IN THE SUPREME COURT OF MISSOURI

KANSAS CITY POWER & LIGHT COMPANY and KCP&L GREATER MISSOURI OPERATIONS COMPANY,	)	
Appellants,	)	
v.	)	Case No. SC98039
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,	)	
Respondent.	)	

SUBSTITUTE BRIEF OF APPELLANTS KANSAS CITY POWER & LIGHT COMPANY AND KCP&L GREATER MISSOURI OPERATIONS COMPANY

Karl Zobrist, MBN 28325
Cody Wood, MBN 70424
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Phone: (816) 460-2400
Fax: (816) 531-7545
karl.zobrist@dentons.com
cody.n.wood@dentons.com

Robert J. Hack, MBN 36496
Roger W. Steiner, MBN 39586
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2791
Fax: (816) 556-2787
rob.hack@kcpl.com
roger.steiner@kcpl.com

Attorneys for Appellants Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company

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JURISDICTIONAL STATEMENT

On September 12, 2018 the Missouri Public Service Commission ("PSC" or "Commission") issued its Order Denying Application for Rehearing and Request for Stay ("Order")[1] of Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively "Appellants" or "Companies")[2] regarding the effectiveness of the Final Order of Rulemaking issued by the Commission on August 8, 2018 that adopted a new Certificate of Convenience and Necessity Rule, now found at 20 CSR 4240-20.045 ("Rule").

The Companies filed a timely Notice of Appeal with the Court of Appeals for the Western District, pursuant to Section 386.510.[3] L.F. 523-529.[4]

The issues raised in this appeal are not within the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution, as amended. Therefore, this appeal comes within this Court's general appellate jurisdiction. Under Supreme Court Rule 83.04, on November 19, 2019 the Court granted the Companies' and Respondent Commission's Applications for Transfer and ordered

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[1] L.F. 489-90.

[2] On October 7, 2019 Kansas City Power & Light Company changed its name to Evergy Metro, Inc. and KCP&L Greater Missouri Operations Company changed its name to Energy Missouri West, Inc. These name changes were made in furtherance of the June 4, 2018 merger of Great Plains Energy Incorporated (the holding company of KCP&L and GMO) and Westar Energy, Inc. to form Evergy, Inc. To avoid confusion, the Appellants will continue to refer to themselves by the names used in the proceedings below.

[3] All statutory references are to the Missouri Revised Statutes (2016), as amended, unless otherwise indicated.

[4] References to the Record on Appeal: "L.F.": Legal File (Volumes I – V); "Ex.": Exhibits; "A. __.": Appendix to the Substitute Brief of Appellants.

this case transferred. This Court has jurisdiction under Article V, Section 10 of the Missouri Constitution.[5]

STANDARD OF REVIEW

In reviewing an order of the Commission, courts use a two-part test. First, the reviewing court must determine whether the Commission's order is lawful, which is determined by whether statutory authority for its issuance exists. Kansas City Power & Light Co. v. PSC, 557 S.W.3d 460, 466 (Mo. App. W.D. 2018). Second, if the order is lawful, the court must determine whether the order is reasonable. Id. Upon initial review, the PSC's orders are considered prima facie lawful and reasonable. Id. The burden of proof is upon the party attacking the order to show by clear and satisfactory evidence that the order of the PSC is unlawful or unreasonable. Id.

This appeal presents questions of law as to whether the PSC's Rule is lawful. Because this case presents only legal issues, the Court "need not afford the Commission's interpretation any deference." Missouri PSC v. Union Elec. Co., 552 S.W.3d 532, 539 (Mo. en banc 2018). The Court reviews all legal issues *de novo* and is to "exercise independent judgment to correct erroneous interpretations" of law. Id. Under such circumstances this Court has stated: "The lawfulness of a PSC order is determined by whether the statutory authority for its issuance exists …." State ex rel. MoGas Pipeline LLC v. PSC, 366 S.W.3d 493, 496 (Mo. en banc 2012) (citation omitted).

[5] "The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal." Mo. Const. Art. V § 10

STATEMENT OF FACTS

The Companies are "electrical corporations" and "public utilities" under Section 386.020, and are regulated by the Commission. See § 386.020(15), (43). KCP&L provides electric service to customers in both Missouri and Kansas, while GMO provides electric and steam service only in Missouri. Before electrical corporations[6] can begin construction of an "electric plant," they must obtain "the permission and approval of the commission" under Section 393.170.1. Similarly, if they wish to "exercise any right or privilege under any franchise" to serve the public, they must obtain "the permission and approval of the commission" under Section 393.170.2.

The PSC may grant such permission if it determines "that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service" under Section 393.170.3. When approval is granted, the Commission issues a Certificate of Convenience and Necessity ("CCN") to the public utility. See § 393.170.3.

On August 8, 2018 the Commission issued a Final Order of Rulemaking that adopted the new CCN Rule promulgated at 20 CSR 4240-20.045[7] under the title of Electric Utility Applications for Certificates of Convenience and Necessity. (A. 1). On that same day the Commission rescinded the existing CCN Rule at 20 CSR 4240-3.105,

[6] The terms "electrical corporation" and "public utility" are defined in Section 386.020, while the Rule uses the term "electric utility." The Companies generally use these terms interchangeably in this Brief, unless otherwise noted.

[7] The Rule was originally promulgated at 4 CSR 240-20.045. After this appeal was filed, the Executive Branch was re-organized and the PSC now falls under the Department of Commerce and Insurance. As a result, the Rule is now located at 20 CSR 4240-20.045.

Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity. (A. 36).

The Rule states that its purpose is to outline "the requirements for applications to the commission, pursuant to section 393.170.1 and 393.170.2, RSMo, requesting that the commission grant a certificate of convenience and necessity to an electric utility for a service area or to operate or construct an electric generating plant, an electric transmission line, or a gas transmission line that facilitates the operation of an electric generating plant." L.F. 568.

Section (2)(A) of the Rule requires an electric utility to obtain a CCN prior to the "[c]onstruction of an asset pursuant to section 393.170.1, RSMo; or…[the] [o]peration of an asset pursuant to section 393.170.2, RSMo." L.F. 568–69.

Section (1)(A)1 of the Rule applies to an "asset" "regardless of whether the item(s) to be constructed or operated is located inside or outside the electric utility's certificated service area or inside or outside Missouri." L.F. 568.

