BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Amendment to	)	
Commission Rule Regarding Applications	)	File No. EX-2018-0189
for Certificates of Convenience and Necessity.	)	

COMMENTS OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), and submits these comments on proposed rule 4 CSR 240-20.045, as requested by the Commission's *Notice to Submit Comments*, as follows:

I. Background to this CCN Rulemaking

1. This rulemaking is the second formal rulemaking proceeding in approximately the last two years regarding the Commission's certificate of public convenience and necessity, or "CCN" rule.[1] The CCN rule implements the authority given the Commission under section 393.170, RSMo.[2] (the "CCN statute"), which provides as follows:

> 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.
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> 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.
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> 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

[1] The Commission initiated the prior rulemaking in early 2016 in File No. EX-2016-0225.
[2] All statutory references are to the Revised Statutes of Missouri (2016).

> 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.

2. The question of whether amendments to the CCN rule were warranted first arose on January 8, 2014, when Dogwood Energy, LLC ("Dogwood"), a Maryland-based merchant generating company not subject to the Commission's jurisdiction, filed a petition asking the Commission to initiate a rulemaking proceeding to consider amendments proposed by Dogwood. Among other things, Dogwood asked the Commission to amend the existing CCN rule to, in Dogwood's words, "clarify" that electric utilities must obtain advance approval from the Commission before acquiring a generating plant or undertaking major renovations at their existing generating plants. Dogwood's petition therefore put at issue the scope of the phrase "begin construction" in section 393.170, with Dogwood arguing that "begin construction" went far beyond both its plain and ordinary meaning and the Commission's longstanding construction and application of that phrase (such an amendment would hardly have been a "clarification" given the Commission's understanding and application of the CCN statute in the 101 years before Dogwood sought these changes). Dogwood's petition also sought to impose, in the CCN process, a mandatory competitive bidding process, and sought what would clearly be an expansion of the Commission's jurisdiction to cover out-of-state plants via an administrative rule (but clearly, a rule cannot expand the Commission's jurisdiction insofar as all of the Commission's authority emanates solely from its enabling statutes, here, section 393.170).

3. When these issues first arose with the filing of Dogwood's petition, 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 The Empire

District Electric Company ("Empire"), all responded. While the Staff agreed with Dogwood that legal issues arising from *StopAquila.Org v. Aquila, Inc.*[3] and *State ex rel. Cass County v. Public Serv. Comm'n*[4] may warrant a rulemaking to address amendments to the existing CCN rule, 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 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]."[5] In opposing 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.[6] 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.

[3] 180 S.W.3d 24 (Mo. App. W.D. 2005).
[4] 259 S.W.3d 544 (Mo. App. W.D. 2008).
[5] *Staff Response to Commission Order Directing Staff the Investigate and File a Recommendation,* File No. EX-2014-0205, at 3 [EFIS Item No. 3].
[6] *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. Dogwood had justified its competitive bidding rule requirement proposal by complaining about Empire's upgrades to its Riverton Plant instead of buying power from Dogwood's merchant plant. The Staff rebutted Dogwood's claims, agreeing with Empire's decision to upgrade Riverton rather than buying power from Dogwood.

4. The Commission denied Dogwood's petition, but (by order dated March 15, 2015) ordered a workshop process largely because of the Staff's suggestion that the above-cited court decisions warranted consideration of possible amendments to the CCN rule.[7]

5. 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.

6. After obtaining the input of the workshop participants, the Staff brought a draft of a revised CCN rule to the Commission. That draft suggested several changes to the rule, but did *not* include some of the primary changes that Dogwood had originally advocated. The Staff draft omitted competitive bidding provisions and omitted attempts to extend the application of the CCN process beyond the state's borders. The "Staff draft" did include language that would, at least in Ameren Missouri's view, expand the meaning of "begin construction" beyond that supported by the CCN statute, an issue that will be addressed in detail below. The Staff draft essentially became the proposed rule in 2016, with one major addition. At the urging of at least some of the then-Commissioners, the Commission decided to add competitive bidding language to the Staff draft on the grounds that it would facilitate a discussion of that issue. The Agenda discussion appeared to reflect that the then-Commissioners were not necessarily endorsing adoption of these provisions. The current rule proposal may reflect the same thinking, as it appears to contain language addressing virtually every idea that has been brought up by any participant in the last three to four years.

[7] *Order Denying Petition for Revision of Commission Rule 4 CSR 240-3.105*, File No. EX-2014-0215 [EFIS Item No. 6].

7. 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. As Ameren Missouri's comments in the prior rulemaking indicated, there was significant agreement between Ameren Missouri and the Staff on the 2016 rule, save primarily the question of what "begin construction" in the CCN statute meant. More specifically, Staff's position was that the CCN statute did not extend to out-of-state facilities and that it was inappropriate for the CCN rule to require competitive bidding; Ameren Missouri agrees. Regarding out-of-state "jurisdiction," the Staff indicated that while the CCN statute "addresses the siting of the construction of gas plant, electric plant, water corporation [sic] or sewer system *in the State of Missouri* . . . [i]t does *not address* the siting . . . in states other than Missouri . . ." (emphasis added).[8] With respect to the competitive bidding issues, the Staff supported requiring the utility to include a *discussion* of its utilization or projected utilization of competitive bidding associated with the project; i.e., explain what the utility did or did not do, and why, but warned that "to go beyond a review of the electric utility's process for deciding *whether to* competitively bid . . . would be placing the Commission in too intrusive of a role . . ." (emphasis added).[9]

8. After the rulemaking hearing was held and for reasons that are not entirely clear, the Commission chose not to proceed with the 2016 rulemaking proposal and withdrew the rule. From then until January of this year, neither the Commission nor its Staff engaged in any further

[8] Additional Comments of the Staff of the Missouri Public Service Commission, File No. EX-2015-0225, p. 2 [EFIS Item No. 29].
[9] *Id.*, p. 10. Staff also indicated that utility management is "ultimately held accountable for the prudency of its decisions, e.g., whether to competitively bid and the management of the project." *Id.*

public activities relating to possible CCN rule amendments. At that time, a "Notice Opening File" appeared in EFIS, followed a couple of months later by an Agenda item to consider a finding of necessity to initiate this formal rulemaking process. As noted, the rule proposed in this docket bears many similarities to the 2016 proposal, but as written reflects a greater "expansion" of Commission jurisdiction than had been reflected in the 2016 proposal.

9. As it did in the 2014-2015 workshop process and the 2016 rulemaking, Ameren Missouri agrees that there are aspects of the CCN rule that can be clarified and improved given the rulings in the *StopAquila* and *Cass County* appellate decisions involving Aquila, Inc.'s (now KCPL-GMO's) Peculiar, Missouri generating plant. Consequently, Ameren Missouri continues to support a number of the amendments contained in the rulemaking proposal in this docket.

10. However, Ameren Missouri has substantive concerns or objections in the following main areas:

a. concerns regarding numerous practical issues that would result from the rule as proposed that provide little or no benefit but will have resulted in a large increase in costs related to CCN applications. Specific concerns include the proposed rule's definition of "construction," including ambiguities and inconsistencies that will likely make the proposed rule difficult to apply and understand, that would likely lead to unnecessary litigation, and that would likely create an explosion of CCN applications at the Commission;

b. legal concerns regarding expanding the term "construction" beyond its plain and ordinary meaning and beyond its historic construction and application by the Commission, so that it would include "rebuilding" or "improvement" or a "retrofit";

c. legal concerns with attempting to turn the phrase "shall not begin construction" in section 393.170 into "shall not *acquire*";

d. concerns about 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;

e. legal concerns arising from attempting to take a Missouri statute primarily focused on siting and extend it to the siting of facilities in other states;

f. legal concerns about taking over utility management; and

g. legal concerns regarding the failure of the Commission to comply with the fiscal note requirements of Missouri law

II. Summary of Comments

11. The *StopAquila* and *Cass County* decisions concerning Aquila's South Harper power plant provided judicial clarification of the requirements of section 393.170 for power plants, but they also confirmed the Commission's longstanding application of the CCN statute regarding new transmission and distribution infrastructure both inside and outside certificated service territories. The existing CCN rule did not line-up (or at least did not clearly line-up) with the teachings in those cases as to new power plants, and that fact, coupled with opportunities to clarify or improve the rule in certain other ways (the rule had not been changed for decades) justifies certain amendments to the CCN rule.

The substantive items addressed in these Comments, however, most if not all of which had their genesis in Dogwood's rejected rulemaking petition, reflect unnecessary, unwieldy, and, in many cases, unlawful additions to the CCN rule. The Company believes that a great many of the provisions were "proposed" in this rulemaking in an effort by the Commission to ensure that

various stakeholders' ideas were vetted and considered (and to address any perceived legal issues some might argue could arise if not all ideas are somehow reflected in a proposed rule). Since all such provisions were "proposed," the Company believes it has no choice but to fully respond to them. But, by the same token, the Company is hopeful that the Commission recognizes the legal limits of its authority under the CCN statute and the practical problems that would be created by some of these proposals. And the Company urges the Commission to be keenly mindful of the "costs" (in time and money to all stakeholders, including the Staff and the Commission) of these proposals as compared to their benefits (which, as discussed below, are sorely lacking in most cases). The Commission should also be mindful of the extreme regulatory *inconsistency* that would be reflected in a complete reversal of the Commission's longstanding interpretation and practice respecting the scope of its "jurisdiction" under the CCN statute.

The bottom line is that there is no reason and no benefit to injecting uncertainty and complication into utilities' ability to maintain and improve their infrastructure so that they can provide safe and adequate service, as many of the proposed amendments would do. The Commission's oversight remains, it hasn't been impaired, and it certainly hasn't been demonstrated that it has been inadequate in the absence of the kind of drastic CCN rule changes reflected in the proposed rule. The important but modest changes reflected in Exhibit A to these Comments will address the requirements of *StopAquila* and accomplish certain other improvements that will serve utilities, the Commission, and customers well. Nothing further need be or should be done.

III. The Proposed Definition of "Construction" – Practical and Legal Concerns

A. Practical Concerns with "Construction."

12. As discussed further below, in many respects the proposed rule is unclear on what does or does not constitute "construction." This is because the definition of "construction" is long, complex, and contains several uncertain terms and inconsistences. But even if the definition is read narrowly and certain assumptions are made about what is intended by it, the reach of the rule's definition of "construction" would greatly expand the instances where a CCN application is required. This would mean that both utilities and the Commission would experience an explosion of CCN cases if the proposed rule were adopted. This would occur both because clearly *many* more projects would require a CCN under the proposed rule than have ever been required in the 105-year existence of the CCN statute, and because of the risk of being wrong about the scope of the term will likely drive utilities to err on the side of caution and when in doubt, file a CCN application. These issues are addressed in more detail in the following paragraphs.

13. Subsection (1)(C)6A[10] – An Inconsistency. Subsection (1)(C)6A appears to be inconsistent with (1)(C)2 and 1(C)4. Under (1)(C)6A, a new gas transmission line that facilitates the operation of an electric generating plant or new electric transmission line, if the line is located within the utility's service territory, is not "construction" at all. Consequently, a CCN application would not be required for such lines, as is the case today. However, under (1)(C)2 and 1(C)4 and regardless of the location of such a line, a CCN would be required for all such new lines (and for certain rebuilds of such lines and any time a "change" in the route or easements for the line is to occur). Both can't be true. There is no reason for the Commission to

[10] This subsection is published as Subsection (1)(D)1 in the proposed rule in the *Missouri Register* (Vol. 43, No. 10, May 15, 2018).

start requiring CCNs for lines located in a utility's service territory. Regardless, the proposed rule is inconsistent (as discussed below, similarly there is no reason to start requiring CCN applications for substations in the utility's service territory).

14. Subsection (1)(C)2-4, (1)(C)6A – In-the-Service-Territory Non-Generation Plant Projects. The concept behind the in-the-service territory exemption in (1)(C)6A should remain but as has always been the case, the lack of the need for a CCN application should not just apply to new electric transmission lines or gas transmission lines that facilitate the operation of a generating plant, but should also apply to all natural gas and electric in-the-service territory transmission lines, substation projects and other distribution facilities. CCNs have not been required for such facilities in the 105-year history of the Commission and the courts have confirmed that practice is proper. *See, e.g., State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177 (Mo. App. K.C. 1960). *StopAquila* did not impose any such requirement. There is simply no apparent justification for vastly expanding the CCN requirements to cover a myriad of projects within the utility's service territory. Instead, the expansion is a solution in search of a problem.

