**IN THE SUPREME COURT OF MISSOURI**

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

**SUBSTITITE BRIEF OF RESPONDENT**
**PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI**

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## JURISDICTIONAL STATEMENT

This case is on appeal from the Respondent Public Service Commission's final order of rulemaking adopting a rule governing applications for certificates of convenience and necessity for electric utilities. Appellants Kansas City Power & Light Company and KCP&L-Greater Missouri Operations Company appealed to the Court of Appeals for the Western District under Section 386.510, RSMo (2016) (Supp. 2019). The Court of Appeals reversed the final order of rulemaking. Appellants and the Public Service Commission each applied for transfer to this Court under Rule 83.04. This Court granted the applications and ordered the case transferred. This Court has jurisdiction to finally decide the case under Article V, Section 10 of the Missouri Constitution.

## STATEMENT OF FACTS

The Public Service Commission is dissatisfied with Appellants' statement of facts and is providing this statement of facts under Rule 84.04(f).

### Parties

Appellants Kansas City Power & Light Co. (KCPL) and KCPL-Greater Missouri Operations Co. (GMO) are public utilities and electric corporations providing retail electric service in Missouri. (App. Sub. Br. 12).

Respondent Public Service Commission of the State of Missouri (Commission) is the state agency responsible for the regulation of public utilities in Missouri. Section 386.250, RSMo (2016).

### Factual Background

The Commission filed a notice of proposed rulemaking to establish a new rule governing applications for a certificate of convenience and necessity (CCN) for electric corporations. (LF 7). The Commission grants CCNs to electric utilities in two circumstances. The Commission grants authority for the construction of electric plant. This type of authority is often referred to as a "line certificate." The Commission grants authority for the provision of electric service. This type of authority is often referred to as an "area certificate." At the same time as the Commission proposed the new rule, the

Commission rescinded its prior rule governing such applications. (LF 20). The rescinded rule was published in the *Code of State Regulations* as 4 CSR 240-3.105.

Several parties filed written comments regarding the proposed rule. (LF 1-2). The comment period ended on June 14, 2018. (LF 500). The Commission held an on the record hearing and heard public comments on June 19, 2018. (LF 500; Tr, Vol. I). Intervenor-Respondent Dogwood Energy filed written comments, but did not attend the hearing. (LF 33; Tr. Vol. I 2-4). Appellants filed written comments during the comment period. (LF 374). Appellants also appeared and offered comments at the public hearing. (LF 500; Tr. Vol. I 17:13-29: 2).

The Commission issued a final order of rulemaking responding to the comments and explaining any changes made to the rule as a result of the feedback it had received from the interested parties. (LF 500-16). The final order of rulemaking addressed the issues that Appellants have raised in this appeal. The final order of rulemaking made several changes to the proposed rule that are intended to address the issues that were raised by the parties. (LF 500-16). The final order of rulemaking clarifies when CCN applications must be filed under both the construction provisions of Section 393.170.1 and the service provisions of Section 393.170.2 and adopts the changes as amended in the final order of rulemaking. (LF 517). The new rule was published in the *Code of State Regulations* as 4 CSR 240-20.045.[1]

The final order of rulemaking addresses the limited circumstances where a line certificate under Section 393.170.1 is required for retrofits, rebuilds, and improvements to existing electric plant. (LF 502). Specifically, the final order of rulemaking requires a CCN application by a regulated utility in Missouri only when those projects will cause an increase to the regulated utility's rate base of ten percent or more. (LF 502).The final order of rulemaking also sets out when a line certificate under Section 393.170.1 is required for new construction for both in-state and out-of-state electric plant projects. (LF

[1] The Commission is now part of the Department of Commerce and Insurance. Its rules have been renumbered. The electric CCN rule is now designated 20 CSR 4240-20.045.

501-02). The final order of rulemaking clarifies that transmission or distribution lines that are entirely located within a utility's existing Missouri service area do not require a CCN under Section 393.170.1. (LF 501). The final order of rulemaking requires the utility submit a statement about how the proposed construction of an asset relates to the utility's Chapter 22 preferred resource plan as part of its CCN application under Section 393.170.1. (LF 511).

By using the word "operate" rather than "acquire" in section 2(A)3 of the rule, the final order of rulemaking addresses situations where a utility may need to obtain a service area certificate under Section 393.170.2 for assets the utility intends to actually use to provide retail electric service in Missouri. (LF 501). The new rule requires a utility to obtain a CCN under Section 393.170.2 before serving any new area in Missouri with its existing assets. (LF 501). The new rule also requires the utility to obtain a CCN under Section 393.170.2 if it intends to operate an asset located outside of Missouri to serve customers located in Missouri and include those assets in its Missouri rate base. (LF 501).

