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**

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("OPC" or "Public Counsel") pursuant to Section 386.500 RSMo and 4 CSR 240-2.160(2) and for its Application for Rehearing of the Public Service Commission's ("PSC" or "Commission") December 21, 2016 Report and Order states as follows:

Introduction

1. The Commission unlawfully and unreasonably granted Union Electric Company d/b/a Ameren Missouri's ("Ameren Missouri" or "Company") application for a "blanket" certificate of convenience and necessity ("CCN") subject to the terms and conditions of the *Non-unanimous Stipulation and Agreement* ("Stipulation and Agreement") that permits Ameren Missouri to build an unknown number of solar generation facilities at an unknown number of locations.

2. Review of the Commission's *Report and Order* in conjunction with the evidentiary record and law applicable in this case establishes this *Report and Order* as unlawful, unsupported by competent and substantial evidence upon the whole record, and unreasonable. Being unlawful and unreasonable, the Commission's *Report and Order* should be reheard.

3. Commission decisions must be lawful and must be reasonable. *State ex rel Atmos Energy Corp. v Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003). An order is lawful if the Commission acted within its statutory authority. *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d, 442 (Mo. App. W.D. 2015). An order is reasonable if it is "supported by substantial,

competent evidence on the whole record, the decision of the Commission is not arbitrary or capricious or where the [PSC] has not abused its discretion." *State ex rel. Praxair, Inc. v. Mo. PSC*, 344 S.W.3d 178, 184 (Mo. banc 2011).

Argument

I. The Report and Order is unlawful in that the Commission granted a "blanket certificate" permitting Ameren Missouri construct an unknown number of new generating facilities at an unknown number of unknown locations.

4. Section 393.170.3 RSMo. empowers the Commission to grant CCNs and 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.

Thus, the Commission must determine the construction of the facility is necessary or convenient for the public service. This 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. Through Section 393.170 RSMo, the Legislature requires the Commission examine the contemporaneous facts and circumstances in order to prevent wasteful duplication of facilities and services and to review land-use considerations before each new generating plant is built.

5. Importantly, the Commission cannot act until the applicant provides certain information. The Court made clear that such '"specific authority' [is] required for the construction of an electric plant." *Id* at 34. Therefore, Ameren Missouri must seek permission for each of the solar generating facilities contemplated under its program as the Commission has no authority to grant a "blanket" CCN. This deficiency cannot be cured by the terms of the flawed Stipulation and Agreement that unlawfully delegate site selection to the self-interested signatories to that document.

6. In its *Report and Order*, the Commission finds Ameren Missouri has not identified specific sites for the solar facilities or provided information required by statute and Commission rules (*Report and Order*, pp. 9-10). Oversight, especially of the particular location of a facility, is not a "waste of resources" as described by the Commission at page 14; it is the purpose and statutory obligation of the Commission. Rather than require this information be provided so that it may evaluate current conditions, concerns, and issues before granting specific authority to begin construction, the Commission unlawfully delegates this statutory obligation to certain signatories by adopting Appendix A (Report and Order, p. 14).

7. The Commission's *Report and Order* dismisses the requirements of Section 393.170 RSMo and ignores the binding effect of precedent by granting Ameren Missouri authority to construct new generating facilities at unknown locations within its vast service territory and is thus unlawful and should be reheard.

II. The Commission's *Report and Order* is also unreasonable in that it granted a "blanket certificate" permitting Ameren Missouri construct an unknown number of new generating facilities at an unknown number of unknown locations.

8. The Commission's *Report and Order* granting a "blanket" CCN is unreasonable especially given the privileges a CCN grants related to zoning. *See StopAquila.Org v. Aquila,* Inc., 180 S.W.3d 24 (Mo. App. 2005); *Union Electric Co. v. Saale,* 377 S.W.2d 427, 430 (Mo. 1964). The Commission approved of and incorporated the terms of the Stipulation and Agreement that will deny affected persons (and entities) the opportunity to participate in the site selection process. Only signatories are included in the process for site verification (*See* Doc. No. 65, Appendix A, p.1). This would exclude even Public Counsel; leaving the public unrepresented in the site selection process.

9. It is unreasonable that there is no process in the *Report and Order* or the Company's plan to accommodate customers with property near a selected site who want to intervene after the site is selected. No notice is provided to neighboring property owners once the site is selected. No information about the project is distributed explaining that, in fact, Ameren Missouri's customers pay for the solar facilities rather than the site partner.

10. Landowners' potential desire to contest the installation and location of solar facilities is a predictable event that has occurred in other situations. *See* generally *Lake at Twelve Oaks Home Assn., Inc. v. Hausman*, 488 S.W.3d 190 (Mo. App. 2016); *Hague v. Trustees of Highlands of Chesterfield*, 431 S.W.3d 504 (Mo. App. 2014); *Babb v. Missouri Pub. Serv. Commn.*, 414 S.W.3d 64 (Mo. App. 2013).

