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, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri to the Iowa Border and an Associated Substation Near Kirksville, Missouri	)	Case No. EA-2015-0146

STAFF'S RESPONSE TO NEIGHBORS UNITED'S
MOTION TO DISMISS APPLICATION

Comes Now the Staff of the Missouri Public Service Commission and for its response to Neighbors United's *Motion to Dismiss Application* ("*Motion to Dismiss*") states the Staff recommends that the Commission either deny Neighbors United's *Motion to Dismiss* or, alternatively, delay ruling on it until after hearing the evidence in this case. In support thereof, the Staff states as follows:

1. In its *Motion to Dismiss,* Neighbors United argues that Ameren Transmission Company of Illinois' ("ATXI") proposed Mark Twain transmission line would impair the right of farmers and ranchers to engage in farming and ranching practices that is conferred by Article 1, Section 35, of the Constitution of the State of Missouri and, therefore, that ATXI's Application to this Commission for a certificate of convenience and necessity ("CCN") for that line should be dismissed.

2. Neighbors United also argues that the Commission should dismiss ATXI's Application because, according to Neighbors United, Section 229.100 RSMo. requires that ATXI obtain authority from the Missouri counties its proposed transmission line

would traverse—Marion, Shelby, Knox, Adair, and Schuyler counties—to "erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of" those counties. Commission rule requires ATXI provide evidence it has that county authority, but ATXI has not provided that evidence and Marion, Shelby, Knox, Adair, and Schuyler counties have passed resolutions opposing construction of the proposed line.

3. As noted, one of the bases utilized by Neighbors United in its October 13, 2015, *Motion to Dismiss* is that ATXI's Application violates Article 1, Section 35, of the Missouri Constitution. The Staff believes that neither ATXI's Application itself nor the Commission's processing of ATXI's Application for a CCN for the construction of the Mark Twain Project as indicated below violates Article 1, Section 35, of the Missouri Constitution. Article 1, Section 35, of the Missouri Constitution states as follows:

> Right to farm
>
> Article 1, Section 35: That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

As Neighbors United indicates Article 1, Section 35, was adopted by popular vote on August 5, 2014, and became law on August 28, 2014.

4. The Staff would note that there is a University of Missouri - Kansas City Law Review article, Shrout, Steven D., *Missouri' Right To Farm Statute's Durational Use Requirement And The Right To Farm Amendment*, 83 UMKC L. Rev. 499, Winter,

2014. The article indicates that the impetus for the right to farm constitutional provision was (1) nuisance actions against farms and (2) the activities of outside interest groups such as the Humane Society of the United States.

5. Neighbors United in Paragraph 10, at page 3 of its *Motion to Dismiss*, states that "[w]hile there may be a dispute as to the extent to which citizens' farming and/or ranching practices will be impacted, neither ATXI nor Neighbors United dispute that some amount of farm and/or ranch property will be permanently removed from production." ATXI witness Douglas J. Brown filed direct testimony on May 29, 2015, in which he stated that he is one of the Ameren Services employees responsible for electric transmission right-of-way acquisition for the Mark Twain Project. He stated at page 6 of his direct testimony that "[t]he final route easement area covers approximately 523 agricultural acres, which means that less than one acre of actual farmland will be taken out of production."

6. Footnote 9 to the preceding statement in the *Motion to Dismiss* cites to affidavits from property owners filed with the *Motion to Dismiss*. The affidavits are part form and part open space for each affiant to write or key in a response. The form part of the affidavits are, among other things, statements and space for the affiant to provide information such as item "4)" on the affidavit: "4) If approved, the transmission line will *infringe* upon my ability to engage in agricultural and/or ranching practices on my property described above by:_____

_____

_____."

(Emphasis added.) The *Motion to Dismiss* shows in Paragraph 2, at pages 1-2, that the

word “infringe” also appeared in the language that was on the August 5, 2014, ballot when the Right to Farm Amendment was passed by Missouri voters: “Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?”

