

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

KANSAS CITY POWER & LIGHT COMPANY	)	
And KCP&L GREATER MISSOURI	)	
OPERATIONS COMPANY	)	
	)	WD82182
V.	)	
	)	
PUBLIC SERVICE COMMISSION OF	)	
THE STATE OF MISSOURI	)	

**RESPONDENT BRIEF
OF INTERVENOR DOGWOOD ENERGY, LLC**

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STATEMENT OF FACTS

Appellants' Statement of Facts is incomplete, as it leaves out the following information:

In 2005 and 2008, this Court held the Missouri Public Service Commission ("Commission" or "PSC") had been misinterpreting Section 393.170 RSMo for 25 years and that its rules were insufficient to achieve compliance with the statute. As a result, as explained further below, a multi-million-dollar electric generation plant owned by Appellants' predecessor almost had to be dismantled, but for special legislative action (see Section 393.171).

Intervenor Respondent Dogwood Energy LLC ("Dogwood") owns the largest interest in the independent Dogwood Energy Facility, a 650 MW natural gas-fired, combined cycle electric power generating facility located in Pleasant Hill, Missouri. The other owners of the plant include Missouri municipal utilities, such as the City of Independence and members of the Missouri Joint Municipal Electric Utility Commission. The Dogwood Energy Facility is the largest combined cycle plant in the state and represents approximately 3% of the total generating capacity and 35% of the combined cycle capacity in the state. The plant provides energy to electric utilities such as Appellants and to municipal utilities. (LF at 47-48)

Subsequent to this Court's rulings in 2005 and 2008, Dogwood proposed clarification of the Commission's rules relating to Section 393.170 by petition filed on January 8, 2014 in PSC Case No. EX-2014-0205. While the Commission denied that petition, it simultaneously opened a working docket to consider rule changes in File No. EW-2014-0239. After substantial industry collaboration in that working docket, Commission Staff submitted proposed rule changes. The Commission then ordered publication of a proposed rule and further proceedings ensued in Case EX-2015-0225. The Commission ultimately withdrew those proposed rules and started over again. (LF at 33, 43, 47).

On May 15, 2018, the Secretary of State published in the Missouri Register the Commission's notice of proposed rulemaking regarding the possible adoption of 4 CSR 240-20.045 and rescission of rule 4 CSR 240-3.105 relating to Section 393.170. (43 MoReg 979-981)(LF at 7, 20). The notice included a statement that the rule was not expected to cause private entities to incur more than \$500 in new compliance costs. (LF at 16). This statement was supported by an affidavit from the Director of the Missouri Department of Economic Development. (LF at 11). It was also supported by the Commission's Small Business Regulator Fairness Board Small Business Impact Statement, pursuant to Section 536.300. (LF at 18).

The Commission invited written comments, due by June 14, 2018. Ten interested parties filed such comments, including Dogwood. The Commission also

held a public hearing on June 19, 2018 at which additional oral comments were made and commissioner questions were answered. (LF at 500).

In its original 2014 rulemaking petition and in its comments in each round of rulemaking, Dogwood cited several examples of utility projects which had evaded any pre-approval process due to lack of clarity in the Commission's rules at the time: (1) Appellants' acquisition of contract rights regarding the Crossroads generation plant located in Mississippi, valued at \$61.8 million after-the-fact by the Commission (discussed in *State ex rel KCPL&L Greater Missouri Operations v. PSC*, 408 SW3d 153 (Mo App 2013) (transfer denied by Mo Sup Ct and cert denied by US Sup Ct) and unreported second appeal Case No. WD76166/76167); and (2) Empire District Electric Company's \$175 million conversion of its Riverton Unit 12 combustion turbine electric generation facility to a combined cycle facility. Dogwood explained that such gaps in regulatory oversight were contrary to the interests of ratepayers and shareholders, and also could have a direct negative impact on independent suppliers like Dogwood and its co-owners if unneeded generation were to be added to the market in lieu of more cost-effective options. (LF at 48).

As stated by Appellants, on August 8, 2018 the Commission issued its orders of final rulemaking adopting rule 4 CSR 240-20.045 and rescinding rule 4 CSR 240-3.105. (LF at 492, 497, Appellants App. A 1 and 36). In the final order, the Commission addressed 63 separate points made by commenters. (LF at 500-16) The

final orders were published in the Missouri Register (LF at 562) and the new rule was subsequently published in the Code of State Regulations.¹ (Dogwood App.).

