BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval of a Certificate of Public Convenience and Necessity Authorizing it to Offer a Pilot Distributed Solar Program and File Associated Tariff.	)))))	**File No. EA-2016-0208**

POST-HEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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COMES NOW the Office of Public Counsel ("OPC" or "Public Counsel") and presents its post-hearing brief as follows:

I. Introduction

Solar generation is a good thing in many respects: it can be used to provide electric service to customers, to comply with Missouri's Renewable Energy Standards ("RES"), and it has the potential to reduce carbon emissions. However, the evidence in this case shows that Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") does not need the proposed project to serve its customers or to comply with the RES requirements (Ex. 3, p 2). The evidence also shows that the proposed projects do not necessarily result in reduced carbon emissions (Ex. 200, p. 5). In cases involving construction of new generating plant, the applicant bears the burden to prove the project is necessary or convenient for the public service. Section 393.170 RSMo. When, as here, the evidence demonstrates overwhelmingly the adequacy of current service the Missouri Public Service Commission ("Commission") must reject attempts to demonstrate speculative need that fail to demonstrate a benefit to ratepayers.

"The Commission's principle interest is to serve and protect ratepayers[.]" *State ex rel. Capital City Water Co. v. PSC*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). Examining the way that rates are set informs and underscores the importance of requiring a utility demonstrate the necessity of a new generating facility. In Missouri, the utilities' regulated business model is

to charge customers for the costs incurred providing the customer service. *In the Matter of Union Elec. Co. d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Elec. Serv.*, 2015 Mo. P.S.C. LEXIS 380, *113-14 (2015) (reiterating Missouri uses cost-of-service regulation). Investments in physical plant make up a substantial proportion of that cost. In addition, the utility has an opportunity to earn a return on that expense to compensate shareholders. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"). Such a model has a benefit to customers in that it incentivizes a utility to build infrastructure required to serve customers. However, such a model also could incent building unnecessary infrastructure, a detriment to the customers who would pay for it. Stated differently, permitting a greater investment than necessary to provide service – even without making a ratemaking determination at this time – is detrimental to the public interest because it may call for increased rates in the future. In fulfilment of its role to protect ratepayers the Commission must require Ameren to meet is evidentiary burden.

Ameren Missouri dismisses Public Counsel's concerns as inapplicable to this case. The Company's *Position Statement* frames Ameren Missouri's argument thusly: "[t]he CCN is necessary or convenient for public service in order for Ameren Missouri to gain an understanding of the benefits and risks of installing solar at the distribution level, on customer facilities." (Doc. No. 88, p. 1). The Company's stated experimental purpose is an inadequate substitute for meeting its affirmative burden to demonstrate the proposed project is "an improvement justifying its cost." Section 393.170 RSMo; *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993) ("Intercon Gas"). The evidence demonstrating that the project is not necessary based on current customer energy demand and regulatory requirements is substantial and undisputed. In contrast, the rationale presented by the

proponents is not evidence, but rather the admission that more evidence is needed before one could conclude the project justifies its costs. This is confirmed by both the terms of the *Non-unanimous Stipulation and Agreement* and the testimony presented during the hearing. For example, during the evidentiary hearing, counsel for Ameren Missouri and Staff witness Ms. Eubanks discussed the putative benefits to customers from this project, including the following exchange:

> Q: (Mr. Lowery) Do you have an opinion about whether gaining that experience would be beneficial to Ameren Missouri's customers ultimately?
> A: (Ms. Eubanks) I believe it would be beneficial.
> Q: Let me posit this. Let's imagine that Ameren Missouri pursues this pilot and learns some things and learns it's a bad idea. Do you follow me?
> A: Yes.
> Q: Would it be beneficial to Ameren Missouri's customers for Ameren Missouri to find that out now as opposed to later?
> A: I believe so.

