

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

In the Matter of the Proposed Amendments to)	
4 CSR 240-3.105, Filing Requirements for)	<u>File No. EX-2015-0225</u>
Electric Utility Applications for Certificates of)	
Convenience and Necessity)	

STAFF COMMENTS

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Staff Counsel's Office, and hereby submits *Comments Of The Staff Of The Missouri Public Service Commission* in File No. EX-2015-0225 on the Commission's proposed amendments to 4 CSR 240-3.105.

Respectfully submitted,

/s/ Steven Dottheim

Steven Dottheim
Chief Deputy Staff Counsel
Missouri Bar No. 29149
Attorney for the Staff of the
Missouri Public Service Commission
P.O Box 360
Jefferson City, Missouri 65102
Phone: (573) 751-7489
Fax: (573) 751-9285
E-mail: steve.dottheim@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the *Comments Of The Staff Of The Missouri Public Service Commission* have been electronically mailed to all entities that have filed Comments in File No. EX-2015-0225 this 29th day of April, 2016 and for which the Staff has an e-mail address.

/s/ Steven Dottheim

MEMORANDUM

TO: Missouri Public Service Commission
Official Case File No. EX-2015-0225

FROM: /s/ Natelle Dietrich 4/29/16 /s/ Steven Dottheim 4/29/16
Staff Director Date Staff Counsel's Office / Date

SUBJECT: Comments Respecting Proposed Amendment of 4 CSR 240-3.105

DATE: April, 29, 2016

COMMENTS OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

A proposed amendment to 4 CSR 240-3.105 was published in the March 1, 2016, edition of the *Missouri Register*. The Staff of the Missouri Public Service Commission (Staff) generally supports the proposed amendment, but offers these comments on specific provisions of the proposed amendment.

The proposed amendment revises the filing requirements for applications which request that the Commission grant a certificate of convenience and necessity ("CCN") to an electric utility for either a service area or to construct in Missouri electric generating plants, electric transmission lines, or gas transmission lines to facilitate the operation of electric generating plants. The Staff views these revisions as improving the regulatory process without being overly burdensome or difficult on the affected entities.

I. Background

In Missouri a CCN is needed to construct an electric generating plant regardless of whether the site for the electric generating plant is inside or outside of the electric utility's certificated service area, but a separate CCN is not needed for the construction of an electric transmission line or for the construction of a gas transmission line to facilitate the operation of an electric generating plant if the line to be constructed is in the electric utility's certificated service area.

The proposed amendment addresses what Staff views as the parameters of the term "construction" in Section 393.170.1 in light of the Western District Court of Appeals decisions in the *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 34 (Mo.App. W.D. 2005) ("*StopAquila.Org*") / *State ex rel. Cass County v. Public Service Comm'n*, 259 S.W.3d 544 (Mo.App. W.D. 2008) ("*Cass County*") cases. Thus, for example, in providing specificity for the word / term "construction," the Staff sees the Commission clarifying and particularizing existing law, not changing existing law.¹

Based upon the language from the *StopAquila.Org* case 180 S.W.3d at 37-38, the Staff supports the proposed amendment, 4 CSR 240-3.105(2), because it treats as construction requiring a

¹ *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 567 (Mo.App. K.C. 1976).

CCN, substantial rebuild, renovation, improvement, retrofit and/or other construction that involves (a) a substantial increase in the capacity of the electric generating plant beyond the planned capacity of the plant at the time the Commission granted the prior certificate of convenience and necessity for the electric generating plant and/or (b) a material change in the discharges, emissions, or other environmental by-products of the electric generating plant than those projected at the time the prior certificate of convenience and necessity was granted by the commission for the electric generating plant. In the Staff's opinion, as indicated by the Commission in its very recent decision in the ATXI / Mark Twain transmission line case, File No. EA-2015-0146, the CCN standard is a rigorous one.

II. Legal Analysis

There is a statutory section, Section 393.1150, that was adopted apparently owing to Aquila, Inc.'s construction of the South Harper power plant near the city of Peculiar in Cass County that is worth taking note of. It provides for treble damages for electric plant unlawfully constructed:

393.1150. For any electric plant unlawfully constructed after August 28, 2008, in any suit or claim brought by any landowner or other legal entity for monetary damages allegedly caused by the operation or existence of such electric plant, the measure of damages shall be treble the actual damages to the plaintiff's real estate proved as determined by a judge or jury, plus court costs and reasonable attorney fees.

The South Harper power plant and substation apparently achieved commercial operation around July 1, 2005.

The Court decisions in the *StopAquila.Org* and *Cass County* cases are in large part responsible for the Staff's view that an amendment of 4 CSR 240-3.105 is appropriate. The *StopAquila.Org* and *Cass County* cases involved Aquila, Inc.'s² South Harper peaking power plant (three 105 MW combustion turbines fueled by natural gas) in Cass County, southwest of the City of Peculiar, and Aquila's electric transmission substation³ in Cass County, northeast of the City of Peculiar. The *Cass County* case involves CCNs being granted by the Commission to both the peaking power generating plant and the substation after both had been constructed. They were new construction on undeveloped sites in Aquila's certificated service territory.⁴ The Western District Court of Appeals' decision in the *Cass County* case states in a footnote, without further comment:

² Aquila, Inc. is the predecessor of KCP&L Greater Missouri Operating Company.

³ 180 S.W.3d at 28. The Peculiar substation was designed to support the electric generating plant by allowing its output to flow from a transmission line from the new electric generating plant to an adjacent, higher voltage transmission line. The substation would also serve load growth in the area.

⁴ *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 27-28 (Mo.App. W.D. 2005).

