BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of South Central MCN LLC for Approval of Transfer of Assets and a Certificate of Convenience and Necessity	))))	File No. EA-2016-0036

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL DISPOSITION

Applicant, South Central MCN LLC (SCMCN), submits this Reply in support of its Motion for Partial Disposition (Motion). SCMCN agrees with and adopts the discussion and conclusion reached by the Staff of the Missouri Public Service Commission (Staff) in Staff's Response to South Central MCN LLC Motion for Partial Disposition (Staff Response) that Section 393.190 RSMo. does not apply to either the City of Nixa (City) or to the transaction (Transaction) that is the subject of SCMCN's application for a certificate of convenience and necessity (Application). SCMCN also agrees with the conclusion reached by the City Utilities of Springfield, Missouri (CU) in its Response (CU Response) that the Commission lacks jurisdiction over the City, the transferor in this Transaction. (CU Resp. at 3.) In spite of its correct conclusion that the Commission lacks jurisdiction over the acts of the City, however, CU still asserts that the Commission has jurisdiction over the Transaction. This is a vast and unprecedented expansion of the statute. To make this argument, CU has to ignore the plain text and grammar of the statute, and CU presents no support for the argument aside from a flawed analogy to Section 203 of the Federal Power Act. CU's strained attempt to bootstrap jurisdiction over the City's decision to sell its transmission assets to SCMCN in the Transaction should be rejected.

I. ARGUMENT

A. The Commission's Lack of Jurisdiction over the City, as the Seller, Deprives the Commission of Jurisdiction under Section 393.190 RSMo. Over the Transaction.

All parties in this proceeding – Staff, SCMCN and CU – agree that the Commission does not have jurisdiction over the City of Nixa. (*See* Staff Resp. at 8; CU Resp. at 3.) Although Staff and SCMCN draw the logical conclusion that since the Commission lacks jurisdiction over the City, as transferor, Section 393.190 RSMo. therefore does not apply to the Transaction, CU asserts that Section 393.190 RSMo. nevertheless does apply. CU's interpretation of Section 393.190 RSMo. is contrary to the plain language of the statute and violates basic rules of statutory construction.

Section 393.190.1 RSMo. requires a Commission order for sales or transfers of assets owned by "electrical corporations" over which the Commission has jurisdiction; that Section provides that:

> No gas corporation, ***electrical corporation***, water corporation or sewer corporation shall hereafter ***sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber*** the whole or any part of ***its franchise, works or system***, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, ***merge or consolidate such works or system***, or franchises, or any part thereof, ***with any other corporation, person or public utility***, without having first secured from the commission an order authorizing it so to do.

Section 393.190.1 RSMo. (emphasis added). By its express terms, Section 393.190.1 RSMo. only applies when an "electrical corporation" takes certain actions; those actions are taken with respect to "its franchise, works or system"; and with respect to a merger or consolidation, the merger or consolidation with "with any other corporation, person or public utility."

As all parties agree, the City does not as a municipality and political subdivision of the State of Missouri meet the definition of an "electrical corporation" for purposes of Section 393.190 RSMo. The Commission lacks jurisdiction over the Transaction because the Commission lacks jurisdiction over the City, and that should end the inquiry.

CU attempts to shift the focus from the City, as transferor, to SCMCN, as transferee, but this is contrary to the plain meaning of Section 393.190 RSMo. When interpreting statutes, the goal is to determine the intent of the legislature from the plain language of the statute, which "should be construed according to everyday rules of grammar and common usage." *MFA Petroleum Co. v. Dir. of Revenue*, 279 S.W.3d 177, 178 (Mo. banc 2009); *Matter of Maxey's Estate*, 585 S.W.2d 326, 327-28 (Mo. Ct. App. 1979). Here, applying basic grammatical principles to the language of Section 393.190.1 RSMo. conclusively demonstrates that the provision applies only to actions taken by the ***transferor***. The relevant subject of the sentence is "electrical corporation"; the verbs are "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber . . . nor by any means, direct or indirect, merge or consolidate"; and the direct object is "[the subject's] franchise, works or system." The subject therefore is necessarily the owner of the franchise, works or system that is the subject of the transaction. Because the City is the "subject" of the provision, and because the Commission lacks jurisdiction over the City, Section 393.190.1 RSMo. cannot apply to the Transaction. The fact that the ***transferee*** is an "electrical corporation" does not give separate authority to the Commission over the sale. CU has not identified a single Missouri case or Commission decision that supports such broad authority, and SCMCN is not aware of any such precedent.