(Tr. Vol. 1, pp. 130-31). The preceding testimony is not based on a study, calculation, workpaper, or any other basis for the conclusions reached. Agreements among aligned parties as to speculative futures are not competent and substantial evidence upon which the Commission can base a decision. In fact, even the foregoing hypothetical scenario meant to (presumably) support the Company's position is devoid of any explanation of *how* customers benefit or required demonstration that the benefit received would *justify* the cost. Yet, the Commission need not even read the transcripts or the pre-filed testimony in this case in order to deduce that Ameren Missouri has not met its burden. The Company's application, as modified by the terms of the *Non-unanimous Stipulation and Agreement*, is *facially deficient* in that it requires appendices purporting to explain how Ameren Missouri will determine and provide the required information after-the-fact (i.e. when the customers have been committed to paying for the project) and so must be rejected.

II. Ameren Missouri's application

Ameren Missouri filed its initial application for a "blanket Certificate of Convenience and Necessity ("CCN")" on April 27, 2016. After several technical conferences and initial settlement discussions, Ameren Missouri, the Commission's Staff ("Staff"), Missouri Department of Economic Development – Division of Energy ("DE"), Earth Island Institute d/b/a Renew Missouri ("Renew Missouri"), and United for Missouri, Inc. ("UFM") filed a *Non-Unanimous Stipulation and Agreement* on August 31, 2016. The terms of the *Non-unanimous Stipulation and Agreement* continue to request the Commission issue a "blanket Certificate of Convenience and Necessity" allowing the Company to "partner with customers to construct and own distributed solar facilities located on those customers' premises" (Doc. No. 65, p. 1). Broadly speaking, the terms in that document do three things: 1) establish a capital investment level of 10 million dollars for the multiple generating facilities, 2) contain a "Site Selection" process in Appendix A to be followed for each solar facility, and 3) list "learning opportunities" and "key questions" in Appendix B to be filed in reports once the project is complete (Doc. No. 65). Public Counsel timely filed its objection because the *Non-unanimous Stipulation and Agreement* failed to present a plan meeting the requirements set forth in the CCN statute and the Commission's rules.

The Company's plan represented by the terms of the *Non-unanimous Stipulation and Agreement* has two components that should be dispositive in this case – Appendices A and B. Each illuminates a reason why the Commission must reject the Company's application. Appendix A representing a "site selection" process unlawfully dispossesses the Commission of its regulatory oversight. Appendix B demonstrates the applicant has not met its burden to show

the project is "necessary or convenient for the public service" but requests permission to do so after the project is built.

III. Commission's authority

"As a creature of statute, the [Public Service] Commission [("Commission" or "PSC")] 'only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable interpretation." *Public Serv. Comm'n v. Consol. Pub. Water Supply Dist. C-1*, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015) ("*Water Supply Dist.*") (citing *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011)). "If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power." *Id*.

> A basic tenet of administrative law provides that 'an administrative agency has only such jurisdiction or authority as may be granted by the legislature.' If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.

Livingston Manor, Inc. v. Dep't of Soc. Servs., 809 S.W.3d 153, 156 (Mo. App. W.D. 1991) (quoting *State* ex rel. *Mo. Health Care Ass'n v. Mo. Health Facilities Review Comm.*, 768 S.W.2d 559, 562 (Mo. App. W.D. 1988)).

As it pertains to this case, the Commission is empowered to grant the permission and approval necessary for an electrical corporation to begin construction of an electric plant "after due hearing" it determines that "such construction … is necessary or convenient for the public service." Section 393.170 RSMo. The Commission grants permission and approval by issuing a CCN, which is valid only if exercised within a period of two years. *Id*. However, the

Commission's power to grant a CCN is limited in certain respects. First, it may only grant a certificate after "due hearing." Section 393.170.1 RSMo. Second, the Commission must determine the construction of the facility is necessary or convenient for the public service. Importantly, the Commission cannot act until the applicant provides certain information. The Court of Appeals has explained that "[b]y requiring public utilities to seek Commission approval *each time* they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered[.]" *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 37 (Mo. App. W.D. 2005) ("StopAquilla") (emphasis added). The court made clear that such '"specific authority' [is] required for the construction of an electric plant. *Id* at 34. Necessarily, then, Ameren Missouri must seek permission for each of the solar generating facilities contemplated under its program. The Commission has no authority to grant a "blanket" CCN.

