IN THE SUPREME COURT OF MISSOURI

Grain Belt Express Clean Line, LLC, Missouri Joint Municipal Electric Utility Commission, and Missouri Landowners Alliance, Appellants, v. Public Service Commission of the State of Missouri, et al. Respondents.	Case No. SC96993

SUBSTITUTE BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

This case is before the Court on transfer from the Court of Appeals for the Eastern District of Missouri (Eastern District) under Rule 83.02 of the Missouri Rules of Civil Procedure. The Eastern District transferred the case to this Court because of the general interest or importance of the question involved.

SUMMARY

This Court must resolve a conflict between the Eastern District and the Western District of the Court of Appeals. The two appellate courts have reached contradictory interpretations of Section 393.170, RSMo (2016) as applied to the same facts. In each case, the company applied for authority to construct a high-voltage long distance electric transmission line. In each case, the company did not request the authority to provide electric service directly to customers. In each case, the company did not provide evidence to the Commission that it had obtained the assent of county commissions under Section 229.100, RSMo (2016).

Under the Western District's interpretation of Section 393.170, RSMo (2016), the Commission cannot lawfully issue a certificate of convenience and necessity for construction of an electric transmission line until the county commissions of the affected counties have granted assent under Section 229.100. *In the Matter of Ameren Transmission Co. of Ill.*, 523 S.W.3d 21, 25-6 (Mo. Ct. App. W.D. 2017) (*ATXI*). The Western District applied Section 393.170.2, RSMo (2016) as establishing the elements necessary for approval of the certificate. *Id.* The Western District's interpretation relies on language referring to local authorities that is found in Section 393.170.2 to conclude that county assents are required prior to the issuance of a certificate by the Commission. *Id*.

Under the Eastern District's interpretation, whether or not the county commissions have granted assents under Section 229.100 is irrelevant to the Commission's decision to grant or deny a certificate of convenience and necessity for the construction of a transmission line. *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n*, No. ED105932, slip op. at 9-10 (Mo. Ct. App. E.D., Feb. 27, 2018) (order transferring to

Supreme Court) (Slip op.). The Eastern District's interpretation relies on the fact that there is no reference to local authorities in Section 393.170.1, which the Eastern District found is the only part of the statute that is relevant to certificates granted for the purpose of construction rather than the purpose of providing service. (Slip Op. at 10).

These two statutory interpretations are directly in conflict. Any ruling from this Court that does not resolve this conflict would place the Commission in an untenable position on remand of this case and in future application cases because it is impossible to abide by both decisions. Guidance from this Court is needed to resolve the conflict and instruct the Commission as to the correct interpretation of Section 393.170.

Point I of this brief addresses the central conflict of the case, which is the disagreement between the Western District's and the Eastern District's interpretations of Section 393.170. The outcome of this case depends on whether this Court agrees with the Western District's statutory interpretation in *ATXI* or the Eastern District's statutory interpretation in this case. The Court does not need to reach the remaining arguments presented by any of the parties in any of the other arguments to dispose of the case.

Point II of this brief addresses Grain Belt's argument regarding the scope of the county commissions' authority under Section 229.100, RSMo (2016). This point does not need to be resolved by this Court in this case because it has no bearing on the lawfulness or reasonableness of the Commission's order on appeal. This question is properly addressed in litigation between an applicant and a county. Such litigation is currently pending before the Court of Appeals for the Western District.

Point III of this brief addresses Grain Belt's argument regarding the application of the Commission's internal filing requirements rule. This point does not need to be resolved by this Court in this case because it has no bearing on the lawfulness or reasonableness of the order on appeal. The Commission's internal procedural rules have no bearing on the appellate courts' contrary interpretations of Section 393.170.

Point IV of this brief addresses Renew Missouri and Sierra Club's argument about the meaning of the term "franchise" in Section 393.170.2, RSMo (2016). This point does not need to be resolved in this case because it has no bearing on the lawfulness or

reasonableness of the order on appeal. The pertinent question before this Court is whether Section 393.170.2 applies to Grain Belt's application.

Point V of this brief addresses Renew Missouri and Sierra Club's extra-record arguments about the motives and intentions of the various county commissions. This point cannot be addressed based on the record in this case. The Commission took no evidence and made no findings of fact or conclusions of law with respect to this issue. It has no bearing on the lawfulness or reasonableness of the order on appeal. The issues raised in this point are more appropriately addressed in the litigation that is now pending before the Western District in WD81269.

Point VI of this brief addresses MJMEUC's argument that the Commission was not bound by the Western District's *ATXI* decision at the time that it issued its order denying Grain Belt's application for a certificate of convenience and necessity. This point should be denied. This Court may well conclude that the Western District's interpretation of Section 393.170 in *ATXI* is incorrect and that the Eastern District's interpretation is the correct one, but that does not mean that the Commission's order was either unlawful or unreasonable at the time that the order was issued. *ATXI* is directly on point and the Commission was bound to follow the ruling of the appellate court.

Point VII of this brief addresses MJMEUC's claim that the Commission denied MJMEUC due process when it admitted into evidence certain exhibits offered by the Missouri Landowners Alliance (MLA). This point should be denied. MLA followed the proper procedure when it offered the exhibits, and the Commission did not violate due process principles when it admitted the exhibits over MJMEUC's objections.

Point VIII of this brief addresses MJMEUC's argument that the Commission unlawfully deprived MJMEUC of a benefit when it denied Grain Belt's application for a certificate of convenience and necessity. This point should be denied. The case law cited by MJMEUC is irrelevant to the issues that are before the Court in this case and they do not support MJMEUC's claim of error.

Point IX of this brief addresses MLA's substitute appellant's brief and the Commission's motion to dismiss MLA's appeal that has been taken with the case. This

Court should also grant the Commission's motion to dismiss the appeal filed by MLA. By injecting non-final issues into this case prematurely, MLA is improperly attempting to control the Commission's future actions in hypothetical circumstances. This Court should apply the standard of review of Section 386.510, RSMo (2016) and should decline to make any decision that is unrelated to the lawfulness and reasonableness of the order denying Grain Belt's application for a certificate of convenience and necessity. This point also briefly addresses the suggestions in support of the motion to dismiss filed by Grain Belt.

STATEMENT OF FACTS

Parties

Appellant Grain Belt Express, LLC (Grain Belt) is a limited liability company organized for the purpose of constructing a high-voltage direct current electric transmission line called the Grain Belt Express. (LF 2662; LF Ex. 1225). Grain Belt is a wholly owned subsidiary of Grain Belt Express Holding, a Delaware limited liability company which is in turn a wholly owned subsidiary of Houston-based Clean Line Energy Partners, LLC. (LF Ex. 1223-25; LF 2662).

Appellant Missouri Joint Municipal Electric Utility Commission (MJMEUC) is a joint action agency which negotiated an option contract on behalf of some of its non-profit municipal electric utility members to take service from the Grain Belt Express. (MJMEUC Sub. Br. 10). MJMEUC intervened before the Commission to support construction of the Grain Belt Express transmission line. (LF 264-68; LF 436-42; LF 2660).

Intervenors Renew Missouri Advocates (Renew Missouri)[1] and the Sierra Club are nonprofit environmental organizations that support the development of renewable energy. (LF 262-63; LF 245-47). Renew Missouri and Sierra Club intervened before the

[1] On December 6, 2016, Earth Island Institute d/b/a Renew Missouri filed a Notice of Change in Party Name to Renew Missouri Advocates d/b/a Renew Missouri. (LF 715-7).

Commission to support the construction of the Grain Belt Express transmission line. (LF 1416; LF 1477).

Appellant and Intervenor-Respondent Missouri Landowners Alliance (MLA) is a nonprofit organization comprised largely of landowners who would be affected by the construction of the Grain Belt Express transmission line. (LF 248-49). MLA intervened before the Commission to oppose the construction of the Grain Belt Express transmission line. (LF 1463-76).

Respondent Public Service Commission of the State of Missouri (Commission) is the state agency responsible for the regulation of public utilities in Missouri. Section 386.250.1, RSMo (2016). The Commission's statutory authority extends to the issuance of certificates of convenience and necessity for the construction of electric plant within the state. Section 393.170.1, RSMo (2016).

2014 Application and Related Litigation

Grain Belt filed its first application for a certificate of convenience and necessity to construct the Missouri portion of the Grain Belt Express in 2014. (LF Ex. 2468, 2471). In that case, the Commission denied the application, finding that Grain Belt had not met the criteria for the issuance of a certificate of convenience and necessity. (LF Ex. 2494-95). The Commission found at that time the company had not shown that the proposed project was necessary or convenient for the public service. (LF Ex. 2494-95).

Outside of the Commission's 2014 proceeding, separate litigation was filed regarding the issue of county assents. In 2014, MLA filed actions naming Grain Belt Express and two county commissions as defendants.[2] MLA alleged the assents of Caldwell County and Monroe County are invalid. MLA's motion for summary judgment was sustained in Caldwell County. (LF Ex. 2464). Venue of the Monroe County case was transferred to Callaway County. Summary judgment was entered in favor of Grain Belt in that case. *Mo Landowners Alliance v. Grain Belt Express, LLC,* No. 16CW-CV00751

[2] The Commission was originally named as a defendant in these suits, but was dismissed by the trial court without opposition from MLA or Grain Belt.

(Judgment entered Sep. 25, 2017). MLA has appealed to the Western District and that appeal is still pending. *Mo. Landowners Alliance v. Grain Belt Express, LLC*, No. WD81269 (Mo. Ct. App. W.D., record filed Feb. 20, 2018).

Background and Procedural History

In 2016, Grain Belt filed another application for a certificate of convenience and necessity (CCN) under Section 393.170.1, RSMo (2016), to build the Missouri portion of a proposed interstate high-voltage direct current electric transmission line to transmit wind power generated in Kansas into other states[3] including Missouri, Illinois,[4] and Indiana. (LF 121-22; LF 2660; LF 2663). The Missouri portion of the line would cross about 206 miles and traverse eight of the state's counties. (LF 2663; LF 128). The eight counties in the proposed path of the line are Buchanan, Caldwell, Carroll, Chariton, Clinton, Monroe, Ralls, and Randolph. (LF 2663; LF 121; LF 156). The record on appeal does not reflect whether Grain Belt has obtained the assent of all of those counties as required by Section 229.100, RSMo (2016). (LF 2665; LF Ex. 2928). Grain Belt has not requested authority to provide electric service to end use customers. (LF 149-50). Grain Belt has acknowledged that the assent of the county commissions will need to be

[3] The regulatory authorities of Kansas and Indiana have issued approval of the projects. (LF 148-9; LF Ex. 1244-5). See additional clarification for the Illinois approval at footnote 4.

[4] The Illinois Commerce Commission (ICC) issued a certificate of convenience and necessity for the Illinois portion of the Grain Belt Express. *Concerned Citizens and Property Owners v. Ill. Commerce Comm'n,* No. 15-0277, 2018 WL 1358948 (Ill. Ct. App. 5th Dist., Mar. 13, 2018). (LF 148-9). A landowners group in Illinois appealed the ICC's decision to the Fifth Appellate District of Illinois. The case was argued to the Illinois appellate court on February 28, 2017. On March 13, 2018, the Fifth Appellate District of Illinois issued an opinion reversing and remanding the ICC's order granting a certificate for the Illinois portion of the project. Grain Belt now has the option of seeking rehearing or transfer to the Illinois Supreme Court. Ill. S. Ct. Rule 315.

obtained for construction of the project to occur. (Grain Belt Sub. Br. 21; Tr. 1681: 23-1682: 3).