The PSC report and order appears to draw a distinction between the two facilities at issue in the present case, treating the South Harper Plant, but not the Peculiar Substation, as an “electric plant” for purposes of section 393.170. That classificatory distinction, however, has not been briefed on appeal, and need not be addressed in this opinion, since the report and order ultimately grants CCNs for both facilities.⁵

The Court held in the *Cass County* decision that authority to grant *post hoc* approval for the construction of a power plant is not contained in Section 393.170.

In the preceding Western District Court of Appeals decision regarding the South Harper power plant, *StopAquila.Org*, the Court made clear that a mere grant of a CCN for a utility to serve an area is not authorization to construct electric generating plant.⁶ The Court cited *State ex rel. Harline v. Public Serv. Comm’n*, 343 S.W.2d 177 (Mo.App. W.D. 1960) for drawing the distinctions in the scope of authority addressed by each of the subsections of Section 393.170 and then stated:

. . . we believe that the legislature, which clearly and unambiguously addresses electric [power] plants in *subsection 1* [of § 393.170], did not give the Commission the authority to grant a certificate of convenience and necessity for the construction of an electric [power] plant without conducting a *public hearing that is more or less contemporaneous with the request to construct such a facility. Subsection 3 requires a hearing* to determine if “such construction . . . is necessary or convenient for the public service.” § 393.170.3. . .

180 S.W.3d at 34; Emphasis added.

The Staff finds it of interest that the *StopAquila.Org* Court refers to the requirement of a CCN for the construction of a power plant in the singular in the months before construction begins:

By requiring public utilities to seek Commission approval each time they begin to construct *a power plant*, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. . . . This strongly suggests that the legislature

⁵ The Staff’s Memorandum Recommendation in File No. EA-2016-0188 identified the difference between a substation and a switch station / switchyard. File No. EA-2016-0188: In the Matter of the Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, and Maintain a Switchyard Necessary for the Interconnection of the Rock Creek Wind Project with the Sibley-Nebraska City Electric Transmission Project.

⁶ The electric, gas, and water CCN statutory section started as Section 72, Public Service Commission Law, Laws 1913, page 610. The only changes from 1913 to today are (1) the long paragraph of multiple sentences which for many years comprised the sole CCN section, was divided into three sequential subsections which still comprise the sole CCN section, Section 393.170, and (2) sewer corporations and sewer systems were added to Section 393.170, among other statutory sections in Chapters 386 and 393, through Laws 1967.

intended that *a public hearing relating to the construction of each particular electric [power] plant, take place in the months **before** construction begins*, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.

180 S.W.3d at 37-38; Footnote omitted; Emphasis added.

The Staff also finds it significant that the *StopAquila.Org* Court does not solely use the word “construction” that is found in Sections 393.170.1 and 393.170.3 but uses the words “new construction.” The Staff does not find that the *StopAquila.Org* opinion is as explicit as ideally would be the case but there is a distinction between maintenance and construction that goes beyond maintenance:

Other states may have specific statutory provisions to address what a public utility is required to do if it wishes to build new facilities or extend its lines in territory already allocated to it, but Missouri does not. We end where we began, with section 393.170.1, which, in plain and unambiguous language, 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.” Because subsection 3 further imposes a finding of necessity and convenience “after due hearing” for “such construction,” we believe that the *legislature wanted the Commission to conduct hearings whenever new construction is proposed*. . . .

180 S.W.3d at 39; Emphasis added. The words in proposed amended 4 CSR 240-3.105(C) “substantial rebuild,” “substantial renovation,” “substantial improvement,” “substantial retrofit,” and/or “substantial construction” in Missouri that will result in . . . “substantial increase in . . .” and/or “material change in . . .” does not appear in either the *StopAquila.Org* or the *Cass County Western District Court of Appeals* decision, but the Staff is of the opinion that there is a level of additional construction that falls within the scope of the *StopAquila.Org* decision respecting new construction.

Black’s Law Dictionary 312 (6th ed. 1990) defines “construct” as:

To build; erect; put together; make ready for use. To adjust and join materials, or parts of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order. “Construct” is distinguishable from “maintain,” which means to keep up, to keep from change, to preserve.

Black’s Law Dictionary 312 (6th ed. 1990) also defines “construction”, in pertinent part, as: “The creation of something new, as distinguished from the repair or improvement of something already existing.”

Black’s Law Dictionary 953 (6th ed. 1990) defines “maintain” as: “The term is variously defined as acts of repair and other acts to prevent a decline, lapse or cessation from existing state or

condition; . . . hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep from change; keep from falling, declining, or ceasing; keep in existence or continuance; keep in force; keep in good order; keep in proper condition; keep in repair; keep up; preserve; preserve from lapse, decline, failure, or cessation; provide for; rebuild; repair; replace;”

Black's Law Dictionary 953 (6th ed. 1990) also defines “maintenance” as: “The upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose. *Bogan v. Postlewait*, 254 N.E.2d 195, 197.”

