

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

In the Matter of the Applications of KCP&L)
Greater Missouri Operations Company for)
Authority to Sell its Liberty Service Center)

File No. EO-2010-0211

OPINION ON JURISDICTION

COMES NOW the Chief Staff Counsel's Office, through the undersigned counsel, and opines that the Missouri Public Service Commission ("Commission") has jurisdiction over the sale of KCP&L Greater Missouri Operations Company's ("KCP&L-GMO" or "Company") Liberty Service Center, and that KCP&L-GMO must seek Commission approval prior to the sale of the service center. For its *Opinion*, the undersigned respectfully states the following to the Commission:

Factual Summary

On January 14, 2010, KCP&L-GMO filed an *Application* with the Commission which initiated this case and requested that the Commission approve a sale of KCP&L-GMO's Liberty Service Center. The *Application* included a copy of a contract for the sale of the service center. According to its *Application*, the service center is already vacated with operations currently handled out of the existing Northland Service Center. The proposal for closure was explained to the Commission in the acquisition case EM-2007-0374, as a consolidation of service centers owned by the two subsidiary companies, KCP&L and KCP&L-GMO.

Legal Analysis

Section 393.190 RSMo (2000) provides:

No....electrical corporation....shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, *necessary or useful* in the performance of its duties to the

public....without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. (emphasis added).

Thus, the question in this case is whether a closed service center is “necessary or useful” in KCP&L-GMO’s performance of its duties to the public.

Prior Case History

KCP&L-GMO’s *Application* references Case No. EO-2009-0148, whereby the Commission conditionally authorized a similar Section 393.190 RSMo application made by the Company. In that case, KCPL-GMO’s application asked for a finding whether the sales of the Platte City and Liberty Service Centers required the Commission’s approval of the proposed sales. The Commission approved the sale of the Platte City Service Center, but denied approval for the sale of the Liberty Service Center as it was not subject to a contract for sale at that time. While, the Commission’s *Order Approving Application To Sell Real Property* stated “Missouri law requires the Company [KCP&L-GMO] to secure Commission approval prior to selling the service centers,” the order did not expound on the meaning of the phrase “necessary or useful” as used in Section 393.190 RSMo.

In the earlier Case No. EO-2005-0156, Aquila, Inc. (now known as KCP&L-GMO) filed an application with the Commission on December 6, 2004, seeking approval under Section 393.190 to enter into a Chapter 100 financing agreement with the City of Peculiar, Missouri. Aquila intended to sell three combustion turbines to the City, and then lease them back for use in the production of electricity. Aquila intended to site the turbines and associated equipment at the South Harper Facility location, the construction and operation of which was enjoined by the Circuit Court of Cass County. The Commission’s *Report And Order* found that

[a]n electrical corporation's sale of any part of its franchise, works, or system necessary or useful in the performance of its duties to the public is void without having first obtained an order from the Commission authorizing the sale. Because the turbines and associated equipment were not providing electricity to Missourians on December 30, 2004, those assets were not necessary or useful at that time. Therefore, Section 393.190 does not apply to this transaction.

The case currently before the Commission differs factually in that Liberty Service Center is constructed, was previously fully operational, and apparently the Company can use the facility in the performance of KCP&L-GMO's duties to the public; KCP&L-GMO is just *choosing not to use* the facility at this point in time. Prior rate cases have included the service center in KCPL-GMO's rate structure.

In a similar case to that at hand, Arkansas Power & Light Company ("AP&L") in Case No. EM-90-12, sought Commission approval for the sale of its ownership interests in the Independence Steam Electric Station Unit 2, located near Newark, Arkansas, and the Ritchie Steam Electric Station Unit 2, located near Helena, Arkansas. In the alternative, AP&L requested a Commission order declining jurisdiction over the proposed sale. AP&L argued the Commission lacked jurisdiction over the sale of the facilities since:

these plants are not reflected in the rates paid by AP&L's Missouri customers and, therefore, these assets are not necessary or useful in rendering service to AP&L's Missouri customers. Section 393.190....requires the Commission's approval for disposal of assets only if the assets are considered necessary or useful in the performance of a utility's duties to its customers in this state.