During the hearing the Staff and Ameren Missouri suggested that the Commission's *Order Granting Certificate of Convenience and Necessity* in File No. EA-2011-0368 supports the proposition that the Commission may grant a "blanket" CCN. First, the Commission is a creature of statute, and to the extent it may have exceeded its lawful authority in the past has no bearing on the present case. *See State* ex rel *Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 54 (Mo. 1979) (explaining the mere fact that the commission has approved similar applications in the past is "irrelevant if they are not permitted under our statute[.]"). Second, the facts and circumstances in EA-2011-0368 are so materially different in size, location, and cost that it would be unreasonable to extend similar treatment to Ameren Missouri in the present case. In EA-2011-0368 the Commission approved a CCN to construct 180kW of solar facilities, of which only 75 kW had unknown locations. The projects were only

approved to be constructed in the discrete "SmartGrid Demonstration Area" in Kansas City. Furthermore the United States Department of Energy was to reimburse the Company for half of the project cost. In Ameren Missouri's present application, the Company seeks permission to build up to 5 MW of solar facilities. During the hearing Ameren witness Mr. Barbieri testified that each MW of solar requires approximately five acres of space, and so, this project is considerably larger (Tr. Vol. 1, pp. 118-19). Ameren seeks permission to build anywhere within its expansive service territory. In *StopAquilla*, the Court of appeals spoke disparagingly of "giving electric companies in the state carte blanche to build wherever … they wish, subject only to the limits of their service territories[.]" *StopAquilla*, 180 S.W.3d 37. Importantly, Ameren proposes that the entire cost of its larger project will be borne by ratepayers. Attempts to equate the present application to the application in EA-2011-0368 are misguided and irrelevant – the Commission does not have statutory authority to grant a "blanket" CCN as requested by Ameren Missouri in this case.

Relevant to the Commission's authority to grant the requested CCN, the Commission is presented with five issues for determination.

IV. Issue 1: *Do the terms contained in the Non-unanimous Stipulation and Agreement (now a Joint Position statement) present a plan meeting the requirements set forth in the CCN statute, section 393.170 RSMo?*

No. The application of Ameren Missouri (as modified by the terms of the *Non-unanimous Stipulation and Agreement*) fails to meet the requirements of Section 393.170 RSMo and, as a result, must be rejected by the Commission.

Before beginning construction of an electric plant, an electric corporation must obtain permission and approval from the Commission. Section 393.170.1 RSMo. As explained above, this permission and approval is commonly referred to as a CCN. Importantly, before a CCN is

issued, the applicant must file a certified copy of the charter of the corporation 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." Section 393.170.2 RSMo. This pre-requisite step cannot be skipped because "a CCN does not confer any new powers on a public utility; it simply permits the utility 'to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent.'" *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 45 (Mo. App. W.D. 2005)(citing *State* ex inf. *Shartel v. Missouri Utilities Co.*, 53 S.W.2d 394, 399 (Mo. 1932).

Only after the applicant has provided such documentation does the Commission "have the power to grant the permission and approval[.]" Section 393.170.3 RSMo. In other words, once an electric corporation has the permission it would otherwise need from local authorities to perform the public service, it must provide that information to the Commission. Through granting CCNs after being presented evidence of local permission by the applicant, the Commission determines whether or not permitting the corporation to operate as a monopoly furthers the public interest. Ameren Missouri has not provided the Commission such information in this case; likely because it plans to build these plants in its existing service territory and so – presumably – the Company already has the franchises and permission required related to these proposed projects. But we do not know because the Company has not identified locations. As regulators, the Commission cannot accept without evidence that this is the case.

Importantly, as it relates to the permission the Company is seeking – to build various electric plants – the Commission may only grant an electric corporation permission to begin construction "after due hearing," if it determines "*such construction* … is necessary or convenient for the public service." Section 393.170.3 RSMo (emphasis added). This, too,

requires the applicant to provide certain information. The Court of Appeals has explained that "[b]y requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered[.]" *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 37 (Mo. App. W.D. 2005). For *each* generating facility, the Commission must consider current conditions, concerns, and issues before granting specific authority to begin construction.

