BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri, to the Iowa Border and Associated Substation Near Kirksville, Missouri.[1]	)	File No. EA-2015-0146

ATXI'S INITIAL POST-HEARING BRIEF

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[1] The project for which the CCN is sought in this case also includes a 161,000-volt line connecting to the associated substation to allow interconnection with the existing transmission system in the area.

collaboration with entities such as those listed above, and also provides an independent perspective of the needs of the overall transmission system.[5]

The pending request is brought under section 393.170.1, RSMo[6] and is a "line certificate" request of the type addressed in *State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177, 182 (Mo. App. W.D. 1960). In such a request, the only question for the Commission is whether or not the construction is "necessary or convenient for the public service."[7] That statutory standard, as consistently applied by this Commission and the courts, boils down to whether the proposed improvement is worth the cost. The standard does not require that the improvement be "absolutely indispensable" in the sense that there would be no electric service without the improvement. *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n,* 848 S.W.2d 593, 597 (Mo. App. W.D. 1993), *citing State ex rel. Beaufort Transfer Co. v. Clark,* 504 S.W.2d 216, 219 (Mo. App. W.D. 1973). Instead, the law is that "[i]f it [the Project] is of sufficient importance to warrant the expense of making [building] it, it *is a public necessity*" within the meaning of section 393.170. *State ex rel. Mo., Kan. & Okla. Coach Lines,* 179 S.W.2d 132, 136 (Mo. App. W.D. 1944) (emphasis added). Put another way, the question is whether the benefits of the improvement are worth its costs? The evidence in this case overwhelmingly establishes that the answer to that question is "yes." That being so, the Project *is* a public necessity within the meaning of section 393.170.

Approval of the Project is supported by every party to this case – save one – including the Staff of the Commission, the Office of the Public Counsel, United for Missouri, Inc., the

[5] *Id.,* p. 4, l. 10-20.
[6] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise indicated.
[7] Section 393.170.3.

i. County Assents

Section 229.100 provides as follows:

> No person . . . [or] compan[y] shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission.

Given that no structure (pole) or any other Project asset will actually be located within any public road right-of-way, there are questions about whether the statute applies at all. Nevertheless, ATXI intends to obtain county assents. For purposes of the following discussion, ATXI will assume section 229.100 applies to the Project.

Staff basis its condition 2 on an interpretation of the requirements of section 393.170, but the Staff limits its analysis to only a portion of the statute. Under sub-section 2 of section 393.170, the Commission shall not issue "such [a] certificate" before the company proves that it has obtained the "required consent of the proper municipal authorities." That consent is in the form of a "franchise" and the statute also indicates that rights cannot be exercised under the franchise without obtaining the required Commission approval under sub-section 2. The Staff takes the position that a section 229.100 assent is a franchise and, therefore, is the "required consent" under section 393.170. Based on that position, the Staff concludes that the Commission is prohibited from "granting" a CCN in this case until ATXI proves it has obtained section 229.100 assents. As noted earlier, the Staff agrees, however, that the Commission can decide now whether the Project is "necessary or convenient for the public service," i.e., can apply the *Tartan* criteria and otherwise decide the case on the merits under the statutory standard applicable to applications such as this one.

If the Commission adopts the Staff's interpretation, it would give locally elected county commissioners a veto power over projects the Commission determines are necessary or convenient for the public service. In other words, the Commission would be subordinating its public-interest determination regarding electric transmission system improvements that have statewide (and regional) implications to the decisions of politically accountable commissioners in five counties.[271] This would not only be bad policy, a point elaborated on further below, but respectfully, it would be based upon reliance on the Staff's misreading and misapplication of section 393.170.

The Staff misreads and misapplies the statute in two ways. First, the franchise/municipal consent requirement in sub-section 2 does not apply in sub-section 1 cases such as this one. In other words, in sub-section 2, when it says the Commission shall not issue "such [a] certificate" before the company proves that it has obtained the "required consent of the proper municipal authorities," it means the Commission shall not issue an *area certificate* before the company proves that it has obtained local consent *to serve an area of the municipality*. Here, ATXI did not apply for an area certificate; ATXI applied for a line certificate. Nothing in sub-section 1 requires ATXI to prove it has obtained local consent. Therefore, section 393.170 does not bar the Commission from "granting" ATXI a line certificate with or without section 229.100 assents.

