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Data Center
Missouri Public
Service Commission

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD79883

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 ASSOCIATED SUBSTATION NEAR KIRKSVILLE, MISSOURI;

NEIGHBORS UNITED AGAINST AMEREN'S POWER LINE,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI and **AMEREN TRANSMISSION COMPANY OF ILLINOIS,**

Respondents.

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI
CASE NO. EA-2015-0146

BRIEF OF RESPONDENT AMEREN TRANSMISSION COMPANY OF ILLINOIS

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need for the Mark Twain Project, that the Project was economically feasible, and that the Project provided a benefit to Missouri ratepayers. (L.F., Vol. IX at 1366, 1370, 1403). The PSC also found that the Project would serve the public interest because it was needed to promote grid flexibility, relieve congestion, promote renewable energy, meet local load-serving needs, and provide downward pressure on customer rates. (L.F., Vol. IX at 1403-1404) Based upon these findings, the PSC granted to ATXI a CCN for the Mark Twain Project subject to certain conditions and providing a process by which adjustments to the proposed route could be made by ATXI. (L.F., Vol. IX at 1406-1408)

The County Assent Condition

Whether ATXI was required to have county assents in order to obtain a CCN from the PSC was a disputed issue during the CCN application process. ATXI had not requested that any county commission issue a § 229.100 assent before the hearing, and its president, Maureen Borkowski, testified that ATXI would obtain county assents before construction. (Exh. to L.F., Vol. I at 9:13-16; Tr., Vol. 5 at 95:8-13, 104:18-23) Neighbors United sought dismissal of ATXI's application on the ground that ATXI had not already obtained assents from each of the five counties. (L.F., Vol. III at 178-183). In opposing the motion, ATXI asserted that the county assents (even if required otherwise) were not required for the PSC's consideration of a line certificate because ATXI's application did not present a question of whether it would be providing electric service to county residents. (L.F., Vol. III at 384-389)

The PSC denied Neighbors United's motion, stating:

ARGUMENT

I. The Public Service Commission ("PSC") did not err in granting ATXI a Certificate of Convenience and Necessity ("CCN") contingent upon ATXI obtaining county assents because § 393.170, RSMo. does not require ATXI to obtain assents in order to obtain a CCN, and even if they were required, the PSC is authorized to issue a CCN with conditions, including the condition precedent that the CCN is not effective until ATXI obtains county assents.

There is no dispute that when ATXI submitted its application to the PSC requesting a CCN pursuant to § 393.170.2 for the proposed Mark Twain Project that it had not obtained permission from any of the five counties under § 229.100 to suspend its line over county highways, roads and rights-of-way. And because ATXI had not obtained these assents at the time the PSC issued its Report and Order, the PSC granted a CCN to ATXI contingent upon ATXI obtaining these assents prior to construction. Neighbors United argues that the PSC was powerless to consider ATXI's CCN application without these assents and that the PSC was powerless to condition the CCN on ATXI obtaining these assents. The PSC did not err, however.

The PSC was not only authorized to consider ATXI's application without the assents, but was not required to consider whether ATXI had them since, under § 229.100, ATXI owes a duty to the counties, not the PSC. Even if assents are a proper consideration of the PSC, it is authorized by § 393.170.3 to grant a CCN conditioned upon ATXI obtaining county assents, as it did here.

A. ATXI is not required by § 393.170 to obtain § 229.100 assents from the counties before it obtains a CCN for the Mark Twain Transmission Line Project.

Neighbors United argues that this appeal involves "[t]he interplay of" the assent statute (§ 229.100), the CCN statute (§ 393.170) and the PSC's rule regarding CCN applications (4 CSR 240-3.105), resulting in its conclusion that ATXI was required to obtain assents prior to obtaining a CCN. *Neighbors United's Brief* at 20-21. A proper reading of the two statutes and the PSC rule, however, does not lead to the conclusion that county assents were "an essential prerequisite" to the PSC's granting of a CCN for the Mark Twain Transmission Line Project.

1. Section 229.100 only requires a utility to obtain the assent of the county before it suspends transmission lines over county roads.

The assent statute, located in Chapter 229 of the Missouri Revised Statutes ("Provisions Relating to All Roads"), states with regard to improvements along public roads:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits *for any purpose whatever*, through, on, under or 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; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such

reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission.

§ 229.100 (emphasis added). Neighbors United properly sets out the principles of statutory construction in its brief—that "the primary rule is to ascertain the intent of the legislature from the language used, by considering the plain and ordinary meaning of the words used in the statute," and "[w]here the language of the statute is unambiguous and clear, this Court will give effect to the language as written, and will not engage in statutory construction." *Neighbors United's Brief* at 22, citing *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 331 S.W.3d 677, 683 (Mo. App. W.D. 2011).

