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June 6, 2003

VIA HAND DELIVERY

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Aquila, Inc.
Case No. EF-2003-0465

Dear Mr. Roberts:

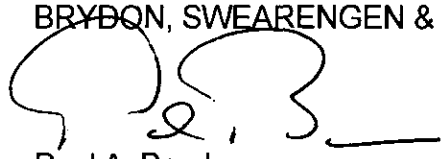
On behalf of Aquila, Inc. I deliver herewith an original and eight (8) copies of a Aquila, Inc.'s Response to Staff's Status Report and Motion to Establish Early Prehearing Conference, for filing with the Commission in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel. Service copies have been mailed or hand-delivered this date.

I have also enclosed an extra copy which I request that you stamp "Filed" and return to the person delivering them to you.

Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 
Paul A. Boudreau

PAB/ccp
Enclosures
cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber Its Franchise, Works or System	))))	Case No. EF-2003-0465

AQUILA, INC.'S RESPONSE TO STAFF'S STATUS REPORT AND MOTION TO ESTABLISH EARLY PREHEARING CONFERENCE

COMES NOW Aquila, Inc. ("Aquila"), Applicant in the above captioned matter, by and through counsel, and for its Response to Staff's Status Report and Motion to Establish Early Prehearing Conference filed on June 3, 2003 (the "Report"), states as follows:

1. Staff's Report at paragraph twelve (12) questions the adequacy of the corporate Resolutions filed as Appendix 7 to the Application. Regrettably, Aquila inadvertently filed inapplicable corporate Resolutions as an Appendix to the Application. As Staff notes, the Resolutions dated November 6, 2002, and that were filed with the Application related to a plan to obtain a waiver from Aquila's former creditors. Instead, Aquila put in place a replacement debt facility with a different group of lenders. The Resolutions authorizing that action were dated April 4, 2003. Simultaneously with this Response, Aquila has caused to be filed a substitute Appendix 7 to the Application, a certified copy of the Resolutions of Aquila's Board of Directors adopted on April 4, 2003. This filing cures the deficiency identified by Staff.

2. Also, due to an unfortunate circumstance brought about by timing, the Application was filed on April 30, 2003, the very same day that the Commission's new filing and reporting requirements in Division 240 of the Code of State Regulations ("CSR") went into effect in new Chapter 3. Consequently, the Application makes reference to 4 CSR

240-2.060(7), language which has been moved to 4 CSR 240-3.110. Other than being moved from Chapter 2 to Chapter 3, the requirements of the rule remain unchanged. Nevertheless, the correct rule reference in the preamble of the Application as of April 30, 2003 should have been 4 CSR 240-3.110. Aquila regrets the difficulty caused by this incorrect citation. Under the circumstances, Aquila believes the erroneous rule reference is excusable.

3. In paragraphs 9 through 11 of the Report, Staff suggests that Aquila's Application is deficient because Aquila has not asked for authority to issue debt securities under §393.200 RSMo[1] in addition to seeking authority to mortgage or encumber its Missouri franchise, works or system under §393.190.1 RSMo. The Report in this regard is incorrect because it fails to take into account legal authority establishing that the requirements of §393.200 RSMo are not applicable to Aquila.

4. It is well settled in law that §393.200 RSMo is not applicable to utilities chartered in states other than the State of Missouri. According to the Missouri Supreme Court, the language in §393.200.1 RSMo that refers to utilities "organized or existing or hereafter incorporated under or by virtue of the laws of this state" means corporations chartered under Missouri law. Public Service Commission v. Union Pacific Railroad Company, 197 S.W. 39, 41 (Mo banc 1917).

5. The Commission subsequently followed the reasoning of the Missouri Supreme Court when it dismissed for lack of jurisdiction the application of a Delaware chartered natural gas company for authority to issue common stock. Citing the Union

[1] The Commission's separate filing requirements regarding applications to issue stocks, bonds, notes and other evidences of indebtedness under §393.200 RSMo. now appear at 4 CSR 240-3.120.