While Grain Belt's application was pending at the Commission, the Court of Appeals for the Western District (Western District) handed down its opinion in a case involving the application of ATXI (f/k/a Ameren Transmission Company of Illinois) for a certificate of convenience and necessity to construct the Missouri portion of a high-voltage interstate transmission line traversing five counties in Missouri. *In the Matter of Ameren Transmission Co. of Illinois*, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017) (*ATXI*). ATXI was a transmission-only company. *Id.* at 24. ATXI provided no proof of county assents in the record it made at the Commission. *Id.* The Commission order granting ATXI's application conditioned the certificate on later obtaining county assents. *Id*. In *ATXI*, the Western District reversed the Commission's decision granting a certificate to ATXI for construction of its proposed transmission line. *Id.* at 27. This Court denied the Commission's application for transfer of the Western District's *ATXI* decision in June of 2017. (SC96427). The Western District issued its mandate on the same day.

After the *ATXI* mandate was handed down, the Commission invited the parties to present additional briefing and oral argument about the effect of that decision on Grain Belt's application. (LF 2540). Before the oral argument, MLA filed notice that it intended to offer four exhibits related to the ATXI application at the Commission and on appeal into the record of this case. (LF 2638). MLA stated that it was offering the exhibits to show that the factual background of ATXI was the same as the factual background of this case. (LF 2639). MJMEUC objected in writing to the admission of the *ATXI* exhibits. (LF 2646). In previous filings, MJMEUC had acknowledged that ATXI filed an application for a certificate of convenience and necessity for construction authority under Section 393.170.1, and not for service authority under Section 393.170.2 (LF 1927-28; LF 2197, LF 2424, LF 2596). Neither MJMEUC nor any other party had objected to references to ATXI at other points throughout the case. (LF 2040 & n.292; LF 2218; LF 2360; LF 2374-5; LF 2249 n.12; LF 2627-8; LF 2360 n.13 & n.14).

MLA offered the exhibits at the oral argument and MJMEUC again objected. (Tr. 1643: 19-1645: 9; 1645: 23-1646: 18). The Commission overruled MJMEUC's objections and admitted the exhibits into the record. (Tr. 1646: 22-1647: 5).

The Commission ultimately determined that the *ATXI* opinion controlled the outcome of Grain Belt's application case. (LF 2667-70). The Commission denied Grain Belt's application in light of the fact that the record lacks evidence that Grain Belt has the necessary county assents. (LF 2670). The Commission's order denying the application was voted out at a public agenda meeting. (LF 2671). Four of the five commissioners signed a concurring opinion stating that the signatory commissioners were of the opinion that Grain Belt's application met the criterion usually applied to an application for a certificate of convenience and necessity. (LF 2675). The Commission did not vote on the concurring statement in a public agenda meeting. (LF 2675; LF 2804 n.1).

Individual applications for rehearing of the Commission's order denying Grain Belt's application for a certificate of convenience and necessity were filed by Grain Belt, MJMEUC, and MLA. (LF 2683; LF 2724; LF 2739). A joint application for rehearing was filed by Renew Missouri and Sierra Club. (LF 2757).

The Commission denied the applications for rehearing. (LF 2804-5). Timely notices of appeal were filed by Grain Belt, MJMEUC, and MLA.[5] (LF 2879; LF 2916; LF 2966). The appeals were consolidated by the Eastern District under case number ED105932. MLA also filed a motion to intervene in the appeals of the other parties in the Eastern District. (Mot. Intervene, No. ED105932, Sep. 26, 2017; Mot. Intervene, No. ED105975, Oct. 5, 2017). Renew Missouri and Sierra Club filed a motion to intervene in Grain Belt's appeal.

The Commission filed a motion to dismiss MLA's appeal in the Eastern District. The Eastern District ordered the motion to be taken with the case. The Eastern District ruled that the motion was moot in light of its disposition of the case. (Slip op. 4 & n.2).

[5] ED105932, ED105975, ED106023, respectively.

The Eastern District found that the Commission erred when it denied Grain Belt's application based on the lack of evidence of county assents in the record. (Slip op. 10). The Eastern District noted that the facts underlying ATXI's application and Grain Belt's application are a matter of first impression because in each case the company sought only construction authority and did not request service authority. (Slip op. at 8 n.3) In making its holding, the Eastern District declined to follow the Western District's holding in *ATXI*, stating it was wrongly decided. (Slip op. 8-10). The Eastern District transferred the case to this Court because of the general interest and importance of the question presented. (Slip op. 10-1).

The Commission has again filed a motion to dismiss MLA's appeal. MLA filed suggestions in opposition to the motion to dismiss. Grain Belt filed suggestions in support of the Commission's motion to dismiss. This Court has ordered that motion to be taken with the case.

STANDARD OF REVIEW

Judicial review of Commission orders is governed exclusively by statute. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 758 (Mo.banc 2003). The Commission's order will be affirmed if it is lawful and reasonable. Section 386.510, RSMo (2016). The order is presumed to be valid, and the burden is on the party opposing the order to demonstrate by "clear and satisfactory evidence" that the order is either unlawful or unreasonable. Section 386.430, RSMo (2016).

An order is lawful if the Commission has the statutory authority to issue it. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734. (Mo.banc 2003). The reviewing court exercises independent judgment on the issue of lawfulness. *Id*. The reviewing court will correct erroneous interpretations of the law. *State ex rel. Sprint, Mo. v. Pub. Serv. Comm'n*, 165 S.W.3d 160, 164 (Mo.banc 2005).

An order is reasonable if it is based on competent and substantial evidence on the record as a whole. *AG Processing, Inc.*, 120 S.W.3d at 735. All reasonable supporting inferences are viewed in the light most favorable to the Commission's order. *Id.* An order

is reasonable if the Commission did not act arbitrarily or abuse its discretion. *Sprint Mo., Inc.*, 165 S.W.3d at 164.

Upon submission, the reviewing court "shall render its opinion either affirming or setting aside, in whole or in part, the order or decision of the commission under review." Section 386.510, RSMo (2016). The reviewing court may remand for further action by the Commission. *Id.* The reviewing court may not direct the Commission as to what its order on remand must be or decide an issue that must be decided by the Commission in the first instance. *State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n*, 835 S.W.2d 356, 361-2 (Mo. Ct. App. W.D. 1992).

This standard of review is applicable to each point relied on. Additional law relevant to each point is included in the Argument section of this brief.

POINTS RELIED ON

I. Grain Belt's first claim of error is dispositive of this case because it is the only question that must be answered by this Court in that this Court's resolution of the conflicting interpretations of Section 393.170 by the Western District and the Eastern District will determine whether the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is unlawful or unreasonable within the meaning of Section 386.510. (Responds to Point I of Grain Belt's Points Relied On).

Statute

Section 393.170, RSMo (2016)

Cases

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544 (Mo. Ct. App. W.D. 2008)

State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 770 S.W.2d 283 (Mo. Ct. App. W.D. 1989)

State ex rel. Harline v. Pub. Serv. Comm'n, 343 S.W.2d 177 (Mo. Ct. App. K.C. 1960)

II. Grain Belt's second claim of error should be denied because it is not necessary for this Court to make any determinations regarding the extent of the county commissions' authority under Section 229.100 for this Court to resolve the conflict between the Western District's and the Eastern District's interpretation of Section 393.170 in that the conflict will be resolved by whether or not the provisions of Section 393.170.2 are applicable to Grain Belt's application. (Responds to Point II of Grain Belt's Points Relied On).

Statutes

Section 229.100, RSMo (2016)

Section 386.130, RSMo (2016)

Section 386.410, RSMo (2016)

Section 393.170, RSMo (2016)

Cases

State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 344 S.W.3d 178 (Mo.banc 2011)

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

In the Matter of the Application of KCP&L Greater Mo. Operations Co. for Permission and Approval of a Certificate of Pub. Convenience and Necessity Authorizing It to Construct, Install, Own, Operate and Maintain and Otherwise Control or Manage Solar Generation Facilities in Western Mo., 515 S.W.3d 754 (Mo. Ct. App. W.D. 2016)

City of Park Hills v. Pub. Serv. Comm'n, 26 S.W.3d 401 (Mo. Ct. App. W.D. 2000)

Other Authority

4 CSR 240-3.105

III. Grain Belt's third claim of error should be denied because the *ATXI* case and this case are not distinguishable in that both cases are based on the same material facts and the Commission rule allowing a waiver or variance of its rules cannot change the statutory requirements of Section 393.170. (Responds to Point III of Grain Belt's Points Relied On).

Statutes

Section 386.020, RSMo (2016)

Section 386.410, RSMo (2016)

Section 393.170, RSMo (2016)

Cases

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

King v. Div. of Employment Sec., 964 S.W.2d 832 (Mo. Ct. App. W.D. 1997)

Mo. Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380 (Mo. Ct. App. W.D. 1994)

Other Authorities

4 CSR 240-2.060

4 CSR 240-3.015

4 CSR 240-3.105

IV. Renew Missouri and Sierra Club's first claim of error should be denied because this Court does not need to reach the issue addressed in this point in that it is not necessary for this Court to decide whether a county assent under Section 229.100 is a franchise within the meaning of Section 393.170.2 to resolve the conflict between the Western District and the Eastern District. (Responds to Point I of Renew Missouri and Sierra Club's Points Relied On).

Statute

Section 393.170, RSMo (2016)

Case

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

V. Renew Missouri and Sierra Club's second claim of error should be denied because the alleged motives of the county commissions with respect to the proposed project are not relevant to this appeal of the order denying Grain Belt's application for a certificate of convenience and necessity under Section 386.510 in that it is not necessary to make any findings with respect to the county commission's motives to answer the question presented by this appeal. (Responds to Point II of Renew Missouri and Sierra Club's Points Relied On.)

Statutes

Section 229.100, RSMo (2016)

Section 393.170, RSMo (2016)

Cases

State ex rel. Elec. Co. of Mo. v. Atkinson, 204 S.W. 897 (Mo.banc 1918)

State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 770 S.W.2d 283 (Mo. Ct. App. W.D. 1989)

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

VI. MJMEUC's first claim of error should be denied because the Commission did not err in following the Western District's opinion in *ATXI* in that at the time the Commission issued its order denying Grain Belt's application for a certificate of convenience and necessity the only case law that was directly on point was the *ATXI* decision and the Commission was bound by that decision. (Responds to Point I of MJMEUC's points relied on).

Statutes

Section 386.040, RSMo (2016)

Section 386.510, RSMo (2016)

Section 393.170, RSMo (2016)

Cases

State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 344 S.W.3d 178 (Mo.banc 2011)

In the Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017)

Matter of Verified Application and Petition of Laclede Gas Co., 504 S.W.3d 852 (Mo. Ct. App. W.D. 2016)

Mo. Pub. Serv. Comm'n v. Oneok, Inc., 318 S.W.3d 134 (Mo. Ct. App. W.D. 2009)

Other Authority

MO. CONST. Art. V, sec. 18

VII. MJMEUC's second claim of error should be denied because the Commission did not deprive MJMEUC of due process in that MJMEUC was given both notice and the opportunity to be heard with regard to the publicly available documents from the *ATXI* case offered as evidence by MLA and the Commission correctly overruled MJMEUC's written and oral objections to that testimony. (Responds to Point II of MJMEUC's Points Relied On).