Here the Company seeks a "blanket CCN" from the Commission permitting Ameren Missouri to "partner with customers to construct and own distributed solar facilities located on those customers' premises[.]" (Doc. No. 65, p.1). The Company's application (as modified by the terms of the *Non-unanimous Stipulation and Agreement*) fails to provide the required information that would enable to Commission to consider the conditions, concerns, and issues for each particular electric plant. According to the Company's own application, Ameren Missouri:

a. "does not yet know which customers will participate in this program" (Doc. No. 18, p. 5).
b. "does not have exact locations at which these solar facilities will be sited" (Doc. No. 18, p. 5).
c. admits "construction plans have not been finalized" (Doc. No. 18, p. 5).
d. admits it has not identified or requested "the permits and approvals required for the construction of each facility" (Doc. No. 18, p. 5).
e. admits it has not determined if any facilities will require crossing any "electric or telephone lines, railroad tracks or underground facilities" (Doc. No. 18, p.5).

At the hearing, Mr. Barbieri agreed the Company is limited in the information it can provide because no site has been selected (Tr. Vol 1, p. 91). He testified because no site has been

selected, the Company hasn't performed an analysis to determine if other system upgrades might be needed. (Tr. Vol. 1, p. 91). The Company has not been able to develop any detailed engineering because no location is known (Tr. Vol. 1, p. 96). Mr. Barbieri did confirm that the Company is proposing to build the facilities on multiple sites (Tr. Vol. 1, p. 89). The Commission cannot consider a "broad range of issues, including county zoning" if the Company has not even determined a location.

This is a deficiency of the Company's own choosing. Mr. Barbieri discussed the Company's decision to pursue a CCN before having partners/locations identified and testified Ameren Missouri is pursuing a blanket CCN because negotiations and contractual relationships with third parties would be more difficult to enter into those contracts with third parties if the CNN was granted afterward rather than before (Tr. Vol. 1, p. 107). Perhaps it is easier for Ameren Missouri to find partners by getting a CCN in advance but that does not ensure the Commission is able to adequately examine the application to protect the public. Moreover, neither convenience, expediency, nor necessity can support an act of the Commission not authorized by statute. *State* ex rel. *Kansas City v. Public Service Commission of Missouri*, 257 S.W. 462 (Mo. 1923).

This deficiency cannot be cured by the provisions in the *Non-unanimous Stipulation and Agreement* offering that "signatories will review" the information upon submission by the Company *after* the CCN is granted. Even the criteria developed for selection is problematic. One particular provision in Appendix A listing "Additional Considerations for Site Evaluation", which includes: "Type of Facility: (Office, Educational, Industrial, Manufacturing, Retail, Religious, Data center, Warehouse, Healthcare, Military, Recreational, Other)" (emphasis added).

Setting aside, for a moment, all the other legal and policy considerations, the religious nature of a site has *nothing* to do with it being a suitable location for solar panels. Making "religion" a selection criterion likely violates the First Amendment to the U.S. Constitution made applicable to the states through the Fourteenth Amendment and the Missouri Constitution. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 454 (Mo. 1959). The First Amendment applies to any application of state power. *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997). Furthermore, the Missouri Constitution provides, in part, "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. Art. I, § 7. It is unclear why the proponents would insert a religious test into the "site selection" appendix. However, even if the religious provision were removed, the remaining process for site selection is unlawful. The site selection criteria in Appendix A creates a procedure lacking any basis in law and deliberately minimizes the Commission's statutory oversight. For each generating facility the Commission must review the application. The legislature did not give this power to the signatories nor any other number of stakeholders but to the Commission alone.

Nothing prevented the Company from finding a partner to participate, selecting a location, developing construction plans, or requesting permits and approval from local authorities. However, the Company chose to forego these required steps and in so doing has not presented a plan meeting the requirements under section 393.170 RSMo. This deficiency cannot be cured by the provisions in the *Non-unanimous Stipulation and Agreement* (now a Joint Position statement) that "signatories will review" the information upon submission by the Company *after* the CCN is granted. This procedure lacks any basis in law and would minimize

the Commission's statutory oversight. Therefore, the Commission must reject the present CCN application because it fails to meet requirements set forth in Section 393.170 RSMo.