Pacific case, the Commission concluded that it had "no authority to supervise or pass upon the proposed issue of stock by the applicant." Re Suburban Service Company, 14 MoPSC 114, 116 (1923).[2]

6. Additionally, the Office of the Commission's General Counsel issued Opinion Number 69-17 (copy attached) in 1969 in which it analyzed the foregoing legal authority and concluded that a foreign corporation is not "organized or existing, or hereafter incorporated, under or by virtue of the laws of the State of Missouri." Id. at pages 6-10. Even more to the point, the General Counsel's Office advised the Commission in 1987, at the time that Aquila (then UtiliCorp) reincorporated in the State of Delaware, that the Commission would no longer have authority under §393.200 RSMo to approve issuances of securities issued by Aquila. A copy of that advisory memorandum filed in Case No. EM-87-26 is also attached hereto.

7. Given the well settled law on this topic, it is somewhat surprising to see the issue resurrected in the context of the Report. Aquila, a corporation chartered under Delaware law, is not required by §393.200 RSMo to file for or obtain the Commission's authorization to issue stocks, bonds, notes or other evidences of indebtedness. Consequently, Aquila's Application in this case is not deficient for failing to have requested relief under §393.200 RSMo or the Commission's implementing regulations. To the

[2] *See also*, Re Arkansas Power & Light Company, Case No. EO-81-216 [held: "Since Arkansas Power & Light Company is an Arkansas corporation, this Commission is not required by the [Section 393.200 RSMo] to approve or disapprove the above-described financing method."]; Re Arkansas Power & Light Company, Case No. EF-81-271 [held: "Since AP&L is not a Missouri corporation, the Commission has no authority to supervise or pass upon the proposed issue of stock by AP&L, even though AP&L is permitted to do business in this state."]

contrary, its Application for authority to mortgage or encumber its franchise, works or system in Missouri complies in all material respects with its obligations under the law and applicable filing requirements.

8. The other asserted deficiencies in the Application mentioned by Staff are minor and inconsequential. The Application is otherwise substantially in compliance with the Commission's filing requirements. See, 4 CSR 240-2.080(14).

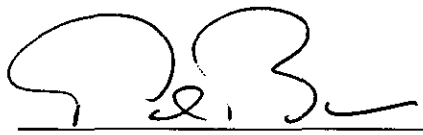
9. The Report suggests that the Commission establish an intervention deadline of thirty (30) days from the date of the filing of its Report. Aquila does not oppose the establishment of an intervention deadline; however, an additional thirty (30) days is excessive under the circumstances. As the Staff points out, Aquila's Application was filed on April 30, 2003, more than thirty (30) days ago and interposing an additional thirty (30) day period seems unreasonable. One application to intervene has been filed and approved. Also, Aquila's companion case in Colorado is already scheduled to go to hearing on June 17, 2003. Similarly, Aquila has a hearing before the Iowa Utilities Board on June 30, 2003. Staff's proposal just serves to delay the case unnecessarily.

10. In the alternative, Aquila suggests that the Commission issue an order establishing an intervention deadline of no later than Monday, June 16, 2003, and hold an early prehearing conference later the same week for the purpose of discussing the establishment of a procedural schedule.

WHEREFORE, Aquila submits that its Application is substantially in compliance with the Commission's filing requirements, is filed in accordance with applicable legal authority and rules of this Commission and, further, prays that the

Commission establish an intervention deadline of no later than June 16, 2003 with an early prehearing conference to be held within a week thereafter for purposes of establishing a procedural schedule in this case.