Statutes

Section 386.510, RSMo (2016)

Section 536.070, RSMo (2016)

Cases

In re J.M., 328 S.W.3d 466 (Mo. Ct. App. E.D. 2010)

Lauber-Clayton, LLC v. Novus Properties, Co., 407 S.W.3d 612 (Mo. Ct. App. E.D. 2013)

Moore v. Mo. Dental Bd., 311 S.W.3d 298 (Mo. Ct. App. W.D. 2010)

State ex rel. Mo. Pipeline Co. v. Pub. Serv. Comm'n 307 S.W.3d 162 (Mo. Ct. App. W.D. 2009)

Other Authority

4 CSR 240-2.150

VIII. MJMEUC's third claim of error should be denied because the Commission did not unlawfully deprive MJMEUC of any benefit in that the Commission does not regulate MJMEUC's rates and the Commission's denial of Grain Belt's application was not equivalent to setting a confiscatory rate for MJMEUC customers. (Responds to Point III of MJMEUC's Points Relied On).

Statutes

Section 386.040, RSMo (2016)

Section 393.130, RSMo (2016)

Section 393.170, RSMo (2016)

Cases

State ex inf. Ashcroft ex rel. Bell v. City of Fulton, 642 S.W.2d 617 (Mo.banc 1982)

In the Matter of Kansas City Power & Light Co.'s Request for Authority to Implement a General Rate Increase for Electric Service, 509 S.W.3d 757 (Mo. Ct. App. W.D. 2017)

State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n, 706 S.W.2d 870 (Mo. Ct. App. W.D. 1985)

Other Authority

MO. CONST. Art. VI, sec. 27

IX. The Commission's motion to dismiss MLA's appeal should be granted because MLA has not brought a proper appeal under Section 386.510 in that MLA does not claim that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable, and this Court does not issue advisory opinions based on hypothetical rather than actual facts. (Responds to Points I, II, III, and IV of MLA's Points Relied On).

Statutes

Section 386.510, RSMo (2016)

Section 536.090, RSMo (2016)

Cases

Evans v. Empire Dist. Elec. Co., 346 S.W.3d 313 (Mo. Ct. App. W.D. 2011)

City of Park Hills v. Pub. Serv. Comm'n, 26 S.W.3d 401 (Mo. Ct. App. W.D. 2000)

State ex rel. Alma Telephone Co. v. Pub. Serv. Comm'n, 40 S.W.3d 381 (Mo. Ct. App. W.D. 2001)

State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n, 835 S.W.2d 356 (Mo. Ct. App. W.D. 1992)

ARGUMENT

I. Grain Belt's first claim of error is dispositive of this case because it is the only question that must be answered by this Court in that this Court's resolution of the conflicting interpretations of Section 393.170 by the Western District and the Eastern District will determine whether the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is unlawful or unreasonable within the meaning of Section 386.510. (Responds to Point I of Grain Belt's Points Relied On).

The Commission has the statutory authority to issue a certificate of convenience and necessity to a utility when it determines, after hearing, that granting the authority sought is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016). The authority that the Commission may grant under Section 393.170 is of two kinds. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo. Ct. App. W.D. 1989). The first kind of authority is the authority to construct utility plant. *Id*. (citing Section 393.170.1). The second kind of authority the Commission may grant is the authority to provide utility service to a specific area. *Id.* (citing Section 393.170.2).

The two kinds of authority available under Section 393.170 are distinct. *Id*. They are not interchangeable. *Id*. Several cases decided before *ATXI* have discussed the differences between construction authority and service authority and the circumstances in which the need to seek a specific kind of authority have arisen. In each of these cases, the utility company both constructed utility plant and provided electric utility service. Although the cases do not present exactly the same factual situation as this case, they are instructive for showing how Section 393.170 has been interpreted by the courts.

In *State ex rel. Harline v. Pub. Serv. Comm'n*, an electric utility planned to construct an eight-mile transmission line to serve companies within its existing service area. 343 S.W.2d 177, 179-80 (Mo. Ct. App. K.C. 1960). Opponents of the proposed construction filed a complaint with the Commission and objected to the project on the ground that the utility had not obtained a certificate of convenience and necessity from the Commission. *Id.* at 179. The appellants in *Harline* argued that the utility was required to obtain a certificate of convenience and necessity under Section 393.170.1. *Id.* at 185. The utility defended itself against the complaint by claiming that the certificate of convenience and necessity granted to its predecessor company in 1938 provided the necessary authority for the construction of the proposed line in its existing service area. *Id.*

The 1938 certificate of convenience and necessity granted both construction authority and the authority to provide service to customers within a specified area in Jackson County. *Harline,* 343 S.W.2d at 180. The utility's predecessor company had also obtained county franchise authority. *Id.* The Commission found that the utility did not need a separate certificate of convenience and necessity to construct a transmission line within its existing service area. *Id.* at 179.

The Commission was affirmed on appeal. *Harline*, 343 S.W.2d at 185. The court recognized the two types of authority available under Section 393.170. *Id.* The *Harline* court found that the utility had an obligation to serve customers within the service area that was allocated to it in 1938. *Id.* at 181. The court rejected the appellants' argument that the utility needed authority under Section 393.170.1 to construct a transmission line within its service territory. *Id*. The court held that the case was governed by the service authority provision of Section 393.170.2. *Id.* The court found that the utility did not need any additional authority from the Commission to build a transmission line within its existing service area. *Id*.

The *Harline* case is not directly on point because, unlike the utility in that case, Grain Belt does not provide service and does not have any service authority under Section 393.170.2. Grain Belt needs only construction authority under Section 393.170.1,

and that is the only authority it has requested from the Commission. The question that must be answered in this case is whether Section 393.170.2 applies to a utility that does not have an obligation to serve customers within an allocated service territory. *Harline* does not answer this question, although it does clearly enunciate the differences between the two types of authority.

In *State ex rel. Cass County v. Pub. Serv. Comm'n*, an electric utility built a power plant without obtaining either a certificate of convenience and necessity from the Commission under Section 393.170 or a zoning exemption from the county under Section 64.235. 259 S.W.3d 544, 546 (Mo. Ct. App. W.D. 2008). In an earlier case, opponents of the power plant had obtained an injunction requiring the utility to remove the unauthorized plant because the court held that the utility's existing area certificate and franchise did not confer authority for the construction of a power plant within the service area. *Id*. The trial court's injunction was upheld on appeal. *Id.*[6] After the injunction was upheld on appeal, the utility sought a certificate of convenience and necessity from the Commission that was intended to approve the construction of the plant after the fact. *Id.*

The Commission granted the utility's application for a certificate of convenience and necessity to construct the plant. *Id*. The utility contended that it was entitled to a zoning exemption from the county in light of the certificate granted by the Commission. *Id.* at 547. Cass County appealed on the issue of whether the Commission has the statutory authority to approve a power plant after the plant had been constructed. *Id.*

The *Cass County* court again recognized that there are two types of authority available under Section 393.170. 259 S.W.3d at 548-9. The court noted that construction authority is available under subsection 1 and that service authority is available under subsection 2. *Id.* at 549. Construction authority is commonly referred to as a line certificate and service authority is commonly referred to as an area certificate. *Id.* The utility in *Cass County* built the power plant within its certificated service area. *Id.* at 547.

[6] That earlier case was *Stopaquila.org v. Aquila, Inc.* 180 S.W.3d 24 (Mo. Ct. App. W.D. 2005).

The *Cass County* court held that the Commission does not have the authority to issue a certificate of convenience and necessity for the construction of a power plant after construction of the plant has already occurred. 259 S.W.3d at 549. The court held that construction undertaken pursuant to authority granted by the Commission under subsection 1 specifically requires prior approval: "No. . .electrical corporation. . .shall begin construction of. . .electric plant. . .without first having obtained the permission and approval of the commission." *Id.;* Section 393.170.1, RSMo (2016). In light of this holding, the court found that the certificate granted by the Commission did not provide an exemption from county zoning laws under Section 64.235. *Id*. at 551. The court set aside the Commission order granting a certificate to the utility. *Id.* at 552.

This case is also not directly on point. Grain Belt has not undertaken any construction without Commission approval. *Cass County* and its companion case *Stopaquila.org* addressed the issue of whether an existing franchise and line certificate relieved the utility of the obligation to get a new line certificate before construction of new plant within an existing service area. The Western District held that it did not and that the utility was required to get a new line certificate before beginning construction of the new plant. This case is not directly analogous to Grain Belt's application because Grain Belt, unlike the utility in *Cass County*, does not currently provide electric service and does not intend to acquire service authority.

In *Union Elec. Co.*, the Western District reviewed a Commission decision ordering Union Electric to stop providing electric service to a state-owned traffic light that was located along a highway where Union Electric had a line certificate authorizing it to build electric plant in St. Charles County. 770 S.W.2d at 284. Union Electric was serving the traffic light from one of its existing lines that had been constructed under authority granted to its predecessor utility in a line certificate. *Id.* at 284. Union Electric had been providing service to the traffic signal at the request of the state highway department. *Id.* The City of Lake St. Louis was subsequently incorporated in 1975, and in 1985 the Commission gave CRESCO a certificate of convenience and necessity to provide service to the City of Lake St. Louis. *Id.* The traffic signal was located in CRESCO's certificated

service area and the Commission found that CRESCO should provide service to the traffic signal under its area certificate. *Id.*

The Western District affirmed the Commission's decision ordering Union Electric to stop providing service to the traffic light under its line certificate. *Union Elec. Co.*, 770 S.W.2d at 288. The Western District rejected Union Electric's argument that separation between the two kinds of authority contemplated by Section 393.170 had become so blurred that they should be considered interchangeable. *Id.* at 285. "On its face, line certificate authority described under subsection 1 of [S]ection 393.170 carries no obligation to serve the public generally along the path of the line." *Id.*

At the same time, the Western District found that the Commission's decision did not negatively impact Union Electric's existing franchise. *Union Elec. Co.*, 770 S.W.2 at 285. "Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *Id.* The authority that grants the franchise does not have the right to dictate the utility's business activities and it cannot "purport to grant an exclusive franchise." *Id.* The area certificate granted by the Commission provides an additional obligation to serve the area that is covered by the local franchise. *Id.* at 286. The local franchise allows a utility to exercise a "privilege which a municipality or county may give or refuse under its delegated police power." *Id.* The court held that CRESCO's area certificate allowed it to provide service to the traffic signal, while Union Electric's line certificate did not. *Union Elec. Co.*, 770 S.W.3d at 288.

This case is also not directly on point because it involves competing claims between one utility with a line certificate and another utility with an area certificate. This case does not address the situation of a utility that requests only a line certificate and does not request an area certificate. *Union Electric* does suggest that a utility may have a line certificate within an area where a different utility has the obligation to provide service under an area certificate. Although in most cases utilities have both a line certificate and an area certificate, a company with only a line certificate, such as the one requested by Grain Belt, does not necessarily have the obligation to provide service.