At the time of this rulemaking proceeding, the Commission was part of the Department of Economic Development (DED). The Commission filed a public cost affidavit signed and sworn by the Director of DED. (LF 11). The public cost affidavit stated that, in the director's opinion, the cost of the proposed rule is less than $500 in the aggregate for DED and for any other state agency. (LF 11). The public cost affidavit and fiscal note were filed at the same time and adjacent to the proposed rule in the *Missouri Register*. (LF 30).

The Commission also filed a revised private entity fiscal note to accompany the final order of rulemaking. (LF 521). The revised private entity fiscal note states that the affected entities are the state's four investor-owned electric utilities. (LF 521). The revised private entity fiscal note estimates that the aggregate cost of compliance with the rule is $0-$100,000. (LF 521). The revised private entity fiscal note was filed with the revised rule. (LF 521).

The costs associated with the proposed rule are based on assumptions about litigation costs associated with CCN proceedings. (LF 521). The proposed rule was modified to clarify that only electric plant retrofits, rebuilds, and other improvements that would increase the utility's rate base by more than ten percent will require a CCN. (LF 521). In light of that modification, the revised fiscal note states that only one project completed in the last several years would have required a CCN under the proposed rule. (LF 521).

The Appellants filed an application for rehearing of the final order of rulemaking. (LF 459). The Commission denied the application for rehearing. (LF 489). KCPL and GMO appealed the final order of rulemaking to the Court of Appeals for the Western District. (LF 522). The Court of Appeals reversed the final order of rulemaking. (WD81282). The Commission and the Appellants filed applications for transfer in the Court of Appeals, which were denied. The Commission and the Appellants then filed applications for transfer in this Court. This Court granted the applications for transfer.

## STANDARD OF REVIEW

The Commission's orders are reviewed under Section 386.510, RSMo (2016) (Supp. 2019). Orders will be affirmed if they are lawful and reasonable. *Pub. Serv. Comm'n v. Union Elec. Co.*, 552 S.W.3d 532, 539 (Mo.banc 2018). This statutory standard applies to the Commission's orders of rulemaking. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 758 (Mo.banc 2003).

Orders are lawful if the Commission had the statutory authority to take the action it did. *In the Matter of Verified Application and Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 524 (Mo.banc 2015). Legal issues are reviewed *de novo*. *Id.* Orders are reasonable if they are supported by competent and substantial evidence on the record as a whole. *Id.* Reasonable orders are not arbitrary and capricious, nor are they an abuse of the Commission's discretion. *Id.*

The Commission's orders are presumed to be valid. *Office of Pub. Counsel v. Pub. Serv. Comm'n*, 409 S.W.3d 371, 375 (Mo.banc 2013). The burden is on the party challenging the Commission's order on appeal to show by "clear and satisfactory evidence" that the order under review is unlawful or unreasonable. Section 386.430, RSMo (2016).

## ARGUMENT

**I. The final order of rulemaking must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that 20 CSR 4240-20.045(2)(A)3 is a proper exercise of the Commission's authority under Section 393.170.2, RSMo (2016) (Supp. 2018). (Responds to Point I of Appellants' points relied on.)**

**1. The rule is a proper exercise of the authority granted to the Commission by Section 393.170.2.**

The Commission's powers and authority are conferred by the legislature. *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo.banc 2012). The Commission has only the powers that are expressly set out in its governing statutes or that by clear implication are necessary for it to carry out designated powers. *Id*. The Commission's authority must be interpreted in context. ". . . [T]he regulatory powers accorded the Commission, which ultimately answer to the public interest, must of necessity address conditions existing at the time the power is exercised because such interest is not static and changes over time." *Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 35 (Mo. Ct. App. W.D. 2005). The Commission has the authority to adopt rules governing the provision of public utility service. Section 386.250(6), RSMo (2016).

The Commission adopted the rule being challenged here under the authority conferred to it under Section 393.170, RSMo (2016) (Supp. 2018). This statute requires public utilities, including electrical corporations, to obtain "permission and approval" from the Commission in two circumstances. *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 548-9 (Mo. Ct. App. W.D. 2008). First, the statute requires an electrical corporation to obtain the Commission's approval before beginning construction of electric plant. *Id.;* Section 393.170.1, RSMo (2016) (Supp. 2018). This type of authority is typically known as a line certificate. *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n*, 555 S.W.3d 469, 471 (Mo.banc 2018). The definition of "electric plant" includes both generation and transmission facilities. Section 386.020, RSMo (2016) (Supp. 2019). Second, the statute requires an electrical corporation to obtain the permission and approval of the Commission before it exercises any right or privilege granted under a franchise. Section 393.170.2, RSMo (2016) (Supp. 2018). This type of authority is typically known as an area certificate. *Id*.

An area certificate gives an electrical corporation the authority to provide electric service to a designated service area. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo. Ct. App. W.D. 1989). In contrast, a line certificate under Section 393.170.1 carries no obligation to provide service. *Id.* A service area does not depend on the utility's authority to construct electric plant, but instead is defined by the utility's franchise. *Id.* "Utility franchises are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *Id.* The Section 393.170 certificate from the Commission must be acquired before the utility can exercise any rights or privileges under the franchise. *Id*. at 286.