Second, even if the franchise/municipal consent requirement could apply in some line certificate cases, or even if there were no distinction between a sub-section 1 and sub-section 2 case, there is no franchise/municipal consent requirement in this case, on the facts at issue here, because this case involves a company (ATXI) that does not provide electric service to end-use customers in Missouri. As we will explain below, the franchise/municipal consent provisions only apply (in any kind of CCN case) when municipal consent is needed to provide service

[271] And for longer projects, the number of counties with such veto power could be much higher.

within the municipality's boundaries (here, within unincorporated areas of a county). ATXI addresses each of these points below.

a. There are no franchise/municipal consent requirements in this sub-section 1 line certificate case.

Missouri case law leaves no doubt about the following point: there are two, distinct kinds of permission and authority for which applications for a CCN can be made under section 393.170. Those two kinds of authority are sub-section 1 authority (referred to by the cases as a "line certificate"), and sub-section 2 authority (referred to by the cases as an "area certificate"). This case is a sub-section 1 line certificate case because ATXI simply seeks authority to construct the line. It does not seek (nor need it seek, given the fundamental nature of ATXI and the Project) authority to serve a territory. That there are two kinds of permission and authority that can be sought under section 393.170 was made clear by the Court of Appeals decision in *Harline,* 343 S.W.2d 177.

Harline, like this case, involved a transmission line that was opposed by landowners along the route. The landowners in *Harline* had filed a complaint with the Commission against the utility in an attempt to require the utility to obtain a specific CCN for the transmission line before it could be built. The landowners argued that sub-section 1 of section 393.170 required a specific CCN for the transmission line proposed at the time because they said that the transmission line was "electric plant" within the meaning of sub-section 1. The landowner further argued that under the literal terms of sub-section 1, a CCN was required before any new electric plant could be built. The utility contended that its pre-existing area certificate, granted more than 30 years earlier, was sufficient authorization to build the transmission line since the transmission line was to be built within its certificated service territory. The area certificate at issue authorized

the utility to "construct, maintain and operate electric transmission lines and distribution systems . . . with authority to furnish electric service to all persons in the area for which this certificate is granted . . . ." *Id.* at 180. Ruling for the utility, the Commission dismissed the complaint. The dismissal was affirmed by the circuit court, and the Court of Appeals affirmed the dismissal and rejected the landowners' contention, explaining that "Sub-section 2 has no application." *Id.* at 183. In discussing sub-section 1 and sub-section 2, the Court said:

> Certificate "authority" is of two kinds and emanates from two classified sources. Sub-section 1 requires "authority" to construct an electric plant. Sub-section 2 requires "authority" for an established company to serve a territory by means of an existing plant. We have no concern here with Sub-section 1 "authority". The 1938 certificate permitted the grantee to serve a territory – not to build a plant. Sub-section 2 "authority" governs our determination.

Id. at 185 (citations omitted).

Since *Harline*, the sub-section 1 versus sub-section 2 distinction has continued to be applied, as the cases cited below demonstrate. Even the Commission's rule governing section 393.170 applications such as this one recognizes that a sub-section 1 CCN case is distinct from a sub-section 2 CCN case, as evidenced by the fact that sub-section (A) of the rule applies by its express terms to "service area" applications and sub-section (B) of the rule applies by its express terms to "electric transmission lines" or "electrical production facilities." 4 CSR 240-3.105(1)(A) to (1)(B).

As noted, the cases have consistently continued to apply the distinction between a sub-section 1 and sub-section 2 case. The first such case is *StopAquila.Org. v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005), in which the Court specifically reiterated *Harline*'s explanation of the two different kinds of authority (sub-section 1 and sub-section 2) contemplated by section 393.170. 180 S.W.3d at 24-25. The *StopAquila* Court also emphasized

one of the key functions of the PSC – to allocate territory – and rejected the notion that the definition of "electric plant" in 386.020(14) necessarily was the same as a "transmission line," stating that the "terms 'electric plant' and 'transmission lines' are not synonymous under the PSC Law . . . . 'transmission line' is not defined." *Id.* at 36.