15. Such an expansion would not be trivial. The "Construction" definition of the proposed rule would require CCN applications for non-generating plant infrastructure located in the utility's service territory, including new facilities and:

a. Rebuilds of transmission lines and substations if there is a "significant" increase in capacity;

b. Rebuilds of substations[11] if there is a "significant" increase in its physical size; and

[11] For purposes of this discussion we are assuming the proposed rule would apply to *transmission* substations, but as literally written, it would apply to substations at the distribution level as well. As discussed later in these

c. Rebuilds of transmission lines and substations if there is a change in route or an easement.[12]

While as discussed below the meaning of "significant" in the proposed rule is unclear, if one assumes a capacity increase of 10% or more is the cutoff for "significant" and further assumes that baseline capacity[13] against which the capacity increase is compared is the capacity of the line/substation as of the date of the new project, Ameren Missouri would have seen (and will see) a drastic increase in its required CCN applications relating to transmission lines and substations.[14]

Over the past 10 years, Ameren Missouri has filed just seven CCN applications *in total* for *all* facilities, five of which are for renewable projects (some relatively small) and only one of which was for a transmission line or substation. Using the interpretation outlined above, that number would have increased by approximately 18, accounting for just transmission lines and substation projects over the past 10 years if the proposed rule had been in place, which would have brought the total to 25, a more than 350% increase (these figures ignore generation-related CCNs that would have been necessary and which are addressed below). Looking forward, based on Ameren Missouri's current 5-year capital expenditure forecast, Ameren Missouri would

Comments, the Company estimates that at least 20 additional CCN applications would have been required just for its distribution substation rebuilds in just the past five years.

[12] As discussed below, the proposed rule can be read to apply to far more projects because it applies to an "asset," which is defined to "include" three enumerated items but by its terms is not limited to those three items. For this discussion Ameren Missouri is assuming an "asset" is limited to those three items.

[13] The proposed rule fails to specify the proper baseline.

[14] As discussed below, a large increase would also occur as to generating plant projects. The 10% threshold was assumed because as discussed below a 10% increase in transmission or generation capability is notable in terms of the operational capabilities of the facility and the proposed rule itself uses a 10% increase in rate base as a trigger for a CCN.

expect to file approximately 14 additional CCN transmission line/substation applications over just the next five years (and perhaps more with the passage of SB 564).[15]

The above-cited numbers do not account for transmission/substation-related CCN applications that would have been necessitated by the "change in the route or easements" language in (1)(C)2 because the Company cannot readily retrace the past situations where such language would have been triggered. However, based on general experience and knowledge, the above-cited numbers would likely increase because the Company makes route or easement changes from time-to-time that are not necessarily part of a project that would require a CCN (under the proposed rule) due to a capacity increase. For example, imagine a project where the capacity increase trigger in the proposed rule is not at issue because it is not "significant," but it is decided due to the condition of certain structures to replace three lattice towers with two monopole structures, with the monopole structures to be placed in a somewhat different location at the request of a landowner. Has the route changed now necessitating a CCN? Literally applied, the proposed rule would say "yes." And similarly, has the easement changed given what could be a change in the associated legal description? The location of structures or arguably the "route" of a line sometimes also must change to accommodate road relocations, or to accommodate private development, both of which are instances that happen with some frequency but which have nothing to do with a capacity increase. The proposed rule, as written, would require a CCN application for every such project if the route changes or if any change to an easement is needed to complete the project.

[15] It is possible that a few of these projects would not constitute a "rebuild" of a transmission line, and perhaps would therefore be exempted, but the term "rebuild" is itself unclear. Subsection (1)(D)2, at least for substations, suggests the term is more than literally tearing down the entire pre-existing substation and building an entirely new one. Regardless, many of the projects would be "rebuilds" or new facilities within the service territory for which today CCN's are not required.

While as earlier noted, none of these requirements should apply to projects within the utility's service territory (which would solve most but not all of these concerns), if a rule addressing route or easements were to be put in place any such rule should not necessitate a CCN case (whether the location is within or outside the utility's service territory) for an existing transmission line when the basic path (e.g., from substation 1 to substation 2) remains, even if, for example, the existing 100 or 150 or 200-foot corridor may shift to some degree, and even if an easement is modified in some way. In addition, any criteria that triggers a CCN requirement for an increase in capacity must be objective since "significant" is highly uncertain in its meaning and is likely to be interpreted differently by different parties, increasing the chance disputes over when a CCN is required.

It is important to remember that a rule has the force and effect of law, and the words in it are to be interpreted using the plain and ordinary meaning of the words as found in the dictionary. *See, e.g., Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 680 (Mo. 1988). Utilities cannot be put in the position of having to guess when a rule requirement is triggered, but use of the term "significant" would require such a guess. "Significant" is defined as "important" or "momentous,"[16] but when is a capacity increase "important"? That appears to very much be a matter of opinion. A project that results in a very small capacity increase could be very important in other respects, for example, if it is addressing a local reliability issue, while a project that results in a very large capacity increase could be less important but still worthwhile.

Consider the example of reconductoring a transmission line. When many of Ameren Missouri's transmission lines were built 30-50 years ago, the standard conductor had an ampacity of 1,300 amps. Given improvements in technology, it would make no sense in most

[16] *Webster's New World Collegiate Dictionary* (4th ed.).

current instances to reconductor the line with that kind of older technology conductor, so the standard conductor used has an ampacity of 1,700 amps. The capacity of a transmission line equals its voltage times its amps. Consequently, for a reconductored 161kV line, the line's capacity to carry generation would increase from 209 MW to 273 MW, a 30% increase. But if the reason for the reconductoring was not to gain an increase in capacity but to improve reliability of a worn-out line, was the capacity increase "significant" (i.e., important) or was it just a byproduct of line replacement? There are other similar examples. Transmission line capacity can also be increased simply by raising the ground clearance of the existing conductor which allows for additional wire sag so the conductor is able to operate at a higher temperature and thus more ampacity on the line is realized. Ameren Missouri completed two such projects in the past 10 years which increased line capacity by approximately 40% and 24%, respectively. Why should a CCN be required for such a project? Similar issues can arise at a substation. As one example, in 2014, Ameren Missouri replaced the single 300 MVA transformer at its Overton substation with a 560 MVA transformer (a standard sized transformer today, as compared to smaller transformers installed decades ago). To all but a utility engineer, there would be no discernable difference when looking at the substation (except perhaps the transformer inside the fence is larger), yet under the proposed rule, it appears such a project would certainly require a CCN (because of the 85%-plus increase in capacity).

Similarly, when is an increase in the size (footprint) of a substation "significant"? Does moving the fence out 25 or 50 feet to allow more working room inside the substation (e.g., to improve safety of workers by providing more room to work around equipment as may be needed to comply with OSHA requirements) "significant"? Does whether it is "significant" depend on how "important" the safety improvement is?

These issues beg at least a couple of questions. First, how are utilities going to know when to file CCN applications? But more fundamentally, why should there be a rule that requires CCN applications for rebuilds or route changes or easement changes at all? Have there been notable and frequent problems with such projects in the past 100-plus years? The Company is not aware of any. The Company is also not aware of any epidemic of imprudence findings against Missouri utilities for any transmission line construction or any substation construction. There does not appear to be a problem that needs to be addressed in the manner set forth in the proposed rule.

16. Subsection (1)(C)4 & 5 – Generation. As noted above, there is imprecision inherent in the use of the term "significant." Similar issues arise from subsection (1)(C)5's use of two other terms that the context suggests are intended to mean essentially the same thing: "substantial" and "material" (substantial means: "considerable; ample; large"; material means: "important; essential"[17]). These terms, like "significant," create uncertainty when applied in the real world, uncertainty that is exacerbated by the fact that the proposed rule is using three different terms apparently to get at the same or a similar concept.

While the Company can appreciate a desire to have flexibility by using words with uncertain meanings, that flexibility comes at a high price. Utilities need to know when they are planning a project what they must do, and when, to complete it. Under the absolute "best" of circumstances, a CCN case would likely take at least 90 days to complete, and that is once the case is filed. In reality, a case will take longer because there are significant pre-filing preparations that must occur, including gathering and in many cases, developing, the information that must be submitted when applying for a CCN. This means every single CCN application will

[17] *Id.*

likely take at least four months, and a timeline of that duration assumes no real contention in the case. But construction often must be planned and staged to account for weather and other factors or to optimize outage periods for generating plants (or transmission lines or substations) so that the impact on service, cost, or both is minimized. There are often regulatory deadlines (e.g., to meet environmental requirements) that must be accounted for when planning and staging work.

The point is that in actual practice, engineers and project managers need to be able to go about their day-to-day planning and execution of the many projects needed to run a utility system with a clear understanding of what is required of them, and when. Subjective criteria will hinder their ability to do their jobs, and ultimately will cost time and money. It could also put regulatory deadlines at risk and result in less-than-optimal solutions to problems that need to be solved.

As noted about the newly proposed requirements for rebuilt transmission lines and substations, even more important is the question of whether the Commission should now necessitate far more CCN applications relating to generation projects than have ever been required before *at all*. Again, what problem exists that such a requirement would solve? Where is the evidence of such a problem? What are the benefits of adding such a regulatory burden?

While it was not possible to fully quantify all the instances over the past 10 years when a generation project would have required a CCN had the proposed rule been in place (and as was the case with transmission lines and substations, when an increase in capacity is "substantial" or a change in emissions/discharges is "material" is uncertain), the Company did compile data assuming that "substantial" and "material" means capacity increases or emission/discharge changes of 10% or more.[18] Based on that analysis, had the proposed rule been in place

[18] The Company measured emission/discharge changes over a five-year period due to inherent fluctuations in point-in-time estimates.

approximately four generation projects would have required a CCN over the past 10 years that under the current rule would not have a required a CCN application, based on emission/discharge changes alone. Based on the Company's current five-year forecast of generation projects, CCNs would be required for an additional approximately three projects over the next five years, also based on emissions/discharge changes.

The proposed rule also triggers a CCN application when there is a 10% increase in rate base. While the baseline is unclear, if one assumes the baseline uses the entire plant (if the plant has multiple units) and that the time of the baseline is just before the project is started, Ameren Missouri estimates that it would have had to file for approximately eight additional CCNs over the past 10 years, and would need to seek approximately 4 more CCNs over the next five years, due solely to the increase in rate base trigger in the proposed rule.[19]

17. All "Construction." Had the proposed rule been place for the past 10 years, and accounting for all the additional transmission, substation, and generation projects discussed earlier, the new rule, for Ameren Missouri alone, would likely have required a total of at least 51 *additional* CCN applications from 2008 through 2023. These figures do not account for yet more applications that would probably have been required relating to "route" changes or "easement changes." Put another way, had the new rule been in place, Ameren Missouri would have filed (and probably would have to file), a CCN application *approximately every three months* from 2008 to 2023.[20] There are three other electric utilities who, proportionally, would be expected to see similar increases.

[19] These numbers are for projects that would not require a CCN due to a capacity increase or a change in emissions/discharge.
[20] If distribution substations would be covered by the proposed rule, that figure would become one CCN application at least every 2 months.

Every single one of those applications would have (and would) require numerous items, including route/site descriptions, a list of utilities/railroads crossed, plans and specifications descriptions, cost estimates, operation features, schedule information, financing plans, proof of a process regarding consideration of other alternatives, evidence regarding competitive bidding on up to three different topics, and proof of notices and public meetings (in the case of transmission lines or substations). Making sure all the steps necessary to meet the filing requirements have been taken and properly documented, assembling the information, developing applications and where warranted, testimony and other proof, for any CCN application, is no small undertaking. It would have to involve engineers, accountants, attorneys, management employees, witnesses (both in-house witnesses and in many cases, outside witnesses), etc., as well as administrative staff. Processing a case involves discovery, conferences, and may involve more testimony, hearings, briefing, and post-decision activities. CCN cases can often also provide a forum for the agendas of various groups who intervene in the cases whose own interests may either not be aligned with the interests of customers at all, or whose primary interest is their own rather than an interest utilities share with the Commission: ensuring the provision of safe and adequate service and compliance with other requirements (like the Renewable Energy Standard ("RES") requirements).

And it is not just the utilities that would have to devote a great deal of time and money to taking all the steps needed to process a CCN application, but others, including Staff and OPC, will also be in the position of reviewing, evaluating, serving and examining discovery, litigating cases where there is a contest, etc.

