA prices to megawatt and megawatt-hour costs of owned generation.

b. Transacting with merchant generators exposes utilities and customers to heightened financial risk.

Merchant generators expose a utility (and ultimately its customers) to heightened financial risk because merchant generators are generally risky counterparties with relatively weak financial profiles. The higher level of risk transacting with merchant generators presents is difficult to capture in a simple comparison of capacity and energy costs under a PPA versus the cost of capacity and energy that would be incurred from a utility-owned asset. However, the relatively high-risk and volatile business of being a merchant generator (and the risk of transacting with them) is evident from recent bankruptcies in the merchant generation sector and from weak merchant generator credit ratings.

Over the last fifteen years, numerous merchant generators have filed for bankruptcy protection. Examples include:

- National Energy Group (2003)
- GenOn (2003)
- NRG (2004)
- Calpine (2005)
- Boston Generating (2010)
- Dynegy (2011)
- Energy Future Holdings (2014)
- Entegra Power Group (2014)
- Mach Generation (2014)
- Edison Mission Energy (2014)

During this same period, no investor-owned utilities have filed for bankruptcy protection, which is a reflection of a more stable regulated business model and stronger credit profiles.

While the reasons for and impacts of merchant generator bankruptcies are varied, the bankruptcies generally underscore the volatility of the merchant generation business and the susceptibility of merchant generators to financial distress. While a merchant generator under bankruptcy protection may have capacity and incentive to perform under existing contracts, including PPAs, merchant generators in financial distress may be unable to perform or, as allowed under bankruptcy law, elect not to perform. Nonperformance by a merchant generator under a PPA could adversely affect a utility's ability to secure adequate energy supply or secure adequate energy at a competitive price, which could weaken reliability or increase cost, both to the detriment of a utility's customers.

Further observable evidence of the relatively high volatility of the merchant generation sector and weak credit profiles among merchant generators is the fact that most large merchant generators have sub-investment grade credit ratings, with debt generally referred to as "junk" due to a relatively high probability of default. Specifically, of the 19 merchant generators currently rated by Moody's Investment Services ("Moody's"), 16 (84%) are rated sub-investment grade, with eight rated as "speculative," six as "highly speculative," one as "extremely speculative," and one as "in default with little prospect for recovery." The three merchant generators with investment grade ratings are all supported by large, diversified, and relatively stable utility holding companies. By contrast, Moody's currently rates the debt of all investor-owned utilities, including Ameren Missouri, as investment grade.

According to Moody's, financial stress caused by persistent lower power prices have pressured certain merchant generators into adopting risky, aggressive and arguably imprudent

financial practices, including maintenance of "untenable" highly-leveraged capital structures and increasing debt balances during a period of cash flow decline. This in turn further increases the risk of financial distress and default, and could lead to cutting corners in safety, operations and maintenance.

The sub-investment grade credit ratings of most merchant generators also weaken their access to capital markets, increase their cost of capital, increase refinancing risk, and generally constrain financial flexibility. This weakened access to the capital markets increases the risk that merchant generators will not be able to access capital necessary to perform under a PPA, or that their cost of capital will be too high to support ongoing operations.

While a merchant generator may promise to build infrastructure and deliver energy at a competitive price, financial pressures (including those that lead to default, bankruptcy, or discontinued operation) could lead to nonperformance, which could drive higher costs to the utilities that contracted with them and, ultimately, the utility's customers. Put another way, as earlier noted, these financial factors mean that one can't just compare the contract price under a PPA to the utility's price of generation, but must consider some kind of risk-adjusted cost, which must consider probability of default or nonperformance by the merchant generator. This is far from an exact science, which creates uncertainty and risk.

