BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Amendment of the	**)**	
Commission's Rule Regarding Applications	**)**	**File No. EX-2018-0189**
for Certificates of Convenience and Necessity	**)**	

Comments of The Empire District Electric Company
Concerning the Proposed Rule 4 CSR 240-20.045

On or about April 5, 2018, the Missouri Public Service Commission ("Commission") submitted to the Missouri Secretary of State its **Certification of Administrative Rule** for publication in the **Missouri Register**. The proposed rule, 4 CSR 240-20.045, addresses the filing requirements to be adhered to by electric corporations when invoking the Commission's authority under §393.170 RSMo., for a certificate of convenience and necessity ("CCN").

The Empire District Electric Company ("Empire") is an electric company doing business in the State of Missouri.[1] It is, therefore, subject to the Commission's regulatory authority as provided by law. Consequently, Empire has a direct interest in the CCN application process in that it may impact the manner in which it manages its operations in this state.

Empire does not object to the rescission of the Commission's current filing requirements rule and the adoption of a new rule *per se*. Empire recognizes that the Commission's practice rules must be reviewed and updated periodically to address new or changing circumstances. It does, however, have serious concerns about a number of major features of the proposed rule that it believes are unconstitutional, unauthorized by law or are burdensome or problematic as will be addressed, *infra*.

Also, the Commission should resist in the promulgation of the rule calls for the Commission to in effect substitute its judgment for the managers of the companies that are subject to its jurisdiction. It is clear that the Commission has an important and solemn regulatory role, but that role does not include the actual management of the companies it regulates.[2]

Subsection (1) "Definitions"

Subsection (1)(C)5 of the proposed rule that would include the "Improvement or retrofit of an electric generating plant" in the definition of "Construction" should be omitted from the

[1] As the Commission is aware, Empire is a Kansas-chartered corporation also having electric utility operations in the neighboring States of Kansas, Arkansas and Oklahoma.

[2] ***Missouri ex rel. Laclede Gas Company v. Missouri Public Service Commission***, 600 S.W.2d 222, 228 (Mo. App. 1980); ***Missouri ex rel. Harline v. Missouri Public Service Commission***, 343 S.W.2d 177 (Mo. App. 1960).

final rule adopted by the Commission. The appellate courts of this state have held that an existing generation facility cannot be certificated under RSMo., after it already has been constructed. Section 393.170.1 RSMo., which addresses the construction of new electric plant, requires that an electric utility to obtain Commission approval to "begin construction" of a power station. The controlling case law makes it plain that the issuance of a certificate must precede the construction of a power unit at a location not previously certificated for that purpose. Additionally, ***State ex rel. Cass County v. Public Service Commission***, 259 S.W.3d 544 (Mo. App. W.D. 2008) ("***Aquila II***") clearly states that the Commission may not authorize the construction of a power plant after-the-fact. Thus, a CCN is not available to make changes to, or to repair, an existing unit because the unit already has been constructed. Consequently, the Commission has no statutory authority to approve or disapprove of an "improvement or retrofit" of an existing power plant.

A starting point for case law guidance can be found at ***State ex rel. City of Sikeston v. Public Service Commission***, 82 S.W.2d 105 (Mo. 1935), wherein the Missouri Supreme Court adopted the Commission's characterization of the statute as requiring a CCN to "begin[] the construction of an electric plant" or to commence[] to exercise any right or privilege under any franchise." ***Id.*** at 109. It found the application of §393.170 RSMo as requiring a finding by the Commission of public convenience and necessity prior to a utility "enter[ing] a given field" as being intended "to prevent unnecessary duplication of service and undesirable competition." ***Id.***[3] To prevent overcrowding in any city or area, "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 new territory." ***Id.*** at 110.[4]

That case involved a utility that acquired from another company an operating system located within the City of Sikeston. The Commission issued an order granting the purchaser authority to (1) issue securities to finance the acquisition and (2) to operate the purchased plant

[3] *Accord*, ***StopAquila.Org v. Aquila***, 180 S.W.3d 24, 34 (Mo. App. W.D. 2005) ("***Aquila I***"). The Court of Appeals found that subsection 1 of §393.170 RSMo., providing for the issuance of a CCN for the construction of new electric plant requires that the Commission "conduct[] a hearing that is more or less contemporaneous with the request to construct the facility." (Emphasis added) That same Court subsequently held that the Commission lacked statutory authority to retroactively certificate a power plant that already had been constructed. Section 393.170 RSMo., the Court later held, "refers only to preconstruction approval." ***Aquila II*** at 549. The Court specifically found that the Commission exceeded its statutory authority by granting CCNs authorizing the construction and operation of a peaking power station and its associated substation after those facilities had been installed. ***Id.*** at 551-552.