There is a final category of transmission projects that the rule would appear to literally apply to, that is, projects that must be completed due to generator interconnections. The

generator interconnection que in MISO[21] currently has approximately 50 generator interconnection requests pending. Ameren Missouri may and likely will be required by MISO to increase the capacity of various facilities as a result of generator interconnections (including connections outside Missouri). The terms of the proposed rule can easily be read to require a CCN for at least some of those projects. There could be many such projects in the coming years.

18. Justification for Drastic Expansion of "Construction". Again: what would such a drastic expansion in CCN applications accomplish? From the Company's perspective and from a relatively close observation of Commission proceedings over the past few decades, there are few and perhaps no noteworthy instances of utility infrastructure being built but somehow escaping appropriate Commission oversight at the appropriate time. Rate base additions are subjected to review when utilities file rate cases to include them in rates. For larger projects, the Staff and sometimes other parties formally audit the project, its execution, and its cost. While the utility need not initially go forward with evidence to establish the prudence of a project, any other party can come forward with evidence that creates a serious doubt as to the prudence of the project's costs and the utility then bears the burden to persuade the Commission the costs should be reflected in the revenue requirement used to set rates. The broad expansion of CCN application requirements reflected in the proposed rule is truly a solution in search of a problem.

19. The IRP Process; Other Processes. If there is some perceived shortcoming in Commission oversight of utility investment, the means to address the issue is not by requiring dozens more CCN applications. Utilities must file a comprehensive IRP analysis every three years. They must file an update yearly. They must address special contemporary issues. They must file if their preferred resource plan changes. As the Staff pointed out when these CCN

[21] Midcontinent Independent System Operator, Inc.

issues first came up in 2014, the IRP assures proper consideration of competitive bidding; the CCN is not place for such requirements. There is a process for acknowledging IRP plans in the IRP rule and if the Commission desires to engage in a decisional prudence review, it could include a means to do so in its IRP requirements, which was an issue discussed in the rulemaking that led to the extensive IRP rule amendments adopted in 2011. None of this to say that there is a problem that needs to be addressed; as noted, the evidence that there is a problem is sparse if it exists at all, but if there were, the IRP process is the place to deal with it.

B. Legal Concerns with "Construction"

20. Even if the practical concerns discussed above did not exist, defining "construction" to be something that it is not (by including rebuilds, retrofits, improvements) plainly and unlawfully goes beyond the statutory authority given the Commission in the CCN statute and is also at odds with the Commission's more than 100 years of interpretation and application of that 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.[22]

The law is settled that statutory terms are to be given their plain and ordinary meaning, which is found in the dictionary.[23] *Black's Law Dictionary* defines "construction" as "[t]he creation of something new, as distinguished from the repair or improvement of something already existing." Clearly one cannot "rebuild" or "improve" or "retrofit" something unless it was "already existing" but if it was already existing, it doesn't involve the creation of something

[22] *State ex. rel. Doe Run v. Brown,* 918 S.W.2d 303, 306 (Mo. App. E.D. 1996) (Stating the settled principle 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).
[23] *Spudich,* 745 S.W.2d at 680.

new. Consequently, "construction" in the CCN statute does not and cannot include rebuilds, improvements, or retrofits. The rule can't change the meaning of the words in the statute.[24]

The fact that 105 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 historically 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 unauthorized and would have been required to be torn down.[25] A later statutory enactment effectively prevented this from happening.[26]

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 105 years utilities have been beginning "construction" within the meaning of the CCN statute *without the permission that the CCN statute requires* because undoubtedly there have been dozens if not hundreds of rebuilds, retrofits, and improvements. If that were true, then, in theory, utilities could face the argument that any generating plant that has been retrofitted or improved must be torn down because the requisite Commission authority was lacking, as was the case for the Aquila Cass County plant. After all, since the term "construction" has not been changed in the statute since 1913, if it means all these other things today (and it must for the Commission to have the authority to

[24] As noted, this does not mean that rebuilds, improvements, and retrofits of an appropriate magnitude necessarily will escape any needed regulatory oversight. The IRP process is available and the Commission always retains the ultimate authority: examination of whether to include the costs in the revenue requirement in a rate case.
[25] *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.
[26] Section 393.1150.

require a CCN for those things), then it also had to have meant all those other things for the past 105 years. Put another way, the meaning of "construction" in the CCN statute did not, and cannot, change here in 2018. If it is to be changed, the General Assembly would have to do so.

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. *Harline*, 343 S.W.2d at 182 (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 means.

Nor is there any indication, as has previously been argued (in particular by Dogwood) that the General Assembly by its use of the word "construction" in the CCN statute intended that it include rebuilding, retrofitting or improvement.

As noted, Dogwood started the debate about this issue when it attempted to use a statute passed well after the CCN statute was adopted (Missouri's prevailing wage statutes) in support of the claim that the General Assembly itself defines "construction" to include reconstruction, improvement, etc. And it is true that in the *prevailing wage statute* the term "construction" is defined to include "reconstruction, improvement, enlargement." However, that tells us nothing about the meaning of that term *in the CCN statute*, as demonstrated by several flaws in Dogwood's argument.

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 proves the point – when the General Assembly means "construction" to encompass "improvement" or like terms that do not conform to the plain and ordinary meaning of the term, it says so.

Second, Dogwood effectively argued that the Public Service Commission Law ("PSC Law") ought to be read *in pari 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 Section 393.170 were 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 of whether laborers are entitled to prevailing wages (to combat the evil of unfair wages) and the question whether an electrical corporation must 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 pari materia* with the PSC Law. The PSC Law and the prevailing wage law deal with different subjects.

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 (even though it is an administrative agency and subject, in part, to the Missouri Administrative Procedure Act),[27] there are numerous other statutes in the PSC Law unique to the Commission, including the one at issue here, section 393.170.

[27] *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).

Moreover, there are other instances in Missouri and other states where, when the state legislatures intended to include construction as well as modification, repair or other terms[28] they explicitly 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[29] (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[30] (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).

The fact that "construction" in the CCN statute has never been interpreted consistent with the proposed rule 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 "construction" to be "*new* construction" (emphasis added). 180 S.W.3d at 39. Moreover, Congress, in the new stationary source provisions of the federal Clean Air Act,[31] uses the term "construction" and 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

[28] All of the statutes cited use the phrase "begin construction," as does section 393.170.
[29] Hawaii
[30] Arkansas
[31] 42 U.S.C.S. § 7411.

"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, whether one believes the General Assembly *should have* expanded "construction" to include these other activities is irrelevant to what the actual statutory language plainly means. "Begin construction" means today what it meant in 1913: new construction. The rules can't change that.

IV. Legal Concerns Regarding "Expanding" Jurisdiction to Cover Acquisitions

21. Equally tenuous 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, transmission line, or substation. Ameren Missouri will not repeat the substance of the argument made above relating to the difference between "construction" and "improvement," etc., but the same principles apply. When an existing asset is acquired, "something new" is not created.[32] In its filings in response to Dogwood's 2014 petition, the Staff thoroughly recounted the history of power plants that have been acquired without first obtaining a CCNs,[33] demonstrating that he Commission has never interpreted "begin construction" to mean "begin acquisition of" an existing power plant. To point to one 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.

[32] *Blacks's Law Dictionary*, defining "construction."
[33] *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].

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 existing power plants over the past 100 years-plus 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. Similar to the attempt to make "construction" mean "improvement," etc., the question is not a close one. If the General Assembly wanted "construction" in section 393.170 to be broader than it is and always has been, it could amend the statute. The Commission cannot do so via a rulemaking.

One final point bears noting. Dogwood's prior comments in support of broadening the statute via rulemaking strongly suggest that even Dogwood, who has been the most vocal party in seeking to "expand" the Commission's jurisdiction in this area, 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,[34] 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,"[35] which the Company believes was intended to refer to what in effect would be a transaction where the utility effectively caused someone else to build a new power plant or a transmission line and then turned around and "acquired" it to avoid the "begin construction" provisions of section 393.170. The Company agrees that when a utility uses a legal structure that permits it to "effectively" construct the asset under a contract with a third party, a CCN is still required. Indeed, that is precisely what Ameren Missouri said and did when it filed its now-pending CCN case relating to the High Prairie Wind Farm (File No. EA-2018-0202) even though

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

in that case Ameren Missouri is acquiring membership interests in a limited liability company that will construct the assets.

After warning of the possibility of "step-transactions" about which there is little controversy (and little practical concern, as the High Prairie Wind Farm application shows), 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. While Dogwood's back-pedaling was appropriate, the truth is that the fact patterns that trigger application of those statutes are not at issue in this rulemaking. 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 others think the CCN statute should have provided for something different.

V. Concerns Regarding Competitive Bidding Provisions

22. As proposed, subsections (5)(I) – (K) and (6)(I) would require certain evidence regarding competitive bidding, as follows:

a. [(5)(I)] That a non-discriminatory, fair, and reasonable processes was utilized to evaluate whether the utility could, as an alternative to the project, use distributed energy resources, energy efficiency, or renewable energy resources instead;

b. [(5)(J)] That a non-discriminatory, fair, and reasonable competitive bidding process was utilized to evaluate whether purchased power or "suppliers of alternative energy" could be used in lieu of construction; and

c. [(5)(K) and (6)(I)] That a non-discriminatory, fair, and reasonable competitive bidding process has or will be utilized to enter into engineering, construction, etc. contracts for the project.

These proposed requirements are problematic for several reasons. Notably, they also go well beyond what the Staff proposed in the 2016 rulemaking when, as earlier discussed, the Staff clearly indicated that the CCN rule should *not* require the use of competitive bidding. Staff argued that at most a CCN application should simply discuss what competitive bidding may have been used for the subject project.

23. Significant Uncertainty About How to Apply These Provisions. There are numerous uncertainties about how to apply the above-described bidding provisions. First, they literally apply to construction of all "assets."[36] As discussed below, the definition of "asset" is unclear, but at a minimum it means a generating plant, substation (as earlier noted it is not clear if these are transmission substations alone or include distribution substations), or a gas transmission line that facilitates the operation of a generating plant (but perhaps not an electric transmission line).[37] Adding to the confusion is that subsection (5)(K) by its terms only applies to those three assets, but as noted, the definition of assets already seems directed toward those three assets, so why are they called out separately in (5)(K)? And if (5)(I) and (J) don't apply to those assets, to what do they apply?[38]

Second, with respect to (5)(I), is it literally true that every single asset that would be covered by the proposed rule (there would be many, as discussed above) must be evaluated against distributed energy resources ("DER"), energy efficiency, or renewable resources? Literal

[36] Subsection (5) "If the application is for authorization to construct assets . . .."
[37] Subsection (1)(B).
[38] And why should they apply to a substation at all?

application of the proposed rule suggests the answer is "yes." What does DER cover? There is no universal definition and the proposed rule doesn't define "DER." Does energy efficiency include demand response (because energy efficiency and demand response are not necessarily the same thing, although both energy efficiency and demand response are included within the term "demand-side management"[39])?

Under (5)(J), how would an RFP or something like it relating to purchased power or alternative energy be relevant to substation project? And is "alternative energy" different than "DER" or "renewable energy"?).[40]

24. Subsections (5)(K) and (6)(I). These subsections present additional concerns beyond those present in (5)(I) and (5)(J). For two decades, transmission function (primarily) employees working for Ameren Services Company have provided design, engineering, procurement and construction management for Ameren Missouri projects. These employees provide these services at cost and have unique, deep knowledge of Ameren Missouri's systems, and use common procurement, engineering, construction, and design standards. By using the service company, Ameren Missouri need not maintain all these employees as a full-time Ameren Missouri employee but instead can share costs with its other affiliates that own transmission. This allows Ameren Missouri to use as much of those employees' time when it needs it, without having to pay for all of it when it doesn't. Literally applied, do (5)(K) and (6)(I) mean bids must be sought from outsiders for this work? We doubt that is the intent, but as written, that appears to be the proposed requirement.

[39] Section 393.1075.

[40] If (5)(I) to (J) or part of them were to be included in a final rule, the existence of the uncertainties outlined above would have to be addressed in order to resolve the great confusion the proposed rules, as written, create. But it is important to step back and ask "should those provisions be included at all"? The answer is "no."

Moreover, there are other reasons to question the need for or appropriateness of (5)(K) and (6)(I). There was no indication of a need for such a provision in the prior workshop or rulemaking, and Ameren Missouri is not aware of any today. There has been no 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. Even Dogwood's earlier case seeking its own amendment to the CCN rule omitted a proposal such as (5)(K) and (6)(I), and none was discussed during the workshops.

