BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of a Working Case to Address Legislative Concerns Regarding Proposals to Modify Ratemaking Procedures for Electric Utilities.	)))	**File No. EW-2013-0425**

COMMENTS OF DOGWOOD ENERGY, LLC

Comes Now Dogwood Energy, LLC, pursuant to the Commission's March 20, 2013 Order issued herein, and for its Comments states as follows:

1. Reliability is undeniably a critical component of the state's electric generation, transmission and distribution infrastructure. Infrastructure replacement surcharges can be an effective means of expediting system replacements for reliability purposes.

2. However, Senate Bill No. 207 and House Bill No. 398 propose to allow electrical corporations to establish ISRS rate schedules to provide for surcharges to recover costs of not only eligible infrastructure system **replacements** (like water and gas corporations already can do), but also electrical plant **additions,** including but not limited to capacity additions and environmental compliance additions.

3. Even assuming that under the proposed Bills the prudence of additions could ultimately be examined at some point after a utility has incurred the costs and started to recover them by means of surcharge (a questionable assumption as discussed below), nonetheless the Commission would as a result be put in the difficult position of only being able to protect ratepayers from imprudent costs by denying recovery to shareholders of monies already expended. Such after-the-fact review of the prudence of plant additions is inconsistent with sound ratemaking procedures, as has been previously held by Missouri courts.

4. The proposal to allow for surcharges to recover not only system replacement costs but also the costs of additions for electrical corporations (unlike other utilities), should raise concern as to the practicality and sufficiency of after-the-fact prudence review procedures.

5. The Commission is charged by statute with reviewing the prudence of plant additions in advance of construction. Section 393.170.1 provides:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

Section 393.170 requires advance approval from the Commission for construction of additional electric plant as defined by Section 386.020. But the proposed Bills would not allow for such advance review.

6. Likewise, Section 386.266.2 currently only authorizes a surcharge for "prudently incurred" environmental compliance costs. In contrast, the proposed Bills do not allow for any consideration of the prudence of such environmental compliance costs before commencement of recovery by surcharge. With the potential for billions of dollars to be spent on environmental compliance upgrades and additions at coal-fired generating facilities in Missouri during the next few years to meet the compliance requirements of the EPA's Mercury and Air Toxics Standards, ensuring that these expenses are prudently incurred, in light of all available options, is essential.

7. The Missouri Court of Appeals has held that Section 393.170 requires advance approval and that the Commission cannot approve a construction project after the fact. *State ex rel. Cass County v. Public Service Commission,* 259 SW3d 544 (Mo. App. 2008). In this decision regarding the illegal construction of the South Harper plant without advance Commission approval, the Court explained the purpose of Section 393.170 as follows:

> Cass County and StopAquila argue that the clear language of section 393.170 grants approval authority only *prior to construction.* We agree. *Id.* at 37 (noting that public utilities are required to seek PSC approval for construction "before the first spadeful of soil is disturbed").[1] The language of subsection 1 is clear and unambiguous. It refers only to pre-construction approval. The statute's plain terms refer to such pre-construction approval not once, but twice, specifying that a utility shall not "*begin* construction ... without *first* having obtained" the necessary authorization. The purposes of such pre-approval are obvious. The PSC is charged with considering and protecting the interests of the general public as well as the customers and investors of a regulated utility. It must balance those interests on a statewide basis, not merely considering a particular utility's operating area in isolation. *See id. at 30* (noting that "uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function"). This function requires a balancing of the needs and interests of ratepayers and investors. Although the PSC always has the power to disallow capital improvements in a utility's rate base, that *post hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors. *See also, id. at 35 n. 12* (noting that compliance with subsection 1 allows for consideration of all the relevant constituencies and interests "without muddying the waters of a future rate case").

The Court correctly held that after-the-fact review puts the Commission in the very difficult position of only being able to protect ratepayers at shareholder expense.

8. Consistent with the Court of Appeals' holdings in the *StopAquila.Org* cases, construction of electric plant additions requires advance Commission approval. *See also, e.g., Warren Davis Properties, LLC v. United Fire & Casualty Co.,* 111SW3d 515, 522 (Mo App 2005)(holding renovation is construction); *Cf.* Section 290.210 (**"Construction"** includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair); *Utility Service Co., Inc. v. Department of Labor and Industrial Relations,* 331

[1] The Court referenced its prior decision in *StopAquila.Org v. Aquila, Inc.,* 180 SW3d 24 (Mo App 2005).

SW3d 654, 660 (Mo. 2011)("any work that is encompassed in the plain meaning of the language defining "construction" under section 290.210(1) is work that requires payment of prevailing wages, regardless of whether the work changes the size, type, or extent of an existing facility"). The "prevailing wages" statutes (Sections 290.210 to 290.340) apply to public utilities, and Section 393.170 should be construed *in pari materia* with these related public works construction statutes. *See, e.g. Hadel v. Board of Education of School District of Springfield,* 990 SW2d 107 (Mo. App. 1999).

9. The potential harm that awaits ratepayers and/or investors absent advance Commission examination of electric plant additions is precisely the jeopardy that the Courts have said the Commission is meant to prevent by means of advance review of a project pursuant to Section 393.170. As the Court said in *StopAquila.org, supra,* the Commission's "function requires a balancing of the needs and interests of ratepayers and investors" and "although the PSC always has the power to disallow capital improvements in a utility's rate base, that ***post hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors**." Neither ratepayers nor investors should be exposed to the adverse consequences that would unavoidably flow from an after-the-fact review of an imprudent investment in a plant addition, including the expenses that litigation of such a matter would inevitably entail.