Section 229.100 is unambiguous. A straightforward reading of the statute simply requires the utility to obtain the assent of a county commission before it suspends wires across the public roads or highways of the county; it does not, however, require that the utility obtain the assent before it approaches the PSC. *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 40 (Mo. App. W.D. 2005) ("Section 229.100 simply prohibits public utilities from erecting power lines without first having obtained the assent of the county commission of such county therefore.").

Moreover, the statute makes no distinction between those utilities that provide service to county residents and those utilities that simply need to construct a transmission line over a county road or highway, nor does it distinguish between those utilities regulated by the PSC and those utilities that are not so regulated. Rather, the concern for the county commission is that the transmission line comply with any "reasonable rules and regulations" of the county highway engineer with regard to the placement of that line

within the public roads and highways. Because § 229.100 doesn't require ATXI to obtain county assents before it obtains a CCN from the PSC,[4] that proscription—if it indeed exists—must be found elsewhere.

2. <u>Section 393.170.1 does not require ATXI to obtain a county assent as part of its application for a line certificate.</u>

a. Section 393.170 provides for two distinct types of CCNs.

The CCN statute, § 393.170, states:

> 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.

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[4] Whether § 229.100 independently applies to ATXI's plans to suspend transmission lines over county roads and highways is a different question, and it is a question of law involving the application of a non-PSC statute; as such, the PSC is not afforded any of the deference in its interpretation of § 229.100. *See State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 54 (Mo. 1979) (where an agency is given broad supervisory authority, deference should be given to its interpretation of a statute). ATXI assumes, for purposes of this appeal only, that it must obtain assents from the individual counties affected by the proposed transmission line, but denies that these assents are in any way related to the ability of the PSC to grant it a CCN for the transmission line.

> 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.
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> 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.

It is quite obvious that at no place in the text of § 393.170 is § 229.100, the county assent statute, explicitly cited or incorporated. The only reference to any type of consent is found in subsection 2 of the statute, which requires that a utility seeking to exercise its franchise rights or privileges show that "it has received the required consent of the proper municipal authorities." The question then becomes whether this subsection 2 language

applies to ATXI such that it is required to show the PSC that it has obtained § 229.100 county assents.

This court (and the PSC) has long recognized that under § 393.170, the permission and approval granted is "of two types"—corresponding to the first two subsections of the statute:

> 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 * * * 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(l)(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.

State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (footnotes omitted). The almost 50-year-old precedent cited by this court in *Cass County*—*State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 183 (Mo. App. W.D. 1960)—first enunciated the distinction between the subsection 1 authority to

construct "electric plant"[5] (in that case, a transmission line like the one at issue here) and the subsection 2 authority, which permitted a grantee to provide service within a territory:

> 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. We have no concern here with Sub-section 1 "authority". The 1938 certificate permitted the grantee to serve a territory not to build a plant. Sub-section 2 "authority" governs our determination.

343 S.W.2d at 185 (internal citation omitted). Just as in *Cass County*, Missouri this court has consistently distinguished between subsection 1 and subsection 2 authority. *See also StopAquila.org*, 180 S.W.3d at 24-25 (explaining the two different kinds of authority contemplated by § 393.170). Even the PSC's rule governing § 393.170 applications recognizes that a subsection 1 CCN case is distinct from a subsection 2 CCN case, as evidenced by the fact that subsection

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[5] "Electric plant" is defined at § 386.020(14) to include "all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and 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."

(A) of the rule applies by its express terms to "service area" applications while subsection (B) of the rule applies by its express terms to "electric transmission lines" or "electrical production facilities." 4 CSR 240-3.105(1)(A) to (1)(B).

b. ATXI's application for a line certificate pursuant to § 393.170.1 did not require it to obtain county assents.

Because ATXI sought permission to construct and operate a transmission line and did not seek permission to exercise a franchise by serving customers, it sought a "line certificate" under subsection 1 of the CCN statute. The significance of this distinction must not be lost. It is only under § 393.170.2 that a "franchise" or the "consent of municipal authorities" is required—subsection 1 does not contain such a requirement. That a utility hold a franchise and have the consent of municipal authorities before it is given an area certificate under subsection 2 but that a utility seeking to construct a transmission line under subsection 1 need not hold a franchise or have municipal authority consent makes sense in light of the nature of authority being sought under each section.

