

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

**In the Matter of the Application of South                    )**  
**Central MCN LLC for Approval of Transfer of            )**            **Case No. EA-2016-0036**  
**Assets and a Certificate of Convenience and            )**  
**Necessity    )**

**MEMORANDUM OF CITY UTILITIES OF SPRINGFIELD, MISSOURI IN  
OPPOSITION TO MOTION OF SCMCN FOR PARTIAL DISPOSITION**

COMES NOW the City of Springfield, Missouri, by and through the Board of Public Utilities, (hereinafter “City Utilities” or “Springfield”), pursuant to 4 CSR 240-2.117(1)(C), and submits this Memorandum in Opposition to the Motion of Applicant South Central MCN LLC (“SCMCN”) for Partial Disposition (“SCMCN Motion”). SCMCN’s Motion is premised on a reading of the first sentence of Section 393.190.1 that effectively reads half the text of that provision out of the statute (SCMCN Memorandum at 7-8). SCMCN, an electrical corporation within the meaning of Sections 386.020(15) and 393.190.1 R.S. Mo., seeks the Commission’s authorization to acquire certain facilities currently owned by the City of Nixa, a home rule charter city that operates a municipal electric utility. Under the transaction proposed by SCMCN, at least a portion of its “works or system” would be consolidated with those of another person (the City of Nixa), which is an act requiring the Commission’s authorization under Section 393.190.1 R.S. Mo. City Utilities does not dispute that the City of Nixa is not subject to this Commission’s jurisdiction, but the absence of Commission jurisdiction over the City of Nixa does not affect the Commission’s jurisdiction over SCMCN’s efforts to consolidate a portion of its works or system with those of the City of Nixa. For these reasons, the SCMCN Motion is without merit and should be denied.

Apart from the fact that the SCMCN Motion is without legal merit, the stated “efficiency” premise of the SCMCN Motion<sup>1</sup> is at best debatable. This is because, as City Utilities discusses in Part B. of its Argument below, the decisional standard applicable to the Commission’s disposition of SCMCN’s application for a certificate of convenience and necessity under Section 393.170 R.S. Mo. will likely subsume – one way or another – the decisional standard applicable to the Commission’s disposition of a request for authorization for disposition or consolidation under Section 393.190.1 R.S. Mo. See *Empire Dist. Elec. Co. and City of Monett*, Case No. EO-2009-0159, 2009 Mo. PSC LEXIS 134 at \*9-\*11 (Feb. 11, 2009). Thus, there appears to be no “efficiency” benefit involved in the Commission’s determination of the jurisdictional issue posed by SCMCN’s motion at this point in the case.

### **ARGUMENT**

The Commission may grant a motion for summary determination only “if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the cases, and the commission determines that it is in the public interest.” 4 CSR 240-2.117(1)(E). As the Missouri Court of Appeals for the Western District recently summarized the law on Commission jurisdiction in *Staff of the Mo. PSC v. Consol. Pub. Water Supply Dist. C-1*, 2015 Mo. App. LEXIS 1189 at 11 (Mo. App. W.D. 2015) (internal citations omitted):

As a creature of statute, the Commission ‘only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable implication.’ ‘Neither convenience, expediency or necessity are proper matters for consideration

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<sup>1</sup> SCMCN Memorandum at 3 (“An early resolution of the threshold jurisdictional question regarding whether Section 393.190 R.S. Mo. applies to the Transaction will potentially narrow the issues of the case and correspondingly promote efficiency, preserve Commission resources, and benefit ultimate consumers by eliminating unnecessary litigation costs that will be recovered through rates, both in this case and in future cases involving similar transactions”).

in the determination of whether or not an act of the Commission is authorized by statute.’ ‘If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power.’

Here, SCMCN is not entitled to relief as a matter of law, because the Commission has jurisdiction over its proposed transaction under Section 393.190.1 R.S. Mo., as well as the jurisdiction acknowledged by SCMCN under Section 393.170 R.S. Mo.<sup>2</sup> As we show in this Memorandum in Opposition, the plain text of Section 393.190.1 R.S. Mo. demonstrates that the Commission has jurisdiction under that provision over a proposed acquisition of municipal utility facilities by an electrical corporation such as SCMCN.