10. The Commission should also examine the prudence of a proposed plant addition in advance because once funds are expended on an imprudent choice they are no longer available to support a better option. A plant that should be retired should not instead undergo environmental compliance upgrades. A plant that should be retired should not undergo a retrofit, conversion or

other addition to expand its capacity. Such matters should be considered before costs are irreversibly incurred.

11. Concerns about after-the-fact prudence reviews also attend the proposed automatic recovery of tracked expenses as set forth in the proposed Bills.

12. In addition to the foregoing issues, the specific language of the proposed Bills also presents concerns in terms of whether any after-the-fact examination of prudence of additions would even be allowed. Further, the Bills would perpetuate existing statutory errors.

13. SB 207 and HB 398 propose to extend to electrical corporations the application of existing statutes (393.1009 – 393.1015) concerning infrastructure replacement surcharges for gas corporations. The Bills would accomplish this extension by means of cross-referencing the existing gas statutes, rather than setting forth comprehensive text.

14. The existing gas statutes only address recovery of ISRS costs for eligible infrastructure system replacements, and not additions.

15. Section 393.1015.8 provides that approval of a surcharge for a gas corporation "shall in no way be binding upon the commission in determining the ratemaking treatment to be applied to eligible infrastructure system replacements during a subsequent general rate proceeding when the commission may undertake to review the prudence of such costs." It also provides for offsets to surcharges if the commission disallows recovery of costs associated with infrastructure system replacements.

16. SB 207 and HB 398, however, would allow electrical corporations to also recover costs of infrastructure system additions through surcharges.

17. There is no provision in cross-referenced 393.1015 regarding examination of the prudence of additions.

18. While it is perhaps arguable that the Bills' proposed language for 393.1019.1 regarding substitution of defined terms would thereby expand the provisions of 393.1015 to include review of the prudence of plant additions, the convoluted structure of the proposed Bills does not make plain such an intention. It is certainly debatable whether different phrases are to be considered "corresponding" or not, under the proposed language. There does not appear to be any good reason for using ambiguous cross-references rather than simply having a complete statement of the provisions regarding infrastructure surcharges for electric corporations.

19. In contrast, water (and sewer as proposed by HB 198), and gas corporations already have free-standing and complete sets of statutes for such surcharges for eligible replacements alone.

20. Similar ambiguity attends the provisions of Section 393.1015.9, as cross-referenced by SB 207 and HB 398, regarding preservation of the Commission's authority to review all costs, and 393.1015.10 regarding prudence complaints. Even greater ambiguity is caused by the fact that 393.1015.9 (presumably erroneously) does not currently use the complete defined term of "**eligible** infrastructure system replacements".

21. SB 207 and HB 398 would also perpetuate and expand on another existing error in the statutes. Currently, Section 393.1012 .1 addresses potential refunds of surcharges by cross-referencing subsections 5 and 8 of Section 393.1009. It is plain that the reference should have been to subsections 5 and 8 of Section 393.1015. SB 207 and HB 398 do not correct this error, but rather would preserve it and extend it to surcharges for electrical corporations.[2]

22. If HB 473 were to be enacted, the problems attending SB 207 and HB 398 would be exacerbated, in that the amount of surcharges (and therefore size of projects) would be increased to 15% of base revenue levels, and after-the-fact review could be five years in the

[2] HB 398 also erroneously has two subsection 2's for 393.1019.

offing instead of only three years. This other Bill also further illustrates the problems with the "cross-referencing" approach, in terms of potential unintended consequences of changing one section and thereby automatically changing another.

23. SB 207 and HB 398 would create substantial uncertainty, in that the subject plant additions would have to be "in service and used and useful" pursuant to proposed 393.1019.2(5)(b), which **should** mean that the addition has already been approved pursuant to Section 393.170. Yet, depending on the way the proposed cross-references are interpreted, the electrical corporation could evade both advance and after-the fact prudence review for plant additions by recovering for them through surcharges.

24. In conformity with the prior holdings of the Missouri courts, the proposed Bills would be improved greatly by either not allowing surcharges for capacity, environmental compliance, and other types of additions, or by expressly requiring advance approval of additions pursuant to Section 393.170 as a condition of eligibility for surcharge in 393.1019.2(5). The other errors noted herein should also be corrected.

25. As the only independent electric power producer in the state and the customer of an electric utility regulated by this Commission,[3] Dogwood has a significant interest in the continuing reliability of electric infrastructure. Likewise, it has a significant interest in trying to avoid imprudent additions to that infrastructure that would impair the efficient and cost-effective delivery of electricity. Commission authority to scrutinize the prudence of projects proposed by monopoly regulated utilities must be preserved to protect the interests of all ratepayers and stakeholders.

26. Dogwood appreciates the Commission affording it the opportunity to submit these comments about issues raised by proposed ISRS legislation.

[3] For more information about Dogwood, please refer to the attached exhibit.

WHEREFORE, Dogwood Energy, LLC requests the Commission to consider these comments as the Commission develops its response to legislative inquiries.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served upon the parties identified on the following service list on this 1st day of April, 2013, by email transmission.

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