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**

STATEMENTS OF POSITION

COMES NOW the Office of Public Counsel ("OPC" or "Public Counsel") and submits its *Statements of Position* as follows:

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?*

OPC Position:

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 Missouri Public Service Commission ("Commission"). Section 393.170.1 RSMo. This permission and approval is commonly referred to as a Certificate of Convenience and Necessity ("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.

Furthermore, the Commission may only grant an electric corporation permission to begin construction "after due hearing," if it determines "*such construction* or such exercise of the right, privilege or franchise is necessary or convenient for the public service." (emphasis added) Section 393.170.3 RSMo. 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.

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.

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?*

OPC Position:

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*, 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. 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.

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?*

OPC Position:

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. The company has not filed with the Commission 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.

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?*

OPC Position:

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.

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

OPC Position:

No. The company's plan outlining treatment of the proposed facilities at the end of 25 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." Doc. No. 20, Direct Testimony of Michael Harding, 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 (1)

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 (2) 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.

WHEREFORE Public Counsel submits its *Statements of Positions*.

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 12th day of October 2016:

/s/ Tim Opitz