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 REPLY BRIEF OF APPELLANTS
KANSAS CITY POWER & LIGHT COMPANY AND
<u>KCP&L GREATER MISSOURI OPERATIONS COMPANY</u>

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Appellants Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, "Companies" or "Appellants")[1] state the following for their Substitute Reply Brief to address the Substitute Brief of Respondent Missouri Public Service Commission ("Commission" or "PSC") and the Brief of Respondent Dogwood Energy, LLC ("Dogwood")[2] filed in the Court of Appeals:

REPLY STATEMENT OF FACTS

The Commission's Statement of Facts is generally accurate regarding the history of the Final Order of Rulemaking that adopted the new certificate of convenience and necessity ("CCN") Rule at 20 CSR 4240-20.045 ("Rule").[3] However, the Commission errs in asserting that the new Rule "clarifies when CCN applications must be filed" in accordance with Section 393.170.1[4] and Section 393.170.2. See PSC Brief at 6. A comparison of the Rule with the language of Section 393.170 shows that the Rule adds words that do not appear in the statute. For example, the Rule requires that an electric utility obtain a CCN prior to the "operation" of an "asset" both inside and outside Missouri. (L.F. 454-55).

Dogwood's Statement of Facts contains an improper argument that GMO's Crossroads plant in Mississippi and the Riverton Unit 12 of Empire District Electric

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[1] As stated in Appellants' Substitute Brief at footnote 2, the Companies have changed their names to Evergy Metro, Inc. and Evergy Missouri West, Inc. Appellants will continue to refer to themselves by the names used in the proceedings below.
[2] Dogwood advised the Court on January 6, 2020 that it would rely on its brief filed at the Court of Appeals.
[3] The Rule was promulgated at 4 CSR 240-20.045, but is currently found in Title 20 as the PSC is now part of the Department of Commerce and Insurance.
[4] All statutory references are to the Missouri Revised Statutes (2016), as amended.

Company in Kansas "had evaded any preapproval process due to lack of clarity in the Commission's rules at the time." See Dogwood Brief at 8. However, the record shows that the PSC exercised its proper statutory authority when these plants were evaluated and placed into rate base. See L.F. 380.

When Dogwood raised issues in 2011 regarding the Crossroads plant, the Commission found, "[c]ontrary to Dogwood's arguments," the plant was fueled by cheaper natural gas than the Dogwood plant in Missouri, and that Crossroads' transmission service was "reliable and sufficient." (A.62)[5]. After assessing all the facts, the PSC concluded that GMO's determination to add Crossroads to its generation fleet reflected "prudent and reasonable decisions." (A.64).

ARGUMENT

Introduction

Dogwood's 7-page "Introduction" seeks to leverage Aquila's 2005 failure to obtain a CCN before constructing a plant in Cass County, and the special legislation required to avoid dismantling the facility, to convince the Court to affirm the Commission's re-write of Section 393.170.1 via the Rule. Dogwood argues that the Rule is needed to prevent similar ventures and to avoid major rate case disallowances. See Dogwood Brief at 9-15. However, no such calamity has occurred. Public utilities understand that if they wish to

[5] This Reply Brief contains a supplement to the Substitute Appendix filed by Appellants on December 9, 2019 that spanned pages A.1 to A.299, pursuant to Rule 84.04(h). The appendix filed with this Reply continues the numbering of the Substitute Appendix beginning at A.300. Accordingly, this Reply Brief refers to materials cited to in pages A.1 through A.344.

construct an electric plant within their service territory, they must obtain prior PSC approval, and they have done so. See United for Missouri v. PSC, 515 S.W.3d 754, 756 (Mo. App. W.D. 2016) (CCN granted to GMO to build solar electrical generation facility in rural Jackson County).

The issues decided in StopAquila.org v. Aquila, Inc., 180 S.W.3d 24, 39-41 (Mo. App. W.D. 2005) ("Aquila"), have no bearing on whether Section 393.170 allows the Commission to require that a public utility obtain a CCN for the "operation of an asset" when the statute doesn't contain those words. Dogwood claims that that the statute "requires separate approval of any regulated utility production (generation) facilities, regardless of location …." See Dogwood Brief at 12. To the contrary, the issue in Aquila was whether an electric utility needed "specific authority" from the PSC under Section 393.170.1 before building an electric plant in the utility's service territory that the Commission had authorized under Section 393.170.2. Aquila, 180 S.W.3d at 37, 40.