The rule is a proper exercise of the Commission's authority to regulate the provision of utility service under Section 393.170.2. The rule is intended to ensure that utilities do not provide service outside of their designated service areas within Missouri without Commission approval as Section 393.170 already requires. (LF 500; Tr. Vol. I 92: 16-21). In other words, if a utility intends to operate or use any of its assets to provide electric service in Missouri, the utility must have a certificate to serve that area granted to it by the Commission under Section 393.170.2, RSMo (2016). Under *Union Elec. Co.,* neither any line certificate granted under Section 393.170.1 nor any area certificate granted to the utility to serve any other territory under subsection 2 is sufficient to give a utility the authority to serve a new area. Whenever a utility moves into a new Missouri service area, it must obtain a CCN under subsection 2, even if it is not going to construct additional plant that would require a CCN under subsection 1. (LF 500-01; Tr. Vol. I 90: 4-15).

The final order of rulemaking also provides a mechanism for utilities to obtain an area certificate under subsection 2 where they have already been providing service in Missouri but outside of any of its designated Missouri service areas. (LF 500-01; Tr. Vol. I 91: 18-25; 92: 1). The final order of rulemaking also provides that the utility must obtain a CCN under subsection 2 if it intends to use assets located outside of Missouri that will be used to provide service to customers in Missouri. (LF 500-01).This provision is consistent with the jurisdiction, supervision, powers, and duties granted to the Commission to oversee the sale of electricity to Missouri customers, and those Missouri regulated utilities that operate gas plants and electric plants under Section 386.250(1).

The Commission has the statutory authority under Section 386.250(6), RSMo (2016) to make reasonable rules governing CCN applications. The Commission has an interest in ensuring that utilities are providing service to Missouri customers only within their designated Missouri service areas. The Commission also has an interest in ensuring that any assets that are included in the rate base and used to provide service to customers in Missouri are "necessary or convenient for the public service" in Missouri, as provided by Section 393.170.3, regardless of where those assets are located. Such assets are ultimately paid for by captive Missouri customers in rates for that service. The final order of rulemaking is a reasonable exercise of the Commission's authority to grant line certificates and area certificates under Section 393.170 in light of the two separate kinds of authority to both construct electric plant and to provide electric service under the public convenience and necessity standard of the statute.

It is not the case that every construction project or expansion of service would require a CCN under the rule. For example, if the utility expands its service to a new customer or customers within an existing service area, it would not be required to obtain a new CCN under Section 393.170.2. (LF 500-01). Also, no CCN under subsection 1 is required under the rule if a utility constructs a transmission or distribution line that is located entirely within the utility's certificated service area. (LF 500-01). These exclusions from the rule make it consistent with the existing case law interpreting Section 393.170, as shown by the examples below.

In *State ex rel. Harline v. Pub. Serv. Comm'n*, the court held that the utility was not required to obtain a CCN under Section 393.170.1 to construct a transmission line located entirely within its existing service area. 343 S.W.2d 177, 185 (Mo. Ct. App. K.C. 1960). The court held that the building of a transmission line to provide service within an existing service area was covered under the authority granted under Section 393.170.2. *Id.* The rule likewise does not require a CCN in this situation.

The question in *Harline* was whether an existing utility already operating in an existing service area needed to obtain a CCN to build a transmission line within that service area. 343 S.W.2d at 185. In contrast, the question in *Pub. Serv. Comm'n v. Kansas City Power & Light Co.* was whether the utility needed to obtain a CCN to extend its existing transmission lines to serve an area that was outside of its existing service territory. 31 S.W.2d 67, 67 (Mo.banc 1930). The court held that the utility's extension of service was not covered under the statute that is now Section 393.170.2 and that the utility was required to obtain authorization from the Commission to provide service to a new service area. *Id.* at 71. The rule likewise requires a new CCN for a utility to provide service to a new area, whether it is by operating its existing assets to provide that service or by acquiring new assets to provide the service. Because a utility may not provide service by any means without first obtaining a CCN under Section 393.170.2, the rule does not impose any requirements on utilities beyond the statutory requirements it must meet in any case.

**2. The rule is not duplicative of the IRP process.**

The integrated resource plan (IRP) process is not an effective substitute for the provisions of the electric CCN rule. Utilities are required to submit IRP plans to the Commission every three years. 20 CSR 4240-22.010 *et seq*. However, the Commission does not formally approve the resource plans. They are not binding on the utilities. The utility's IRP plan does not have any direct impact on the utility's rates.

The standard for evaluating a proposed construction project under Section 393.170 is different than the IRP process. The Commission's "approval and permission" is required by the statute. The Commission must evaluate the project and find that it is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016) (Supp. 2018). The reason that it is important for the Commission to approve construction in advance is to protect ratepayers. *Stopaquila.Org*, 180 S.W.3d at 35. The nonbinding nature of the IRP process simply does not afford this protection for ratepayers.