**A. The Plain Language of Section 393.190.1 Establishes Commission Jurisdiction over SCMCN’s Proposed Acquisition of the City of Nixa’s Facilities**

SCMCN devotes much of its Memorandum in Support to arguing the proposition that this Commission lacks jurisdiction over the acts of the City of Nixa in connection with the proposed sale of its 69 kV facilities to SCMCN (SCMCN Memorandum at 3-6). That the Commission does not have jurisdiction over the acts of the City of Nixa contemplated in connection with SCMCN’s Application is settled by over eighty years of precedent.<sup>3</sup> The absence of Commission jurisdiction

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<sup>2</sup> As the Staff Recommendation submitted November 5, 2015, in this proceeding correctly points out (at ¶¶ 18-20), there is no principled basis for contesting Commission jurisdiction under Section 393.170 R.S. Mo. in light of the Commission’s Revised Order Granting Certificate of Convenience and Necessity in *Ameren Transmission Co. of Illinois*, No. EA-2015-0145, 2015 Mo. PSC LEXIS 646 (July 22, 2015) at \*4-\*10.

<sup>3</sup> *State ex rel. City of Sikeston v. Public Service Comm’n*, 336 Mo. 985, 999, 82 S.W.2d 105, 111 (Mo. 1935) (“The policy of our Legislature concerning the light and power business . . . has been to leave the field open to both private and public ownership. In any case where the people are not satisfied with the results of regulation, the right of any city to build its own plant, without asking the permission of the commission, and to furnish electricity to its people at such rates and under such conditions as it sees fit, without being subject to any regulation except the will of its own citizens, remains as a further safeguard in the public interest”); *City of Columbia v. Public Service Comm’n*, 329 Mo. 38, 47, 43 S.W.2d 813, 817 (1931) (“The fixing of rates to be charged by a municipality owning and operating an electric plant is an exceedingly positive and vital form of regulation and control. For the reasons above stated we are constrained to hold that the power to fix such rates has not been validly conferred upon the Public Service Commission . . .”).

over the City of Nixa does not, however, determine the question of the Commission’s jurisdiction over SCMCN and its proposed transaction with the City of Nixa.

The Commission’s jurisdiction with respect to SCMCN’s proposed transaction is established by the language of the first sentence of Section 393.190.1 boldfaced below:

**No gas corporation, electrical corporation, water corporation or sewer 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, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.**

The relevant statutory command of Section 393.190.1 – “No . . . electrical corporation . . . shall . . . by any means, direct or indirect . . . consolidate such works or system . . . or any part thereof, with any other . . . person . . . without having first secured from the commission an order authorizing it so to do” – operates entirely on SCMCN without this Commission exercising any jurisdiction over the City of Nixa. SCMCN, an “electrical corporation” within the meaning of Sections 386.020(14) and 393.190.1 R.S. Mo.<sup>4</sup> seeks to consolidate all or part of its works or system with the City of Nixa, a “person” within the meaning of Section 1.020(12) R.S. Mo.<sup>5</sup>

This reading of Section 393.190.1 is supported by two important considerations. First, as

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<sup>4</sup> *Ameren Transmission Co. of Illinois*, No. EA-2015-0145, 2015 Mo. PSC LEXIS 646 (July 22, 2015) at \*4-\*10.

<sup>5</sup> Section 1.020(12) R.S. Mo. provides in relevant part that “As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof: \* \* \* (12) The word ‘person’ may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.” The definition of “person” in Section 386.020(40) R.S. Mo. does not, in fact, narrow the definition established by Section 1.020(12) but merely states that the word “includes an individual, and a firm or copartnership.” Section 386.020 thus does not in any way limit the applicability of the broader definition supplied by Section 1.020(12) R.S. Mo. *See* Section 386.610 R.S. Mo. (“The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities”).

the Court of Appeals for the Eastern District observed in *State ex rel. Missouri Cities Water Co. v. Hodge*, 1993 Mo. App. LEXIS 1361 at \*32, 147 P.U.R.4th 224 (Mo. App. 1993), *rev'd on other grnds*, 878 S.W.2d 819 (Mo. 1994):

. . . [W]e find the fact that the regulatory jurisdiction of the Commission does not extend to municipally owned water utilities . . . does not affect the jurisdiction of the Commission, established in § 393.190.1, over the transfer or disposition of utility property necessary or useful in the performance of its duty to the public.