Staff counsel’s research to date has not found an electrical corporation that has filed an application with the Commission for a CCN for a project that has involved an environmental retrofit / upgrade of a generating unit, or for example a rebuild of a baseload generating unit’s boiler, after an incident such as a catastrophic explosion of the unit’s boiler (KCPL – Hawthorn Unit No. 5 in 1999). Several recent upgrade, rebuild projects would not appear to fall within the Commission’s proposed amendment 4 CSR 240-3.105(C): (a) the environmental renovation of the two LaCygne baseload coal-fired generating units, including wet scrubber flue gas desulfurization systems, fabric filters, mercury control systems on both Units 1 and 2, and low NO_x burners, over-fired air, and selective catalytic reduction system on Unit 2, which units are owned 50% by KCPL and 50% by Kansas Gas and Electric Company (a wholly-owned subsidiary of Westar Energy, Inc.), with in-service dates of March 24, 2015 for Unit 2 and April 30, 2015 for Unit 1; (b) the environmental upgrade of the baseload coal-fired Iatan 1, including economizer surface addition, selective catalytic reduction system, low NO_x burners, installation of turning vanes, replacement of the distributed control system, refurbishment of the submerged and dry flight conveyors which unit is owned by KCPL, SJLP, Empire, and the Kansas Electric Power Cooperative, Inc., with an in-service date in April 2009; (c) the environmental improvement of Ameren Missouri’s two baseload coal-fired units at its Sioux plant by adding wet flue gas desulfurization units (“scrubbers”), with an in-service date in the fall of 2010; and (d) the installation of electrostatic precipitators at Units 1 and 2 of Ameren Missouri’s coal-fired Labadie Energy Center, with construction and testing requirements completed for Unit 2 in August 2014 and for Unit 1 in December 1 in December 2014.⁷

Coal-fired power plants produce coal combustion products that must be recycled or disposed of. On January 24, 2013, Ameren Missouri filed an Application establishing File No. EA-2012-0281 for a CCN to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill to replace the plant’s existing waste impoundments (“ash ponds”)

⁷ The Sierra Club raised issues with the LaCygne environmental retrofit project in KCPL’s general rate case File No. ER-2014-0370, which the Commission heard and decided. The Staff and the Missouri Retailers Association raised issues with the prudence of certain of the costs incurred in the air quality control system update at Iatan 1 in File Nos. ER-2010-0355 and ER-2010-0356, which the Commission heard and decided. The Staff raised questions about the temporary suspending of the construction of the scrubbers at Sioux in Ameren Missouri’s general rate increase case File No. ER-2011-0028, which the Commission heard and decided. The Sierra Club raised issues with the Labadie Energy Center Project in Ameren Missouri’s general increase rate case File No. ER-2014-0258, which the Commission heard and decided.

and conduct other plant related operations at the site. Ameren Missouri stated that it expected the utility waste landfill to be large, meeting the Ameren Missouri's ash disposal needs for approximately 24 years at current and estimated future disposal needs. The Commission granted a CCN to Ameren Missouri on July 2, 2014.

The *StopAquila.Org* Court in rendering its opinion held that the Commission's Report And Order in *Re Union Electric Company*,⁸ 24 Mo.P.S.C.(N.S.) 72, Case No. EO-79-119 (1980) was incorrectly decided. 180 S.W.3d at 36-37. In Case No. EO-79-119, Union Electric Company ("UE") filed an application seeking authority to construct, operate and maintain two combustion turbine generating units within its certificated service territory at UE's Meramec Power Plant property and its Sioux Power Plant property. UE proposed to locate the combustion turbine generating units at the Meramec and Sioux Power Plants so that the blackstart capability of these units could be used to start the Meramec and Sioux baseload turbines from a cold start. 24 Mo.P.S.C.(N.S.) at 73, 75.

UE and the Staff filed prepared testimony and schedules. An evidentiary hearing was held. The General Counsel filed a motion to dismiss and suggestions in support of said motion. UE filed an answer and requested the Commission to deny the General Counsel's motion. The General Counsel filed a motion for oral argument and the Commission granted the motion. *Id.* at 73.

Some of the oral argument of Counsel for UE is worth noting, as he related at the Case No. EO-79-119 oral argument, UE's practice of seeking CCNs for generating plant in UE's certificated service territory up to Case No. EO-79-119 (Transcript, pp. 191-93, July 10, 1979):

[Mr. Barnes (UE)]: First of all, do we need a certificate for the combustion turbines? . . .

* * * *

Relying on the wording of these statutes [393.170(1) and 386.020 electric plant], we have always sought Commission approval for constructing generating units in our certificated areas; Meramec, 1950; and since the Harline case there has been Portage des Sioux, 1963; Labadie, 1966; Rush Island, 1971; a combustion turbine at Howard Bend in '72; and a combustion turbine at Meramec in 1973. The Commission has never questioned our duty to seek their approval in these cases. And, in fact, did not question our application in this case until a month after the hearing was held.

Case No. EO-79-119 was submitted to the Commission for decision, and the Commission stated that the threshold question to be addressed was whether an electric utility under the Commission's jurisdiction must obtain the Commission's approval through the issuance of a CCN before it may build generating plant within its certificated service territory. 24 Mo.P.S.C.(N.S.) at 76. The Commission held that it is not necessary for an electric utility to come before the Commission to obtain the Commission's approval through the issuance of a

⁸ In the matter of the application of Union Electric Company for permission and authority to construct, operate and maintain two combustion turbine generating units in the state of Missouri.

CCN before it may build generating plant within its certificated service territory. *Id.* at 78. The *StopAquila.Org* Court found the Commission to be in error. 180 S.W.3d at 36-37.

Staff counsel's effort to date to research the Commission's archives⁹ indicates that not every electrical corporation within the Commission's jurisdiction, followed UE's practice of filing for a CCN for the construction of a generating station in its Missouri certificated service territory. In fact it appears that UE was unique in this practice.