The second case that clearly continues to recognize that a sub-section 1 case and a sub-section 2 case are not the same, as *Harline* teaches, is *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544 (Mo. App. W.D. 2008). That *Cass County* clearly continued to recognize the distinction is made clear because the Court described sub-section 2 cases as those giving Commission permission to "exercise rights or privileges under a franchise by *providing public utility services*," which the Court said "include the provision, *distribution*, and *sale* of electricity." (emphasis added). 259 S.W.3d at 548. As earlier noted, ATXI does not provide electric service; it does not provide, distribute or sell electricity at all. To the contrary, it provides open-access transmission service to (among others) utilities that do so, pursuant to MISO's FERC-approved open-access transmission tariff.

The bottom line is that while the Staff may *say* there is only one kind of CCN and that this means that a franchise is required in every single CCN case, and while the Staff may *say* that there is no distinction between sub-sections 1 and 2, controlling appellate authority in this state that has existed and been followed for 50 years says otherwise. Because there is not one word about a "franchise" or "consent" in sub-section 1 and because this is a sub-section 1 case, those requirements simply do not apply and there is nothing whatsoever in the statute that precludes this Commission from granting the CCN before ATXI obtains the assents, assuming they have to be obtained.

To be clear, nothing this Commission does in this case has or can have any effect at all on whether an assent is required. Staff may argue that section 229.100 definitely applies, or that as a matter of other (non-PSC Law) sources of law, the state, by some means, must give permission to cross the roads (*i.e.,* the Staff would say, grant a franchise) and that such permission must come under section 229.100. But even if the Staff were correct about that, it does not mean that this Commission can't exercise its authority under sub-section 1 of section 393.170. Section 229.100 either applies or it doesn't apply, but that is a question of law involving the application of *a non-PSC statute*. It has nothing to do with what the PSC statute involved here – section 393.170 – does or does not provide for or require.

b. Even if there were no distinction between a sub-section 1 and sub-section 2 CCN, and assuming section 229.100 applies, under the facts of this case section 229.100 is not the kind of franchise contemplated by section 393.170.

As noted in *Harline*,

> The company had the legal duty to serve the public in the certificated Jackson County area . . . [t]he Jackson County franchise [which supported the area certificate that the utility already had] implies an obligation to serve the public in return for the privileges granted by it. The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve.

Harline, 343 S.W.2d at 181. The bottom line is that when an area certificate is involved, the granting of a franchise by the "proper municipal authority" involves a *quid pro quo*. For most utility systems, and certainly for an electric distribution system, use of the roads in the area is, as a matter of practicality, required. When the municipal authority gives permission to use the roads, a duty arises on the part of the utility (assuming it has or obtains the requisite permission and authority from the Commission under section 393.170) to serve the residents of the municipality. The Commission's role in such a

case is to prevent destructive competition and duplicative facilities, which is why it has a role under section 393.170.

However, in the case of a transmission line like ATXI's Mark Twain line, there is no utility service to the general public (i.e., to the counties' residents) in the traditional sense, because ATXI will not supply electricity to any end user. ATXI isn't being chosen as the counties' electric supplier. Instead, ATXI will transmit electricity for others (*e.g.,* Ameren Missouri, wind generators, *etc.*) as part of the regional, interstate bulk power system. Put another way, a "franchise" for ATXI under section 229.100 does not in any way relate to an allocation of territory to ATXI for ATXI to serve the county residents, and thus does implicate one of the key reasons we have a PSC Law at all: to avoid wasteful duplication of utility services in the same area. *Harline*, 343 S.W.2d at 182 (citing *Peoples Tele. Exchange v. Pub. Serv. Comm'n,* 186 S.W.2d 531 (Mo. App. K.C. 1945)). Instead, the transmission line at issue is, by definition, a transmission line meeting *overall* state and regional needs and providing state and regional benefits. Applying *Harline's* words to ATXI's line: the CCN for a transmission line like this one is simply to get authority to construct the line in the first place; it is not authority to serve any territory – it is authority to "build a plant" (here, a line); not to "serve a territory." *Harline,* 343 S.W.2d at 185.[272]