11. Denying the affected members of the public a meaningful opportunity to participate, learn, and comment on the final site location (unknown at this point because Ameren Missouri has not provided that statutorily required minimum information) is unreasonable and the Commission should rehear this point.

III. The Report and Order is unlawful and unreasonable in that the project is not necessary or convenient for the public service as required by section 393.170 RSMo.

12. Section 393.170.3 RSMo. provides the standard to be applied when evaluating an application. 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).

13. Nowhere in the Commission's *Report and Order* granting the "blanket" CCN does it find or conclude that the proposed construction is an improvement justifying its cost. There is nothing in the evidentiary record to support such a finding or conclusion even if the Commission has so stated. The Commission itself explains in its findings of fact that "Ameren Missouri does not require additional generation capacity or energy production to meet the needs of its native load at this time." (*Report and Order*, p. 7). The Commission also found "[t]he company can comply with the solar energy portfolio requirements in the Missouri Renewable Energy Standard ("RES") law until approximately 2024 without building facilities under this pilot program." (*Report and Order*, p. 7).

14. 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. Instead, the Commission and the signatories to the Stipulation and Agreement attempt to justify the project as a means for Ameren Missouri to

explore "learning opportunities" outlined in the terms of the Stipulation and Agreement (*Report and Order*, pp. 15-20). The Commission's Report and Order adopting these terms inverts the CCN process by attempting to justify the project with a commitment by the Company to determine the very things it is required to prove *before* a CCN is granted.

15. 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 *before* the CCN can be granted. The *Report and Order* incorporates Appendix B that demonstrates the applicant has not met its burden to show the project is "necessary or convenient for the public service" but instead permits the Company to do so after the project is built. This is not permission the Commission has authority to grant.

16. Ameren Missouri failed to meet its evidentiary burden to show the proposed project would be an improvement justifying its cost. The undisputed evidence demonstrates overwhelmingly the current service is adequate and compliant with all regulations. The novel process in Appendix B and underlying theory offered by the proponents have no basis in law. The Commission's decision permitting the Company to collect and file required information after the projects are built with no effort to measure or demonstrate *how* customers benefit or the required demonstration that the benefit received would *justify* the cost is unlawful and unreasonable and should be reheard.

IV. The Commission's *Report and Order* is unreasonable in that encourages Ameren Missouri to pursue more expensive forms of generation to comply with environmental standards rather than minimizing costs when pursuing compliance.

17. The Commission's *Report and Order* unreasonably and illogically concludes "maximizing profit by purchasing the least-cost energy option may not be applicable in the

situation of a pilot program where the purpose of the program is not to provide the cheapest power to the utility's customers." (Report and Order, p. 18). First, this conclusion demonstrates the Commission has forgotten its primary obligation is to protect the public, not to enable the utility to "maximize profit." Second, the Commission's conclusion is illogical because building the least-cost energy option would not maximize profit, it would minimize cost thus ensuring rates are as affordable as possible. In this case no additional construction is needed to serve customers or comply with the law. Permitting construction of these expensive and unnecessary solar generating facilities *increases* costs to customer and maximizes *only* the utility's profits.

18. In its *Report and Order*, the Commission explains "[t]he company can comply with the solar energy portfolio requirements in the Missouri Renewable Energy Standard ("RES") law until approximately 2024 without building facilities under this pilot program." (*Report and Order*, p. 7). The Commission then finds that "Ameren Missouri will be spending approximately $1 billion in capital over the next 10-12 years to meet the Missouri RES requirements." (*Report and Order*, p. 8). This finding by the Commission is particularly unreasonable in light of the undisputed evidence presented that these solar facilities do not result in least cost options for capacity or for solar RES compliance (Tr. Vol. 1, p. 132). Staff Witness Eubanks 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).

19. The Commission should rehear its unreasonable decision encouraging Ameren Missouri to pursue more expensive forms of generation to comply with environmental standards.

V. The Commission's *Report and Order* is unreasonable in that it finds that delaying the project will increase costs to customers.

20. The Commission unreasonably and incorrectly concluded that "[t]he reduction in 2020 of the federal Business Energy Investment Tax Credit would increase total project costs if the pilot program is delayed, resulting in a higher revenue requirement burden on ratepayers." (*Report and Order* p. 9). It is the Commission's decision to grant a "blanket" CCN at this time that will result in a higher revenue requirement burden on ratepayers; not the expiration of tax incentives.

