

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 5th day of
March, 2014.

In the Matter of Dogwood Energy, LLC's
Petition for Revision of Commission Rule
4 CSR 240-3.105

)
) **File No. EX-2014-0205**
)

**ORDER DENYING PETITION FOR REVISION OF
COMMISSION RULE 4 CSR 240-3.105**

Issue Date: March 5, 2014

Effective Date: March 15, 2014

On January 8, 2014, Dogwood Energy, LLC filed a petition asking the Commission to amend Commission rule 4 CSR 240-3.105 to clarify that electric utilities must obtain advance approval from the Commission before acquiring electric plant built by others as a regulated asset, before acquiring electric plant located in another state, and before undertaking major renovation projects regarding its existing electric plant. In addition, Dogwood's proposed regulation would require electric utilities to fully consider alternatives for renovation or construction of electric plant by means of competitive bidding. Dogwood proposed specific language to amend the regulation as part of its petition.

After receiving Dogwood's petition, as required by Section 536.041, RSMo (Supp. 2012), the Commission provided a copy of that petition to the Joint Committee on Administrative Rules and to the Office of Administration. Before deciding whether to grant Dogwood's petition, the Commission directed its Staff to investigate that petition and to file a recommendation. The Commission also invited other interested stakeholders to offer their recommendations.

Staff filed its recommendation on February 14. Staff agrees with Dogwood that 4 CSR 240-3.105 should be amended to address legal issues that arose from decisions issued by the Missouri Court of Appeals in 2005 and 2008.¹ Staff asserts that such a rulemaking should address issues such as:

- (a) Whether separate certificates of convenience and necessity (CCNs) should be required for each generating unit at a multi-unit site, in particular if there is a lapse of more than two years between the end of construction of one unit and the beginning of construction of the next unit;
- (b) Whether separate CCNs should be required for substantial renovation or refurbishment of an existing unit that changes the principal fuel used, increases the capacity of the unit, extends the life of the unit, or appreciably changes the emissions, noise level, or traffic from or at the plant;
- (c) Whether separate CCNs should be required for the construction of a generating unit in a state other than Missouri that will be treated in rate base and operating expense for the purpose of setting Missouri rates for Missouri native load; and
- (d) Whether separate CCNs should be required for acquiring electric plant built by others in Missouri or another state to be treated in rate base and operating expense for the purpose of setting Missouri rates for Missouri native load.

While Dogwood's petition raises these same issues, Staff disagrees with much of the revised regulatory language that Dogwood proposes. Nevertheless, Staff recommends that the Commission use Dogwood's petition as a vehicle to amend a regulation that should be amended.

¹ *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005) and *State ex rel. Cass County v. Public Service Comm'n*, 259 S.W.3d 544 (Mo. App. W.D. 2008).

Kansas City Power & Light Company (KCP&L) and KCP&L Greater Missouri Operations Company (GMO), Union Electric Company, d/b/a Ameren Missouri, and The Empire District Electric Company also filed responses to Dogwood's petition. KCP&L, GMO, and Ameren Missouri argue that the revised regulation proposed by Dogwood is unnecessary and beyond the Commission's regulatory authority in that it would require the Commission to illegally intrude into the management of the utilities. They urge the Commission to reject Dogwood's petition.

Ameren Missouri and Empire also responded to Staff's recommendation that the Commission use Dogwood's rulemaking petition as a vehicle to consider amendments to the regulation, even if the Commission does not adopt the specific regulatory language proposed by Dogwood. Ameren Missouri and Empire suggest that if the Commission is inclined to consider revising its regulation it should not start with the language proposed by Dogwood. Instead, they urge the Commission to deny Dogwood's petition and to start fresh by opening a new working case, through which all interested stakeholders would have an opportunity to provide input on an appropriate rule revision.

Section 536.041, RSMo (Supp. 2012), allows any person to petition a state agency requesting the adoption, amendment, or repeal of any rule. That section further requires the agency to submit a written response to the rulemaking petition within sixty days of receipt of the petition, indicating its determination of whether the proposed rule should be adopted. Similarly, Commission Rule 4 CSR 240-2.180(3)(B) requires the Commission to respond to a petition for rulemaking by either denying the petition in writing, stating the reasons for its decision, or initiate a rulemaking in accordance with Chapter 536, RSMo.

Section 536.041 also requires the agency to offer a concise summary of the agency's "findings with respect to the criteria set forth in subsection 4 of section 536.175." The criteria in subsection 4 are designed to guide the agency's review of its existing rules under the periodic review process required by that statute. As a result, those criteria do not precisely match the review needed to determine whether Dogwood's rulemaking petition should be granted. However, the gist of the criteria is to require the agency to consider whether the rule is properly drafted to be consistent with the language and intent of the authorizing statute; whether the rule imposes an unnecessary regulatory burden; and whether a less restrictive, more narrowly tailored, or alternative rule could accomplish the same purpose.

The Commission finds that the specific regulatory language offered by Dogwood does not meet the statutory criteria. Staff and the electric utilities that responded to Dogwood's petition raise significant concerns about whether Dogwood's proposal is consistent with the Commission's authority and whether the revised rule would impose an unnecessary regulatory burden on the utilities. For that reason, the Commission will deny Dogwood's petition.

Nevertheless, the Commission will undertake a review of its regulation as suggested by Staff, and will seek input from all interested stakeholders before deciding whether to submit revised language through the formal rulemaking process. In addition to the four issues identified by Staff and set forth earlier in this order, the Commission will also review whether to require competitive bidding for renovation or construction of electric plant. This list of issues should not be considered to be exclusive. During the review

process, Staff or any stakeholder may raise any other issue they believe should be brought to the Commission's attention.

To facilitate Staff's efforts to draft an appropriate rule, and to allow all interested stakeholders an opportunity to offer their advice concerning that rule, the Commission will issue a separate order to establish a working case to facilitate a series of workshops led by Staff and to contain the informal comments that may result from that workshop process. A separate working case is appropriate for that process to allow the informal comments presented in the workshops regarding initial drafts of the rule to be kept separate from the comments on the proposed rule that may be filed during any subsequent formal rulemaking process.

The Commission does not want the workshop process to unreasonably delay the promulgation of a revised rule. Therefore, the Commission will direct its Staff to submit a revised rule for the Commission's consideration no later than August 29, 2014.

THE COMMISSION ORDERS THAT:

1. Dogwood Energy LLC's rulemaking petition for revision of Commission rule 4 CSR 240-3.105 is denied.
2. The Commission's Staff shall prepare and submit a proposed rule revising Commission rule 4 CSR 240-3.105 no later than August 29, 2014.
3. As required by Section 536.041, RSMo, a copy of this order shall be provided to the Joint Committee on Administrative Rules and to the Commissioner of Administration.

4. This order shall become effective on March 15, 2014.

BY THE COMMISSION



Morris L. Woodruff

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Woodruff, Chief Regulatory Law Judge