The Western District and the Eastern District took very different approaches to this case law. The Western District made no reference to this line of cases in its *ATXI* decision. *ATXI*, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017). Indeed, the Western District made no reference to Section 393.170.1 at all in its decision. *Id.* The Western District focused solely on the municipal authority requirements of Section 393.170.2 in making its decision that the Commission could not lawfully grant a certificate to ATXI without proof of county assents. *Id.* at 25-6. Under the Western District's interpretation and application of Section 393.170, the Commission had no choice but to deny Grain Belt's application on the record that was created in this case.

The Eastern District took notice of this line of case law in its decision below. (Slip op. at 7). The Eastern District noted that Grain Belt is requesting only to construct a transmission line and not to provide electric service. (Slip op. at 5). The Eastern District found that a utility that requests only a line certificate under Section 393.170.1 does not have to meet the local consent requirements of Section 393.170.2. (Slip op. at 10). Based on its reading of the statute, the Eastern District declined to follow *ATXI* and found that the Commission should not have denied Grain Belt's application based on the Western District's reasoning. *Id*. Under the Eastern District's interpretation and application of Section 393.170, the Commission could have proceeded to the merits of Grain Belt's application on the record that was created in this case.

Obviously, the Western District and the Eastern District cannot both be correct. The two appellate divisions have reached opposite conclusions based on the same statute and underlying facts. The Western District found that the Commission unlawfully granted a certificate to ATXI and the Eastern District found that the Commission unlawfully denied a certificate to Grain Belt. The Eastern district transferred the case to this Court because the Commission cannot resolve a conflict between two appellate divisions. Once this Court has determined which statutory interpretation is correct, the Commission can correctly decide whether the applicant has met the criteria to be granted the authority granted in the application. In this case, the Commission has not yet made a final determination as to the merits of Grain Belt's application because it believed itself bound

by the Western District's holding in *ATXI*. If this Court determines that the Eastern District's interpretation of Section 393.170 is the correct one, the Commission can make a final decision as to the merits of Grain Belt's application on remand.

II. Grain Belt's second claim of error should be denied because it is not necessary for this Court to make any determinations regarding the extent of the county commissions' authority under Section 229.100 for this Court to resolve the conflict between the Western District's and the Eastern District's interpretation of Section 393.170 in that the conflict will be resolved by whether or not the provisions of Section 393.170.2 are applicable to Grain Belt's application. (Responds to Point II of Grain Belt's Points Relied On).

A. Neither the Commission nor the Courts are bound by the Commission's prior administrative decisions.

The Commission is not bound by its own prior administrative decisions. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003). The courts are likewise not bound by the Commission's previous decisions. *Id.* In *ATXI,* the Western District found that the Commission did not have the statutory authority to issue a certificate of convenience and necessity before the applicant has provided proof of county assents to the Commission. 523 S.W.3d at 25-6. The Western District held that the Commission could not issue a certificate of convenience and necessity that is conditioned on a future acquisition of county assents. *Id.* at 26.

The fact that the Commission has previously granted certificates of convenience and necessity for construction projects without proof of county assents is not dispositive in this case. As is discussed in more detail in the Commission's Point III below, whether or not the Commission has granted variances to its filing requirements rule has no bearing on resolving the conflicting interpretations of the relevant statute, Section 393.170. The municipal consent requirement that is the center of the conflict between the Western District and the Eastern District is found in Section 393.170.2, RSMo (2016). If Section 393.170.2 applies to Grain Belt's application, the Commission does not have the authority to waive those statutory requirements. The Commission's past practice of

granting certificates of convenience and necessity without county assents and waiving its filing requirements rule in Commission-level cases that were not reviewed on appeal is not a valid basis for determining that the order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

B. The scope of the county commissions' authority under Section 229.100 is not at issue in this case.

Any company that intends to erect poles for the suspension of electric transmission lines along or across any road located in a county must first obtain the assent of the county commission. Section 229.100, RSMo (2016). The county highway engineer, with the approval of the county commission, can place "reasonable rules and regulations" on the placement of the poles and wires. *Id.* The Commission does not have the authority to determine whether or not an assent issued by a county commission is valid. *State ex rel. Elec. Co. of Mo. v. Atkinson*, 204 S.W. 897, 898 (Mo.banc 1918).

The Western District in *ATXI* did not discuss the scope of the county commissions' authority under Section 229.100. 523 S.W.3d 21, 25 (Mo. Ct. App. W.D. 2017). The Western District, based on its interpretation of Section 393.170.2, held that the Commission does not have the statutory authority to issue a certificate of convenience and necessity for the construction of an electric transmission line before the company has furnished proof of county assents to the Commission. *Id.* at 25-6. The Eastern District in this case, based on its interpretation and application of Section 393.170.1, held that the Commission does have the statutory authority to issue a certificate of convenience and necessity for the construction of an electric transmission line before the company has furnished proof of county assents to the Commission. (Slip op. at 10). The Commission may issue a certificate of convenience and necessity if it determines that the proposed construction or provision of service is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016).

Grain Belt has acknowledged that it will need to obtain county assents under Section 229.100 before it can begin construction of its proposed transmission line. (Tr. 1681: 23-1682: 3). There may be valid questions about the extent of the county

commissions' authority under Section 229.100, such as whether a county commission may deny assent outright, whether a county commission can impose any condition that is unrelated to road safety, or whether a county commission may rescind an assent it had previously granted. But those questions are not before this Court. Those questions are better addressed in WD81269, which is currently pending in the Western District. Grain Belt, MLA, and a county commission are all parties to that appeal and can present their positions on those questions based on the record created in that case. The Commission is not a party to the Western District appeal. The Commission was originally named as a defendant, but it was dismissed from the case by the trial court.

The Commission has no authority to determine whether or not the actions taken by the county commission in WD81269 are valid or invalid. The order denying the application for a certificate of convenience and necessity did not make any findings of fact or conclusions of law about the limits of the county commissions' authority under Section 229.100. (LF 2662-71). That order is the only order on appeal in this case. In light of the Commission's conclusion that it had to apply the Western District's holding in *ATXI* to Grain Belt's application, the order on appeal did not address the public interest determination that must be made under Section 393.170.3.

This Court does not have to go beyond the Commission's order denying Grain Belt's application for a certificate of convenience and necessity to resolve the conflict between the Western District and the Eastern District. The only question that needs to be answered to resolve that conflict is whether the Commission must wait to issue a certificate of convenience and necessity for the construction of an electric transmission line until after the county commissions have issued assents under Section 229.100 or whether the Commission may issue a certificate of convenience and necessity for the construction of an electric transmission line before the county assents have been obtained. The answer to that question depends entirely on this Court's interpretation and application of Section 393.170 to cases where a company requests a certificate for construction and does not request a certificate for the provision of service.

Grain Belt's arguments about the scope of the county commissions' authority under Section 229.100 are beyond the record in this case. Those arguments do not provide a valid basis for determining that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

C. The Commission's decision to deny Grain Belt's application for a certificate of convenience and necessity was not based on its rule setting out filing application requirements.

The Commission has the authority to adopt rules to govern its own procedures. Section 386.410, RSMo (2016). The Commission's rule setting out the filing requirements for applications for certificates of convenience and necessity is based on the statutory requirements of Section 393.170. 4 CSR 240-3.105. The Commission's authority under this rule cannot expand or modify the requirements of the statute. *State ex rel. Philipp Transit Lines, Inc. v. Pub. Serv. Comm'n*, 523 S.W.2d 353, 356 (Mo. Ct. App. K.C. 1975).

None of the previous applications of the filing requirements rule by the Commission are particularly relevant to this case. The question in this case is one of statutory interpretation. The Commission's application of its rule will follow the Court's interpretation of Section 393.170. If the Court determines that the statute does not require a company that is seeking only construction authority to provide proof of county assents to the Commission before the Commission can issue a certificate of convenience and necessity authorizing the construction, then the Commission will not apply its procedural rule in such a way that such assents would be required to obtain the certificate.

The Commission did not base its order denying Grain Belt's application for a certificate of convenience and necessity on its filing requirements rule. (LF 2670). The Commission based its order on the Western District's decision in *ATXI*. *Id.* The Commission's past applications of the filing requirements rule to other cases do not provide a valid basis for determining that the Commission's order is either unlawful or unreasonable.

D. The Commission has not made a final and appealable determination as to whether Grain Belt's proposed project is in the public interest.

The Commission has the statutory authority to determine whether a proposed utility construction project is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016). There are no specific criteria applied to make this determination in all cases. *In the Matter of the Application of KCP&L Greater Mo. Operations Co. for Permission and Approval of a Certificate of Pub. Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage Solar Generation Facilities in Western Mo.*, 515 S.W.3d 754, 759 (Mo. Ct. App. W.D. 2016). Whether or not an applicant has provided sufficient evidence that the proposed project meets the standard for the issuance of a certificate is a matter left to the Commission's discretion. *Id.* The Commission makes the determination on a case-by-case basis. *Id.* A reviewing court will not disturb the Commission's decision about whether or not an application meets this standard unless the decision is not supported by the competent and substantial evidence in the record. *Id*.

To be valid, the Commission's orders and decisions must be subject to judicial review under Section 386.510. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 186 (Mo.banc 2011). Only the Commission's final orders are subject to such review. *City of Park Hills v. Pub. Serv. Comm'n*, 26 S.W.3d 401, 404 (Mo. Ct. W.D. 2000). Final orders are those that have disposed of all issues and left nothing for further decision by the Commission. *Id.* To be final, an order must be voted on by a quorum of the Commission at a public agenda meeting. Section 386.130, RSMo (2016). Matters that are within the Commission's area of expertise must be decided by the Commission in the first instance. *State ex rel. Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 317 (Mo. Ct. App. W.D. 2011).

The only final order in this case is the order denying Grain Belt's application for a certificate of convenience and necessity. That order does not make any findings with respect to whether or not Grain Belt's application is "necessary or convenient for the public service" under Section 393.170.3. (LF 2670). The concurring opinion that was

signed by four of the commissioners was not voted on at a public agenda. (LF 2675; LF 2804 n.1). It is not an order. It is not final. It is not subject to judicial review. Whether or not Grain Belt's proposed project is "necessary or convenient for the public service" is a matter that is left the Commission's discretion in the first instance because it is within the Commission's area of expertise.

Because the Commission has not made a final and appealable decision as to the merits of the proposed project, there is nothing about the merit of the project for the Court to review at this time. The decision regarding the merits of the project must be left for the Commission's decision in the first instance. If the Court determines that the Eastern District's reading of Section 393.170 is correct and that the Commission may issue a certificate of convenience and necessity to a company that seeks only construction authority before proof of county assents has been submitted, the matter must be remanded to the Commission. The Commission will then make a final and appealable decision on the merits of the application.

At this time, any judicial examination of the merits of the project is premature. The Commission must be allowed to exercise its discretion first. Any argument about the merits of the proposed project does not provide a valid basis for determining that the order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

III. Grain Belt's third claim of error should be denied because the *ATXI* case and this case are not distinguishable in that both cases are based on the same material facts and the Commission rule allowing a waiver or variance of its rules cannot change the statutory requirements of Section 393.170. (Responds to Point III of Grain Belt's Points Relied On).

