BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of Dogwood Energy, LLC's Petition for Revision of Commission Rule 4 CSR 240-3.105.	)))	File No. _____

RULEMAKING PETITION

COMES NOW Dogwood Energy, LLC ("Dogwood"), pursuant to Sections 386.250 and 393.170 RSMo., and Missouri Public Service Commission ("Commission") Rules 4 CSR 240-2.180 and 3.105, and for its Rulemaking Petition for revision of Commission Rule 4 CSR 240-3.105, states as follows:

INTRODUCTION

1. Missouri electric utilities are not consistently obtaining advance Commission approval of major plant additions as required by Section 393.170 RSMo. Two recent examples stand out: (1) KCPL GMO's acquisition of contract rights regarding the municipal Crossroads generation plant, valued at $61.8 million after-the-fact by the Commission (subject to pending judicial review); and (2) Empire's alleged commitment to a $165-175 million conversion of its Riverton Unit 12 combustion turbine electric generation facility to a combined cycle facility. One reason for this gap in regulatory oversight of major plant additions: the Commission's rules do not provide clear direction. This gap in regulatory oversight is contrary to the interests of ratepayers and shareholders, and also has a direct negative impact on independent suppliers like Dogwood. Monopoly utilities are making major facility commitments without taking into account all relevant factors and without allowing the Commission an adequate opportunity to make certain that such commitments are not contrary to the public interest. Further, utilities are not protecting the interests of shareholders by obtaining advance approval of major projects to reduce the risks

that attend regulatory scrutiny after-the-fact. Dogwood presents this Petition to address these issues.

PROPOSED RULE AMENDMENT

2. The full text of current rule 4 CSR 240-3.105, with suggested amendments clearly marked, is attached hereto as **Exhibit A**. In summary, the proposed amendments would make plain that advance Commission approval is required for any new electric plant that is to be included in rate base for purposes of setting Missouri electric rates, including:

- plant acquired from others,
- renovation of existing plant, and
- plant located in another state.

Additionally, the proposed amendments would make clear that companies must fully consider alternatives identified by means of competitive bidding and provide sufficient information to the Commission so that it can evaluate a request for approval in the context of such alternatives. The clarified rule should minimize disputes and thereby result in cost savings, rather than having any negative fiscal impact.

PETITIONER

3. Dogwood is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. Dogwood owns a majority interest in the Dogwood Energy Facility, a 650 MW jointly-owned combined

cycle electric power generating facility located in Pleasant Hill, Missouri. Dogwood's office address is 6700 Alexander Bell Drive, Suite 360, Columbia, MD 21046.

4. All inquiries, correspondence, communications, pleadings, notices, orders, and decisions relating to this matter intended for Dogwood should be directed to:

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SECTION 393.170

5. 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.

6. The Missouri Court of Appeals has held that Section 393.170 requires advance approval and that the Commission cannot approve a 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

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

> 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").

As the Court noted, advance approval of capital plant projects is critical to protection of the interests of both ratepayers and utility shareholders.

KCPL GMO - CROSSROADS

7. KCP&L Greater Missouri Operations Company (KCPL GMO) never applied for approval under Section 393.170 to acquire an interest in the Crossroads municipal electric generation facility in Clarksdale, Mississippi, as a regulated asset. In the GPE merger case that the Commission decided in July 2008, the Commission found that Crossroads was to remain a merchant plant that could not be used in Missouri due to lack of transmission and that would possibly be considered for inclusion in rate base sometime in the future. Report and Order, Case No. EM-2007-0374 (July 2008), p. 8, 147 & note 566. In recent rate cases, although it never expressly approved the acquisition of an interest in the plant as a regulated asset by KCPL GMO,

the Commission approved inclusion of a capital lease interest in the power generated at the plant in rate base, at a value less than proposed by the company and with the exclusion of related transmission costs. See Case Nos. ER-2012-0356 and ER-2013-0175. There have been, and continue to be, substantial, duplicative and expensive judicial review proceedings of these decisions, because the issues were not decided before KCPL GMO decided to try to include the plant in rate base rather than dispose of it.