Further, Section (1)(B)2 of the Rule defines "construction" as including "[t]he improvement, retrofit or rebuild of an asset that will result in a ten percent (10%) increase in rate base as established in the electric utility's most recent rate case." Id.

The Final Order of Rulemaking contains a revised Fiscal Note in which the PSC purported to calculate the private cost of complying with the Rule. L.F. 571 (A. 25). In its Worksheet section, the PSC noted that "[t]wo affiliated investor-owned electric utilities" had indicated that "the requirement to obtain a CCN under Section (1)(A)1 for an asset located outside Missouri would cause them to incur significant litigation

expense." Id. These utilities are KCP&L and GMO, the only affiliated entities who submitted comments to the PSC. See L.F. 562, Order of Rulemaking at 1. The Commission estimated that the aggregate cost for affected entities to comply with the rule was in the range of $0 to $100,000, concluding that the impact of the Rule "is deemed minimal." L.F. 571 (A. 25) The Fiscal Note apparently arrived at this range by asserting that the estimated life of the Rule will only be three years. Id.

The Commission also noted the Companies' view that Section (1)(B)2 would cause them significant expense if they were required to obtain a CCN for "the improvement, retrofit or rebuild" of an asset. However, it concluded that because the CCN only needed to be obtained if a 10 percent increase in rate base resulted, the cost would be "minimal" because "only one project over the past several years would have required a CCN." The PSC did not identify the project.

In the Fiscal Note the PSC did not address the compliance costs of obtaining the Commission's permission to "operate an asset" under Section (2)(A).

The Companies timely applied on September 5, 2018 for rehearing and requested the Commission to stay the effectiveness of the Rule. L.F. 459. The Commission denied rehearing and the stay request on September 12, 2018. L.F. 489. The Appellants filed a timely Notice of Appeal on October 9, 2018. One week later, on October 15, 2018, the Rule and its accompanying Fiscal Note were recorded in the Missouri Register. L.F. 562-571.

The Companies filed their appeal at the Court of Appeals for the Western District on January 7, 2019. On June 28, 2019 the Court of Appeals issued an order vacating the

Order of Rulemaking. On July 12, 2019 the Companies moved that the Court of Appeals rehear the appeal or, in the alternative, transfer the appeal to this Court. The Court of Appeals denied both requests on July 30, 2019.

The Companies filed an Application for Transfer to this Court on August 13, 2019. On November 19, 2019 this Court granted the Application for Transfer.

POINTS RELIED ON

I. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(2)(A)3 because it has no statutory authority to require an electric utility to obtain a certificate of convenience and necessity ("CCN") prior to the "operation of an asset" in that Section 393.170.2 does not require an electric utility to obtain a CCN to operate an asset.

State ex rel. MoGas Pipeline LLC v. PSC, 366 S.W.3d 493 (Mo. en banc 2012).

State ex rel. Philipp Transit Lines, Inc. v. PSC, 523 S.W.2d 353 (Mo. App. K.C. 1975).

State ex rel. Harline v. PSC, 343 S.W.2d 177 (Mo. App. K.C. 1960).

Section 393.170, Mo. Rev. Stat. (2016).

II. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(1)(B)1-2 and (2)(A)2 because it has no statutory authority to require an electric utility to obtain a CCN prior to the improvement, retrofit or rebuild of an electric plant for which a CCN has already been granted, or the construction of a plant where a multi-unit CCN was previously granted in that Section 393.170.1 only requires a public utility to obtain a CCN to begin construction of an electric plant.

State ex rel. MoGas Pipeline, LLC v. PSC, 366 S.W.3d 493, 496 (Mo. en banc 2012).

State ex rel. Util. Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979).

State ex rel. Philipp Transit Lines, Inc. v. PSC, 523 S.W.2d 353, 357 (Mo. App. K.C. 1975).

Section 393.170, Mo. Rev. Stat. (2016).

III. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(1)(A)1 because it has no statutory authority to require an electric utility to obtain a CCN prior to the construction or operation of an electric plant or other asset that is not located in Missouri in that Section 386.250 limits the jurisdiction of the PSC to "within the state."

Missouri PSC v. Union Elec. Co., 552 S.W.3d 532 (Mo. en banc 2018).

Section 386.250, Mo. Rev. Stat. (2016).

Section 386.030, Mo. Rev. Stat. (2016).

IV. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045 because the Fiscal Note violates Sections 536.205 and 536.215 in that its estimate of compliance costs presumes the Rule will only be in effect for three years even though the Rule contains no "sunset" clause terminating its requirements, and because the estimate is based on the speculative presumption that the 10% rate base threshold will never be reached.

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

Missouri Hosp. Ass'n v. Missouri Dep't of Consumer Affairs, 731 S.W.2d 262 (Mo. App. W.D. 1987).

Section 536.205, Mo. Rev. Stat. (2016).

ARGUMENT

I. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(2)(A)3 because it has no statutory authority to require a public utility to obtain a CCN prior to the "operation of an asset" in that Section 393.170.2 does not require utilities to obtain a CCN to operate an asset.

The Commission's power to determine when a utility must obtain a CCN is derived exclusively from Section 393.170. The authority of the PSC to prescribe when and how public utilities must seek a CCN is limited by this statute, "either expressly, or by clear implication as necessary to carry out the powers specifically granted." State ex rel. Util. Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979). "If a power is not granted to the PSC by Missouri statute, then the PSC does not

have that power." State ex rel. MoGas Pipeline, LLC v. PSC, 366 S.W.3d 493, 496 (Mo. en banc 2012).

The Commission's adoption of the Rule goes well beyond the express and implied powers conferred to it under this statute. Although the Commission's factual determinations are normally entitled to deference, it is a different situation "when an administrative agency's decision is based on the agency's *interpretations of law* [because] the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations." Burlington Northern R.R. v. Director of Revenue, 785 S.W.2d 272, 273 (Mo. en banc 1990) (emphasis added). See State ex rel. Sprint Missouri, Inc. v. PSC, 165 S.W.3d 160, 164 (Mo. en banc 2005) (applying Burlington standard to the PSC); Morton v. Missouri Air Conservation Comm'n, 944 S.W.2d 231, 236-37 (Mo. App. S.D. 1997).