7. Citing *Brown v. Carnahan*, 370 S.W.3d 637, 649 (Mo. banc 2012), the *Motion To Dismiss* states in Paragraph 5, at page 2 that “[w]hen a word is not given a technical meaning or defined in the constitution, ‘…the Court determines the plain and ordinary meaning of the word as found in the dictionary.’” [Footnote omitted.] The Western District Court of Appeals in a recent Commission case stated “we begin with the well established principle that in the absence of a statutory definition, we give statutory words and phrases their plain and ordinary meaning as derived from the dictionary.” [*State ex rel. MoGas Pipeline, LLC v. Public Serv. Comm'n,* 366 S.W.3d 493, 498 (Mo.banc 2012).] *In re Union Elec. Co.*, 422 S.W.3d 358, 366 (Mo.App. W.D. 2013). The Merriam-Webster Dictionary defines the word “infringe” as follows: trans. verb - to encroach upon in a way that violates law or the rights of another; intrans. verb - encroach – used with *on* or *upon*.[1] Black’s Law Dictionary does not define the word “infringe” but it does define the word “infringement”: “A *breaking into*; a trespass or *encroachment* upon; a violation of a law, regulation, contract, or right. Used especially of invasions of the rights secured by patents, copyrights, and trademarks.”[2]

8. Neighbors United has not addressed the rule of statutory/constitutional/other interpretation that discerning the meaning of words should

[1] http://www.merriam-webster.com/dictionary/infringe

[2] http://thelawdictionary.org/infringement/

avoid unreasonable or absurd results. The unreasonable/absurd results that Neighbors United's interpretation leads to is that the permanent removal of any amount of land from farming or ranching by the construction, installation, owning, operating, maintaining, and otherwise controlling and managing a 345-kV electric transmission line by ATXI violates Article 1, Section 35, of the Missouri Constitution. The practical result of Neighbors United's proposed application of Article 1, Section 35, is that it is unlikely that any long range high voltage power lines will ever be built in the future in Missouri.

9. There are court decisions addressing Commission conduct and principles of statutory/constitutional/other interpretation that relate that attempts to discern the meaning of words should avoid unreasonable or absurd results.

> The parties urge that we must discern the intended meaning of words or phrases in the Ameren tariff for which no "statutory" definition has been provided by resort to dictionary or industry definitions. *See, e.g., State ex rel. Burns v. Whittington,* 219 S.W.3d 224, 225 (Mo. banc 2007). However, this rule of statutory interpretation is tempered by the overriding rule that "construction of a statute should avoid unreasonable or absurd results." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue,* 362 S.W.3d 1, 4 (Mo. banc 2012). Here, surprisingly, the parties' competing arguments about the proper dictionary or industry definitions for terms used in the phrase "long-term full and partial requirements contracts" completely ignores that the PSC's authority to adopt (and thus to interpret) fuel adjustment clauses is controlled by statute. Thus, before we resort to dictionary and industry definitions to determine the meaning of terms not defined in the Ameren tariff, we must first appreciate the constraints imposed by the legislature on the PSC with respect to approval and interpretation of fuel adjustment clauses. [Footnote omitted.]

State ex rel. Union Elec. Co. v. Public Serv. Comm'n, 399 S.W.3d 467, 480-81 (Mo.App. W.D. 2013)

> Thus, although the dictionary and technical meanings of terms used in the phrase "long-term full and partial requirements sales" are relevant to our *de novo* review of the PSC's Order, they are neither our starting point nor dispositive. We are primarily concerned with whether the competing

> definitions proffered by the parties would render the fuel adjustment clause unlawful. We will not ascribe a meaning to the phrase "longterm full and partial requirements sales" that would call the lawfulness of the fuel adjustment clause into question, as that would be an unreasonable and absurd result. *See Aquila Foreign Qualifications,* 362 S.W.3d at 4.