The final order of rulemaking is lawful and reasonable and should be affirmed on this point.

**II. The final order of rulemaking must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that 20 CSR 4240-20.045(1)(B) 1-2 and (2)(A)2 are a proper exercise of the Commission's authority under Section 393.170, RSMo (2016) (Supp. 2018). (Responds to Point II of Appellants' points relied on.)**

**1. The rule is consistent with the authority conferred to the Commission by Section 393.170.**

Section 393.170 provides for the Commission to provide authorization to utilities in two circumstances. First, the Commission must grant "permission and approval" before a utility "shall begin construction of. . .electric plant." Section 393.170.1, RSMo (2016) (Supp. 2018). Second the Commission must grant "permission and approval" before a utility "shall exercise any right or any privilege under any franchise. . . ." Section 393.170.2, RSMo (2016) (Supp. 2018).

The exercise of authority granted under Section 393.170 must be exercised within two years. Section 393.170.3, RSMo (2016) (Supp. 2018). If the authority granted by the Commission under the statute is not exercised within that time, the authority is "null and void." *Id*. The statute does not explicitly authorize additional new construction begun at the same site but after the initial grant of authority to begin construction within two years has expired. The statute requires a utility to obtain a CCN before beginning construction of an electric plant. Section 393.170.1, RSMo (2016) (Supp. 2018). There is also nothing in the statute to suggest that construction of electric plant can go on indefinitely once it begins or can stop and start over time without further authorization from the Commission. Indeed, Appellant KCP&L Greater Missouri Operations Company has recently obtained a CCN for the construction of solar generation facilities at one of its existing plant sites. *Matter of the Application of KCP&L Greater Mo. Operations Co. for Permission and Approval of a Certificate of Convenience and Necessity Authorizing it to Construct,* *Install, Own, Operate, Maintain and Otherwise Control and Manage Solar Generation Facilities in Western Mo. v. Pub. Serv. Comm'n*, 515 S.W.3d 754 (2016).

The rule is within the authority granted by Section 393.170.1. It does not require a CCN application for any and all construction that occurs on the site of existing electric plant. A CCN application is required only when a retrofit, rebuild, or other improvement to an existing plant will cause the utility's Missouri rate base to increase by ten percent or more. A CCN application also is not required for the construction of a transmission or distribution line that is located entirely within the utility's existing service area.

The Commission may grant a CCN if it determines that the proposed construction or provision of service is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016) (Supp. 2018). *KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 759. There are no specific statutory criteria for making this determination. In the case of construction, that inquiry is not one of strict necessity. Instead, the inquiry is focused on whether the construction is "an improvement justifying its cost." *Id*. The rule is consistent with this standard.

**2. The rule is consistent with the case law interpreting Section 393.170.**

On its face, Section 393.170.1 does not contain exceptions from the requirement to obtain a CCN before constructing any electric plant. However, the case law makes it clear that a CCN is not necessary for every construction project involving electric plant. In *State ex rel. Harline v. Pub. Serv. Comm'n*, the court held that it was not necessary for an electric utility to obtain a CCN for a transmission line within the utility's designated service area. 343 S.W.2d 177, 185 (Mo. Ct. App. K.C. 1960). The *Harline* court rejected the argument that a CCN for a transmission line within the utility's designated service area was required under Section 393.170.1. *Id.* at 183. The court instead held that the construction of the line had been authorized under the CCN granted to the utility under Section 393.170.2, which required the utility to provide electric service to all customers within its designated service area. *Id.* at 185. The *Harline* court found no support in Section 393.170 for the contention that a new CCN was required for every new construction project within a designated service area. *Id*. The court found that, while the

Commission's regulatory powers are broad, they do not extend to the management of the utility as long as the utility is acting lawfully. *Id.* at 182.

Notwithstanding the holding in *Harline*, an electric utility may not rely on its service area CCN under subsection 2 to authorize construction of a new electric peaking plant[2] within its designated service area. *Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 34 (Mo. Ct. App. W.D. 2005). The *Stopaquila.Org* court held that an electric utility's CCN to provide service under subsection 2 did not provide the authority to construct a power plant. *Id.* at 33. While acknowledging the holding in *Harline*, the court held that construction of a power plant within a service area is not analogous to the construction of a transmission line within a service area. *Id.*at 34. The court held that in the case of a new power plant, it is necessary for the Commission to hold a hearing that occurs close in time to the construction of the plant. *Id.*

Reading *Harline* and *Stopaquila.Org* together in the context of the necessary and convenient standard, it is clear that the Commission's final order of rulemaking for electric CCNs has struck an appropriate balance between the mere extension of a transmission line required for service and new plant construction. The project in *Harline* was required to enable the utility to provide service to customers within its designated service area. *Harline,* 343 S.W.2d at 181. In that case, there was no real question that the construction was necessary because it gave the utility the ability to meet its service obligations under the authority granted to it by Section 393.170.2. *Id.*

