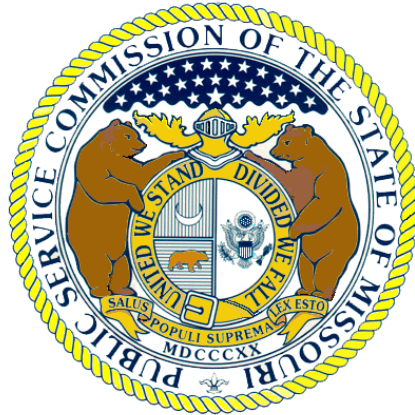


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the 2009 Resource Plan of )  
KCP&L Greater Missouri Operations Company )  
Pursuant to 4 CSR 240-22 )

**File No. EE-2009-0237**

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**REPORT AND ORDER**

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**Issue Date:** October 19, 2011

**Effective Date:** October 29, 2011

## **APPEARANCES**

### **APPEARING FOR KCP&L GREATER MISSOURI OPERATIONS COMPANY:**

**James M. Fischer**, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101,

and

**Roger W. Steiner**, Kansas City Power & Light Company, P.O. Box 418679. Kansas City, Missouri 64141.

### **APPEARING FOR MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION:**

**Douglas L. Healy**, HEALY & HEALY, ATTORNEYS AT LAW, L.L.C., 939 North Booneville, Suite A, Springfield, Missouri 65802.

### **APPEARING FOR DOGWOOD ENERGY, L.L.C.:**

**CARL J. LUMLEY**, CURTIS, OETTING, HEINZ, GARRETT & O'KEEFE, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105.

### **APPEARING FOR THE MISSOURI DEPARTMENT OF NATURAL RESOURCES:**

**Sarah Mangelsdorf** and **Jenny Frazier**, Assistant Attorney Generals, P.O. Box 899, Jefferson City, Missouri 65102

### **APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE RATEPAYERS:**

**Christina Baker**, Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.

### **APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

**Kevin Thompson**, Chief Staff Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

**REGULATORY LAW JUDGE:** Harold Stearley, Deputy Chief Regulatory Law Judge

# REPORT AND ORDER

## I. Procedural History

KCP&L Great Missouri Operations Company (“GMO”) filed its Integrated Resource Plan (“IRP”), as required by 4 CSR 240 – Chapter 22, on August 5, 2009. The majority of the parties filed a Non-Unanimous Stipulation and Agreement (“Agreement”) that included a Stakeholder Process Agreement for resolving several of the parties’ concerns and alleged deficiencies with the IRP. The Agreement required stakeholder meetings culminating with the filing of a revised IRP. On June 2, 2010, after conducting an independent review of the IRP and the unopposed Agreement the Commission determined that the IRP was compliant with the Commission’s Chapter 22 rules and approved it.

On January 18, 2011, after being granted a one-month extension of time, GMO submitted its revised IRP filing.<sup>1</sup> With that filing, GMO stated:

As a result of this additional analysis completed per the Stipulation and Agreement in Case No. EE-2009-0237, GMO has determined that the preferred resource plan filed in August, 2009 is no longer appropriate. Significant changes have occurred in projections of both natural gas costs and CO2 emission costs along with recently proposed U.S. Environmental Protection Agency regulations, (Transport Rule) that dictates [sic] the need to fully evaluate additional alternative resource plans prior to determining a revised preferred plan. GMO will be conducting this additional analysis and expects to have results available in the summer of 2011.

On February 8, 2011, the Commission’s Staff filed a complaint against GMO opening File No. EC-2011-0250. Staff alleged that because GMO did not file a preferred resource plan with its revised IRP that GMO had violated Commission Rules 4 CSR 240-22.070(10) and (11), 22.080(1)(A)-(D) and (7) and 22.010(2). Staff further alleged that GMO’s incomplete filing violated the Agreement and the Commission’s order approving it.

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<sup>1</sup> The Commission had granted GMO a one month extension from the original deadline of December 17, 2010. EFIS Docket Entry Number 54, *Order Granting Extension of Time*, issued on December 28, 2010. EFIS is the Commission’s Electronic Filing and Information System.