The order of final rulemaking regarding 4 CSR 240-20.045 included a revised fiscal note statement that indicated all four regulated investor-owned electric utilities in Missouri (including Appellants) would be affected by the new rule, with an estimated total new cost of compliance over three years of \$0-100,000. (LF at 458, 570). In reaching this estimate, the Commission considered utility comments about fiscal impact. (LF at 453, 458).

ARGUMENT

Introduction

In 2005, this Court in *Stopaquila.Org v. Aquila, Inc.*, 180 SW3d 24 (Mo App 2005), held that the Commission had been misinterpreting and misapplying Section 393.170 for 25 years, and that the statute did not allow a regulated electric utility (Appellants' predecessor) to rely on its authorization to serve its franchised service area as authorization to construct a new electric generating plant. The Court ruled that the statute requires Commission approval before the construction of an electric generating plant by an electric utility regardless of whether it is to be built inside or

¹ Under the rulemaking process, the proposed rule and final order of rulemaking have to be pieced together to comprehend the final rule in its entirety, but the Code of State Regulations sets forth the complete rule.

outside of the electric utility's service area, and that such approval cannot be granted until after the opportunity for contemporaneous hearings.

After the *Stopaquila* decision, the Commission attempted to approve the same electric generating plant that was at issue in *Stopaquila*, after it had already been constructed. In 2008, this Court in *State ex rel Cass County v. PSC*, 259 SW3d 544 (Mo App 2008), held that Section 393.170 (among other statutes) does not allow for such *post hoc* approval. The Court observed that the multi-million-dollar generation plant would have to be dismantled. *Id* at 545. However, the Missouri Legislature passed special legislation with a sunset clause to allow the PSC to approve it *post hoc* in order to remain. See Section 393.171.

Given the rulings in *Cass County* and *Stopacquila*, Appellants' extensive reliance on the prior practices of the Commission regarding the requirements of Section 393.170 to support their arguments in their brief is misplaced. The ultimate question presented herein is whether the Commission had authority to issue the new rule, not how the new rule compares to prior (sometimes unlawful) Commission practices.

In its opinion, this Court in *Stopaquila* noted that it was "curious" that the Commission did not have comprehensive rules regarding applications for approval under Section 393.170. After a lengthy process dating back to at least 2014 (Dogwood Comments, LF at 33, 43, 47), in 2018 the Commission finally adopted

the rule now being challenged by Appellants. The rule has been codified in the Code of State Regulations at 4 CSR 240-20.045 (Dogwood App.).

Rule 4 CSR 240-20.045 provides more specific instructions regarding applications for critical Commission review and authorization of substantial capital investments by regulated electric utilities. The new rule will enable the Commission to perform better its responsibilities under Section 393.170. It replaces a vague rule which had been codified at 4 CSR 240-3.105. The prior rule was repealed simultaneously with the final order issuing the new rule. (LF at 492, 497).

“The guiding star of the public service commission law and the dominating purpose to be accomplished by such regulation is the promotion and conservation of the interests and convenience of the public.” *State ex rel. Crown Coach Co. v. PSC*, 179 SW2d 123, 128 (Mo App 1944). A remedial statute such as Section 393.170 should be liberally construed to fulfill its intended purpose. See, e.g., Section 386.610, *State ex rel Laundry Inc v PSC*, 34 SW2d 37, 42-43 (Mo 1931). Any doubts about the applicability of such a remedial statute should be resolved in favor of applying it to protect the public interest, and any exceptions should be narrowly construed. *See Utility Service Co., Inc. v. Department of Labor and Industrial Relations*, 331 SW3d 654, 658 (Mo. 2011). Accordingly, the Commission’s authority to protect the public interest pursuant to Section 393.170 should not be artificially constrained by a narrow interpretation.

Given that this Court held in 2005 that the Commission had not been fully exercising its authority under Section 393.170 for decades, the adoption of this new rule in 2018 should be viewed as necessary, appropriate, and long overdue.

Requirements of Section 393.170

Pursuant to Section 393.170, an electric corporation cannot "begin construction of ... electric plant² ... without first having obtained the permission and approval of the commission." The Commission is authorized to approve such construction when it determines after "due hearing ... that such construction ... is necessary or convenient for the public service." This Court has held that this part of the statute requires separate approval of any regulated utility production (generation) facilities, regardless of location, as well as transmission facilities to be located outside of any previously approved service area. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005).

