

MEMORANDUM

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Date 5/18/16 Reporter JC
File No. EX-2015-0225

TO: Missouri Public Service Commission
Official Case File No. EX-2015-0225

FROM: /s/ Natelle Dietrich 5/11/16 /s/Steven Dottheim 5/11/16
Staff Director Date Staff Counsel's Office / Date

SUBJECT: Additional Comments Respecting Proposed Amendment of 4 CSR
240-3.105

DATE: May 11, 2016

FILED

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Missouri Public
Service Commission

**ADDITIONAL COMMENTS OF THE STAFF OF
THE MISSOURI PUBLIC SERVICE COMMISSION**

The Staff notes that the comments submitted by various stakeholders were extensive and far ranging. Unfortunately, the Staff is not able to submit comments in response to all those that warrant comment. Thus, the Staff submits these additional comments to address those issues which appear to be most controversial or substantive. The lack of response should not be considered agreement or disagreement with the comments not addressed.

A number of stakeholder comments¹ addressed what the Staff views as incomplete language in proposed Section 4 CSR 240-3.105(2)(D). The focal point of Section 393.170 is "construction." The Staff suggests that the words "to be constructed" be added in the second line of the proposed amendment so that 4 CSR 240-3.105(2)(D) would read as follows:²

(D) Includes, acquisition of full or partial ownership by purchase or capital lease,³ of electric generating plant **to be constructed in Missouri, whether the site for the electric generating plant is inside or outside of the electric utility's certificated service area, and electric transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plant(s), if the electric transmission line(s) or gas transmission line(s) to facilitate the operation of electric generating plant(s) is(are) outside the electric utility's certificated service area in Missouri;**

Regarding a generating plant, transmission line and gas transmission line to facilitate the operation of electric generating plant that has already been constructed, there should be CCN. If a generating plant, transmission line or gas transmission line to facilitate the operation of electric

¹ Ameren Missouri at pages 35-37, KCP&L and GMO at pages 6 and 8, and Empire at the bottom of page 7 of its April 29, 2016 comments.

² For purposes of these comments, any Staff proposed changes to language as published in the March 1, 2016, Missouri Register will be in "red" text.

³ The Staff views the reference to "capital lease" as the inclusion of another form of ownership.

generating plant that has already been constructed is purchased, the purchase entails at least the transfer of the CCN.

In *Re Arkansas Power & Light Co. and Union Electric Co.*, Case Nos. EM-91-29⁴ and EM-91-404, Report and Order, 1 Mo.P.S.C.3d 96 (September 19, 1991), Arkansas Power & Light Co. (APL) respectfully requested the Commission to issue its Order authorizing APL to transfer to Union Electric Co. (UE) and UE to own, operate, control, manage, and maintain the assets and to provide electrical service to the public as an electrical corporation and public utility subject to the jurisdiction of the Commission in service areas pursuant to CCNs previously issued by the Commission to APL. Included in the assets to be sold, conveyed, and assigned were the CCNs issued by the Commission to APL pursuant to which APL conducted retail operations in Missouri subject to the jurisdiction of the Commission. The cases were resolved by Stipulation and Agreement.

Citing the *Cass County* decision,⁵ Dogwood argues that an electrical corporation cannot “begin construction of . . . electric plant . . . without first having obtained the permission and approval of the commission.” Dogwood further contends that the Commission is authorized to approve such construction when it determines “after due hearing . . . that such construction . . . is necessary or convenient for the public service.” Dogwood claims that “[t]he Courts have held that this part of the statute requires separate approval of any regulated utility production (generation) facilities, *regardless of location*, as well as the transmission facilities outside of any previously approved service area. See *State ex rel. Cass County v. PSC*, 259 SW3d 544, 549 (Mo.App. 2008); *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 35 (Mo.App. 2005).” The “regardless of location” that Dogwood refers to does not include outside of the State of Missouri.

Section 393.170 RSMo. 2000 RSMo. is the Missouri Public Service Commission siting statute. It addresses the siting of the construction of gas plant, electric plant, water corporation or sewer system in the State of Missouri. It does not address the siting of the construction of gas plant, electric plant, water corporation or sewer system in states other than Missouri serving Missouri customers as Dogwood appears to contend. The Commission schedules local public hearings for the Missouri Commissioners to hear from local landowners, customers, and residents in Missouri concerning operations in Missouri. The hearings that are held are held in Missouri to not listen to issues such as residents’ complaints concerning generating plant construction and/or transmission line construction from residents in states other than Missouri, but about activity in Missouri where construction of generating facilities or transmission lines will occur.