Id. at 482.

> A court will look beyond the plain meaning of the statute only when the language is ambiguous or will lead to an absurd or illogical result. *Spradlin v. City of Fulton,* 982 S.W.2d 255, 258 (Mo. banc 1998).

State ex rel. Office of Public Counsel v. Public Serv. Comm'n, 331 S.W.3d 677, 683 (Mo.App. W.D. 2011)

> Thus, the statute is rendered ambiguous, and we must give effect to the Legislature's intent. *See State ex rel. Nixon v. Premium Std. Farms, Inc.,* 100 S.W.3d 157, 162 (Mo.App. W.D. 2003). When a statute is ambiguous, "[c]ourts must avoid statutory interpretations that are unjust, absurd, or unreasonable." *Id*.

State ex rel. Missouri Pipeline Co. v. Public Serv. Comm'n, 307 S.W.3d 162, 173-74 (Mo.App. W.D. 2009)

10. At Paragraph 11, on page 3 of its *Motion to Dismiss*, Neighbors United states that "ATXI's Application presents issues that require constitutional interpretation and application. Such questions are beyond the authority of administrative agencies." [Footnote omitted.] The two non-Commission cases cited by Neighbors United in its footnote, *Duncan v. Missouri Bd. for Architects, Professional Engrs., & Land Surveyors,* 744 S.W.2d 524, 530-31 (Mo.App.1988) and *Fayne v. Department of Social Servs.,* 802 S.W.2d 565 (Mo.App.1991), are not relevant to the instant proceeding. Article V, Section 3, of the Missouri Constitution states in part that the Missouri Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a statute or a provision of the constitution of this state. The Commission can decide the instant

proceeding without deciding the constitutionality of Article 1, Section 35, of the Missouri Constitution or some other constitutional provision or statute.

11. The *Duncan* court noted that "[a]dministrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments. *City of Joplin v. Industrial Commission of Missouri,* 329 S.W.2d 687 (Mo. banc 1959)." 744 S.W.2d at 531. The *Duncan* case involves the determination of the Administrative Hearing Commission revoking the engineering certificates of registration of Daniel Duncan and Jack Gillum and the engineering certificate of authority of G.C.E. International as a result of the Kansas City Hyatt Regency Hotel walkways collapse on July 17, 1981. Specifically, the appellants challenged subparagraph of Section 327.441(2)(d) (now Section 327.441.2(5) RSMo.) on the basis that the term "gross negligence" is so vague as to deny appellants their due process rights under the Fifth and Fourteenth Amendments to the U. S. Constitution.

12. The *Fayne* case involves an administrative agency's jurisdiction to engage in constitutional interpretation and application required by the determination of a complaint brought before the administrative agency under Chapter 536, the Administrative Procedure And Review Chapter. Dr. Fayne appealed the decision of the Circuit Court of Jackson County, which affirmed the decision of the Administrative Hearing Commission, which upheld the decision of the Department of Social Services, directing Dr. Fayne to repay alleged Medicare overpayments made to him in his psychiatry practice on the basis of a distinction between psychiatrists and medical doctors. Dr. Fayne alleged that his due process and equal protection rights had been

violated under the U.S. and Missouri Constitutions by the Department of Social Services' decision.