Under Section 393.170, an electric corporation also cannot exercise any franchise right or privilege "without first having obtained the permission and approval of the commission" as well as any required municipal consents. As with construction projects, the Commission must hold any "due hearing" and determine whether the exercise of such rights and privileges "is necessary and convenient for

² See definitions in Section 386.020.

the public service." This Court has held that "service area" approval under this part of the statute includes the authority to install transmission and distribution facilities within that area. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005).

The evaluation of necessity under the statute protects the public by making sure that a project is "an improvement justifying its cost." *State ex rel Intercon Gas v. PSC*, 848 SW2d 593, 597-98 (Mo App 1993).

Section 393.170 authorizes the Commission to impose "reasonable and necessary" conditions upon any approval of electric plant construction or any approval of franchise rights and privileges.

The statute further provides that any authority that is not exercised by an electric utility within two years from the grant thereof "shall be null and void." Accordingly, long-term plans cannot be approved, but rather only imminent projects. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005).

As stated above, this Court has held that the Commission cannot approve construction of electric production plant by a regulated utility after-the-fact, but rather pursuant to Section 393.170 can only approve such construction in advance, based on a contemporaneous hearing and record. See *State ex rel Cass County v.*

PSC, 259 SW3d 544, 549-50 (Mo App 2008). This Court explained the public policy behind this requirement at length:

The language of subsection 1 [of 393.170] is clear and unambiguous. It refers only to pre-construction approval. The statute's plain terms refer to such pre-construction approval not once, but twice, specifying that a utility shall not “*begin* construction ... without *first* having obtained” the necessary authorization. The purposes of such pre-approval are obvious. The PSC is charged with considering and protecting the interests of the general public as well as the customers and investors of a regulated utility. It must balance those interests on a statewide basis, not merely considering a particular utility's operating area in isolation. {citation omitted}(noting that “uniform regulation of utility service territories, ratemaking, and adequacy of customer service is an important statewide governmental function”). This function requires a balancing of the needs and interests of ratepayers and investors. Although the PSC always has the power to disallow capital improvements in a utility's rate base, that *post hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors. [citation omitted](noting that compliance with subsection 1 allows for consideration of all the relevant constituencies and interests “without muddying the waters of a future rate case”). Subsection 1 [of 393.170] allows the PSC to consider and weigh all of these factors, as well as location and zoning, prior to construction.

Id. This Court has observed further that:

By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan. This strongly suggests that the legislature intended that a public hearing relating to

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

StopAcquila.org v. Aquila, Inc., 180 SW3d 24, 37-38 (Mo App 2005).

Thus, under Section 393.170 the Commission must review proposed electric generation facilities by regulated utilities in advance, as to necessity, cost, location, and other relevant concerns. It must conduct such review of the prudence of the project based on contemporaneous facts, not long-term future projections. *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 34 (Mo App 2005). Such pre-approval is required because once the company builds the facilities and seeks to recover the costs in its rates, the Commission is not in a tenable position to balance the interests of ratepayers and utility shareholders. Rather, one group or the other can be substantially harmed by an after-the-fact decision. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005). This point was made abundantly clear by the fact that absent special legislation (Section 393.171) the multi-million-dollar plant at issue in those cases would have had to been dismantled.

The Commission has express statutory authority to establish rules “which prescribe the conditions of rendering public service.” See Section 386.250. This authority specifically includes “the power to establish such rules and regulations to carry into effect the provisions of [Sections 393.108-393.320], as it may deem

necessary.” See Section 393.140(11). Rules promulgated by a state agency such as the Commission are a “statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of the agency.” See Section 536.010(6).

Against this backdrop, the Court should uphold the Commission’s new rule, 4 CSR 240-20.045. The new rule is authorized under Section 393.140(11). It provides greater clarity regarding the type of electric plant projects that require pre-approval under Section 393.170.

I. The Commission did not err in promulgating the Rule at 4 CSR 240-20.045(2)(A)3, because it has statutory authority under Section 393.170 to issuing a clarifying regulation that a public utility must obtain a CCN prior to operating a limited category of assets (as defined in the Rule) that it intends to acquire from others.

The new rule provides that an electric utility must obtain a certificate of convenience and necessity (CCN) prior to “operation of an asset pursuant to section 393.170.2”. The rule defines an “asset” as either: (1) an electric generating plant (or facilitating gas transmission line) that is expected to serve Missouri customers and

be included in the rate base to set their retail rates;³ or (2) transmission and distribution plant located outside its service territory but within Missouri. This part of the rule does not address construction by the utility, which is addressed by another part of the rule (discussed in section II below). Consistent with this Court's decision in *State ex rel Cass County v. PSC*, 259 SW3d 544 (Mo App 2008), the rule also does not require approval to operate transmission and distribution plant within an already-authorized service area.