On April 10, 1973, the Commission issued an *Order and Notice of Hearing* in Case No. 17,754. The *Order and Notice of Hearing* stated that on or about February 21, 1973 KCP&L announced plans to build a nuclear power plant in Coffey County, Kansas as a joint project with Kansas Gas and Electric Company. The Commission said that an investigation needed to be conducted to determine whether it was in the public interest that such plant be built outside KCP&L’s service

⁴ In the matter of the Joint Application of Arkansas Power & Light Company (“APL”) and Union Electric Company (“UE”) for an order authorizing the sale, transfer, assignment of certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements and, in connection herewith, certain other related transactions.

⁵ Page 2, paragraph 4 of its April 29, 2016 comments.

territory and that there were many questions regarding the out-of-state location. The Commission provided a list of questions it wanted addressed at an April 16, 1973 hearing. On May 2, 1973, the Commission issued a three page Report And Order stating that “the Commission is of the opinion that the investigation herein should be discontinued and said cause dismissed.” KCP&L did not seek a CCN for the construction of Wolf Creek in Coffey County, Kansas and the Commission did not require a CCN for the construction of Wolf Creek in Coffey County, Kansas.

There are statutory Subsections 386.210.7 and .8 RSMo. Cum.Supp. 2013 that empower the Commission to make joint investigations and hold joint hearings within or outside the state with other state commissions and issue joint or concurrent orders, but the Commission is to function under agreements or contracts between states or under the concurrent power of the states:

7. The commission may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any railroad, public utility or similar commission, of other states or the United States of America, or any official, agency or any instrumentality thereof, except that in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or contracts between states or under the concurrent power of states to regulate interstate commerce, or as an agent of the United States of America, or any official, agency or instrumentality thereof, or otherwise.

8. The commission may appear, participate, and intervene in any federal, state, or other administrative, regulatory, or judicial proceeding. This subsection applies to all proceedings now pending or commenced after August 28, 2013.

Returning to Dogwood’s comments, Dogwood quotes from 259 S.W.3d at 549-50 of the *Cass County* decision of the Western District Court of Appeals: the Court states that the Commission is charged on a *statewide* basis with considering and protecting the interests of the general public as well as stakeholders.⁶ Dogwood also quotes from 180 S.W.3d at 30 of the *StopAquila.Org* decision of the Western District Court of Appeals that “uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important *statewide* governmental function”⁷ (Emphasis added.)

The Staff in its comments notes that Empire did not file with the Commission an application for a CCN pursuant to Section 393.170 RSMo. for the construction of its 7.5% ownership share (50 MW of generating capacity) in the 665 MW coal-fired Plum Point plant located in Osceola, Arkansas of which Empire also has a long-term power contract for the purchase of another 50 MW of the units’ capacity. Construction financing was sought by Empire pursuant to Sections 393.180 and 393.190 RSMo. 2000.⁸ In contrast, Dogwood related in its comments⁹ that the

⁶ Page 3, paragraph 9.

⁷ Page 4, paragraph 9.

⁸ Attachment A, paragraph 17 to its April 29, 2016 comments.

⁹ Page 11, paragraph 25.

Commission exercised jurisdiction over Empire's interest in Plum Point coal-fired unit by conditioning approval of construction financing in File No. EF-2006-263 and approving construction accounting in File No. EF 2010-0262, pursuant to the Plum Point generating unit being in full compliance with the criteria in Empire's Experimental Regulatory Plan.¹⁰

The relevant Missouri statutory sections in the case noted by Dogwood are not Section 393.170, the Missouri siting statute. Commission authority for "construction accounting" for Plum Point or other generation or transmission construction accounting is Section 393.140(8) RSMo which is intended to address the situation of a generating or transmission unit becoming fully operational and used for service for a consequential period of time before the facility can be reflected in rates. The Empire Experimental Regulatory Experimental Plan case was filed on February 3, 2005 and predated Plum Point.

The Dogwood comments refer to cases involving UE generating units in other states¹¹ Dogwood cites the following cases:

Case No. EM-92-225 In the matter of the application of the Union Electric Company for an order authorizing the sale, transfer, and assignment of certain assets, real estate, leased property, easements and contractual arrangements to Iowa Electric Light & Power Company and, in connection therewith, certain other related transactions. In its Application, UE states that it seeks an order from the Commission pursuant to Section 393.190.