The need for a new electric plant like the one at issue in *Stopaquila.Org* is less evident. The need for a new electric plant in a given service area will change over time. *Stopaquila.Org*, 180 S.W.3d at 35. The Commission has an interest in determining whether or not the proposed electric plant is necessary at the time of construction. *Id.* The fact that the electric plant needs of a service area change over time means that the construction of some electric plant within that designated service area cannot be within

[2] A peaking plant is an electric generation plant that runs when there is a high level of demand for electricity.

the purview of the utility's subsection 2 area certificate and a new subsection 1 line certificate is needed. *Id.*

The *Stopaquila.Org* court expressed some concern that the Commission had not been exercising its authority under Section 393.170.1 properly because the Commission had extended the holding in *Harline* too far. 180 S.W.3d at 36. The court also noted that the courts also tended to give deference to long-standing Commission practice, finding "we believe that if we were to extend *Harline* as urged by Aquila, we would effectively be giving the electric companies in the state carte blanche to build whatever and wherever they wish, subject only to the limits of their service territories and the control of environmental regulation, without *any* other government oversight." *Id.* (emphasis in original). The *Stopaquila.Org* court declined to grant such expansive rights to utilities to act without authorization from the Commission. *Id.*

The *Stopaquila.Org* court also noted that "curiously, as to certificates of convenience and necessity relating to the construction of electric plants . . .the Commission has promulgated no rules regarding the type of information that it said would be required for those utilities seeking Commission approval of plant construction in their certificated areas." 180 S.W.3d at 37. The final order of rulemaking in this case provides guidance for the need to obtain appropriate CCNs under the circumstances discussed by the Court of Appeals in *Stopaquila.Org*.

The Commission has the authority to determine whether construction of electric plant is "necessary or convenient to the public service." Section 393.170.3, RSMo (2016) (Supp. 2018). This authority extends to retrofits, rebuilds, or other improvements to existing plant if the will increase the utility rate base by ten percent or more. The Commission's authorization for such projects is necessary to ensure that the retrofit, rebuild, or other improvement has benefits that outweigh its costs given the circumstances at the time the construction occurs. The mere fact that the Commission had provided authorization for the original construction in the past under the past relevant circumstances does not provide authorization for later construction. A finding that once construction authority for an electric plant is given, that electric plant can be modified in any way the utility sees fit does not align with the holding in *Stopaquila.Org* in that the Commission has an ongoing interest in ensuring that electric plant construction, including retrofits, rebuilds, or other capital improvements to existing plants is being undertaken for the benefit of the public.

Nor can the fact that an electrical corporation has a service area certificate under subsection 2 excuse the obligation to obtain a new line certificate under subsection 1 for some electric plant construction projects. Because of the rate impact on Missouri customers, the Commission has an interest in electric plant construction that will substantially increase a utility's rate base, and requiring a line certificate under subsection 1 for such projects does not cause interference with the management decisions of the utility. The Commission sought to avoid overly burdensome certification requirements by limiting the newly adopted rule to construction projects that will increase the utility's rate base by ten percent or more. (LF 502). The Commission also clarified the rule to ensure that CCN applications are not required for transmission lines that are located entirely within a utility's existing service area. (LF 501). The rule is consistent with the statute.

**3. Neither this Court nor the Commission are bound by the Commission's prior decisions.**

The fact that past construction projects at existing electric plants have been completed without a CCN are not dispositive of the lawfulness and reasonableness of the current rule. The Commission is not bound by its own prior decisions. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003). The Commission's past decisions are also not binding on this Court. *Id.* The only question before the Court on judicial review under Section 386.510 is whether the final order of rulemaking is a lawful and reasonable exercise of the Commission's authority under Section 393.170. The Commission cases cited by the Appellants do not bind the Court and they are not persuasive here. The appellate courts have also suggested that the Commission's long-held past interpretation of Section 393.170 did not conform to the existing case law. *Stopaquila.Org*, 180 S.W.3d at 37.

Also, as discussed more fully in Point I, the IRP process is not an adequate substitute for the determination of whether or not a proposed construction of electric plant is "necessary or convenient for the public service" under Section 393.170.3 because that process does not require specific authorization and approval from the Commission and is not binding on the utility. The current rule is lawful and reasonable under Section 386.510.

**4. The rule does not interfere with the management decisions of the utility.**

The Commission's oversight does not extend to the utility's management decisions. *Harline*, 343 S.W.2d at 182. The legislature determined, however, that the Commission should have oversight over construction of electric plants. Section 393.170.1, RSMo (2016) (Supp. 2018). Neither the statute nor the rule interferes with the utility's management decisions. Management can decide that an electric plant should be built. Management can make the decision to construct a new plant or to undertake new or additional construction to an existing plant. Then, the Commission's permission and approval is required before construction can begin under Section 393.170.1. There is no reason to distinguish between entirely new construction and new or additional construction at an existing plant based on the management decisions of the utility. If the Commission does not have the authority to approve construction of electric plant before it begins, management could make decisions that will ultimately be included in rates without the Commission first having the opportunity to determine whether the construction meets the "necessary or convenient for the public service" standard of Section 393.170.3, RSMo (2016) (Supp. 2018).

