

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Ameren Transmission)
Company of Illinois for Other Relief or, in the Alternative,)
a Certificate of Public Convenience and Necessity)
Authorizing it to Construct, Install, Own, Operate,) File No. EA-2015-0145
Maintain and Otherwise Control and Manage a)
345,000-volt Electric Transmission Line in Marion)
County, Missouri, and an Associated Switching Station)
Near Palmyra, Missouri.)

APPLICATION FOR REHEARING

COMES NOW Ameren Transmission Company of Illinois (“ATXI”), by and through its counsel, and pursuant to § 386.500.1, RSMo,¹ and 4 CSR 240-2.160, respectfully applies for rehearing of the Commission’s Revised Order Granting Certificate of Convenience and Necessity in the above-captioned proceeding which was issued July 22, 2015 (“Revised Order”). While ATXI acknowledges that the Commission has now twice stated its belief that it has jurisdiction over ATXI and that the Commission is unlikely to change its view, ATXI is filing this Application pursuant to statute to preserve issues for appeal. For its Application for Rehearing, ATXI states as follows:

1. Commission decisions must be lawful (i.e., the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n*, 103 S.W.3d 753, 759 (Mo. banc 2003).

2. The question raised by ATXI’s Application for a Certificate of Convenience and Necessity (“CCN”) for the Illinois Rivers Transmission Project (“Project”) was whether ATXI was an “electrical corporation” and “public utility” within the meaning of the PSC Law² and,

¹ Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

² The PSC Law is codified as Chapter 386 and, as applicable to electrical corporations and public utilities subject to the Commission’s jurisdiction, as Chapter 393, RSMo.

therefore, required to obtain approval of the Commission before it could begin construction of the Project under section 393.170.

3. The Commission's decision not to dismiss ATXI's application on the grounds that the Commission did not have jurisdiction over ATXI because ATXI was not a "public utility" under Missouri law constitutes error under the above-stated standard of review.

4. In its Revised Order, this Commission explained that its jurisdiction over ATXI was based upon the supervisory authority over "electrical corporations" transmitting electricity delegated to the Commission in section 393.140.1. *Revised Order* at 3. The Revised Order suggests that ATXI's status as a public utility subject to the Commission jurisdiction is simply a matter of applying the statutory definition of "electric plant" to ATXI's transmission line project, and reasoning backwards to then make ATXI an "electric corporation" because it owns "electric plant," which then subjects it to the Commission's supervisory powers as set out in section 393.140.1. This backwards analysis ignores the statutory scheme found in Missouri's PSC Law.

5. Foundational to the fact that the Commission does not have jurisdiction over ATXI is the basic principle of law that the Commission's jurisdiction is limited by statute. *State ex rel. Cass County, Mo. v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 547-48 (Mo. App. W.D. 2008) (holding that even where statute authorized the Commission to grant CCNs for construction of electric plants, it did not authorize it to do so *after* electric plant had been constructed); *see also Public Serv. Comm'n v. ONEOK, Inc.*, 318 S.W.3d 134, 137 (Mo. App. W.D. 2009) (holding that absence of statute authorizing the Commission to receive by assignment causes of action of local gas distribution companies and to pursue those private actions for damages precluded it from doing so). This principle regarding the limits of the Commission's jurisdiction is well-settled. *See, e.g., State ex rel. Kansas City v. Pub. Serv. Comm'n*, 257 S.W. 462, 462-63 (Mo.

1923); *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 181 (Mo. App. W.D. 1960); *State ex rel. Pub. Serv. Comm'n v. Bonacker*, 906 S.W.2d 896, 898 (Mo. App. S.D. 1995). This is so even though the Commission's powers are an extension of the state's sovereignty. *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). Accordingly, the Commission's jurisdiction is dictated by statute and not policy, and any authority for it to act must be exercised within the limits of its statutory authorization.

6. ATXI is not subject to the limited jurisdiction of the Commission. The Commission's jurisdiction is limited by statute to the *intrastate* operations of public utilities and does not extend to utilities engaged only in interstate commerce. PSC Law is explicit on this point.

7. Section 386.250(1) provides, in part: "The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter . . . [t]o the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, *within the state* . . ." (emphasis added). Even more to the point, section 386.030 provides:

Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

As the Missouri Supreme Court recently noted, enactment of section 386.030 by the Missouri legislature placed limits on the powers granted to the Commission "as to matters affecting interstate commerce." *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 498 (Mo. 2012). The clarity provided by section 386.250 is this: in order to be subject to

Commission jurisdiction, the utility must manufacture, sell or distribute electricity for light, heat and power within Missouri. ATXI does not.