The proposed requirements in (5)(K) and (6)(I) are also impractical in certain other respects. Before addressing them, it should be pointed out that 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 is not used for many goods and services needed on construction projects. Very often an RFP process is used. Indeed, Ameren Missouri (and Ameren Services Company) 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 have similar requirements. But 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, but the proposed language provides that there must be evidence the utility has utilized or "will utilize" such bidding. That simply may not be wise, particularly in the areas

of engineering, design, or construction oversight services. Just as most individuals and entities do not choose their attorneys or doctors or specialized consultants via bidding processes based solely on cost, utilities (or other industrial firms that engage in substantial construction) don't always choose designers and engineers and oversight firms 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 the Company'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, if such an explanation is somehow pertinent to the CCN decision to be made. Respectfully, the Company does not 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 the Company is not aware that this has been much of an issue, if it has been an issue at all.

For example, the undersigned counsel has been involved in several CCN cases, 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.[41] 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 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, including about competitive bidding, or lack of it, in any rate case where the project costs are impacting the revenue requirement. 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.

Consider how the question of competitive bidding requirements started in the first place. The question first arose from Dogwood's petition from 2014, which demonstrates that a key driver behind the concept of injecting competitive bidding requirements into the CCN process was Dogwood's dissatisfaction with Empire's 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.[42] Aside from Dogwood's private financial interests, no party – in that workshop or in the 2016 rulemaking – has ever identified any real need to inject bidding issues into a CCN proceeding, much less those involving design, engineering, and construction.

In response to Dogwood's 2014 petition, the Staff in fact affirmatively opposed addressing bidding in the CCN rule and as noted earlier, the Staff stated that it did "not consider

[41] *In Re Tartan Energy*, Case No. GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994).
[42] Dogwood's *Rulemaking Petition*, File No. EX-2014-0205, filed January 8, 2014.

such [competitive bidding] provisions any more appropriate for 4 CSR 240-3.105(1)(E) [the CCN rule] than for Chapter 22 [the IRP rule]."[43]

For reasons that have never been explained, the Staff did include certain competitive bidding language in the draft rule the Commission considered (and ultimately proposed) in the 2016 rulemaking, but even then, the Staff later suggested modifications the reflected some ambivalence toward the issue. Staff's modified suggestions were that the rule should require only a "discussion" of the *what* competitive bidding was utilized.[44] But the Staff made clear that the Commission in its view should not "go beyond review of the electric utility's process for deciding whether to competitively bid" and that if the Commission did so it would be acting in a manner that was "too intrusive a role regarding the operations of the utility . . .."[45] Staff went on to fully recognize that this was not necessary because "management is ultimately to be held accountable for the prudency of its decisions, e.g., whether to competitively bid and the management of the project."[46]

25. Additional Substantive Concerns with (5)(I) and (5)(J). There are at least three fundamental flaws that underlie efforts to inject a mandatory competitive bidding process for purchase power agreements ("PPAs") or other alternative means to meet resource needs into a CCN case, such as DERs.

a. False Equivalence

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

[43] *Staff Response to Commission Order Directing Staff the Investigate and File a Recommendation*, File No. EX-2014-0205, at 3 [EFIS Item No. 3].
[44] *Staff's Comments*, p. 10 (April 29, 2016), File No. EX-2015-0225 [EFIS Item No. 13].
[45] *Id.*
[46] *Id.*

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.

b. *The Role of the IRP Process*

Evaluation of and debate about important resource decisions (PPAs versus owning generation, role of DER, etc.[47]) 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, DER providers, etc., 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, and requirements regarding studying and providing information for special contemporary issues. Stakeholders 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 and DERs in greater detail, below.

[47] A discussion of amendments to the IRP rules to better address DERs in the IRP process is currently taking place in File No. EW-2017-0245.

c. Practical Issues.

It is also unnecessary, unwise and impractical to clog CCN proceedings with a time-consuming mandatory competitive bidding process. 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. Imagine the injection of these issues into the approximately three CCN applications per month Ameren Missouri would likely have to file under the rule as proposed.

26. More Detailed Discussion of PPAs. As noted above, the premise advanced by those who advocate for mandated competitive bidding for alternatives such as 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. As noted, DERs and "alternative energy" may also involve PPAs. In fact, the premise that a PPA is a substitute 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. Lack of Control

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.

b. Operator Incentives.

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, economic 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.

And given the fixed energy and capacity payments typical of PPAs, if the merchant generator did gain efficiencies in the makeup of the asset or its operations, it is the *merchant generator* that would enjoy 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.

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 must come down to a head-to-head comparison of PPA prices to megawatt and megawatt-hour costs of owned generation.

c. Financial Risks

Merchant generators may also expose a utility (and ultimately its customers) to heightened financial risk because merchant generators can often be 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.

During the last approximately seventeen years, numerous merchant generators 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)
- Exelon Generation Texas Power LLC (2017)
- Pandra Temple Power LLC (2017)
- FirstEnergy Solutions Corporation (2018)

During that same period, no investor-owned utilities filed for bankruptcy protection, which reflects the 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 the capacity and the 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, according to S&P Global Ratings research dated January 25, 2018, ten of the 13 North America Unregulated (Merchant Power) entities rated by Standard & Poor's were rated sub-investment grade. Obligations rated sub-investment grade, per Standard & Poor's Ratings Definitions, "are regarded as having significant

speculative characteristics" and may face "large uncertainties or major exposures to adverse conditions."

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 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 account for the likelihood 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.[48]

[48] 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

There are other concerns. For smaller merchant generators, there is limited information available regarding their financial position and creditworthiness. As a result, 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 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. Own Rather Than Rent.

In addition, and 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 substantially depreciated 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

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.

on rate base reflected in rates, 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 quite large (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. Impact on the Utility

Another issue is a PPA's impact on the buying utility's financial condition. Due to the way 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.

Receipts of payments due from a regulated utility under a PPA may also 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 can use the utility's stronger credit profile to reduce their costs and increase their profits while exposing utilities and their customers to higher degrees of risk.

f. CCN Proceedings are Ill-Suited

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 several 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 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.

The Commission's IRP rules are comprehensive regarding 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 – including DERs.[49] 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, 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

[49] 4 CSR 240-22.040(1).

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.[50] 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.[51] 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.[52] Ameren Missouri described its procurement policies and project oversight process in Chapter 10 of its 2017 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 months before it is filed.[53] 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.[54] Utility IRPs are in turn relied upon as both a record of the

[50] 4 CSR 240-22.060.
[51] 4 CSR 240-22.070.
[52] 4 CSR 240-22.070(6)(E).
[53] 4 CSR 240-22.080(5).
[54] 4 CSR 240-22.010(2).

utility's decision-making process and its consideration of a wide range of options for providing service to its customers.

Duplicating this robust process as part of 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 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, including consideration of DER? The Commission already uses the IRP process to ensure such consideration. 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.

g. Taking Over Utility Management

Finally, mandating use of competitive bidding may encroach on the utility's right to manage its business, a power the Commission does not possess, as discussed in detail below.

VI. "Extending Jurisdiction" Out-of-State

27. As earlier noted, Dogwood first advocated for imposing Missouri CCN requirements on siting assets in other states in its 2014 petition. Effectively, Dogwood's argument (and the proposed rule language now) amounts to an acknowledgement that the Commission has engaged in "unlawful" activity for the past 105 years since it has not required CCNs for out-of-state facilities owned by an electric utility providing service to Missouri customers.[55] Past attempts (by Dogwood) to suggest all kinds of customer and utility shareholder harm arising from this claimed failure on the Commission's part to adhere to the statute as to out-of-state facilities have fallen flat.[56] No one else has demonstrated any harm to either.

There is simply no statutory authority for the Commission to require a CCN for out-of-state facilities. The CCN statute is the same today as it was in 1913; this authority did not suddenly appear now.

Such a requirement is also completely at odds with longstanding practice. There are numerous power plants owned by Missouri utilities which are located in other states for which CCNs were not required, including Empire's Plum Point facility in Arkansas; KCP&L's interest in the Wolf Creek nuclear Plant, the LaCygne coal plant, and the Spearville I and II wind farms in Kansas; KCPL-GMO's interest in the Jeffrey Energy Center in Kansas; and Ameren

[55] Indeed, Dogwood directly claimed a lack of out-of-state provisions means that the CCN rule is unlawful, stating in the 2016 rulemaking that the "proposed rule unlawfully fails to fully meet the requirements of the [CCN] statute . . .." Dogwood's April 29 Comments, File No. EX-2015-0225, p. 13 [EFIS Item No. 9].
[56] *Id.*, generally at pages 9-14.

Missouri's Venice, Goose Creek, Raccoon Creek, Pinckneyville and Kinmundy plants in Illinois.[57] In addition, Ameren Missouri has transmission lines in Illinois and Iowa for which certificates were never sought or obtained. The same could be true of KCP&L (given its Missouri service territory's proximity to Kansas) and for Empire (for the same reasons as to Kansas, Oklahoma, and/or Arkansas). Again, if CCNs were required for these facilities an argument could be made that they should all be torn down. The Company is unaware of issues of ratepayer or shareholder harm arising from not obtaining CCNs for those facilities.

The Commission has not acted unlawfully by not attempting to regulate siting, construction or acquisition of properties in other states, but instead, has correctly understood that it cannot reach beyond Missouri's borders to preempt or regulate the siting and construction of power plants outside the state. This is made clear by both Sections 386.250(1) and 386.030. Section 386.250(1) provides that the Commission's jurisdiction extends "[t]o the manufacture . . . [and] distribution . . .. of power, *within the state*" (emphasis added). An out-of-state generator does not involve the manfacture of power in this state, nor does an out-of-state transmission line distribute power in this state. Section 386.030 provides that "[n]either this chapter, nor any provision of this chapter, except where specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states ...." Section 386.030 reflects longstanding decisions of the United States Supreme Court, which demonstrate that a state's authority stops at its borders. *See, e.g, State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003), citing *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). In *State Farm*, the authority of Missouri courts to award damages was limited to damages arising

[57] The Staff has advised the Commission that it has not identified a single CCN case involving a power plant located in another state that is owned by a Missouri electric utility. *Staff Response to Commission Order Directing Staff to Investigate and File Recommendation,* File No. EX-2014-0215 (Dogwood's prior rulemaking Petition), p. 13.

from State Farm's activities in Missouri, even though the plaintiff had claimed that punitive damages should arise from State Farm's actions outside Missouri. The United States Supreme Court also noted that a state law has no force beyond the particular state's territory, except through the comity of other states. *Id.* Neither Kansas, Arkansas nor Illinois have agreed that this Commission can apply Missouri law within their borders to prevent an entity qualified to do business in those states from buying land in those states and building a power plant on it. For decades, the Commission has decided how out-of-state facilities are to be reflected in the ratemaking process and has received information (such as required by 4 CSR 240-3.190) about such facilities. The Commission has and will have such regulatory oversight, but can't regulate the siting of the facilities outside the state.

Prior court (and Commission) decisions, as well as statues in Missouri confirm that the CCN statute is primarily a siting statute. Consider the facts of the *StopAquila* decision. Aquila's mistake in that case was that it relied on an exemption from zoning requirements (which squarely are focused on siting) contained in Missouri's zoning statutes *if* this Commission had already granted a CCN for the power plant. What the Court said was that a new power plant in Missouri could not be constructed in contravention of county zoning requirements applicable to the site at issue unless the Commission examined the construction of the plant "roughly contemporaneously" with its construction, or unless the plant site fell within a county master zoning plan, and even then, a county hearing was needed. 180 S.W.3d at 37-38. The Court did not purport to apply section 393.170 to a plant built in another state, where the propriety of the use of the land in that other state would presumably be subject to land use controls *by the proper authority in those other states*.

Missouri statutes also confirm the nature of the CCN as primarily involving siting, particularly subsection 1 (line certificate) authority that is the point of contention in this rulemaking. As noted, zoning statutes exempt facilities for which a CCN has been granted from local zoning processes[58] because of the obvious policy rationale that if the Commission has evaluated the considerations that are central to zoning (i.e., the appropriateness of siting the facility where proposed) there need not be a duplicative siting examination by, e.g., a county. This demonstrates that the General Assembly views the Commission's CCN authority as primarily authority over siting.[59]

VII. Prudence

28. The Company believes that to the extent the Commission desires to reconsider its decision (made when the IRP rules were substantially amended in 2011) not to adopt a rule regarding decisional prudence, it should do so by considering amendments to the IRP rule.