In significant part, the Court's view in the *Missouri Cities Water Co.* case quoted above is simply an application of the broad scope of the statutory definition of the Commission's jurisdiction as set forth in Section 386.250.1 R.S. Mo.:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

- (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same.

The fact that the Commission does not have jurisdiction to regulate the activities of the City of Nixa does not in any way limit the Commission's statutory jurisdiction over SCMCN, an electrical corporation, or over activities undertaken by SCMCN with respect to the consolidation of its system or works. SCMCN's effort to limit the application of Section 393.190.1 R.S. Mo. to sellers of utility facilities is unsupported by the plain text of the statute, which applies with equal force to electric corporations seeking to consolidate their works or system with those of any other person, or to "otherwise dispose of" their facilities. "The primary rule of statutory construction is to ascertain the legislative intent of the statute from the language used, to give effect to that intent whenever possible, and to consider the words as defined by their plain and ordinary meaning." *Union Elec. Co. v. Platt-Clay Elec. Coop., Inc.*, 814 S.W.2d 643, 647 (Mo. App. 1991). The

construction outlined above applies that analysis correctly. The interpretation proffered by SCMCN in its Motion simply fails to meet that standard.

Second, the construction of Section 393.190.1 R.S. Mo. outlined above harmonizes the interpretation of that statute with the substantively identical language of Section 203(a) of the Federal Power Act (16 U.S.C. § 824b(a)). In interpreting the latter provision in the context of a statutory jurisdictional exclusion for municipal utilities,<sup>6</sup> the United States Court of Appeals stated in *Duke Power Co. v. Federal Power Comm'n*, 401 F.2d 930, 941 (D.C. Cir. 1968) (footnotes omitted):

Governmental agencies and instrumentalities, utilities carrying on only intrastate business and, as we recently held, electric cooperatives financed under the Rural Electrification Act, are not ‘public utilities,’ but we have no doubt that any acquisition from either by a public utility of what would normally be a jurisdictional facility, such as a transmission line conducting interstate energy, would fall within the purview of the clause under consideration.

Following the Court’s decision in *Duke Power Co.*, *supra*, the Federal Energy Regulatory Commission has consistently held that the language of its transfer of control statute, Section 203 of the Federal Power Act, “should not be read narrowly, as to do so ‘would result in a jurisdictional void in which certain types of power sales facilities and corporate transactions could escape Commission oversight.’”<sup>7</sup> From its inception as part of the Public Utility Act of 1935, Section 203 of the Federal Power Act has been held to have no preemptive effect on state regulation of

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<sup>6</sup> Section 201(f) of the Federal Power Act (16 U.S.C. § 824(f)) provides in relevant part that “No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.”

<sup>7</sup> *Public Serv. Co. of Colorado*, 149 FERC ¶ 61,228 at P 34 (2014), quoting *Enova Corp. & Pac. Enterprises*, 79 FERC ¶ 61,107, at 61,489-61,490 (1997).

consolidations or transfers of utilities or utility property.<sup>8</sup> It is therefore important that the reach of state and federal statutes regulating the same types of transactions should effectively cover comparable ranges of regulatory concern.

For these reasons, the construction of Section 393.190 R.S. Mo. advocated by the SCMCN Motion rests on a defective construction of that statute and should be rejected by the Commission. Section 393.190 R.S. Mo. vests the Commission with jurisdiction over SCMCN's proposed acquisition of certain transmission facilities from the City of Nixa, notwithstanding the fact that the Commission has no regulatory jurisdiction over the City of Nixa. This is because SCMCN's proposed acquisition involves at least a consolidation or other disposition "in part" of its works or system with another statutory person – the City of Nixa – and the proposed transaction falls squarely within the scope of the jurisdiction conferred on the Commission by Section 393.190 R.S. Mo.