Even then there is the question of whether one CCN covers a multi-unit generating station site. UE did not file separate CCNs for separate generating units on the same site. In undersigned Staff counsel's research, he has only found that Empire filed for a CCN for Empire Energy Center Unit 2 (*Re Kansas City Power & Light Co., St. Joseph Power & Light Co., and The Empire District Electric Co.*, 22 Mo.P.S.C.(N.S.) 249, Case No. EM-78-277, Report And Order (1978)) after having filed for a CCN for Empire Energy Center Unit 1 (*Re The Empire District Electric Co.*, 21 Mo.P.S.C.(N.S.) 351, Case No. EA-77-38, Report And Order (1977)). (See Attachment A, entries "(18)" and "(19)").

In recent history, a Nonunanimous Stipulation And Agreement was approved by the Commission in 2005 in Case No. EO-2005-0329 which comprised the Kansas City Power & Light Company ("KCP&L") Experimental Alternative Regulation Plan providing for the environmental retrofitting of the Iatan 1 power plant and the construction of the Iatan 2 power plant in Platte County, Missouri. The Sierra Club and the Concerned Citizens of Platte County appealed the Commission's decision on, among other grounds, that the CCN that KCP&L had received in 1973 in *Re Kansas City Power & Light Co. and St. Joseph Light & Power Co.*, Case No. 17,895, Report And Order (1973)(Unreported Case) was no longer effective because Iatan 2 had not been constructed within two years of the issuance of the CCN as provided for by Section 393.170(3). (See also Attachment A entry "(4)" regarding CCNs for Bagnell Dam, Federal Power License, Project No. 459.) There is no reported decision because KCP&L and the Sierra Club and the Concerned Citizens of Platte County ultimately settled this litigation along with other litigation after an application to transfer to the Missouri Supreme Court had been granted by the Missouri Supreme Court.

III. Staff Comments on Specific Provisions of the Amendment:

4 CSR 240-3.105(1)(B)1

It appears there is an inadvertent comma between "utility" and "conduit" in the second line of this subsection. Staff recommends the comma be removed so the subsection will read:

1. A description of the **proposed** route **or site** of construction and a list of all electric, **gas**, and telephone **utility conduit, wires, cables, and** lines of regulated and nonregulated utilities, railroad tracks [*or any*], **and each** underground facility, as defined in section 319.015, RSMo, which the proposed construction will cross **or come within two hundred fifty feet (250') of;**

⁹ See Attachment A: Summary Of Electric Generating Plant Certificate Of Convenience And Necessity Cases.

4 CSR 240-3.105(1)(B)6

As discussed below, the Staff is suggesting revisions to the proposed 4 CSR 240-3.105(1)(B)6.

If the application is for a CCN for the construction of an electric generating plant, transmission line(s), or gas transmission lines(s) to facilitate the operation of electric generating plant(s) in Missouri, in addition to the general filing requirements of 4 CSR 240-2.060(1), applications, according to 4 CSR 240-3.105(1)(B)6, as published in the *Missouri Register*, shall include among other things:

* * * *

The facts showing (a) the utilization of a non-discriminatory, fair, and reasonable competitive bidding process for entering into, identifying, and/or being the projected process for identifying: the design, engineering, procurement, construction management, and construction contracts for the construction of electric generating plant(s), electric transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plant(s), and (b) the utilization of a non-discriminatory, fair, and reasonable competitive bidding process for purchased power capacity and energy from alternative suppliers, reviewed by the electric utility at an identified time(s) as a possible resource(s) in lieu of the construction of electric generating plant(s), electric transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plant(s).

An application for a CCN is not intended to duplicate or replace Chapter 22 Electric Resource Planning. Rule 4 CSR 240-22.010(1) describes the Commission's electric resource planning policy goal, which

...is to set minimum standards to govern the scope and objectives of the resource planning process that is required of electric utilities subject to its jurisdiction in order to ensure that the public interest is adequately served. Compliance with these rules shall not be construed to result in commission approval of the utility's resource plans, resource acquisition strategies, or investment decisions. (Emphasis added)

Rule 4 CSR 240-22.040 establishes minimum standards for the scope and level of detail required in the supply-side resource analysis and requires:

(1) The utility shall evaluate all existing supply-side resources and *identify a variety of potential supply-side resource options which the utility can reasonably expect to use, develop, implement, or acquire*, and, for purposes of integrated resource planning, all such supply-side resources shall be considered as potential supply-side resource options. These potential supply-side resource options include full or partial ownership of new plants using existing generation technologies; full or partial ownership of new plants using new generation technologies, including technologies expected to become commercially available within the twenty (20)-

year planning horizon; renewable energy resources on the utility-side of the meter, including a wide variety of renewable generation technologies; technologies for distributed generation; life extension and refurbishment at existing generating plants; enhancement of the emission controls at existing or new generating plants; purchased power from bi-lateral transactions and from organized capacity and energy markets; generating plant efficiency improvements which reduce the utility's own use of energy; and upgrading of the transmission and distribution systems to reduce power and energy losses. *The utility shall collect generic cost and performance information sufficient to fairly analyze and compare each of these potential supply-side resource options, including at least those attributes needed to assess capital cost, fixed and variable operation and maintenance costs, probable environmental costs, and operating characteristics.* (Emphasis added)

The Commission's Chapter 22 Rules do not require that an electric utility issue an RFP to obtain cost information for the utility's supply-side alternatives. Rather, 4 CSR 240-22.040 states:

(2)(C) The utility shall indicate which potential supply-side resource options it considers to be preliminary supply-side candidate resource options. Any utility using the preliminary screening analysis to identify preliminary supply-side candidate resource options *shall rank all preliminary supply-side candidate resource options based on estimates of the utility costs and also on utility costs plus probable environmental costs.* The utility shall—

1. Provide a summary table showing each potential supply-side resource option and the utility cost and the probable environmental cost for each potential supply-side resource option and an assessment of whether each potential supply-side resource option qualifies as a utility renewable energy resource; and
2. Explain which potential supply-side resource options are eliminated from further consideration and the reasons for their elimination. (Emphasis added)

