

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

In the Matter of the Application of Ameren Transmission)
Company of Illinois for Other Relief or, in the Alternative,)
a Certificate of Public Convenience and Necessity)
Authorizing it to Construct, Install, Own, Operate,) File No. EA-2015-0146
Maintain and Otherwise Control and Manage a)
345,000-volt Electric Transmission Line from Palmyra,)
Missouri, to the Iowa Border and Associated Substation)
Near Kirksville, Missouri.)

INITIAL BRIEF OF UNITED FOR MISSOURI, INC.

COMES NOW United for Missouri, Inc. (“UFM”), by and through its undersigned counsel, and files its *Initial Brief* supporting the application for a Certificate of Convenience and Necessity (“CCN”) submitted by Ameren Transmission Company of Illinois (“ATXI”) and for the imposition of one condition.

I. Introduction

This case is a request by ATXI for a CCN from the Missouri Public Service Commission (“Commission”) to construct, install, operate, control, manage and maintain a new 345,000 volt (345 kV) electric transmission line running generally from Palmyra, Missouri, and extending westward to a new substation located near Kirksville, Missouri, a new 345 kV transmission line extending from the new substation north to the Iowa border, and a 2.2 mile 161,000 volt (161 kV) connector line from the new substation to an interconnection with an existing substation in Adair county, Missouri (“Mark Twain Project”). There can be very little doubt that the Mark Twain Project is necessary or convenient for the public service. The only remaining issue for UFM is how the property rights of Missouri landowners should be protected. UFM proposes that the Commission impose a condition in the CCN that ATXI follow property division lines in the construction of the Mark Twain Project under certain conditions.

II. Does the Commission possess authority to approve ATXI's application?

The Commission's role and authority is detailed by a series of statutory provision, as follows:

Section 393.110. 1, RSMo¹ states in part, "Sections 393.110 to 393.285 shall apply to . . . the generation, furnishing and transmission of electricity for light, heat or power . . ."

Section 393.170.1 requires that, "No . . . electrical corporation . . . shall begin construction of a . . . electric plant . . . without first having obtained the permission and approval of the commission."

Similarly, Section 393.170.2 requires that, "No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission."

"Electrical corporation" is defined as "every corporation, company, . . . owning, operating, controlling or managing any electric plant . . ." Section 386.020(15) RSMo.

"Electric plant" is defined as "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 . . ." Section 386.20(14) RSMo.

The Commission has jurisdiction over corporations owning, operating, controlling, or managing property used for or in connection with or to facilitate the provision of electric service.

ATXI has argued in other places that since it will not be selling electricity or holding itself out as selling to the public, it is not under the jurisdiction of the Commission.² UFM does not see it that way. The case law to date explicates, in general, a distinction between integrated (generation, transmission and distribution) services that service the public and integrated services provided for limited purposes. It has not generally addressed the "unbundled" services as is

¹ Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

² See *Application for Rehearing*, File No. EA-2015-0145, filed June 11, 2015.

presented in the Ameren Corporation and ATXI structure or in this application. Such cases are, therefore, generally not on point.

This new corporate structure requires a new analysis. When defining “electric plant,” the legislature did not use narrow terms such as “sell” or “deliver”; it used broad terms of “used for or in connection with or to facilitate.” Therefore, facilities that foster a public service are within the proper purview of the Commission’s authority. ATXI’s facilities will foster such service inasmuch as they will be functionally controlled by MISO and serve MISO load pursuant to the MISO Open Access Transmission Tariff.

There is a fundamental consideration that militates the conclusion that the Commission has jurisdiction over ATXI and the granting of a CCN in this case. The fundamental consideration is that the legislature has granted the right of eminent domain to electrical corporations.³ The right of eminent domain is a right exclusively held by the sovereign that can only be wielded upon a legislative grant. An electrical corporation must have a grant of the right from the legislature to exercise eminent domain. The exercise of the right without such a grant would constitute lawlessness.

State ex rel. Harline v. Public Service Commission of Mo instructs that a significant purpose of the Public Service Commission is to correct the abuse of any property right of a public utility.

The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent. *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges.

³ Section 523.010 RSMo.

343 S.W.2d at 181. The CCN is the mechanism whereby the state authorizes the corporation to exercise the corporate privilege of eminent domain. Inasmuch as the legislature is presumed to eschew lawless acts, the Commission must be in a position to recognize when an entity is justified in exercising the power of the sovereign to condemning property.

III. Does the evidence establish that the Mark Twain transmission line project, as described in ATXI’s application in this docket, and for which ATXI is seeking a certificate of convenience and necessity (“CCN”), is “necessary or convenient for the public service” within the meaning of that phrase in section 393.170, RSMo?

In the past, the Commission has used a five factor test known as the *Tartan* test to decide cases such as this, i.e. whether the application is “necessary or convenient for the public service.” In this this case, that analysis is appropriate. The five factors are as follows:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant’s proposal must be economically feasible; and
5. The service must promote the public interest.⁴

The Mark Twain Project passes the *Tartan* test. ATXI is clearly qualified and financially able to provide the service. ATXI is a corporate affiliate of Ameren Corporation, a long time provider of transmission services.⁵ Likewise, the project itself is clearly economically feasible. The cost of the project will be regionally allocated to the entire MISO footprint.⁶

⁴ *In re Tartan Energy Co.*, 3 Mo P.S.C. 173, 177 (1994).

