BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of a Proposed Amendment to Commission Rule 4 CSR 240-3.105, Filing Requirements for Electric Utility Application for Certificates of Convenience and Necessity	))))	Case No. EX-2015-0225

COMMENTS OF THE EMPIRE DISTRICT ELECTRIC COMPANY

I. INTRODUCTION

The Empire District Electric Company ("Empire") believes some changes to Commission rule 4 CSR 240-3.105 [Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity] may be necessary to address legal developments that have occurred since the rule was previously amended. Specifically, appellate court opinions regarding the construction of the South Harper peaking plant located in Cass County, Missouri,[1] have changed the legal landscape regarding the certification of electric power production facilities and have ratified existing practices regarding the certification of transmission and distribution infrastructure.

Any changes to the rule, however, should be limited to addressing and clarifying those legal principles. This rulemaking should not become a venue for expanding the scope of the purpose of §393.170, RSMo., as articulated by the Missouri Supreme Court or to subordinate the rights of an electric utility to manage its affairs in order to advance the business interests of non-regulated, third-party vendors.

[1] ***StopAquila.org v. Aquila***, 180 S.W.3d 24 (Mo. App. W.D. 2005). ("***Aquila I***") ; ***State ex rel. Cass County v. Public Service Commission***, 259 S.W.3d 544 (Mo. App. W.D. 2008) ("***Aquila II***").

II. LEGAL PRINCIPLES GOVERNING ELECTRIC UTILITY CERTIFICATES OF CONVENIENCE AND NECESSITY

A. General Considerations

The Commission's deliberations on the proposed changes to the rule should be guided by several overarching legal principles. First among these is that the Commission is a creature of statute and has only those powers specifically granted to it by the Missouri General Assembly or by clear implication as necessary to carry out an expressed power. ***State ex rel. City of West Plains v. Public Service Commission***, 310 S.W.2d 925, 928 (Mo. 1958) While it is true that the statutes conferring power on the Commission are remedial and should be construed liberally, neither convenience, expediency or even necessity are proper considerations in determining the scope of its statutory authority. ***State ex rel. Utility Consumers Council v. Public Service Commission***, 585 S.W.2d 41, 49 (Mo. banc 1979).

Additionally, the Commission's authority to regulate certain aspects of the public utility's operations and practices does not include the right to dictate the manner in which the company conducts its business. ***State ex rel. City of St. Joseph v. Public Service Commission***, 30 S.W.2d 8 (Mo. banc 1930).

> [I]t must be kept in mind that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. The company has the lawful right to manage its own affairs and to conduct its business in any way it may choose, provided that in doing so, it does not injuriously affect the public. The customers of a public utility have the right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the company must employ in the rendition of that service. It is of 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 it should be.

Id. at 14.

B. Section 393.170, RSMo

The starting point for considering the proposed revisions to Commission rule 4 CSR 240-3.105 is an understanding of the relevant enabling legislation, §393.170, RSMo. This statute is comprised of three parts.

Subsection 1 provides that an electrical corporation may not "begin construction" of electric plant before it obtains the permission and approval of the Commission. Subsection 2 provides an electrical utility may not exercise any right or privilege under a municipal franchise without having first obtained the permission and approval of the Commission. Finally, subsection 3 provides that the Commission may grant the permission and approval required by subsections 1 or 2 after "due hearing" and a finding that approval "is necessary or convenient for the public service." The Commission may put reasonable conditions on its approval and any such approval expires unless the authority granted is exercised within a two-year period from the Commission order granting a certificate of convenience and necessity ("CCN"). A copy of §393.170, RSMo is attached hereto.

Case law concerning §393.170, RSMo is instructive. In the case of ***State ex rel. City of Sikeston v. Public Service Commission***, 82 S.W.2d 105 (Mo. 1935), the Missouri Supreme Court held, among other things, that the public convenience and necessity finding required by §393.170.3 RSMo., is determined at a time *preceding* construction of electric plant. The public policy advanced by the statute is "to prevent unnecessary duplication of service and undesirable competition." ***Id***. at 109. The Court specifically found that the validity of the Commission's finding that the plant will serve the public convenience and necessity cannot be called into question in a subsequent proceeding. ***Id***. at 110-111.