In addition, CU's attempt to characterize the Transaction as a "merger" or "consolidation" is contrary to the ordinary meanings of those terms. Ordinary meanings for words are typically derived from the dictionary when not defined in a statute. *See Collins v. Dep't Of Soc. Servs., Family Support Div.*, 141 S.W.3d 501, 505 (Mo. Ct. App. 2004); *Hoffman v. Van Pak Corp.*, 16 S.W.3d 684, 688 (Mo. Ct. App. 2000). Merriam-Webster defines "merge" as "to cause (two or more things, such as two companies) to come together and become one thing: to join or unite (one thing) *with* another," and defines "consolidate" as "to join or combine together into one thing." CU's argument overlooks that Section 393.190 RSMo. prohibits an electrical corporation from merging or consolidation its franchise, works or system "with any other corporation, person or public utility" — it does not refer to merger or consolidation "with any other franchise,

works or system," or to merger or consolidation "with those of any other corporation, person or public utility." SCMCN is acquiring discrete physical facilities and is not merging or consolidating with the City.

Finally, adopting CU's argument would essentially allow the second half of Section 393.190.1 RSMo. to "swallow up" the first half. In other words, adopting CU's interpretation would mean that *every* transaction involving a transfer of assets would be viewed as a "merger or consolidation," which begs the question of why the preceding language relating to a sale or lease or transfer of assets is necessary.[1]

B. CU's Reliance on Section 203 of the Federal Power Act is Flawed.

CU also argues that its interpretation of Section 393.190 RSMo. "harmonizes" that provision with Section 203 of the Federal Power Act (CU Resp. at 6), but this argument fails for at least three reasons.

First, the meaning of Section 393.190 RSMo. must be ascertained "by looking at it in a sense by the four corners." *See State ex rel. Harvey v. Wright*, 251 Mo. 325, 158 S.W. 823, 828 (Mo. banc 1913); *see also Cano v. Travelers Ins. Co*., 656 S.W.2d 266, 271 (Mo. banc 1983) ("There should be some hesitation in implying terms which the legislature did not specify."). Given that the plain meaning of the statute is clear, Missouri courts are bound by that language and cannot resort to statutory interpretation. *See Simpson v. Simpson*, 352 S.W.3d 362, 365 (Mo. banc 2011); *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011). Implying that the legislature intended Section 393.190 RSMo. to apply in the same circumstances as Section 203 is contrary to these clear rules of law.

Second, there is no policy basis for CU's proposed reading of Section 393.190 RSMo. because the Transaction for which SCMCN seeks approval in its Application does not implicate the purpose underlying Section 393.190 RSMo. The Commission has recognized that the purpose of Section 393.190 RSMo. is "to ensure the continuation of adequate service to the public served by the utility." *Matter of Kansas City Power & Light Co.*, Case No. EM-86-121, 1986 WL 293043, at *5 (Mo. P.S.C. June 2, 1986). The

[1] CU's interpretation of Section 393.190.1 RSMo. would likewise effectively swallow up many of the requirements under Section 393.170 RSMo. to the extent that a certificate is required for a company entering the Missouri electricity market to acquire existing assets.

transferring "utility" in this case is the City. As discussed previously, the Commission lacks jurisdiction over the City, so the Transaction does not implicate Section 393.190 RSMo.'s purpose "to ensure the continuation of adequate service to the public served by the [City]." The City has already decided that a sale of the Assets to SCMCN is in the best interest of the City and its retail customers, and the Commission should not seek to expand its jurisdiction over the City by second-guessing the City's decision. In any event, Commission oversight of the Transaction is unnecessary because the continued adequacy of utility service provided by SCMCN over the approximately 10 miles of transferred transmission lines and the rates, terms, and conditions of that service will be regulated by the Federal Energy Regulatory Commission (FERC).