When construing the statute forming the basis for the agency's interpretation of law, the court's duty is to ascertain the intent of the legislature from the language it used. MoGas Pipeline, 366 S.W.3d at 497-98. There is no language in Section 393.170.2 that indicates the legislature intended the Commission to exercise CCN authority over the "operation of an asset."

A. The language of Section 393.170.2 does not authorize the Commission to require a CCN prior to an electric utility's "operation of an asset."

Nothing in Section 393.170 requires an electric utility to obtain Commission approval prior to the "operation" of an asset. The statute only requires the Commission's approval of a CCN application under two specific circumstances. Electric and other

public utilities must obtain the permission and approval of the Commission prior to the "construction of a gas plant, electric plant, water system, or sewer system …." See § 393.170.1 (emphasis added). Public utilities must also obtain the permission and approval of the Commission prior to the "exercise [of] any right or privilege under any franchise." See § 393.170.2.

The Commission may only exercise its power to grant the permission outlined in Subsection 1 (construction) or Subsection 2 (exercise of a right or privilege). Section 393.170.3 makes it clear that the Commission's authority is thus limited, stating that "the commission shall have the power to grant the permission and approval herein specified" as relates to "such construction or such exercise of the right, privilege, or franchise …." No language in the statute gives the Commission the power to grant a CCN for the "operation of an asset" – a situation not identified in these two enumerated categories.

Despite the express limitations set forth in Section 393.170, the Commission's Rule requires a CCN to be obtained prior to an electric utility's "operation of an asset pursuant to section 393.170.2." See 20 CSR 4240-20.045(2)(A)3. Such a requirement is at odds with the limitation imposed in Subsection 2, which extends only to CCNs required for the exercise of rights and privileges under a franchise. Indeed, Section 393.170.2 contains no reference to either "asset" or to "operation."

Disregarding the absence of such authority in Section 393.170.2, the Rule details numerous requirements that must be included in applications submitted before a utility may "operate" an "asset," including: "(A) A description of the asset(s) to be operated; (B) The value of the asset(s) to be operated; (C) The purchase price and plans for financing

the operation; and (D) Plans and specifications for the asset, including as-built drawings." 20 CSR 4240-20.045(5).

The Rule contains a detailed definition of "asset":

> 1. An electric generating plant, or a gas transmission line that facilitates the operation of an electric generating plant, that is expected to serve Missouri customers and be included in the rate base used to set their retail rates regardless of whether the item(s) to be constructed or operated is located inside or outside the electric utility's certificated service area or inside or outside Missouri; or
>
> 2. Transmission and distribution plant located outside the electric utility's service territory, but within Missouri.

20 CSR 4240-20.045(1)(A).

Regardless of how "operation" is defined, it is the absence of a statutory predicate that renders the Rule outside the Commission's statutory authority. This Court recently made clear that Subsection 2 only "grants the Commission the authority to issue an area CCN for the utility to exercise a franchise and provide retail utility service to a geographic territory." Grain Belt Express Clean Line, LLC v. PSC, 555 S.W.3d 469, 471 (Mo. en banc 2018). This "area" certificate is one of the only two types of CCN's authorized under Section 393.170. Id. The other type of CCN is a construction or "line" certificate under Subsection 1. Id.

As is clear from a long line of cases construing Subsection 2, an area certificate gives a utility the "authority" to "serve a territory by means of an existing plant." State ex rel. Harline v. PSC, 343 S.W.2d 177, 185 (Mo. App. K.C. 1960) ("Harline"). See Grain Belt Express Clean Line, LLC, 555 S.W.3d at 472 (citing Harline with approval in

conjunction with other decisions construing Section 393.170); State ex rel. Union Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989).

In Harline the Court of Appeals recognized that under Subsection 2 "a primary function of the Commission in its regulation of electric utilities is to allocate territory in which they may render service." 343 S.W.2d at 182. These precise parameters were at work in Harline, where the Court declined to apply the "right or privilege" language of Subsection 2 to the construction of a new transmission line within an area in which the electric utility already possessed an area CCN to operate.

Landowners opposing the transmission project argued that the construction of a new asset was the exercise of a "right or privilege under any franchise" that meant a utility must acquire an additional CCN. Harline, 343 S.W.2d at 180, 183. The Court of Appeals squarely rejected such an expansive interpretation of that language, stating:

> We view the company's rights and privileges under its corporate franchise as the unitary, indivisible sum of all its corporate powers conferred by the state, merged into the single privilege of operating an electric utility. Likewise, we consider that the rights and privileges held by the company under the county franchise partake of the same nature. … If Commission approval were required for all separate acts in the exercise of 'any right or privilege under any franchise', we envisage its ridiculous application to every conceivable detail incident to business operation.

Id. at 183 (emphasis added).

And yet, Section (2)(A)3 of the Rule now requires an electric utility to obtain a Subsection 2 area CCN under Section 393.170 for such "separate acts" when it begins to operate an electric generating plant or a gas transmission line that facilitates the plant's operation. Comparing the objective of the Rule's "operation" language with the holding

of Harline, it is clear that the Commission has crossed the line and attempted to manage "every conceivable detail incident to [an electric utility's] business operation." Id.

In approving the Rule and going beyond these recognized limits, the Commission has violated the principle that neither the courts nor administrative agencies may "supply what the legislature has omitted from controlling statutes." Turner v. School Dist., 318 S.W.3d 660, 668 (Mo. en banc 2010). Administrative agencies, as well as the courts "may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. St. L. 1978). Accord State v. Collins, 328 S.W.3d 705, 709 n.6 (Mo. en banc 2011); Metro Auto Auction v. Director of Revenue, 707 S.W.3d 397, 402 (Mo. en banc 1986). See also Kansas City Power & Light Co. v. PSC, 557 S.W.3d 460, 472 (Mo. App. W.D. 2018) (reversing PSC order that erroneously concluded § 386.020(14) definition of "electric plant" did not include electric vehicle charging stations).

B. Requiring a CCN prior to the "operation" of an asset contradicts the statutory purpose of Section 393.170.2 and burdens the public interest.

Because an electric utility is entitled to manage its own affairs, the PSC is barred from issuing orders that encroach on these matters. The "commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995). The Commission has the power to monitor and oversee, but not to manage. "Those powers are purely regulatory. The dominating purpose of the Public Service Commission was to promote the public welfare. To that end the statutes provided

regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use." Harline, 343 S.W.2d at 181 (original emphasis).