Order Approving Sale, 30 Mo. P.S.C. (N.S.) 244, 245. The Commission's *Order Approving Sale* found "[t]here is no doubt that the Commission has jurisdiction over this matter." *Id.* at 246. A finding of jurisdiction in a matter involving plant not recovered in Missouri rates would certainly lend a finding of jurisdiction over the sale of the Liberty Service Center. The service center was fully operational and remains completely available for the Company's use to serve its

customers, only the Company is choosing not to use the facility at this time for the purpose that it was previously designed for and serving.

Chief Staff Counsel's Opinion

The purpose of Section 393.190 “is to ensure the continuation of adequate service to the public served by the utility.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980). While no clear statutory definitions exist for the terms “necessary” or “useful” as used in the statute, the *Dissenting Opinion* in Case No. EO-2005-0156 identified other judicial decisions that lend guidance for the meanings of the terms. One of those decisions is *State ex rel. Union Elec. Co. v. University City*, 449 S.W.2d 894, 901 (Mo. App. 1970), where an electric utility sought a conditional use permit to site an electric substation under a city ordinance. The conditional use ordinance provided:

[i]n addition to such permitted compatible uses, however, it is recognized that there are other uses which it may be *necessary* or desirable to allow in a given district in the interest of public convenience, but which may have an effect upon neighborhood uses or public facilities and therefore need to be carefully regulated with respect to location or operation for the protection of the community. (emphasis added).

In interpreting the ordinance, the Court found the term “necessary” as used “means suitable, proper and convenient to the ends sought”, not absolute necessity. *Id.* at 901.

Further, Section 393.170.3 RSMo (2000) uses similar statutory language to 393.190, and provides “[t]he commission shall have the power to grant [a certificate of convenience and necessity]....whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is *necessary* or convenient for the public service.” (emphasis added). As for necessary, opinions of the Western District Court of Appeals state “[t]he term “necessity” does not mean “*essential*” or “*absolutely indispensable*,” but that an additional service would be an improvement justifying its cost. *State ex rel. Intercon Gas, Inc. v.*

Public Service Com'n of Missouri 848 S.W.2d 593, 597 (Mo. App. W.D. 1993), citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. K.C. 1973). KCP&L-GMO states in the *Application* that the Liberty Service Center was closed as part of a consolidation of the Company's service centers with those of KCP&L. Allowing any company to determine what facilities are "necessary" or "useful" by the act of closure, will remove from the Commission's purview a review for the necessity or usefulness of such facility, which skirts the Commission's mandate under Section 393.190.

The Staff also finds of interest the discussion at page three of the *Dissenting Opinion* in Case No. EO-2005-0156, regarding what might occur if "a utility could simply turn off a generator [or close a service center as in this case] that had been operational up to that time, declare it no longer necessary, and sell it without prior authority from the Commission." This hypothetical might seem outlandish, but KCP&L originally sought to abandon its Downtown Kansas City steam service system until this Commission, in Case No. HO-86-139, compelled KCP&L to first seek a purchaser of the system. In *Re Kansas City Power & Light Co.*, 29 Mo. P.S.C. (N.S.) 232 (1987).

A denial of the Commission's Section 393.190 jurisdiction over the sale of the Liberty Service Center is not within the letter or the spirit of Section 386.610 RSMo (2000), which provides that the provisions of Chapter 386 "shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

Conclusion

WHEREFORE, the Chief Staff Counsel's Office files this *Opinion* for the Commission's consideration, and requests the Commission to assert its jurisdiction over the proposed sale of KCP&L Greater Missouri Operations Company's Liberty Service Center.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was served via electronic mail on Roger W. Steiner, Sonnenschein Nath & Rosenthal LLP, Attorney for Kansas City Power & Light Great Missouri Operations Company, at rsteiner@sonnenschein.com; Victoria Schatz, in-house counsel for Kansas City Power & Light, at victoria.schatz@kcpl.com; and The Office of Public Counsel of the State of Missouri, at opcservice@ded.mo.gov this 16th day of February, 2010.

/s/ Jennifer Hernandez