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**

STAFF RESPONSE TO SOUTH CENTRAL MCN LLC MOTION FOR PARTIAL DISPOSITION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through Staff Counsel's Office, in response to the Motion For Partial Disposition ("Motion") and Memorandum In Support Of Motion For Partial Disposition of South Central MCN LLC ("Memorandum In Support") filed in File No. EA-2016-0036 on December 18, 2015. South Central MCN LLC ("SCMCN") submitted its Motion For Partial Disposition and Memorandum In Support Of Motion For Partial Disposition to address a threshold question phrased in SCMCN's words in both documents as: "Whether the Missouri Public Service Commission (the Commission) lacks jurisdiction under Section 393.190 RSMo. over the transaction (Transaction) that is the subject of SCMCN's application for a certificate of convenience and necessity (Application)?" The Staff concurs with SCMCN that the Commission lacks jurisdiction under Section 393.190 RSMo of the sale of the Nixa transmission facilities to SCMCN, but does have jurisdiction over the subject of SCMCN's application for a certificate of convenience and necessity pursuant to Section 393.170 RSMo. respecting said transmission facilities. In support of Staff's position, the Staff states as follows:

1. From the manner in which SCMCN has phrased its threshold question in its Motion and Memorandum In Support, it is the Staff's understanding that SCMCN's Application filed on August 19, 2015 does not request an Order from the Commission

disclaiming jurisdiction under Section 393.170 RSMo. 2000. In fact in the Application in the WHEREFORE clause on page 13, subparagraph "D.," SCMCN requests from the Commission an Order "[g]ranting a new CCN to SCMCN to own, operate, control, manage, and maintain the Assets being transferred as part of this Transaction and other such transmission assets as may be acquired, constructed, or installed by SCMCN in the future." SCMCN states in the third sentence of the second paragraph of its Memorandum In Support "SCMCN does not now (and did not in its Application) dispute that the Commission has jurisdiction under Section 393.170 RSMo. to grant SCMCN a certificate to operate the transmission assets it seeks to acquire from the City of Nixa (the City)." SCMCN also states in part in the first sentence in the first full paragraph on page 3 of its Memorandum In Support that in the Application, it seeks a certificate of convenience and public necessity under Section 393.170 RSMo. to own and operate the transmission assets.

2. SCMCN's August 19, 2015, Application requests (a) pursuant to Section 393.170, 4 CSR 240-2.060, and 4 CSR 240-3.105, an Order of the Commission authorizing SCMCN and Nixa to execute any and all documents necessary to effectuate the transaction in question pursuant to an Asset Purchase Agreement ("APA") (Appendix A to the Application) including the transfer of certain existing transmission assets[1] to SCMCN by the City of Nixa, Missouri ("Nixa") under the aforementioned statutes and rules, or in the alternative (b) pursuant to the aforementioned statutory section and rules plus Section 393.190.1 RSMo and 4 CSR 240-3.110 an Order of the Commission authorizing SCMCN and Nixa to execute any and all documents necessary

[1] The property involved in the transaction are the assets, comprising approximately ten miles of 69 kV electric transmission lines and related facilities.

to effectuate the transaction in question. SCMCN challenges the applicability of Section 393.190 and 4 CSR 240-3.110 applicability to the sale of the transmission assets in question.

3. It is and has been the Staff's position that the Commission has jurisdiction over SCMCN through the necessity of the granting of a certificate of a convenience and necessity to SCMCN under Section 393.170 RSMo. 2000. On November 5, 2015, the Staff filed in File No. EA-2016-0036 its Staff Recommendation That Commission Has Jurisdiction And Should Schedule Prehearing Conference For Parties To Propose Procedural Schedule Including Evidentiary Hearings.

4. At Paragraph 10, page 3, of its Application, SCMCN states that on August 14, 2015, SCMCN and Nixa executed the APA under which SCMCN agrees to purchase and Nixa agrees to sell approximately ten miles of 69kV electric transmission lines and related facilities located in Christian and Greene Counties. Nixa will retain its distribution facilities and will continue to provide distribution service and retail sales to its customers. (Paragraph 11, page 3, Application). SCMCN will continue to have no generation or retail distribution assets, after the closing of the pending transaction. (Paragraph 2, page 2, Application).