Section (2)(A)3 of the Rule contradicts this statutory purpose. Because the Rule now requires electric utilities to obtain a CCN prior to operating any electric plant or related gas transmission line, the Commission would be directing a utility how to conduct its business when it runs the facilities that it owns. The exercise of such power "would involve a property right in the utility. The law has conferred no such power upon the Commission." Id. See City of O'Fallon v. Union Electric Co., 462 S.W.3d 438, 444 (Mo. App. W.D. 2015) (PSC has no authority to order a utility to sell its property without its consent). Even considering the Commission's broad authority over public utilities, the Harline Court held that the PSC's powers "do not clothe the commission with the general power of management incident to ownership." Harline, 343 S.W.2d at 182.[8] This is especially true with regard to the powers of Section 393.170, which relate exclusively to granting CCNs before a utility begins construction and exercises a right or privilege under a franchise.

The Commission's attempt to manage the operation of an electric utility's assets not only runs contrary to the purpose of the Commission's regulatory powers, but also burdens the public interest that Section 393.170 is meant to serve. The ability of

[8] The Court of Appeals in Harline relied on both Missouri and federal decisions, including State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n of Mo., 262 U.S. 276, 289 (1923), which stated: "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

Missouri public utilities to operate electric generating plants that they have acquired in a timely and efficient manner without having to obtain a CCN or other approval from the Commission has served the public well. The PSC has encountered no difficulty in reviewing the prudence of such decisions and determining how the costs associated with such decisions should be reflected in the utility's rates.

For example, as GMO and its predecessor Aquila, Inc. analyzed their resource options during the past decade, they determined that the 300 megawatt ("MW") Crossroads Energy Center, at the time a merchant plant owned by a non-regulated affiliate, was the lowest cost option to meet their requirements to serve customers. See Report & Order at 77-85, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Electric Service, No. ER-2010-0356 (May 4, 2011) (A.42-50).[9] After Great Plains Energy Incorporated acquired Aquila, the Crossroads unit was transferred to the regulated books of GMO. Id., Report & Order at 85. In GMO's 2010 general rate case, the Commission thoroughly reviewed the resource planning process that GMO had conducted and concluded that the decision to add Crossroads to its generating fleet was "prudent and reasonable." Id. at 99-100 (A.64-65).

Finally, the Commission's regulatory overreach to extend and apply Section 393.170.2 regarding the *exercise of a right* under a franchise to the *operation of an asset* is unnecessary given the comprehensive process of evaluating utility supply options in

[9] The Commission's order was affirmed in State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013).

the Integrated Resource Planning ("IRP") framework under Chapter 22 of the Commission's regulations that has been in effect for the past 25 years. See 20 C.S.R. 4240, Chap. 22 (Electric Utility Resource Planning). Requiring an electric utility to obtain a CCN to operate an asset, in addition to the IRP process and the ultimate rate case proceeding that evaluates the prudence of a utility's decision and sets rates under Section 393.150, would impose an additional set of requirements for a utility to meet without any statutory authority or corresponding benefit to customers. See Companies' Application for Rehearing at 8-10 (Sept. 5, 2018) (L.F. 466–68). Indeed, Section (2)(A)3 of the Rule creates the confounding possibility that even after an electric generating plant or a gas transmission line is lawfully acquired or constructed, the PSC might second-guess the utility's management decision and not grant an "operational" CCN.

Section 393.170.2 gives the Commission no authority to promulgate a regulation that creates a new CCN relating to the "operation of an asset." Section (2)(A)3 of the Rule exceeds the powers granted to the PSC by the General Assembly and is invalid.

II. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(1)(B)1-2 and (2)(A)2 because it has no statutory authority to require an electric utility to obtain a CCN prior to the improvement, retrofit or rebuild of an electric plant for which a CCN has already been granted, or the construction of a plant where a multi-unit CCN was previously granted in that Section 393.170.1 only requires an electric utility to obtain a CCN to begin construction of an electric plant.

The Commission's attempt to expand its jurisdictional reach by requiring an electric utility to obtain a CCN prior to the retrofit or improvement of an electric generating plant, or to the construction of a plant where a multi-unit CCN was previously granted is not authorized under Section 393.170.1. Because the Rule exceeds the statutory limits set forth in Section 393.170.1, it is invalid. State ex rel. MoGas Pipeline, LLC v. PSC, 366 S.W.3d 493, 496 (Mo. en banc 2012); State ex rel. Util. Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979).

Similar circumstances were presented in State ex rel. Philipp Transit Lines, Inc. v. PSC, 523 S.W.2d 353, 357 (Mo. App. K.C. 1975), where the Court held that the Commission had issued a rule that exceeded the scope of its authority. At a time when it regulated common carriers in Missouri, the PSC adopted a rule that limited "through routes and joint rates" to an "authorized single carrier." Id. at 356. Finding that the carriers in question "are doing nothing more than using routes already granted to them by the Commission" which "has already exercised its power by issuing certificates of convenience and necessity" to them, the Court held that it was "manifest" that the rule was "contrary to § 390.116," the enabling statute. Id. at 356-57. "That being so, the rule is hereby found to be void and the Commission may not enforce it." Id. at 357.

Similarly, there is no language in Section 393.170.1 that applies to an electric utility's "improvement, retrofit or rebuild of an electric generating plant or other asset" for which a CCN has already been granted. This is true regardless of whether the increase in the utility's rate base resulting from the improvement, retrofit or rebuild is 10% or some other figure. Therefore, the inclusion of these activities in the definition of

"construction" found in Rule (1)(B)2 is unlawful. Consequently, the incorporation of this definition into the language of Rule (2)(A)2 relating to a traditional "line" or construction CCN under Section 393.170.1 is also unlawful.

Section 393.170.1 states that no electrical corporation or other public utility "shall begin construction of" a plant "without first having obtained the permission and approval of the Commission." Once that permission has been obtained with a CCN, construction may begin. As long as the authority conferred by the CCN is "exercised within a period of two years from the grant thereof," as provided in Section 393.170.3, there is no requirement for a public utility to return to the Commission for any additional or supplemental CCN authority.