The final order of rulemaking is lawful and reasonable and should be affirmed on this point.

**III. The final order of rulemaking must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that 20 CSR 4240-20.045 is consistent with the Commission's jurisdictional limits under Sections 386.250 and 386.030. (Responds to Point III of Appellants' points relied on.)**

**1. The rule is consistent with the framework for the regulation of public utilities in Missouri.**

The Commission's jurisdiction and authority is set out in Section 386.250, RSMo (2016). The Commission's authority extends

> (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same.

Section 386.250(1), RSMo (2016). The Commission's jurisdiction and supervisory powers and duties applies: "To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined. . . ." Section 386.250(5), RSMo (2016). The Commission may decline to exercise jurisdiction over out-of-state service providers who serve Missouri customers only in limited circumstances not applicable here. *Id.*. Electrical corporations under the Commission's jurisdiction and supervision are defined as ". . .every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever. . .owning, operating, controlling or managing any electric plant . . . ." Section 386.020(15), RSMo (2016) (Supp. 2019). Electrical corporations are included in the definition of "public utility." Section 386.020(43), RSMo (2016) (Supp. 2019).

The Commission's authority is subject to Section 386.030, RSMo (2016): "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 insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

Section 393.170.1, RSMo (2016) (Supp. 2018) provides in relevant part that "no. . .electrical corporation. . .shall begin construction of. . .electric plant. . .without first having obtained the permission and approval of the Commission." Where the language of a statute is unambiguous, the courts do not engage in statutory construction. *State v. Johnson*, 524 S.W.3d 505, 510-11 (Mo.banc 2017). Where the language of a statute is unambiguous, the courts will look beyond that language only when interpreting the language as written would lead to an illogical or absurd result. *Perkins v. Bridgeton Police Dept.*, 549 S.W.3d 504, 506 (Mo. Ct. App. E.D. 2018). The primary purpose of Public Service Commission law is to protect Missouri ratepayers. *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. Ct. App. W.D. 1993).

The statutory language at issue here is unambiguous. Reading the language of the statute as written does not lead to an absurd or illogical result. There is nothing in the plain language of Section 393.170 that limits the construction of plant that requires the permission and approval of the Commission to plant that is constructed in Missouri. Electrical corporations have been defined by the legislature to include any corporation that owns, operates, manages, or controls any electric plant. This statutory definition also is not confined to plant that is located in Missouri. The Commission's jurisdiction extends to electrical corporations under Section 386.250(1). The sole limitation in the statutory framework is that the electricity manufactured, sold, or distributed must be "within the state." The electric plant generating the electricity sold or distributed is not required to be located within the state. It is certainly possible that out of state electric plant can be used to manufacture, sell, and distribute electricity within Missouri. The Commission's authority over electricity that is manufactured, sold, or distributed in Missouri does not violate Section 386.230. There is no federal or state entity other than the Commission with supervisory authority over public utilities in Missouri. There is no entity other than the Commission with the authority to grant CCNs based on the construction of electric plant or provision of electric service in Missouri. Because the

Commission is the only entity with the authority to regulate utilities and the provision of utility service in Missouri, reading the statute as plainly written leads to the common sense result of allowing the Commission to fulfill its role of protecting ratepayers. The legislature intended the Commission to have authority over electricity that is distributed and sold to ratepayers in Missouri, whether or not the electricity originates in Missouri.

The proposed rule is properly confined to the statutory limits of the Commission's authority. The Commission has authority over the manufacture, distribution, or sale of electricity within Missouri. The proposed rule requires an electrical corporation to obtain a CCN under Section 393.170.2 (area certificate) if it intends to manufacture, sell, or distribute electricity in Missouri, which is covered under the first part Section 386.250(1).

The second part of Section 386.250(1) gives the Commission authority over electric plants. It does not contain the phrase "within the state." But even if the phrase "within the state" applies to the Commission's authority over electric plants, the rule conforms to the statute. The rule requires electric corporations to obtain a CCN to construct electric plant only if the plant is intended to serve Missouri customers and to be placed into the utility's Missouri rate base. It is exactly this kind of construction that Section 393.170.1 contemplates. The Commission's interest in the construction of electric plant does not depend on the location of the plant, but on its effect on ratepayers and investors.