21. The Commission confirms the increase, finding: "[t]he annual impact to residential customers of the $10 million in capital expenditures for the pilot program would be approximately 42 cents per customer." (*Report and Order*, p. 9). Moreover, even if the tax incentives expired in 2020 there is no need for additional solar generation until 2024. The Commission found "[t]he company can comply with the solar energy portfolio requirements in the Missouri Renewable Energy Standard ("RES") law until approximately 2024 without building facilities under this pilot program." (*Report and Order*, p. 7). These findings cannot be reasonably reconciled to reach a conclusion that delaying the project will increase costs. Furthermore, to the extent that future RES compliance costs will cause rates to increase, the magnitude is already limited by statute. Section 393.1045 RSMo provides that "[a]ny renewable mandate required by law shall not raise the retail rates charged to the customers of electric retail suppliers by an average of more than one percent in any year[.]"

22. The Commission's *Report and Order* is unreasonable because it will increase the cost to customers for a service the evidence shows they do not need for nearly a decade. The Commission should rehear this point.

VI. The Commission's Report and Order is unreasonable in that it finds entities are willing to host a utility-owned solar generation facility on their own property without receiving a lease payment.

23. The Commission's order is unreasonable because its finding that entities are willing to participate in this program is not supported by competent and substantial evidence of record and is contrary to the evidentiary record in this case. The Commission unreasonably found:

> Ameren Missouri has been approached by several business entities that are interested in participating in the pilot program in order to demonstrate their overall support for sustainability efforts. These entities are willing to host a utility-owned solar generation facility on their own property without receiving a lease payment.

(Report and Order, p. 9).

24. In *State* ex rel. *Byers Transp. Co. v. Public Service Comm'm*., the Court acknowledged that the CCN applicant offered testimony "he had received, almost daily, calls for service … but he was not specific as to who asked for the service, or why, or the volume" and held that "[g]eneral testimony to the effect that he received calls for service from people in the area, is not the kind of testimony required to prove necessity and convenience." *State* ex rel. *Byers Transp. Co. v. Public Service Comm'n*., 246 S.W.2d 825, 826 (Mo. App. 1952). In the present case, Ameren Missouri's general statements relied on by the Commission about customer interest are similarly insufficient to prove necessity and convenience.

25. Furthermore, in the only evidence offered by a plausible partner, Walmart offered testimony that it was not interested in participating in this program. The Commission's finding that entities are willing to host a utility-owned solar generation facility on their own property without receiving a lease payment is unreasonable, not supported by competent and substantial evidence of record, is contrary to the evidentiary record in this case and should be reheard.

VII. The *Report and Order* is unlawful in that the Commission adopted criteria that will unlawfully endorse or discriminate on the basis of religion in violation of both the United States and Missouri Constitutions.

26. The Commission's Report and Order adopts the terms of the Stipulation and Agreement (Report and Order, p. 22). The "site selection" process unlawfully requires religion to be considered when selecting a site location. Appendix A listing "Additional Considerations for Site Evaluation", includes: "Type of Facility: (Office, Educational, Industrial, Manufacturing, Retail, Religious, Data center, Warehouse, Healthcare, Military, Recreational, Other)" (emphasis added). The religious nature of a site has *nothing* to do with it being a suitable location for solar panels. Making religion a selection criterion violates the First Amendment to the U.S. Constitution as well as 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); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997); Mo. Const. Art. I, § 7.

27. The Commission unlawfully erred in permitting the utility to endorse or discriminate on the basis of religion when selecting a site for the generation facilities. The Commission should grant rehearing on its determination to include religion as a site selection criterion.

VIII. The Commission's Report and Order is unlawful in that it binds the decisions of future Commissions.

28. Section 393.190.1 RSMo is the statute governing sale, disposal, and transfer of utility plant and 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.

29. The Commission cites to testimony describing the Company's plan indicating "[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" (Report and Order, p. 20; Ex. 1, p. 4). The Commission also includes in its findings of fact that "[A]t the end of the 25-yer term, the customer may purchase the facility, renew the lease, or have the facility removed from the property." (Report and Order, p. 7). In making this decision and including this finding of fact, the Commission effectively binds the acts of a future Commission when the lease expires in 25 years.

30. In the event that the Commission's conclusion and finding on this point is not binding on a future commission, the Commission's *Report and Order* remains unreasonable. 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.

31. The *Report and Order* permitting this program will also create a dilemma for future commissioners who may 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 solar renewable energy credits 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 reasonable. The Commission should grant rehearing on this point.

Conclusion

32. The Commission's *Report and Order* in this case is unlawful, not supported by substantial and competent evidence, and is unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission grant its application for rehearing.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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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 19th day of January 2017:

/s/ Tim Opitz