On April 27, 2011, the Commission ordered GMO to file its revised preferred resource plan no later than July 1, 2011. The Commission also set a hearing in this matter (not Staff's complaint case) to determine if GMO violated the stipulation and agreement. The evidentiary hearing was held on August 1, 2011.<sup>2</sup>

## **II. Findings of Fact and Conclusions of Law**

### **A. The Parties**

#### **Introduction**

Not all of the parties to this case appeared for the evidentiary hearing convened on August 1, 2011. The parties entering appearances are delineated in the findings of fact below.

#### **Findings of Fact**

1. **KCP&L Greater Missouri Operations Company ("GMO")** is a Missouri corporation with its principal office and place of business located at 1201 Walnut Street, Kansas City, Missouri 64106-2124. GMO is primarily engaged in the business of generating, transmitting, distributing, and selling electric energy in portions of northwestern Missouri.<sup>3</sup>

2. **Dogwood Energy, L.L.C.** ("Dogwood") is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in

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<sup>2</sup> Transcript, Volume 2. In total, the Commission admitted the testimony of 4 witnesses and received 22 exhibits into evidence. Post-hearing briefs were filed on September 8, 2011 and reply briefs were filed on September 22, 2011. The case was deemed submitted for the Commission's decision on September 22, 2011, when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

<sup>3</sup> EFIS Docket Entry No. 1, *Application for Waivers Concerning the 2009 Integrated Resource Plan Submission of KCP&L Greater Missouri Operations Company*, filed on December 4, 2008.

the State of Missouri. Dogwood owns the 625 MW combined cycle generating facility located in Pleasant Hill, Missouri, which is within the MPS service territory of GMO.<sup>4</sup>

**3. Missouri Joint Municipal Electric Utility Commission** (“MJMEUC”) is a body corporate and politic of the State of Missouri, organized and existing as a joint municipal utility commission pursuant to Section 393.700, et seq. Fifty-eight Missouri municipalities currently are parties to the joint contract establishing MJMEUC. MJMEUC serves 5 municipalities that currently have wholesale power contracts with GMO and 7 municipalities directly embedded in GMO's transmission system that take transmission service through the Southwest Power Pool.<sup>5</sup> MJMEUC is a wholesale energy and transmission customer of GMO, both directly and on behalf of its contracting municipalities.<sup>6</sup>

**4. Missouri Department of Natural Resources** (MDNR”) is Missouri's general environmental agency charged with administering the programs assigned to the Department relating to environmental control and the conservation and management of natural resources.<sup>7</sup> MDNR, and specifically its Division of Energy, is a state agency vested with the powers and duties set forth in Section 640.150, RSMo 2000, which includes planning for energy resource development; analyzing energy management issues; consulting and cooperating with all state and federal governmental agencies on matters of energy research and development, management, conservation and distribution; assessing the potential impacts on environmental quality; and analyzing the potential for increased

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<sup>4</sup> EFIS Docket Entry No. 2, *Application to Intervene*, filed December 10, 2008.

<sup>5</sup> EFIS Docket Entry No. 21, *Application to Intervene*, filed August 26, 2009.

<sup>6</sup> See In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief, *Report and Order*, 266 P.U.R.4th 1, 2008 WL 2648913, 14 (Mo. P.S.C. 2008). While MJMEUC entered an appearance, it did not actively participate in the hearing and did not file a post-hearing brief.

<sup>7</sup> *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 19 (Mo. banc 2003).

use of energy alternatives and making recommendations for the expanded use of such alternate energy sources and technologies.<sup>8</sup>

**5. The Office of the Public Counsel** (“Public Counsel”) “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”<sup>9</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”<sup>10</sup>

**6. The Staff of the Missouri Public Service Commission** (“Staff”) is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.<sup>11</sup>

### **Conclusions of Law – Jurisdiction and Burden of Proof**

GMO provides electric service to customers throughout the service area certificated to it by the Commission.<sup>12</sup> GMO is an “electrical corporation” and “public utility” as those terms are defined by Section 386.020, RSMo Supp. 2010, and is subject to the Commission’s jurisdiction, supervision, control and regulation as provided in Chapters 386 and 393, RSMo.