VIII. Transmission Line Project Notices

29. Just before the hearing in the 2016 rulemaking, OPC proposed certain detailed notice requirements for transmission line projects. Ameren Missouri in concept supported the idea and provided a specific mark-up of OPC's proposal, which OPC in large measure agreed with. There remained some details to which OPC didn't commit. In any event, the rulemaking did not proceed as noted earlier.

The proposed rule essentially (with a few changes) takes Ameren Missouri's proposal from 2016 and includes it as part of the currently-proposed rule. Ameren Missouri is largely

[58] See, e.g., Section 64.090.3 (Prohibiting county zoning authority from interfering with public utility services specifically permitted by a CCN).

[59] Certainly, in the case of allocating service territories *in Missouri* another concern is to prevent duplication of service and wasteful competition. But when it comes to the other aspects of the CCN statute (i.e., subsection 1 authority as compared to subsection 2, which deals with area certificates) the issue is, and always has been, primarily one of siting.

supportive of the proposal, but after further review and given some experience of which it is aware in Illinois, is suggesting a few changes to the proposal. Those suggestions are shown in Exhibit A. In summary, the changes are important so that in the event a claim is made that a notice was not received, a landowner should not have an argument that the landowner, by virtue of the rule, has somehow acquired a "right" to actually receive notice. [60] Clearly a landowner has no such right today, e.g., customers are not entitled to individual notice of rate increases because they have no protected property interest in any particular rate. *State ex rel. Jackson Cty. v. Pub. Serv. Comm'n* 532 S.W.2d 20, 31 (Mo. *banc* 1975). The Commission does not want to put itself in the position of facing arguments that its authority to issue a CCN has been compromised by notice to landowner issues that the statute does not require, or that its ability to decide what to do in the face of a failure of a landowner to be given or to receive notice is somehow limited.

IX. Other Miscellaneous Concerns

30. Subsection (1)(C) Baseline issues. There are at least two issues. First, as to generation projects, the proposed rule assumes there was a prior CCN for the plant as originally built and that it specified the baseline for capacity and emissions, but this is not always or even usually true. How then would those baselines be established? Second, even if there is a CCN and baselines are evident in the CCN or the file where it was obtained, do those baselines make sense? For example, the Callaway Energy Center went into operation in the early 1980s with a nameplate capacity of 1,150 MW. About 13 years ago, new turbine generators were installed that increased the capacity to about 1,200 MW. Why would one compare a future project to 1,150 MW from the early 1980s?

[60] Such arguments are being made in litigation pending in Illinois (under a different statutory/rule scheme).

As for changes in emissions, a baseline of emissions/discharges from 30, 40, 50 years ago makes little sense given the drastic changes in environmental regulations that have occurred during that time frame, and the improvements to plants that have been implemented.

With respect to the useful life of a generating plant, from where does the baseline come? As an example, Ameren Missouri's most recent depreciation study utilized certain retirement dates but as to some plants, the 2017 IRP used different dates. Against which dates would one measure the life extension?

The proposed rule is also unclear on the one measure where an objective trigger is used; i.e., the 10% increase in rate base. Is the 10% measured against the rate base of a single unit at a multi-unit plant? If so, should the common part of the plant allocated to that unit be a part of the baseline, or just the unit investment? Or is a CCN application only triggered if the rate base of the entire plant increases by 10%? Or would the baseline be 10% of the rate base of the utility's entire generation fleet?

With respect to transmission lines, a line's capacity is a function of multiple items, including voltage, ampacity, distance the conductor is strung from the ground, capacity of transformers and other factors. If a CCN was obtained for the line (which has often <u>not</u> been the case, as noted above), the capacity at the time the CCN was obtained may be different than it is when a project at issue now might trigger a CCN requirement under the proposed rule. The same can be said of substations. As earlier noted, large capacity increases can occur in a transmission line simply because today's conductors have significantly more ampacity but under the proposed rule, a CCN application requirement is triggered when all that occurred is to string a new conductor from the insulators on the same poles.

31. Subsection (1)(B) "Asset includes": First, the proposed rule indicates that an "[a]sset includes . . ." followed by a listing of three things: a generating plant, a substation, or a gas transmission line that facilitates operation of a generating plant.[61] The term "includes" (which means a "as part of a whole"[62]) suggests those three items are not the only "assets" at issue when that term is used in the rule. Indeed, literally applied would mean that every rebuild of a *distribution* substation that met the trigger would require a CCN application. For Ameren Missouri, making the assumptions noted earlier, that would have meant an additional 20 or so CCN applications for distribution substations alone in just the last five years and another 120-150 CCN applications, for distribution substations alone, in the next 10-15 years.

32. Subsection (1)(C) "Construction includes": The term "includes" also adds even more confusion to the definition of "construction" for similar reasons. Utilities need to know when they must seek a CCN. Indeed, the Commission is powerless to provide an advisory opinion on what one of its rules mean, which means that if there were doubt about a rule's application the only way to resolve it is to invoke the rule and obtain a ruling, precipitating CCN cases that could otherwise be avoided.

X. Improperly Taking Over Utility Management

33. Stepping back and looking at the proposed rule as a whole, it is clear that the tremendous breadth of the proposed rule goes much too far and if adopted, would reflect an improper encroachment on the utilities' management of their own companies. This is because Missouri courts have consistently held that the Commission is a body of limited jurisdiction, and

[61] 20.045(1)(A).
[62] *Webster's New World Collegiate Dictionary* (4th ed.). As noted earlier, terms in an administrative rule are to be given their plain and ordinary meaning as found in the dictionary, and every word in a rule is presumed to be meaningful, indicating that the term "includes" cannot simply be ignored. *Gott v. Director of Revenue,* 5 S.W.3d 155, 158 (Mo. banc 1999).

"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). The cases teach 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). *See also State ex rel. Harline v. Missouri Public Service Commission*, 343 S.W.2d 177, 181-82 (Mo. App. W.D. 1960) (The Commission is not clothed "with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare." (In the several years of informal and formal rulemaking related processes that have led to the current proceeding, there has been no showing; scarcely even an allegation, that utilities have failed to perform their legal duty to provide safe and adequate service at just and reasonable rates or have otherwise engaged in any kind of malfeasance regarding planning and executing capital projects of the type the extremely broad proposed CCN rule would, if adopted, regulate)).

34. Finally, the cases make clear that this means that the Commission is not to dictate to the utility how it obtains the resources (here, capital projects on its system) 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, 14 (Mo. 1930).

The Commission ensures that the "quality and price" are what they should be through its authority to set rates, which encompasses 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" (emphasis added).

XI. Fiscal Note Concerns

35. Section 536.205.1 states, in relevant part:

> Any state agency filing a notice of proposed rulemaking, as required by section 536.021, whereby the adoption, amendment, or rescission of the rule would require an expenditure of money by or a reduction in income for any person, firm, corporation, association, partnership, proprietorship or business entity of any kind or character which is estimated to cost more than five hundred dollars in the aggregate, shall at the time of filing the notice with the secretary of state file a fiscal note containing the following information and estimates of cost:
>
> (1) An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule, amendment or rescission of a rule;
>
> (2) A classification by types of the business entities in such manner as to give reasonable notice of the number and kind of businesses which would likely be affected;

Failure to comply with Section 536.205 renders any rule promulgated without the required fiscal note "void and of no force and effect." Section 536.205.2. The Missouri Court of Appeals has confirmed that the statute[63] means "exactly what it says." *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 392 (Mo. App. W.D. 1994).

[63] And a similar statute, Section 536.200, which deals with the impact of a proposed rule on public agencies and political subdivisons.

36. In order to comply with Section 536.205, the Court made clear that the agency must discharge its basic duty to "take reasonable steps to consider and identify all public and private entities significantly affected by any proposed rule, *and to investigate, consider and comprehensively estimate the full range of costs involved. . .*" (emphasis added). The Court went on to note that "[t]hese requirements are not trivial. They are necessary to ensure that any agency proposing a rule adequately considers the private and public entities it will affect." *Id.* at 390-91.

37. The Commission failed to discharge its duties under the statute because it did not "comprehensively estimate the full range of costs involved." In fact, it did not estimate them *at all*. Nor did it investigate those costs, or even consider what they might be.

38. That the Commission did not discharge the duty the Court indicated it has is evidenced by the Commission's response to a "Sunshine Law" request seeking in pertinent part: "[a]ll documents (including e-mails, spreadsheets, presentations, memoranda, etc., whether printed, written, or electronic) relating to any estimation of the cost of complying with proposed rule 4 CSR 240-20.045, a rulemaking for which is pending in File No. EX-2018-0189. Responsive documents would include documents relating to the estimation of the cost of compliance by state agencies or political subdivisions and by private entities." In response to that request, the Commission's Custodian of Records produced only a packet of documents sent to the Department of Economic Development. However, that packet simply contains the proposed rule (identical to that published in the *Missouri Register* except with a blank for the date comments are due), a Small Business Regulator Fairness Board Small Business Impact Statement,[64] a form of affidavit dealing with impact to public agencies, and what is apparently a

[64] *See* Section 536.300.

form required by the Governor's office labelled a "Rule Proposal Summary,"[65] none of which reflect that the Commission considered, investigated or estimated the full range of the costs the proposed rule would cause the utilities to which it would apply, as required by Section 536.205 and the Court's opinion in *Missouri Hospital Association*. The Custodian went on to in fact confirm that "[n]othing in that packet, aside from the affidavit, address the cost of compliance with the rule," and also stated that the "Commission has no other documents responsive to your request." A copy of the Sunshine Request and the Custodian's response is attached to these Comments as Exhibit B.

39. The foregoing facts make clear the Commission did not consider, investigate or estimate the aggregate cost of compliance by affected private entities. That failure would render adoption of the rule, as proposed, void.

40. Moreover, it is clear that had the Commission investigated the private entity compliance cost its estimate would have been far greater than $500, whether looked at for one year, two years, or for the foreseeable future, as the Court of Appeals made clear is required. As these Comments – for Ameren Missouri alone – indicate, under the proposed rule the Company would have had to have filed approximately 30 *additional* CCN applications over the past 10 years and would expect to need to file an *additional* 21 more over the next five years. Even if the proposed rule were read as narrowly as possible, including giving the exemptions to "construction" the broadest possible reading, the proposed rule would still apply to *at least* to the following circumstances not covered by the current rule (and not covered by any CCN rule or the CCN Statute itself for the past 100-plus years):

a. All new out-of-state generation whether constructed *or acquired*;

[65] It being clear that no investigation or estimation of costs was performed, the statement in the Governor Office's form to the effect that the costs have been quantified is incorrect (question 9).

b. All new or rebuilt (if significant increase in capacity) out-of-state electric transmission lines whether constructed *or acquired*;

c. All new or rebuilt (if significant increase in capacity) out-of-state substations (transmission only?) whether constructed *or acquired*;

d. All generation improvements or retrofits where emissions or discharges change;

e. All generation improvements or retrofits where rate base is increased by 10% (regardless of capacity/emissions/discharge changes);

f. All generation improvements or retrofits where a substantial capacity increase occurs;

g. All generation improvements or retrofits where the useful life is extended; and

H. All new or rebuilt in-state substations even if in the utility's service territory.

41. It is obvious that significantly more engineering, project management, legal, administrative, and other resources, all of which involve added costs, would be required to assemble and prepare the vast amount of information necessary to file even a single incremental CCN application required by the rule's new requirements, let alone the many additional applications the rule, as proposed, would at a bare minimum require. This includes, but is not limited to, significantly more legal resources to prepare, file, process, handle, and litigate each case (including for procedural conferences, discovery, required filings, hearings, etc.) and the need to procure witnesses to support applications, among other resources. It is also obvious that the *time* to complete many projects will be increased in order to accommodate the added time

needed to prepare, file, and process the application, and obtain a CCN, which will also add costs to projects, including additional financing costs. The mandatory competitive bidding provisions will require processes to evaluate distributed energy resources, energy efficiency, or renewable energy resources that is not required today, adding more cost the project. Similarly, if the proposed rule were adopted many projects must involve a competitive bidding process to evaluate purchased power or alternative energy suppliers and for all projects, a bidding process respecting engineering, design, procurement, construction management, and construction of the project. These added bidding requirements will also consume additional time and resources, all of which come at a cost.

XII. Mark-Up of Proposed Rule

42. Attached as Exhibit A is a mark-up of the proposed rule consistent with the foregoing Comments. It also includes brief commentary of the changes that should be made to the proposal for the reasons outlined in these Comments. That brief commentary is consistent with the above-comments.

XIII. Conclusion

43. For the reasons given in these Comments, the Commission should amend the CCN rule as reflected in Exhibit A hereto, but not otherwise.

