Summary of SC98039, *In the Matter of the Amendment of the Commission's Rule Regarding Applications for Certificates of Convenience and Necessity, Kansas City Power and Light and KCP&L Greater Missouri Operations Company v. Missouri Public Service Commission and Dogwood Energy*

Appeal from the Missouri Public Service Commission
Argued and submitted March 3, 2020; opinion issued February 9, 2021

Attorneys: KCP&L was represented by Karl Zobrist and Cody Wood of Dentons US LLP in Kansas City, (816) 460-2400; and Robert J. Hack and Roger W. Steiner of Kansas City Power & Light Company in Kansas City, (816) 556-2791. The public service commission was represented by Shelley E. Brueggemann, Jennifer Leigh Heintz and Curt Stokes of the commission in Jefferson City, (573) 751-8377; and Carl J. Lumley of Curtis, Heinz, Garrett & O'Keefe PC in St. Louis, (314) 725-8788.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Several electric utility companies appeal from an order of rulemaking issued by the public service commission that promulgated new rule related to certificates of convenience and necessity (CCNs). In a 7-0 decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the commission's decision. The commission had statutory authority to define "asset" and "construction" as it did in the new rule, as well as to require an electric utility to obtain a CCN before constructing or operating an electric plant outside Missouri. The rule's fiscal note met statutory requirements.

Judge Jeffrey W. Bates – chief judge of the Missouri Court of Appeals, Southern District – sat in this case by special designation in place of Judge Mary R. Russell.

Facts: In 2018, the commission filed a notice of proposed rulemaking to establish a new rule governing applications for CCNs. The commission accepted written and public comments during a hearing. Two public electric utilities, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively, KCP&L), filed written comments and also offered comments during the public hearing. The commission then issued its final order of rulemaking adopting a new rule imposing certain requirements for when a regulated utility must apply for a CCN. The final order of rulemaking also included a revised fiscal note estimating the aggregate cost for the state's investor-owned electric utilities to comply with the new rule would be $100,000 or less. KCP&L sought rehearing and a stay of the commission's final order of rulemaking. The commission denied KCP&L's request, and the rule and its fiscal note became final. KCP&L appeals.

AFFIRMED.

Court en banc holds: (1) Section 393.170.2, RSMo, authorizes the commission's definition of "asset" in the new rule. The statute's plain language enables the commission to require CCNs when it determines an electrical corporation will start to exercise any right or privilege under a

franchise. The commission, therefore, was authorized statutorily to create a rule requiring a CCN when an asset is operated. Such a definition of "asset" is not unreasonable merely because it encompasses circumstances in which a public utility intends to provide service outside its designated area.

(2) The commission had statutory authority to define "construction" to include any improvements, retrofit or rebuilding of an electric plant that will increase the rate base more than 10 percent. Section 393.170.1 does not define "construction," but nothing in the dictionary requires every piece or part to be new to constitute "construction." Because construction can include improvements, retrofits and rebuildings, the word "begin" in section 393.170.1 merely means to initiate the process, not to require the construction of an entirely new electrical plant.

(3) Section 386.250, RSMo, supports the new rule's requirement that an electric utility obtain a CCN prior to constructing or operating an electric plant not located in Missouri. Under the statute, the commission's jurisdiction extends to the manufacture, sale or distribution of electricity within the state. Accordingly, the commission can regulate operation of an electrical plant so long as one of the three activities occurs within the state.

(4) The fiscal note attached to the order of rulemaking satisfies the statutory requirements in sections 536.205 and 536.215, RSMo. The purpose behind the statutory requirement for fiscal notes is to provide useful information to those potentially affected by a proposed rule. The commission made a reasonable estimation as to the cost of compliance and likely affected entities based on the previous three years and adequately communicated that information to the public and potentially affected entities.