Further, 4 CSR 22.070(6)(C) requires the utility to describe and document the implementation of its preferred resource plan, including:

(C) A schedule and description of all supply-side resource research, engineering, activities, including research to meet expected environmental regulations; retirement, acquisition, and construction activities, including research to meet expected environmental regulations;

and, 4 CSR 22.070(6)(E) requires the utility to include in its implementation plan,

(E) A description of adequate competitive procurement policies to be used in the acquisition and development of supply-side resources;

Finally, 4 CSR 240-22.010(1) makes clear that the resource planning process, while required, is not a Commission pre-approval of utility resource plans, resource acquisition strategies, or investment decisions. Therefore, it is reasonable, as part of a CCN case, for the Commission and the intervenors to review the electric utility's process for identifying and/or entering into contracts for resources to be used for design, engineering, procurement, construction management, and construction.

To clarify this intent, the Staff suggests modification to the proposed 4 CSR 240-3.105(1)(B)6 as follows:

6. A discussion of the utilization or projected utilization of a non-discriminatory, fair, and reasonable competitive bidding or other process for entering into, and/or identifying:

A. The design, engineering, procurement, construction management, and construction contracts for the construction of electric generating plant(s), electric transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plant(s), if these design and construction areas are held appropriate for competitive bidding; if any of these areas are not held appropriate for competitive bidding, an explanation why it is not held appropriate for competitive bidding, and

B. The purchased power capacity and energy contracts, if any, sought from alternative suppliers, reviewed by the electric utility at an identified time(s) as a possible resource(s) in lieu of the construction of electric generating plant(s), electric transmission line(s), or gas transmission line(s) to facilitate the operation of electric generating plant(s).

In the Staff's opinion, to go beyond a review of the electric utility's process for deciding whether to competitively bid for identifying and/or entering into contracts for resources for design, engineering, procurement, construction management, and construction would be placing the Commission in too intrusive a role regarding the operations of the utility (i.e., deciding bidding matters such as whether there is a presumption that the lowest bid is the best bid). However, management is ultimately to be held accountable for the prudence of its decisions, e.g., whether to competitively bid and the management of the project.

As previously noted herein, the Commission very recently issued its Report and Order in the ATXI / Mark Twain transmission line CCN case, File No. EA-2015-0146. A major issue in that case involved Section 229.100 RSMo. 2000 and 4 CSR 240-3.105(1)(D)1. The issues in the lead-up to and the shaping of the present rulemaking respecting 4 CSR 240-3.105 did not specifically include the just noted issue in the ATXI / Mark Twain transmission line CCN case. The Staff has not addressed the ATXI / Mark Twain transmission line CCN case issue in these comments from the perspective of proposing any amendment because the

Staff is of the opinion that given the Commission's Report and Order in the ATXI / Mark Twain transmission line CCN case, the present language of 4 CSR 240-3.105(1)(D)1 and the proposed amended language of 4 CSR 240-3.105(3) published in the March 1, 2016, edition of the *Missouri Register* are adequate.

**SUMMARY OF ELECTRIC GENERATING PLANT
CERTIFICATE OF CONVENIENCE AND NECESSITY CASES**

Union Electric Company

(1) In *Re Union Electric Co.*, 17 Mo.P.S.C.(N.S.) 258, Case No. 17,509, Report and Order (1972), Union Electric Company ("UE") filed an application for permission and authority to construct, operate and maintain a 43 megawatt oil-fired combustion turbine generating unit to be known as the Howard Bend generating unit in St. Louis County. The proposed construction, operation, and maintenance was found to be in the public interest by the Commission, and the permission and authority requested was granted.

(2) In *Re Union Electric Co.*, 15 Mo.P.S.C.(N.S.) 505, Case No. 17,139, Report And Order (1971), UE filed an application for permission and authority to construct, operate, and maintain a multi-unit steam electric generating plant within its service territory as established by the Commission in Case No. 3505 in Jefferson County, Missouri at UE's Rush Island site. UE planned to install two generating units each with a capacity of 600 megawatts, with provisions for future installations of additional units. (First unit to be completed in May 1975 and second unit to be completed in May 1976.) Commission determined that the proposed construction, operation, and maintenance of the multi-unit steam electric generating plant was in the public interest and the permission and authority requested should be granted.

(3) In *Re Union Electric Co.*, 9 Mo.P.S.C.(N.S.) 62, Case No. 14,390, Report and Order (1960), UE application for permission and authority pursuant to Section 393.170 to construct, operate and maintain a pumped storage electric generating

station in Reynolds County, Missouri to be known as its “Taum Sauk Plant.” It was noted that Meramec Unit No. 4 was then under construction.) Commission held that the proposed construction was in the public interest and that the authority as requested was granted.

(4) In *Re Union Electric Light And Power Co. and Missouri Hydro-Electric Power Co.*, 17 Mo.P.S.C. 367, Case No. 6474, Report and Order (1929), Missouri Hydro-Electric Power Company (“Missouri Hydro”) applied for a Commission order authorizing it to sell and assign and Union Electric Light And Power Company (“UEL&P”) to purchase all of the licenses, franchises, properties, and rights of Missouri Hydro pertaining to and being a part of Federal Power License, Project No. 459, and UEL&P applied for a CCN for the construction, maintenance, and operation of the dam and power plant on the Osage River near Bagnell, Missouri in accordance with Federal Power License, Project No. 459 and certain transmission lines.