13. The *Fayne* case cites the *Duncan* case for authority that deciding such questions is beyond the authority of administrative agencies. The *Fayne* case states "§ 536.140 (1986), instructs courts to review agency actions that present constitutional questions presented in the petition. *See* Mo.Rev.Stat. § 536.140.1, § 536.140.2(1) (1986)." Sections 536.140.1 and .2(1) do not apply to the Commission. Chapter 536 supplements Chapter 386 except where in direct conflict with it. *State ex rel. Utility Consumers Council of Mo. v. Public Serv. Comm'n*, 562 S.W.2d 688, 693 n.11 (Mo.App. St.L.), *cert. denied*, 439 U.S. 866, 99 S.Ct. 192, 38 L.Ed.2d 177 (1978). The review provisions of Chapter 536, Sections 536.100-.140, do not apply to the Commission. Shewmaker, Richard D., *Procedure Before, And Review Of Decisions Of, Missouri Administrative Agencies*, 37 Mo. Ann. Stat. Chapter 536, pp. 145, 167 (Vernon 1953) ("Section 22 of Article V of the Constitution, and all the other provisions of Chapter 536 except the review provisions, apply to the Public Service Commission, but the review provisions of Chapter 536 do not.")[3] The review provisions of Chapter 386, starting at Section 386.500, are the review provisions that apply to the Commission. *Union Electric Company v. Clark,* 511 S.W.2d 822, 825 (Mo. 1974). The appellate standard of review of a Commission order is two-pronged: first, the reviewing court must determine whether the Commission's order is lawful; and second, the court must determine whether the order is reasonable. The lawfulness of a Commission order is determined

[3] Section 22 of Article V referred to in this quotation from a 1953 article in Volume 37 of Vernon's Annotated Missouri Statutes, which article does not appear in the 1988 or 2008 replacement Volume 37, is presently Section 18 of Article V of the Missouri Constitution.

by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo* by the court. *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003)

14. In the first years of the Commission, the Missouri Supreme Court stated that it is necessary for the Commission to ascertain what the law is in performing its function:

> . . . The statute (section 47, Laws 1913, p. 583) expressly gives the commission authority to fix rates, and this court has held valid that delegation of administrative power. State ex rel. v. Public Service Commission, 259 Mo. loc. cit. 728, 168 S. W. 1156. It is true the Public Service Commission is not a court (City of Macon v. Commission, 266 Mo. loc. cit. 490, 181 S. W. 396; Rhodes-Buford. L., H. & P. Co. v. Union Elec. L. & P. Co., 2 P. S. C. Rep. 123); nevertheless though it cannot exercise judicial functions, it must take cognizance of existing facts and the law. . . . In determining whether a proposed rate or change of rate is reasonable--i. e., whether it is the lawfully applicable rate for the future--the commission does so in view of existing facts and controlling law. To do this it is necessary for it to ascertain what that law is, and in performing its legitimate function--i.e., putting into effect in respect to a particular utility the previously declared will of the Legislature (Michigan Central R. R. v. Michigan R. R. Com., 160 Mich. 355, 125 N. W. 549)--it must ascertain the existing facts, since these, under the law, determine the applicable rate. . .

Missouri Southern R. Co. v. Public Serv. Comm'n, 214 S.W. 379, 380 (Mo. 1919).

15. In 1976 the electorate in Missouri passed by initiative petition/referendum what was entitled "Proposition 1." The Revisor of Statutes gave Proposition 1 the statutory section "393.135" and the title "Charges based on nonoperational property of electrical corporation prohibited." The actual language is as follows:

> Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

16. There is a dearth of court cases on Section 393.135, but the Commission has been called upon to interpret Section 393.135 and the Commission's decisions have reached appellate review on several occasions, most notably in the following cases: *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 606 S.W.2d 222 (Mo.App. W.D. 1980); *State ex rel. Missouri Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882 (Mo.App. W.D. 1981); *State ex rel. Union Electric Co. v. Public Serv. Comm'n*, 687 S.W.2d 162 (Mo. banc 1985); and *State ex rel. Union Electric Co. v. Public Serv. Comm'n*, 765 S.W.2d 618 (Mo.App. W.D. 1988). The Section 393.135 issues in the first two cases principally involved various tax timing difference issues and a compensating bank balance issue used to support the financing of CWIP, and in the last two cases the Commission was required to render a determination on the applicability of Section 393.135/Proposition 1 to Union Electric Company's ("UE") requested recovery of the incomplete construction and cancellation costs of its abandoned second generating unit at the Callaway nuclear generating station, referred to as Callaway II. Missouri courts did not find that addressing these issues was the responsibility of some entity other than the Commission.