The Commission has adhered to these statutory limitations for over a hundred years. The PSC recently reviewed expenditures amounting to hundreds of millions of dollars by a number of Missouri electric utilities to bring their generating units into compliance with environmental regulations, as well as to improve their operations and efficiency. There was never a suggestion by the Commission during any of these proceedings that an additional CCN was required before an air quality control system, a selective catalytic reduction system, or other environmental control equipment became operational. See In re Kansas City Power & Light Co., Report & Order at 59-64, No. ER-2014-0370 (2015) (La Cygne Units 1 and 2) (A. 72–77); In re Ameren Missouri, Report & Order at 24-35, No. ER-2011-0028 (2011) (Sioux Units 1 and 2) (A. 83–94); In re Kansas City Power & Light Co., Order Approving Non-Unanimous Stipulations & Agreements, No. ER-2009-0089 (2009) (Iatan Unit 1) (A. 97–114).

In the case of the La Cygne generating station, the Commission, its Staff, and other parties undertook a thorough study of the $1.23 billion environmental retrofit project that successfully brought the station's two units into compliance with a variety of federal and state air quality standards. In re Kansas City Power & Light Co., Report & Order at 59-60, No. ER-2014-0370 (2015) (A. 72–73). The PSC specifically noted the "multi-faceted analysis of a series of alternative long-term resource plans" that KCP&L had conducted before proceeding with the retrofits, and never suggested that an additional CCN was required before the plants were retrofitted. Id. at 60.

There is also no requirement for an electric utility to apply for a new or amended CCN when it wishes to construct a plant at a generating station that previously received a line certificate under Section 393.170.1 for multiple units and the first unit was built within two years from its issuance. Therefore, the requirements of Section (1)(B)1 of the Rule exceed the authority provided to the Commission under the governing statute.

This proposition is entirely consistent with how the Commission itself has acted over the years. One example is the Commission's 2011 decision to allow Iatan Unit 2 into rate base years after a line CCN was granted in 1973 to the multi-unit Iatan Generating Station in Platte County and construction promptly began on Iatan Unit 1. While the CCN for the multi-unit station was issued over 35 years ago previously, Iatan 2 was included in KCP&L's rate base in 2011 without any indication that an additional CCN was required under Section 393.170.1. See Report & Order at 18-77, In re Kansas City Power & Light Co., No. ER-2010-0355 (Mo. P.S.C. 2011) (A. 125–184); Report & Order, In re Application of Kansas City Power & Light Co. and St. Joseph Light &

Power Co. for Certificates of Public Convenience and Necessity to Construct an Elec. Generation Station in Platte County, Mo., No. 17,895 at 6 (Mo. P.S.C. 1973) (A. 192). However, Section (1)(B)1 of the Rule now requires an electric utility to seek a line CCN under Section 393.170.1 before constructing a "new asset," regardless of whether a CCN for multiple units had already been granted for the generating station where it would be built.

As noted above, the Commission already maintains regulations that provide for the assessment and planning related to an electric utility's undertaking of retrofits, repairs, or improvements in its comprehensive Integrated Resource Planning process established in 20 CSR 4240-22.010. These regulations declare:

> The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all legal mandates, and in a manner that serves the public interest and is consistent with state energy and environmental policies.

20 CSR 4240-22.010(2).

The Commission regularly applies these considerations with respect to an electric utility's proposal to retrofit, repair, or improve one of its facilities. In the case of KCP&L's $1.23 billion environmental retrofit at its La Cygne generating station, the Commission determined that KCP&L's planning process demonstrated that its decisions were "prudent in proceeding with the La Cygne environmental retrofit project" and permitted over $292 million in costs to be included in its rate base. In re Kansas City Power & Light Co., Report & Order at 64, No. ER-2014-0370 (Mo. P.S.C. 2015) (A. 77). There was no suggestion that a CCN under Section 393.170.1 should have been obtained

before construction on the retrofit began, or that the resource planning and rate case procedures were lacking in any way.

The PSC may regulate electric and other public utilities, but it "is not clothed with a general power of management incident to ownership." State ex rel. Southwestern Bell Tel. Co. v. PSC, 262 U.S. 276, 289 (1923). "The Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business." State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5, 11 (Mo. en banc 1966). See City of O'Fallon v. Union Elec. Co., 462 S.W.3d 438, 444 (Mo. App. W.D. 2015) ("The legislature, not the Commission, sets the extent of the Commission's authority.").

The Commission's definition of "construction" to include electric utilities that seek to improve, retrofit or build existing plants for which a CCN has already been granted, or to construct a plant at a generating station that holds a multi-unit CCN exceeds the scope of authority granted by Section 393.170.1. As a result, Sections (1)(B)1 and (B)2 of the Rule, as well as their incorporation into Section (2)(A)2 are invalid.

III. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(1)(A)1 because it has no statutory authority to require an electric utility to obtain a CCN prior to the construction or operation of an electric plant or other asset that is not located in Missouri in that Section 386.250 limits the jurisdiction of the PSC to "within the state."

There is no language in Section 393.170 or any other provision of the Public Service Commission Law that grants the PSC authority to regulate an electric utility's business outside the State of Missouri. The Missouri legislature defined the limits of the Commission's "jurisdiction, supervision, powers and duties" in Section 386.250.

Section 386.250(1) limits the jurisdiction of the PSC "[t]o the manufacture, sale or distribution of … electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to … electric plants, and to persons or corporations owning, leasing, operating or controlling the same [emphasis added]."

Although the phrase "within the state" does not appear in the second clause after the semicolon, a common sense reading of the statute shows that the PSC's jurisdiction in the second clause is also limited to electric plants located in Missouri. The Commission's Rule stands in stark contrast to that legislative declaration, however. Section (1)(A)1 of the Rule directs all electric utilities to obtain a CCN before they construct or operate an electric generating plant "regardless of whether the item(s) to be constructed or operated is located inside or outside the electric utility's certificated area or inside or outside Missouri; …." 20 CSR 4240-20.045(1)(A)1 (emphasis added). This is contrary to any reasonable construction of Section 386.250.

The first clause of Section 386.250 clearly limits the PSC's jurisdiction over the "manufacture" of electricity to "within the state" of Missouri. The second clause must be similarly read to limit the PSC's jurisdiction over electric plants. This common sense conclusion arises from the fact that an electric plant exists to "manufacture" electricity.

The Commission cannot regulate an electric plant without also regulating the manufacture of electricity. Thus, its jurisdiction over an electric plant must be limited to Missouri.