Regulators have recognized the risks inherent in using long-term PPAs to meet a utility's service obligation. In a report to the Oregon PSC investigating the issues involved in utility self-builds versus PPAs, the Oregon PSC Staff stated:

> The second potential barrier to the purchase of PPAs is the counterparty risk involved in entering into a PPA contract. By entering into a PPA, the utility is relying on another entity for certain amounts of power at certain prices. If the entity does not fulfill its obligations to the utility, the result is potentially costly to both the utility and to customers, especially if this failure occurs during a period of prices significantly higher than those in the contract. History has shown that this risk is

> real, as independent power producers are an industry market with instability and the bankruptcies of some of its largest players.[11]

The bottom line is that the question of whether a bid from a merchant generator is a "good deal" or a viable substitute for generation a utility owns, controls, and operates is far from a simple one for a number of reasons, including the uncertainties and risks created when a regulated utility relies on unregulated counterparties with speculative credit ratings, weak balance sheets, high degrees of cash flow volatility, and generally high levels of financial and business risk. The push by entities like Dogwood to mandate competitive bidding in a CCN case ignores these complexities. That is not to say that PPAs cannot properly play a role in a utility's resource mix, but a CCN case is not the place for that discussion. As discussed below, the IRP process, which generally spans a year or longer before the IRP is filed and many months if not a year after the filing, is well-suited to consider and evaluate these and other complexities inherent in evaluating PPAs versus utility-owned generation. The CCN process is ill-suited for such an exercise, and there is in any event no need to duplicate such an exercise in a CCN case.

c. The limited amount of information available for smaller merchant generators inhibits a utility's ability to effectively assess and manage counterparty risk.

For smaller merchant generators (such as Dogwood), there is limited information available regarding their financial position and creditworthiness. As such, potential utility counterparties (such as Ameren Missouri) may be unable to effectively and efficiently evaluate counterparty credit and operational risk. The lack of verifiable, public information challenges a utility's ability to comply with its internal credit policies, to operate within an acceptable level of

[11] Public Utility Commission of Oregon Staff Report Public Meeting August 22, 2006, p. 4. When the utility owns and operates the generation, it has the obligation to utilize it in a manner that discharges its obligation to provide safe and adequate service and, if it fails in that obligation, the Commission has the ultimate tool of seeking civil or criminal penalties. Merchant generators have no such obligations, and the Commission has no such tools respecting them.

risk tolerance, and to make sound and prudent credit decisions. Specifically, a utility may be unable to effectively evaluate a counterparty's operational capacity to perform under a proposed PPA or monitor on an ongoing basis the financial health of the counterparty, which increases the utility's credit risk.

d. PPAs amount to renting capacity instead of owning it; ownership has its advantages.

Related to the financial risk concerns noted earlier is the fact that entering into a long-term PPA is effectively "renting" capacity instead of owning it. When the contract is over, the rent has been paid, but the utility owns nothing. Ownership, however, has its advantages, and those advantages accrue not just to the owning utility, but to the utility's customers.

Consider the fact that at the end of a long-term PPA, the merchant generator will resell the capacity and energy from the plant to the market or another buyer, but if the utility owned the facility, which would likely be heavily depreciated at the time, the utility could continue to rely on the capacity and energy from the asset for the benefit of its customers. And, a heavily depreciated and utility-owned generating plant has long-term cost advantages to customers; the cost of the plant in rates is significantly lowered because its contribution to rate base, and the return reflected in rates on rate base, is significantly reduced over time. Consider the example of the Callaway Energy Center ("Callaway"). To build Callaway today would cost billions of dollars. Some would make the case that a long-term PPA would be a better choice for procurement of the power that Callaway provides to Ameren Missouri customers. However, Callaway will almost certainly "live" well beyond its originally-estimated life, and there are indications that it will continue to live for a very long time into the future. While the rate base value of Callaway today is significant (owing to replacements and improvements over time), depreciation has nevertheless materially reduced its contribution to rate base, and customers are

still receiving the benefits of low-cost generation from Ameren Missouri's ownership and operation, not to mention the hundreds of jobs and other positive economic impacts it continues to create for the state. And, as earlier noted, operational improvements at a utility-owned facility also accrue to customers instead of to merchant generator owners. For example, expansions to Callaway's capacity have accrued to the benefit of Ameren Missouri and its customers. Moreover, ownership of generation assets may also present opportunities for efficiency of operations through flexible sharing of maintenance staff across plants and optimization of fleet-wide emissions standards for owned generators, benefits that ultimately accrue to utility customers.

e. PPAs can adversely impact the utility's key credit metrics and credit ratings.