[4] This is a statement of the legislative intent when it was enacted in 1913. The statute cannot be said to have taken on a new meaning or purpose in the absence of further legislative action. In 1944, the Missouri Supreme Court restated this statutory policy finding that "[b]y these two latter sections [§§393.170 and 393.190 RSMo.], it was intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein." ***State ex rel. Consumers Public Service Co. v. Public Service Commission***, 180 S.W 40, 44 (Mo. banc 1944).

and lines.[5] The Court found that the second element of the Commission's order was not a grant of a CCN, but, rather, was merely "descriptive of the purpose for which [the plants] were bought." ***Id.*** at 109. Having distinguished the purchaser's acquisition approval from a CCN, **the Court concurred with the Commission's conclusion that it had no authority to make a factual finding that the public convenience and necessity no longer existed** such that its transfer order could be set aside. The Court noted that even significant changed circumstances, such as the introduction of a competing supplier, do not call into question the validity of the findings supporting the incumbent provider's CCN. ***Id.*** at 110-111.

The key take-away from this body of case law is the principle that a CCN to build electric plant[6] is a determination to be made at the outset which cannot be rescinded other than by non-exercise of the privilege within two years of such authority being granted.[7] The Commission cannot in a rulemaking redefine the term "construction" as including the improvement or retrofit of an **existing** plant in order to circumvent the plain language of the statute. If an electric power plant exists, by definition it has been constructed and the CCN that initially authorized its construction remains valid. By including subsection (1)(C)5, the Commission would be acting in excess of its statutory authority.

Subsection (2)(B) Assets Acquired or Constructed Outside Missouri

Subsection (2)(B) of the proposed rule which suggests that the term "Asset" as defined in subsection (1)(B) includes plant built beyond the geographic boundary of the State of Missouri should be omitted from the final rule adopted by the Commission. The plain language of the Commission's general enabling legislation limits its authority only to activities occurring within the territorial boundaries 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)

In other words, the Commission's powers concerning power generation operations end at the state line.

That the State's powers end at its borders is an inherent constitutional limitation that has been recognized by the United States Supreme Court.

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[5] *See also,* ***State ex rel. Harline v. Public Service Commission***, 343 S.W.2d 177, 185 (Mo. App. 1960).

[6] A scenario governed by subsection 1 of §393.170 RSMo. Or, presumably, by subsequent abandonment.

[7] Section 393.170.3 RSMo.

> 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 the 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.

State Farm Mutual Auto. Ins. Co. 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).[8]

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. This provision of law supports the principle of an inherent geographical limitation to the Commission's regulatory authority.

There is additional support for this notion in Missouri case law as well. One of the earliest cases examining the purpose and application of the statute now codified as §393.170 RSMo., was the ***City of Sikeston*** case discussed, ***supra***. The Missouri Supreme Court there observed that the public policy behind the enactment (as noted in the previous section) is 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 new territory." ***Id***. at 110. (Emphasis added). More recently, the Missouri Court of Appeals in ***Aquila I*** referred to the regulation of utilities as "an important statewide government function." (Emphasis added)

As noted in the previous section, the Commission and the courts of this state have observed repeatedly that the purpose of the statute enacted in 1913 is to avoid wasteful duplication of facilities and destructive competition. Neither of those considerations is indicated by the construction of a power plant in a state other than Missouri. The legislative purpose intended to be served by pre-approval of new electric plant would not be advanced by an extra-territorial application of the statute.