The PSC has taken these duties seriously, requiring applicants to justify proposed new generating plants, transmission lines and other infrastructure on the basis of (1) need, (2) economic feasibility, (3) financial ability, (4) operational qualifications, and (5) public interest ("Tartan factors"). Missouri Landowners Alliance v. PSC, 2019 WL 6869467 at *2, *6 (Mo. App. E.D., Dec. 17, 2019), citing In re Tartan Energy Co., 1994 WL 76882 (Mo. P.S.C. 1994); In re Intercon Gas, Inc., 1991 WL 639125 at *5 (Mo. P.S.C. 1991), aff'd, State ex rel. Intercon Gas, Inc. v. PSC, 848 S.W.2d 593, 597-99 (Mo. App. W.D. 1993).

I. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(2)(A)3 because Section 393.170.2 does not require a public utility to obtain a CCN prior to the "operation of an asset."

Section 393.170.2 requires an electric utility to obtain a CCN from the Commission prior to exercising a franchise right to provide service in a new territory. Although the PSC recognizes this, it insists that Section 393.170.2 gives it the power to require a novel "operating" CCN that would apply to "assets" located both in and outside of Missouri. See PSC Brief at 10–11; Rule §§ (1)(A)1 & (3)(B) (L.F. 454-55). However, serving a new territory is not the same thing as "operating" an asset. No language in Section 393.170 requires a CCN for the "operation" of an "asset" as set forth in the Rule's Section (2)(A)3.

The Commission reasons that before an electric utility operates a plant to provide service to customers – "regardless of where those assets are located" – a CCN is required under Section 393.170.2. See PSC Brief at 11. It makes this brazen claim while citing Section 386.250(1) which explicitly limits the Commission's jurisdiction to "the manufacture, sale or distribution" of electricity "within the state." Id. Regardless of the PSC's claim that it "has an interest in" these issues, it cannot deploy the police power of the state to address such matters where the General Assembly has not authorized it. See Turner v. School Dist., 318 S.W.3d 660, 668 (Mo. en banc 2010); State ex rel. Gulf Transport Co. v. PSC, 658 S.W.2d 448, 455 (Mo. App. W.D. 1983) (policy "that lacks statutory support" is "inapplicable and void").

Moreover, the Commission cannot assert under Section 386.250(6) that it has authority "to make reasonable rules governing applications for CCNs" as a justification for its overreach into matters of utility management prerogative. See PSC Brief at 11. The PSC's ability to issue a CCN when "necessary or convenient for the public service" describes the assessment the Commission must make in approving an electric utility's request for an area certificate. See Section 393.170.3. However, Section 393.170.2 only applies to the ability of a utility to exercise its right under a franchise and to provide service in a particular territory. See Grain Belt Express Clean Line, LLC v. PSC, 555 S.W.3d 469 (Mo. en banc 2018); State ex rel. Harline v. PSC, 343 S.W.2d 177, 182 (Mo. App. K.C. 1960) ("Harline"). The PSC cannot expand the scope of activities requiring a CCN without statutory authority.

The Commission never responded to the Companies' position that the Rule's overreach contradicts the purpose of Section 393.170. See Appellants' Brief at 22–25. Requiring an electric utility to obtain a CCN prior to "operating" any electric plant or related gas transmission line commandeers a utility's authority to manage certain "assets" that have never before required a CCN. The Commission's jurisdiction and authority to supervise utilities under Section 386.250 does not allow it to dictate the manner in which a company conducts its business. City of O'Fallon v. Union Elec. Co., 462 S.W.3d 438, 443-44 (Mo. App. W.D. 2015); State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); Harline, 343 S.W.2d at 181.

Furthermore, the PSC's reference to assets that would be included in a utility's rate base "regardless of where such assets are located" (PSC Brief at 11) has no relevance to Section 393.170. CCNs must be granted and acted upon well before a utility files tariffs that propose rates, including the cost of those assets to be charged under Sections

393.140(11) and 393.150. The Commission also belittles the role of its existing and lengthy public Integrated Resource Planning ("IRP") process, arguing that it is not binding and thus a CCN is necessary to "protect ratepayers." Id. at 12. However, the PSC's argument is undercut by its IRP rules which state, to the contrary, that they have functioned "to provide the public with energy services that are safe, reliable, and efficient." See 20 CSR 4240-22.010(2) ("Electric Utility Resource Planning") (A.301).