EMPIRE – RIVERTON UNIT 12 CONVERSION

8. The Empire District Electric Co.'s (Empire's) September 3, 2010, IRP filing identified its "preferred plan", which included the projected conversion of Empire's 150 MW Riverton Unit 12 combustion turbine generation facility into a 250 MW combined cycle facility for use starting in 2015, which conversion would primarily consist of adding a new 100 MW steam turbine and associated equipment and controls at the Riverton site. See Empire 2012-2029 IRP, Vol. I, Executive Summary. Empire selected this component of its "preferred plan" based on an initial cost estimate prepared by an engineering and technical services company in the amount of $1,253 per kW (in 2010 dollars), or $125,300,000. See Empire 2012-2029 IRP, Vol. III, Supply-Side Resources Analysis, Section 4.3. Now Empire reports that it expects the project will cost $165,000,000-175,000,000. See Empire PowerPoint filed 10-28-2013 in File No. EW-2012-0065.

9. In March 2012, pursuant to the Commission's IRP rules, Empire submitted its 2012 Integrated Resource Plan Annual Update Report, which was assigned File No. EO-2012-0294. In that report, Empire stated that its "preferred plan" had changed, including a postponement of the projected completion of conversion of Riverton Unit 12 from 2015 to 2016.

Empire also stated that there "have been no significant changes to the cost information used for the proposed conversion of Riverton Unit 12 to a combined cycle" and that there was "no significant change to cost estimate" for this conversion. At this time, on information and belief, Empire was still working from a cost estimate of $125,000,000, rather than $175,000,000. See Empire 2012 Integrated Resource Plan Annual Update Report, pages 10, 13-17.

10. On or about April 18, 2012, because Empire had not yet issued a request for proposals for alternatives to its "preferred plan" Riverton Unit 12 conversion project, Dogwood submitted a proposal for power supply resources to Empire. Therein, Dogwood offered a fractional ownership share of 100 MW in its combined cycle electric generation plant to Empire, at a price of $677.60 per kW, or $67,760,000, assuming a closing date of January 1, 2014. Dogwood indicated that the price would be adjusted up or down by 10% per year for a later or earlier closing, respectively, and also indicated that a smaller or larger interest could be acquired by Empire, with a minimum purchase level of 40 MW. The terms outlined in the proposal were identical to those contemporaneously agreed to by Dogwood's other co-owners, three of which had closed on the purchase of their shares in the plant at the time the proposal was issued to Empire.

11. During a December 18, 2012 meeting with IRP stakeholders, Empire indicated that although it still had not met prior commitments to update its information sources with due diligence, it nonetheless still planned to go forward with the Riverton Unit 12 conversion. Empire indicated that it expected the Riverton Unit 12 conversion project would be a "committed" project by the time it submitted the 2013 IRP in April 2013. Empire confirmed it had not obtained Commission approval for the conversion project.

12. On March 20, 2013, the Commission granted Empire additional time to file its triennial IRP, to July 1, 2013. (Case No. EO-2013-0405). In its order, the Commission acknowledged that with the additional time, among other things, "Empire also proposes to conduct further evaluation of supply-side resources as suggested by Dogwood Energy."

13. Empire did conduct an additional analysis outside the IRP process and provided the results to Dogwood and other stakeholders on April 5, 2013. Empire indicted that it still planned to proceed with the Riverton Unit 12 conversion project.

14. Dogwood raised questions and concerns about the results of the study provided on April 5, 2013, and while Empire did continue to share some information, it also made plain that it was not interested in any further analysis.

15. On July 1, 2013, Empire submitted its triennial IRP filing in File No. EO-2013-0547. Therein it stated that it expected very soon to be committed to the Riverton Unit 12 conversion project, with construction to start in 2014 and finish in 2016. As indicated above, Empire did not use an RFP process to identify whether this conversion project was its least cost alternative, and only had information about the opportunity to acquire an interest in the Dogwood Energy Facility because Dogwood submitted an unsolicited proposal.

16. On July 19, 2013, Empire informed Dogwood that it had entered into a contract to proceed with the Riverton Unit 12 conversion project. As indicated above, Empire's cost projection from the project has increased by $50 million (from $125 million to $175 million) since it rejected Dogwood's proposed alternative at a cost of $68 million (i.e. Empire's identified $50 million cost increase is almost as much as Dogwood's proposal).

17. Empire alleges that it has committed itself to the Riverton Unit 12 conversion project, and if it has it has done so:

(a) without first issuing an RFP to obtain sufficient cost information regarding its supply alternatives,

(b) without an open-minded and full analysis of the proposal that Dogwood submitted on its own (when it became clear Empire was not going to seek such information on its own) as one such available and viable alternative,

(c) without due regard for an apparent $107,500,000 in up-front capital cost savings and related ratepayer benefits that would result from buying a fractional interest in the Dogwood Energy Facility of 100 MW rather than converting Riverton Unit 12, and

(d) without due regard for the opportunity to accelerate retirement of other generation units in connection with a prompt acquisition of an interest in the Dogwood Energy Facility (or another alternative source of supply).