The reason that the Commission must approve construction of electric plant is that the Commission must determine whether the proposed construction is "necessary or convenient for the public service." Section 393.170.3, RSMo (2016) (Supp. 2018). To be meaningful, the determination must be made before the construction occurs and not only at a rate case that occurs after the fact when the plant is placed into the utility's rate base. *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 549-50 (Mo. Ct. App. W.D. 2008). The ability of the Commission to disallow a capital project in rates after the fact "is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors." *Id.* Section 393.170.1 allows the Commission to weigh the costs and benefits of the proposed construction in advance. *Id.* at 550. That inquiry does not depend on whether the proposed plant is located inside Missouri or outside of the state, and the Commission's interest in determining whether construction meets the public convenience or necessity standard of Section 393.170.3 is the same regardless of where the plant is located. The rule is consistent with Sections 386.250 and 386.030.

**2. The legislature would not have intended to create a gap between federal and state regulation.**

With some exceptions for interstate transmission lines that are not at issue here, the Federal Power Act generally does not give the Federal Energy Regulatory Commission (FERC) the authority to grant CCNs for the construction of electric plant. 16 U.S.C. § 824. In the absence of any other source of authority for a CCN, the need for the Commission to approve CCNs as contemplated in the rule can be demonstrated by considering various hypothetical scenarios.

In the first hypothetical, assume that the utility is authorized to provide retail service electric service in Missouri. Assume also that the utility intends to construct an electric generation plant just over the border in Kansas and to use the power generated by the plant to serve only Missouri customers and to add the electric plant to its Missouri rate base. In those circumstances, the utility would have to obtain the proper building and zoning permits in Kansas. But in the absence of the rule, the utility would not have to obtain a CCN at all because the FERC could not issue a certificate for the plant under the Federal Power Act, and the Kansas Corporation Commission (KCC) could not issue a CCN authorizing a plant that will be part of the utility's Missouri rate base. The utility could build the plant without any determination that the plant is "necessary or convenient for the public service" in Missouri. The legislature would not have intended such a result in enacting Section 393.170.

In the second hypothetical, assume that a utility is authorized to provide retail electric service in both Missouri and Kansas. The utility again intend to construct an electric generation plant in Kansas, but in this case the plant will serve customers in both states. A portion of the costs for the plant will be placed in the utility's Kansas rate base and a portion of the costs for the plant will be placed in the utility's Missouri rate base.

FERC would still have no authority to issue a CCN for the plant, and the utility would still have to obtain the proper building and zoning permits in Kansas. But in this second scenario, the KCC could issue a certificate for the plant and could authorize placing a portion of the plant into the utility's Kansas rate base. But the Commission still would not be able to determine whether the construction of the electric plant is "necessary or convenient for the public service" in Missouri, even though a portion of the plant will be placed into the utility's Missouri rate base and will serve customers in Missouri. The first time the Commission would have an opportunity to assess the project would be in a general rate case that occurs after the fact. Again, the legislature would not have intended this result in enacting Section 393.170.

At the same time, the Commission recognizes that is does not have authority over some aspects of out-of-state construction of electric plant. A utility that constructs electric plant outside of Missouri will have to comply with that other state's applicable laws, including zoning and environmental regulations. The proposed rule does not purport to negate any other state or federal requirement that the utility construction out of state electric plant must meet.

As explained more fully in Section II above, what past Commissions have done with respect to out of state plant is not dispositive here. Neither the Commission nor this Court are bound by the Commission's prior orders. The relevant questions here are whether the proposed rule is lawful and reasonable within the meaning of Section 386.510 and within the Commission's statutory authority under Section 393.170. The rule is consistent with these statutes.

The final order of rulemaking is lawful and reasonable and should be affirmed on this point.

**IV. The final order of rulemaking must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the fiscal note for 20 CSR 4240-20.045 does not violate the provisions of Section 536.205. (Responds to Point IV of Appellants' points relied on.)**

The Commission's jurisdiction and power extends to "the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service. . . ." Section 386.250(6), RSMo (2016). The Commission must follow the rulemaking procedures of Chapter 536. *Id.* A state agency that files a notice of proposed rulemaking with the Secretary of State under Section 536.021 must also file a private entity fiscal note if the rule will require private entities to incur costs to comply with the rule. The statute requires the private entity fiscal note to contain certain information:

(1) An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule, amendment or rescission of a rule;

(2) A classification by types of the business entities in such manner as to give reasonable notice of the number and kind of businesses which would likely be affected;

(3) An estimate of the aggregate as to the cost of compliance with the rule, amendment or rescission of a rule by the affected persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character.

Section 536.205.1, RSMo (2016)[3]. The private entity fiscal note must be filed in the *Missouri Register* at the same time as and adjacent to the proposed rule. Section

[3] The version of Section 536.205 cited in this brief is the one that was in effect when the final order of rulemaking was issued.

536.205.2, RSMo (2016). Failure to file the private entity fiscal note "shall render any rule promulgated thereunder void and of no force and effect." *Id*. If the cost estimate changes during the course of the rulemaking, a revised fiscal note can be filed under Section 536.215, RSMo (2016).