V. Issue 2: *Does the evidence establish that Ameren Missouri's proposed project as presented in the Non-unanimous Stipulation and Agreement (now a Joint Position statement), for which it seeks a CCN, "necessary or convenient for the public service" within the meaning of section 393.170, RSMo?*

No. The evidence does not show the proposed project is "necessary or convenient for the public service." Section 393.170 RSMo.

Section 393.170.3 RSMo. provides the standard to be applied when evaluating an application, stating:

> [t]he commission shall have the power to grant the permission and approval … 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.

The Missouri Court of Appeals has explained the legal standard to be applied when making that determination as follows:

> The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." § 393.170.3. The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost.

State ex rel. Intercon Gas, Inc. v Pub. Serv. Comm'n, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993). When evaluating applications for CCNs, the Commission frequently considers the five

"Tartan factors". The Tartan factors, first described in a Commission decision regarding an application for a CCN filed by Tartan Energy Company, are: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company,* 3 Mo. P.S.C. 3d, 173, 177 (1994).

The Company's application, as supplemented by the *Non-unanimous Stipulation and Agreement,* does not demonstrate the project is necessary to provide safe and adequate service or that it is an improvement justifying its cost. No party has presented any quantification of putative benefits that would enable Ameren Missouri to meet its burden to show the cost of the project is required to provide safe and adequate service or otherwise justified.

The signatories to the *Non-unanimous Stipulation and Agreement* attempt to justify the project as a means for Ameren Missouri to explore "learning opportunities" and "key questions to explore." Absent from either is any quantification of putative benefits. In fact, a review of the items listed in Appendix B of the *Non-unanimous Stipulation and Agreement* reveals it to be little more than a list of (1) marketing research plans ("[e]xplore which types of customers are most interested in the program, and under what terms they would participate"); (2) documentation the Company should develop before undertaking a project ("[w]hat contract terms are necessary in order to make this type of arrangement work"); and (3) questions that could be answered without the 10 million dollar project ("[w]hat levels and structures of host site compensation are offered by other IOUs").

Importantly, Ameren Missouri does not explain why investigating these "opportunities" and "questions" provides any benefit to ratepayers. One listed "learning opportunity" suggests

that "Ameren Missouri should also be able to determine if there are any specific financial benefits from this form of solar generation." Ameren Missouri inverts the CCN process by attempting to justify its project with a commitment to determine the very things it is required to prove *before* a CCN is granted.

As the applicant, Ameren Missouri bears the burden to show that its proposed project is "necessary or convenient for the public service" and prove that the additional service would be an improvement justifying its cost. No such evidence has been presented to support the application.

Ameren Missouri witness Mr. Barbieri testified that he did not perform any calculations to quantify any benefit to customers for any of the learning objectives (Tr. Vol. 1, p. 101). Other than identifying the potential cost of land he did not perform any calculation to show a benefit to customers resulting from the key questions to explore (Tr. Vol 1, pp. 101-02). When asked whether the Company has "performed a study to attempt to quantify what you expect to be the benefits to the larger grid" Mr. Barbieri testified Ameren Missouri has not developed any at this point but that would be developed as the Company goes along (Tr. Vol. 1, p. 98).

Mr. Barbieri's testimony unequivocally acknowledges that the project is not necessary to serve customers or meet RES requirements at this time, stating:

> It is literally true that Ameren Missouri does not need additional generation capacity or energy production to meet the needs of its native load at this moment, and it is also true that Ameren Missouri can comply with the solar energy portfolio standard in the MoRES until approximately 2024 without building facilities under this pilot.

(Ex. 3, p. 2).