Respectfully submitted,

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Attorneys for Ameren Missouri

Dated: June 14, 2018

VERIFICATION

CITY OF ST. LOUIS)
)
STATE OF MISSOURI)

I, Thomas M. Byrne, being first duly sworn and upon my oath, do hereby state that I am the Senior Director of Regulatory Affairs for Ameren Missouri, that I have knowledge of the facts outlined in the above-Comments of Ameren Missouri filed in File No. EX-2018-0189, and that the same are true and correct to the best of my knowledge, information, and belief.

Thomas M. Byrne

Subscribed and sworn to before me, a Notary Public in and for the city and state aforesaid, this 14th day of June, 2018.

Notary Public

GERI A. BEST
Notary Public - Notary Seal
State of Missouri
Commissioned for St. Louis County
My Commission Expires: February 15, 2022
Commission Number: 14839811

. Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240—Public Service Commission
Chapter 20 — Electric Utilities

PROPOSED RULE

4 CSR 240-20.045 Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

PURPOSE: This proposed rule outlines the requirements for applications to the commission, pursuant to section 393.170 RSMo, requesting that the commission grant a certificate of convenience and necessity to an electric utility for a service area, ~~or to acquire or~~ to construct in Missouri an electric generating plant, or to construct in Missouri outside an incumbent electrical corporation's certificated service territory ~~a substation,~~ an electric transmission line including a transmission substation~~,~~ or a gas transmission line that facilitates the operation of an electric generating plant.

(1) Definitions. As used in this rule, the following terms mean:

~~(A)~~ Acquire or acquisition means full or partial ownership by purchase or capital lease.

~~(B)~~(A) Asset, ~~includes~~ an electric generating plant, electric transmission line including a transmission substation~~substation~~ or gas transmission line that facilitates the operation of electric generating plant regardless ~~of whether the item(s) to be acquired/constructed is located inside the electric utility's certificated service area or is located outside the electric utility's certificated service area but will be used to serve Missouri customers and paid for by Missouri retail ratepayers~~.

(B)

~~3.~~ Construction means ~~includes:~~

~~1.~~ ~~C~~construction of new asset(s), which shall include project structures where an entity other than the electrical corporation owns the project during its physical construction up to and including its full or partial commissioning but the project is to be acquired (in whole or in part by purchase or capital lease) and subsequently owned and operated by the electrical corporation starting at or near the time of its completion;~~;~~

(C) "Non-incumbent electric provider" means a Federal Energy Regulatory Commission-regulated transmission company that does not serve Missouri retail customers.

~~2. Construction of a new electric transmission line or a rebuild of a transmission line that will result in a significant increase in the capacity of the transmission line, or a change in the route or easements;~~

~~3. Construction of a new substation or a rebuild of the substation that will result in a significant increase in the capacity and/or size of the substation;~~

~~4. Construction of a new gas transmission line that facilitates the operation of an electric generating plant or a rebuild of a gas transmission line that will result in a significant increase in the capacity of the gas transmission line that facilitates the operation of an electric generating plant, or a change in the route or easements of the gas transmission line; and~~

~~5. Improvement or retrofit of an electric generating plant that will result in:~~

~~1. A substantial increase in the capacity of an electric generating plant beyond the planned capacity of the plant at the time the Commission granted the prior certificate of convenience and necessity for the electric generating plant;~~

Comment [JL1]: Jurisdiction does not extend out-of-state

Comment [JL2]: No legal requirement to expand requirements, no need to do so, significant burden without benefit as problems simply have not existed.

Comment [JL3]: No jurisdiction – statute is limited to construction.

Comment [JL4]: Ameren Missouri believes the intention of the proposed rule was to address transmission substations which do not exist apart from the line to which they connect.

Comment [JL5]: Construction simply does not mean "rebuild, improve, retrofit," but utilities should not be able to effectively engage in construction and avoid CCN requirements.

2. A material change in the discharges, emissions, or other environmental byproducts 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;
3. An increase in the useful life of an existing electric generating plant; or,
4. A 10% increase in rate base.

~~6. Construction does not include:~~

~~1. Construction of a new electric transmission line or a new gas transmission line that facilitates the operation of electric generating plant if the line to be constructed is in the electric utility's Missouri certificated service area;~~

~~2. Periodic, routine or preventative maintenance or replacement of failed or near term projected failure of equipment or devices with the same or substantially similar items that are intended to restore the electric generating plant or substation to an operational state at or near a recently rated capacity level; or,~~

~~Transmission projects where the only relationship to Missouri ratepayers is through the regional transmission organization/independent system operator cost allocation process.~~

Comment [JL6]: Not needed when construction is confined to the meaning of the statute.

(2) In addition to the general requirements of 4 CSR 240-2.060(1), the following additional general requirements apply to all applications for a certificate of convenience and necessity, pursuant to Section 393.170 RSMo:

(A) The application shall include facts showing that granting the application is necessary or convenient for the public service.

~~(B) If an asset to be acquired or constructed is outside Missouri, the application shall include plans for allocating costs, other than regional transmission organization/independent system operator cost sharing, to the applicable jurisdiction.~~

~~(C)~~(B) If any of the items required under this rule are unavailable at the time the application is filed, the unavailable items may be filed prior to the granting of authority by the commission, or the commission may grant the certificate subject to the condition that the unavailable items be filed as and when available so long as any item needed to perform a specific portion of the construction is obtained and filed before that portion of the construction commences~~before authority under the certificate is exercised~~.

Comment [JL7]: There are almost always permits that are not and cannot be obtained until part of the construction has already commenced.

~~(D)~~(C) The commission may, by its order, impose upon the issuance of a certificate of convenience and necessity such condition or conditions as it may deem reasonable and necessary.

~~(E)~~(D) In determining whether to grant a Certificate of Convenience and Necessity, the commission may, by its order, make a determination on the prudence of the decision to ~~acquire or~~ construct an assets~~electric generating plant, a substation, an electric transmission line, or a gas transmission line that facilitates the operation of electric generating plant~~ subject to the commission's post-construction review of the project.

Comment [JL8]: Unnecessary to repeat list of assets given "asset" definition.

(3) If the application is for authorization to provide electric service to retail customers in a Missouri service area for the electric utility, the application shall also include:

(A) A list of those entities providing regulated or nonregulated retail electric service in all or any part of the service area proposed, including a map that identifies where each entity is providing retail electric service within the area proposed;

(B) If there are ten (10) or more residents or landowners, the name and address of no fewer than ten (10) persons residing in the proposed service area or of no fewer than ten (10) landowners, in the event there are no residences in the area, or, if there are fewer than ten (10) residents or landowners, the name and address of all residents and landowners;

(C) The legal description of the service area to be certificated;

(D) A plat of the proposed service area drawn to a scale of one-half inch (1/2") to the mile on maps comparable to county highway maps issued by the state's Department of Transportation or a plat drawn to a scale of two thousand feet (2,000') to the inch; and

(E) A feasibility study containing plans and specifications for the utility system and estimated cost of the construction of the utility system during the first three (3) years of construction; plans for financing; proposed rates and charges; and an estimate of the number of customers, revenues, and expenses during the first three (3) years of operations.

~~(4) If the application is for authorization to acquire assets, the application shall also include:~~

~~A description of the asset(s) to be acquired;~~

~~The value of the asset(s) to be acquired;~~

~~The purchase price and plans for financing the acquisition;~~

~~Plans and specifications for the utility system, including as-built drawings;~~

(~~4~~5)An electrical corporation shall file an application for construction of an asset, which ~~If the application is for authorization to construct assets, the application~~ shall include:

(A) A description of the proposed route or site of construction;

(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross;

(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~ once it is fully operational and used for service;

(D) The projected beginning of construction date and the anticipated fully operational and used for service date of each asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~ for which applicant is seeking the certificate of convenience and necessity;

(E) An indication of whether the construction project for which the certificate of convenience and necessity is being sought will include common electric generating plant~~, or common gas transmission plant that facilitates the operation of electric generating plant,~~ and if so, the nature of the common plant;

(F) Plans for financing the construction of the project~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

(G) For non-incumbent electric providers, an overview of plans for operating and maintaining the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

(H) For non-incumbent electric providers, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the asset~~electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant~~;

~~(I) Evidence that the electric utility utilized a non-discriminatory, fair, and reasonable process to evaluate whether distributed energy resources, energy efficiency, or renewable energy resources would provide a reasonable alternative to the construction proposed;~~

~~(J) Evidence that the electric utility utilized a non-discriminatory, fair, and reasonable competitive bidding process to evaluate whether purchased power capacity or suppliers of alternative energy would be a reasonable resource in lieu of the construction proposed; and~~

~~(K) Evidence that the electric utility utilized or will utilize a non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant.~~

Comment [JL9]: IRP process is where this belongs; Commission retains oversight when costs are considered for inclusion in rates.

(5~~6~~) If the application is for authorization to ~~acquire or~~ construct an electric transmission line, the application shall also include:

~~(A) A description of the proposed route or site of construction;~~

~~(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross;~~

~~(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of the electric transmission line once it is fully operational and used for service;~~

~~(D) The projected beginning of construction date and the anticipated fully operational and used for service date of the electric transmission line;~~

~~(E) An indication of whether the construction project for which the certificate of convenience and necessity is being sought will include a common electric transmission line(s);~~

~~(F) Plans for financing the construction of the electric transmission line;~~

~~(G) For non-incumbent electric providers, an overview of plans for operating and maintaining the electric transmission line;~~

~~(H) For non-incumbent electric providers, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the electric transmission line;~~

~~(I) Evidence that the electric utility utilized or will utilize a non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric transmission line; and~~

Comment [JL10]: Duplicative – already covered since an electric transmission line is an "asset."

~~(J)~~(A) An affidavit or other verified certification of compliance with the following notice requirements to landowners directly affected by electric transmission line routes or substation locations proposed by the application. The proof of compliance shall include a list of all directly affected landowners to whom notice was sent.

1. Applicant shall send~~provide~~ notice of its application to the owners of land, or their designee, as stated in the records of the county assessor's office, on a date not more than sixty (60) days prior to the date the notice is sent, who would be directly affected by the requested certificate, including the preferred route or location, as applicable, and any known alternative route or location of the proposed facilities. For purposes of this notice, land is directly affected if a permanent easement or other permanent property interest for the electric transmission line or transmission substation would be obtained over all or any portion of the land or if the land contains a habitable structure that would be within three hundred (300) feet of the centerline of an electric transmission line.

Comment [JL11]: Important clarification so that access easements (which at the CCN stage of the projects often can't be determined) don't trigger the notice requirements.

2. Any letter sent by applicant shall be on its representative's letterhead or on the letterhead of the utility, and it shall clearly set forth—
   A. The identity, address, and telephone number of the utility representative;
   B. The identity of the utility attempting to acquire the certificate;
   C. The general purpose of the proposed project;
   D. The type of facility to be constructed; and
   E. The contact information of the Public Service Commission and Office of the Public Counsel.
3. If notice of the application is required to be sent to twenty-five (25) or more persons in a county ~~would be entitled to receive notice of the application~~, applicant shall hold at least one (1) public meeting in that county. The meeting shall be held in a building open to the public and sufficient in size to accommodate the number of persons in the county entitled to receive notice of the application. Additionally:
   A. All persons to whom notice ~~entitled to notice~~ of the application is to be sent shall be afforded a reasonable amount of time to pose questions or to state their concerns;
   B. To the extent reasonably practicable, the public meeting shall be held at a time that allows affected landowners an opportunity to attend; and
   C. Notice of the public meeting shall be sent to any persons to whom ~~entitled to receive~~ notice of the application is to be sent.
4. If applicant, after filing proof of compliance, becomes aware of a person to whom ~~entitled to receive~~ notice of the application was to be sent but to whom applicant did not send such notice, applicant shall, within twenty (20) days, sent the required ~~provide~~ notice to that person by certified mail, return receipt requested, containing all the required information. Applicant shall also file a supplemental proof of compliance regarding the additional notice.
5. A person to whom notice is to be sent but who did not receive notice does not gain any Due Process or other rights by reason of such person's failure to receive the notice.

(6) If the application is for construction of an asset by means of a project structure where an entity other than the electrical corporation owns the project during its physical construction up to and including its full or partial commissioning but the project is to be acquired (in whole or in part by purchase or capital lease) and subsequently owned and operated by the electrical corporation starting at or near the time of its completion the application shall also include:

1. A description of the asset(s); and
2. 2. The terms and conditions for the construction and ultimate ownership of the asset(s) by the electrical corporation, including the purchase price.

