BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri to the Iowa Border and an Associated Substation Near Kirksville, Missouri.	)	**Case No. EA-2015-0146**

STAFF'S REPLY POST-HEARING BRIEF

Introduction

Staff has reviewed the initial briefs filed in this case. None have caused Staff to change any of its positions or arguments presented in its initial brief. However, Staff believes that responding to Ameren Transmission Company of Illinois ("ATXI")'s arguments that permissions from the county commissions of Marion, Shelby, Knox, Adair and Schuyler Counties, Missouri, for the Mark Twain project to cross the public roads and highways in those counties is not a prerequisite to this Commission issuing ATXI a certificate of convenience and necessity for the Mark Twain project may assist the Commission in its deliberations.

When addressing the issue of county permission to cross public roads and highways ATXI suggests a narrow construction of § 229.100, RSMo., stating, "Given that no structure (pole) or any other Project asset will actually be located within any public road right-of-way, there are questions about whether the

statute [§ 229.100, RSMo.] applies at all."[1] The plain language of § 229.100, RSMo., includes laying and maintaining conductors across public roads and highways:

> No [one] shall . . . lay and maintain . . ., conductors, . . . for any purpose whatever, . . . across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; . . . .

Appendix D to ATXI's application shows that to build the Mark Twain project ATXI must lay and maintain conductors across public roads and highways in the rural areas of several northeast Missouri counties. ATXI's suggestion § 229.100, RSMo., is inapplicable has no merit.

After suggesting that § 229.100, RSMo., may be inapplicable, ATXI advances three arguments for why, even if required, county permissions to cross public roads and highways are not prerequisites to a certificate of convenience and necessity for the Mark Twain project:

(1) Prior county permission is required for "area" certificates, but not "line" certificates;

(2) Prior county permission is not required where a line does not directly serve end users and;

(3) Local control is bad policy.

None of these arguments has merit. If county permission to cross roads or highways is required to provide electric service, then it is illogical that the Commission's authority to issue a utility a certificate of convenience and necessity without that county permission would depend on whether the certificate is requested for authority to act within an area,

[1] ATXI Initial Brief, p. 59.

along a specific route, or to provide wholesale transmission service. ATXI's attempt to create different franchises—one for areas and another for specific lines—has no basis in statute. Neither § 229.100 (counties), § 393.010 (cities, towns, villages and limited rural), nor § 71.520, RSMo. (cities, towns, and villages), sources of authority to give utilities permission to use public rights-of-way, draw such distinctions. As explained following, there is nothing in § 393.170, RSMo., or caselaw which supports that the Missouri legislature intended such an illogical result. Regardless of ATXI's perspective that local county control of the use of rural public roads and highways is bad public policy with regard to electric lines, through the general assembly, in §§ 229.100, § 393.010 and 393.170, RSMo., the people of the State of Missouri have established that to be the policy of this state.

"Area" versus "line" certificate

As its initial brief reveals, ATXI's "line" versus "area" certificate basis for arguing county permission is not a prerequisite for the Mark Twain project originates with the Western District Court of Appeals' opinion *State ex rel. Harline v. Public Service Commission,* 343 S.W.2d 177 (Mo. App. W.D. 1960). In that case the Court held that Missouri Public Service Company did not need to obtain a Commission certificate that specifically authorized it to build eight miles of 69 kV transmission line in Jackson County, Missouri. It based its holding on the fact that Missouri Public Service, and its predecessor, had been exercising its Jackson County franchise—"local permission to use the public roads and right of ways in a manner not available to or

exercised by the ordinary citizen"[2]—to provide electric service in the area where the line was to be built continuously since the Commission had issued it a certificate of convenience and necessity some twenty years earlier for an area that included where this line was to be built. The most relevant passages to ATXI's "line" versus "area" certificate argument in the Court's opinion follow:

> A primary function of the Commission in its regulation of electric utilities is to allocate territory in which they may render service. The Commission is empowered by statute to pass upon the question of public necessity and convenience (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory. Peoples Telephone Exchange v. Public Service Commission, 239 Mo.App. 166, 186 S.W.2d 531.
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> Appellants claim that sub-section 1 of Section 393.170 required the company to obtain an additional certificate to construct the transmission line. They say, with no authority except a reference to the statutory definition of 'electric plant', that a transmission line is an 'electric plant'. Hence, it is argued, as no electric plant can be constructed without approval, and as a transmission line is an electric plant, therefore a transmission line must have approval. We do not share those views. Sub-section 2 (*sic*) has no application. The record of this case shows that the company's electric plant had been constructed prior to 1938 and operated continuously since.
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> Appellants also invoke the applicability of sub-section 2 of Section 393.170, insisting that the construction of a transmission line is the exercise of a 'right or privilege under any franchise', prohibited without Commission approval. We do not read the statute with that understanding. 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.

[2] State ex rel. Union Electric Company v. Public Service Commission, 770 S.W.2d 283, 285 (Mo. App. E.D. 1989).

* * * *

> Certificate 'authority' is of two kinds and emanates from two classified sources. Sub-section 1 requires 'authority' to construct an electric plant. Sub-section 2 requires 'authority' for an established company to serve a territory by means of an existing plant. Peoples Telephone Exchange v. Public Service Comm., 239 Mo.App. 166, 186 S.W.2d 531.
>
> We have no concern here with Sub-section 1 'authority'. The 1938 certificate permitted the grantee to serve a terriority (*sic*)—not to build a plant. Sub-section 2 'authority' governs our determination.
>
> The question before us, stripped of ambiguity and resolved to simplicity, is: Did the company, within 2 years, proceed to use the 1938 area certificate by operating as an electric utility in the newly allocated territory? The answer can not come from appellants' evidence. There is none—except records. The company has shown that it exercised the certificate 'authority' immediately upon grant, and continuously to the time of trial. It has suffered no forfeiture. The contention is void of merit.[3]

Following Harline, through Stopaquila.Org v. Aquila, Inc., 180 S.W.3d 24 (Mo.App. W.D. 2005), and Cass County v. Public Service Commission, 259 S.W.3d 544 (Mo. App. W.D. 2008), the Western District explained its view that before building a new power generating plant, a public utility must obtain a certificate of convenience and necessity from the Commission which specifically authorizes it to build that power generating plant at a specific location within two years after the certificate issues. In those opinions the Court focused on distinguishing power generating plants from transmission lines.

In Stopaquila.Org, where the issue before the Court was whether Aquila's construction of a new power generating plant was subject to Cass County zoning, the Court said:

[3] *State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177, 182-85 (Mo. App. W.D. 1960).

> The issue in this case does not involve a mere extension of transmission lines. Rather, Aquila is seeking to build an electric power plant, a matter that is governed by section 393.170.1. . . . .
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> * * * *
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> . . . . The terms "electric plant" and "transmission lines" are not synonymous under the Public Service Commission Law. While "electric plant" is defined to include "any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power," § 386.020(14), "transmission line" is not defined. And under any reasonable definition, a transmission line does not generate electricity as an electric plant does. A transmission line is not a source of significant levels of noise, and it does not emit pollutants in the same way that a generating facility emits pollutants. Nor does a transmission line require the construction of roads and buildings or siting near fuel sources or water. The Commission's interpretation does not accord with the *plain language* of section 393.170.1, which does not contain an exemption for those utilities that are already authorized to operate in a particular service territory and wish to construct an electric plant. Moreover, *Harline* appropriately ruled that transmission line extensions do not need additional authorization from the Commission, because such authority already comes within the franchise granted by a county, and territorial authority is based on the franchise. Accordingly, the Commission has erroneously interpreted *Harline* by extending the court's reasoning in that case to a public utility's request for specific authority to build a power plant under section 393.170.1 in territory already allocated to it. [4]

In *Cass County*, where the issue before the Court was whether the Commission could issue a certificate for a power generating plant and associated substation after they were built, the Court said:

> Section 393.170 has three subsections. Subsections 1 and 2 deal with procedural requirements for PSC approval either to construct power plants or to exercise rights or privileges under a franchise by providing public utility services. Such rights and privileges include the provision, distribution, and sale of electricity. *See State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177, 183 (Mo.App.1960). The full text of the statute is as follows:

[4] 180 S.W.3d at 35-38.