Contrary to Appellants' argument, this part of the rule does not intrude into the management decisions of an electric utility. As the Commission made clear in the final rulemaking order, the intent of this portion of the rule is to address proposed operation of electric plant (within the definition of "asset") which the utility proposes to acquire from another entity. (Order of Rulemaking, at LF at 500-01). The rule reinforces this intent in subsection 20.045(5)(C), which requires submittal of "the purchase price and plans for financing." If the plant to be acquired is already owned by another regulated utility, the transaction would be reviewed as a sale under Sections 393.190-393.220. Hence, this part of the rule is intended to make sure that

³ Rate base consists of the property on which the utility is allowed to earn its authorized rate of return, which together with operating costs leads to the amount recovered in retail rates. See, e.g. *In Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase*, 509 SW3d 757, 765 (Mo App 2016).

if an electric utility is planning to acquire electric plant from a non-regulated owner, the utility will submit the transaction to the Commission for pre-approval.

Under Appellants' arguments, an electric utility would be able to evade the Commission's authority to protect ratepayers by having a non-regulated entity build electric plant and then (whether immediately or after a period of time) transfer the plant to the utility without any prior Commission authorization. There is no such loophole in the statutes. This provision of the rule regarding the advance approval of the operation of a limited subset of electric plant makes sure that the Commission does not end up facing the untenable choices that would be presented by *post hoc* review of substantial asset transactions in a rate case, noted by this Court in its decisions in *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005).

But even if the Court finds that the Commission did not make this particular part of the rule sufficiently clear, the Court should find the "operation" provisions severable from the remainder and not invalidate the rest of the rule. There is no basis to conclude that the Commission intended the rule to be reviewed on an "all or nothing" basis. See, e.g., 2 Am Jur 2d Administrative Law, Sec. 545. Given the rescission of rule 4 CSR 240-3.105, a ruling against the entire rule would leave utilities with no guidance as to how to comply with Section 393.170.

II. The Commission did not err in promulgating the Rule at 4 CSR 240-20.045(1)(B)1-2 and (2)(A)2, because the Commission has statutory authority to interpret the word “construction” as set forth in Section 393.170 to include substantial improvement, retrofit or rebuild of an electric plant for which a CCN has already been granted, and construction that was not commenced within two years of an approval order.

By adding a definition of "construction", the Commission makes clear that in addition to totally new generation projects, any substantial project (increasing total company rate base by ten percent or more) must be approved in advance, consistent with the requirements of Section 393.170. Environmental upgrades and generation plant fuel source conversions or other conversions indisputably can involve hundreds of millions of dollars (App Brief, p 18) and deserve (require) as much scrutiny as original plant construction in order to protect the interests of all concerned.

The definition of "construction" in the new rule appropriately follows the principles laid down in the Missouri prevailing wage statutes, which also apply to regulated utilities, by distinguishing between construction and maintenance. See Sections 290.210-340. Under these statutes, "public works" construction includes "any work done directly by any public utility company when performed by it pursuant to the order of the public service commission" other than maintenance. By

including an appropriate definition of "construction", the rule properly follows court guidance that words should be given similar meaning throughout various overlapping statutory schemes. See *Hadel v. Board of Education of School District of Springfield*, 990 SW2d 107, 112-13 (Mo. App. 1999)(Word "construction" should be interpreted consistently in all statutes governing entity subject to prevailing wage law); *State ex rel Smithco Transport v. PSC*, 316 SW2d 6, 11-13 (Mo 1958)(PSC statutes should be interpreted and applied consistent with other applicable statutes); *Utility Service Co. Inc v. Depart of Labor and Industrial Relations*, 331 SW3d 654, 660 (Mo 2011)(term "construction" should be broadly construed in statutes that protect public interests); *Warren Davis Properties, LLC v. United Fire & Casualty Co.*, 111 SW3d 515, 522 (Mo App 2005)(renovation is construction). Absent such a definition of "construction", regulated utilities would be able to evade Commission review of major projects as well as the prevailing wage statutes (which only apply to such projects when undertaken pursuant to PSC order).