Consequently, while a section 229.100 assent may be *a* type of franchise, the Staff is mistaken when it assumes that it is *the* type of franchise *contemplated by section 393.170* (that is, even if there is no sub-section 1/sub-section 2 distinction, which the Staff argues means the franchise language applies to all CCNs). To the contrary, the franchise *contemplated by section*

[272] As noted, this does not mean that ATXI does not need an assent, assuming section 229.100 requires it. It just means that the *PSC Law* doesn't require that it obtain an assent; section 229.100, independently, may.

393.170 is a franchise given by the municipal authority *in exchange for* the utility undertaking an obligation to serve end-use customers in the area in question.

That not all "franchises" are a franchise *within the meaning of section 393.*170 is supported by other analogous authority, including other provisions of the PSC Law.

The first such authority is section 393.010, which provides as follows:

> Any corporation formed under or subject to chapter 351 or heretofore organized under the laws of Missouri for the purpose of *supplying* any *town, city or village with* gas, *electricity* or water shall have full power to manufacture and sell and to furnish such quantities of gas, electricity or water as may be required by the city, town or village, district or neighborhood where located for public or private buildings or for other purposes, *and such corporations shall have the power to lay conductors* for conveying gas, electricity or water *through the streets*, alleys and squares of any city, town or village *with the consent* of the municipal authorities thereof under such reasonable regulations as such authorities may prescribe, *and* such companies are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under *any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads*, streets and waters (emphasis added).

The takeaway from this statute is that it only applies to supplying utility service to a city/town/village and if that city/town/village consents, the utility can use the city/town/village's streets *and* can use any other road in the state as needed to discharge its public service obligations, even if those other roads are outside the city/town/village limits.

Additional authority is found in section 71.520, which provides as follows:

> Any city, town or village in this state may by ordinance authorize any person, or any company organized for the purpose of *supplying* light, heat, power, water, gas or sewage disposal facilities, and incorporated under the laws of this state, to set and maintain its poles, piers, abutments, wires and other fixtures, and to excavate for, install, and maintain water mains, sewage disposal lines, and necessary equipment for the operation and maintenance of electric light plants, heating plants, power plants, waterworks plants, gas plants and sewage disposal plants, and to maintain and operate the same along, across or under any of the public roads, streets, alleys, or public places within such city, town, or village, for a period of twenty years or less, subject to such rules, regulations and conditions as shall be expressed in such ordinance (emphasis added).

This statute has long been understood to be the city/town/village "franchise" statute. *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973) ("Section 71.520 relates to the granting of utility franchises by municipalities."). Moreover, according to the courts, sections 393.170 and 71.520 must be construed together.[273] Section 393.010 (according to the cases) gives the utility that has been awarded the 71.520 franchise the right to use the streets so long as the use does not "incommode" the public's use of them. Taken together, it is clear that use of the streets in a city, town or village that is contemplated by the franchise statute (71.520) is use so that "light, heat, power" [utility service] can be *supplied to the residents in the city/town/village.* This makes clear that the section 71.520 franchise statute has nothing to do with a transmission line from point A to point B where there *is no service to* the residents in the city/town/village.

This makes perfect sense when considered together with the purpose of the PSC Law, which is to allocate service territory in a manner that prevents destructive competition for customers to whom service is provided. One of the primary reasons that the Commission is given authority under section 393.170 to grant CCNs is to insure that very thing – to prevent destructive competition or unnecessary duplication of services. *Harline*, 343 S.W.2d at 182 (citing *Peoples Tele. Exchange v. Pub. Serv. Comm'n,* 186 S.W.2d 531 (Mo. App. K.C. 1945)). This case does not involve the allocation of service territories.