5. Paragraph 1, page 1 of its Application explains that SCMCN was formed to operate within the Southwest Power Pool, Inc. ("SPP") as a transmission-only company, and explains that SCMCN intends to enter long-term agreements to develop, own, and operate new or existing transmission assets with cooperatives, municipally-owned electric systems, and joint action agencies, including the Missouri Joint Municipal Electric Utilities Commission ("MJMEUC"), collectively, "Public Power."

As part of its strategy for start-up, SCMCN has offered to purchase existing assets of Public Power entities. SCMCN explains in Paragraph 23, page 8 of its Application that acquisition of existing transmission assets is contemplated by SCMCN as a means for it to put into effect a Federal Energy Regulatory Authority ("FERC") rate and begin the work of improving and integrating these existing transmission assets with other transmission assets SCMCN will acquire in Missouri and elsewhere.

6. At Paragraph 16, page 5 of its Application SCMCN relates:

> {Nixa's] municipally-owned electric utility is not rate-regulated by the Commission and therefore is not an electrical corporation subject to Section 393.190. Moreover, SCMCN's understanding is that no Commission approval is required for an electrical corporation to *purchase* an asset, and SCMCN has found no precedent requiring a purchaser of assets from a municipally-owned electric utility to obtain Commission approval authorizing such a transaction. . . .

SCMCN requests that the Commission hold, among other things, that no approval is required under Section 393.190.1, RSMo., and that compliance with the requirements of 4 CSR 240-3.105(1)(A), 4 CSR 240-3.105(1)(B).1-.3, and 4 CSR 240-3.110 is unnecessary. (*Id*.; Paragraph 34, page 11, Application.)

7. In the alternative, out of an abundance of caution, at Paragraph 16, page 5, of its Application SCMCN requests Commission approval of the transaction, and provides information in conformance with 4 CSR 240-3.110 and to assist the Commission in its determination of SCMCN's request for a certificate of convenience and necessity ("CCN") under 4 CSR 240-3.105. Although SCMCN requests at Paragraph 16, page 5 of its Application that the Commission hold that compliance with the requirements of 4 CSR 240-3.110 is unnecessary, 4 CSR 240-3.110 is not among the provisions that SCMCN asserts in Paragraph 36, page 12 of its Application are

inapplicable or should be waived by the Commission. At Paragraph 34, pages 10-11 of its Application, SCMCN states that the new CCN being sought by SCMCN is for a line CCN and not an area CCN and is not for the construction of new transmission lines. Thus, SCMCN is seeking in its alternative request a line CCN for the existing transmission assets of Nixa.

8. SCMCN has cited the principal cases holding that the Commission's general jurisdiction does not extend to municipally owned electric light and power systems and facilities.

In *City of Columbia v. Public Serv. Comm'n*, 329 Mo. 38, 43 S.W.2d 813, 816, (Mo. 1931) the title of the Public Service Commission Act and the Commission's jurisdiction over municipal water utilities came under scrutiny:

> Replying to this objection, counsel for appellant say that we should "find that the title to the act, 'An act to create and establish a Public Service Commission, prescribing its powers and duties', is broad enough to include all the duties and powers given to the Commission by the Public Service Commission Law. * * *" Under the foregoing rule, this suggestion can have no application because the title is not confined to any such general statement. It immediately descends to particulars by limiting the objects of "regulation and control" to "public service corporations, persons and public utilities," without mentioning municipalities. Counsel for appellant say that the word "corporations" includes "municipalities," but it seems obvious that "municipalities" are not "public service corporations." . . .