Although the Commission asserts that a CCN is necessary to protect customers, it is well armed to address these concerns through the comprehensive rate case process. The PSC recently demonstrated this when it evaluated the prudence of GMO's adding the Mississippi-based Crossroads plant to rate base. While the Commission concluded that adding the plant was prudent, it valued Crossroads at less than 60 percent of what GMO proposed to put in rate base and prohibited it from recovering in rates certain annual transmission costs. See Report & Order at 77-85, In re KCP&L Greater Mo. Operations Co., No. ER-2010-0356 (Mo. P.S.C. 2011) (A.42-50), aff'd, State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013).

Dogwood also confuses rate case issues with the purpose of the CCN statute, which is to ensure that the construction of a plant and the exercise of franchises granted by municipal authorities are "necessary or convenient for the public service" under Section 393.170.3.[6] Once these approvals to build a plant or serve a territory are granted, the utility

[6] Dogwood asserts that if the Rule's "operating" CCN is not upheld, the PSC "is not in a tenable position to balance the interests of ratepayers and utility shareholders" in a rate case and that "untenable choices … would be presented." See Dogwood Brief at 15, 18.

proceeds to construction and to serve customers. Subsequently, when it seeks to recover the costs of construction and of service, the utility files tariffs with new rates reflecting those costs, and the PSC judges whether the utility's decision to construct was prudent and the associated costs were prudently incurred. See State ex rel. Public Counsel v. PSC, 274 S.W.3d 569, 577-79 (Mo. App. W.D. 2009) (upheld PSC finding that Ameren's purchase of Illinois plants from corporate affiliate was prudent and costs properly included in rates). Such issues of utility decisional and execution prudence are determined by the Commission in rate cases, but not in CCN proceedings which are governed by the principles of convenience and necessity in Section 393.170, and assessed under the five Tartan factors, described above.

Recognizing the weakness of its arguments, Dogwood's final plea is to urge that the Rule not be voided if the Court finds that "the Commission did not make this particular part of the rule [Rule (2)(A)3] sufficiently clear." However, lack of clarity is not the problem. It is the Rule's lack of grounding in Section 393.170 that invalidates it.

II. The Commission erred in promulgating the Rule at 20 CSR 4240-20.045(1)(B)1-2 and (2)(A)2 because Section 393.170.1 does not require an electric utility to obtain a CCN prior to the improvement or retrofit of an electric plant that already holds a CCN.

The Commission's Rule misconstrues the purpose of Section 393.170.1 regarding the need to obtain "permission and approval" before "construction." See PSC Brief at 13.

Since its creation in 1913, the Commission has never expressed similar concerns until it was forced to justify the Rule.

The Rule's requirement that an electric utility obtain a CCN prior to the repair, retrofit, or rebuild of an asset is not a means of regulating the construction of an electric plant that "can go on indefinitely." Id. Instead, Rule (1)(B)1-2 and (2)(A)2 seek to reach entirely new categories of how an electric utility chooses to manage its plants. Retrofitting, repairing, or rebuilding an electric plant is not the same thing as efforts to "begin construction" of one under Section 393.170.1.

GMO's application for a solar generation facility near four existing gas-fired combustion turbines at its 300-acre Greenwood Energy Center in Jackson County proves this point. That CCN application was for an entirely new and separate electric plant located on twelve acres north of the combustion turbines. In re KCP&L Greater Mo. Operations Co., No. EA-2015-0256, 2016 WL 946579 at *2 (Mo. P.S.C. 2016) (A.326-A.327), aff'd, United for Missouri v. PSC, 515 S.W.3d 754, 756-57 (Mo. App. W.D. 2016). Requiring a CCN prior to the construction of a new separate plant does not mean that an existing plant operating with a previously granted CCN now requires a new one if it is to be repaired, retrofitted, or rebuilt.

The Commission draws an imaginary line between Harline and Aquila to argue that the Rule has struck a proper balance "between the mere extension of a transmission line required for service" and "new plant construction." See PSC Brief at 15. While the Commission may think the Rule reflects a hybrid of these two decisions, there is no statutory authority to support its argument.

The requirement of Section 393.170.1 is triggered when a utility wishes to "begin construction" of an electric plant. No language in Section 393.170 encompasses the scope of activities identified in Section (1)(B)1-2 and (2)(A)2, especially with regard to the "improvement, retrofit or rebuild of an asset." Dogwood also ignores the "begin construction" language in Section 393.170.1. Without citation to any PSC or Missouri appellate decision, Dogwood opines that environmental upgrades or plant fuel-source conversions "deserve (require) as much scrutiny as the original plant construction …." See Dogwood Brief at 19.