Finally, the Commission's own historical practice demonstrates that a CCN is not required for a rate-based power station constructed in another state. Empire is not aware of any order of the Commission asserting CCN jurisdiction as to 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 power stations in the state of Kansas and one in Mississippi.

[8] *See also*, ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 821-822, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985).

Subsection (2)(E) Prudence Determination

The proposed rule provides that the Commission ***may*** make a decisional prudence determination. Presumably, it would be left to the applicant to request such a determination.

For reasons more fully explained in the next section, the phrase "acquire or" should not be included in the final rule.

Empire generally supports this aspect of the proposed rule given the capital commitment that building new generation can entail. In the event an applicant requests a decisional prudence determination, Empire suggests that a number of the filing requirements currently proposed to be generally applicable to any application, only should be required to aid the Commission in making its finding under subsection (2)(E). Specifically, the matters addressed in (5)(I) through (J) and (6)(I) should be reorganized as items (2)(E)1., 2., 3, and 4, or otherwise made subordinate to this specific element of the rule to the extent they are retained in the final rule. The matters now addressed in these four subsections (i.e., nondiscriminatory **decision-making** process) are only relevant if the Commission is considering **decisional** prudence on the part of the utility.

In the absence of a request for a decisional prudence determination, requiring "evidence" of the applicant's supply-side decisions is redundant of the process that is regularly undertaken as part of its integrated resource planning filings which is an open, participatory process. As such, these matters would seem to be simply make-work obligations with regard to information that already is reviewed on a routine basis. Additionally, the Commission's affiliate transactions rule would address matters related to self-dealing. To the extent decisional prudence becomes an issue, the discovery process is available.

Subsection (4) Acquisition of an Existing Power Plant

Subsection (4) of the proposed rule which would require the filing of an application for a CCN to acquire and existing power plant should be omitted from the final rule adopted by the Commission. As noted above, a CCN under subsection 1 of §393.170 RSMo., is only required to be obtained prior to building a new plant.

> No gas corporation, electrical corporation, water corporation or sewer corporation shall <u>begin construction</u> of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission. (Emphasis added).

The plain language of this section is limited in application to plans for building a new power plant. It does not address the acquisition of an **existing** power plant whether previously certificated or otherwise.[9]

[9] Subsection 2 of §393.170 RSMo., contains this additional feature:

> No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not

Once again, the ***City of Sikeston*** case is instructive in that it dealt with a regulated utility's acquisition of electric plant located within a municipality. The significant jurisdictional feature of the case was not the acquiring entity's need to obtain a CCN (which the Court held was not within the Commission's power), but, rather, the utility's need to obtain the **authority to finance** the acquisition. This obligation emanates from an entirely different statutory grant.

Subsection (5)(D) and (6)(D) Construction/Completion Timing

Subsections (5)(D) and (6)(D) of the proposed rule would require the applicant to provide timing estimates for the commencement and completion of the construction of a new power plant or an electric transmission line. These requirements should not be included in the final rule. This information is not necessary to a CCN request in light of the requirement in subsection 3 of §393.170 RSMo., that a certificate be exercised within two years after the date the CCN is issued. Otherwise, it expires. This is a self-regulating feature of the legislation.

Also, the completion date requirement is not relevant to the matter of certification. This is illustrated by the proposed rule's use of the phrase "fully operational and used in service" which is a ratemaking term applicable to whether a new plant qualifies to be rate based in the context of an approval of new rate schedules. The CCN process is not the proper forum to be previewing or examining a ratemaking qualification.

Subsection (6)

The phrase "acquire or" in the first line should not be included in the final rule for the reasons set forth above.

Conclusion

Empire appreciates this opportunity that the Commission has provided to submit these comments for consideration. Empire anticipates that it will be present and will participate in the rulemaking hearing on June 19, 2018.

> 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.

This language addresses the authority that needs to be obtained for an electric utility to provide service, or to commence operations, within a defined municipality or area. The Eastern District Court of Appeals recently referred to this language as the "area certificate" language of the statute. ***Grain Belt Express Clean Line v. Public Service Commission***, Case No. ED105932, Slip Op. at 5, (February 27, 2018). As such, it has no bearing on a CCN for authority to construct a power plant or transmission line.

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