Public Counsel Witness Mr. Burdge offered testimony that the proposed project is not necessary at this time. He testified Ameren Missouri has sufficient resources to meet customers' demand and provide sufficient reserve capacity to ensure reliability of electric generation and

support sales into MISO (Ex. 200, p. 3). His conclusion was based on information contained in Ameren Missouri's 2014 Integrated Resource Plan, section 1.2 (Ex. 200, p. 3). Mr. Burdge further testified that Ameren Missouri does not need this project to comply with the RES standards (Ex. 200, p. 5). His conclusion relating to RES was based on information provided by the Company in response to a Staff data request (Ex. 200, p. 5). Mr. Burdge also testified that this proposed project would not lead to a corresponding reduction in carbon-emitting generation (Ex. 200, p. 5). His conclusion relating to carbon emissions relies on Ameren Missouri's *Response to Comments of Parties* filing in EO-2016-0286 that stated:

> [B]ecause Ameren Missouri operates in the Midcontinent Independent System Operator, Inc., ("MISO") footprint, the addition of renewable resources does not mean that the Company's non-renewables will generate less as part of a RES-compliant portfolio. In fact, there will be no discernable change, meaning no impact (positive or negative) to greenhouse gases.

(Ex. 200, p. 5). Mr. Burdge's conclusions on these points are not disputed by any party.

Although she offered testimony supporting the *Non-unanimous Stipulation and Agreement*, Staff witness Ms. Eubanks did not perform an analysis to quantify the benefit to ratepayers for any learning opportunity listed in Appendix B (Tr. Vol. 1, p. 131). Staff did not perform any analysis to quantify any benefit to ratepayers that will result if the solar project is approved (Tr. Vol. 1, p. 131). In fact, Staff did not perform *any* calculations to quantify *any* benefit to ratepayers that will result to customers if this solar project is approved (Tr. Vol. 1, p. 131).

However, Ms. Eubanks did offer testimony that illustrates this project is not needed at this time. She testified that the modified application does not result in least cost options for capacity or for solar RES compliance (Tr. Vol. 1, p. 132). She testified that Ameren does not need additional capacity at this time (Tr. Vol. 1, p. 132). She agreed that even if Ameren

Missouri needed additional capacity this project would not be the least cost option (Tr. Vol. 1, p. 133). Further, her conclusion on least cost is based on the Company's 2015 resource plan volume 6 (Tr. Vol. 1, p. 133). Ms. Eubanks also testified that this project is not necessary for solar RES compliance (Tr. Vol. 1, p. 133).

Division of Energy witness Mr. Hyman also testified he did not quantify any benefits to Missouri ratepayers what will result from this project (Tr. Vol. 1, p. 157). Nor did he provide any quantitative cost/benefit analysis related to this project (Tr. Vol. 1, p. 157). However, he did testify participant host locations may receive a "public relations benefit" (Tr. Vol. 1, p. 160). To be clear, Ameren Missouri's captive ratepayers should not be required to pay additional money in order to benefit a separate Company's public image.

Why did the proponents of the project in this case fail to quantify any benefit to customers? Mr. Barbieri inverts the required process contending the only way to quantify the benefit to customers is to implement the program (Tr. Vol. 1, p. 101). He acknowledged that Exhibit 105 is a connection study for the O'Fallon Energy Center but that no such document was created for the proposed project in this case (Tr. Vol. 1, pp. 87-88). When asked whether Ameren Missouri has conducted any economic feasibility studies to determine the benefits as well as the costs related to this project, Mr. Barbieri testified "until we actually start to have this programs or the projects actually implemented, *it will be difficult* to determine the specific economics related to it, but we do anticipate some overall benefits that we're going to be able to gauge, again, whether - - the points that we talked about earlier about the value that we think could be existing though small scale distributed generation and how that does impact our overall implementation of solar." (Tr. Vol. 1, p. 97) (emphasis added). Mr. Barbieri further testified he does "not know how that [conducting a feasibility study] would be done without having things actually

operational." *Id*. Notably, Mr. Barbieri testified Ameren Missouri performed a feasibility study for the O'Fallon Energy Center where they "looked at the overall cost to construct and the value that solar was going to bring, and at that point in time we were looking there with the solar facility in O'Fallon was predominantly related specific to the Missouri RES compliance." (Tr. Vol. 1, p. 113). However, for *this* project Mr. Barbieri testified it would impossible to perform such a study (Tr. Vol. 1, p. 112). He explained the evaluation that was conducted for O'Fallon was to look at the overall cost to customers in utilizing the facility to meet the Missouri RES (Tr. Vol. 1, p. 116). Applying that method to the project at issue in this case, such a study would be unlikely to support moving forward with this project because the value of the solar using RES as a metric. Ameren Missouri does not need this project to meet its RES requirements nor does it outweigh the cost of 10 million dollars.