While the courts clearly recognize that sections 393.170 and 71.520 must be construed together (and while the terms of both make clear that they are concerned with *supplying* utility service to residents in a city/town/village), no court in this state has ever concluded or implied that whatever consent may be required to use a road given to a utility that is not providing

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[273] *See, e.g., Holland Realty & Power Co. v. St. Louis*, 282 Mo. 180, 221 S.W. 51, 189 (1920) (Addressing Mo. Rev. Stat. § 3367 (1909). Mo. Rev. Stat. § 9947 (1909), which are the predecessors to sections 393.010 and 71.520, respectively, and stating that "The two sections are cognate and should be construed together . . .."). The same has been said of sections 393.010 and 71.520 in substantially their current form, *see, e.g., Mo. Utilities Co.*, 475 S.W.2d at 31).

service (to whatever municipality – county, city) is a "franchise" *within the meaning of* section 393.170. Indeed, there is not a single court case where the franchise requirement of section 393.170 was applied to an entity like ATXI that does not provide end-use electric service within a territory in Missouri. Indeed, not only is there no court case, but there is no such Commission decision, as discussed below. In other words, if the Commission adopts the Staff's interpretation in this line certificate case, it will be breaking entirely new ground and subordinating its jurisdiction in a way it has never done before.

There are two court cases that refer to section 229.100 as involving a "franchise" of some type, but both of those cases involved a county giving assent to use the roads *so that the utility could supply utility service to the residents in the county.* Those cases are *StopAquila,* and *Public Water Supply Dist. v. Burton,* 379 S.W.2d 593 (Mo. 1964). In *StopAquila* it is clear that Aquila did have county permission to use the county roads but had gotten that permission *and* had gotten a CCN from the Commission so that it could *provide electricity to those county residents* (i.e., it had an area certificate). In *Burton,* a section 229.100 assent was also referred to as a franchise from the county, but again, the issue was whether the utility's *area* certificate from the Commission that allocated a certain part of the county to the utility to provide water service allowed the utility to go serve outside that area. In other words, there are franchises which provide permission to use roads, without any obligation of service, and then there are *franchises* to use roads that give rise to *an obligation to provide service* (assuming this Commission has made or makes the proper determinations under section 393.170 so as to avoid wasteful competition and duplication of services). In the case of unincorporated areas of a county, both types of franchises are obtained under section 229.100, but they are distinct; only the *latter* is the kind of franchise referenced in section 393.170.

Not only are there no court cases that conclude or suggest in any way that a section 229.100 assent is a franchise *within the meaning of section 393.170*, but in the *only* two cases ever decided by this Commission involving transmission-only companies that do not provide electric service to end users but instead provide transmission service to entities that do (like ATXI), the Commission itself imposed no conditions regarding county assents or any other kind of "franchise" or municipal consent on the grant of the CCN, despite the fact that those lines crossed county roads. This was true in a case involving a 161-kV transmission line constructed in northeast Missouri by IES Utilities, Inc. *See Order Granting Certificate of Convenience and Necessity, Granting Variances from Certain Commission Rules, and Authorizing Sale of Assets, IES Utilities, Inc., Case No. EA-2007-0485 (Sept. 7, 2007).* It was also true for a 345-kV transmission line (similar in purpose to the MVP line at issue here, but approved through SPP's regional *transmission* planning process) constructed by Transource Missouri, LLC. *See In re: Transource Missouri, Case No. EA-2013-0098 (Sept. 6, 2013).* Common to the ATXI case before the Commission now, and the *IES* and *Transource* cases, is the fact that all three cases involved a CCN to *build a transmission line* and not to serve an area within the state. Once again, if the Commission adopts Staff's interpretation in this case, it will be going beyond anything the Commission or the courts have ever done.

