

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

In the Matter of the Application of Evergy                    )  
Missouri West, Inc. d/b/a Evergy Missouri                )       File No. EF-2022-0103  
West for Authority to Encumber Assets Mortgage        )  
Bonds    )

**EVERGY MISSOURI WEST’S  
RESPONSE TO OBJECTION OF PUBLIC COUNSEL**

Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“EMW” or “Company”), states the following in response to the Objection to Stipulation and Agreement filed by the Office of the Public Counsel (“OPC” or “Public Counsel”), pursuant to the Commission’s Order Setting Time for Responses issued on February 2, 2022:

1.       The legal question at issue in this case, and what forms the basis of OPC’s objection to the Stipulation and Agreement (“Stipulation”), is whether the Commission has the authority to review and approve future issuances of bonds and other forms of indebtedness of a non-Missouri corporation like Evergy Missouri West after it grants the Company’s request in this case to encumber assets under Section 393.190 RSMo<sup>1</sup>.

2.       The answer is clear. There is nothing in Section 393.190 that gives the Commission authority over issuances of stocks, bonds, and other forms of indebtedness. That provision relates only to a public utility seeking to “sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber the whole or any part of its franchise, works or system ...”<sup>2</sup> This is the statute that the Company relied upon when it filed its Application to encumber its entire system. The mortgage that the Company wants to enter into will encumber virtually all the Company’s assets, rather than assets valued at the amount of secured debt that is issued subsequently. The amount of debt that

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<sup>1</sup> All statutory citations are to the Missouri Revised Statutes (2016), as amended.

<sup>2</sup> Section 393.190 also applies to mergers or consolidations which are not relevant to this proceeding.

can be issued under the mortgage will be capped by the Bondable Property provisions to be negotiated within the mortgage. In accordance with the Stipulation filed this case, the Bondable Property ratio will be no higher than 75% of the value of the property.

3. The authority that OPC attempts to invoke in this case is provided to the Commission in Section 393.200 which relates to the approval of issues of stocks, bonds and other forms of indebtedness. However, that statute applies *only* to Missouri corporations.

4. EMW is a Delaware corporation, not a Missouri corporation, as stated in Paragraph 1 of its Application. The EMW corporate entity has operated in Missouri for decades under its prior names Aquila, Inc. and KCP&L Greater Missouri Operations Company. As a Delaware corporation, it is subject to a variety of provisions of Chapters 386 and 393. EMW is not governed by Section 393.200.1 regarding the issuance of bonds or other forms of indebtedness because it is not “organized or existing or hereafter incorporated under or by virtue of the laws of this state ....”

5. However, it is this power, granted to the Commission under another statute, that OPC seeks to impose on the Company even though there is no language in Section 393.190 relating to the issuance of bonds or other forms of indebtedness.

6. Missouri judicial decisions have long held that both the courts, as well as administrative agencies like this Commission, “may not engraft upon” a statute “provisions which do not appear in explicit words or by implication from other words in the statute” and “cannot supply what the legislature has omitted.” Kansas City Power & Light Co. v. PSC, 557 S.W.3d 460, 472 (Mo. App. W.D. 2018), citing In re J.L.H., 488 S.W.3d 689, 696 (Mo. App. W.D. en banc 2016). See State v. Collins, 328 S.W.3d 705, 709 n.6 (Mo. en banc 2011); Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 402 (Mo. en banc 1986); Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. St. L. 1978).

7. The specific question regarding the power of the Commission to approve debt issuances by the Company has been addressed at least twice in the last 20 years. Each time the Commission it has concluded that it has no authority or jurisdiction to require the Company to seek such approval.

8. In a case related to Aquila's sale and lease back of three natural gas combustion turbines (now known as the South Harper facility) in a transaction with the City of Peculiar, the Commission stated that a "Missouri electrical corporation must seek Commission approval to issue debt" under Section 393.200, but that "Aquila is not a Missouri corporation." See Report & Order at 9, *In re Aquila, Inc. Application to Acquire, Sell and Lease Back Three Natural Gas-Fired Combustion Turbine Power Generation Units*, No. EO-2005-0156 (Dec. 19, 2005).

9. In a subsequent case Aquila asked the Commission to determine whether entering into an asset purchase agreement for the Aries combustion turbine facility required Commission approval under Section 393.190 which applies to all corporations, not just Missouri corporations. The Commission concluded that it did not because the agreement did not involve the sale, lease, transfer, or mortgage of any part of Aquila's system under Section 393.190, but a related question arose regarding the issuance of "long-term indebtedness." Aquila contended that, as "a Delaware corporation, [it] does not require Commission approval to incur long-term indebtedness." The Commission found that "[t]his position has merit." See Order Dismissing Application for Lack of Jurisdiction at 7, *In re Application of Aquila, Inc. under Section 393.190 regarding Aries Combustion Turbine Facility*, No. EO-2007-0172 (Nov. 28, 2006).

10. This Order found that "Section 393.200 expressly applies to only those corporations 'organized or existing or hereinafter incorporated under or by virtue of the laws of this state.'" Id. at 8. The Commission confirmed that "Aquila is not a Missouri corporation" and

that “[n]o other statutory authority exists that confers upon the Commission for the regulation of a foreign electric corporation’s long-term indebtedness” except for Section 393.190 which relates to the encumbrance of Missouri rate-based assets. Id. at 9. It was pursuant to Section 393.190 that EMW filed its Application in this case and entered into the Stipulation with Staff.

11. The Stipulation states that the Company will provide Staff an electronic copy of the final Mortgage Indenture that is filed with the U.S. Securities and Exchange Commission within five days after its filing, as well as an electronic copy of its application to issue long-term debt securities under Section 204 of the Federal Power Act, 16 U.S. Code § 824c, that is filed with the Federal Energy Regulation Commission within five days after its filing. See Stipulation ¶ 5. EMW is also required to file with this Commission reports regarding issuances of debt, communications with rating agencies regarding such debt, and any credit rating agency reports regarding the Company’s credit quality or the credit quality of its securities. Id., ¶ 6.

12. EMW has no objection to providing such information to Public Counsel on the same basis that it is provided to Staff.

13. These requirements and others contained in the Stipulation appropriately recognize that EMW, being a Delaware corporation, does not require Commission approval to incur long-term indebtedness, under either Section 393.190 or Section 393.200.

14. Because the law is clear and provides no support for OPC’s objection, the Commission should approve the Stipulation and Agreement between the Company and Staff.

**WHEREFORE**, Evergy Missouri West respectfully requests that the Commission overrule Public Counsel’s Objection and approve forthwith the Stipulation and Agreement between it and the Staff of the Commission.

Respectfully submitted,

*/s/ Roger W. Steiner*

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**ATTORNEYS FOR EVERGY MISSOURI  
WEST**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and copy of the foregoing was hand delivered, emailed, or mailed by first class U.S. mail, postage prepaid, this 7<sup>th</sup> day of February 2022 to all parties of record on the service list maintained by the Commission for this case.

*/s/ Roger W. Steiner*

Roger W. Steiner