Respectfully submitted,



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(573) 635-7166

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 6th day of June 2003 to the following:

Mr. Dana K. Joyce, General Counsel
Missouri Public Service Commission
Office of the General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Douglas Micheel
Deputy Public Counsel
Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 7800
Jefferson City, MO 65102

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
3100 Broadway, Suite 1209
Kansas City, MO 64111

MEMORANDUM

To: Commissioners

From: Gordon Persinger, Director of Utility Division
Douglas Walther, Assistant General Counsel DCW

Re: Case No. EM-87-26, Utilicorp Merger

Date: March 18, 1987

The purpose of this memorandum is to provide you with the recommendation of the Missouri Public Service Commission Staff regarding the proposed merger of Utilicorp, United, Inc., a Missouri corporation, and Utilicorp United, Inc., a Delaware corporation. On September 22, 1986, Utilicorp Missouri and Utilicorp Delaware filed an application with the Commission requesting a Commission Order authorizing the Joint Applicants to merge Utilicorp Missouri with and into Utilicorp Delaware. Under the terms of the merger, all of the property, rights, privileges, immunities and franchises of Utilicorp Missouri, including those under its certificate of public convenience and necessity, would be transferred to Utilicorp Delaware, the surviving corporation of the merger.

As you are aware, by virtue of Section 393.190(1) RSMo 1986, no gas corporation or electrical corporation shall merge any part of its franchise, works or system, necessary or useful in the performance of its duties to the public without first having secured an Order from the Commission authorizing it to do so. As you are also aware, the standard that this Commission and Missouri Courts apply in deciding whether to approve a merger is whether the merger is "detrimental to the public interest". This standard was discussed by the Missouri Supreme Court in the case State ex rel. City of St. Louis v. Public Service Commission of Missouri, 73 S.W.2d 393 (Mo. 1934). The Court stated:

> 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 benefitted, 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". (Court's emphasis) Id. at 400.

In determining whether a detriment exists, a number of factors have generally been looked at by the Commission. An excellent discussion of these factors is contained In The Matter of the

Application of the Kansas Power & Light Company and The Gas Service Company for authority of the Commission pursuant to Section 393.190, RSMo 1978, for the purchase by the Kansas Power & Light Company of all outstanding common stock of The Gas Service Company, 26 Mo. P.S.C. (N.S.) 254 (Sept. 12, 1983). In approving the transaction, the Commission stated:

> The evidence shows that the proposed stock acquisition and merger between KPL Acquisition Corporation and GSC will not be detrimental to the public interest. It is apparent from the record that the status quo is at the very least, to be maintained, at least for the immediate future, with no change in rates or conditions of service and no substantial changes in methods of operation. For the future there appears to be reasonable prospects that the acquisition will not be detrimental to GSC and therefore, its ratepayers in the areas of financial integrity, enhanced managerial capability, and economies of scale and operational efficiencies and other areas on which the Commission requested information.

Id. at 257, 258.

In the instant case, none of the factors traditionally used to determine whether a detriment to the public exists appear to be present. There is no evidence that the merger will result in a change in rates, a change in the method of operation of Utilicorp or a change in the quality or condition of service. Moreover, there is no evidence that this merger will have a detrimental effect on the efficiency of Utilicorp's operation, or on the managerial capability and financial integrity of Utilicorp. Therefore, it is the recommendation of Staff that the merger be approved by the Commission.

Although a review of the law compels us to recommend approval, there are certain factors unique to this situation that are of concern to Staff and which Staff believes should be brought to the Commission's attention. First, in the event that the merger is approved, the Commission would lose jurisdiction over the issuance of stock by Utilicorp Delaware. Section 393.200 states in relevant part:

> A gas corporation, an electric corporation, water corporation or sewer corporation organized or existing or hereafter incorporated under or by virtue of the laws of this state may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than 12 months after the date thereof . . . ; provided, and not otherwise, that there shall have been secured from the Commission an Order authorizing such issue. . . .

Since Utilicorp, as a Delaware corporation, would no longer be organized and existing under the laws of Missouri, it would no longer be subject to the requirements of Section 393.200.