Because Staff dismissed its complaint against GMO, and because MDNR and Public Counsel are the only remaining parties that are alleging any violations of the Commission’s rules, the Agreement and the Stakeholder Process Agreement, MDNR and Public Counsel bear the burden of proof. The burden of proof is the preponderance of the evidence

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<sup>8</sup> EFIS Docket Entry No. 4, *Missouri Department of Natural Resources’ Application to Intervene*, filed on December 23, 2008.

<sup>9</sup> Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

<sup>10</sup> Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

<sup>11</sup> Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

<sup>12</sup> See File Numbers EM-2007-0374 and EN-2009-0164.

standard.<sup>13</sup> In order to meet this standard, MDNR and Public Counsel must convince the Commission it is “more likely than not” that GMO violated the Commission’s rules, or the terms of the Agreement and Stakeholder Process Agreement, and/or the Commission’s order approving the Agreement and Stakeholder Process Agreement.<sup>14</sup>

## **B. Witnesses**

### **Introduction**

A total of four witnesses provided testimony at the evidentiary hearing. Those witnesses were: Lena Mantle for Staff, Adam Bickford for MDNR, Kevin Bryant for GMO and James Okenfuss for GMO.

### **Findings of Fact**

7. The Commission finds that any given witness’s qualifications and overall credibility are not dispositive as to each and every portion of that witness’s testimony. The Commission gives each item or portion of a witness’s testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.

8. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

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<sup>13</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

<sup>14</sup> *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

## Conclusions of Law – Witness Testimony

Witness credibility is solely a matter for the fact-finder, “which is free to believe none, part, or all of the testimony.”<sup>15</sup> An administrative agency, as fact-finder, also receives deference when choosing between conflicting evidence.<sup>16</sup> In fact, the Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.”<sup>17</sup>

The Commission receives deference when reaching decisions based on technical and scientific data.<sup>18</sup> And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.<sup>19</sup> Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.<sup>20</sup>

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.<sup>21</sup> When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a

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<sup>15</sup> *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

<sup>16</sup> *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

<sup>17</sup> *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

<sup>18</sup> *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

<sup>19</sup> *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

<sup>20</sup> *Id.*

<sup>21</sup> *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).



fact-finding agency.<sup>22</sup> Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.<sup>23</sup>

### **C. The 2009 IRP Filing, the Agreement and the Stakeholder Process Agreement Introduction**

The procedural posture of this case is unique. The Commission convened an evidentiary hearing in the IRP file as opposed to convening one in Staff's related complaint file, i.e. EC-2010-0250. When MDNR intervened in Staff's complaint, it stated that while it generally agreed with Staff's allegations it would not declare a position at that time. MDNR's position on the issues was unknown to the Commission prior to the evidentiary hearing held in this file, File No. EE-2009-0237. Similarly, Public Counsel declared no position on any issue in either file prior to the hearing, and its position was not clearly defined until it submitted its post-hearing brief.

After the evidentiary hearing, Staff voluntarily dismissed its complaint and neither MDNR nor Public Counsel filed a separate complaint. Nevertheless, issues regarding alleged violations of the Commission's rules and the Agreement and the Stakeholder Process Agreement have been raised at the evidentiary hearing by MDNR and Public Counsel. GMO did not object, but rather defended its positions. Consequently, Section 536.063(3) is applicable because it provides: "Where issues are tried without objection or by consent, such issues shall be deemed to have been properly before the agency."

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<sup>22</sup> *Id.*

<sup>23</sup> *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

Although no formal complaint was filed with the Commission by MDNR or Public Counsel,<sup>24</sup> a contested case proceeding on their alleged violations was held that ensured all due process requirements.

MDNR alleges that GMO did not comply with three requirements in the Agreement and Stakeholder Process Agreement by: (1) making changes in its Demand-Side Management (“DSM”) portfolio; (2) failing to select a preferred resource plan with the revised IRP filing; (3) failing to file an analysis of the retirement of the Sibley 3 coal unit.<sup>25</sup> MDNR also maintains that GMO failed to vet all plans and programs through the stakeholder process, post execution of the Stakeholder Process Agreement.<sup>26</sup> Implied in these various allegations is the additional allegation that if GMO violated the Agreement or the Stakeholder Process Agreement, then GMO violated the Commission’s order approving them.