9. The question of the Commission's jurisdiction over municipal water utilities was further addressed in *Forest City v. City of Oregon*, 569 S.W.2d 330, 332-33 (Mo.App. K.C. 1978):

> However, the Supreme Court subsequently ruled that the statutory grant of power to the Commission to regulate municipally owned public utilities was unconstitutional. City of Columbia v. State Public Service Commission, 329 Mo. 38, 43 S.W.2d 813 (1931); State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 333 Mo. 426, 62

> S.W.2d 742 (1933); State ex rel. City of Sikeston v. Public Service Commission of Missouri, 336 Mo. 985, 82 S.W.2d 105 (1935).

The Court in *Forest City* goes on to state that in 1949 the Missouri Legislature changed the sections defining the powers of the Commission to delete any authority for jurisdiction over municipal utilities. The Court includes as a footnote in its decision the revision comment to Section 393.130:

> As originally enacted, sections 5645, 5646, 5647, 5648 and 5659, R.S.1939, empowered the Public Service Commission to regulate municipally owned and operated utilities. However, in City of Columbia v. Public Service Commission, 329 Mo. 38, 43 S.W.2d 813, the Supreme Court ruled that the Commission did not have such power. Therefore these sections were repealed and reenacted as this section and Sections 393.140 to 393.160 omitting the reference to municipal utilities.

In *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482, 489 (Mo.banc 1986), Commission authorization was sought and obtained, pursuant to Section 393.190.1, for (1) Union Electric Company ("UE") to sell its Ashley generating plant to Thermal Resources of St. Louis, Inc., (2) UE to sell its Downtown St. Louis steam loop to Bi-State Development Agency ("Bi-State," a public agency)[2], (3) the discontinuance of UE's operations in St. Louis as a regulated steam heating company and its replacement by Bi-State as the supplier of steam to UE's steam customers, (4) Thermal's operation of the steam production and distribution facilities by contract with Bi-State, (5) the temporary supply of electric power from Ashley by UE until UE constructed alternate facilities, and (6) the construction of a refuse-to-steam plant by

[2] "Bi-State Development Agency (Bi-State) is a public agency established by interstate compact approved by the legislatures of Missouri and Illinois and by the Congress of the United States as required by Art. I, Sec. 10, of the Constitution. It is governed by a Board of Commissioners appointed in equal numbers by the governors of each state and renders a variety of services in the Greater St. Louis metropolitan area. It has no taxing power but does have the authority to issue revenue bonds to finance its various projects and to accept contributions from agencies of government." 715 S.W.2d at 484-85; footnotes omitted.

Thermal which will provide the normal quantities of steam required and the Ashley plant will be kept in reserve. 715 S.W.2d at 485. Among other things, the Commission rejected certain steam customers' argument that the plan of UE, Bi-State and Thermal would produce an unreasonable increase in rates for steam and the Commission held that the fact of an initial rate increase was not ground for disapproving the plan. *Id.* at 485-86. The steam users argued to the Court that the governing contracts would subject steam customers to unreasonable rate increases. The Court responded:

> . . . As we have said earlier, the customers are not entitled to a guarantee of the status quo in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE were to continue the operation. It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. The Commission might well conclude, however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.

As a matter of instant relevance, the Court in particular noted:

> . . . The legislature, in its wisdom, has given the Commission jurisdiction only over investor-owned utilities, and has specifically exempted public agencies of Bi-State's type. The fear, apparently, was that profit-making utilities might make use of their naturally monopolistic situation to extract exorbitant profits for their owners. The Commission does not regulate rates of municipally-owned utilities and rural cooperative associations. *See Pace v. City of Hannibal,* 680 S.W.2d 944 (Mo. banc 1984). . . .

715 S.W.2d at 489.

10. There is also Section 91.025.2 in the Chapter of Statutes on Municipally Owned Utilities, which itself references Sections 393.106, and 394.315, and states in relevant part that the Commission is given jurisdiction over municipally owned

or operated electric systems to order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential:

> . . . Except as provided in this section, nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any such municipally owned or operated electrical system, and nothing in this section, section 393.106, RSMo., and section 394.315, RSMo., shall affect the rights, privileges or duties of any municipality to form or operate municipally owned or operated electrical systems. . . .