17. Respecting the cancellation of Callaway II, the Commission first disallowed rate recovery of the partial construction and cancellation costs of the abandoned Callaway II unit on the basis that the terms of Proposition One, Section 393.135, precluded the Commission from allowing recovery of any amount from ratepayers relating to abandoned construction because the it never became "fully operational and used for service." In the first appellate court decision respecting UE's

effort to recover in rates the costs associated with the abandoned Callaway II unit, the Missouri Supreme Court held that Proposition One, Section 393.135, did not have the purpose and did not have the effect, of divesting the Commission of the authority to make any allowance for the costs of abandoned generating plant construction. The Court stated its conclusion as follows:

> We conclude that Proposition One did not have the purpose, and does not have the effect, of divesting the Commission of the authority to make any allowance at all on account of construction which is definitely abandoned. We base our conclusion on the established practice of allowing such charges, absent a statutory command to the contrary, and on the absence from Proposition One of explicit language dealing with abandoned construction.

687 S.W.2d at 168. The Court decided the case on nonconstitutional grounds which made it unnecessary to consider the arguments that Section 393.135 was unconstitutional as advocated by the respondents. The Court remanded the case to the Commission for further proceedings. [4]

18. It is the Staff's opinion that because ATXIs' proposed transmission line will cross county roads in the counties of Marion, Shelby, Knox, Adair, and Schuyler it requires the assent of the county commissions of those counties to "erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public

[4] After further proceedings on the remanded issues, the Commission again rejected recovery in rates of the construction and cancellation costs of Callaway II. The Commission held that UE's shareholders had already been compensated for some of their loss through the rates of return in prior UE cases. 765 S.W.2d at 621. The Commission concluded that the initial risk of cancellation should be borne by the investors-shareholders. Among other things, the Commission determined that UE shareholders had received some compensation for the risk of their investment in UE which included a risk of cancellation of Callaway II. The Western District Court of Appeals found that the Commission's decision was within the Commission's discretion and was supported by competent and substantial evidence. *Id.* at 622-24.

roads or highways of any county of this state, to "erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, *conductors*, mains and conduits *for any purpose whatever*, through, on, under or *across* the public roads or highways of any county of this state"[5] before it may exercise any authority this Commission gives it with a CCN.[6]

19. Neighbors United correctly cites Commission rule 4 CSR 240-3.105(1)(D)1, which provides:

> When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired;

but ignores Commission rule 4 CSR 240-3.105(2), which provides:

> If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought.

20. In Paragraph 9 of its Application, ATXI avers, "ATXI will provide all required approvals or seek an appropriate waiver prior to the granting of the authority sought, as provided by 4 CSR 240-3.105(2)."

21. Commission rule 4 CSR 240-3.105(1)(D)2 provides:

> 4 CSR 240-3.105(1)(D) When approval of the affected governmental bodies is required, evidence must be provided as follows:
>
> * * * *
>
> 2. A certified copy of the required approval of other governmental agencies;

[5] Section 229.100 RSMo; Emphasis added.

[6] Since it need not do so to respond to Neighbors United's *Motion to Dismiss*, the Staff is not opining on the timing of these assents to the Commission's granting of a CCN in this case. Section 393.170 RSMo.

In the past, when such approvals are not in evidence before the Commission has granted a certificate of convenience and necessity, Staff has recommended the certificate be conditioned on obtaining them. It is doing so in this case as well.

22. The Commission should give ATXI the opportunity to provide evidence of required county franchises and required affected governmental body approvals.

Wherefore, Staff recommends that the Commission either deny Neighbors United's *Motion to Dismiss* or, alternatively, delay ruling on it until after hearing the evidence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 28th day of October, 2015.

/s/ Steven Dottheim