BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

SUPPLEMENTAL COMMENTS OF THE EMPIRE DISTRICT ELECTRIC COMPANY

I. INTRODUCTION

The Empire District Electric Company ("Empire") submits the following supplemental comments in response to portions of comments filed by the Missouri Public Service Commission Staff ("Staff"), Office of Public Counsel ("OPC"), Dogwood Energy, LLC ("Dogwood") and Wind on the Wires ("WOW"). Amendments not included in the rule published by the Commission have been offered by several of the responding entities. These deserve to be addressed, particularly by utilities which may be subject to the requirements of the amended rule. The fact that Empire addresses particular features of the Comments of these parties should not be viewed as acquiescence in those matters not specifically addressed.

II. RESPONSE TO COMMENTS FILED BY STAFF

Staff states at page 1 its "general" support for the proposed amendments to Commission rule 4 CSR 240-3.105. Those comments correctly note that the moving force behind the proposed revisions of the Commission's electric CCN rule are the ***Aquila I*** and ***Aquila II*** opinions handed down by the Western District Court of Appeals and addressed in more detail in Empire's initial comments.[1] In doing so, however, Staff reads a great deal more into these two appellate court opinions than can be justified to support a sweeping expansion of electric utility CCN filing requirements and other features of a CCN application. Moreover, no mention is

[1] EFIS Document No. 14.

made by Staff in its comments of the Missouri Supreme Court's seminal opinion in the ***Sikeston*** case,[2] which is the controlling case law on this topic.

Staff's Legal Analysis

The starting point for Staff's legal analysis is the ***Aquila I*** and ***Aquila II*** opinions of the Western District Court of Appeals. Staff observes that ***Aquila I*** stands for the proposition that, going forward, an electric utility must "seek Commission approval each time they begin to construct a power plant." 180 S.W.3d 37-38. (Emphasis added) Staff informs the Commission, correctly, that no electric utility has ever filed an application for an environmental retrofit or upgrade or rebuild or refurbishment of an existing power plant. Staff comments, p. 5.

Despite the fact that ***Aquila I*** and ***Aquila II*** address only the construction of a new power plant and that the two opinions are limited to the circumstance of an utility "begin[ning] to construct a power plant",[3] Staff nevertheless offers its conclusory and unjustified interpretation that there is "a level of additional construction" that is captured by ***Aquila I***.[4] Presumably, this includes rebuilds, renovations, improvements, retrofits, and capacity enhancements of existing power plants although Staff does not elaborate on what it means by the phrase "a level."[5] This vague reference provides no meaningful guidance to the industry. Moreover, it is squarely at odds with the principles enunciated by the Missouri Supreme Court in the ***Sikeston*** case.[6] Staff

[2] Empire's initial comments include an extensive discussion of this case.
[3] Staff concedes this point at page 4 of its comments.
[4] Staff comments, p. 4.
[5] If §393.170 RSMo., applies to rebuilds, renovations, retrofits, etc., of existing power production facilities, as Staff now implicitly contends, this requirement has been on the books since 1913 when the PSC Law was first enacted. Yet Staff offers no explanation for why it has taken over one hundred years to suggest to the Commission that all of the activities it notes on page 5 took place absent obtaining CCNs.
[6] Empire does not believe ***Aquila I and II*** conflict with the holdings in ***Sikeston***, but to the extent of a conflict, ***Sikeston*** controls because it is the pronouncement of a superior tribunal.

provides no compelling rationale for an expansion of the CCN rule to cover anything other than initial builds of power plants.

Competitive Bidding

Staff offers an internally inconsistent argument concerning subsection (1)(B)6 of the proposed rule. Staff starts with the proposition (with which Empire agrees) that "an application for a CCN is not intended to duplicate or replace Chapter 22 Electric Resource Planning." Staff comments, p. 8. Staff nevertheless goes on to state that "it is reasonable, as part of a CCN case, for the Commission . . . to review" an electric utility's resource planning decisions. These two statements appear to be working at crossed purposes. In any event, Staff offers no rationale for how §393.170 RSMo., expressly or implied authorizes an examination of the resource planning process in order to secure a CCN. As noted in Empire's initial comments, the statute is intended to give the Commission authority to regulate economically inefficient competition with other electric distribution utilities, nothing more.

III. RESPONSE TO COMMENTS OF OPC

Public Counsel's primary concern as stated in its comments is the adequacy of public notice about CCN proceedings. In the past, it has been the Commission's duty to notify the public. Over the years, it has directed Staff to arrange for notice by publication or otherwise and this process has worked very well. OPC has not identified any actual problem with the process. Affected landowners in the ***ATXI*** case to which OPC refers were actively engaged in Ameren Missouri's CCN proceeding. This does not evidence a due process deficiency. To the contrary, it shows that the current process works well. If nothing is broke, nothing needs fixing.

IV. RESPONSE TO COMMENTS OF WOW

WOW addresses competitive bidding as a means to ensure the use by electric utilities of least-cost providers of power. WOW Comments, pp. 6-9. It does not, however, address the fact that the Commission already employs a comprehensive IRP process to address a utility's preferred resource plan. Nor does WOW give any consideration to the fact that a decision by the utility to add capacity is a matter of cost prudence that can be addressed in the subsequent rate case.

Additionally, WOW's proposal that a third party "manage and administer" the RFP process for the utility is facially unlawful and unconstitutional. An electric utility regulated by the Commission is owned by the company's shareholders and is run by a board of directors elected by those shareholders. The corporation has a property right in all facilities owned by it and all power supply contracts entered into by it. It is entitled to run its business as it sees fit so long as it provides safe and reliable electric service to the public.[7] Imposing an outside "manager" to oversee power supply decisions is a direct usurpation of corporate authority and is clear error. None of the language proposed by WOW should be included in the rule.