11. In *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo banc 1934), the Missouri Supreme Court delineated the standard for Section 393.190 and for the application of the standard falling under it when it stated:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: “To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'”

The Missouri Supreme Court based its determination on a review of Section 393.190's predecessor, Section 5195, RSMo 1929. No Missouri court has deviated from that ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190. Again, it is the Staff’s position that Section 393.190 RSMo. does not apply to the instant transaction because the Commission does not have jurisdiction over the sale of municipally owned transmission facilities by the owner of the facilities.

12. Section 393.170 RSMo. is a different matter. Granting a CCN to SCMCN must be based on a showing that it is necessary or convenient for the public service for SCMCN to own, construct, operate, and maintain certain electric transmission facilities.

In the 1994 case, *In Re Tartan Energy*, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994), the Commission commented that "[a]lthough there is a dearth of statutory guidance, the Commission has articulated "the criteria to be used in evaluating such applications in *Re Intercon Gas, Inc*., 30 Mo.P.S.C.(N.S.) 554, 561 (1991)." The Commission stated that the *Intercon* case combined the standards used in several similar CCN cases, and set forth the following criteria for deciding whether to grant Tartan Energy a CCN to provide retail gas service in a number of southern Missouri counties:

- There must be a need for the service;
- The applicant must be qualified to provide the proposed service;
- The applicant must have the financial ability to provide the service;
- The applicant's proposal must be economically feasible; and
- The service must promote the public interest. *Id*.

In the *Tartan Energy* case, the Commission explained that it first stated these five factors in *Re Intercon Gas, Inc.*, 30 Mo.P.S.C.(N.S.) 554 (1991), where the Commission canvassed a number of certificate cases and distilled the criteria for a CCN into these five factors for purposes of deciding whether, and to whom, to grant a CCN for an intrastate natural gas pipeline.

In the *Intercon* case, Intercon Gas, Inc. ("Intercon"), Missouri Gas Co. ("MoGas"), Missouri Pipeline Co. ("MPC"), and Laclede Gas Co. ("Laclede") applied to the Commission for CCNs for various gas plant operations. MoGas, MPC and Laclede were awarded CCNs and Intercon was denied a CCN. The Circuit Court affirmed and appeal was taken by Intercon.

The Western District Court of Appeals expounded upon the meaning of the phrase "necessary or convenient for the public service," *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*, 848 S.W.2d 593, 597-598 (Mo. App. W.D. 1993):

> The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." § 393.170.3. The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost. *State ex rel. Beaufort Transfer Co. v. Clark,* 504 S.W.2d at 219. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. *State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n,* 600 S.W.2d 147, 154 (Mo.App.1980). The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. *State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n,* 527 S.W.2d 390, 394 (Mo.App.1975). Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. *Id.* at 392.

13. Pursuant to Section 393.120, RSMo. 2000, the terms "electrical corporation" and "electric plant" are defined in Section 386.020(14) and (15), RSMo. Cum. Supp. 2013 as follows:

> (14) **"Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever**, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, **owning, operating, controlling or managing any electric plant** except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others [Emphasis added];
>
> (15) **"Electric plant" includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the** generation, **transmission,** distribution, sale or furnishing **of electricity for light, heat or power; and**

> **any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power** [Emphasis added];

Both definitions have remained unchanged since the enactment of the Public Service Commission Act in 1913.

14. Section 1.090, RSMo, provides, "Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." When the Legislature provides a definition for a word or phrase, that definition is authoritative and to be read into the statute where that word or phrase appears as a part of the statute itself. *State ex rel. Exchange Bank of Richmond v. Allison*, 155 Mo. 325, 56 S.W. 467 (1900); *State v. Brushwood*, 171 S.W.3d 143 (Mo. App. W.D. 2005). Under these directives and as further set out herein, SCMCN is an "electrical corporation" that will own and operate "electric plant," an electric transmission line, for the sale of electricity to others and, thus, requires a CCN from the Commission for its proposed transmission facilities in Missouri.