Case No. EM-92-253 In the matter of the application of Union Electric Company for an order authorizing the sale, transfer and assignment of certain assets, real estate, leased property, easements and contractual agreements to Central Illinois Public Service Company and in connection therewith, certain other related transactions. In its Application, UE states that it seeks an order from the Commission pursuant to Section 393.190.

Case No. EM-91-213 In the matter of the application of The Kanas Power and Light Company and KCA Corporation for approval of the acquisition of all classes of the capital stock of Kansas Gas and Electric Company, to merge with Kansas Gas and Electric Company, to issue stock and incur debt obligations – KPL asserted that it was a public utility rendering gas service in the state of Missouri under the jurisdiction of the Commission pursuant to Chapters 386 and 393, RSMo 1986, as amended and that the Commission has jurisdiction of this case pursuant to sections 393.180, 393.190, and 393.200, RSMo 1986. *Re Kansas Power and Light Co.*, Report and Order, 1 Mo.P.S.C.3d 150, 158 (1991)

Case No. EF-87-29 In the matter of the application of Kansas City Power & Light Company for authority to acquire certain share of stock of Wolf Creek Nuclear

¹⁰ Appendix B In-Service Criteria Stipulation, Case No. EO-2005-0263.

¹¹ Page 11, paragraph 26.

Operating Corporation 29 Mo.P.S.C.(N.S.) 29 Order (pursuant to Section 393.190.2 RSMo.)(1986)

Case No. EO-2004-0108 In the Matter of the Application of Union Electric Company Doing Business As AmerenUE for an Order Authorizing the Sale, Transfer, and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business As AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions. The Commission held that the governing standard was Section 393.190.1 *Re Union Electric Co.*, 13 Mo.P.S.C.3d 266, 291 Report and Order (2005).

Dogwood¹² refers to a requirement of competitive bidding practices as consistent with the mandates of the Commission's integrated resource planning rules regarding affiliate transaction rules regarding supply-side facilities, 4 CSR 240-22.070(6)(E), and its affiliate transaction rules, 4 CSR240-20.015(3)(A), as well as state purchasing practices under Section 34.040 RSMo. Dogwood asserts a competitive bidding practice is also consistent with purchasing regulatory practices in eight other states that it lists. Various of these other states have had their electric power resource operations restructured. Section 34.040 does not apply to Missouri electrical corporations.

There is evidently some confusion about gas transmission lines¹³ which should be addressed. The filing requirements for an electric utility of an application for a CCN specifically addresses: (A) a CCN for a service area and an application for a CCN to construct in Missouri: (1) an electric generating plant, (2) an electric transmission line, or (3) a gas transmission line to facilitate the operation of an electric generating plant. The electric utility must meet the requirements set forth in 4 CSR 240-3.105 and 4 CSR 240-2.060(1), which 4 CSR 240-3.105 is intended to address a CCN for an electric utility. The filing requirements for a gas utility of an application for a CCN specifically addresses: (1) a CCN for a service area and (B) a CCN to construct in Missouri a gas transmission line, and the gas utility must meet the requirements set forth in 4 CSR 240-3.205 and 4 CSR 240-2.060(1).

Wind on the Wires is a not for profit, collaborative organization dedicated to wind energy's fair access to the electric transmission system and market in the Midwest Region. It submitted comments on April 29, 2016, in which it proposes independent third parties be used to select the winning bid from competitive bidding of a utility construction project and alternative third party construction projects that directly sell the electric services to end use customers. The Wind on the Wire comments recommend proposed language for a bidding process including an independent third party evaluator. Finally there is a recommendation regarding which local government approvals should be considered by the Commission in its CCN process. The Staff does not recommend that the Commission adopt any of these suggestions.

¹² Page 9, paragraph 19 of its April 29, 2016 comments.

¹³ For example, see comments of Wind on the Wires and Clean Line.

The Staff finds the April 29, 2016, comments of the Office of the Public Counsel ("Public Counsel") to be of considerable interest. In the Staff's opinion Public Counsel's comments focus on the siting jurisdiction of the Commission within the State of Missouri under the Missouri Constitution and Laws and more specifically Section 393.170. To the extent Public Counsel's recommended language can be considered in the current rulemaking, the Staff is in favor of procedures such as those suggested by Public Counsel to attempt to assure that landowners in the preferred and alternative routes would receive notice from the utility of the proposed construction and invitation to a public meeting. See Section 386.030 RSMo. 2000.