Staff's second concern about this merger involves Section 393.190(2) RSMo 1986. The second sentence of Section 393.190(2) states in relevant part:

> Save where stock shall be transferred or held for the purpose of collateral security, no stock corporation of any description, domestic or foreign, other than a gas corporation, electrical corporation, water corporation, sewer corporation or street railroad corporation, shall, without the consent of the Commission, purchase or acquire, take or hold, more than 10% of the total capital stock issued by any gas corporation, electrical corporation, water corporation or sewer corporation organized or existing under or by virtue of the laws of this state. . . .

This language means that a non-utility can acquire up to 10% of the stock of an electric, gas, water, or sewer corporation organized or existing under or by virtue of the laws of Missouri without Commission approval. However, a gas corporation, electric corporation, water corporation, sewer corporation or street railroad corporation must receive Commission approval to acquire any amount of stock in an electrical, gas, water, or sewer corporation organized or existing under or by virtue of the laws of Missouri. Therefore, when the merger is approved and Utilicorp is no longer organized or existing under or by virtue of the laws of Missouri, the Commission will lose jurisdiction to approve the acquisition of Utilicorp stock by another public utility and will be without jurisdiction to approve the acquisition of more than 10% of the stock of Utilicorp by a non-utility.

Staff could develop hypothetical scenarios for the Commission in which the loss of this jurisdiction could ultimately result in a detriment to the public. However, Staff has been unable to find any legal authority standing for the proposition that hypothetical scenarios constitute competent and substantial evidence of detriment to the public. Nonetheless, Staff believes that it is important for the Commission to be aware that by approving this merger it will lose the aforementioned jurisdiction.

Staff wishes to put Company on notice that it will hold it to a strict burden of proof in future rate cases regarding its accounting treatment among its various divisions.

Finally, to fully effectuate this merger, Staff recommends the approval of the acquisition by Utilicorp Missouri of the stock issued by its subsidiary, Utilicorp Delaware, at the time of Utilicorp Delaware's incorporation.

DCW:nsh

OPINION OF THE GENERAL COUNSEL
MISSOURI PUBLIC SERVICE COMMISSION

UTILITIES:
RAILROAD CORPORATION:
COMMON CARRIERS:
JURISDICTION:
STOCK ACQUISITION:
CORPORATIONS:

Section 387.260(2), RSMo, requiring approval of the Public Service Commission before foreign or domestic stock corporations can purchase or acquire, take or hold more than ten percent (10%) of the capital stock issued by any railroad corporation or common carrier does not apply when such railroad corporation or common carrier is a foreign corporation.

Opinion No. 69-17

December 15, 1969

Honorable William R. Clark
Chairman
Missouri Public Service Commission
1001 Jefferson State Office Bldg.
Jefferson City, Missouri 65101

Dear Judge Clark:

This is in response to your request for an opinion of this office as to whether the Missouri Public Service Commission has jurisdiction to approve or disapprove the acquisition of more than ten percent (10%) of the stock of Kansas City Southern Industries, Inc. (KCSI) by Lee National Corporation (Lee National).

It appears that it was reported in the public press approximately one month ago that Lee National had reported to the Securities and Exchange Commission acquisition of a substantial amount of common and preferred stock of KCSI. It is my understanding that as of this writing Lee National has acquired approximately twenty percent (20%) of the stock of KCSI.

Lee National is a New York corporation and is qualified to do business in Missouri. KCSI is a Delaware corporation and qualified to do business in Missouri. KCSI holds, among other things, ninety-nine percent (99%) of the stock of Kansas City Southern Railway Company.

KCSI was authorized by this Commission in March, 1962, to acquire more than ten percent (10%) of the stock of the Kansas City Southern Railway Company in Re: Kansas City Southern Industries, Inc., 10 Mo PSC (NS) 163. KCSI in its application requested that the Commission either deny it had jurisdiction because of pre-emption by the Federal Government or in the alternative approve the application. The Commission chose the latter alternative.