Section 393.170 authorizes the Commission to grant two distinct types of certificate of convenience and necessity. The first kind of certificate of convenience and necessity the Commission may grant is a certificate for the construction of electric plant. Section 393.170.1, RSMo (2016). Electric plant includes electric transmission lines. Section 386.020(14), RSMo (2016). The certificate of convenience and necessity

required by this subsection must be obtained before construction of electric plant can begin. Section 393.170.1, RSMo (2016). This subsection makes no reference to any other municipal or local authority that must give consent before the Commission can exercise its authority to grant permission for the construction of electric plant. *Id.*

The second kind of certificate of convenience and necessity the Commission may grant is a certificate for the provision of utility service. Section 393.170.2, RSMo (2016). This subsection does make reference to authority that is required before the Commission can exercise its authority to grant a certificate of convenience and necessity for the provision of service: ". . .Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities." Section 393.170.2, RSMo (2016).

The Commission has the authority to adopt its own procedural rules. Section 386.410, RSMo (2016). The Commission has adopted rules setting out the filing requirements for an application for a certificate of convenience and necessity. 4 CSR 240-3.105. In the filing requirements rule, there is a provision that allows for an application for a certificate of convenience and necessity to be filed with proof of the necessary consents as long as the consents are received before the certificate is issued. 4 CSR 240-3.105(2). The Commission also has rules allowing for the waiver of its procedural rules. 4 CSR 240-2.060(4); 4 CSR 240-3.015. Rules created by administrative agencies must be within the scope of the authority delegated to the agency. *Mo. Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 397 (Mo. Ct. App. W.D. 1994). A rule adopted by an administrative agency cannot modify the terms of the controlling statute. *King v. Div. of Employment Sec.*, 964 S.W.2d 832, 835-6 (Mo. Ct. App. W.D. 1997). To the extent that a rule purports to do so, it is void. *Id.*

The Western District made no reference to subsection 1 in its interpretation of Section 393.170. *Matter of Ameren Transmission Co.*, 523 S.W.3d 21 (Mo. Ct. App. W.D. 2017). Instead, the Western District applied subsection 2 to ATXI's application. *Id.*

at 25-6. The Western District concluded that the local consent requirement applied to ATXI and that, under that requirement, ATXI was required to get assents from county commissions before the Commission could issue a certificate of convenience and necessity for construction of its proposed transmission line. *Id.* at 26-7. The Western District also found that the Commission's filing requirements rule required ATXI to obtain county assents before the certificate can be issued. *Id.* at 26.

The Eastern District read Section 393.170 very differently and declined to follow *ATXI*. (Slip op. at 9-10). The Eastern District found that only subsection 1 of the statute applies to Grain Belt's application for a certificate of convenience and necessity to construction its proposed transmission line. *Id*. The Eastern district found that the municipal consent provisions of subsection 2 only apply to companies that are seeking a certificate to provide service. *Id*. Under the Eastern District's reading of Section 393.170, Grain Belt does not need to provide proof of county assents before the Commission can issue a certificate for construction of the proposed transmission line. *Id*. The Eastern District's decision does not rely on the waiver of the Commission's filing requirements rule. *Id*.

The resolution of this case does not depend on whether or not the Commission grants a variance from its filing requirements rule. The issue that must be decided here is how Section 393.170 applies to companies that request only a certificate of convenience and necessity for the construction of an electric transmission line and do not request a certificate of convenience and necessity to provide service. There is no need to look to the Commission's rules to answer this question.

If the Western District's reading of the statute is adopted, then subsection 2 applies to Grain Belt's application. Under that reading, Grain Belt is required to provide proof of county assents before the Commission can grant its application. Because the municipal consent provision appears in the statute, a waiver of the Commission's rule would not excuse Grain Belt's obligation to receive county assents as a prerequisite to the issuance of a certificate of convenience and necessity for the construction of its proposed transmission line.

If the Eastern District's reading of the statute is adopted, then only subsection 1 applies to Grain Belt's application. Under that reading, Grain Belt is not required to provide proof of county assents before the Commission can grant its application for a certificate of convenience and necessity for construction of its proposed transmission line. If Grain Belt is not required to provide proof of county assents as a prerequisite to the issuance of a certificate for the construction of its proposed transmission line, there is no need for a waiver of the Commission's filing requirements rule because that provision of the rule would not apply to Grain Belt's application. Grain Belt would have no obligations at all under subsection 2 because it does not intend to offer electric service.

In either case, whether or not the Commission provides a waiver to its filing requirements rule is irrelevant. The question is one of statutory interpretation. The Commission's rule must conform to the requirements of the statute. The applications filed by ATXI and by Grain Belt are not distinguishable in any meaningful way, and the same statute applies in each case. This Court must resolve the conflict between the Western District and the Eastern District rather than distinguishing between them. Merely distinguishing between the two appellate opinions would leave the Commission in the untenable position of being bound by both cases. The Commission would then be left to determine which case applies in future application cases where only construction authority and not service authority is requested. Grain Belt's third claim of error does not present a workable resolution of the conflict presented by this case. The claim of error also does not provide a valid basis for determining that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable. Grain Belt's third claim of error should be denied.

IV. Renew Missouri and Sierra Club's first claim of error should be denied because this Court does not need to reach the issue addressed in this point in that it is not necessary for this Court to decide whether a county assent under Section 229.100 is a franchise within the meaning of Section 393.170.2 to resolve the conflict between the Western District and the Eastern District. (Responds to Point I of Renew Missouri and Sierra Club's Points Relied On).

There are two kinds of authority available under Section 393.170, RSMo (2016). The first kind is the authority for the construction of electric plant, including transmission lines. Section 393.170.1, RSMo (2016). The second kind is the authority to provide utility service. Section 393.170.2, RSMo (2016). Section 393.170.1 makes no reference to any other authority from any other entity besides the Commission. Section 393.170.2 requires that the utility receive and present to the Commission the consent of the "proper municipal authorities" before exercising any of the rights granted under any franchise.

The Western District and the Eastern District have split on the application of Section 393.170 to companies that seek only the authority to build and not the authority to serve. The Western District applied the provisions of subsection 2 to ATXI's application for a certificate of convenience and necessity to construct a high-voltage electric transmission line. *ATXI*, 523 S.W.3d at 25-6. The Eastern District found that the provisions of subsection 2 are inapplicable to Grain Belt's application for a certificate of convenience and necessity to construct a high-voltage electric transmission line. *Grain* (Slip op.at 9-10).

The material facts underlying ATXI's application and the material facts underlying Grain Belt's application are the same. Slip op. at 8 & n.3. The different outcomes in the Western District and the Eastern District are based only on the courts' differing interpretations of Section 393.170. *Id*. at 10. The differences in the opinions of the two divisions of the appellate court are essentially an issue of the timing of the Commission's exercise of its authority under Section 393.170. The question that divided the two courts is whether a certificate of convenience and necessity can be issued before the county commissions have granted assent under Section 229.100.

In *ATXI*, the Commission granted ATXI's application for a certificate of convenience and necessity before ATXI had obtained the assent of the counties under Section 229.100. 523 S.W.3 at 24. The Western District held that this decision was unlawful under Section 393.170.2. *Id.* at 25-6. In this case, the Commission found that the holding in *ATXI* compelled the denial of Grain Belt's application because the record created in this case does not show that Grain Belt has obtained the assent of each county the line would cross. (LF 2670). The Eastern District found that this decision was unlawful because the provisions of subsection 2 are not applicable to applications for construction authority. (Slip op. at 10). If the Eastern District is correct, no interpretation of subsection 2 is necessary because only subsection 1 applies. If the Western District is correct, subsection 2 applies to Grain Belt's application and the Commission's order must be affirmed.

Section 393.170.2 requires that the utility provide the Commission with evidence of the receipt of the consent of the municipal authority before the certificate of convenience and necessity from the Commission can be issued. If this Court agrees with the Eastern District's interpretation of Section 393.170, Grain Belt would have no obligation to provide the Commission with the evidence required by subsection 2 that it has obtained the authority of the county commissions before it can obtain a certificate of convenience and necessity from the Public Service Commission because Grain Belt's application would implicate only Section 393.170.1 and not Section 393.170.2.

Although Grain Belt would not have the burden of providing evidence of county assents to the Commission under the Eastern District's interpretation of Section 393.170 as a prerequisite to the Commission granting its application, it would not be relieved of its separate and independent obligation to obtain county assents under Section 229.100. Grain Belt has acknowledged this obligation. (Grain Belt Sub. Br. 21; Tr. 1681: 23-1682: 3). Grain Belt's obligation under Section 229.100 would remain whether a county assent

under Section 229.100 is a "franchise" under Section 393.170.2 or not.[7] The only thing that would change is whether the assent under Section 229.100 has to be obtained before the Commission issues a certificate of convenience and necessity or whether the assents under Section 229.100 could be obtained after the Commission granted the certificate.

It is not necessary for this Court to reach the question of whether or not an assent under Section 229.100 is a franchise within the meaning of Section 393.170.2 to resolve the conflict between the Western District and the Eastern District. The order denying Grain Belt's application for a certificate of convenience and necessity did not make any findings of fact or conclusions of law about the meaning of the word "franchise" in Section 393.170.2. It is not necessary for this Court to resolve this question to resolve the conflict between the Western District and the Eastern District. This argument is not a valid basis for determining that the order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable. Renew Missouri and Sierra Club's first allegation of error should be denied.

[7] If this Court determines that Section 393.170.2 does apply to Grain Belt's application, then it would seem to follow that a county assent is a "franchise" because it is not clear what other municipal authority would be needed for a company such as Grain Belt that requests only the authority to build and does not request authority to serve. Considering an assent under Section 229.100 to be a franchise under Section 393.170.2 also appears to be consistent with a prior decision involving a sewer company. *State ex rel. Pub. Water Supply Dist. v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964).

V. Renew Missouri and Sierra Club's second claim of error should be denied because the alleged motives of the county commissions with respect to the proposed project are not relevant to this appeal of the order denying Grain Belt's application for a certificate of convenience and necessity under Section 386.510 in that it is not necessary to make any findings with respect to the county commission's motives to answer the question presented by this appeal. (Responds to Point II of Renew Missouri and Sierra Club's Points Relied On).

Only the Public Service Commission has the authority to grant certificates of convenience and necessity. Section 393.170, RSMo (2016). A certificate for convenience and necessity can provide authority for either construction of plant or authority for the provision of service. *Id*. The two kinds of authority are distinct and are not interchangeable. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 283, 285-6 (Mo. Ct. App. W.D. 1989).

The Western District and the Eastern District have split on the question of whether a company that is seeking authority to construct a transmission line needs to comply with the local authority requirement of Section 393.170.2. The Western District held that the Commission did not have the authority to issue a certificate of convenience and necessity until after the county commissions had granted assent under Section 229.100, RSMo (2016). *ATXI*, 523 S.W.3d at 26. The Eastern District found that the Commission could lawfully issue a certificate of convenience and necessity under Section 393.170.1 authorizing the construction of an electric transmission line before the county commissions have granted assent. (Slip op. at 10). The Commission does not have the authority to determine whether or not an assent granted by a county commission is valid. *State ex rel. Elec. Co. of Mo. v. Atkinson*, 204 S.W. 897, 898 (Mo.banc 1918).

This Court must resolve the conflict created by these differing interpretations of Section 393.170. That conflict can be resolved without speculation about the actions of the county commissions. The order on appeal made no findings of fact or conclusions of law about the scope of the county commissions' authority. (LF 2656-71). This case is

also not an appropriate place to determine the limits of the county commissions' authority under Section 229.100.[8] That question is currently on appeal to the Western District. It can be addressed in that forum better than it can be addressed in this case.