Due to the manner in which fixed obligations under a PPA are typically either accounted for as debt under U.S. Generally Accepted Accounting Principles or imputed as debt by credit rating agencies, PPAs can have an adverse impact on key leverage and interest coverage metrics used by credit rating agencies to evaluate a utility's creditworthiness and ultimately set ratings. This is due to higher levels of actual or imputed debt balances and interest expense associated with PPAs assumed to be financed with 100% equity, rather than in a manner consistent with a utility's actual long-term capital structure, which typically includes only approximately 50% debt. Weaker leverage and interest coverage metrics could limit a utility's financial flexibility and, ultimately, pressure credit ratings. Weaker credit ratings would impact capital market access and increase a utility's cost of capital, which could negatively affect reliability and increase rates for customers.

f. PPAs allow merchant generators to unfairly benefit from stronger utility credit profiles.

Receipts of payments due from a regulated utility under a PPA may be considered reasonably assured given the strong credit profiles and investment grade credit ratings of regulated utilities. The relative certainty of receipt of payments required under the PPA allows a merchant generator to obtain debt financing at a lower cost relative to its stand-alone cost of capital. Effectively, the *utility's* creditworthiness is used as security to support the debt of the merchant generator. Reliance on the utility's stronger credit profile to support the merchant generator's debt creates an unfair competitive pricing advantage for the merchant generator, who reaps the benefits of the utility's stronger credit profile without having to incur the capital costs of a more prudently-financed, stable, investment-grade credit profile, the cost of which has been borne over time by utility customers. This dynamic renders prices bid under PPAs by merchant generators incomparable to the cost of generation responsibly financed and operated by a regulated utility. Essentially, under PPAs, highly-leveraged merchant generators use the utility's stronger credit profile to reduce its costs and increase its profits while exposing utilities and their customers to higher degrees of risk.

g. The existing IRP process properly considers alternative resources, including the use of PPAs.

The Commission's IRP rules are comprehensive with regard to evaluating resource options and selecting a preferred resource plan and resource acquisition strategy. They include requirements for evaluating options for full or partial ownership of resources and resources available through bi-lateral transactions (i.e., PPAs) and using a wide variety of technologies that are commercially available or are expected to be commercially available during the planning horizon.[12] The utility must evaluate and rank potential supply-side resource options based on the full costs of each option (which includes the option of utilizing PPAs), including capital costs,

[12] 4 CSR 240-22.040(1).

fuel costs, environmental compliance costs, and other operating and maintenance costs. Potential supply-side resource options are also often subject to a screening evaluation that accounts for operational and feasibility factors in addition to costs. A list of candidate supply-side resource options is developed for further evaluation as part of integrated alternative resource plans, which include various combinations of supply-side and demand-side resources designed to meet customer demand for at least the succeeding twenty years. These alternative resource plans are subjected to rigorous analyses under a range of future potential conditions to evaluate the probable range of costs for each plan and the impacts of various cost drivers, or critical uncertain factors.[13] This analysis is considered along with other key planning criteria in the decision process used by utility management to select the utility's preferred resource plan and resource acquisition strategy.[14] The resource acquisition strategy identifies implementation milestones to effectuate the preferred plan, key contingency plans and options, and a plan for monitoring decision drivers that may lead to changes in the preferred plan. A description of adequate competitive procurement policies for the acquisition and development of supply side resources is required to be included as part of the implementation plan.[15] Ameren Missouri described its procurement policies and project oversight process in Chapter 10 of its 2014 IRP.