Third, although CU asserts that the language of Section 393.190 RSMo. is "substantively identical" to the language of Section 203(a) of the Federal Power Act, CU is mistaken again.[2] Unlike Section 393.190 RSMo., which focuses solely on the transferor, Section 203(a) of the Federal Power Act states that a public utility may not "sell, lease or dispose" or "merge or consolidate" assets without FERC approval, but it also states, in the same provision, that a public utility may not "purchase, lease or otherwise acquire" assets. 16 U.S.C. § 824b(a)(1). In addition, as noted above, Section 393.190 RSMo. requires authorization for a merger or consolidation "with any other corporation, person or public utility," while

[2] It is perhaps telling that although CU asserts that Section 203(a) is "substantively identical" to Section 393.190 RSMo., CU failed to include the text in its Response. Section 203(a) reads as follows:

> No public utility shall, without first having secured an order of the Commission authorizing it to do so—
> (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;
> (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;
> (C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or
> (D) purchase, lease, or otherwise acquire an existing generation facility—
> (i) that has a value in excess of $10,000,000; and
> (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

16 U.S.C. § 824b(a)(1).

Section 203(a) requires authorization for a merger or consolidation of facilities "with ***those*** of any other person." *See* 16 U.S.C. § 824(b)(A)(1)(B) (emphasis added). Because Section 203(a) prohibits certain actions by both transferors and transferees and discusses mergers and consolidations in different terms, it is not "substantively identical" to Section 393.190 RSMo.

C. Granting SCMCN's Motion Will Promote Efficiency and Conserve Resources.

CU's argument that a finding by the Commission will not promote efficiency because the "in the public interest" standard under Section 393.170 RSMo. and the "not detrimental to the public interest" standard under Section 393.190.1 RSMo. are "virtually identical" (CU Response at 7-8) overlooks the different standards the Commission must satisfy for each. While the standard to be applied for purposes of Section 393.170 RSMo. is limited to a finding with respect to the "public interest," the standard generally applied for purposes of granting a certificate of public convenience and necessity pursuant to Section 393.190 RSMo. requires the Commission to find that the service promotes the public interest ***and*** that there is a need for the service, that the applicant is qualified to provide the proposed service, that the applicant has the financial ability to provide the service, and that the applicant's proposal is economically feasible. *In re Tartan Energy*, 1994 WL 762882 (Mo. P.S.C. Sept. 16, 1994).

Generally speaking, if the first four *Tartan* factors are satisfied, an application for a certificate of public convenience and necessity will promote the public interest. *See Matter of Grain Belt Express Clean Line LLC*, Case No. EA-2014-0207, 2015 WL 4124748 (Mo. P.S.C. July 1, 2015) ("*Grain Belt*") (citing *In re Tartan Energy*, 1994 WL 762882 (Mo. P.S.C. Sept. 16, 1994). Independent consideration of the "public interest" factor therefore may not be required for purposes of the *Tartan* factors if the Commission determines that the first four factors are satisfied by SCMCN. Moreover, the Commission has substantial discretion in determining whether an application satisfies the necessary and convenient standard, and is not rigidly bound by the *Tartan* factors. *See Grain Belt*, 2015 WL 4124748 at 8 ("It is important to note that the [Tartan] factors have been developed and implemented by the Commission itself, not the legislature or

the courts, so the Commission is not bound to strictly follow past decisions where it is reasonable to deviate from those standards."). Even if *Grain Belt* cannot be read to establish that independent consideration of the "public interest" factor is necessary when the first four factors are satisfied, the Commission could determine that it is reasonable to deviate from consideration of the "public interest" factor where, as here, any impact on the public interest would be a function of rates and the applicant is not rate-regulated by the Commission.

II. CONCLUSION

The transferor of the transmission assets in question, the City of Nixa, is a municipality over which the Commission has only limited jurisdiction. As all parties in this proceeding agree, the City is not an "electrical corporation" – the type of selling entity to which Section 393.190 RSMo. applies. As a result, the Commission lacks jurisdiction over the proposed sale of the City's transmission assets to SCMCN. Accordingly, SCMCN respectfully requests that the Commission grant SCMCN's Motion and declare that the Commission lacks jurisdiction under Section 393.190 RSMo. over the Transaction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon all parties of record by forwarding the same by electronic mail or U.S. Mail, postage prepaid, this 22ndth day of January, 2016, to the following:

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