⁵ Ex. No. 31, p. 2.

⁶ Ex. No. 32, p. 2.

There is a need for the Mark Twain Project, and it is, therefore, in the public interest. The “necessity” for the project, as required by section 393.170, does not mean that it is “essential” or “absolutely indispensable.” It is enough if the benefit justifies the cost.⁷ MISO and ATXI both observe that the Mark Twain Project is a multi-value portfolio (“MVP”) project adopted by MISO.⁸ Mr. Kramer testified that MVP projects, such as the Mark Twain Project, “facilitate the delivery of renewable energy, resolve numerous reliability issues, reduce transmission line losses, and provide economic and efficiency benefits to customers within the MISO footprint.”⁹ Even the Neighbors United witness Mr. Powers recognized the Mark Twain Project will provide reliability benefits. He stated, “I would agree that it's one of the available alternatives to addressing the reliability issues that were raised in the application.”¹⁰ There are economic benefits as well, somewhere on the order of 2.3 to 3.3 times the costs.¹¹ And Missouri customers will only be responsible for 8% of the costs arising from the Mark Twain Project.¹² Clearly, the benefits exceed the cost. The Mark Twain Project provides a needed response to reliability concerns and brings economic value to the transmission system. The Mark Twain Project fosters the public interest.

IV. Do §§ 393.170 and 229.100, RSMo., require that before the Commission can lawfully issue the requested CCN the evidence must show the Commission that where the proposed Mark Twain transmission line project will cross public roads and highways in that county ATXI has received the consent of each county to cross them? If so, does the evidence establish that ATXI has made that showing?

⁷ *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n.*, 848 S.W.2d 593, 597-98 (Mo. App. 1993).

⁸ Ex. No. 3, pp. 7-15.

⁹ Id. at pp. 16-18.

¹⁰ Tr. Vol. 7, p. 352.

¹¹ Ex. No. 3, p. 15.

¹² Id.

UFM takes no position on this issue.

V. If the Commission decides to grant the CCN, what conditions, if any, should the Commission impose?

The Commission has the right to impose conditions on the grant of a CCN.¹³ UFM suggests that there is no higher purpose for such conditions than to protect rights in private property. With this in mind, UFM encourages the Commission to impose a condition upon the grant of the CCN that, “the route of the Mark Twain Project shall conform to division lines of lands, according to government survey, wherever the same is practicable and reasonable, at the request of the owner or owners of the land or lands affected, and so as not to unnecessarily interfere with the use of any lands by the occupants thereof.” UFM highlights two aspects of this condition that are particularly relevant. First, it may be that following division lines may be technically infeasible. Therefore, conformity to division lines should be required only where practicable and reasonable. Second, there may be instances where conformity to division lines results in additional disruption to property rights. Therefore, the modification of the proposed route to division lines should only be required in the event a landowner or landowners make such a request.

Notwithstanding the public convenience and necessity of the Mark Twain Project, the landowners of the state of Missouri have a vital right to protect in their property. As Sir William Blackstone discusses in his *Commentaries on the Laws of England*, the English common law has a great regard for private property.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might

¹³ Section 393.170.3 RSMo.

perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.¹⁴

Missouri's respect for the citizen's right to land is enshrined in Article I, Section 2 of the Missouri Constitution. This Commission must be protective of the property rights of Missouri landowners.

The state of Iowa has established a useful provision on this public policy issue within their statutes. Iowa Code §478.18.2 (2002), provides as follows:

A transmission line shall be constructed near and parallel to roads, to the right-of-way of the railways of the state, or along the division lines of the lands, according to the government survey, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant.

A condition such as this is appropriate in this case for at least two complimentary reasons. First, as an MVP project, the Mark Twain Project is being built to provide regional benefits. Missouri farmers should not be expected to bear a burden, the diminution in the use in their land, for providing a regional benefit. That burden should be reduced as much as possible, and the cost of reducing that burden should be placed upon those that receive the benefit. This principle of allocating cost in rough proportion to benefit is inherent in the federal regulation of transmission service¹⁵ and should be applied here. Second, inasmuch as only 8% of the cost of the Mark Twain Project will be borne by Missouri load serving entities, the rate impact on Missouri load

¹⁴ 1 William Blackstone, *Commentaries* *135. Citations to the *Commentaries on the Laws of England* by William Blackstone is made to a Facsimile of the First Edition of 1765-1769, published by The University of Chicago Press (Chicago & London, 1979).

¹⁵ *Illinois Commerce Commission v. FERC*, 576 F.3d at 470 (7th Cir. 2009).

serving entities from the increased cost such a condition will cause will be minimized. Ninety-two percent of the cost of the Mark Twain Project will be borne by load serving entities outside of the state of Missouri. In short, there is no countervailing state interest, i.e. cost to Missouri rate payers, that rises to counter the need to protect property rights in the state of Missouri.

WHEREFORE, United for Missouri, Inc. respectfully requests the Commission grant ATXI's application for a CCN for the Mark Twain Project but impose the condition as described in this *Initial Brief* of United for Missouri, Inc.

Respectfully submitted,

By: /s/ *David C. Linton*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email to all parties by their attorneys of record as provided by the Secretary of the Commission on the 4th day of March, 2016.

/s/ *David C. Linton*

David C. Linton