(7) Provisions of this rule may be waived by the commission for good cause shown.

*AUTHORITY: section 386.250, RSMo 2000. * Original rule filed Aug. 16, 2002, effective April 30, 2003. *Original authority: 386.250, RSMo 1939, amended 1963, 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996; StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App. W.D. 2005); *State ex rel. Cass County v. Public Serv. Comm 'n*, 259 S.W.3d 544 (Mo.App. W.D. 2008); *State ex rel. Harline v. Public Serv. Comm 'n*, 343 S.W.2d 177 (Mo.App. K.C. 1960).

Comment [JL12]: All changes to these notice provisions are designed to make sure that a landowner that for some reason did not receive notice does not gain an argument that this somehow would impair the Commission's ability to grant a CCN. While the concept of sending notice is reasonable, it is not required by the CCN statute (similar to the concept that customers do not have a Due Process right in a given utility rate).

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LEGAL NURSE CONSULTANT
KAREN ASHRAFZADEH, RN

June 7, 2018

Custodian of Records
Data Center
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Via E-mail (Recordsrequest@psc.mo.gov)

Re: Open Records Request

To Whom It May Concern:

Pursuant to Chapter 610, RSMo., please provide within three business days of this request copies of the following public records (*see* Section 610.010(6) for the applicable definition of "public record"):

> All documents (including e-mails, spreadsheets, presentations, memoranda, etc., whether printed, written, or electronic) relating to any estimation of the cost of complying with proposed rule 4 CSR 240-20.045, a rulemaking for which is pending in File No. EX-2018-0189. Responsive documents would include documents relating to the estimation of the cost of compliance by state agencies or political subdivisions and by private entities. Without limiting the foregoing, responsive documents would include any information the Commission or its employees provided to the Department of Economic Development (DED) (or received from DED) relating to the cost of compliance with such rule.

We will pay, upon request, any fees authorized by Section 610.026, RSMo relating to the request reflected herein.

Should you have any questions regarding this request, please contact the undersigned at the telephone number listed in the letterhead above, or via e-mail, at the e-mail address shown below.

Sincerely,

/s/ James B. Lowery

James B. Lowery

EXHIBIT B

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://psc.mo.gov

Via e-mail: lowery@smithlewis.com

James B. Lowery
Smith Lewis, LLP
P.O. Box 918
Columbia, Missouri 65205-0918

Re: Sunshine Request of June 7, 2018

Dear Mr. Lowery:

On June 7, 2018, the Public Service Commission received your letter dated the same date, in which you make a request under Missouri's Sunshine Law for all documents relating to any estimation of costs of complying with proposed rule 4 CSR 240-20.045, a rulemaking pending in File No. EX-2018-0189. As the Commission's Secretary, I respond to all Sunshine Requests.

In response to your request, I have enclosed a copy of the packet of documents sent to Rob Dixon, Director of the Department of Economic Development on March 14, 2018 for the purpose of obtaining his signature on the Public Cost Affidavit. A copy of the signed Public Cost Affidavit returned to the Commission by Mr. Dixon is also enclosed. Nothing in that packet, aside from the affidavit, addresses the cost of compliance with the rule. The Commission has no other documents responsive to your request.

Having responded to your request, the Commission considers this matter to be closed. If you have any questions, you can reach me directly by email at morris.woodruff@psc.mo.gov. If you prefer, you can reach me by phone at 573-751-2849.

Sincerely,

Morris L. Woodruff
Secretary of the Commission

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://psc.mo.gov

March 14, 2018

Rob Dixon, Director
Department of Economic Development
301 W. High Street
P.O. Box 1157
Jefferson City, Missouri 65102

RE: 4 CSR 240-20.045 Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

Dear Mr. Dixon:

The Public Service Commission proposes rule 4 CSR 240-20.045, Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity. This rule outlines the requirements for applications to the commission, pursuant to Section 393.170 RSMo., requesting that the Commission grant a certificate of convenience and necessity or to acquire or construct an electric generating plant.

The proposed rule does not implicate the takings clause of the U.S. Constitution, because the proposed rule does not involve the taking of real property.

The Commission has performed the small business analysis required by Section 536.300, RSMo, and includes the small business impact statement with this filing. Proposed Rule 4 CSR 240-20.045 does not impose any requirement that "will cause direct and significant economic burden upon a small business, or that is directly related to the formation, operation, or expansion of a small business." The Commission certifies that is has determined that the proposed rule will not have an economic impact on small businesses.

Please find enclosed a copy of the Letter from the Governor's Office, the Proposed Rule, a Small Business Impact Statement, and lastly for your signature, a Public Entity Cost Affidavit. Please review and sign the Affidavit at your earliest convenience so that the Commission may proceed with publishing the proposed rule.

Please let me know if you have any questions concerning this proposed rule.

Sincerely,

Morris Woodruff
Chief Regulatory Law Judge
(573) 751-2849 (telephone)
(573) 526-6010 (facsimile)
Morris.woodruff@psc.mo.gov (e-mail)

Enclosure
MW/ck

ERIC R. GREITENS
GOVERNOR

GOVERNOR OF MISSOURI
JEFFERSON CITY
65102

P.O. BOX 720
(573) 751-3222

March 7, 2018

Daniel Hall
Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, Missouri 65102

Dear Chairman Hall:

This office has received your proposed rulemaking relating to filing requirements for electric utility applications for certificates of convenience and necessity, 4 CSR 240-3.105 (rescission) and 4 CSR 240-20.045 (proposed).

Executive Order 17-03 requires this office's approval before state agencies release proposed regulations for notice and comment, amend existing regulations, rescind regulations, or adopt new regulations. After our review, we approve the submission of this rule rescission and proposed rule to JCAR and the Secretary of State.

Sincerely,

Justin D. Smith
Deputy Counsel

Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240—Public Service Commission
Chapter 20 – Electric Utilities

PROPOSED RULE

4 CSR 240-20.045 Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

PURPOSE: This proposed rule outlines the requirements for applications to the commission, pursuant to section 393.170 RSMo, requesting that the commission grant a certificate of convenience and necessity to an electric utility for a service area or to acquire or to construct an electric generating plant, a substation, an electric transmission line, or a gas transmission line that facilitates the operation of an electric generating plant.

(1) Definitions. As used in this rule, the following terms mean:

(A) Acquire or acquisition means full or partial ownership by purchase or capital lease.

(B) Asset includes electric generating plant, substation or gas transmission line that facilitates the operation of electric generating plant regardless of whether the item(s) to be acquired/constructed is located inside the electric utility's certificated service area or is located outside the electric utility's certificated service area but will be used to serve Missouri customers and paid for by Missouri retail ratepayers.

(C) Construction includes:

1. Construction of new asset(s);
2. Construction of a new electric transmission line or a rebuild of a transmission line that will result in a significant increase in the capacity of the transmission line, or a change in the route or easements;
3. Construction of a new substation or a rebuild of the substation that will result in a significant increase in the capacity and/or size of the substation;
4. Construction of a new gas transmission line that facilitates the operation of an electric generating plant or a rebuild of a gas transmission line that will result in a significant increase in the capacity of the gas transmission line that facilitates the operation of an electric generating plant, or a change in the route or easements of the gas transmission line; and
5. Improvement or retrofit of an electric generating plant that will result in:
    A. A substantial increase in the capacity of an electric generating plant beyond the planned capacity of the plant at the time the Commission granted the prior certificate of convenience and necessity for the electric generating plant;
    B. 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;
    C. An increase in the useful life of an existing electric generating plant; or,
    D. A 10% increase in rate base.

6. Construction does not include:
    A. Construction of a new electric transmission line or a new gas transmission line that facilitates the operation of electric generating plant if the line to be constructed is in the electric utility's Missouri certificated service area;
    B. Periodic, routine or preventative maintenance or replacement of failed or near term projected failure of equipment or devices with the same or substantially similar items that are intended to restore the electric generating plant or substation to an operational state at or near a recently rated capacity level; or,
    C. Transmission projects where the only relationship to Missouri ratepayers is through the regional transmission organization/independent system operator cost allocation process.

(2) In addition to the general requirements of 4 CSR 240-2.060(1), the following additional general requirements apply to all applications for a certificate of convenience and necessity, pursuant to Section 393.170 RSMo:

(A) The application shall include facts showing that granting the application is necessary or convenient for the public service.

(B) If an asset to be acquired or constructed is outside Missouri, the application shall include plans for allocating costs, other than regional transmission organization/independent system operator cost sharing, to the applicable jurisdiction.

(C) If any of the items required under this rule are unavailable at the time the application is filed, the unavailable items may be filed prior to the granting of authority by the commission, or the commission may grant the certificate subject to the condition that the unavailable items be filed before authority under the certificate is exercised.

(D) The commission may, by its order, impose upon the issuance of a certificate of convenience and necessity such condition or conditions as it may deem reasonable and necessary.

(E) In determining whether to grant a Certificate of Convenience and Necessity, the commission may, by its order, make a determination on the prudence of the decision to acquire or construct an electric generating plant, a substation, an electric transmission line, or a gas transmission line that facilitates the operation of electric generating plant subject to the commission's post-construction review of the project.

(3) If the application is for authorization to provide electric service to retail customers in a service area for the electric utility, the application shall also include:

(A) A list of those entities providing regulated or nonregulated retail electric service in all or any part of the service area proposed, including a map that identifies where each entity is providing retail electric service within the area proposed;

(B) If there are ten (10) or more residents or landowners, the name and address of no fewer than ten (10) persons residing in the proposed service area or of no fewer than ten (10) landowners, in the event there are no residences in the area, or, if there are fewer than ten (10) residents or landowners, the name and address of all residents and landowners;

(C) The legal description of the service area to be certificated;
(D) A plat of the proposed service area drawn to a scale of one-half inch (1/2") to the mile on maps comparable to county highway maps issued by the state's Department of Transportation or a plat drawn to a scale of two thousand feet (2,000') to the inch; and
(E) A feasibility study containing plans and specifications for the utility system and estimated cost of the construction of the utility system during the first three (3) years of construction; plans for financing; proposed rates and charges; and an estimate of the number of customers, revenues, and expenses during the first three (3) years of operations.

(4) If the application is for authorization to acquire assets, the application shall also include:
(A) A description of the asset(s) to be acquired;
(B) The value of the asset(s) to be acquired;
(C) The purchase price and plans for financing the acquisition;
(D) Plans and specifications for the utility system, including as-built drawings;

(5) If the application is for authorization to construct assets, the application shall include:
(A) A description of the proposed route or site of construction;
(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross;
(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant once it is fully operational and used for service;
(D) The projected beginning of construction date and the anticipated fully operational and used for service date of each electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant for which applicant is seeking the certificate of convenience and necessity;
(E) An indication of whether the construction project for which the certificate of convenience and necessity is being sought will include common electric generating plant, or common gas transmission plant that facilitates the operation of electric generating plant, and if so, the nature of the common plant;
(F) Plans for financing the construction of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant;
(G) For non-incumbent electric providers, an overview of plans for operating and maintaining the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant;
(H) For non-incumbent electric providers, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant;
(I) Evidence that the electric utility utilized a non-discriminatory, fair, and reasonable process to evaluate whether distributed energy resources, energy efficiency, or renewable energy resources would provide a reasonable alternative to the construction proposed;

(J) Evidence that the electric utility utilized a non-discriminatory, fair, and reasonable competitive bidding process to evaluate whether purchased power capacity or suppliers of alternative energy would be a reasonable resource in lieu of the construction proposed; and
(K) Evidence that the electric utility utilized or will utilize a non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric generating plant, substation, or gas transmission line that facilitates the operation of electric generating plant.

(6) If the application is for authorization to acquire or construct an electric transmission line, the application shall also include:
(A) A description of the proposed route or site of construction;
(B) A list of all electric, gas, and telephone conduit, wires, cables, and lines of regulated and nonregulated utilities, railroad tracks, and each underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross;
(C) A description of the plans, specifications, and estimated costs for the complete scope of the construction project that also clearly identifies what will be the operational features of the electric transmission line once it is fully operational and used for service;
(D) The projected beginning of construction date and the anticipated fully operational and used for service date of the electric transmission line;
(E) An indication of whether the construction project for which the certificate of convenience and necessity is being sought will include a common electric transmission line(s);
(F) Plans for financing the construction of the electric transmission line;
(G) For non-incumbent electric providers, an overview of plans for operating and maintaining the electric transmission line;
(H) For non-incumbent electric providers, an overview of plans for restoration of safe and adequate service after significant, unplanned/forced outages of the electric transmission line;
(I) Evidence that the electric utility utilized or will utilize a non-discriminatory, fair, and reasonable competitive bidding process for entering into contracts for the design, engineering, procurement, construction management, and construction of the electric transmission line; and
(J) An affidavit or other verified certification of compliance with the following notice requirements to landowners directly affected by electric transmission line routes or substation locations proposed by the application. The proof of compliance shall include a list of all directly affected landowners to whom notice was sent.

