

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

In the Matter of the Application of Citizens Electric)	
Corporation for an Order Authorizing the Sale)	File No. EM-2019-0212
of Certain Electric Transmission Facilities)	

**STAFF RESPONSE TO RESPONSE OF WABASH VALLEY
POWER ASSOCIATION, INC. TO STAFF RECOMMENDATION
AND STAFF REQUEST FOR PREHEARING CONFERENCE**

COMES NOW the Missouri Public Service Commission Staff ("Staff"), by and through Staff Counsel's Office, and files its response to the October 25, 2019 Response Of Wabash Valley Power Association, Inc. To Staff Recommendation ("Response"). In support of Staff's Response, Staff states as follows:

1. Wabash Valley Power Association, Inc. ("Wabash") states on page 1 of its Response that "[it] is willing to be accommodating to the recommendations of Staff with respect to providing future notice of sales or transfers." On page 3 of its Response, Wabash states "Wabash will voluntarily agree to enter into a contractual arrangement with Citizens obligating Wabash to notify the PSC of any future sale of the assets being transferred as described in this case." However, Staff is not clear what is the purpose of what Wabash is stating it is voluntarily willing to do because Wabash has not correctly stated what the Staff's proposed condition is. The actual condition is that Wabash agrees to provide notice to the Commission that it is considering selling the transmission facilities¹ in the Citizens service territory to an entity other than Citizens. This includes after there is no longer any conditions effective pursuant to the Facilities Purchase

¹ The transmission facilities purchased through the Facility Purchase Agreement including any additions, upgrades and replacements and any additional sole-use transmission lines and substations located in the state of Missouri and owned by Purchaser serving Seller.

Agreement that Wabash first offer the facilities to Citizens for purchase, i.e., Paragraph 4.a.iii. in the October 23, 2019, Citizens Electric Corporation's Response To Staff Of Missouri Public Service Commission's Recommendation, and after the conditions of Paragraphs 4.a.iv. and vii. on pages 1-2 of Citizens' October 23, 2019, response and Wabash still holds the transmission facilities it purchased from Citizens including any additions, upgrades and replacements and any additional sole-use transmission lines and substations located in the state of Missouri and owned by Wabash serving Citizens.

2. As part of the confusion, Citizens in its October 23, 2019 response repeats the proposed condition correctly in Paragraph 4.c. on page 2 of its response, and then in Paragraph 7, on page 3 of its response, Citizens agrees to the Staff's proposed condition but then does not correctly state what the Staff's proposed condition is. Citizens states the proposed condition is:

Regarding the pre-condition set forth above in paragraph 4.c., Citizens has been provided with a written commitment from Wabash Valley to satisfy said pre-condition by way of an amendment to the Facility Purchase Agreement dated September 27, 2018. The amended agreement would provide that if Citizens notifies the Commission that it is considering the question of whether to authorize the sale by Wabash Valley of the Property purchased by Wabash on December 26, 2018 pursuant to the Facility Purchase Agreement dated September 27, 2018 to a third party, Wabash Valley will commit to Citizens that it will contemporaneously provide a copy to the Commission of any such written request made by Wabash Valley to Citizens.

The above is in part an incorrect restatement of what is shown as the condition in Paragraph 4.a.iii. on page 1 of Citizens' response and addressed in paragraph 1 above.

3. Wabash has filed a Motion For Intervention which Staff does not oppose. If the Commission grants intervention to Wabash and decides to determine whether it has

jurisdiction over Wabash, including “future activities”² or not, it would be Staff’s position, under these changed circumstances, that should the Commission find that it has jurisdiction over Wabash, then the Commission should direct Wabash to file with the Commission, not just agree to advise the Commission that it is considering selling to a third-party the transmission facilities it purchased from Citizens including any additions, upgrades and replacements and any additional sole-use transmission lines and substations located in the state of Missouri and owned by Wabash serving Citizens.

4. Wabash asserts in its Response that it is exempt from Commission jurisdiction because it meets the requirements of Section 394.200 RSMo., i.e., “Wabash is a ‘corporation organized on a nonprofit or a cooperative basis for the purpose of supplying electric energy in rural areas and own[s] and operate[s] electric transmission or distribution lines in a state adjacent to this state . . .” A closer look at Section 394.200.1 RSMo., in particular, is warranted:

394.200. Cooperative of adjacent state may extend lines and transact business in this state, when — service of process on, how made. —

1. Any corporation organized on a nonprofit or a cooperative basis for the purpose of supplying electric energy in rural areas and owning and operating electric transmission or distribution lines in a state adjacent to this state **shall be permitted to extend its lines into and to transact business in this state without complying with any statute of this state pertaining to the qualification of foreign corporations** for the transaction of business in this state. Any such foreign corporation, as a **prerequisite to the extension of its lines into and the transaction of business in this state**, shall, by an instrument executed and acknowledged in its behalf by its president or vice president under its corporate seal attested by its secretary, **designate the secretary of state its agent to accept service of process in its behalf.** (Emphasis added.)