Kansas City Southern Railway Company is a Missouri corporation. It is a "railroad corporation" and a "common carrier" as those terms are defined in Section 386.020, RSMo Supp 1967, subsections 8 and 9 respectively. The jurisdiction of the Commission is expressly extended over the Kansas City Southern Railway Company by virtue of Section 386.250, RSMo Supp 1967. The Kansas City Southern Railway Company is subject to the provisions of Chapters 386, 387, 388 and 389, RSMo.

Based on the facts stated above and for the reasons stated herein, it is the opinion of this office that the Missouri Public Service Commission has no jurisdiction over the acquisition of more than ten percent (10%) of the stock of KCSI by Lee National. In reaching this conclusion, we have extensively researched the matter. We have reviewed the laws of this state, other states and federal law. We have utilized the Reporter System, C.J.S., P.U.R., Mo. PSC Reports and other materials in order to find all applicable cases which could shed some light on the subject.

It is a well established principle of law that the Public Service Commission is a creature of statute and has only such powers as are expressly granted it by statute or which may be reasonably and necessarily implied therefrom. State ex rel. Kansas City Transit, Inc. v. Public Service Commission, 406 SW2d 5 (Mo. 1966).

If the Commission has the power to approve or disapprove of the acquisition of more than ten percent (10%) of the common stock of KCSI by Lee National, the power would come from Section 387.260, RSMo. The pertinent part of the statute provides:

> ". . . no stock corporation of any description, domestic or foreign . . . shall, without the consent of the Commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by any railroad corporation . . . or any other common carrier organized or existing under or by virtue of the laws of this state. . ."

The statute goes on to provide in subsection 3 that any such transaction made without the consent of the Commission shall be void and of no effect.

It is clear from reading the above-quoted portion of Section 387.260 that Lee National's acquisition of over ten percent (10%) of KCSI stock would necessitate the consent of the Commission if KCSI is a railroad corporation or common carrier organized or existing under or by virtue of the laws of this state, and further, if the Federal Government has not pre-empted the field.

Thus it would appear that three prerequisites or conditions must exist before this Commission would have jurisdiction and that if anyone of the three is missing that there is no jurisdiction. We will discuss them in the following order: 1) KCSI must be a "common carrier" or "railroad corporation" as those terms are defined by the Public Service Commission Law; 2) That the Federal Government must not have pre-empted the field; and 3) That KCSI must be "organized or existing under or by virtue of the laws of this state."

In arriving at our conclusion, we found that it was not necessary to arrive at a conclusion as to whether KCSI is a "common carrier" or "railroad corporation" or whether the field has been pre-empted by the Federal Government because we found that KCSI is not "organized or existing under or by virtue of the laws of this state." This is fortunate because the state of the law on the former subjects is not as clear as the state of the law on the latter subject. Since it is not necessary in this opinion to arrive at a conclusion on the questions of whether KCSI is a "common carrier" or "railroad corporation" or whether the field has been pre-empted, we will merely discuss the authorities pro and con on such subjects and assume for the purposes of this opinion that KCSI is a "common carrier" or "railroad corporation" and that the field has not been pre-empted by the Federal Government.

1) "Common Carrier" or "Railroad Corporation"

A case could definitely be made for the proposition that KCSI is a "common carrier" or "railroad corporation" as defined by Section 386.020, RSMo Supp 1967, even though neither KCSI nor the Commission has ever treated KCSI as such.

The only time KCSI has been before this Commission was for approval to purchase over ten percent (10%) of the stock of Kansas City Southern Railway Company, a "railroad corporation"

and "common carrier" organized and existing under the laws of this state since it is a Missouri corporation. The case was Re: Kansas City Southern Industries, Inc., supra. It was not determined nor was it necessary to determine in that case that Commission jurisdiction extended to KCSI since under Section 387.260, RSMo, the transaction of acquiring over ten percent (10%) of the stock required Commission approval by virtue of its jurisdiction over the Kansas City Southern Railway Company.