The second allegation of error in Renew Missouri and Sierra Club's brief serves only as a distraction to the issues in this case. The order denying the application for a certificate of convenience and necessity did not make any findings of fact or conclusions of law about the possible motivations or actions of the county commissions. Speculation about the actions or motivations of the county commission is not a basis for finding that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity was unlawful or unreasonable under Sections 386.510 and 393.170. Renew Missouri and Sierra Club's second allegation of error should be denied.

VI. MJMEUC's first claim of error should be denied because the Commission did not err in following the Western District's opinion in *ATXI* in that at the time the Commission issued its order denying Grain Belt's application for a certificate of convenience and necessity the only case law that was directly on point was the *ATXI* decision and the Commission was bound by that decision. (Responds to Point I of MJMEUC's Points Relied On).

A. The Western District's holding in *ATXI* was unequivocal.

ATXI is a transmission-only company. *ATXI*, 523 S.W.3d at 23. ATXI sought a certificate of convenience and necessity to construct the Missouri portion of an interstate

[8] Grain Belt references other statutes that make other kinds of local authority dependent on or subordinate to the Commission's authority. (Grain Belt Sub. Br. at 41-43). On its face, Section 229.100 contains no such restriction. If the legislature had intended to create such a relationship between the county commissions' authority under Section 229.100 and the Commission's authority under Section 393.170, it could have done so explicitly. A court will not read non-existent words into a statute. *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 667-8 (Mo.banc 2010). The other statutes cited by the Intervenors are irrelevant to the issue before this Court.

high-voltage electric transmission line. *Id*. At the time ATXI's application case was decided, ATXI did not have the assents of all the counties its proposed line would cross. *Id*. at 24. The Commission granted ATXI's application and issued a certificate of convenience and necessity. *Id*. The certificate of convenience and necessity granted to ATXI had a condition that required the company to obtain county assents before exercising the authority granted under the certificate. *Id*.

The Western District held that it was unlawful for the Commission to issue a certificate of convenience and necessity before the company had obtained county assents under Section 229.100. *ATXI*, 523 S.W.3d at 25-6. The Western District found that the Commission did not have the statutory authority to issue a certificate of convenience and necessity for the construction of a transmission line in the absence of satisfactory evidence that the assents had been obtained. *Id*. The Western District held that the fact that the Commission issued a conditional certificate did not cure the defect in the Commission's premature issuance of a certificate to ATXI. *Id*. at 26.

MJMEUC offers a reading of the *ATXI* decision that distorts the straightforward holding of the case. MJMEUC focuses unduly on the secondary holding that making the certificate conditional did not make the Commission's grant of the certificate lawful. MJMEUC glosses over the primary holding in the case, which is that the Commission lacked statutory authority to issue a certificate of convenience and necessity granting construction authority before the company has obtained county assents.

The Eastern District's slip opinion in this case does not adopt MJMEUC's interpretation of the holding in *ATXI*. It is not necessary for this Court to adopt that reading of the *ATXI* case, either. The conflict between the two appellate courts does not rely on MJMEUC's reading of *ATXI*. This Court can resolve the conflicting interpretations of Section 393.170 by the Western District and the Eastern District without resorting to MJMEUC's unpersuasive reading of *ATXI.* MJMEUC's argument does not provide a basis for finding that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

B. The opinions of the appellate courts are binding on the Commission.

The Commission's final orders must be subject to judicial review. *City of Park Hills v. Pub. Serv. Comm'n*, 26 S.W.3d 401, 404 (Mo. Ct. App. W.D. 2000). The scope of judicial review is limited to determining whether the Commission's order or decision is both lawful and reasonable. Section 386.510, RSMo (2016). In *ATXI*, the Western District held that it was unlawful for the Commission to issue a certificate of convenience and necessity to ATXI before the company had received the assent of the relevant county commissions. 523 S.W. 3d at 25-6. The Western District vacated the Commission's order granting the certificate of convenience and necessity. *Id.* at 27.

It is not in dispute at this stage of the case that the facts underlying both the ATXI application and the Grain Belt application are materially the same in that both cases involve transmission-only companies that sought authority under Section 393.170 only for the construction of a transmission line and did not seek authority to provide electric service. Neither ATXI nor Grain Belt provided evidence of county assents to the Commission as part of their applications.

Despite these factual and legal similarities between ATXI's application and Grain Belt's application, MJMEUC offers the novel suggestion that the Commission was not bound by the *ATXI* decision when deciding the case that is now before this Court. The mandate in *ATXI* was handed down when this Court denied transfer in June of 2017. The Commission issued its order denying Grain Belt's application for a certificate of convenience and necessity in August of 2017. At the time the Commission issued its order, the only case law that was directly on point was the *ATXI* decision. The Commission does not agree that it was free to disregard the *ATXI* decision when it was making its decision about Grain Belt's application. The fact that the Western District held that the Commission's grant of ATXI's application was unlawful led the Commission to conclude that it also would have been unlawful for the Commission to grant Grain Belt's application.

The Eastern District disagreed with the Western District's interpretation of Section 393.170. (Slip op. at 8,10). The Eastern District found that it would have been lawful for

the Commission to issue a certificate of convenience and necessity to Grain Belt before Grain Belt obtained county assents. (Slip op.at 10). The Eastern District did not hold that the Commission is not bound by appellate court decisions.

The Commission is currently faced with conflicting holdings from two different appellate courts. A decision that distinguishes *ATXI* from this case without resolving the conflict between the two decisions would leave the Commission in an unworkable position. The facts and the underlying statute in both cases are the same. If *ATXI* and the Eastern District's opinion are both good law, the Commission would be left in the impossible situation of attempting to determine which case applied to future applications from other transmission-only companies that do not intend to offer electric service. The conflict must be resolved rather than be distinguished.

This Court may ultimately agree with the Eastern District's interpretation of Section 393.170 and remand the case to the Commission for a decision using that interpretation of Section 393.170. But that result would not mean that the Commission was not bound by *ATXI* at the time that it issued its order denying Grain Belt's application for a certificate of convenience and necessity. MJMEUC's argument is not a valid basis for the Court to conclude that the order denying the application is either unlawful or unreasonable.

C. The order denying Grain Belt's application for a certificate of convenience and necessity was consistent with the Commission's statutes then-existing and case law.

The Public Service Commission was created and vested with the powers and duties set out in Chapters 386 and 393. Section 386.040, RSMo (2016). Because the Commission was created by statute, the Commission has only the powers that are given to it by the legislature. *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. Ct. App. W.D. 2009). The actions taken by the Commission under its enumerated statutory authority must be lawful. *Id.* Whether or not a Commission action is lawful "depends directly on whether it has statutory power and authority to act." *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 452 (Mo. Ct. App. W.D. 1983).

"Neither convenience, nor expediency, nor necessity is a proper matter to consider in determining whether the Commission's actions are authorized by statute." *Oneok, Inc.*, 318 S.W.3d at 137.

The Commission undoubtedly has the statutory authority to grant certificates of convenience and necessity, including the authority to authorize the construction of electric transmission lines. Section 393.170.1, RSMo (2016). However, the Western District has held that the Commission lacks the statutory authority under Section 393.170.2 to issue such a certificate before the applicant has provided evidence to the Commission that it has obtained the county assents required by Section 229.100. *ATXI*, 523 S.W.3d at 25-6. If the Commission lacks statutory authority, it may not act. *Oneok, Inc.*, 318 S.W.3d at 137.

In light of the *ATXI* decision and the fact that Grain Belt did not provide evidence of county assents to the Commission as part of its application, the Commission concluded that it lacked the statutory authority to issue a certificate of convenience and necessity to Grain Belt at that time. (LF 2670-1). The Commission did not refuse to exercise its statutory authority at an appropriate time. There was nothing unlawful or unreasonable about this decision at the time it was made. The Eastern District did not rely on MJMEUC's reasoning under this argument to find that the Western District's interpretation of Section 393.170 is incorrect. Even if this Court determines that the Eastern District's interpretation of Section 393.170 is the correct one, this argument by MJMEUC is not a valid basis for determining that the order denying Grain Belt's application for a certificate of convenience and necessity was either unlawful or unreasonable.

D. The question in this case is solely a question of lawfulness and it does not depend on the Commission's factual determinations as to the merits of Grain Belt's proposed project.

Judicial review of Commission orders and decisions is divided into two parts. Section 386.510, RSMo (2016). On appeal, a reviewing court will determine if the Commission's order is lawful and reasonable. *Id.* The lawfulness of the Commission's

order is reviewed *de novo* and the reviewing court must correct erroneous interpretations of the law. *Matter of Verified Application and Petition of Laclede Gas Co.*, 504 S.W.3d 852, 859 (Mo. Ct. App. W.D. 2016). Courts reviewing the Commission's interpretation of a statute exercise independent judgment. *Id*. The courts do not consider convenience, expediency, or necessity when they are considering the lawfulness of a Commission order. *Id*. The reviewing court will afford the Commission some discretion when the Commission is interpreting its own regulations. *Id.* "This does not mean that the Commission has the authority to exercise discretion when a statute is unambiguous or to ignore its own rules." *Id.*

The courts on judicial review afford more discretion to the Commission under the reasonableness prong of the Section 386.510 inquiry. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 477 (Mo. Ct. App. W.D. 2013). "We generally do not substitute our judgment for the PSC's when it acts as a fact-finder because we tend to defer to the PSC on matters that are within the realm of the PSC's expertise." *Id.* Even under the reasonableness prong, however, the deference afforded to the Commission is not unlimited. *Id*. A Commission's interpretation of a tariff, which has the force and effect of a statute, is conducted under the reasonableness prong of judicial review, but it is reviewed by the court *de novo. Id*. "*De novo* review similarly applies to review the PSC's determination of whether a [statute or] tariff applies to a given set of facts." *Id.* The Commission is expressly given the authority to determine whether the requested construction authority or the requested service authority is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016).

The question before the Commission in both the ATXI application and the Grain Belt application was whether or not the application for a certificate of convenience and necessity should be granted. That question depended on whether or not Section 393.170 allows the Commission to issue a certificate of convenience and necessity to an applicant when the facts of the case show that the applicant is seeking only construction authority and not service authority and where there is an absence of evidence that the applicant has obtained the assent of the relevant county commissions.

The Commission interpreted Section 393.170 in ATXI's application case and determined that the statute allowed it to issue a certificate of convenience and necessity under those operative facts. *ATXI*, 523 S.W.3d at 24. The Western District determined that the Commission's interpretation of the statute in light of those facts was unlawful. *Id.* at 25-6.

The Commission in this case determined that it could not grant Grain Belt's application in light of the Western District's interpretation of Section 393.170 and its application of that statute to the relevant facts. Because of that threshold determination, the order denying Grain Belt's application for a certificate of convenience and necessity did not contain any findings of fact or conclusions of law about whether or not the proposed project is necessary or convenient for the public service. (LF 2670-1). The Eastern District determined that the Commission's order is unlawful because the Eastern District disagrees with the Western District's interpretation of Section 393.170. (Slip op. at 8, 10).