18. Additionally, Empire has apparently committed itself to the Riverton Unit 12 conversion project without advance Commission approval pursuant to Section 393.170 RSMo.

NEED FOR RULE CLARIFICATION

19. Section 393.170 requires advance approval from the Commission for substantial capital items such as KCPL GMO's acquisition of a contract interest in the Crossroads plant and Empire's Riverton Unit 12 conversion project.

20. Unless the Commission makes plain that "construction" of new plant that requires advance approval under Section 393.170 includes acquisition of plant built by others as a regulated asset, like KCPL GMO's acquisition of a capital lease interest in power generated at the Crossroads plant, utilities will likely continue to skirt the requirements of the statute to the

detriment of the public. It is irrelevant whether the utility builds the plant itself, acquires it from someone else, and/or delays proposed inclusion in regulated rate base. The uncertainty surrounding such unapproved transactions will continue to result in substantial litigation and related expenses, as it has in the case of the Crossroads plant.

21. Likewise, consistent with the Court of Appeals' holdings in the *StopAquila.Org* cases, the Commission's rule should confirm that "construction" of electric plant as defined by Sections 386.020 and 393.170 includes major renovation projects like Empire's planned conversion of the Riverton Unit 12 combustion turbine facility into a combined cycle facility at an estimated cost of $165,000,000-175,000,000. *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 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 Empire and other 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).

22. The Commission's rule should also confirm that approval is required based on intended inclusion in Missouri rate base and not physical location. While in the examples, the Crossroads and Riverton Unit 12 plants are located in other states (Mississippi and Kansas,

respectively), they will presumably continue to be included in the companies' Missouri rate base. Hence, their physical location is irrelevant and the Commission had jurisdiction to approve or disapprove such acquisition/construction pursuant to Section 393.170. For example, the Commission has previously exercised its jurisdiction over Empire's interest in the Plum Point generation plant in Arkansas. See, e.g., Case No. EF-2006-0263 (approval of construction financing); Case No. EO-2010-0262 (approval of construction accounting).

23. The ongoing litigation related to the Crossroads transaction and the potential harm that now awaits ratepayers and/or investors because the Commission has not approved Empire's intended conversion of Riverton Unit 12 in advance, are examples of 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 of hundreds of millions of dollars, as well as the expenses that litigation of such a matter would inevitably entail.

24. Additionally, the Commission should make sure that its rule requires companies to review thoroughly their proposed projects, based on alternatives identified by truly fair and open competitive bidding procedures, and provide sufficient information to the Commission regarding such alternatives. Such rules are already in place in other states, such as Arkansas, Connecticut, Iowa, Maryland, New Jersey, Oklahoma, Pennsylvania, and Texas. When taxpayer

dollars are being spent, the State of Missouri employs competitive bidding procedures to assure sound fiscal management rules the day, rather than internal bias or external favoritism. Improper influence, whether from affiliated relationships or less formal connections, is an insidious thing – it can be hard to identify, hard to prove, and hard to undo. Monopoly utilities should also be required to use such competitive bidding procedures when evaluating major capital projects. The risks of harm to the public are great, given the large dollar amounts involved in electric plant projects.

25. The utilities and their shareholders will also benefit from the proposed clarification of the Commission's rules, because they will be better-positioned to obtain subsequent rate case approval of the costs of a project that has been developed through competitive bidding against other alternatives and minimize the risks that attend after-the-fact regulatory scrutiny of costs. Subsequent rate case review would focus upon the prudence of specific implementation costs, rather than the prudence of the utility's decision to move forward with the project.

26. Dogwood has made a substantial investment in the state and seeks to ensure that it will have the opportunity to compete fairly to sell its generation capacity to monopoly utilities. The public deserves to have access to that capacity when it is the best alternative, and should not be deprived of such benefits as a result of skewed monopolistic purchasing decisions. The Riverton Unit 12 example shows that absent Commission requirements, utilities can choose to focus on their predetermined preferences and not fully consider lower cost alternatives. Companies and their investors also deserve the opportunity to obtain preapproval of a project, to minimize the risk of cost disallowances in subsequent rate cases.