ATXI acknowledges that the question of whether a franchise from a county for the road crossings was required by section 393.170 before the CCNs could be granted in the *IES* and *Transource* cases was not an issue of controversy in those cases, and ATXI's counsel indicated as much as to the electric line cases when Chairman Hall asked him. What inference, if any, can be drawn from the lack of controversy? Some might argue that there can be no inference at all, since the issue did not come up. However, those cases involved entities, including the Staff, who

were represented by lawyers, and the odds are there were commissioner-advisors who were lawyers advising commissioners at the time. The Staff now takes the position that this Commission is totally powerless to "grant" a CCN for a transmission line owned by a company with no service territory and that is located in an unincorporated area of a county and crosses roads, yet the Commission has clearly done so twice in recent years. None of these lawyers have ever before told the Commission – on the facts present here – that it cannot grant a CCN without such a transmission-only company with no service territory proving it has county assents. Nor did this Commission, in this case, interpret section 393.170 as does the Staff. The Commission previously indicated that it has the ability to grant the CCN, but could impose a condition subsequent on any such CCN that would not allow the construction to start until assents (or at least assent in the county where construction would occur) were obtained.[274] ATXI addresses such a condition, below.

It is against that backdrop that the Commission must ask itself whether the Staff's position makes sense. Whether it makes sense is legally relevant, as the cases teach us. *See, e.g., State ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845, 851 (Mo. App. K.C. 1974)) ("Basically, good law is common sense. If it is not common sense, it is not good law."). Statutes are to be construed in a manner consistent with practicality and common sense. *See, e.g., Concord Pub. House, Inv. v. Dir. of Revenue*, 916 S.W.2d 186, 184(Mo. 1996). Moreover, in construing a statute, the problems sought to be remedied at the time of its enactment and the circumstances existing at that time also inform what was intended by the legislature. *See, e.g., Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. 2013). And the whole act (here, the PSC Law as a whole) can (and should) be considered in

[274] *Order Regarding Motion to Dismiss*, p. 5 [EFIS Item No. 75].

determining the legislature's intent. *See, e.g., Altom Const. Co., LLC v. BB Syndication Services, Inc.*, 359 S.W.3d 146, 154 (Mo. App. S.D. 2012).

ATXI respectfully submits that it would be nonsensical for the General Assembly, on the one hand, to have created this Commission and clothed it with broad regulatory powers, while on the other hand, to have made the outcome of the Commission's determinations dependent on a county commission's assent regarding what are merely, in effect, simple road crossing permits. If that were the statutory scheme envisioned by section 393.170, then any county could entirely negate this Commission's public-interest determination that a transmission line ought to be built. Such a scheme makes sense in circumstances where a county is granting permission to use its roads so that an electrical system can be built to serve its residents, *i.e.,* where there is a *quid pro quo*. In that circumstance, the need for the line depends on the county franchise. But it makes no sense in these circumstances, where a transmission line is being built to meet statewide and regional needs.

Moreover, the county commissions retain power within reasonable limits to say *how* the line is constructed so that the transmission line does not interfere with the public's ability to use the public highways. But as noted earlier, that is a totally separate question from whether the General Assembly intended for this Commission's authority to be subordinated to the decisions of up to 114[275] separate county commissions who, in a case such as this, are not asked to select a supplier, but to regulate the crossing of their roads under regulations promulgated by the county highway engineer to prevent interference with travel. Common sense and principles of statutory construction indicate that such regulation may involve *a* franchise from a county, but it does not involve a franchise *of the type contemplated* by section 393.170. Consequently, this Commission can "grant" the CCN regardless of the status of county assents.

[275] Missouri has 114 counties.

The Missouri Supreme Court's opinions in *Crestwood I* and *Crestwood II* are further support for the proposition that, in certain circumstances, the Commission's regulatory authority is superior to a local government's. *See City of Crestwood, supra* (499 S.W.2d 480) ("*Crestwood I*"), and its companion case, *Union Electric Co v. City of Crestwood*, 562 S.W.2d 344 (Mo. 1978) ("*Crestwood II*"). The *Crestwood* cases involved a transmission line to be built by Union Electric Company (now d/b/a Ameren Missouri), most of which was located within the city's municipal boundaries, but which was connected to two substations that didn't just serve the city, but served Ameren Missouri's system generally. The city passed an ordinance that purported to require that Ameren Missouri build the line underground at a far higher cost. Ameren Missouri brought a declaratory judgment action against the city claiming, among other things, that the ordinance invaded the field of regulation vested by the General Assembly in this Commission. The trial court ruled for the city, but the Missouri Supreme Court (in *Crestwood I*) reversed, concluding that the ordinance did invade the Commission's jurisdiction, and was therefore void. 499 S.W.2d at 483-84.