Any agency proposing a rule must also comply with the public entity fiscal note provisions of Section 536.200, RSMo (2016)[4]. A public entity fiscal note is required when the cost to any state agency or political subdivision will be in excess of $500 in the aggregate. Section 536.200.1, RSMo (2016). "If no fiscal note is filed, the director of the department to which the agency belongs shall file an affidavit which states that the proposed change will cost less than five hundred dollars in the aggregate to all such agencies and political subdivisions." *Id.* A revised fiscal note must be filed if the original cost estimate changes by more than ten percent during the rulemaking. Section 536.215, RSMo (2016).

The requirements of the fiscal note statutes are important. *Friends of Agriculture for Reform of Mo. Environmental Regulations v. Zimmerman*, 51 S.W.3d 64, 70 (Mo. Ct. App. W.D. 2001). Fiscal notes that comply with the statutes "are necessary to ensure that any agency proposing a rule adequately considers the private and public entities it will affect." *Id.* Fiscal notes also have an important role in providing estimated financial costs to the entities that will be affected by the rule. *Id.* The fiscal note plays a role similar to that of the notice and comment provisions found in Section 536.021. *Id.*

The Commission filed the public entity fiscal note required by Section 536.200.1 stating that the cost to state agencies and political subdivisions would be less than $500 in the aggregate. (LF 11). The Commission's initial assessment of the public cost did not change during the course of the rulemaking.

The Commission also filed the revised private entity fiscal note required by Section 536.215 for the change in the private entity cost of the rule. (LF 521). The

[4] The version of Section 536.200 cited in this brief is the one that was in effect when the final order of rulemaking was issued.

revised private entity fiscal note states that the four investor-owned electric utilities in the state are the private entities that will be affected by the proposed rule. (LF 521). The revised private entity fiscal note also states that the proposed rule has been modified to clarify that only improvements, retrofits, or rebuilds that will result in an increase to the utility's rate base of ten percent or more will require a CCN under Section 393.170.1. (LF 521). The revised private entity fiscal note states that under that criterion, only one project within the last several years would have required a CCN. (LF 521). The private entity fiscal note estimates that the cost to the affected entities will be $0 - $100,000. (LF 521). That revised cost estimate is based on the litigation cost that would be incurred by that additional CCN proceeding. (LF 521). The revised public entity fiscal note states that the assumed life of the proposed rule is three years. (LF 521).

The Commission's fiscal notes comply with the applicable statutes. The affidavit and the original and revised fiscal notes were properly filed in the *Missouri Register*. (LF 30; LF 521). The fiscal notes were also appropriately filed with the revised rule. (LF 521). As required, the Commission examined the potential cost of the proposed rule for both public and private entities. In particular, the original private entity fiscal note complied with Section 536.205 and the revised private entity fiscal note updated the fiscal note according to the three enumerated criteria from Section 536.205 as required by Section 536.215.

The revised private entity fiscal note identifies the four investor-owned companies that will be affected by the rule. (LF 521). The revised private entity fiscal note states that the proposed rule will apply to investor-owned electrical corporations providing electric service within the state. (LF 521). The revised private entity fiscal note also contains an aggregate cost estimate for those utilities over the assumed life of the rule. (LF 521). The cost estimate is based on the anticipated litigation costs associated with the additional CCN case that would have to be filed to comply with this rule. (LF 521).

The final order of rulemaking also identifies situations where a CCN application will not be required under the new rule. CCN applications will not be required for transmission or distribution lines that are located entirely within a utility's existing service area. (LF 502). CCN applications will not be required for retrofits, rebuilds, and other improvements that will increase the utility's rate base by less than ten percent. (LF 502). With these modifications, the rule as adopted by the Commission will reduce the number of CCN applications from the number that would have been required by the rule as originally proposed. Those changes, in turn, will reduce the costs to private entities associated with the new rule.

The examples Appellants give do not require reversal of the rule. Litigation costs associated with any CCN proceedings required by the rule are an appropriate measure of the costs included in the revised private entity fiscal note because the other costs related to the construction of electric plant would be incurred by the utility in the absence of the rule and are not caused by the existence of the rule. The rule will not cause utilities operating in more than one state to incur additional costs. If a utility is constructing facilities or providing service that will only serve ratepayers outside of Missouri, the requirements of the rule will not apply to that out of state activity. In-state activity is subject to the rule in the same way for utilities with operations only in Missouri and utilities with operations in Missouri and in other states. The reasons that the Commission has an interest in granting permission and approval to projects that will be included in a Missouri utility's regulated rate base are discussed more fully above. Appellants' arguments regarding the assumed three year life of the rule are merely speculative.

The final order of rulemaking is lawful and reasonable and must be affirmed on this point.

## CONCLUSION

For the above reasons, the Commission respectfully requests that the final order of rulemaking be affirmed in its entirety. The Commission requests such other relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

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

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 8196 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to all counsel of record this 6th day of January, 2020.

*/s/ Jennifer Heintz*
Jennifer Heintz