27. The rule clarifications set forth in **Exhibit A** will eliminate the uncertainty that now apparently causes utilities to refrain from seeking advance approval of major plant additions from the Commission. Further, these clarifications will require companies to fully evaluate alternatives and thereby provide the Commission with sufficient information in order to make a decision as to whether or not such projects are in the public interest.

WHEREFORE, Dogwood prays the Commission to commence rulemaking proceedings to fully consider and approve an amendment of 4 CSR 240-3.105 as described herein.

Respectfully submitted,

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

/s/ Carl J. Lumley

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 8th day of January, 2014, by email transmission.

/s/ Carl J. Lumley

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VERIFICATION

STATE OF District of Columbia)
City) ss.
~~County~~ of Washington)

I, Robert Janssen, being first duly sworn upon oath, depose and say that I am the President and General Manager of Dogwood Energy, LLC, and as such am authorized to make this verification on its behalf; that I have read the foregoing Petition; that I know the contents thereof; and that the facts set forth in the foregoing Petition are true and correct to the best of my knowledge, information and belief.

Robert Janssen

Subscribed and sworn to before me this 8th day of January, 2014.

James D. Glenn

Notary Public

My Commission expires: 7/31/2016

JAMES D. GLENN JR. NOTARY PUBLIC EXP. 7-31-2016 DISTRICT OF COLUMBIA

4 Mo. Code of State Regulations 240-3.105

4 CSR 240-3.105 Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity

PURPOSE: Applications to the commission requesting that the commission grant a certificate of convenience and necessity must meet the requirements of this rule. As noted in the rule, additional requirements pertaining to such applications are set forth in 4 CSR 240-2.060(1).

(1) In addition to the requirements of 4 CSR 240-2.060(1), applications by an electric utility for a certificate of convenience and necessity pursuant to Section 393.170 RSMo authorizing operation in a service area or construction of electric plant shall include:

(A) If the application is for a service area--

1. A statement as to the same or similar utility service, regulated and nonregulated, available in the area requested;

2. If there are ten (10) or more residents or landowners, the name and address of no fewer than ten (10) persons residing in the proposed service area or of no fewer than ten (10) landowners in the event there are no residences in the area, or, if there are fewer than ten (10) residents or landowners, the name and address of all residents and landowners;

3. The legal description of the area to be certificated;

4. A plat drawn to a scale of one-half inch (1/2″) to the mile on maps comparable to county highway maps issued by the Missouri Department of Transportation or a plat drawn to a scale of two thousand feet (2,000′) to the inch; and

5. A feasibility study containing plans and specifications for the utility system and estimated cost of the construction of the utility system during the first three (3) years of construction; plans for financing; proposed rates and charges and an estimate of the number of customers, revenues and expenses during the first three (3) years of operations;

(B) If the application is for electrical transmission lines, gas transmission lines or electrical production facilities--

1. A description of the route of construction and a list of all electric and telephone lines of regulated and nonregulated utilities, railroad tracks or any underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross;

2. The plans and specifications for the complete construction project and estimated cost of the construction project or a statement of the reasons the information is currently unavailable and a date when it will be furnished; and

3. Plans for financing;

(C) When no evidence of approval of the affected governmental bodies is necessary, a statement to that effect;

(D) When approval of the affected governmental bodies is required, evidence must be provided as follows:

1. When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired; and

2. A certified copy of the required approval of other governmental agencies; and

(E) The facts showing that the granting of the application is required by the public convenience and necessity, taking into account the projected risk and costs of the electric plant described in the application as compared to the projected risk and costs of all reasonable alternative solutions. The costs of such alternative solutions shall be identified using open, transparent, fair, and nondiscriminatory competitive bidding procedures. The commission may appoint an independent and unbiased monitor to evaluate such costs and supporting information prior to ruling on the application.

(2) If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought.

(3) For purposes of Section 393.170 and this rule, "construction" of electric plant shall include: acquisition of facilities constructed by others; proposed inclusion of previously-constructed facilities into rate base and operating expense for purpose of setting Missouri rates; both new construction projects and projects involving substantial renovation of existing facilities, such as to increase capacity, extend the life of the facility, or comply with environmental regulations; and in all such instances facilities that are either located in Missouri or that are to be included in rate base and operating expense for purposes of setting Missouri electric rates.

AUTHORITY: section 386.250, RSMo 2000. Original rule filed Aug. 16, 2002, effective April 30, 2003.

Original authority: 386.250, RSMo 1939, amended 1963, 1967, 1977, 1980, 1987, 1988, 1991, 1993, 1995, 1996.