15. For purposes of addressing the Commission's jurisdiction here, there is the 1968 Commission case involving Nixa. The Commission found Progressive Industries, Inc. ("Progressive") to be subject to its jurisdiction when Progressive began building a transmission line from Springfield to Nixa to provide electricity to the municipal distribution system in Nixa without having first obtained a CCN when The Empire District Electric Company ("Empire") filed a Complaint. *Re The Empire District Electric Co., Complainant, vs. Progressive Industries, Inc.*, a corporation, Respondent, Case No. 16,447, *Report And Order*, 13 Mo.P.S.C.(N.S.) 659

(April 2, 1968). Empire was previously certificated by the Commission to provide retail electric service in Nixa by means of Empire's generation, transmission, and distribution system. Empire's municipal franchise expired in 1965 and Nixa constructed its own electric distribution system substantially completing it in 1967. Also in 1967, Progressive entered into a contract to sell and deliver and Nixa agreed to take and pay for all the electric power necessary for its municipal distribution system. Progressive petitioned for County and State Highway permits and franchises to install and maintain an electrical transmission line to provide for the electric power requirements for Nixa and the surrounding area. The source of the power was to be the Southwest Power Administration. Construction of the transmission line began on or about February 1, 1968 and continued until it was stopped by agreement of counsel for Progressive and Staff counsel while Empire's Complaint was pending.

In its *Report And Order*, the Commission states, in part:

> Thus, whether [Progressive], by its activities in the construction of the electric transmission line in question, is **a public utility, that is a utility coupled with or affected with a public interest**, is the subject of the inquiry in the instant case. . . . [13 Mo.P.S.C.(N.S.) at 667; Emphasis added.]
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> * * * *
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> . . . Without attaching any particular significance to the fact that the line under construction appears to be designed for a capacity far in excess of that required by the inhabitants of the City of Nixa now or in the foreseeable future, **we do find that such line is, and is intended to be, an important and necessary link in the sale, transmission and distribution of electrical energy** from Southwestern Power Administration facilities to consumers and users, the inhabitants of the City of Nixa, Missouri, who will receive such power. [13 Mo.P.S.C.(N.S.) at 668; Emphasis added.]
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> * * * *
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> We find that the City of Nixa, being a municipal corporation, is not a private corporation in the full legal sense even though it is invested by law

> with some of the attributes of such a corporation. In the instant case, the sale of electric energy by [Progressive] to the City of Nixa, for use by it and distribution to its inhabitants is not, and will not be, considered as service to a single customer. (Cf. Southern Okla. Power Co. v. Corporation Comm., 96 Okla. 53, 220 P. 370 (1923)) [13 Mo.P.S.C.(N.S.) at 670.]

In its *Report And Order*, the Commission found Progressive "a public utility whose present and projected activities are affected by and coupled with the public interest and that the jurisdiction of the Commission should and must be invoked." 13 Mo.P.S.C.(N.S.) at 671.

16. The Commission found Progressive to be an uncertificated public utility engaged in the construction, ownership, or control of an electrical transmission line contrary to and in violation of the provisions of Chapters 386 and 393; ordered and directed Progressive to cease and desist in the construction, ownership, or control of electrical transmission facilities contrary to and in violation of the provisions of Chapters 386 and 393; and authorized and directed the General Counsel to take any action necessary for the enforcement of the instant Order. 13 Mo.P.S.C.(N.S.) at 671. On March 1, 1968, apparently on its own motion, the Commission in Case No. 16,463 issued an Order directing the General Counsel to institute on behalf of the Commission such legal proceeding or proceedings as he shall deem expedient and necessary to compel Progressive to comply with the provisions of the Public Service Commission Law, i.e., Progressive is constructing a power transmission line without first obtaining authority from the Commission to do so. On February 26, 1970 , the Commission issued an Order Of Dismissal respecting its Order issued on March 1, 1968 in the instant case on the basis that it had come to the Commission's attention that

Progressive on January 16, 1969 forfeited its Certificate of Incorporation to the Missouri Secretary of State.