The preparation of the IRP typically requires more than a year to develop assumptions, evaluate options, develop and evaluate alternative plans, and select a preferred resource plan and acquisition strategy, and IRP dockets, once they formally begin with the filing of the IRP, often take another year to complete. IRP development and evaluation involves an interactive stakeholder process that includes a full review of all assumptions and of draft documentation

[13] 4 CSR 240-22.060.
[14] 4 CSR 240-22.070.
[15] 4 CSR 240-22.070(6)(E).

months before it is filed.[16] The IRP process is relied upon by the Commission and stakeholders to ensure that electric utilities provide services that are safe, reliable, and efficient, at just and reasonable rates, and in a manner that serves the public interest and is consistent with state energy and environmental policies.[17] Utility IRPs are in turn relied upon as both a record of the utility's decision making process and its consideration of a wide range of options. While Dogwood did not like the resource decision regarding Riverton Unit No. 12 that arose from Empire's IRP process, there is no indication (as the Staff has confirmed) that the resource decision was ill-advised or that the alternative that Dogwood proposed (that would have financially benefitted Dogwood by allowing it to sell its Missouri plant) was a superior one.

Duplicating this robust process as part of each and every application for a CNN would be counterproductive at best. The time required, the range of options that must be considered, and the rigor with which they must be evaluated would frustrate the public interest by adding undue and duplicative bureaucracy that adds nothing to the consideration and selection of resources. For at least these reasons, the CCN process can and should rely upon the existing IRP process to inform the Commission's consideration of whether or not a particular CCN request meets the necessary or convenient for the public service standard in the CCN statute.

Since the Commission can and should continue to rely on its established IRP process to inform it regarding the appropriateness of requests for a CCN, the obvious question is what problem, if any, does the competitive bidding language for PPAs that is being proposed seek to solve? Is it to require consideration of resources not owned by the utility? The Commission already uses the IRP process to ensure such consideration. As noted, Empire's consideration of the potential acquisition of Dogwood Energy's gas-fired facility in northwest Missouri is a

[16] 4 CSR 240-22.080(5).
[17] 4 CSR 240-22.010(2).

perfect example. Is it to ensure that utilities use appropriate and effective processes for procurement of resources? The Commission revised its IRP rules in 2011 to ensure that utilities document such processes. Is it to ensure greater use of PPAs for resource acquisition? If so, it is not at all clear that such an objective is necessarily in the public interest, either now or in the future, and the Commission can consider such questions and preferences in the context of its established IRP process and ultimately in rate cases when a utility seeks to include in rate base investment in generation or otherwise recover costs incurred under a PPA. There is no need to clog CCN cases with these issues.

h. The proposed mandated competitive bidding rule may encroach on the utility's right to manage its business.

Missouri courts have often held that the Commission 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. and to Use of Kansas City Power & Light Co. v. Buzard,* 168 S.W.2d 1044, 1046 (Mo. 1943). Moreover, neither convenience, expediency nor necessity can support an act of the Commission that is not authorized by statute. *State ex rel. Kansas City v. Public Service Commission of Missouri,* 257 S.W. 462 (Mo. 1923). Missouri courts have also consistently held that the Commission has no authority to manage the utilities that it regulates. "The Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." *State ex rel. Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. 1966).

The cases make clear that this means that the Commission is not to dictate to the utility how it obtains the resources it needs to provide service to the public. "The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in the rendition of that service. It is no concern

of either the customers of the water company or the Commission, if the water company obtains necessary material, labor, supplies, etc., from the holding company so long as the quality and price of the service rendered by the water company are what the law says they should be." *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 36 (Mo. 1930). The Commission ensures that the "quality and price" are what they should be through its authority to set rates, which includes the authority to exclude from rates imprudent costs, including imprudent resource costs. But as the Supreme Court made clear, the Commission isn't to take over utility management in advance and dictate to the utility what the resource decision should be; otherwise, the Commission would be unlawfully "dictat[ing] . . . the methods which the utility must employ in the rendition of [its] . . . service."

Mandated competitive bidding may effectively cross the line between sound regulation and taking over management of the utility The Commission should be reviewing the prudence of decisions which electric utilities under its jurisdiction make, and requiring that utilities engage in a robust process for resource planning (which they already must, per the IRP rules), but should not be injecting itself to this degree into how those decisions are ultimately made. Moreover, such a rule is also completely unnecessary, as outlined above.

16. "Begin Construction" - 3.105(2)(C)[18] – ***Construction vs. Rebuilding, Renovation, Etc***.