However, it would appear from a literal reading of the definitions of "railroad corporation" and "common carrier" found in Section 386.020(8) and (9) that the holding by KCSI of ninety-nine percent (99%) of the stock of Kansas City Southern Railway Company may qualify KCSI to be deemed a railroad corporation and a common carrier.

The pertinent provisions of Section 386.020, RSMo Supp 1967, are as follows:

> "8. The term 'railroad corporation', when used in this chapter, includes every corporation . . . owning, holding, operating, controlling or managing any railroad or railway. . ." [Emphasis supplied.]
>
> "6. The term 'railroad' when used in this chapter, includes every railroad and railway, other than street railroad, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, equipment, switches, spurs, tracks, stations, real estate and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad;"
>
> "9. The term 'common carrier', when used in this chapter, includes all railroad corporations. . . and every corporation. . . owning, holding, operating, controlling or managing any such agency for public use in the conveyance of persons or property within this state." [Emphasis supplied.]

It is to be noted that the language of the definitions of "common carrier" and "railroad corporation" contained in Section 386.020, RSMo Supp 1967, differs from the language of the definitions of other utilities found in the same statute.

The definitions of "gas corporation", "electrical corporation", "telephone corporation", "telegraph corporation", "water corporation", "heating company" and "sewer corporation", found in subsections 11, 13, 17, 19, 21, 28 and 29, respectively, of Section 386.020, do not contain the word "holding" which is found in the phrase ". . . owning, holding, operating, controlling or managing. . ." used in both subsection 8 (railroad corporation) and subsection 9 (common carrier). The language for the other utilities reads ". . . owning, operating, controlling or managing." In construing statutes, there is a presumption raised that the legislature acted with a purpose in making such a distinction.

Thus it would appear that the decision of the Commission in Re Stern Bros. & Co., 27 Mo. PSC 337, 65 PUR(NS) 286 (1946) would not apply in this case because of the difference in the language of the statute defining "gas corporations" and "railroad corporations." The Stern case held that an underwriting company which held a majority of the stock of a gas corporation but which did not dominate such company was found not to be a gas corporation, and therefore not subject to the provisions of the statutes requiring that no gas corporation may purchase stock of another company doing the same or a similar business without authorization from the Commission. Since the definition of "gas corporation" did not contain the word "holding" the Commission did not have to decide if the holding of the stock by Stern Bros. made it a "gas corporation." That is not the case here. Here there is a holding of stock as well as control of the railroad corporation by KCSI.

Therefore, it would appear that under a reasonable construction of Missouri Law, KCSI may be determined to be technically a "common carrier" and "railroad corporation" as defined in Section 386.020 and subject to the jurisdiction of the Missouri Public Service Commission. We would not want to make this statement without qualifications until we were acquainted with all the facts of KCSI's operations.

For the purposes of this opinion, assume arguendo that KCSI is a common carrier and a railroad corporation under the definitions of the Public Service Commission Law; it does not necessarily follow that the transaction in question here requires Commission approval.

2) Pre-emption

It may be that this matter has not been pre-empted by the Federal Government because while the KCSI may be a common carrier under Missouri Law it is not a carrier under Federal Law. The Interstate Commerce Commission held in Finance Docket 21,979

on April 13, 1962, in the case of Kansas City Southern Industries, Inc. - Control - Kansas City Southern Railway Co., that it did not have jurisdiction over the acquisition of control through the ownership of the capital stock of the Kansas City Southern Railway Company, a carrier, by KCSI because KCSI was not a carrier.

On the other hand, it has been held that Congress has undoubtedly manifested an intention to occupy the field of railroad unification, consolidation, combination and acquisition of control. If so, the enactments of Congress would supersede and override the regulatory provisions of Chapter 387. The District Court in Kansas City Southern Ry. Co. v. Chicago Great Western R. Co., et al., 58 F 2d 810 (W.D. Mo. 1932) said this by way of dictum concerning the statute in question in this case, Section 387.260.