The Commission noted that Missouri Hydro by an Order dated January 26, 1926 had been granted a CCN for the proposed hydro-electric development, but the CCN may have expired under Section 10481 RSMo. 1919, the then predecessor section number for Section 393.170 RSMo. 2000, and UEL&P as a consequence applied for a new CCN. 17 Mo.P.S.C. at 369. (The only differences between Section 10481 RSMo. 1919 and Section 393.170 RSMo. 2000 are that the former is not divided into three subsections and the latter also covers sewer corporations and systems.)

Commission issued UEL&P the CCN and authorized Missouri Hydro to sell, assign, transfer, convey, and deliver its property, rights and franchises to Federal Power License, Project No. 459 to UEL&P. The right of way of the transmission lines

had not been determined, so no Order could be made at the present regarding their construction.

(5) On August 2, 1923, Union Electric Light and Power Company (“UEL&P”) *Re Union Electric Light and Power Co.*, Case No. 3714 (1937) (Unreported Case) filed a petition/application to lease from Union Electric Light and Power Company of Illinois (“UEL&P-IL”) its Cahokia power plant then being constructed at Cahokia, Illinois. The first section of the Cahokia power plant was to go into service generating current about October 1, 1923. UEL&P prayed for an order authorizing it to enter into the lease with UEL&P-IL authorizing it to operate said Cahokia plant or assign or sublet the same to a subsidiary company owned and controlled by UEL&P. The Commission issued a 10 page Report on September 12, 1923 noting that (1) the Cahokia plant was being constructed at the peak of high prices, (2) for ratemaking determinations “fair value”¹ must reflect the prevailing cost at the time of valuation, and (3) objections were raised in the case by the City of St. Louis as to certain terms of the lease. On that same date, the Commission issued a two page Order dismissing the UEL&P petition/application. On November 1, 1923 UEL&P filed a Motion For Rehearing And For Leave To Amend its petition/application. The Commission issued Supplemental Order No. 4 that same day setting aside and holding for naught its September 12, 1923 Order and granted UEL&P leave to amend its petition/application, and set November 7, 1923 as the date for rehearing the case. On November 8, 1923, the Commission issued Supplemental Order No. 5, which noted that the City of St. Louis consented to the relief sought by UEL&P. Supplemental Order No. 5 authorized UEL&P to enter into the lease with

¹ Missouri is referred to as a “fair value” state.

UEL&P-IL to operate said Cahokia plant or assign or sublet the same to a subsidiary company owned and controlled by UEL&P.

(6) On December 7, 1937 Union Electric Company of Missouri ("UEM") filed a petition/application in *Re Union Electric Co.*, Case No. 9478 (1937) (Unreported Case) to acquire and hold all of the issued and outstanding shares of common stock of Keokuk Electric Company (the name of which to be changed to Union Electric Company of Iowa), (a) then owned and held by Central Mississippi Valley Electric Properties and (b) those shares of common stock to be issued pursuant to a certain contract entered into by UEM and Keokuk Electric Company, Fort Madison Electric Company, Dallas City Light Company and Central Mississippi Valley Electric Properties. On December 13, 1927, the Commission issued a Report And Order in Case No. 9478 granting the UEM petition/application.

(7) On October 20, 1966, Union Electric Company in *Re Union Electric Co.*, Case No. 16,108 (1966) (Unreported Case) filed an Application with the Commission for permission and authority under Section 393.170 to construct, operate, and maintain a multi-unit steam electric generating plant in the applicant's service area Franklin County, Missouri, to be known as its Labadie plant. It is proposed that the first 600 megawatt generating unit will be in operation on or before January 1, 1970 and the second 600 megawatt generating unit will be in service on or before January 1, 1971. On December 2, 1966 the Commission issued a Report And Order in Case No. 16,108 finding that the proposed construction, operation, and maintenance of a multi-unit steam electric generating plant is in the public interest and that the permission and authority requested should be granted.

(8) On February 16, 1977, Union Electric Company in *Re Union Electric Co.*, Case No. EA-77-146, Report And Order (1977) (Unreported Case) filed an Application, as amended March 3, 1977, for permission and authority under Section 393.170 to construct, operate, and maintain three combustion turbine generators, one each to be known as its Mexico Combustion Turbine Unit, Moreau Combustion Turbine Unit, and Moberly Combustion Turbine Unit. The proposed units will be oil-fired peaking units, each with a nominal summer capacity rating of 54 megawatts, and will go into service in May 1978. On April 14, 1977, the Commission issued a Report And Order in Case No. EA-77-146 finding that the proposed construction, operation, and maintenance of the three combustion turbine generating units is in the public interest and that the authority requested should be granted.

(9) AmerenUE did not file a CCN case for Peno Creek which has four (4) units located in Pike County near Bowling Green, Missouri. The site is in AmerenUE's service territory and the units were installed in May 2002. The units are Pratt & Whitney FT-8 aero-derivative simple cycle combustion turbine generators rated at 48 MW each. The units have two engines (fuel oil or natural gas-fired) driving a common generator. AmerenUE sought Peno Creek's inclusion in rate base in 2006 at its full cost of construction and the Commission granted AmerenUE's request. *Re Union Electric Co., d/b/a AmerenUE*, Case No. ER-2007-0002, 15 Mo.P.S.C.3d 470, 508-09, Report and Order (2007)

(10) AmerenUE did not file a CCN case for its Venice Energy Center in Venice, Illinois located at the former site of UE's baseload Venice steam-electric generating plant (south of the McKinley Bridge). The Venice Energy Center is designed as a

peaking facility. Venice CTG 2 has two engines (fuel oil or natural gas-fired) driving a common generator. It was installed in June 2002. Venice CTG 3 and 4 are Siemens-Westinghouse 501FD natural gas-fired combustion turbines rated at 165 MW each. They were installed in June 2005. Venice CTG 5 is a Siemens-Westinghouse 501D5A natural gas-fired combustion turbine rated at 117 MW. It was installed in November 2005.