The proposed rule contains what would be an administratively-created definition of the term "construction." As explained below, this administrative definition would unlawfully change the plain meaning of the term "construction," and would reflect an interpretation and application of that term that is completely at odds with the Commission's more than 100 years of

[18] Deletion of (C) renders 3.105(2)(E) unnecessary. Consequently, it too should be deleted. 3.105(2) should only consist of subdivisions (A) and (B), consistent with *StopAquila* and *Cass County*.

application of the CCN statute. While the Commission has the power to adopt rules, it has no power to expand the statutory authority it was given, including no power to change the meaning of words in its enabling statutes.[19]

Statutory terms are to be given their plain and ordinary meaning, which is found in the dictionary.[20] *Black's Law Dictionary* defines "construction" as "[t]he creation of something new, as distinguished from the repair or improvement of something already existing." It is clear that one cannot "rebuild" or "renovate" or "improve" or "retrofit" something unless it was "already existing." Consequently, "construction" in the CCN statute does not and cannot "[i]nclude substantial rebuild, renovation, improvement, retrofit …." The rule can't change the meaning of the words in the statute.

The fact that 103 years after the statute was enacted (and that it has not been changed in any material respect since then), there is now a proposal to adopt a definition that is totally at odds with how the statute has actually been applied is itself proof that "construction" simply can't mean what the proposed rule assumes. In the *Cass County* decision, the Court of Appeals held that the Commission could not give *post-hac* permission to "begin construction" of a generating plant. The effect of that decision was that because Aquila had already built the plant before the Commission granted it a CCN, the plant was completely unauthorized and was at risk of having to be torn down.[21] A later statutory enactment effectively prevented this from happening.[22]

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[19] *State ex. rel. Doe Run v. Brown,* 918 S.W.2d 303, 306 (Mo. App. E.D. 1996) (Stating the settled rule that rules and regulations are void if they attempt to expand or modify a statute, and that a rule that is inconsistent with a statute must fail).
[20] *Spudich v. Dir. or Revenue,* 745 S.W.2d 677, 680 (Mo. 1988) (Stating the settled rule that words and phrases in a statute are to be given their plain and ordinary meaning, as found in the dictionary).
[21] *Cass County* was an appeal from a mandatory injunction that required that the plant be torn down – the injunction was upheld by the Court of Appeals.
[22] Section 393.1150, RSMo. (Cum. Supp. 2013).

The point is that if "construction" in fact did "include" (as the proposed rule posits) all of the noted activities besides new or initial construction, then for 103 years utilities have been beginning "construction" within the meaning of the CCN statute *without the permission that the CCN statute requires*. If that were true, then, in theory, utilities could face the argument that any generating plant that has been renovated or improved has to be torn down because it simply lacked the requisite Commission authority, as did the Aquila Cass County plant. After all, since the term "construction" has not been changed since 1913, if it means all of these other things today, then it also had to have meant all of those other things for the past 103 years. Put another way, the meaning of "construction" in the CCN statute did not, and cannot, change here in 2016 simply because someone wants it to. If it is to be changed, the General Assembly will have to do it.

The Commission has certainly never construed the phrase "begin construction" in the manner reflected in the proposed rule. This too supports the conclusion that it does not mean what the proposed rule now attempts to make it mean. *See, e.g., State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177 (Mo. App. K.C. 1960). (The Court of Appeals recognizing that the Commission's longstanding application of section 393.170 such that "begin construction" did not encompass a new transmission line to be built within the utility's pre-existing certificated service territory was persuasive as to what the statute meant). The converse is also true. That the Commission has always treated the phrase "begin construction" as applying only to a construction of a new power plant informs what the phrase actually means.

Nor is there any indication whatsoever that the General Assembly by its use of the word "construction" in the CCN statute intended that it include rebuilding, renovation, retrofitting or improvement. In its rulemaking petition case, Dogwood pointed to Missouri's prevailing wage

statutes and argued that since prevailing wage laws apply to public utility construction, the definition of "construction" in the prevailing wage statute should define what "construction" means in section 393.170. The prevailing wage statute expressly defines "construction" in that statute to include "reconstruction, improvement, enlargement." There are several flaws in Dogwood's argument, aside from those already pointed out above.