This Commission has admitted that the Interstate Commerce Commission has exclusive jurisdiction over the issuance of securities of even a Missouri railroad corporation in Re M-K-T RR. Co., 27 Mo PSC 16, 19 (1944) when the railroad was an interstate carrier.

Thus, it would appear that this Commission might adopt the same reasoning in an acquisition of stock case. However, the Commission did not do so in the case of acquisition of stock by KCSI of the Kansas City Southern Railway Co. In that case, Re: Kansas City Southern Industries, Inc., 10 Mo PSC(NS) 163 (1962), KCSI requested that the Commission deny jurisdiction because of pre-emption by the Federal Government or in the alternative to approve the acquisition if it had jurisdiction. The Commission assumed it had jurisdiction, without discussing pre-emption, and approved the acquisition.

While the Interstate Commerce Commission denied jurisdiction of the KCSI acquisition, this may not necessarily mean that the field has not been pre-empted. See Re: M-K-T RR. Co., supra. However, for the purposes of this opinion we will assume that the field has not been pre-empted.

3) "Organized or existing under or by virtue of the laws of this state."

It is the opinion of this office that the Commission does not have jurisdiction in this matter because KCSI is not a corporation "organized or existing under or by virtue of the laws of this state." KCSI is a Delaware corporation, organized and existing under the laws of that state.

It is clear that it was not organized in Missouri. The question then is whether it "exists" in Missouri because it is licensed to do business here. The fact that it has qualified to do business in the State of Missouri and acts within the state does not make it "exist" in this state. It still owes its existence to the laws of the State of Delaware. This distinction between a corporation "existing" within a state and "acting" within a state is clearly made at 20 C.J.S. Corporations, §1788, p. 12:

> "A corporation can have no legal existence beyond the bounds of the state or sovereignty by which it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence***this principle does not prevent a corporation from acting in another state or country with the latter's expressed or implied consent***"

While we could find no case directly interpreting this portion of Section 387.260, we have found a Missouri Supreme Court case and a Commission case interpreting a similar provision in sections of the Public Service Commission Law relating to issuance of securities. We have also found cases from other jurisdictions supporting this contention and after extensive research we have not been able to find any cases or authority to the contrary.

Language similar to the language in question in Section 387.260 is found in the following Section of Chapter 387, RSMo, relating to the Commission's jurisdiction over the issuance of securities by common carriers. The language of Section 387.270(1), RSMo, reads:

> ". . . organized or existing, or hereafter incorporated, under or by virtue of the laws of the State of Missouri . . ." [Emphasis supplied.]

As can readily be seen, the language is virtually identical with Section 387.260(2). The Supreme Court of Missouri, en banc, in Public Service Commission v. Union Pacific Railroad Company, 197 SW 39 (1917), construed the above phrase to apply solely to domestic (Missouri) corporations. Thus it held that the Public Service Commission had no jurisdiction to approve or disapprove the issuance of stock by the Union Pacific, a foreign (Utah) corporation.

The Commission in a case involving an identical provision relating to the issuance of securities by gas corporations in what is now Chapter 393, RSMo, reached a similar result. In Re Suburban Service Company, 14 Mo PSC 114 (1923), the applicant sought authorization from the Commission to issue securities. The Commission found the applicant to be a Delaware corporation licensed to do business in Missouri. It further found that while the applicant was a "gas corporation" over whose rates and service the Commission had jurisdiction, it had no jurisdiction over the applicant's right to issue securities because applicant was not a domestic corporation.

There have been no changes made by the legislature in the particular language of the statutes in question since the decision of the Supreme Court and the order of the Commission were rendered. It is a general rule of statutory construction that where a Court or administrative agency have placed a particular interpretation on a statute and the legislature at its subsequent meetings has left the statute materially unchanged, it is presumed that the legislature has acquiesced in the interpretation. This rule is stated at 82 C.J.S. Statutes, §316, p. 548, as follows:

> "Where a particular interpretation has been placed on a statute by the Court and the legislature at its subsequent meetings has left the statute materially unchanged, it is presumed that the legislature has acquiesced in that interpretation; and the same presumption is indulged with respect to administrative interpretations of a statute which are acquiesced in."