The reason that issuance of a subsection 2 area certificate requires a utility to provide proof of municipal authority consent is simple—the utility is seeking authority to "exercise rights or privileges under a franchise *by providing public utility services*," which the *Cass County* court said "include the provision, distribution and sale of electricity." 259 S.W.3d at 548 (emphasis added). As the Missouri Supreme Court noted in *State ex inf. Shartel v. Missouri Utilities Co.*, 53 S.W.2d 394, 399 (Mo. 1932), a CCN does not confer any new powers on a public utility; rather, it simply permits the utility "to

exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent." After all, the PSC's primary function is to allocate service territory under § 393.170.2. *Harline*, 343 S.W.2d at 185. Consequently, the PSC, of course, must require proof of a franchise or municipal consent to utility service by the CCN applicant before the PSC can determine whether the proposed service "is *necessary* or convenient for the public service" as required by § 393.170.3 (emphasis added). Of course, that same utility may also need authorization under subsection 1 to construct a particular electric generating plant or even a transmission line (located outside its certificated service area),[6] but where a transmission-only utility that does not provide retail electric service (like ATXI) seeks subsection 1 permission to construct only a transmission line, no statutory language or logical basis exists to require the utility to provide the PSC proof of a franchise or municipal consent to service as the utility is

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[6] It is unnecessary for an electric company holding an area certificate under § 393.170.2 to return to the PSC to obtain permission to extend its transmission lines *within* the service area it has been allocated, but must do so to extend transmission lines beyond their certificated areas. *Harline*, 343 S.W.2d at 185; *Cass County*, 259 S.W.3d at 552, n.6. A utility does not require a CCN to extend lines within its area certificate because that certificate "is a mandate to serve the area covered by it," and because it is the utility's duty to serve all persons in an area it has undertaken to serve, it can only perform its duty by extending its lines and facilities as required to serve those customers. 343 S.W.2d at 181-82.

neither infringing upon other service areas nor forcing itself upon unwilling municipal customers or where its service would be duplicative.

c. *Section 393.170.2 does not apply to ATXI's application for a line certificate.*

Neighbors United chooses to ignore any distinction between the types of authority granted under subsections 1 and 2 of § 393.170. Instead, Neighbors United relies upon the language in subsection 2 to argue that the § 229.100 county assents are "essential" prerequisites to the PSC's granting of a line certificate to ATXI. *Neighbors United's Brief* at 21-29. However, no explanation is offered by Neighbors United to explain why the subsection 2 requirements are applicable in the first instance to ATXI's CCN application. And the case law to which Neighbors United points as support for its argument that ATXI must provide proof of the county assents are cases involving utilities that provide retail utility service under area certificates issued under subsection 2 and not non-retail serving utilities seeking a line certificate under subsection 1 of § 393.170.[7] *See Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 481 (Mo. 1973) (utility held a "20-year franchise to construct its 'poles, towers, wires, conduits, * * * in, along, across, over and under the streets, roads, alleys, sidewalks, * * * and other public places in the City of Crestwood' for the purpose of '*transmitting, furnishing and distributing electricity.*'");

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[7] ATXI discusses in the next section why the cases relied upon by Neighbors United do not support their argument that § 229.100 assents are "essentially the equivalent" to the "franchise" and "municipal consent" language found in § 393.170.2.

Shartel, 53 S.W.2d 394 (electric utility for the city of Sikeston held a city franchise and an area certificate to serve the city, but the franchise had expired); *State ex rel. City of Sikeston v. Pub. Serv. Comm'n*, 82 S.W.2d 105 (Mo. 1935) (also dealing with the City of Sikeston where the electric utility held an area certificate and expired franchise to provide service to city residents); *State ex rel. Public Water Supply Dist. No. 2 v. Burton*, 379 S.W.2d 593 (Mo. 1964) (water company providing service under a franchise from portions of a county could not be given an area certificate over those portions of the county for which it did not have a franchise to provide water service).

In short, there is no Missouri case to which Neighbors United can point to in support of the proposition that a transmission-only utility seeking a line certificate is required to obtain a franchise or municipal consent before a line certificate can be granted by the PSC under § 393.170.1, and the statutory language in subsection 1 provides absolutely no support for that proposition. Therefore, the fact that ATXI had not obtained county assents prior to the PSC's issuance of the CCN for the Mark Twain Transmission Line Project does not invalidate the Report and Order.

3. Even if the franchise requirement found in § 393.170.2 applies to all CCN applications, a county assent that does not impose an obligation to serve customers is not the type of franchise contemplated by the CCN statute.

Neighbors United points to language in subsection 2 of § 393.170 as the basis for requiring § 229.100 assents from ATXI, although it does not provide any analysis as to *why* subsection 2 applies in the first instance to ATXI's application for a line certificate.