First, the prevailing wage statutes were enacted in 1957, some 43 years after section 393.170 was enacted. If "construction" in the General Assembly's collective mind in 1913 included "reconstruction, improvement, enlargement," then there was no need for the General Assembly to add the additional terms to the definition of "construction" in the 1957 prevailing wage law. Instead of supporting Dogwood's expansive definition of construction in section 393.170, Dogwood's prevailing wage statute argument actually proves Ameren Missouri's point – when the General Assembly means "construction" to encompass "improvement" or "enlargement," it says so.

Second, Dogwood is effectively arguing that the Public Service Commission Law ought to be read *in para materia* with the prevailing wage law. For starters, the Commission does not have to resort to using any statutory-construction tools where (as here) the statute is unambiguous: words are to be given their plain, ordinary meaning. *Jefferson v. Mo. Baptist Med. Ctr.*, 447 S.W.3d 701, 709 (Mo. App. E.D. 2014). The Commission has given the term its plain and ordinary meaning for more than 100 years; it's not ambiguous. Moreover, a term is not ambiguous merely because one party disagrees about its meaning. *Id.* at 707–08 (holding that the term "employee" (in the context of medical-malpractice lawsuits) is not ambiguous and (as a result) declining to construe it using the construction principle of *in pari materia*).

Furthermore, even if § 393.170 was ambiguous, *in pari materia* (Latin for "in the same matter") would not be the proper statutory-construction tool for the Commission to use. Statutes are only read *in pari materia* when they deal with the same subject-matter, when it appears that they were intended to be read "consistently and harmoniously." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). If a court is uncertain about the meaning of a term, for example, it can look to another statute—on the *same subject-matter*—for guidance.

But here, the prevailing-wage laws have nothing in common with the CCN statute. There is no connection between the question whether laborers are entitled to prevailing wages (to combat the evil of unfair wages) and the question whether an electrical corporation has to get the Commission's permission before it builds an electric plant (to prevent wasteful duplication of facilities and services or to review land use considerations before a new generating plant is built, as addressed in *StopAquila*). It is not uncommon for a word to have different meanings in different contexts. *See*, *e.g.*, *Short v. Southern Union Co.*, 372 S.W.3d 520, 535 (Mo. App. W.D. 2012) ("strict necessity" in the context of *establishing* private roads has a different meaning than it does when dealing with *widening* private roads). And the fact that both the prevailing-wage laws and the PSC Law may both be remedial does not require the Commission to adopt all its definitions. There are many remedial statutes on the books. Not all of them are to be read *in para materia* with the PSC Law. The PSC Law and the prevailing wage law deal with different subjects. They cannot be construed *in pari materia*, even if there were ambiguity, which is lacking in any event.

That the statutes are not to be read together is made even more clear by the unique and comprehensive scheme of regulation reflected in Chapter 393, RSMo and the fact that the PSC Law substantially pre-dated the prevailing wage law. Just as the Commission has its own unique

provisions for judicial review (despite the fact that it is an administrative agency and subject, in part, to the Missouri Administrative Procedure Act),[23] there are numerous other statutes in the PSC Law unique to the Commission, including the one at issue here, section 393.170.

Moreover, there are other instances in Missouri and other states where, when the state legislatures intended "begin construction"[24] to mean something other than its plain and ordinary meaning, they said so. *See, e.g.,* Section 701.052, RSMo. (prohibiting certain persons from beginning "construction, major modification *or* major repair" of onsite sewer systems until a performance bond or letter of credit is provided (emphasis added)); 63 Ok. St. § 1-880.9 (prohibiting the commencement of "construction *or* modification" of a new psychiatric or chemical dependency facility until a certificate of need is obtained (emphasis added)); HRS § 342b-22[25] (prohibiting one from beginning "construction, modification *or* relocation" of a "covered source" [of air pollutants] until a permit is obtained (emphasis added)); A.C.A. § 14-236-114[26] (making it unlawful for an installer of a sewage system to "begin construction, alteration, repair, *or* extension" of the system without certain notification (emphasis added)); and Tex. Health & Safety Code § 366.054 (same as Arkansas statute).