(11) In *Re Missouri Power & Light Co.*,² 18 Mo.P.S.C.(N.S.) 116, Case No. 17,737, Report And Order (1973) Application under Section 393.170 to construct, operate and maintain a 54 megawatt oil-fired combustion turbine generating unit to be installed at applicant's Fairgrounds Substation, Jefferson City, Mo. Commission found that MPL had complied with municipal requirements and found that it was in the public interest for MPL to proceed as planned.

Kansas City Power & Light Company

(12) On August 22, 1973, in *Re Kansas City Power & Light Co. and St. Joseph Light & Power Co.*, Case No. 17,895, Report And Order (1973) (UnreportedCase), KCP&L and St. Joseph Light & Power Company ("SJL&P"), pursuant to Section 393.170, filed a joint application for separate CCNs from the Commission for (1) KCP&L and SJL&P to construct, own, operate, and maintain the Iatan steam electric generating station, wholly outside of KCP&L's certificated service territory, and partially outside of SJL&P's certificated service territory, and (2) KCP&L to construct, own, operate, and maintain a 345 kV transmission line for the transmission of electric power and energy from Iatan to KCP&L's Nashua substation, wholly outside of KCP&L's certificated service territory.

² A wholly-owned subsidiary of Union Electric Company.

The Commission's Report And Order refers to Iatan station being a multi-generating unit site designed for four generating units to be constructed and operated by KCPL. The Report And Order indicates that only Iatan 1 and possibly Iatan 2 will be constructed in the immediate or near term future. The Report And Order states that "[l]ead time requirements are presently estimated for fossil-fuel generation at five years" (Report And Order, p. 6), and Iatan 1 is scheduled for completion and commercial operation by April 1, 1979 (*Id.* at 7). The Commission notes that "If KCPL's loads exceed its estimate or if KCPL's Wolf Creek Unit scheduled for completion in 1981 is delayed, KCPL would be able to commence construction of Iatan Unit #2 as late as 1976 to provide additional capacity by 1981." (*Id.*). The Commission found that the construction of Iatan station and the 345 kV Iatan-Nashua transmission line were necessary and convenient for the public service, and that KCP&L and SJL&P should be granted separate CCNs as requested.

(13) On February 10, 1976, *Re Kansas City Power & Light Co. and St. Joseph Light & Power Co.*, Case No. 18,696, Report And Order (1976) (Unreported Case), KCP&L and SJL&P filed a joint application in Case No. 18,696 for a Supplemental CCN, pursuant to Section 393.170, sought to expand upon the original certificated area granted to them in Case No. 17,895 for the construction of Iatan Station and all facilities, equipment, and installations related thereto because the Missouri State Highway Department determined that the structure of the soil in the area of the railroad along the route originally approved by the Commission makes it unsuitable as a highway base material. April 10, 1976 Supplemental Application in Case No. 18,696 filed with Commission seeking approval to construct a railroad track at grade across a public

road, near the Iatan Station plant site within the proposed expansion of the certificated area sought in Case No. 18,696. On May 5, 1976, the Commission issued a Report And Order in Case No. 18,696 granting a supplemental CCN authorizing the requested construction, operation, and maintenance of (1) rail access to the Iatan electric generating station and (2) a railroad grade crossing across a portion of the public road.

(14) In *Re Kansas City Power & Light Co.*, Case No. 13,058, Report And Order (1955)(Unreported Case), KCP&L filed on March 15, 1955 an application for a CCN to construct, operate and maintain a steam-electric generating station in Henry County, Missouri near Montrose, Missouri. Although the proposed Montrose generating station will be located outside of the service territory of KCP&L but in the service territory of Missouri Public Service Company ("MPS"), KCP&L intended to serve customers in KCP&L's service territory and not customers in MPS' service territory. Large coal deposits and reserves are within the vicinity of the generating station site. The first unit is to be ready for service in the spring of 1958 and the three subsequent units are scheduled for completion in 1959, 1962, and 1965, respectively. The Commission held that there was need for additional generating capacity to supply KCP&L's present and projected future requirements of its customers, the proposed construction would make available a substantial long-term economic source of electric power for its customers, and the location of lower cost fuel at the site of the station would inure to the benefit of KCP&L and its customers.

The Empire District Electric Company

(15) In *Re The Empire District Electric Co.*, 17 Mo.P.S.C. 152, Case No. 5864, Report And Order (1928)(In the Matter of the Application of The Empire District Electric

Company for Authority to Construct a Dam). Empire was granted a CCN for construction and operation of the Ozark Beach Dam in Taney County, Missouri and in connection therewith the construction of a power house and hydro-electric generating plant.