However, the Commission cannot use the distinctions between area and line certificates to create and mandate another certificate that is not required by Section 393.170. Aquila simply clarified that Harline did not change the requirement of Section 393.170.1 that an electric utility must obtain a line CCN if it seeks to build a new plant, even if it would be located in territory for which it holds an area CCN. Aquila, 180 S.W.3d at 36–37. It never addressed whether a utility must obtain a CCN to improve, repair or retrofit a plant, nor did it address the propriety of building plants where a utility held a multi-unit CCN. Although the Commission's "ongoing interest in ensuring that electric plant construction … is being undertaken for the benefit of the public" is understandable (PSC Brief at 17), it does not create regulatory authority where the statute provides none. Subsection 393.170.1 applies only to new plant construction and does not justify Rule (1)(B)1-2 and (2)(A)2.

Moreover, the Commission's concerns about whether an electric utility's improvements, retrofits, or rebuilds will burden the public interest are unfounded. The Integrated Resource Planning process provides a significant disincentive for a utility to make imprudent judgments. For example, KCP&L went through this process as it considered whether to make $1.23 billion in environmental upgrades to the La Cygne Generating Station in Kansas. In a subsequent rate case filed to include upgrade costs in rates, the PSC concluded that KCP&L's decision was prudent and permitted the costs to be recovered. In re Kansas City Power & Light Co., Report & Order at 59–64, No. ER-2014-0370 (Mo. P.S.C. 2015) (A.72-77).

Unlike Dogwood, a merchant company not regulated by the Commission, KCP&L and GMO are subject to the comprehensive Integrated Resource Planning rules which require them to develop a strategic resource plan with at least a 20-year planning horizon. See 20 CSR 4240-22.040(1) (A.307). This includes plans for "life extension and refurbishment at existing generating plants" and "enhancement of the emissions controls at existing or new generating plants." Id. The analysis of these and other issues extends to consideration of "major refurbishment, life extension, upgrading, or retrofitting of existing generating facilities," as well as cost estimates "for new facilities or for existing facilities that are being upgraded, refurbished, or rehabilitated; …." Id., § 22.040(3)(A)3, (5)(C) (A.308). These regulations have been in effect since 1992, and the Commission has never construed Section 393.170 to require additional CCNs when a utility retrofits or upgrades a plant that already holds a CCN.

Dogwood also argues that the Court should incorporate definitions from the Prevailing Wage Act where "construction" is defined to include "alteration, painting and decorating" under Section 290.210(2). Such broad language intended to prevent the payment of substandard wages has no relevance to obtaining PSC approval before a utility "shall begin construction" of a project that will benefit the public under Section 393.170.1.

Similarly, Dogwood's reliance on cases construing the terms of an insurance policy against the insurer are not relevant to whether a rule exceeds the authority of the statute under which it is promulgated. See Dogwood Brief at 19-20.

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 outside Missouri in that Section 386.250 limits the PSC's jurisdiction to "within the state."

The Commission has no authority to approve an electric utility's construction or operation of power plants outside Missouri, given the explicit language of Section 386.250(1). Although the PSC quotes this provision (PSC Brief at 19), it does not appreciate its restrictive language. The statute declares that the Commission's "jurisdiction, supervision, powers and duties … shall extend" to "the manufacture" of electricity "within the state," which applies to "electric plants, and to persons or corporations owning, leasing, operating or controlling the same; …." Before a plant is built, the PSC's jurisdiction over whether to authorize that construction under Section 393.170.1 extends only to plants constructed in Missouri.

The Commission's Brief offers a tortured reading of Section 386.250(1) and its jurisdictional limitation. The PSC first appears to concede that the statute restricts its jurisdiction to "the manufacture, sale or distribution" of electricity "within the state, and to persons or corporations, owning, leasing, operating or controlling the same; …." (PSC Brief at 19-20). But, it then argues that the provision following the semi-colon eliminates the "within the state" requirement and "gives the Commission authority over electric plants" because "[i]t does not contain the phrase 'within the state.'" Id. at 21. And, in a remarkable sleight of hand, the PSC tells the Court to ignore the "within the state" language of Section 386.250(1) because there "is nothing in the plain language of Section 393.170.1 that limits" its authority to a "plant that is constructed in Missouri." Id. at 20.