That legislatures draw a clear distinction between "construction" and "alteration," "modification," etc. and that "construction" has not for 103 years been interpreted as Dogwood now advocates is not the only evidence that construction does not mean what the proposed rule suggests. In the *StopAquila* decision, the Court of Appeals (when it made the initial ruling that a CCN was required – that decision did not address *when* it was required), interpreted the term

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[23] *State ex rel. Atmos Energy Corp. v. PSC*, 103 S.W.3d 753 (Mo. 2003); *Union Electric Company v. Clark*, 511 S.W.2d 822, 825 (Mo. 1974) (Both cases recognizing that despite the existence of judicial review provisions in Chapter 536, RSMo., and the general application of Chapter 536 to Commission cases, the unique and specific judicial review provisions of the PSC Law govern Commission cases).

[24] All of the statutes cited use the phrase "begin construction," as does section 393.170.

[25] Hawaii

[26] Arkansas

"construction" to be "new construction." 180 S.W.3d at 39. Moreover, Congress, in the new stationary source provisions of the federal Clean Air Act,[27] uses the term "construction" and also the term "modification." The federal courts have construed what "construction" means in the statute, ruling that it does *not* mean a repair or improvement, but only applies to something that does not already exist, just as the plain meaning of the term "construction" demands. *See United States v. Narragansett Improv. Co.*, 571 F. Supp. 688 (D. R.I. 1983) (Rejecting the government's claim that refurbishment of components of an asphalt plant, including replacing air pollution equipment, was "construction" within the meaning of section 7411 and concluding that it must be afforded its plain meaning).

In summary, Dogwood (and, apparently the Staff since the expansion of "construction" made its way into the Staff's draft) may believe that the General Assembly *should have* expanded "construction" to include these other activities, but their belief is irrelevant to what the actual statutory language plainly means.

17. "Acquisition" - 3.105(2)(D) – ***Construction vs. Acquisition***.

Equally tenuous (if not more so) is the attempt to take the plain meaning of the term "construction" and to morph it into applying to the purchase of an existing power plant. Ameren Missouri will not repeat the substance of the argument made above relating to the difference between "construction" and "renovation," etc., but the same principles apply. When an existing power plant is acquired, "something new" is not created.[28] As the Staff's recitation of the history of power plants that have been acquired (without first obtaining a CCN) indicates,[29] the Commission has never interpreted "begin construction" to mean "begin acquisition of" an

[27] 42 U.S.C.S. § 7411.
[28] *Blacks's Law Dictionary*, defining "construction."
[29] *Staff Response to Commission's Order Directing Staff to Investigate and File a Recommendation,* at 13, File No. EX-2014-0205 [EFIS Item No. 3].

existing power plant. To point to one fairly recent example, when Ameren Missouri purchased the Audrain combustion turbine plant in 2005, there was no claim by Staff or anyone else that a CCN was first required.

As indicated above, "construction" in 1913 either included "acquisition" of a power plant or it did not. If it did, then utilities that have bought an existing power plant over the past 103 years have done so without the proper authority and presumably a plaintiff could argue that the acquisition is void, just as the argument was made (and sustained by the Court of Appeals) that an injunction requiring Aquila to tear down the Cass County plant was enforceable.

Just as with the attempt to make "construction" mean "improvement," etc., the question is not a close one. If the General Assembly wants "construction" in section 393.170 to be broader than it is and always has been, it can amend the statute. The Commission cannot do so via a rulemaking.