Staff witness Ms. Eubanks testified it "would be hard" to quantify the learning objectives (Tr. Vol. 1, p. 147). Instead, she testified that staff believes "to the extent that it's *not easy* to quantify certain things such as what Ameren will learn, that can also be considered an improvement justifying its cost." (Tr. Vol. 1, p. 149) (emphasis added). That the Commission's technical staff now considers hypothetical "benefits" as proof an improvement justifies the cost of a project is troubling. There is no factual or technical basis offered for reaching such a conclusion, instead the Commission's staff appears to rely entirely on the Commission's guidance in EA-2015-0256 – a case currently under appeal.

In effect, proponents ask the Commission to determine the proposed project is "necessary or convenient for the public service" on faith. "Faith" is "the substance of things hoped for, the evidence of things not seen." *State* ex rel *Interstate Transit Lines v. Pub. Serv. Comm'n*, 132 S.W.2d 1082, 1088 (Mo. App. K.C. 1939) (quoting Hebrews, chap. 11, verse 1). As regulators

charged with protecting the public, the Commission must require the applicant for a CCN to demonstrate the benefit to the public with competent and substantial evidence no matter how important an issue of faith may be to an individual. When setting rates, Missouri Courts have explained: '"however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that rates be authorized by law and supported by competent and substantial evidence upon the whole record.'" *State* ex rel. *Public Counsel v. Mo. PSC*, 289 S.W.3d 240, 251 (Mo. Ct. App. W.D. 2009) (citing *State* ex rel. *Sprint Spectrum L.P. v. Pub. Serv. Comm'n*, 112 S.W.3d 20, 28 (Mo. App. W.D. 2003). This case does not set rates. However, the Commission should require an applicant support its proposal with competent and substantial evidence even if the proponents witnesses describe doing so as being "difficult".

In total, the application tests the limits of how little information this Commission will require whenever the possibility of a "pilot" program is raised. Importantly, no separate statutory basis exists for permitting "pilot" generating facilities that do not meet the standards under section 393.170 RSMo and *Intercon Gas* and so this application must be judged according to the standards described therein. Should any party attempt to minimize the impact of the proposed project by designating it a "pilot" or suggesting that the projected cost of 42 cents per customer per year is "immaterial", it should not be forgotten that the Company must demonstrate a benefit to customers outweighing the cost. To the extent the Company believes, as indicated by its counsel's questioning of Staff's witness, that the impact to customers is "lost in the rounding of Ameren Missouri's capital investment", Public Counsel suggests the Company's *Shareholders* pay for the project (Tr. Vol. 1, p. 128). *Any* increase will impact customers' ability to pay their bills.

The evidence overwhelmingly shows that the project is not necessary at this time to serve customers nor is it necessary to comply with existing government regulations. This project is not necessary for capacity needs or RES compliance at this time. No benefit has been quantified; only the cost. Because the evidence does not show the proposed project is "necessary or convenient for the public service" the Commission must reject the present CCN application.

VI. Issue 3: *Does the evidence demonstrate the company has provided the information required to comply with the Commission's rules at 4 CSR 240-3.105?*

No. This information has not been provided. The Commission's rules at 4 CSR 240-3.105 supplement the CCN statute and require applicants to provide certain information with an application.

The Company has not filed a list of all electric and telephone lines of regulated and non-regulated utilities, railroad tracks, or any underground facilities the proposed construction will cross as required by 4 CSR 240-3.105(1)(B)1 or a statement that there are no electric and telephone lines, railroad tracks, or underground facilities on the project site. The Company has not filed the complete plans and specifications for construction of the proposed facilities with the Commission as required by 4 CSR 240-3.105(1)(B)2 or a statement that approval of affected governmental bodies is unnecessary or evidence of all required approvals as required by 4 CSR 240- 3.105(1)(C) and (D).