This general principle has been affirmed recently in the ***Aquila I*** case in which the Western District Court of Appeals found that Subsection 1 of §393.170, RSMo providing for the issuance of a CCN for the construction of new electric plant requires that the Commission "conduct a hearing that is *more or less contemporaneous with* the request to construct the facility." (emphasis added) ***Id***. at 34. In a subsequent, companion case, the Court of Appeals further held that §393.170.1 RSMo., "refers only to *preconstruction approval*" and that construction of a power plant cannot be ratified after-the-fact. (emphasis added) ***Aquila II*** at 549.

III. COMMENTS CONCERNING PROPOSED RULE REVISIONS

With the foregoing judicial guidance and statutory considerations in mind, the following specific comments with regard to the Commission's proposed rule are offered for the Commission's consideration.

A. Subsection (1)(A)

Subsection (1) appears to be largely unchanged in any material respect and provides for changes for the sake of clarity. The word "new" in Section (1)(A) appears to be surplusage inasmuch as any electric utility requesting a CCN for a service area presumably is requesting a certificate for an area it does not already serve. Consequently, the word "new" need not be added.

B. Subsection (1)(B)

Subsection (1)(B)2 includes new requirements beyond the provision of an estimate of construction costs for a new generating plant. The new language is vague and confusing. It is not clear what is meant by "the operating and other features" of the new facility. Also, the use of the phase "fully operational and used for service" is a ratemaking concept used to determine

when the cost of new rate base can be included in rates. *See*, §393.135 RSMo. Conflating certification requirements with differing ratemaking standards creates confusion and complications without any corresponding benefit.[2] A request that the Commission be supplied with anticipated timelines for construction and more specificity as to the type of plant sought to be constructed (i.e., common v. dedicated plant), however, is not unreasonable and can, arguably, go to the Commission's finding of necessity.

Empire suggests the following alternative language:

> 2. The plans and specifications for the construction project and estimated cost of the construction project [or]; **the anticipated beginning of construction date and the date the plant is anticipated to be placed in service; and whether the plant will include facilities to be used in common with existing or future power production facilities. If any of the information is unavailable at the time the application is filed, provide** a statement of the reasons the information is currently unavailable and a date when it will be furnished; [and]

Subsections (B)4 and (B)5 should be omitted in their entirety. Plans for operating and maintaining electric plant and plans for the restoration of service after unplanned/forced outages are well beyond the scope of the statute. Section 393.170, RSMo makes no mention of operating or maintenance protocols or service restorations. The Commission may have the authority to address these matters under separate statutory authority or other rules dealing with quality of service and reliability, but the CCN process has nothing to do with these topics. Their inclusion in the final rule would be entirely gratuitous.

Likewise, Subsection (B)6 should be omitted in its entirety. There is no provision under §393.170, RSMo that gives the Commission the authority or discretion to oversee, approve or

[2] Just to illustrate the point, if the Commission grants a CCN based, in part, on a determination about the when the plant will become operational and used in service, has it made the necessary finding called for in §393.135 RSMo., to include a new power plant in rate base in the rate case filed to capture the investment? If not, why embark on an inconsequential inquiry?

mandate design, engineering, materials procurement or power supply bids from third-party vendors as part of a process for obtaining a CCN. These are considerations reserved to the informed judgment of the utility's management. Where alternative power supply options are concerned (whether demand- or supply-side options), these planning considerations already are reviewed under the Commission's electric integrated resource planning ("IRP") rules. At a minimum, addressing the topic of competitive bids in this rule would be duplicative, wasteful and likely will delay a utility's efforts to bring on new load or transmission grid improvements when and as needed. To the extent that the cost of power is an issue, it is a prudence matter that needs to be taken up in a subsequent rate case; not second-guessed in the certification process. Finally, Subsection (B)6 puts the Commission in the position of managing the utilities' business decisions rather than regulating its operations; something that is beyond its authority.

C. <u>Subsection (2)</u>

Subsection (2) of the rule is entirely new and appears to be an attempt to expand the meaning of the statutory term "construction" contained in the statute to all manner of activity that is not covered under §393.170 RSMo. Consequently, this feature of the rule is in excess of the Commission's powers.