There is no express provision of the rule which states that further approval is required in circumstances where multiple units are initially approved by the Commission, but less than all of them are built within two years of the approval order. However, subsection (2)(D) of the rule, which is not mentioned in Appellant's point on appeal, does state that "an electric utility must exercise the authority granted within two (2) years from the grant thereof." This provision is consistent with

Section 393.170.3, which states: “Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.”

Whether building the first of several approved generating units constitutes sufficient “exercise” of a grant of authority as to the other units beyond two years from the date of the approval order would depend on the facts and circumstances. But this Court has made clear that in general, approval of construction must be contemporaneous with the actual build date, because the underlying circumstances can change over time. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org v. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005).

III. The Commission did not err in promulgating the Rule at 4 CSR 240-20.045(1)(A)1 because it has jurisdiction over the construction of new assets that are to be included in the rate base underlying the retail Missouri rates of an electric utility providing service in Missouri.

The Commission has jurisdiction over all public service activities of an electric utility that is subject to its regulation, which includes all generation plants built by or for such monopoly utilities. See, e.g. *State ex rel. and to Use of Cirese v. PSC*, 178 SW2d 788, 790 (Mo. App. 1944); see also Sections 386.020, 386.030, and 386.250. Absent advance review by the Commission, both ratepayers and

investors would face the substantial risks posed by an adverse after-the-fact ruling when the Commission must decide whether to allow substantial plant construction costs to be recovered in Missouri rates. As this Court has held, Section 393.170 must be applied to prevent such a collision of ratepayer and investor interests. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org V. Aquila, Inc.*, 180 SW3d 24, 35 (Mo App 2005). Physical location of a plant outside the state does not preclude a utility from seeking rate recovery, nor does it lessen the Commission's duty to examine the project in advance under Section 393.170.

The Commission has authority to examine all "methods, practices, regulation and property employed by public utilities." *State ex rel Laclede Gas v. PSC*, 600 SW2d 222, 228 (Mo App 1980). The statutes governing the Commission and public utilities establish a "complete scheme for the supervision and regulation of **all** the activities of an electric utility by the commission." *PSC v. Kansas City Power*, 31 SW2d 67, 71 (Mo 1930)(emphasis added).

If a Missouri-regulated utility proposes to construct an electric generating unit in another state, such a project could certainly impose detrimental impacts on Missouri ratepayers. An imprudent project could impact the utility's overall ability to render safe and adequate service, could increase rates, could increase administrative and capital costs, or have other impacts in Missouri. Absent pre-construction review, the Commission would be faced with a post-construction issue

contrary to the provisions of Section 393.170. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549-50 (Mo App 2008).

If a utility holding company segregates its operating entities by state, with each operating entity standing on its own, then the Commission would only be concerned with the operations of the Missouri operating entity. But when a single utility entity chooses to conduct operations in Missouri and other states, it must expect scrutiny from all the involved states including this Commission.

The Commission has jurisdiction under Chapters 386 and 393 over a regulated electrical utility and its construction, acquisition, financing, and other activities, including such activities outside the state. These statutes make plain that major decisions of a utility are to be reviewed in advance, notwithstanding its general managerial discretion (that remains subject to after-the-fact prudence review in ratemaking cases). Thus, under Section 393.170, the Commission has jurisdiction and responsibility to examine in advance any major activities, such as construction projects proposed by a Missouri utility in another state, to protect Missouri ratepayers. While such projects may also be examined by the regulatory commission in the other state, that is a product of the utility choosing to have multi-state activities under a single entity.

As made plain by this Court, the Commission has authority to prevent Missouri ratepayers from bearing the costs of imprudent projects at any location by

regulated utilities operating in Missouri. The Court has rejected the idea that regulated utilities can be given "carte blanche authority to build wherever and whenever they wish". Under the statute, the Commission is not merely charged with examining proposed construction in Missouri locations. See *State ex rel Cass County v. PSC*, 259 SW3d 544, 549 (Mo App 2008); *StopAcquila.org V. Aquila, Inc.*, 180 SW3d 24, 35-37 (Mo App 2005).

The Commission's new rule does not violate the commerce clause of the United States Constitution, because the rule does not preclude an electric utility from engaging in construction activities in another state. If the Commission were to deny an application that involved plans for a generation plant outside the state, the electric utility could still go forward with its plans to build or acquire the plant. Once the Commission decides that such cost recovery would not be allowed in Missouri rates, the plant would no longer fit the definition of "asset" under the rule and no approval of construction for other purposes would be needed. But the electric utility would know it would not be able to recover the costs of the plant in its Missouri rates and could factor that consideration into its analysis of whether to go forward. As is the case with Section 393.170, the rule should be construed in a manner consistent with constitutional limitations. See Sections 386.030, 386.610.