17. There is a case of note from Ohio regarding whether a corporation is operating as a public utility. *Industrial Gas Co. v. Ohio Public Util. Comm'n*, 21 N.E.2d 166 (S.Ct. Ohio 1939). On April 13, 1938, the Industrial Gas Co. filed with the Public Utilities Commission of Ohio ("Ohio Commission") an application to change the purpose clause of its articles of incorporation, withdraw its properties from service to domestic users of gas and to be declared not subject to the jurisdiction of the Ohio Commission on the ground that it was no longer a public utility. The Industrial Gas Co. operated approximately 50 miles of pipeline, served 19 industrial and twelve private customers under written contracts which stipulated the price to be paid for gas, but the Industrial Gas Co. did not hold itself out to serve either the public or the users of industrial gas generally and refused or failed to agree with, and did not serve certain industrial users of gas in its territory. The corporation supplying service did not hold itself out to serve the public generally. No proceedings of eminent domain / condemnation had ever been instituted to acquire property or right of way. The Ohio Commission found the Industrial Gas Co. was a public utility within the definition Ohio General Code, and denied the Industrial Gas Co.'s application for a ruling that the Ohio Commission did not have jurisdiction. 21 N.E.2d at 166-67.

18. The Court held that the changed purpose clause of the charter did not of itself alter the real character of the Industrial Gas Co. business. The Court said it is what the corporation was doing, the nature of its operations, rather than the purpose clause, that determined whether the business had the element of public utility. 21 N.E.2d at

167-68. The Court held that the Industrial Gas Co. dedicated itself to the public utility service to such a degree on the part of a substantial public and within a substantial area so as to make its business a matter of a matter public concern, welfare and interest; for the Industrial Gas Co. to be a public utility and subject to regulation by the Ohio Commission. *Id*. at 167-68.

19. Recently, in File No. EA-2015-00145, In the Matter of the Application of Ameren Transmission Company of Illinois ("ATXI")[3] for a disclaimer of jurisdiction or in the alternative, a CCN relating to 7 miles of the 345 kV Illinois Rivers, the Commission issued a *Revised Order Granting Certificate of Convenience and Necessity* on July 22, 2015 ("*Revised Order*") after the ATXI filed an Application for Rehearing. In its Application, ATXI stated that it does not provide retail electric service to the general public in Missouri, does not serve any retail service territory in Missouri, and does not manufacture, sell or distribute electricity for light, heat or power either within or outside Missouri. The Commission in its *Revised Order* related that ATXI offered two arguments against Commission jurisdiction. Those arguments appeared in ATXI's first Application for Rehearing, Paragraph 7, page 4 and Paragraphs 9-12, pages 5-6.

20. First, ATXI argued in its first Application for Rehearing that under *State ex rel. M.O. Danciger & Co. v. Public. Serv. Comm'n*, 205 S.W. 36 (Mo. 1918) (the "*Danciger Test"*) 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. In *Danciger*, the stock of the

[3] 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 in Marion County, Missouri, and an Associated Switching Station Near Palmyra, Missouri ("the first ATXI case for a CCN").

Royal Brewing Company in Weston, Mo. (whose stock was largely or wholly owned by M.O. Danciger (trading as M.O. Danciger & Co.) and his brothers) had its own private electric plant by which it ran its plant and provided electric service to certain residences and businesses in a three block radius from surplus electric service under the name M.O. Danciger & Co. Electric service was not provided to all who requested service and a complaint for reinstatement of service was made by a business for which service was terminated. The Commission held that ATXI was an electrical corporation building electric plant, stating at pages 5-6 of its July 22, 2015, *Revised Order*, as follows:

> In the words of the Missouri Supreme Court:
>
> > the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.[9]
> > ---
> > [9] *Danciger*, at 40.
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> That then is the *Danciger* test; whether the electric plant has been devoted to the public use. Contrary to ATXI's assertion, there is no requirement that the alleged public utility indiscriminately provide electric service to the general public at retail.
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> **Although ATXI will not be selling electricity at retail to the public, its application establishes that the electric transmission line it proposes to build and operate will be an integral link in the sale and distribution of electricity to the public.** In fact, the transmission line's importance to that public purpose is the basis for ATXI's claim that the line is needed. Under the circumstances, **the Commission finds that the electric transmission line that ATXI proposes to build will be dedicated to the public service and is subject to regulation by this Commission under the *Danciger* test**. [Emphasis added.]