In order to manufacture electricity, it is obvious that an electric plant is necessary. Section 386.250(1) states that the jurisdiction of the PSC only extends to the "manufacture" of electricity "within the state" and "to persons or corporations … operating … the same; …." This must mean that the Commission's authority ***only*** applies to a corporation "operating" a facility that "manufacture[s] … electricity" "within the state" of Missouri. Consequently, the jurisdiction of the PSC cannot extend to electric plants that are not "within the state" when their sole purpose is to manufacture electricity.

To the extent that a utility with a non-Missouri plant engages in the "sale or distribution … of electricity" to its Missouri customers, the Commission may regulate such activities and determine in a rate case what customers will be charged because the sale and distribution of electricity will occur "within the state."

This sensible reading of Section 386.250(1) is consistent with Section 386.250(2)-(4) and its "within this state" language that applies to telecommunications, water, and sewer companies. The PSC'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.

Where the Legislature has not granted authority to the Commission, the courts have constrained its reach for new powers. In a procedural dispute over whether the PSC had authority to intervene in proceedings at the Federal Energy Regulatory Commission ("FERC"), this Court stood firm. "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 "is a creature of statute" whose "powers are limited to those conferred by … statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." Id. Rejecting the Commission's arguments that FERC intervention was implied by statutes allowing it to "confer" with federal authorities, and participate in "joint investigations" and "joint hearings" with federal agencies, this Court held that the "PSC has no authority to intervene in matters pending" at FERC. Id. at 501.

The Commission here argues that because it can regulate the rates charged within Missouri, it can regulate activity occurring outside Missouri because it might in the future affect those rates. See PSC Brief at 21. This leap in logic is not supported by the statutes. Section 393.170.1 contains no language regarding construction of electric plants in other states, and the Rule fails to recognize the restriction in Section 386.250(1) which limits the Commission's jurisdiction to activity occurring "within the state." Once a public utility seeks to charge for non-Missouri facilities and proposes to place them in rate base, a different situation arises.

When assets in Missouri or elsewhere become subject to the Commission's ratemaking authority, the PSC has not hesitated to judge the prudence of investments and to disallow costs found to be excessive. See Report & Order at 98-100, In re KCP&L Greater Mo. Operations Co., No. ER-2010-0356 (Mo. P.S.C. 2011) (A.63-65), aff'd, State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013) (investment in Mississippi-based Crossroads plant investment found prudent but valued at less than utility requested; certain transmission costs disallowed).

Clearly, the Commission's rate case decisions were not "toothless," as the Commission alleges with its citation to State ex rel. Cass County v. PSC, 259 S.W.3d 544, 549-50 (Mo. App. W.D. 2008). Moreover, there is nothing in Cass County remotely relevant to the PSC's desire to authorize CCNs for non-Missouri power plants, given the case's focus on "statewide" regulation. Id.; PSC Brief at 21.

The Commission also seeks to formulate two hypotheticals to argue that "the Legislature would not have intended to create a gap between federal and state regulation." Id. at 22. While the PSC has cited no decision in which it has ever decried the existence of such a "gap" in the past hundred years of its existence, it offers two hypotheticals that fail to support its effort to supplant Section 393.170.1 with the Rule.

The Commission's first hypothetical postulates that if a utility were to build a plant in Kansas that would serve only its Missouri customers, the Commission should have authority to issue that plant a CCN. See PSC Brief at 28. However, two nearly identical situations have occurred without protest by the Commission, showing there is no "gap" under this scenario. First, as noted above in the Crossroads case, the Commission exercised its ability to regulate an out-of-state plant serving Missouri customers when it valued the plant at less than 60 percent of GMO's rate base request and disallowed $406,000 of annual

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transmission costs. State ex rel. KCP&L Greater Mo. Operations Co. v. PSC, 408 S.W.3d 153, 162-63 (Mo. App. W.D. 2013). The second example involves GMO's ownership of a portion of the Jeffrey Energy Center near St. Marys, Kansas. When a GMO corporate predecessor proposed to add fuel inventories at Jeffrey to rate base, the Commission agreed and never even discussed whether a CCN was required. In re Mo. Pub. Serv. Co., 1982 Mo. PSC LEXIS 136 at *47-51 (1982).