IV. The Commission did not err in promulgating the Rule at 4 CSR 240-2.045 because the Fiscal Note complied with Section 536.205.

Section 536.205 required the Commission to file a fiscal note with the Secretary of State together with the notice of proposed rulemaking, if the estimated aggregated “expenditure of money by or reduction of income for” private persons or entities exceeded \$500. Such a fiscal note would need to estimate the number of persons and entities, by class, which would likely be affected, as well as the estimated aggregate cost of compliance.

The Commission’s notice of proposed rule stated that the proposal was not expected to cost private persons and entities more than \$500. (LF at 16). This statement was supported by an affidavit from the Director of the Missouri Department of Economic Development. (LF at 11). It was also supported by the Commission’s Small Business Regulator Fairness Board Small Business Impact Statement, pursuant to Section 536.300. (LF at 18).

As Appellants state, “the Commission’s power to determine when a utility must obtain a CCN is derived exclusively from Section 393.170.” (App. Brief, p 8). In other words, the statute already imposed all the requirements that are allowed to be imposed. The statute does not require any implementing regulations; it has applied since enactment in 1939. And there already was a rule in place, at 4 CSR 240-3.105, which was less specific than the new rule. (Appellants’ App at A36) By

issuing new clarifying regulations, the Commission actually reduced private costs; without any such regulations, electric utilities would have to guess when to file applications, as well as what information to include in such filings. The Commission confirmed its intent to clarify its rules in its proposed rule submission to the Secretary of State, in both the statement of purpose and its Small Business Impact Statement. (LF at 12, 18).

Appellants' point on appeal challenges the sufficiency of the fiscal note under the statute that relates to notices of proposed rules, Section 536.205. But Appellants' arguments focus on the terms of the revised note that was filed with the order of rulemaking pursuant to Section 536.215. Hence, it is dubious that Appellants have properly preserved this issue for appeal under Rule 84.04(e). See, e.g., *Bellemere v. Cable-Dahmer Chevrolet*, 423 SW3d 267, 273 (Mo App 2013).

But the Commission did include a fiscal note regarding private entity costs with the final order of rulemaking, pursuant to Section 536.215. That fiscal note was not necessary, given that the order of rulemaking scaled back the requirements for making submissions under Section 393.170 even further as compared to the propose rule. (The Commission noted the reduction in any costs in its response to comments filed about the proposed rule, set forth in its order of rulemaking, LF at 568). Nonetheless, the Commission made an overly cautious revised estimate under Section 536.215 that the four regulated electric utilities (including Appellants) in the

state might have costs of \$0 to \$100,000 over an estimated shelf-life of three years for the rule. In other words, the Commission did not abandon its initial cost estimate of less than \$500, but nonetheless allowed for the possibility that costs for the four regulated entities might be as much as \$100,000 over three years. (LF at 570-71).

According to Section 536.175, the Commission would be required to review the rule by July 1, 2020. Subject to that mandate, the Commission has control over the timing of its rulemaking procedures. Given the requirements of Section 536.175, the Court should accept the Commission's estimation that it will likely revise the rule again within three years.

In short, the Commission reasonably limited its estimate of private costs of the final rule to a period of three years. It also over-estimated private cost impacts in that the rule does not (cannot) mandate more than Section 393.170 already required of the four regulated electric utilities. The new rule provides more clear instructions than the prior rule. Appellants arguments, which focus on a different rulemaking filing and a different statute than its point relied on, should be rejected.

CONCLUSION

It has been 14 years since this Court observed the absence of clear rules under Section 393.170. The Commission took pains over a period of four years of extensive rulemaking proceedings to consider all views and complied with applicable law. The Court should uphold rule 4 CSR 240-20.045.

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 103.08, service of this brief is being made on this 6th day of February 2019, through the electronic filing system. All parties are represented, and all attorneys of record are registered users.

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CERTIFICATE PURSUANT TO RULE 84.06(c)

I hereby certify that the foregoing Brief of Intervenor Respondent Dogwood Energy LLC complies with the limitations contained in Rule 84.06(B) and Special Rule 41 and, according to the word count of the word-processing system used to prepare the brief contains 6005 words.

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