1. No gas corporation, electrical corporation, water corporation or sewer corporation ***shall begin construction*** of a gas plant, electric plant, water system or sewer system ***without first having obtained*** the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the ***power to grant the permission and*** approval ***herein specified*** whenever it shall after due hearing determine that ***such construction*** or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 393.170 (emphasis added).

The permission and approval that may be granted pursuant to section 393.170 is of two types: The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. See Harline, 343 S.W.2d at 185 (quoted in Aquila I, 180 S.W.3d at 33). Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a "line certificate." See 4 CSR 240-3.105(1)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170. Permission to exercise a franchise by serving customers is generally granted in the form of an "area certificate." See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170.[5]

[5] 259 S.W.3d at 548-49.

(Emphases to statutes added by Court; footnotes omitted). The text of omitted footnote 6 follows:

> The terminology and analysis here is somewhat complicated by the fact that section 393.170 makes no reference to the erection of transmission lines, an activity that falls within the broad ambit of a utility's rights and privileges under its franchise. State ex rel. Harline v. Pub. Serv. Comm'n, 343 S.W.2d 177, 183 (Mo.App.1960); see also Aquila I, 180 S.W.3d at 37. Thus, this court has held, in Harline, that it is not necessary for a utility to obtain a new line certificate before extending transmission lines through its certificated area (i.e. the territory covered by its area certificate). Harline, 343 S.W.2d at 185. Utilities must, nonetheless, obtain line certificates to extend transmission lines beyond their certificated areas. See Pub. Serv. Comm'n v. Kansas City Power & Light Co., 325 Mo. 1217, 31 S.W.2d 67, 71 (Mo. banc 1930). Because the construction of a new power plant, even within a certificated area, is governed by section 393.170.1, a utility may not rely solely upon its area certificate and must obtain a line certificate from the PSC before doing so. Aquila I, 180 S.W.3d at 35.

In *Harline* county permission to cross roads was not in issue, since Missouri Public Service had had that authority from the county since at least 1938. Likewise, county permission to cross roads was not in issue in either *Stopaquila.Org* or *Cass County*, both involved the same power generating plant and associated substation which did not cross public roads or highways. Neither *Harline*, *Stopaquila.Org* nor *Cass County* support ATXI's argument for county permissions being prerequisites in some circumstances where a line will cross public roads or highways, but not others. If anything, they support local control—certainly local control by county zoning was the concern in *Stopaquila.Org* and a concern in *Cass County*. As the Missouri Supreme Court said in 1932, a Commission certificate of convenience and necessity is nothing more than where "the state as the sovereign power [has] condition[ed] the exercise of a privilege granted by one agency [(here local permission)] upon approval of another [(the Commission)]. *State ex inf. Shartel ex rel. City of*

Sikeston v. Missouri Utilities Company, 331 Mo. 337-38, 53 S.W.2d 394, 397 (1932). Here, the exercise of the privilege of crossing rural public roads and highways is conditioned on Commission approval.

Directly serving endusers is irrelevant

In an effort to distinguish its request from those the Commission most often has encountered in the past, ATXI argues the fact that it will provide wholesale transmission service over the Mark Twain project means the Commission may issue it a certificate for the Mark Twain project absent county permissions to cross public roads and highways. It argues *quid pro quo*—that the privilege of using the public roads and highways is given in exchange for an obligation to serve endusers. There is no *quid pro quo*, the obligation to serve arises from undertaking to serve the public.[6] A simple example demonstrates the lack of *quid pro quo*. If a public water utility installs its lines in private roads, then they become public roads by dedication, the water utility is obligated to serve, has facilities in public roads, but did not require local permission to use those roads. However, if the roads were dedicated to the public before the water utility lays its lines in them, then it would require local permission to use the roads. ATXI's *quid pro quo* argument is meritless.