Although separated by a semicolon, the two clauses should not be interpreted to create an absurd result. Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 84 (Mo. 1958); State ex rel. Geaslin v. Walker, 257 S.W. 470, 472 (Mo. en banc 1924) ("Clearly the use of a comma, or even a period, is not controlling upon the question of proper construction, where such use would result in an unreasonable or absurd construction."). It would make no sense for the General Assembly to have limited the PSC's jurisdiction to the manufacture of electricity "within" Missouri, but then extend its full regulatory authority to electric plants located entirely beyond its borders. Otherwise, the phrase "within the state" in the first clause of Section 386.250(1) would have no meaning. In construing statutes, the courts "presume that the Legislature does not enact laws without a reason" and "will not be charged with having done a meaningless act." In re J.L.H., 488 S.W.2d 689, 696 (Mo. App. W.D. 2016), citing Stiers v. Director of Revenue, 477 S.W.3d 611, 617 (Mo. en banc 2016) (citations omitted).

The fact that the phrase "within the state" is not present in the last antecedent of Section 386.250(1) should not compel a different conclusion. While the "last antecedent rule" of construction focuses on a statute's grammatical construction to ascertain its meaning, courts often disregard this rule in favor of a "common sense interpretation." Blue Cross & Blue Shield of Kansas City, Inc. v. Nixon, 26 S.W.3d 218, 233-34 (Mo. App. W.D. en banc 2000). Noting that "the rule is not inflexible and its use depends

upon many considerations," the Court of Appeals in Blue Cross rejected its application to the dissolution provision of articles of incorporation, holding that "the clear intent of the provision" must be honored. Id. at 234. Accord Norberg v. Montgomery, 173 S.W.2d 387, 390 (Mo. en banc 1943); Elliott v. James Patrick Hauling, Inc., 490 S.W.2d 284, 287 (Mo. App. St. L. 1973). Similarly, it would defy common sense to limit the authority of the PSC to the manufacture of electricity "within the state," but allow the Commission to require a CCN under Section 393.170.1 for electric plants that manufacture electricity outside Missouri.

Construing the statutory language to apply to electric plants beyond Missouri's borders is also contrary to the "within this state" language found in Section 386.250(2)-(4) which applies to telecommunications, water, and sewer public utilities. The Commission's jurisdiction over each of these three classes of public utilities is expressly limited to their facilities, operations, land, property, and services that exist or are rendered within Missouri.

The rules for interpreting Subsection (1) regarding electric and gas public utilities with Subsections (2) through (4) of Section 386.250 have been set down by this Court. "The provisions of legislative acts are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." R.M.A. v. Blue Springs R-IV School Dist., 568 S.W.3d 420, 429 (Mo. en banc 2019) (citations omitted). To determine "the intent and meaning of statutory language, the words must be considered in context" and sections of a statute relating to the same matter "must be considered in order to arrive at the true meaning and scope of the words." Id. See

Executive Board v. Missouri Baptist University, 569 S.W.3d 1, 18 (Mo. App. W.D. 2019).

Reading the statute to limit the Commission's jurisdiction to electric plants within Missouri is also consistent with the Commission's historical exercise of its jurisdiction, and other statutes governing its authority. This limitation is reinforced in Section 386.030 which states: "Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except as permitted under the provisions of the Constitution of the United States or the acts of Congress [emphasis added]." The General Assembly's intent to uphold the language of these statutes is made all the more clear by its 2007 amendment to Section 386.210. That amendment declared the Commission may enter into agreements or contracts with the public utility commissions of other states only if they are "in the interest of the state of Missouri and the citizens thereof, for the purpose of carrying out its duties pursuant to section 386.250 as limited and supplemented by section 386.030 …." See § 386.210(6) [emphasis added].

Throughout the Commission's history, it has acted in accord with these geographical and jurisdictional limitations. For example, KCP&L did not apply for a CCN before the construction of the 100 MW Spearville Wind Energy Project in western Kansas. This facility was placed in service in September 2006, and was included in KCP&L's rate base with the Commission Staff's concurrence in KCP&L's 2006 general rate case. See Direct Testimony of David W. Elliott at 3-12 In re Kansas City Power &

Light Co., No. ER-2006-0314 (Aug. 7, 2006) (A. 205-15); True-Up Direct Testimony of David W. Elliott at 1-3, In re Kansas City Power & Light Co., No. ER-2006-0314 (Nov. 7, 2006) (A. 216-18); Staff Cost of Service Report at 4, 104, 137, In re Kansas City Power & Light Co., No. ER-2009-0089 (Feb. 11, 2009) (A. 223-27).[10]

Similarly, GMO did not apply for a CCN before acquiring or applying for rate base treatment regarding the Crossroads Energy Center which is located in northwestern Mississippi. The PSC agreed that GMO's decision to add the electric facility to its generation portfolio was prudent and valued the plant for purposes of GMO's rate base. See Report & Order at 98-100, In re Application of KCP&L Greater Mo. Operations Co. for Approval to Make Certain Changes in its Charges for Elec. Serv., No. ER-2010-0356 (Mo. P.S.C. 2011) (A.63-65). This decision was affirmed in State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013).

These recent precedents are consistent with the Commission's long-held view that its authority does not extend beyond Missouri's borders. Indeed, the Commission recognized such limitations as early as 1914. In re Retail Merchants' Ass'n v. Chicago, Burlington & Quincy R.R., 1 Mo. P.S.C. 278, 282 (1914) ("[W]e cannot consider" a proposed plan for service in Missouri and Iowa "for the very sufficient reason that our jurisdiction does not extend beyond the limits of this State.") (A. 241).

[10] Pursuant to Rule 84.04(h), these records are included in the Appendix at pages A. 200-12, A. 213–18, and A. 219-27 as other pertinent authorities which the Appellants cited to the Commission during the rulemaking. See L.F. 469. They can be accessed through the PSC's public Electronic Filing Information System at http://www.psc.mo.gov.

When KCP&L proposed to build its Wolf Creek nuclear power plant in Coffey County, Kansas, the Commission reviewed "whether it is in the public interest that such plant be built outside the service area of Kansas City Power & Light Company." See Order and Notice of Hearing at 2, In re Kansas City Power & Light Co. Proposed Nuclear Power Plant, No. 17,754 (Mo. P.S.C. 1973) (A. 230). Noting that "many questions about the out-state location have been raised by Commission staff which need to be answered," the Commission ordered KCP&L to respond, as well as to present evidence on ten detailed factors regarding its proposal to construct the nuclear plant in Kansas. Id. at 2-3 (A. 230–31).