**B. There Is No "Efficiency" Benefit to Immediate Commission Determination of SCMCN's Motion**

SCMCN asserts that "[a]n early resolution of the threshold jurisdictional question regarding whether Section 393.190 R.S. Mo. applies to the Transaction will potentially narrow the issues of the case and correspondingly promote efficiency. . . ." (SCMCN Memorandum at 3). This does not actually appear to be the case, because "[t]he factors the Commission considers for approving a transfer of assets and granting a CCN are virtually identical." *Valley Woods Water*

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<sup>8</sup> *Duke Power Co. v. Federal Power Comm'n*, *supra*, 401 F.2d at 935 n. 41 ("Section 203 was likewise added with full awareness that this was not a provision needed to close a constitutional gap, and that the states had jurisdiction to accomplish this regulation. . . . That the states did and do have such constitutional jurisdiction is clear"); *Public Serv. Co. of Colorado*, 149 FERC ¶ 61,228 at P 37 ("the Commission's exercise of its authority under section 203 with regard to a transfer . . . would not diminish the authority of the Colorado Commission to regulate the transfer of any facilities that are subject to its jurisdiction. This principle is well-established and supported by precedent").

Co., File No. WM-2012-0288, 2012 Mo. PSC LEXIS 470 at \*12 (2012). Thus, in the event that SCMCN satisfies the 393.170 R.S. Mo. “in the public interest” standard,<sup>9</sup> it necessarily also satisfies the 393.190.1 “not detrimental to the public interest standard.”<sup>10</sup> Conversely, if SCMCN fails the “in the public interest” standard under 393.170, it likely also fails the “not detrimental to the public interest standard” of 393.190.<sup>11</sup> Thus, there is at most a very narrow range of proof over which the jurisdictional question posed by SCMCN’s motion will ever prove relevant to the disposition of the case, and the Commission likely will not know whether or not the case involves a situation in which the jurisdictional question is relevant to disposition of the case until the record is complete and the decision on the merits is ready to be made. For these reasons, there is no apparently or significant efficiency purpose that would actually be served by summarily determining the jurisdictional question now.

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<sup>9</sup> As explained in *Valley Woods Water Co.*, *supra*, 2012 Mo. PSC LEXIS 470 at \*8 (internal footnotes omitted), the Commission is authorized by Section 393.170.3 R.S. Mo. to grant a certificate of convenience and necessity:

... [W]hen it determines, after due hearing, that the proposed project is ‘necessary or convenient for the public service.’ The term ‘necessity’ does not mean ‘essential’ or ‘absolutely indispensable,’ but rather that the proposed project ‘would be an improvement justifying its cost,’ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity. It is within the Commission’s discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.

<sup>10</sup> This standard is explained in such cases as *State ex rel. City of St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 400 (Mo. 1934) and *State ex rel Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

<sup>11</sup> See *Empire Dist. Elec. Co. and City of Monett*, Case No. EO-2009-0159, 2009 Mo. PSC LEXIS 134 at \*9-\*10 (“... [T]he standards are dramatically different. Simply put, to satisfy the ‘in the public interest’ standard, the applicant must demonstrate that the transaction in question promotes or provides a positive benefit to the public interest. Whereas, to satisfy the ‘not detrimental to the public interest’ standard, the applicant must demonstrate that no net detriment would result (i.e. a zero-sum game), not that a positive benefit would result. Should Empire satisfy the ‘in the public interest’ standard, the higher burden, it will have satisfied the tests for granting approval of either a transfer of assets or a change of supplier”).



**CONCLUSION**

For the foregoing reasons, the Commission should deny SCMCN’s Motion. City Utilities has no objection to the Commission determining the SCMCN Motion at this time, but respectfully observes that there really is little, if any, efficiency to be gained by doing so.

Respectfully submitted,

*/s/ John P. Coyle*

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**ATTORNEYS FOR CITY UTILITIES OF  
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Dated: January 15, 2016.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of City Utilities' Response in Opposition to Motion for Partial Disposition of South Central MCN, LLC and the Memorandum of City Utilities in Opposition to SCMCN's Motion for Partial Disposition were sent to the following parties via ( ) U.S. Mail, postage prepaid, ( ) facsimile, (x) electronic transmission, and/or ( ) hand delivering this 15<sup>th</sup> day of January, 2016:

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*/s/ John P. Coyle*  
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