Instead, Ameren states it will provide this required information later "as allowed by 4 CSR 240-3.105(2)" (*See* Doc. No. 18, p. 5). The course preferred by the Company would have the Commission grant a CCN and then the Company would provide the required information. To be clear, this is not permitted by the rule. Commission Rule 4 CSR 240-3.105(2) provides:

> If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished *prior to the granting of the authority sought*.

(emphasis added). This rule makes the provision of certain information a pre-requisite to issuance of a CCN. At this point the Company has not provided the required information and so the Commission must reject the present CCN application.

VII. Issue 4: *Does the evidence show that good cause exists to support a waiver of the Commission's rules at 4 CSR 240-3.105?*

There is no evidence to support a waiver of the Commission's rules at 4 CSR 240-3.105. As explained in Issue 3 above, Commission Rule 4 CSR 240-3.105(2) does not permit an applicant to provide the required information *after* the authority sought is granted as the Company intends. However, it is true the Commission may waive its rules "for good cause." *See* 4 CSR 240-3.015(1), 4 CSR 240-2.060(4), and 4 CSR 240-2.015(1).

In this case, the Company has not sought a waiver of the Commission's rule. If the Company did at this late stage seek a waiver from the Commission's rules there is no evidence to show good cause. On the contrary, the failure to provide the required information indicates the Company's CCN application is premature. As mentioned above, nothing prevented the Company from finding a partner to participate, selecting a location, developing construction plans, or requesting permits and approval from local authorities before making its filing as the applicant the Company bears the burden to so do. However, the Company chose to forego these required steps and in so doing has not presented a plan meeting the requirements under *section 393.170 RSMo* or the Commission's rules at 4 CSR 240-3.105.

The Company has not shown good cause to depart from the Commission's rules and, because it has not provided the required information, the Commission must reject the present CCN application.

VIII. Issue 5: *Is the company's plan outlining treatment of the proposed facilities at the end of 25 years lawful under 393.190 RSMo?*

No. The Company's plan outlining treatment of the proposed facilities at the end of twenty-fives years is unlawful. Section 393.190.1 RSMo requires:

> No … electrical corporation, … shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its … works or system, necessary or useful in the performance of its duties to the public … without having first secured from the commission an order authorizing it so to do.

The testimony describing the Company's plan indicates "[a]t the end of the 25-year term, the customer may purchase the facility, renew the lease, or have the facility removed from the property" (Ex. 1, p. 4). No explanation about the process for seeking commission approval or commitments made to the customer has been provided. Offering the listed options to potential partners without making them aware that future treatment of the facilities is subject to Commission approval could be misleading and, without a plan in place, will create future problems. The Company's plan, to the extent one exists, will create a dilemma for future commissioners who may potentially be asked to choose between approving the removal of generation facilities that have been paid for by all ratepayers and are used to generate energy and SRECs for all ratepayers or denying approval and requiring a host site to keep a facility on its property that it wants removed. Neither choice is in the public interest. Failure to consider the

impact of its proposal further indicates the CCN application is premature. The Company's plan to treat the proposed facility at the end of 25 years is unlawful and should be rejected.

IX. Conclusion

Ameren Missouri's request for a "blanket" CCN must be denied because 1) it requests permission the Commission cannot grant and 2) fails to provide required information to the Commission. Under the pretense of complying with the law; the Company and certain parties agreed to a *Non-unanimous Stipulation and Agreement*. Appendix A speaks in terms of a "site selection" process. This process abrogates the Commission's statutory oversight and has no basis in the law. Appendix B addresses the Company's "learning objectives" in an attempt to mask the failure to meet its burden to show the project is "necessary or convenient of the public service". Each appendix attempts to cure the Company's failure to provide required information; each fails to meet the requirements of the law.

The Company has not shown this project is necessary or convenient to provide safe and adequate service or that it is an improvement justifying its cost. Ameren Missouri's application unlawfully minimizes the Commission's oversight and fails to meet its evidentiary burden to prove necessity and convenience for the public service interest and so must be rejected.

WHEREFORE Public Counsel submits its post-hearing brief and requests the Commission DENY Ameren Missouri's application for a Certificate of Convenience and Necessity.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 4th day of November 2016:

/s/ Tim Opitz