Both the Western District and the Eastern District have determined that the Commission acted unlawfully. *ATXI*, 523 S.W.3d at 25-6; Slip op. at 10. Neither court reached the question of whether or not the Commission acted unreasonably based on the merits of the proposed project. *ATXI*, 523 S.W.3d at 27; Slip op. at 4. Neither court reached the issue of whether or not the project under consideration is "necessary or convenient for the public service." *ATXI,* 523 S.W.3d at 27; Slip op. at 4. As discussed in Point II above, it is in that public interest determination, not in the question of the interpretation of Sections 393.170.1 and 393.170.2, that the courts' deference to the Commission is greatest because that fact-based question is where the Commission's expertise is grounded. No final decision as to the merits of Grain Belt's proposed project is currently before the Court.

The Commission cannot resolve the conflict between the Eastern District and the Western District. Only this Court can resolve that conflict. In resolving that conflict, the Court will have to decide which appellate court's interpretation of Section 393.170 is correct in light of the operative facts. In making that determination, the Court does not

owe any deference to the Commission's interpretation of subsections 1 and 2 of the statute or its application to those operative facts.

Once this Court has made a decision and has given the Commission guidance on the correct interpretation of Section 393.170 in cases involving companies that request only construction authority and not service authority, the Commission can then apply that statutory interpretation to such cases in the future. If this Court determines that the Eastern District's interpretation of the law under these facts is the correct one, the Commission can make a determination as to the merits of Grain Belt's application. In the meantime, there is no reason for this Court to conclude that the Commission has acted either unlawfully or unreasonably based on the level of deference owed to the Commission by the Courts under the various phases of judicial review. MJMEUC's argument to the contrary does not provide a valid basis to conclude that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

E. The Commission's decision in this case did not represent an improper action against an executive agency by the judiciary.

The Commission was created by legislative enactment. Section 386.040, RSMo (2016). The regulation of public utilities is "primarily a legislative function." *State ex rel. Laundry v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 43 (Mo. 1931). As such, the Commission "is purely and simply an administrative agency or arm of the Legislature" that performs a legislative or quasi-legislative function when it carries out the duties that have been delegated to it by the legislature. *Id.* The Commission is not a court and lacks judicial powers. *State ex rel. Kansas City v. Pub. Serv. Comm'n*, 228 S.W.2d 738, 741 (Mo. 1950) (internal citation omitted). Its orders "are not judgments or adjudications." *Id*.

The quasi-judicial orders the Commission issues as an administrative agency must be subject to judicial review in order for those orders to comport with the separation of powers doctrine. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 186-7 (Mo.banc 2011). This principle applies to administrative agencies that are executive or legislative in nature. *Id*. The judiciary must have the opportunity for "meaningful and

unobstructed judicial review" as provided in MO. CONST. Art. V, sec. 18. *Id.* For Commission orders, that review is the one provided in Section 386.510, RSMo. *Id.* at 187. The judiciary has the final word on what the law means. *Id.*

The Western District's judicial review of the Commission's decision in ATXI's application case was a typical judicial review under Section 386.510. The Western District determined that the Commission acted unlawfully when it granted ATXI's application for a certificate of convenience and necessity before Grain Belt's submitted evidence to the Commission showing that county assents had been obtained. *ATXI,* 523 S.W.3d at 25-6. The Western's District's opinion was based on its interpretation of Section 393.170.2. *Id.* The Western District opinion did not make any findings with respect to the scope of the county commission's authority under Section 229.100 or state that the role of the county commissions with respect to the use of the roads was more important than the role of the Commission in determining whether or not ATXI's proposed transmission line was "necessary or convenient for the public service." The Western District merely held that the county commissions must grant their assents before the Commission can issue a certificate. *Id.*

At the time the Commission made its decision in this case, *ATXI* was the only interpretation of how Section 393.170 is to be applied to applicants that request only construction authority and not service authority. It was not an abdication of the Commission's authority for the Commission to follow the Western District's decision in *ATXI.* The Commission was merely deferring to the judiciary's final role in declaring what the law means.

Obviously, there are now two different interpretations of Section 393.170 in cases where an applicant requests only construction authority under Section 393.170.1 and not service authority under Section 393.170.2. The distinction between those two subsections was acknowledged by the Eastern District, although the Western District had not made the distinction in *ATXI.* The resolution of this conflict may well compel a different outcome in this case than the one the Commission originally arrived at, but this case has not yet reached that point.

The Eastern District recognized that conflict when it transferred this case with its differing interpretation of the controlling law to this Court rather than remanding the case to the Commission for a decision consistent with the Eastern District's reading of the law. This Court, not the Commission, gets the final say on the question of how Section 393.170 should be interpreted. MJMEUC's argument that the Commission somehow abdicated its role by deferring to a judicial opinion is incorrect. MJMEUC's argument is not a valid reason for determining that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable.

VII. MJMEUC's second claim of error should be denied because the Commission did not deprive MJMEUC of due process in that MJMEUC was given both notice and the opportunity to be heard with regard to the publicly available documents from the *ATXI* case offered as evidence by MLA and the Commission correctly overruled MJMEUC's written and oral objections to that testimony. (Responds to Point II of MJMEUC's Points Relied On).

A. The Commission was entitled to take official notice of its own report and order and the briefing in *ATXI,* and MLA followed the correct procedure to have those briefs admitted into the record of this case.

The Commission did not act unlawfully or unreasonably under Section 386.510 by admitting the appellate briefs filed by the Commission and ATXI in the *ATXI* case into the record of this case. "Agencies shall take official notice of all matters of which the courts take judicial notice." *Moore v. Mo. Dental Bd.*, 311 S.W.3d 298, 305 (Mo. Ct. App. W.D. 2010); Section 536.070(6), RSMo (2016). Notice can be taken of the records of other cases when justice so requires. *Lauber-Clayton, LLC v. Novus Properties, Co.*, 407 S.W.3d 612, 617 (Mo. Ct. App. E.D. 2013). The correct procedure for a party to follow when it is requesting consideration of briefs filed in another case is notify the other parties of its request and then to proffer the briefs for admission into evidence. *In re J.M.*, 328 S.W.3d 466, 468-9 (Mo. Ct. App. E.D. 2010). In Commission cases, the record remains open until after the presentation of oral arguments. 4 CSR 240-2.150(1).

MLA followed the correct procedure here. It filed written notice to the other parties stating its intention to proffer the *ATXI* briefs into evidence in this case. (LF 2638). It offered the exhibits during an oral argument, which took place before the record in the case was closed. (Tr. 1643: 19-1645: 9). There was no procedural basis for the Commission to refuse to admit either of the documents that were filed in ATXI's application case at the Commission level. The Commission also did not err by admitting briefs filed in the *ATXI* appeal into the record. Given that the Commission was a party to the *ATXI* appeal, it is unreasonable to expect that the Commission would refuse to acknowledge the arguments that were made in that case. The record in this case also makes it clear that MJMEUC was well aware of the arguments that had been raised in *ATXI* before MLA offered them as evidence at the oral argument. (LF 1927-8; LF 2197; LF 2424; LF 2596).

B. The Commission's order should not be reversed based on the admission of the exhibits offered by MLA at the oral argument because the Commission's admission of the documents was neither unlawful nor unreasonable.

A reviewing court may reverse a Commission order only if the order is unlawful or unreasonable. Section 386.510, RSMo (2016). The statute provides that if an order is found to be unlawful or unreasonable because the Commission failed to accept evidence that should have been admitted, the order will be reversed and remanded with instructions for the Commission to admit the excluded evidence. *Id*. The statute does not have a provision addressing the reverse situation where the Commission has admitted evidence that should have been excluded. *Id*. Due process at the administrative level requires notice and an opportunity to be heard in a meaningful way. *State ex rel. Mo. Pipeline Co. v. Pub. Serv. Comm'n*, 307 S.W.3d 162, 174 (Mo. Ct. App. W.D. 2009).

It is not clear how MJMEUC could have met or rebutted the evidence offered by MLA apart from what it did in the Commission proceeding. In its notice, MLA stated that the exhibits were being offered to show that the factual background of *ATXI* was the same as the factual background of this case. (LF 2639). MLA argued that the parties in

ATXI raised the same argument before the appellate court that Grain Belt raised before the Commission. (LF 2639). In multiple filings made at the Commission, MJMEUC acknowledged that ATXI filed an application only for a certificate for construction authority under Section 393.170.1 and not for service authority under Section 393.170.2. (LF 1927-8; LF 2197; LF 2424; LF 2596). No party filed a motion to strike or otherwise objected when MLA referenced or quoted from the *ATXI* briefs on numerous other occasions. (LF 2040 & n.292; LF 2218; LF 2360; LF 2374-5; LF 2449 n.12; LF 2627-8; 2630 & n.14 & n.15). MJMEUC was certainly aware of the briefs filed in *ATXI* and no additional facts or argument offered by MJMEUC would have affected the existence of those briefs or altered their content.

It was both lawful and reasonable for the Commission to admit those briefs at the Commission level. Before the Eastern District at oral argument, it was acknowledged that that the facts underlying the applications filed by ATXI and Grain Belt were materially the same. There is no reason for this Court to conclude otherwise based on MLA's offer of the disputed evidence to the Commission. MJMEUC's second claim of error should be denied.

VIII. MJMEUC's third claim of error should be denied because the Commission did not unlawfully deprive MJMEUC of any benefit in that the Commission does not regulate MJMEUC's rates and the Commission's denial of Grain Belt's application was not equivalent to setting a confiscatory rate for MJMEUC customers. (Responds to Point III of MJMEUC's Points Relied On).

A. The Commission's role in Grain Belt's construction of its proposed transmission line does not extend to MJMEUC or its contract with Grain Belt.

The Commission's statutory duty is to regulate investor-owned public utilities in Missouri. Section 386.040, RSMo (2016).The Commission's statutory authority includes the exclusive right to set just and reasonable rates for those public utilities. Section 393.130.1, RSMo (2016). The Commission's regulatory authority does not extend to

MJMEUC, which was created under an amendment to the Missouri Constitution. MO. CONST. Art. VI, sec. 27. *State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2d 617, 620 (Mo.banc 1982). The Commission does not have the authority to set rates for MJMEUC members. Nor does the Commission have the authority to set rates for Grain Belt's interstate transmission service. Interstate transmission rates are regulated by the Federal Energy Regulatory Commission (FERC). *State ex rel. KCP&L Greater Mo. Operations Co. v. Pub. Serv. Comm'n*, 408 S.W.3d 153, 163-4 (Mo. Ct. App. W.D. 2013).

The only authority that is at issue in this case is the Commission's authority to grant a certificate of convenience and necessity for the construction of electric plant, including transmission lines, in Missouri. Section 393.170.1, RSMo (2016). The scope of the Commission's authority under this statute is in question because of the conflicting opinions between the Western District and the Eastern District. Regardless of how this Court resolves that conflict, however, the Court cannot find that the Commission has unlawfully deprived MJMEUC of any benefit because this Commission has no authority to make any decision with respect to MJMEUC's contract with Grain Belt and the rates MJMEUC pays under that contract. The benefit that MJMEUC identifies will not be conferred by the Commission.

B. MJMEUC's claim that the Commission's decision in this case results in MJMEUC members paying confiscatory rates is without merit.

The Commission has wide discretion in setting rates. *In the Matter of Kansas City Power & Light Co.'s Request for Authority to Implement a General Rate Increase for Electric Service*, 509 S.W.3d 757, 765 (Mo. Ct. App. W.D. 2016). That discretion is afforded to the Commission because of the inherently complex nature of utility ratemaking. *Id*. The only limitation on the Commission's discretion in rate-setting is constitutional. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870, 873 (Mo. Ct. App. W.D. 1985). The Commission does not have the authority to set rates that are confiscatory. *Kansas City Power & Light*, 509 S.W.3d at 764-5. In *Associated Natural Gas*, the Western District held that the capital structure used

by the Commission in setting the utility's rates did not result in a confiscatory rate. 706 S.W.2d at 882.

