

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

In the Matter of the Applications of KCP&L	)	
Greater Missouri Operations Company for	)	<b><u>File No. EO-2010-0060</u></b>
Authority to Sell its Blue Springs Service Center	)	

**OPINION OF CHIEF STAFF COUNSEL’S OFFICE 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 (“GMO” or “Company”) Blue Springs Service Center, and that GMO must seek Commission approval prior to the sale of the service center. For its *Opinion*, Counsel respectfully states the following to the Commission:

**Factual Summary**

On August 19, 2009, GMO filed an *Application* with the Commission which initiated this case and requested the Commission approve a sale of GMO’s Blue Springs Service Center. Included with the *Application* was a copy of a contract for the sale of the service center. According to its *Application* in this case, GMO has closed its Blue Springs Service Center. The proposal for closure was explained to the Commission in the acquisition case EM-2007-0374, between GMO, Great Plains Energy Incorporated (“GPE”) and Kansas City Power & Light Company (“KCPL”), as part of the consolidation of service centers owned by the two subsidiary companies, KCPL and GMO. The plan was for the service center operations at Lee’s Summit, Blue Springs, and Dodson to be combined into a new multi-purpose operations center south of Kansas City on the I-470 corridor.

## 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 service center that has been closed is “necessary or useful” in GMO’s performance of its duties to the public.

## Prior Case History

GMO’s *Application* references Case No. EO-2009-0148, where the Commission, with conditions, authorized a similar application made under Section 393.190 for authority to sell a different service center. In that case GMO’s application asked for a finding whether the Commission’s approval of the proposed sales of the Platte City and Liberty Service Centers was necessary. However, while the Commission approved the sale of the Platte City Service Center in that case, the Commission’s *Order Approving Application To Sell Real Property* did not speak to the necessity of the Commission’s approval prior to any sale.

In an earlier case, Case No. EO-2005-0156, Aquila, Inc. (now known as 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, whereby Aquila would sell three combustion turbines to the City, and then lease them back for use in production of electricity. The turbines and associated equipment were intended to be sited at Aquila’s 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 Blue Springs Service Center is constructed, was previously fully operational, and apparently can be used for service in the performance of GMO's duties to the public; GMO is just *choosing not to use* the facility at this point in time. This service center was included in GMO's rate structure for many years.

In Case No. EM-90-12, which is of relevance to this case, Arkansas Power & Light Company ("AP&L") 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 near Helena, Arkansas, or in the alternative, 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." *Order Approving Sale*, 30 Mo. P.S.C. (N.S.) 244, 245 (1990). The Office of the Public Counsel contended that the Commission had jurisdiction over the sale. 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 Case No. EM-90-12 would certainly lend to a finding of jurisdiction over the sale of the Blue Springs Service Center as it has been 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 serving.

### Opinion of Chief Staff Counsel's Office

At least one Missouri court has stated that 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 Section 393.190, the *Dissenting Opinion* in Case No. EO-2005-0156 pointed out that there are other judicial decisions which can 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), an electric utility sought a conditional use permit to site an electric substation under the city’s 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 in the ordinance “means suitable, proper and convenient to the ends sought,” not absolute necessity. *Id.* at 901.

Further, Section 393.170.3 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, “[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). GMO states in the *Application* that the Blue Springs Service Center was closed as part of a consolidation of the Company's service centers with those of KCPL. 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 the discussion in the *Dissenting Opinion* 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" of interest. *Dissenting Opinion*, p. 3. This hypothetical might seem outlandish, but KCPL originally sought to abandon its Downtown Kansas City steam service system until this Commission compelled KCPL to first seek a purchaser of the system. In *Re Kansas City Power & Light Co.*, Case No. HO-86-139, Report and Order, 29 Mo. P.S.C. (N.S.) 232 (1987).

Denying Section 393.190 jurisdiction over the sale of the Blue Springs Service Center is not within the letter or the spirit of Section 386.610, which provides that the Public Service Commission Law "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 asks the Commission to assert jurisdiction over the proposed sale of KCP&L Greater Missouri Operations Company's Blue Springs Service Center.

Respectfully submitted,

**/s/ Jennifer Hernandez**

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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 KCP&L GMO, at [rsteiner@sonnenschein.com](mailto:rsteiner@sonnenschein.com); Victoria Schatz, in-house counsel for KCP&L, at [victoria.schatz@kcpl.com](mailto:victoria.schatz@kcpl.com); and The Office of Public Counsel of the State of Missouri, at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov) this 31<sup>st</sup> day of August, 2009.

**/s/ Jennifer Hernandez**