After careful consideration of "the record made by Kansas City Power & Light Company and the evidence adduced thereon," as well as "the absence of any evidence presented by the Staff" or other parties, the Commission terminated the investigation into KCP&L's plan to build a plant in Kansas to serve customers in both Missouri and Kansas, and dismissed the case. See Report and Order, In re Kansas City Power & Light Co. Proposed Nuclear Power Plant, No. 17,754 (Mo. P.S.C. 1974) (A. 233–36). In neither order regarding the construction of a nuclear power plant in Kansas did the Commission assert that KCP&L needed a CCN.

Perhaps more notably, when the Commission issued its order twelve years later that allowed the Wolf Creek plant into rate base, it no made mention of the need for a CCN while exhaustively examining a multitude of other legal principles relevant to the construction of the Kansas facility. See Report & Order, In re Kansas City Power & Light Co., 1986 WL 1301283 at **50–149 (Mo. P.S.C. 1986).

Similarly, when Missouri Public Service Company, one of GMO's corporate predecessors, sought to recover costs related to the operation of the Jeffrey Energy Center, located near St. Marys, Kansas, the Commission never discussed the applicability of a CCN. See Report & Order, In re Missouri Pub. Serv. Co., 1982 Mo. PSC LEXIS 136 *47-51 (1982).

The Commission has accorded similar treatment to other Missouri utilities' out-of-state state facilities, such as Empire District Electric Company's Riverton Unit 12 in Kansas[11] and its ownership share of the Plum Point generating station in Arkansas,[12] as well as to Ameren's ownership of generating units in Illinois.[13]

These cases demonstrate that for decades, if not longer, the Commission has regulated electric utilities consistent with the principle that Missouri law does not require CCNs for out-of-state plants or operations. The Commission's effort to depart from this well-established view of the law exposes the false premise on which the Rule rests. See Missouri PSC v. Union Elec. Co., 552 S.W.3d 532, 540 (Mo. en banc 2018) (No deference given to PSC where the interpretation of a rule is a legal issue).

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[11] Order Approving Stipulation & Agreement at 2-3, In re Empire Dist. Elec. Co. Request for Auth. to Implement a Gen'l Rate Increase, No. ER-2016-0023 (Mo. P.S.C. 2016) (A. 252-53).

[12] Order Approving Unanimous Stipulation at 2, In re Empire Dist. Elec. Co. for Auth. To File Tariff Increasing Rates, No. ER-2010-0130 (Mo. P.S.C. 2010) (A. 247).

[13] Report & Order at 59-67, In re Union Elec. Co. Tariffs Increasing Rates for Elec. Serv., No. ER-2007-0002 (Mo. P.S.C. 2007) (A. 261-69), aff'd, State ex rel. Pub. Counsel v. PSC, 274 S.W.3d 569, 577-80 (Mo. App. W.D. 2009) (no reference to CCN authority in Commission's discussion of utility's purchase, ownership and operation of electric generating units in Illinois).

IV. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045 because the Fiscal Note violates Sections 536.205 and 536.215 in that its estimate of compliance costs presumes the Rule will only be in effect for three years, even though the Rule contains no "sunset" clause terminating its requirements, and in that the estimate is based on the speculative presumption that the 10% rate base threshold will never be reached.

The Commission issued a revised Fiscal Note in which it estimated that the aggregate cost of compliance with the Rule would range from $0 to $100,000. (L.F. 571). Because Missouri law requires all rules to be promulgated with a Fiscal Note that "shall contain a detailed estimated cost of compliance" that is "reasonably accurate" under Section 536.200.1, the absence of any rational basis to support that estimate renders the Fiscal Note defective under Sections 536.205.1(3) and 536.215, and constitutes an independent reason to invalidate the Rule which shall be "void and of no force and effect." See § 536.205.2.

A. In the Fiscal Note the PSC incorrectly estimates compliance costs to be between $0 to $100,000 for affected private entities by assuming the rule will be in effect for three years when, in fact, the rule has no sunset provision.

The primary defect in the Fiscal Note's calculation is its failure to account for the aggregate costs of compliance with the Rule. The $0 to $100,000 cost estimate in the Fiscal Note is premised on the Rule's "estimated life" of three years. (L.F. 571).

However, the Rule contains no limitation or "sunset" clause that terminates its requirements. Id.

Instead, the Rule's introductory "Purpose" statement advises that the Rule "outlines the requirements for applications … pursuant to section 393.170.1 and 393.170.2, RSMo, requesting that the commission grant a certificate of convenience and necessity …." (L.F. 568). There is no statement regarding how long the requirements will be in effect.

The prior CCN rule, 4 CSR 240-3.105, was promulgated in 2000, with a revision that became effective in 2003. (A. 36). It contained a similar "Purpose" statement, advising that applications "requesting the commission grant a certificate of convenience and necessity must meet the requirements of this rule." (A. 36). This prior CCN rule also contained no reference to its duration. Given their similar purpose, and the fact that the prior rule lasted not three years, but 18 years, the only logical conclusion is that the new Rule is capable of lasting indefinitely, or at least a substantial period of time and far longer than the three-year period presumed by the Commission in the Fiscal Note. Consequently, one of the Fiscal Note's "Assumptions" (L.F. 458) that the Rule will be in effect for an estimated three years has no basis and violates the requirement of Section 536.205.1(3) that compliance costs be estimated "in the aggregate."

Where a proposed rule "requires periodic compliance expenditures," such as the Rule's requirement that an electric utility obtain a CCN whenever it wishes to operate or construct an asset under Section (2)(A), "the agency should attempt to estimate the cost of compliance in the aggregate for the foreseeable future." Missouri Hosp. Ass'n v. Air

Conservation Comm'n, 874 S.W.2d 380, 390 (Mo. App. W.D. 1994). "These requirements are not trivial. They are necessary to ensure that any agency proposing a rule adequately considers the private and public entities it will affect." Id. at 391. This includes the agency "think[ing] about the economic consequences of its rulemaking." Id. (citation omitted).

Because the Fiscal Note only estimates the costs for an arbitrary and insufficient number of years, there is no reasonable way to calculate the "aggregate" costs of compliance "for the foreseeable future" as required by Section 536.205.2. Missouri strictly enforces this statute and its public entity counterpart in Section 536.200.3, declaring that they "mean exactly what they say: rules adopted in violation of their mandates are void and of no force or effect." Id. at 392. The Rule is therefore invalid and void. See Missouri Hosp. Ass'n v. Missouri Dep't of Consumer Affairs, 731 S.W. 262, 263 (Mo. App. W.D. 1987).