V. RESPONSE TO COMMENTS OF DOGWOOD

Dogwood's interest in this proceeding is its ownership of a 650 MW combined-cycle, power generating facility located in Pleasant Hill, Missouri. Dogwood comments, p. 5. Dogwood seeks to enhance the value of its asset by manipulating the regulatory process to give it an advantage in negotiations with Missouri's regulated electric utilities. Dogwood's interest is not affordability for ratepayers or the general public interest. Rather, its interest is increasing the profitability of its business asset. Its comments should be understood in this light.

[7] *See, State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930).

Dogwood's claim at page 4 that "necessity, cost, location and other relevant considerations" is only correct as to the notations of "necessity" and "location" as stated by the Missouri Supreme Court in its opinion in the ***Sikeston*** case. The CCN application process is not a rate case subject to an *a priori*, open-ended, all relevant factors standard. The statutory standard is necessity or convenience. *See*, §393.170.3 RSMo.

Dogwood alleges at page 6 that Empire's conversion of its Riverton Unit 12 to combined-cycle operation "evaded any pre-approval process." Empire categorically rejects the suggestion that this project was required to be certificated under the language of §393.170 RSMo. This was a project involving an existing power plant, located in the State of Kansas. Empire's actions in all respects were in full compliance with Missouri law.

Dogwood's stated "general support" of the rule as proposed suffers from many of the same deficiencies as noted above in Empire's initial comments. Specifically, the definition of the term "construction" to include anything other than the initial build of a power plant is at odds with the ***Sikeston*** case and is not supported by the facts of, or the opinions in, either ***Aquila I*** or ***Aquila II***. Dogwood's support for a nearly boundless interpretation of the phrase "begin construction" appearing in §393.170.1 RSMo., is unsupported by statutory purpose or policy, case law or past Commission practice. If it is thought that the CCN process should include upgrades, retrofits or acquisitions, those are topics that need to be addressed by the Missouri General Assembly; not by the Commission in a rulemaking.

Dogwood correctly notes at page 9 that the Commission has in place an IRP rule in Missouri [4 CSR 240-22.010]. That rule, however, does not "require[] competitive bidding practices" as advocated by Dogwood and such a requirement should not be introduced in the context of a CCN application. The cost of generation to meet demand is a topic to be taken up in

a rate case. An application filed pursuant to §393.170 RSMo., is not, and should not become, a rate proceeding.

Dogwood's contention that the CCN process should apply also to power plants constructed in states other than the State of Missouri[8] is dangerously misguided. The Commission has no jurisdiction over the construction of facilities located in states other than the State of Missouri. Specifically, §386.250 RSMo., ("Jurisdiction of the Commission") states as follows:

> The jurisdiction, supervision, powers and duties of the public service commission herein created and established, shall extend under this chapter:
>
> (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same; (emphasis added).

This is compelling proof that the Commission's authority concerning the manufacture of electric power ends at the state line.

That the Commission's power authorize the construction of a power plant ends at its borders is an inherent constitutional limitation that has been recognized by the United States Supreme Court.

> It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound.

[8] Dogwood comments, pp. 9-14.

State Farm Mutual Auto Insurance Company v. Campbell, 538 U.S. 408, 421, 123 S.Ct. 1513, 155 L.Ed. 585 (2003); quoting *Huntington v. Attrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 36 L.Ed. 1123 (1892). *See also, Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 821-822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Amplifying on this notion of constitutional constraints, the PSC Law contains language stating that it does not apply to matters of interstate commerce. *See*, §386.030 RSMo.

There is additional support for this notion in Missouri case law. The Missouri Supreme Court in the ***Sikeston*** case observed that the purpose of the enactment was to prevent overcrowding in any city or area. As such, "the Commission was given the authority to pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter a new territory." ***Sikeston*** at 110. (Emphasis added) More recently, ***Aquila I*** referred to the regulation of utilities as "an important statewide government function." 180 S.W.3d at 30. (Emphasis added)

Finally, the Commission's historical practice is strongly supportive of the conclusion that a CCN from the Commission is not required for a ratebased power station constructed in another state. Empire is not aware of any circumstance when the Commission asserted jurisdiction over an electric power plant constructed in a state other than Missouri even though there are a number of power stations located in other states which provide native load and are included in Missouri rate base. Ameren Missouri has power plants located in Illinois and Iowa. Empire has a power plant in Kansas and partial ownership of one in Arkansas. The Kansas City Power and Light Companies have three (3) power stations in the State of Kansas and one in Mississippi. These facts are strongly indicative of the fact that the Commission has long understood that its plant

certification jurisdiction only applies to construction of new power plants located in the State of Missouri.

Respectfully submitted,

Brydon, Swearengen & England, P.C.

By: /s/ Paul A. Boudreau
Paul A. Boudreau - #33155
Dean L. Cooper - #36592
312 E. Capital Ave.
P.O. Box 456
Jefferson City, MO 65102
Phone: (573) 635-7166
Fax: (573) 636-6450
Email: paulb@brydonlaw.com

ATTORNEYS FOR THE
EMPIRE DISTRICT ELECTRIC
COMPANY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent via U.S. Mail, postage prepaid, hand-delivery, electronic filing system, or electronic mail this 11th day of May, 2016, to the following:

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Office of Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

/s/ Paul A. Boudreau
Paul A. Boudreau