Local control is bad policy

On page 71 of its brief, ATXI to appeals to broad Commission authority saying:

> ATXI respectfully submits that it would be nonsensical for the General Assembly, on the one hand, to have created this Commission and clothed it with broad regulatory powers, while on the other hand, to have made the outcome of the Commission's determinations dependent on a county commission's assent regarding what are merely, in effect, simple

[6] *State ex rel. M. O. Danciger & Co. v. Public Service Commission of Missouri*, 275 Mo. 483; 205 S.W. 36, 40; 18 A.L.R. 754 (Mo. 1918).

> road crossing permits. If that were the statutory scheme envisioned by section 393.170, then any county could entirely negate this Commission's public-interest determination that a transmission line ought to be built. Such a scheme makes sense in circumstances where a county is granting permission to use its roads so that an electrical system can be built to serve its residents, *i.e.,* where there is a *quid pro quo*. In that circumstance, the need for the line depends on the county franchise. But it makes no sense in these circumstances, where a transmission line is being built to meet statewide and regional needs.

ATXI indulges in the presumption that the Commission should reach the issue of convenience and necessity in the absence of required county permission. As Staff explained in its initial brief, with regard to certificates of convenience and necessity for electrical corporations, the Commission's role is to decide whether to allow the corporation to engage in business in this state as a public electric utility, when it would already be able to do so, absent the Public Service Commission Law. The legislature in Missouri has vested the counties with local control over the use of the public roads and highways within them, and it is not the Commission's role to question that local control. The Commission's role is to decide at the state level whether projects such as the Mark Twain project should go forward after county commissions have given their permissions. It is the province of the legislature and Missouri voters to change Missouri's preference for local control should the state find projects such as the Mark Twain project ought to go forward, but are being stymied at the local level.

Conclusion

As Staff fully explained in its initial brief, if the Commission has authority to issue ATXI a certificate of convenience and necessity for the Mark Twain project, then ATXI must prove to the Commission that it has permissions from the county commissions of Marion, Shelby, Knox, Adair and Schuyler Counties, Missouri, to cross the public roads

and highways in those counties before the Commission can lawfully issue the certificate. ATXI has not done so, and apparently cannot do so. In these circumstances Staff sees little recourse for the Commission other than to dismiss ATXI's application, with or without finding ATXI has shown the Mark Twain project is necessary and convenient.

As it did in its initial brief, Staff recommends the Commission make the following findings:

1. Ameren Transmission Company of Illinois is a public utility that requires a certificate of convenience and necessity from the Commission to operate in the state of Missouri;

2. With the six conditions enumerated above, the evidence in this case shows the Mark Twain project is "necessary and convenient for the public service";

3. There is good cause to relieve Ameren Transmission Company of Illinois from the filing and reporting requirements of rules 4 CSR 240-3.145, 4 CSR 240-3.165, 4 CSR 240-3.175 and 4CSR 240-3.190(1), (2) and (3)(A)-(D) because these filing and reporting requirements are intended for state ratemaking, but this Commission will have no jurisdiction over Ameren Transmission Company of Illinois's rates; and

4. Ameren Transmission Company of Illinois does not have the consents of the county commissions of Marion, Shelby, Knox, Adair and Schuyler Counties, Missouri, or otherwise from the State of Missouri, to cross the public roads and highways in those counties; and the following determination:

The Commission cannot lawfully issue Ameren Transmission Company of Illinois a certificate of convenience and necessity for the Mark Twain project.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 18th day of March, 2016.

/s/ Nathan Williams