The Supreme Court of Missouri has announced this rule in numerous cases, one recent case being Becker v. St. Francois County, 421 SW2d 779 (1967).

It is the opinion of this office that the same interpretation placed on the language contained in Sections 387.270 and 393.200, RSMo Supp 1967, must of necessity be placed upon the virtually identical provision of Section 387.260 of the same Public Service Commission Act with the result that the Commission's approval of over ten percent (10%) of the stock of KCSI is not required in this case because KCSI is not a domestic corporation.

This reasoning is in line with other sound rules of statutory construction. One such rule dictates that identical language used in different parts of the same act raises the presumption that the language shall mean the same throughout the act. U.S. v. Brunett, 53 F2d 219 (D.C. Mo. 1931); 82 C.J.S. Statutes, §316, p. 553.

Another such rule of statutory construction, stated earlier herein, is that the Public Service Commission is a creature of statute and has only such powers that are expressly conferred upon it or which can be necessarily implied therefrom. State ex rel. Kansas City Transit, Inc. v. Public Service Commission, supra.

In applying the above rules of construction to this case, we conclude that the Commission has no jurisdiction to approve or disapprove of the acquisition of more than ten percent (10%) of the common stock of KCSI because it is not a domestic corporation.

We have done extensive research on this point in an attempt to find the law in other jurisdictions since Missouri statutes on this subject were to a great extent copied from the laws of other states. We could find no cases which would hold contrary to the position that we espouse herein. The cases we did find generally support our position. See Re Chicago, North Shore & Milwaukee Railway Company, et al., 1 PUR 3d 527 (Wisc. PSC, 1953); Southern Sierras Power Co. v. Railroad Commission of California, 205 Cal. 479, 271 P 747 (1928); Re Chicago, North Shore & Milwaukee Railroad Co., 54 PUR(NS) 315 (Wisc. PSC, 1944).

The case of Kansas City Southern Railway Company v. Chicago Great Western Railroad Company, supra, is also interesting on this point. That case involved what is now Section 387.260 and the specific language pertinent to the case at hand. It is worthy of note that the Judge in that case paraphrased the provision that relates to acquisition of more than ten percent (10%) of the capital stock of a railroad corporation or common carrier as follows at 58 F2d 810:

> "Moreover, other than railroad corporations are forbidden to acquire more than ten percent of the capital stock of any domestic railroad corporation." [Emphasis supplied.]

Thus the Judge indicated that a corporation "organized or existing under or by virtue of the laws of this state" meant a "domestic" corporation.

In searching the recent decisions of the Commission authorizing acquisition of a railroad corporation, street railroad corporation or common carrier under the provisions of Section 387.260, RSMo, we find no cases inconsistent with the position that the Commission's jurisdiction to approve acquisitions of such corporations is limited to domestic corporations. The recent cases involved the acquisition of domestic (Missouri) corporations by foreign holding companies. These cases are: Re Westgate-California Corporation, 10 Mo PSC(NS) 142 (1962); Re Kansas City Transit, Inc. - Sovereign Western Corp., 9 Mo PSC(NS) 564; and Re Kansas City Southern Industries, Inc., 10 Mo PSC(NS) 163 (1962). We can find no case where the Commission took jurisdiction over the acquisition of a foreign railroad, street railroad or common carrier.

Conclusion

Therefore, it is the opinion of this office that the provision of Section 387.260(2), RSMo, requiring approval of the Missouri Public Service Commission before a foreign or domestic stock corporation can purchase or acquire, take or hold more than ten percent (10%) of the capital stock issued by any railroad corporation or common carrier does not apply when such railroad corporation or common carrier is a foreign corporation.

Respectfully submitted,

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JDF:lc