² Staff addresses in paragraphs 7 and 8 below the unlawfulness of the Commission rendering decisions on hypothetical, not presently existing situations, i.e., advisory opinions.

5. As indicated in the language emphasized above in Section 394.200.1 RSMo., Wabash has chosen not to identify certain language that places a different focus on Section 394.200.1 RSMo. First, for example, language not highlighted by Wabash states “shall be permitted to extend its lines into . . . this state . . .” and “prerequisite to the extension of its lines into this state . . .” Based on Staff’s initial review, apparently there is more than one Illinois rural electric cooperative that is a member of Wabash in Illinois, but there is only one that appears to border on the Mississippi River across from Missouri. However, this Illinois utility is not contiguous with Citizens. Seemingly, the statute would be designed to facilitate a rural electric cooperative extending transmission or distribution lines of one of its entities to an affiliate/associate, or in essence a related entity, just across the state line. Thus, possibly the reason for the language in Section 394.200.1 RSMo. about not being required to comply with any statute of Missouri pertaining to the qualification of foreign corporations.

6. On Paragraph 12, page 3 of its Motion To Intervene, Wabash does not deny that it is registered with the Missouri Secretary of State as a Chapter 351 RSMo. Corporation. Wabash argues that by the operation of Section 394.200 RSMo. it is a Chapter 394 RSMo. Corporation despite the reality of the records of the Missouri Secretary of State.

7. At page 1 of its Response, Wabash states “Wabash would like to have clarification on the Commission’s understanding of Wabash’s cooperative status as that status impacts the Commission’s jurisdiction for this and **future activities** of Wabash in Missouri.” (Emphasis added.) Among other things, Wabash refers to “future activities” without identifying what those future activities may be. Should there be a decision by the

Commission whether it is appropriate for it to make a determination regarding its jurisdiction over “future activities,” there may be a determination in some aspects regarding the applicability of Section 394.200 RSMo. to the instant proceeding that is an advisory opinion from the Commission. The case law in Missouri is that the Commission does not have the authority to render advisory opinions.

8. In the October 15, 2019, Staff Response To Commission Order Directing Filing Of Staff Recommendation, Staff mentioned the possibility of Wabash constructing transmission in the Citizens service territory and Wabash has raised the matter under Section 394.200 RSMo. of it extending its transmission lines into Missouri from Illinois. In *State ex rel. Laclede Gas Co. v. Public Serv. Comm’n*, 392 S.W.3d 24, 38 (Mo.App. W.D. 2012), the Western District Court of Appeals stated the following regarding the Commission’s authority to issue advisory opinions:

... Like other administrative agencies, the Commission is not authorized to issue advisory opinions. The Commission, the circuit court, and this court should not render advisory opinions. See *Wasinger v. Labor & Indus. Relations Comm’n*, 701 S.W.2d 793, 794 (Mo.App.1985). “The function of each is to resolve disputes properly presented by real parties in interest with existing adversary positions.” *Id.* The Commission was restricted to determining the complaint before it, and it should not be issuing decisions with “no practical effect and that are only advisory as to future, hypothetical situations.” *State ex rel. Mo. Parks Assoc. v. Mo. Dept. of Natural Res.*, 316 S.W.3d 375, 384 (Mo.App.2010). “The petition must present a ‘real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.’” *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996) (citation omitted).

The “future activities,” as is, do not appear to be “necessary and essential issues” that must be decided as identified in *State ex rel. AG Processing, Inc. v. Public Serv. Comm’n*, 120 S.W.3d 732, 736 ((Mo.banc 2003).

9. Staff also notes that at the time it filed its Recommendation on October 15, 2019, Wabash was not a party to Citizens' Application or an intervenor in the instant case and Staff was not aware of Section 394.200 RSMo. until October 22, 2019. Staff has not conducted any discovery of Wabash regarding said section or any other matter to date.

10. Staff hereby requests that the Commission issue an Order Setting An Early Prehearing Conference for the purpose of setting a procedural schedule to address the issues set out above as necessary in this proceeding.

WHEREFORE Staff requests that the Commission make no determinations at this point other than (1) as requested herein; (2) as requested in Staff Response To Motion of Wabash Valley Power Association, Inc. To Intervene; and (3) as requested in Staff Response To Citizens Electric Corporation's Response To Staff Of Missouri Public Service Commission's Recommendation. Staff requests the Commission issue an Order Setting An Early Prehearing Conference for the purpose of setting a procedural schedule to address the issues set out above as necessary in this proceeding.

Respectfully submitted,

/s/ Steven Dottheim

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Staff Response To Commission Order Directing Filing has been transmitted electronically to all counsel of record this 4th day of November, 2019.

/s/ Steven Dottheim