The ***Sikeston*** case controls in regard to this proposed expansion of the electric CCN rule. In that case, the Missouri Supreme Court concluded that the purpose of the statute was to prevent unnecessary duplication of service and undesirable competition that tend to drive up the cost of service in a business that is a natural monopoly. A rebuild, renovation, improvement or retrofit of an *existing* electric production plant has no bearing on this consideration because the plant already is in operation and does not introduce a new, competitive feature into the equation. Thus, these activities are beyond the scope of the statute.

The ***Sikeston*** case also is significant in that it makes it clear that subsequent changes concerning the certificated facility cannot be revisited by the Commission under §393.170 RSMo. This was a case that involved a utility that acquired from another company an operating system located within the City of Sikeston. The Commission issued an order granting the purchaser authority both to issue securities to finance the acquisition and to operate the purchase plant and lines. The Missouri Supreme Court found that the second element of the Commission's order was not the grant of a CCN but, rather, was merely "descriptive of the purpose for which [the plants] were bought." ***Id***. at 109. Having distinguished the purchaser's acquisition approval from a CCN, ***the Court concurred with the Commission's conclusion*** that it had no authority to make a factual finding that the public convenience and necessity no longer existed such that its transfer approval order could be set aside**.** The Court further observed that even significantly changed circumstances, such as the introduction of the competing supplier during the interim, did not call into question the validity of the findings supporting the incumbent provider's CCN. ***Id***, at 110-111. The key takeaway is the notion that a CCN to build electric plant is a determination made at the outset and that it cannot be rescinded thereafter. Any rebuild or renovation of, and any improvement or retrofit to, a certificated electric plant cannot call into question the Commission's initial finding of public convenience and necessity. As such, the Commission has no authority to issue or deny a CCN for any of these purposes.

Additionally, the proposed rule's treatment of the "acquisition of full or partial ownership by purchase or capital lease" of a power production plant as a "construction" activity subject to certification by the Commission is pure fiction. There is no definition of the term "construction" in any English language dictionary that justifies casting the drafting net far enough to cover such an occurrence. Even if one can get beyond the obviously false equivalence the proposed

language presents, the circumstances of the ***Sikeston*** case are directly on point and its holding is controlling. The fact a utility acquires full or partial ownership of an existing electric generating plant does not require a finding that the plant being acquired is necessary for the public convenience or necessity because that finding was made before the plant was constructed. The case law makes it clear that the original public convenience and necessity finding is immutable.

Because proposed new Subsection (2) is wholly inconsistent with the controlling statute and the expository case law concerning CCNs, it should be deleted from the final rule adopted by the Commission.

IV. CONCLUSION

There are a number of features of the proposed revisions that provide needed or helpful clarification in light of recent court opinions in ***Aquila I*** and ***Aquila II***. Unfortunately, many of the proposed revisions to the rule go far beyond what is necessary to properly address this limited objective. Many of the proposed changes to the rule are directly at odds with the Commission's previous determinations on the topic at hand[3], are unauthorized by law and will have the Commission exceeding its delegated authority to certificate new construction of electric plant. There are several instances of regulatory overreach that should be excluded from the final language of the rule. Empire submits that the changes that it identifies above would conform the rule to the current state of the law concerning certification of electric utility power plants as viewed through the lens of ***Aquila I*** and ***Aquila II***. Any changes beyond that (other than drafting refinements or clarifications) are unjustified and unauthorized by law.

[3] The absence of an explanation for the Commission's deviation from its prior findings on the scope of its authority under §393.170 RSMo., is troubling. As the Commission just recently stated, "a departure from previous policy should be reasonable and not arbitrary. If the Commission determines it will not follow a prior ruling, it should set forth its reasons . . ." *See*, ***Re Laclede Gas Company***, Report and Order, Case No. GF-2015-0181, Slip Op. at 8-9.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent via U.S. Mail, postage prepaid, hand-delivery, electronic filing system, or electronic mail this 29th day of April, 2016, to the following:

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Missouri Revised Statutes

Chapter 393
Gas, Electric, Water, Heating and Sewer Companies

Section 393.170.1

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Approval of incorporation and franchises--certificate.

393.170. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

(RSMo 1939 § 5649, A.L. 1967 p. 578)

Prior revisions; 1929 § 5193; 1919 § 10481