1. Applicant shall provide notice of its application to the owners of land, or their designee, as stated in the records of the county assessor's office, on a date not more than sixty (60) days prior to the date the notice is sent, who would be directly affected by the requested certificate, including the preferred route or location, as applicable, and any known alternative route or location of the proposed facilities. For purposes of this notice, land is directly affected if a permanent easement or other permanent property interest would be obtained over all or any portion of the land or if the land contains a habitable structure that would be within three hundred (300) feet of the centerline of an electric transmission line.

2. Any letter sent by applicant shall be on its representative's letterhead or on the letterhead of the utility, and it shall clearly set forth–
    A. The identity, address, and telephone number of the utility representative;
    B. The identity of the utility attempting to acquire the certificate;
    C. The general purpose of the proposed project;
    D. The type of facility to be constructed; and
    E. The contact information of the Public Service Commission and Office of the Public Counsel.
3. If twenty-five (25) or more persons in a county would be entitled to receive notice of the application, applicant shall hold at least one (1) public meeting in that county. The meeting shall be held in a building open to the public and sufficient in size to accommodate the number of persons in the county entitled to receive notice of the application. Additionally:
    A. All persons entitled to notice of the application shall be afforded a reasonable amount of time to pose questions or to state their concerns;
    B. To the extent reasonably practicable, the public meeting shall be held at a time that allows affected landowners an opportunity to attend; and
    C. Notice of the public meeting shall be sent to any persons entitled to receive notice of the application.
4. If applicant, after filing proof of compliance, becomes aware of a person entitled to receive notice of the application to whom applicant did not send such notice, applicant shall, within twenty (20) days, provide notice to that person by certified mail, return receipt requested, containing all the required information. Applicant shall also file a supplemental proof of compliance regarding the additional notice.

(7) Provisions of this rule may be waived by the commission for good cause shown.

AUTHORITY: section 386.250, RSMo 2000. Original rule filed Aug. 16, 2002, effective April 30, 2003. *Original authority: 386.250, RSMo 1939, amended 1963, 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996*; *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App. W.D. 2005); *State ex rel. Cass County v. Public Serv. Comm'n*, 259 S.W.3d 544 (Mo.App. W.D. 2008); *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177 (Mo.App. K.C. 1960).

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars ($500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars ($500) in the aggregate.

NOTICE TO SUBMIT COMMENTS AND NOTICE OF PUBLIC HEARING: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Morris L. Woodruff, Secretary of the Commission, PO Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the commission's offices on or before x, and should include a reference to Commission Case No. EX-2015-0225. Comments may also be submitted via a filing using the commission's electronic filing and information system at

http://www.psc.mo.gov/efis.asp. A public hearing regarding this proposed amendment is scheduled for X, at 10:00 a.m., in Room 305 of the Governor Office Building, 200 Madison St., Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule, and may be asked to respond to commission questions. Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 or TDD Hotline 1-800-829-7541.

AFFIDAVIT

PUBLIC COST

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, Rob Dixon, Director of the Department of Economic Development, first being duly sworn, on my oath, state that it is my opinion that the cost of proposed rule, 4 CSR 240-20.045, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.

_____
Rob Dixon
Director
Department of Economic Development

Subscribed and sworn to before me this _____ day of _____, 20__, I am commissioned as a notary public within the County of _____, State of Missouri, and my commission expires on _____.

_____
Notary Public

Small Business Regulator Fairness Board
Small Business Impact Statement

Date: January 3, 2018

Rule Number: 4 CSR 240-20.045

Name of Agency Preparing Statement: Missouri Public Service Commission

Name of Person Preparing Statement: Natelle Dietrich

Phone Number: 573-751-7427 **Email: natelle.dietrich@psc.mo.gov**

Name of Person Approving Statement: Natelle Dietrich

Please describe the methods your agency considered or used to reduce the impact on small businesses *(examples: consolidation, simplification, differing compliance, differing reporting requirements, less stringent deadlines, performance rather than design standards, exemption, or any other mitigating technique).*

Clarify definitions and scope of rule and application process. Simplify existing Commission rules by combining most, if not all, electric-only rules into the electric utility chapter. Remove language that may be inconsistent with statutory requirements.

Please explain how your agency has involved small businesses in the development of the proposed rule.

Rulemaking was initiated in 2015. Several workshops were open to all interested stakeholders and the public. The Office of the Public Counsel participated in the workshops. The rulemaking was withdrawn in July 2016 and a new rulemaking process was initiated addressing issues raised in the previous rulemaking process.

Please list the probable monetary costs and benefits to your agency and any other agencies affected. Please include the estimated total amount your agency expects to collect from additionally imposed fees and how the moneys will be used.

None

Please describe small businesses that will be required to comply with the proposed rule and how they may be adversely affected.

None known.

Please list direct and indirect costs (in dollars amounts) associated with compliance.

None identified for small business.

Please list types of business that will be directly affected by, bear the cost of, or directly benefit from the proposed rule.

Electric utilities, entities requiring commission authority to construct electric generating plants, electric transmission lines or gas transmission lines to facilitate the operation of electric generating plants.

Does the proposed rule include provisions that are more stringent than those mandated by comparable or related federal, state, or county standards?
Yes___ No_X__

If yes, please explain the reason for imposing a more stringent standard.

For further guidance in the completion of this statement, please see §536.300, RSMo.

Rule Proposal Summary

Please submit the completed form and attachments to Justin Smith and Kristen Sanocki by hand delivery or mail to the Governor's Office (Capitol Room 216) or by fax (1-1495). In accordance with Executive Order 17-03, the Governor's Office must approve each rule twice during the rulemaking process: (1) before the proposed rule is filed with the Secretary of State for notice and comment; and (2) before the rule is adopted by the state agency and the order of rulemaking is filed with JCAR and the Secretary of State. Accordingly, this form also should be submitted twice. Upon approval, the Governor's Office will send an approval letter to the identified contact person. This letter should be included in the rulemaking packet submitted to the Secretary of State and/or JCAR.

Date: January 3, 2018

Department: Public Service Commission

Rule number: 4 CSR 240-3.105 and 4 CSR 240-20.045

Type of rule (new, amendment, rescission, emergency): Rescission and related new rule

Stage of process (proposed or final): Proposed

Contact person name and title: Morris Woodruff, Secretary/Chief Regulatory Law Judge

Contact phone number: 573-751-2849

1. Describe the proposed rule (if an emergency rule, include Section 536.025, RSMo justifications).

The proposed rescission outlines current requirements for electric utility applications requesting the Commission grant a Certificate of Convenience and Necessity (CCN) for a service area, electrical transmission lines, gas transmission lines or electrical production facilities. The proposed rule is for applications requesting the Commission grant a CCN for a service area or to acquire or construct certain electric assets, whether those assets are located inside the electric utility's certificated service area or located outside the electric utility's service area but used to serve Missouri customers and paid for by Missouri retail ratepayers.

2. What is the statutory authority for the proposed rule?

Sections 386.250 and 393.170 RSMo

3. Why should the proposed rule become a Missouri regulation?

The proposed rule clarifies definitions and the scope of the rule and the application process. The proposed rule simplifies existing Commission rules by rescinding 4 CSR 240-3.105 and promulgating 4 CSR 240-20.045; thus, combining most, if not all, electric-only rules into the

electric utility chapter. The proposed rule removes language that may be inconsistent with statutory requirements.

4. Why is the proposed rule needed now? Why has it not been promulgated before?

Rescinds existing rule (4 CSR 240-3.105) and replaces it with a new rule (4 CSR 240-20.045). Rulemaking was initiated in 2015. Several workshops were open to all interested stakeholders and the public. The rulemaking was withdrawn in July 2016 and a new rulemaking process was initiated addressing issues raised in the previous rulemaking process and as part of the general rule review pursuant to Executive Order 17-03.

5. Is the proposed rule needed as a result of, or in response to, any specific legislation or litigation?

No

6. Is the proposed rule based on any federal, state, or local regulations or ordinances? If yes, what are any key differences?

No

7. Is the proposed rule based on any standards, guidelines, or model rules of an agency of the United States or a nationally or state-recognized organization or association? If yes, what are any key differences?

No

8. How is the proposed rule essential to the health, safety, or welfare of Missouri residents?

The proposed rule outlines the requirements for receiving a CCN. The grant of a CCN provides the authorization for an electric utility to serve an area, or authority to acquire or construct assets that are located either in an electric utility's certificated area or located outside the electric utility's certificated area, but used to serve Missouri customers and paid for by Missouri retail ratepayers.

9. Have the proposed rule's estimated costs been quantified? What are they?

Less than $500 – clarifying current rule.

10. Have the proposed rule's estimated benefits been quantified? What are they?

No, but proposed rule clarifies existing rule.

11. What process and schedule are in place to measure the effectiveness of the proposed rule?

Review of acquisition/construction in future cases before the Commission for prudency/conformity with authorized CCN.

12. Do any less restrictive alternatives exist? Why are these alternatives less desirable than the proposed rule?

N/A

13. What is the sound, reasonably available scientific, technical, economic, or other relevant information upon which the proposed rule is based?

Section 393.170 RSMo states that no gas, electrical, water or sewer corporation shall begin construction of plant without first obtaining the permission and approval of the Commission. The Commission grants permission and approval after determining that such construction or acquisition is necessary or convenient for the public service.

14. Does the proposed rule unduly or adversely affect Missouri citizens or customers of the State, or the competitive environment in Missouri?

No

15. List the stakeholders engaged to review the proposed rule and the name and title of each stakeholder representative. What was each stakeholder representative's feedback on the proposed rule? Were there any stakeholders that were not engaged to review the proposed rule, and if not, why not?

Previous rulemaking process – Dogwood Energy, LLC; The Empire District Electric Company; Ameren Missouri; Kansas City Power & Light Company; The Office of the Public Counsel; GridLiance Heartland, LLC; Wind on the Wires; CleanLine Energy Partners. Feedback varied based on interest. Much of the feedback was addressed in the informal rulemaking process, but the formal rulemaking was withdrawn to further address feedback.

16. List the other state departments affected by the proposed rule and the name and title of each department representative engaged to review the proposed rule. What was each department representative's feedback?

The Office of the Public Counsel – Recommended a requirement for notice to landowners affected by the application for CCN.

17. (If proposed rule) Please identify each person or organization that you anticipate may oppose or be dissatisfied with the proposed rule. Why do you anticipate this opposition or dissatisfaction? What has been done to attempt to mitigate or eliminate this opposition or dissatisfaction?

Dogwood Energy, LLC; The Empire District Electric Company; Ameren Missouri; Kansas City Power & Light Company; GridLiance Heartland, LLC; Wind on the Wires; CleanLine Energy Partners may oppose or be dissatisfied with different parts of the propose rule. An attempt was made to address concerns raised in the previous rulemaking. Interested stakeholders will have an opportunity to express their concerns to the Commission through the rulemaking process through comments and a hearing.

18. (If proposed rule) Has this proposal been considered at a public hearing or meeting? If so, what comments were received, if any?

The current proposed rescission and proposed rule have not yet been considered at a public hearing or meeting.

19. (If final rule) Provide the summary of comments received during the notice and comment period (can be the same as the summary included in the order of rulemaking). If a public hearing was held, please describe how many people attended and what comments were made.

N/A

20. By what date do you need a response from the Governor's Office, and why that date?

Attachments:

1. Proposed rule text (changes to existing regulations visible in bold or redline)
2. Public Entity and Private Entity Fiscal Note
3. Small Business Impact Statement
4. (If final rule) Order of Rulemaking

AFFIDAVIT

PUBLIC COST

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, Rob Dixon, Director of the Department of Economic Development, first being duly sworn, on my oath, state that it is my opinion that the cost of proposed rule, 4 CSR 240-20.045, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.

Rob Dixon
Director
Department of Economic Development

Subscribed and sworn to before me this 19th day of March, 2018 I am commissioned as a notary public within the County of Moniteau, State of Missouri, and my commission expires on Dec. 13, 2019

DAWN ELLEN OVERBEY
My Commission Expires
December 13, 2019
Moniteau County
Commission #15456865

Notary Public