8. As has already been demonstrated, nothing in Missouri’s PSC Law vests the Commission with jurisdiction over companies that are engaged only in interstate commerce through the transmission of electricity via interstate transmission facilities that would require the interstate transmission company to approach the Commission to request a CCN. Moreover, it is the FERC—and not the Commission—that has jurisdiction over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.

9. That it is the FERC that has jurisdiction over these interstate transmission facilities is made explicit by Section 201 of the FPA (16 U.S.C. § 824(b)) (“The provisions of this Part shall apply to the transmission of electricity in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . .”). And there is no question but that the lines ATXI will build and own are interstate transmission lines insofar as the United States Supreme Court has confirmed that this statute means what it says: “transmissions on the interconnected national grids constitute transmissions in interstate commerce.” *New York v. Federal Regulatory Energy Comm’n*, 535 U.S.1, 16 (2002). Not only does FERC have exclusive jurisdiction over the interstate transmission of the electricity itself, but it also has jurisdiction over these interstate transmission facilities, like the transmission lines ATXI will build and own. 16 U.S.C. § 824(b) (“The Commission [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy.”). Consequently, the only activity conducted by ATXI—transmission of electricity in interstate commerce using interstate facilities—cannot, under section 386.030, be regulated by the Commission because the activities are in interstate commerce.

10. Although ATXI is not involved in the sale, manufacture or distribution of electricity for light, heat or power within Missouri, a determination that it is such a utility simply because ATXI owned an “electric plant” and, therefore, must be an “electrical corporation” would not automatically subject it to the Commission’s jurisdiction. Appellate courts in Missouri have construed the definitions of “electrical corporation” and “electric plant” on several occasions, with the case law establishing that to be an electrical corporation under the jurisdiction of the Commission, the entity must serve or otherwise hold itself out to indiscriminately provide electric service to the general public at retail, thereby evidencing its dedication to public use. *See State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm’n*, 205 S.W. 36 (Mo. 1918); *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 9 S.W.2d 589 (Mo. banc 1928); *Palmer v. City of Liberal*, 64 S.W.2d 265 (Mo. 1933); *see also, Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227 (Mo. App. W.D. 1995). The Commission itself has applied this test on numerous occasions. *See, e.g., In the Matter of the Investigation of the Provision of Local Exchange Telephone Service by Entities Other than Certificated Telephone Corporations*, 1985 Mo. PSC LEXIS 12 (1985) (Case No. TC-84-233). Consequently, a company that manufactures, sells or distributes electricity for light, heat or power within Missouri must also be dedicated to the public use in this manner before it is subject to the Commission’s jurisdiction. Again, ATXI does not fall within these parameters.

11. The Commission implicitly acknowledges that ATXI is not a public utility like other public utilities when it waived in the Revised Order certain requirements otherwise applicable to public utilities in Missouri. *See Revised Order* at ¶ 2, p. 8. There are no such things as “half” public utilities, however. As *Danciger* makes clear, if a utility is a public utility subject to the Commission’s jurisdiction, it is subject to the Commission’s jurisdiction in all matters:

“[i]t is fundamental that the business done by respondent either constitutes him a “public utility,” or it does not. If he is a public utility, he is such within the whole purview and for all inquisitorial and regulatory purposes of the Public Services Commission Act.” *Danciger* at 40. ATXI is either a public utility subject to the Commission’s control and jurisdiction in all respects or it is not at all. There is no in-between.

12. Because ATXI does not sell, manufacture or distribute electricity for light, heat or power within Missouri, and because it does not offer retail electric service to the general public in Missouri, it simply is not subject to Commission jurisdiction. As a matter of law, the Commission’s limited jurisdiction does not extend to ATXI, and the Commission’s Revised Order concluding otherwise is unlawful.

WHEREFORE, for the foregoing reasons, ATXI respectfully requests that the Commission enter its order granting rehearing on the issue of its jurisdiction over ATXI, and that the Commission determine that it does not have jurisdiction over ATXI and dismiss ATXI’s Application for a Certificate of Convenience and Necessity, for the reasons outlined above.

Respectfully submitted,

/s/ James B. Lowery

James B. Lowery, Mo. Bar #40503

Michael R. Tripp, Mo. Bar #41535

SMITH LEWIS, LLP

P.O. Box 918

Columbia, MO 65205-0918

(T) 573-443-3141

(F) 573-442-6686

lowery@smithlewis.com

tripp@smithlewis.com

*Attorneys for Ameren Transmission Company of
Illinois*

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the public version of the foregoing response has been e-mailed on July 31, 2015, to all parties of record.

/s/ James B. Lowery

**An Attorney for Ameren Transmission
Company of Illinois**