Crestwood II arose when Ameren Missouri then sought a permit from the city to actually construct the line, which the city denied, despite *Crestwood I*. The permit was called for by the city's zoning code under a different provision than the one invalidated in *Crestwood I*. In striking down the second ordinance, the Supreme Court stated that "[e]ach [ordinance] basically seeks to assert municipal control over the method of transmission of electric power anywhere within the borough, the first by absolute prohibition . . . and the second by requiring municipal permit . . . ."

Is the Commission willing to decide that it is powerless to grant a line certificate for an addition to the interstate transmission system in the region unless five local counties with no

public utility expertise or responsibility decides to grant assents? ATXI concedes that a municipality is entitled to refuse to grant a franchise to use its roads *to serve its residents*. After all, many municipalities supply their citizens' electric needs on their own. To say, however, that a municipality's bare permission to cross the roads is required before the Commission may issue a line certificate is to say, contrary to *Crestwood I* and *Crestwood II*, that a municipality can prevent construction of an interstate transmission line that goes well beyond serving local residents even after the Commission has determined that the Project is necessary or convenient for the public service. This would be a tremendous invasion of the Commission's regulatory authority. Yet, because the Staff treats all "franchises" alike, the Staff is effectively endorsing this result. It does not make sense for the Commission's important public necessity determination to be subordinated to local second-guessing. Not all franchises are franchises *within the meaning of section 393.170.*

The only way to square the holding of the *Crestwood* cases with section 393.170 is to recognize that when an area certificate is not involved, section 393.170 does not require, as a prerequisite to the exercise by and effectiveness of this Commission's authority, that the municipal authorities give any kind of assent. To repeat: this does not mean that if another statute (here, section 229.100) applies that ATXI is freed from complying with it, but it does mean that the PSC's authority under section 393.170 does not depend on what the counties may do.[276]

Finally, even if the Commission were to read section 393.170 such that a 229.100 assent, even in a case like this, is a "franchise" within the meaning of section 393.170, the Commission ought to waive the requirement that the franchise first be obtained just as it is waiving the need to file rate schedules as would be otherwise contemplated by section 393.140(11). Indeed, the Staff

[276] And then the question will be the extent of the counties' authority under section 229.100.

agrees that the requirement to file rate schedules should be waived, since this Commission cannot set ATXI's transmission service rates.

ii. The Commission should not otherwise condition ATXI's ability to construct the Project.

a. County Assents.

The Commission indicated in its *Order Regarding Motion to Dismiss* in November that it could (but did not rule that it would or must) grant the CCN but impose as a condition subsequent a requirement that construction not start (or at least not start in a county that had not given assent) until assents were obtained. While ATXI will not go so far as to say that the Commission could not impose such a condition, ATXI urges the Commission not to do so. Doing so, respectfully, would also subordinate this Commission's public interest determination to the decisions of multiple elected county commissions and could thwart the benefits projects such as the Mark Twain Project will bring to the state and the region.[277]

As discussed above, this Commission is charged with protecting a much larger public interest than the interests of just one segment of the public – be that a group of landowners, or certain counties. The Commission, as its name obviously implies, is the Public Service Commission of the *State of Missouri*. It's one thing for this Commission to effectively wait to see which electric supplier a municipal authority (city, county) chooses for the municipality's residents and not allow construction under a CCN until that choice is made, but it is entirely another thing to make the effectiveness of its decision in a CCN case dependent on what county commissions later do in a case like this one. Otherwise, the Commission could be viewed as having effectively placed decisions about the need/benefits of an improvement to the electric

[277] ATXI has no objection to providing the Commission with informational evidence that assents were later obtained (or that they were not required), but doing so should not be a condition on any permission the Commission grants in this case.