The second hypothetical assumes that a utility providing service in both Missouri and Kansas constructs a plant in Kansas, but does not obtain a CCN to construct the plant. KCP&L operates the Wolf Creek Nuclear Plant near Burlington, Kansas, as well as the La Cygne Generating Station near La Cygne, Kansas. See Appellants' Brief at 29-30, 35-36. None of these facilities holds a CCN under Section 393.170.1. They were placed in rate base by the Commission years ago and continue to serve the public. The Commission's hypotheticals present no real issues, and do not support its claim that the PSC needs a CCN process to regulate out-of-state plant construction to protect Missouri customers.

Dogwood also fails to explain why the Commission possesses the power to require a CCN for the construction of a plant outside Missouri when Section 386.250 restricts PSC jurisdiction to "within the state." While Dogwood cites the Aquila decision throughout its brief, the Court of Appeals never suggested that the PSC's "state-wide governmental function" extended beyond Missouri's borders. Aquila, 180 S.W.3d at 30. To the contrary, the decisions regarding Aquila's power plant provide no support for the Rule's extraterritorial reach, given their focus on the strict language of Section 393.170 and its relationship to Missouri county zoning statutes. The Aquila Court's opposition to "giving electric utilities in the state carte blanche authority to build whenever and wherever they wish" is solidly linked to their Missouri service territory and to county zoning issues. Id. at 37-38. Nothing in the decision extends the Commission's authority to out of state operations.

The way to determine legislative intent is to give the statute a common sense reading. R.M.A. v. Blue Springs R-IV School Dist., 568 S.W.3d 420, 429 (Mo. en banc 2019). Using this rule, it is evident the General Assembly intended Section 386.250 to limit the Commission's CCN jurisdiction to activities within Missouri.

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, and speculates that the 10% rate base threshold will never be reached.

Even if "[l]itigation costs associated with any CCN proceedings ... are an appropriate measure of the costs" (PSC Brief at 27), it is clear from Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380 (Mo. App. W.D. 1994), that the PSC substantially underestimated the cost for electric utilities to comply with the Rule. The Fiscal Note is defective under Sections 536.205 and 536.215 because it fails to estimate the "aggregate" compliance costs electric utilities may face "for the foreseeable future." Id. at 390.

The Fiscal Note's three-year estimated life is unreasonable because the Rule has no sunset clause and its predecessor lasted 15 years, having been promulgated in 2003. (A.36). The Court in Missouri Hosp. Ass'n voided the Air Conservation Commission's similar two-year estimate of the cost to comply with its air pollution regulations. Id. It held that "when a rule requires periodic compliance expenditures, the fiscal note should designate the length of the period and the estimated aggregate cost of compliance during each period." Id. The PSC didn't address this argument or deny that the previous CCN rule was in effect for 15 years, even though the Rule assumes, without factual basis, that it will last only three years. Instead, the Commission simply dismissed the Companies' point as "merely speculative." See PSC Brief at 27.

The Commission also failed to rebut the Companies' argument disputing the PSC view that the 10% "threshold" for CCN requirement would never be reached. See Appellants' Brief at 42-43. Because the revised Fiscal Note fails to provide "[a]n estimate in the aggregate as to the cost of compliance" in violation of Section 536.205.1(3), the Rule is invalid.

The Fiscal Note narrowly focused on the cost of the Rule for only "two affiliated investor-owned utilities," which it mis-judged as falling within the 10% rate base threshold, and failed to consider the Rule's effect on Missouri's smallest investor-owned utility, Empire District Electric Company.[7] In this regard, the Commission's statement that "[t]he rule will not cause utilities operating in more than one state to incur additional costs" is patently untrue. See PSC Brief at 27. As noted by the Companies, KCP&L, GMO, Empire, and Ameren all stand to be affected. See Appellants' Brief at 42.

[7] See 2019 PSC Annual Report at 41 (operating revenues and total customers of Missouri's four investor-owned utilities as of 2017) (A.344).

Dogwood's argument that "a fiscal note was not necessary" because the Rule "scaled back the requirements" for Section 393.170 submissions (Dogwood Brief at 26) is nonsensical, given the additional regulatory submissions required by the Rule's Section (5) [CCN to operate assets] and the detailed information mandated by Section (6) [CCN to construct assets inside or outside Missouri]. (L.F. 455-57). It is also contrary to Dogwood's earlier call for "comprehensive" CCN regulations and its praise for the new Rule that "provides more specific instructions" in lieu of the previous "vague rule" which it replaced. See Dogwood Brief at 10-11.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 103.08, service of this brief is being made on this 16th day of January, 2020 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 Reply 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 **5,555** words.

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