One final point bears noting. Dogwood's comments in support of broadening the statute via rulemaking strongly suggest that even Dogwood doesn't believe in the argument that "construction" means "acquisition" within the meaning of the existing CCN statute. In Comments submitted in the workshop docket,[30] Dogwood made a couple of policy arguments in this area. First, it said that utilities should not be able to avoid the CCN statute via a "step-transaction,"[31] which Ameren Missouri believes was intended to refer to what in effect would be a sham transaction where the utility effectively caused someone else to build a new power plant and then turned around and "acquired" it to avoid the "begin construction" provisions of section 393.170. Whether this hypothetical "gap" in the current CCN statute is real is an open question. Regardless, the proposed rule goes far beyond plugging any such perceived gap. After warning

[30] *Dogwood Energy, L.L.C.'s Comments*, File No. EX-2014-0205 [EFIS Item No. 11].
[31] *Id.* p. 12.

of the possibility of "step-transactions," Dogwood then back-pedaled on the "acquisition" issue entirely, conceding that it "may be a better approach to consider acquisitions of electric plant that have actually been used by others under separate statutes," and then pointing to sections 393.190 – 220. The fact patterns that trigger application of those statutes are also not at issue here. The proposed rule can't make them an issue by changing (via a rule) the terms of section 393.170 even if, as was noted in connection with the other attempt to broaden the statute, Dogwood (or perhaps the Staff) thinks section 393.170 should have provided for something different.

IV. Conclusion

The *StopAquila* and *Cass County* decisions provided judicial clarification of the requirements of section 393.170, confirming the Commission's longstanding application of the statute regarding new transmission and distribution infrastructure both inside and outside certificated service territories, and outlining requirements for new generating plants. The existing CCN rule did not line-up (or did not clearly line-up) with the teachings in those cases, and it makes sense to update the rule to do so. There are other clarifications and improvements to the rule, which had not been revised in some time, that make sense.

The substantive items addressed above, however, all of which had their genesis in Dogwood's rejected rulemaking petition, reflect unnecessary and also in many cases unlawful additions to the CCN rule.

For the reasons given in these Comments, the Commission should adopt the proposed revisions to the CCN rule, except that:

a. It should amend the proposal as to 3.105(1)(B)2 relating to plans and specifications and estimates using the language suggested in these Comments above;

b. It should not adopt proposed 3.105(1)(B)4 and 3.105(1)(B)5 relating to matters of future operation and maintenance;

c. It should not adopt proposed 3.105(1)(B)6 relating to bidding;[32] and

d. It should not adopt proposed 3.105(2)(C) and (D) (or (E), which becomes unnecessary) relating to matters other than the construction of new facilities.

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[32] These Comments also make note of a lack of clarity in part (a) of 3.105(1)(B)6 and the inappropriateness of including electric transmission lines in a list designed to be in lieu of generation in part (b), but these comments should be moot since 3.105(1)(B)6 should not be adopted at all.

EXHIBIT A

- Table 1 of AACE International Recommended Practice No. 18R-97, Cost Estimate Classification System

COST ESTIMATE CLASSIFICATION MATRIX FOR THE PROCESS INDUSTRIES

	Primary Characteristic	*Secondary Characteristic*		
ESTIMATE CLASS	**MATURITY LEVEL OF PROJECT DEFINITION DELIVERABLES** Expressed as % of complete definition	**END USAGE** Typical purpose of estimate	**METHODOLOGY** Typical estimating method	**EXPECTED ACCURACY RANGE** Typical variation in low and high ranges [a]
Class 5	0% to 2%	Concept screening	Capacity factored, parametric models, judgment, or analogy	L: -20% to -50% H: +30% to +100%
Class 4	1% to 15%	Study or feasibility	Equipment factored or parametric models	L: -15% to -30% H: +20% to +50%
Class 3	10% to 40%	Budget authorization or control	Semi-detailed unit costs with assembly level line items	L: -10% to -20% H: +10% to +30%
Class 2	30% to 75%	Control or bid/tender	Detailed unit cost with forced detailed take-off	L: -5% to -15% H: +5% to +20%
Class 1	65% to 100%	Check estimate or bid/tender	Detailed unit cost with detailed take-off	L: -3% to -10% H: +3% to +15%

Notes: [a] The state of process technology, availability of applicable reference cost data, and many other risks affect the range markedly. The +/- value represents typical percentage variation of actual costs from the cost estimate after application of contingency (typically at a 50% level of confidence) for given scope.