21. Second, in its first Application For Rehearing, ATXI argued that the Illinois Rivers transmission line in Missouri is not subject to regulation by this Commission because the Commission's jurisdiction is limited to the intrastate operations of public

utilities, citing Section 386.250(1), and the Commission's jurisdiction does not include utilities engaged only in interstate commerce, citing Section 386.030, *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 498 (Mo. 2012), and Section 201 of the Federal Power Act ("FPA") (16 U.S.C. Section 824(b)). So the issue became whether FERC, which generally regulates the interstate transmission of electricity, had preempted the Commission's state authority to regulate ATXI. The Commission noted that while FERC has authority over the transmission of electricity in interstate commerce, 16 U.S.C. Section 824(a)(1), it does not claim jurisdiction over the siting of transmission facilities and quoted from *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) that "[S]tates have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." The Commission concluded that federal law does not preempt this Commission's authority to require ATXI to obtain permission, in the form of a CCN, before constructing electric plant in Missouri. The case is presently being briefed before the Western District Court of Appeals, *Ameren Transmission Co. of Illinois v. Public Serv. Comm'n*, WD 78939.

22. Finally, the Staff would note some of the language in the U.S. Supreme Court's decision in *New York v. F.E.R.C.*, 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002). The State of New York, et al. questioned FERC's assertion of jurisdiction over unbundled retail transmissions and Enron Power Marketing, Inc. questioned FERC's refusal to assert jurisdiction over bundled retail transmissions. In Order No. 888, FERC ordered functional unbundling of wholesale generation and transmission services, imposed a similar open access requirement on unbundled retail transmission service in

interstate commerce and declined to extend open access requirements to the transmission component of bundled retail sales. The Court noted that no petitioner questioned the validity of Order No. 888 as it applied to wholesales transactions. The disputes before the Court were over the proper scope of FERC jurisdiction over retail transmission transactions:

> . . . FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. See, *e.g.,* Order No. 888, at 31,782, n. 543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); *id.,* at 31,782, n. 544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges"). . . .

535 U.S. at 24, 122 S.Ct. at 1026.

> To remedy the wholesale discrimination it found, FERC chose to regulate all wholesale transmissions. It also regulated unbundled retail transmissions, as was within its power to do. See Part III, *supra.* However, merely because FERC believed that those steps were appropriate to remedy discrimination in the wholesale electricity market does not, as Enron alleges, lead to the conclusion that the regulation of *bundled* retail transmissions was "necessary" as well. Because FERC determined that the remedy it ordered constituted a sufficient response to the problems FERC had identified in the wholesale market, FERC had no § 206 obligation to regulate bundled retail transmissions or to order universal unbundling.

535 U.S. at 26-27, 122 S.Ct. at 1028; Footnote omitted.

WHEREFORE, the Staff files its response to the Motion For Partial Disposition and Memorandum In Support Of Motion For Partial Disposition of South Central MCN LLC and states it concurs with SCMCN that the Commission does not have jurisdiction under Section 393.190 RSMo over the sale of the Nixa transmission facilities by Nixa to

SCMCN but that SCMCN requires Commission approval of a certificate of convenience and necessity pursuant to Section 393.170 RSMO. respecting the transmission facilities to be sold and transferred from Nixa to SCMCN which is the subject of SCMCN's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Staff Response To South Central MCN LLC Motion For Partial Disposition* have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 15th day of January, 2016.

/s/ Steven Dottheim