(16) In *Re Empire District Electric Co.*, 9 Mo.P.S.C.3d 136, Case Nos. EM-2000-145 and EA-2000-153, Order Approving Application To Transfer Assets And Order Granting Certificate Of Convenience And Necessity (2000), Empire filed an application requesting permission and authorization to sell and transfer an interest in certain assets at its State Line generating facility in Jasper County, Mo. to Westar Generating, Inc. ("WGI"), a corporation duly organized and existing under the laws of the State of Kansas, for the purpose of the construction of a 500 megawatt combined cycle generating station utilizing portions of the existing site and State Line Unit 2 to be jointly owned by it and WGI. One new combustion turbine (State Line Unit 3), two new boilers, a new steam turbine (Unit 4), and a new cooling tower are to be constructed at the site. The new boilers and steam turbine will use heat from the exhaust from two of the combustion turbines (existing Unit 2 and new Unit 3) to generate electric power and energy for the new State Line Combined Cycle ("SLCC") facility to be constructed. There will be an increase in generating capacity and an increase in taxable property. WGI filed an application for a CCN, pursuant to Section 393.170, to allow it to construct own, control, operate, and maintain electric production facilities in Jasper County, Missouri. WGI did not have any retail or other customers in Missouri and proposed to provide power to its utility affiliates outside the state of Missouri. The Commission approved both applications finding that Empire's application was not detrimental to the

public interest and WGI's application was necessary and convenient for the public service. *Re Westar Generating, Inc.*, 9 Mo.P.S.C.3d 136, Case Nos. EM-2000-145 and EA-2000-153, Order Approving Application To Transfer Assets And Order Granting Certificate Of Convenience And Necessity (2000).

(17) The Plum Point Generating Station is a 665 MW coal-fired plant located near Osceola, Arkansas which went in-service in September 2010. Empire is a 7.5% owner (50 MW of generating capacity) of the generating station and also has a long-term power contract for the purchase of another 50 MW of the unit's capacity. Empire did not file for a CCN with the Commission.

(18) In *Re The Empire District Electric Co.*, 21 Mo.P.S.C.(N.S.) 351, Case No. EA-77-38, Report And Order (1977), pursuant to Section 393.170 filed an application to acquire, construct, own, operate, maintain, remove, replace, and otherwise control and manage a 90 megawatt oil-fired internal combustion turbine with all facilities related thereto for the production of electric power and energy to be located in Jasper County, Missouri. The Commission appeared to believe that the CCN that Empire obtained in Case No. 9,420 authorized Empire to construct the Empire Energy Center:

Empire is now certificated by the Report and Order in Case No. 9,420 (Exhibit 3 herein) to construct, operate and maintain electric facilities and to render electric service in all unincorporated areas of Jasper County, Missouri, and certain other counties in Missouri. Upon advice from its legal counsel, Empire seeks to certificate a 90 megawatt oil-fired internal combustion turbine, with related facilities and equipment, for the production of electric power and energy near the confluence of the Spring River, the Missouri Pacific Railroad and the Explorer Pipeline in an unincorporated portion of eastern Jasper County. The proposed facilities and other facilities which may be added subsequently will be known as the Empire Energy Center.

21 Mo.P.S.C.(N.S.) at 352.

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Empire is a public utility subject to the jurisdiction of this Commission. This Commission is authorized to grant and Empire has voluntarily chosen to secure permission and authority prior to the commencement of construction of additional facilities pursuant to Section 393.170 V.A.M.S.

Id. at 355.

* * * *

. . . Inasmuch as Empire has submitted voluntarily to this Commission its application for authority to construct these facilities, notwithstanding its existing certificate of convenience and necessity under the Report and Order in Case No. 9,420, we choose to exercise our authority and jurisdiction and do not treat the issue respecting the efficacy of that certificate as authority for the facilities involved in this proceeding.

Id. The Commission issued Empire a CCN in Case No. EA-77-38 to acquire, construct, own, operate, maintain, remove, replace, and otherwise control and manage a 90 megawatt oil-fired internal combustion turbine with all facilities related thereto for the production of electric power and energy to be located in Jasper County, Missouri.

(19) In *Re Kansas City Power & Light Co., St. Joseph Power & Light Co., and The Empire District Electric Co.*, 22 Mo.P.S.C.(N.S.) 249, Case No. EM-78-277, Report And Order (1978), KCP&L and SJL&P sought an adjustment in the existing ownership interests in Iatan generating station, approving the sale by KCP&L to Empire of an ownership interest in Iatan generating station, granting to Empire a CCN authorizing Empire to purchase, construct, and own an ownership interest in Iatan generating station, and granting Empire a CCN authorizing Empire to construct own, operate and maintain a second 90-megawatt, oil-fired combustion turbine at the Empire Energy Center in Jasper County, Missouri.

In Count III, Empire requests a certificate of public convenience and necessity to construct, own, operate and maintain a second 90-Megawatt oil-fired combustion turbine at its Empire Energy Center near LaRussell, Missouri, in Jasper County. The initial turbine at that location was certificated in Case No. EA-77-38 and became commercially operable on February 24, 1978. The proposed unit will be adjacent to the existing unit

and the substructures for the proposed unit are already in place, having been required by safety and soil stability requirements in connection with the installation of the first unit.

Although Empire is now certificated by the Report and Order in Case No. 9,420 to render electric service in all incorporated areas of Jasper County, Missouri, including the instant site, it nevertheless sought and obtained the first unit certificate and requests a similar certificate for the second unit.

22 Mo.P.S.C.(N.S.) at 253-54.

* * * *

Empire is a public utility subject to the jurisdiction of this Commission. This Commission is authorized to grant and Empire has voluntarily chosen to secure permission and authority prior to the commencement of construction of additional facilities pursuant to Section 393.170, V.A.M.S.

Id. at 255.

* * * *

Inasmuch as Empire has submitted voluntarily to this Commission its application for authority to construct these facilities, notwithstanding its existing certificate of convenience and necessity under the Report and Order in Case No. 9,420, we choose to exercise our authority and jurisdiction and do not treat the issue respecting the efficiency of that certificate as authority for the facilities involved in this proceeding.

Id. at 256. Pursuant to Section 393.170, the Commission granted a CCN for a second 90-megawatt oil-fired combustion turbine at the Empire Energy Center. *Id.*