In the Staff's opinion, the Public Service Law should not be read in *pari materia* with Sections 290.210-.340 Prevailing Wages on Public Works.¹⁴ Several stakeholders¹⁵ are critical of the language "rebuild, renovation, improvement, retrofit" in proposed amendment 4 CSR 240-3.105(2)(C). Merely excluding maintenance and routine procedures on generating units and transmission lines in the language of the proposed amendment does not address the problem. The Staff has found it difficult to articulate the scale of a project on or to a generating plant or a transmission line that would warrant a new CCN procedure after one has been held and a CCN has been awarded by the Commission pursuant to section 393.170. The Staff also notes Empire's citation of *State ex rel. Sikeston v. Public Serv. Comm'n*, 82 S.W.2d 105 (Mo. 1935). The Staff is mindful of the Court's language in the decision *Stop Aquila.Org*: "new construction." Possibly the term "new construction" from *Stop Aquila.Org* is the appropriate word to substitute in the proposed 4 CSR 240-3.105(2)(C):

(C) Includes ~~substantial-rebuild, renovation, improvement, retrofit-and/or~~
other-new construction in Missouri that will result in—

1. A substantial increase in the capacity of the electric generating plant beyond the planned capacity of the plant at the time the Commission granted the

¹⁴ Missouri Courts have recognized that the Commission is a unique administrative body. The Western District Court of Appeals noted in *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 45, 50 (Mo.App. W.D. 1982) that rather than the provisions of the Administrative Procedures Act controlling, Section 393.140(9), Section 392.210.1, and Section 386.410.1 are "special statutory provisions directed solely to proceedings before the Public Service Commission" which are "considerably different from and vastly more complicated than the type of proceedings involved in" Chapter 536. *Id.* In fact, the Court commented that "[t]he authority under Section 386.410-1 for the Commission to adopt its own rules of procedure seems to be a rather uncommon grant to an administrative agency . . ." *Id.* The St. Louis District Court of Appeals stated in *State ex rel. Utility Consumers Counsel of Missouri v. Public Serv. Comm'n*, 562 S.W.2d 688, 693 n.11 (Mo.App. St.L.D.), cert. denied, 439 U.S. 866, 58 L.Ed2d 177, 99 S.Ct. 192 (1978):

Chapter 536, the Missouri Administrative Procedure Act, supplements Chapter 386 regulating the Public Service Commission, except where in direct conflict with it. See *Patterson v. Thompson*, 277 S.W.2d 314, 317(5) (Mo.App.1955). Thus, the procedures delineated in Chapter 536 for a hearing and for the presentation of evidence during a hearing apply unless a contrary provision exists in Chapter 386.

¹⁵ Ameren Missouri at Section 16 pages 29-35, Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") at pages 7-8, and The Empire District Electric Company ("Empire") at pages 3, 7-8 of their April 29, 2016 comments.

**prior certificate of convenience and necessity for the electric generating plant;
and/or**

2. A material change in the discharges, emissions, or other environmental by-products of the electric generating plant than those projected at the time the prior certificate of convenience and necessity was granted by the commission for the electric generating plant;

A number of entities' comments¹⁶ recommend that the Commission not adopt the proposed subsections 3.105(1)(B)4 and 3.105(1)(B)5. Proposed language for 3.105(1)(B)4 seeks an overview of plans for operating and maintaining the electric generating plant, electric transmission lines or gas transmission lines to facilitate the operation of the electric generating plants. What might possibly be a routine issue for Ameren Missouri, KCP&L and GMO, and Empire, is not a routine question for entities such as Grain Belt Express Clean Line. Similarly the situation with the proposed language for 3.105(1)(B)5. The proposed language at 3.105(1)(B)5 is more intended to address non-incumbent entities, i.e. entities such as Clean Line Grain Belt.

Several comments¹⁷ take issue with the language of the proposed amendment adding the provision for competitive bids. GridLiance Heartland, LLC states that "the Commission should exempt from the proposed competitive solicitation requirement from the proposed competitive solicitation and transmission projects that have been approved through a RTO's competitive planning process" "(e.g., [FERC] Order No. 1000)." In Staff's opinion, the FERC Order No. 1000 RTO competitive bidding process should be given an opportunity to be observed before the Commission mandates its own form of competitive bidding for electric transmission lines.

¹⁶ Ameren Missouri at pages 10 and 38, KCP&L and GMO at page 5, and Empire at the bottom of page 5 to page 6 of its April 29, 2016 comments.

¹⁷ Ameren Missouri in Subsection 14 at pages 10-14, KCP&L and GMO at pages 4-6, and Empire at the bottom of page 5 to page 6 and GridLiance Heartland, LLC at page 2 of their April 29, 2016 comments.