B. The Fiscal Note fails to consider the compliance costs of electric utilities who will likely operate or construct plants outside Missouri.

The Fiscal Note is also defective because it fails to consider which and how many electric utilities will be affected by the Rule. Section III of the Fiscal Note ties the "$0-$100,000" range to the fact that "two affiliated investor-owned electric utilities indicated the requirement to obtain a CCN for an asset outside Missouri would cause them to incur significant litigation expense." (L.F. 571). The reference is clearly to KCP&L and GMO, as is the Fiscal Note's statement that the impact of Section (1)(A)1 on the Companies is between "zero and $100,000."

Limiting this amount based on the assumed litigation costs of two utilities falls woefully short of the potential entities the Rule may ultimately affect. This limitation means the aggregate compliance costs are not reasonably calculated.

For example, KCP&L has retail service territory in Kansas and may choose in the future to construct or operate a generating plant in that state. Under the Rule such construction or operation would require KCP&L to apply for a CCN from the Commission. Further, on June 4, 2018 the Appellants' former holding company Great Plains Energy Incorporated merged with Westar Energy, Inc., ("Westar"), a Kansas regulated public utility, to form a new holding company, now known as Evergy, Inc. ("Evergy"). See Notice of Closing, In re Application of Great Plains Energy Inc. for Approval of its Merger with Westar Energy, Inc., No. EM-2018-0012 (Mo. P.S.C. June 5, 2018). Given that KCP&L, GMO, and Westar are now public utility subsidiaries of Evergy, it is even more likely KCP&L and GMO will work with their affiliate Westar to construct or operate assets in Kansas.

Other Missouri electric utilities are affected as well. The Empire District Electric Company ("Empire") and Ameren Missouri currently own or operate generating plants and related facilities in Arkansas, Illinois, Iowa, and Kansas, as well as in Missouri. See IRP Executive Summary at 7-9, 19-20, In re Empire Dist. Elec. Co. 2016 Triennial Compliance Filing Pursuant to 4 CSR 240-22, No. EO-2016-0223 (April 2016) (A. 272-277); State ex rel. Public Counsel v. PSC, 274 S.W.3d 569, 577-80 (Mo. App. W.D. 2009). Empire has already incurred the cost of having to obtain a Missouri CCN for a wind power project located in Neosho County, Kansas. See Report & Order at 4-11, 53,

In re Application of Empire Dist. Elec. Co. for Certificates of Convenience and Necessity related to Wind Generation Facilities, No. EA-2019-0010 (Mo. P.S.C. June 19, 2019) (A. 278-287). Ameren's current Integrated Resource Plan contemplates additional wind resources that may be built outside of Missouri. See Annual Update Summary Report, In re Ameren Missouri's 2017 Integrated Resource Plan Annual Update Report, No. EO-2019-0314 (Apr. 12, 2019), Exec. Summary at 5 ("Ameren Missouri continues negotiations for a third wind project located in either Missouri or surrounding states … [emphasis added].") (A. 298).

The number of utilities with out-of-state interests that are left unconsidered by the Fiscal Note renders the maximum estimate of $100,000, which relied on only two utilities, insufficient. However, even if the Commission is found to be correct in its assumption that only two entities may be affected, an estimated limit of $100,000 in litigation expenses has no basis given the history of contested CCN proceedings which have taken place over the past ten to fifteen years.[14]

Moreover, the $100,000 threshold is made with the assumption that the Rule's 10% threshold for what qualifies as "construction" under Section (1)(B)2 will never be reached. It bases this assumption on an unfounded assertion that with "this [10%] limitation, only one project over the past several years would have required a CCN." (L.F. 571). In fact, within the past nine years environmental retrofit projects alone have

[14] Grain Belt Express Clean Line LLC v. PSC, 555 S.W.3d 469 (Mo. en banc 2018); In re Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. App. W.D. 2017); State ex rel. Cass County v. PSC, 259 S.W.3d 544 (Mo. App. W.D. 2008); StopAquila.org v. Aquila, Inc., 180 S.W.3d 24 (Mo. App. W.D. 2005).

added more than 10% to the rate bases of the Companies on three occasions: (1) the environmental retrofits to Units 1 and 2 of the La Cygne Generating Station that were placed in service in 2015 for KCP&L; (2) the environmental retrofit to Unit 1 at the Iatan Generating Station that was placed in service in 2009 for KCP&L; and (3) the Iatan 1 environmental retrofit that was also placed in service in 2009 for GMO's SJLP division. The La Cygne retrofit on its own was projected to cost $1.23 billion. (A. 73). Despite these facts, the Fiscal Note concludes that with the 10% limitation, "the fiscal impact of this provision is deemed minimal," and so it provides no cost estimate whatsoever. The failure of the Commission to consider the costs of these retrofit projects alone demonstrates its failure to estimate the Rule's compliance costs. The revised Fiscal Note therefore fails to "estimate in the aggregate as to the cost of compliance" in violation of Section 536.205.1(3), and the Rule is invalid.

CONCLUSION

For the above reasons, the Commission's Order of Rulemaking must be reversed and the Rule voided.

Respectfully submitted,

/s/ Karl Zobrist
Karl Zobrist, MBN 28325
Cody Wood, MBN 70424
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Phone: (816) 460-2400
Fax: (816) 531-7545
karl.zobrist@dentons.com
cody.n.wood@dentons.com

Robert J. Hack, MBN 36496
Roger W. Steiner, MBN 39586
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2791
rob.hack@kcpl.com
roger.steiner@kcpl.com

Attorneys for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 103.08, service of this brief is being made on this 9th day of December, 2019 through the electronic filing system. All parties are represented, and all attorneys of record are registered users.

/s/ Karl Zobrist
Attorney for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company

CERTIFICATE PURSUANT TO RULE 84.06(c)

I hereby certify that the foregoing Brief of Appellants Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the brief (excepting therefrom the cover, certificate of service, this certificate, the signature block, the table of appendices, and the appendix), contains **[10,791]** words.

/s/ Karl Zobrist
Karl Zobrist, MBN 28325

Attorney for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company