None of these principles are relevant to this case. The Commission is not engaged in ratemaking. The Commission does not have ratemaking authority over Grain Belt or MJMEUC. The Commission has no authority over the contractual rate negotiated by Grain Belt or MJMEUC, and that rate is not the subject of this appeal. It is impossible for the Commission to have acted unconstitutionally with regard to MJMEUC's rates. This is not a rate case. It is a case about an application for a certificate of convenience and necessity filed by Grain Belt.

Nor is the Commission solely responsible for the eventual outcome of Grain Belt's proposed transmission line in the same way that it is solely responsible for setting the rates of investor-owned public utilities in Missouri. Several things outside of the Commission's exclusive authority also have to be resolved before the construction of the proposed line could occur. Before construction of the line can move forward, a number of other entities besides the Commission would need to act.[9]

The only question that is on appeal in this case is whether or not the Commission may lawfully issue a certificate of convenience and necessity before the company has obtained county assents under Section 229.100. This question will be resolved according to this Court's interpretation of Section 393.170 as applied to utilities that request only construction authority under subsection 1 and do not request service authority under subsection 2. However that question is resolved by this Court, the county assents will

[9] If Grain Belt is unable to obtain county assents, approval from the private landowners or eminent domain authority, or a final decision from the Illinois within two years, any certificate of convenience and necessity would expire in two years under Section 393.170.3, RSMo (2016). It is not disputed that Section 393.170.3 applies in this case. (Slip op. at 6). That two-year limitation under subsection 3 would remain in place even if this Court determines that Section 393.170.2 (which has a separate time limitation) does not apply to Grain Belt's application.

have to be obtained before construction can begin. (Tr. 1681: 23-1682: 3). The record shows that at this point not all of the counties have provided that assent. (LF 2664-5; Tr. 297: 8-11; Tr. 297: 12-25; Tr. 1680: 23-1681: 10; LF Ex. 2932-33; LF Ex. 3104; LF Ex. 3130-42). There are also issues outside of the state that would need to be resolved before the line as proposed can be built. (Tr. 1216: 4-12). The Illinois Commerce Commission has granted a certificate of public convenience and necessity to Grain Belt for the Illinois portion of the proposed line. (Tr. 1216: 4-12). The grant of that certificate is on appeal and has not been finally resolved. (Tr. 1216: 4-12). The Fifth Appellate District of Illinois has recently issued an opinion reversing the ICC's grant of a certificate of public convenience and necessity for construction of the Illinois portion of the proposed line. *Concerned Citizens & Property Owners v. Ill. Commerce Comm'n*, No. 15-0277 (Ill. Ct. App. 5th Dist., Mar. 13, 2018). Under Illinois rules, the parties have 21 days to seek rehearing or transfer of the Fifth Appellate District's decision. Ill. S. Ct. Rule 315. Grain Belt would also need to come to agreement with the private landowners to cross their property or acquire eminent domain under Chapter 523 to do so.

It cannot be the case that the Commission has deprived MJMEUC of any benefit, especially when the presumed benefit cannot be conferred by the Commission acting alone. Citations to case law about the Commission's rate-setting authority are irrelevant to this case. MJMEUC's third claim of error does not provide a valid basis for determining that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable and should be denied.

IX. The Commission's motion to dismiss MLA's appeal should be granted because MLA has not brought a proper appeal under Section 386.510 in that MLA does not claim that the Commission's order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable, and this Court does not issue advisory opinions based on hypothetical rather than actual facts. (Responds to Points I, II, III, and IV of MLA's Points Relied On).

MLA's appeal should be dismissed for the reasons set out in the Commission's motion to dismiss that has been taken with the case. MLA's appeal should be dismissed for the additional reasons stated in this point. The reasons supporting the dismissal of MLA's appeal also support this Court disregarding Grain Belt's invitation to presume that the outcome of this case on remand is known if the Court resolves the conflict between the appellate divisions in the Eastern District's favor. Grain Belt's suggestions in support of the Commission's motion to dismiss state that the certificate of convenience and necessity must be granted based on the statements made by four commissioners' concurring opinion. Grain Belt's statement is wrong because the concurring opinion is not final or binding on the Commission or on the courts.

The actions that a reviewing court can take on judicial review of a Commission order are limited. Section 386.510, RSMo (2016). The reviewing court can affirm the order, reverse the order, or reverse and remand the order with directions. *State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n*, 835 S.W.2d 356, 361-2 (Mo. Ct. App. W.D. 1992). When an order is remanded, it is remanded "for further action." *Id*. at 362 (internal quotation omitted). On remand, the court may not direct the Commission as to what its order on remand must be. *Id.* The reviewing court also may not decide an issue that must be decided by the Commission in the first instance. *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. Ct. App. W.D. 2011). Once the Commission has issued a final order disposing of all the issues on remand, the final order is subject to judicial review. *City of Park Hills v. Pub. Serv. Comm'n*, 26 S.W.3d 401, 404 (Mo. Ct. App. W.D. 2000).

A premature appeal must be dismissed. *Hull v. Pleasant Hill Sch. Dist.*, 526 S.W.3d 278, 286-7 (Mo. Ct. App. W.D. 2017).

Courts have encountered premature appeals of Commission orders in previous cases. In one such case, an appellant asked the Western District to review a proposed rule provision that was withdrawn before the rule was published in the *Code of State Regulations*. *State ex rel. Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165, 175 (Mo. Ct. App. W.D. 2012). The Western District declined to review provisions that were included in the final rule because appellate courts do not decide moot or hypothetical controversies that could arise in a future case. *Id.* at 175-6. This Court should do likewise.

The only order that is before the Court at this time is the order denying Grain Belt's application for a certificate of convenience and necessity. That order did not address the merits of the application. (LF 2670-1). The merits of the application are not currently before the Court.

MLA has not alleged that the order denying Grain Belt's application for a certificate of convenience and necessity is either unlawful or unreasonable. (MLA Sub. Appellant's Br. 1; 18-21; 55-6). MLA's allegations relate to interlocutory or evidentiary orders that the Commission's order denying Grain Belt's application certificate for a certificate of convenience did not reach. (MLA Sub. Br. at 21-55). Those interlocutory or evidentiary orders are not before this Court at this time. Even if this Court reverses the order denying Grain Belt's application, the Court may not direct the Commission as to what the outcome of the application on remand must be. On remand, the Commission would have to make a new final order addressing the merits of the application. Once the Commission has made that final order, the order on remand would be subject to judicial review in the same way as the order denying the application. If the Commission decided to base its determination as to the merits of the application on the record that has already been created, MLA would have the opportunity to challenge the order on remand as either unlawful or unreasonable. At this point, MLA's appeal of issues that are not

addressed in the order that is on judicial review is premature. The Court should not decide issues that MLA anticipates may arise in the future in this case.

MLA's appeal has not placed any issues properly before the Court. The Commission did not rely on any of the evidence that MLA claims is erroneous in its order denying Grain Belt's application. It is too early to address any issues outside of the order denying the application for a certificate of convenience and necessity. This Court should decline MLA's invitation to attempt to control the future actions of the Commission with respect to the merits of the application before the Commission has had an opportunity to issue a final decision with respect to the merits of the application. MLA's improper appeal should be dismissed.

A. The evidentiary rulings made by the Commission are not final and appealable orders.

The Commission's final orders must be subject to judicial review. *City of Park Hills*, 26 S.W.3d at 404. Final orders are those that finally dispose of all issues and leave nothing left for resolution. *Id*. On the other hand, orders that are contingent, tentative, or subject to future revision by the Commission are not final for purposes of appellate review. *Id.*

MLA's Eastern District briefs in response to the appellants' briefs makes clear that it believes the Court should affirm the order denying Grain Belt's application. (MLA ED Br. in response to Grain Belt at 48; MLA ED Br. in response to MJMEUC at 21; MLA ED Br. in response to Renew Missouri and Sierra Club at 4).[10] That order is the final order in the case. If the case is remanded to the Commission and decided on the basis of the agency record that has been created, MLA could once again raise the same objections it is making in its current "contingent" appeal. The Commission's future ruling on those objections is not known at this time. Its earlier rulings could change and they cannot be addressed in this case without improperly directing the Commission's future actions. If

[10] MLA's substitute responsive briefs have not yet been filed, but the Commission presumes MLA will have the same position in this Court.

the order denying Grain Belt's application is affirmed, then MLA admits that it has no grounds for appeal here. (MLA Sub. Br. 1). MLA's appeal should be dismissed because the Commission has not issued a final order addressing MLA's allegations of error.

B. The law of the case doctrine does not make MLA's premature appeal valid.

The doctrine of the law of the case provides that a prior holding cannot be relitigated in successive adjudications involving the same facts and issues. *State ex rel. Alma Telephone Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 388 (Mo. Ct. App. W.D. 2001). The decision of a court is generally the law of the case "for all points presented and decided." *Id.* The doctrine also applies to issues that could have been raised but were not. *Id.* It is not an absolute doctrine, but a policy of convenience involving the exercise of discretion. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-9 (Mo.banc 2017).

The order denying Grain Belt's application for a certificate of convenience and necessity did not make any findings of fact or conclusions of law regarding the merits of the application. If this case is remanded, the Commission will be required to make findings of fact and conclusions of law with respect to the merits of the application in the first instance. In the absence of findings of fact and conclusions of law regarding the merits, there is no law of the case.

The Commission is not a court. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 187 (Mo.banc 2011). It has not fulfilled its administrative function of making findings of fact and conclusions of law under 536.090, RSMo (2016) about the merits Grain Belt's application. Even if the Commission had made such findings of fact and conclusions of law, they are not relevant to this appeal and would not be binding on the Commission if this case is remanded. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003). Neither the Commission nor this Court is bound by its prior administrative findings. *Id*. The Court should not address the merits of the application in its resolution of this case because the Commission has not address them in a final and appealable order that is subject to judicial review under Section 386.510, RSMo (2016).

Any allegation of error about the Commission's future findings of fact and conclusions of law must be adjudicated in a future appeal. The law of the case doctrine would not prevent MLA from raising its issues in that future appeal. In the meantime, MLA's premature appeal must be dismissed.

CONCLUSION

For the above reasons, the Commission requests that this Court interpret Section 393.170 and resolve the conflict between the differing statutory interpretations by the Western District and the Eastern District. If this Court determines that the Western District's interpretation and application of Section 393.170 is correct, it should affirm the Commission's order denying Grain Belt's application for a certificate of convenience and necessity. If this Court determines that the Eastern District's interpretation and application of Section 393.170 is correct, then it should reverse the Commission's order denying Grain Belt's application for a certificate of convenience and necessity and remand the case to the Commission for a determination on the merits of the application. The Commission requests that this case be remanded to the Commission so that the Commission can make a decision as to the merits of Grain Belt's application in light of the correct interpretation of Section 393.170 as determined by this Court. The Commission requests the Court to grant the Commission's motion to dismiss MLA's appeal. The Commission requests such other relief that the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 20,153 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to all counsel of record this 29th day of March, 2018.

/s/ Jennifer Heintz
Jennifer Heintz