In addition to alleging this non-compliance, MDNR’s witness testified that the alleged breaches of the Agreement and Stakeholder Process Agreement would also be violations of the Commission’s IRP rules; specifically 4 CSR 240-22.070(6) (failure to select a preferred resource plan); 4 CSR 240-22.050(7) (failure to test DSM portfolios for cost effectiveness); 4 CSR 240-22.050(6)(C) and 11(G) (adding a new program to the DSM

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<sup>24</sup> At the beginning of the evidentiary hearing, Public Counsel informed the Regulatory Law Judge that it did not want, at that time, to pursue a complaint based upon the allegations raised by Staff in its complaint action, File No. EC-2011-0250. Transcript, p. 19. However, in its post-hearing brief, Public Counsel does allege violations of the Agreement and Stakeholder Process Agreement and states it believes the evidence supports a Commission finding of the violations. Public Counsel has not sought penalties or any other form of relief.

<sup>25</sup> Transcript, pp. 59-130.

<sup>26</sup> Transcript, pp. 66, 80-81, 84, 96-97, 101, 104-105, 108-109, 124-128. See also Public Counsel’s Post-hearing Brief, EFIS Docket Entry No. 103, filed September 8, 2011.

portfolio without a proper description); and 4 CSR 240-22.070 (failure to properly analyze alternative resource plans).<sup>27</sup>

Public Counsel's allegations mirror those of MDNR. However, while MDNR and Public Counsel outline their allegations in general terms, and while MDNR identifies what it believes are specific rule violations, neither identifies specific paragraphs, by number, of the Agreement or the Stakeholder Process Agreement that GMO is alleged to have violated.

In terms of relief, MDNR requests the Commission to order GMO to comply with the Agreement by correcting its alleged deficiencies and filing a revised IRP. Additionally, MDNR and Public Counsel seek Commission findings that GMO violated the terms of the Agreement and Stakeholder Process Agreement. Neither party has sought penalties.

Dogwood takes a more pragmatic view. Dogwood did not file or join any complaint. Dogwood does not seek any findings of violations and observes that GMO is required to make its next IRP filing in April 2012. Dogwood believes that little would be gained from requiring GMO to make further changes to its 2009 IRP or the subsequent supplemental filings. Dogwood believes that efforts should now focus on GMO's next IRP filing and that any remaining concerns should be addressed in that filing. Dogwood has listed its concerns, most of which address purchased power agreements, in its post-hearing brief.

In its post-hearing briefing, Staff reiterates its position that GMO, following the July 1, 2011 supplemental filing, is now in compliance with the Commission's IRP rules.

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<sup>27</sup> Staff Exh. 1; GMO Exh. 2; Transcript, pp. 85-101. The failure to test allegation was restricted to the January 18, 2011 filing. The added program was called "Residential Lighting and Appliances." Another program was removed from the portfolio, the "Affordable New Homes" program. The addition and subtraction of programs occurred with the July 1, 2011 filing. The failure to properly analyze alternative resource plans was restricted to the January 18, 2011 filing.

Staff has several concerns with GMO's revised filings and states its desire to have any further efforts to address those concerns by GMO occur with GMO's April 2012 IRP filing.

**Findings of Fact – General Provisions of the IRP, the Agreement and the Stakeholder Process Agreement**

9. GMO filed its 2009 Integrated Resource Plan (“IRP”) on August 5, 2009.<sup>28</sup>

10. The IRP was composed of 8 volumes and various appendices: Volume 1, the Executive Summary of the IRP; Volume 2, the Filing Schedule and Requirements; Volume 3, Load Analysis and Forecasting; Volume 4, Supply-Side Resource Analysis; Volume 5, Demand-Side Resources Analysis; Volume 6, Integrated Resource Analysis; Volume 7, Risk Analysis and Strategic Selection; and Volume 8, Filing Schedule and Requirements.<sup>29</sup>

11. Among other things, the IRP included alternative resource plans, a preferred resource plan, and an analysis of various Demand-Side Management (“DSM”) Programs.<sup>30</sup>

12. Cost effectiveness testing was performed on the DSM programs.<sup>31</sup>

13. On April 12, 2010, GMO, Staff, Public Counsel, MDNR and Dogwood filed a Non-Unanimous Stipulation and Agreement (“Agreement”) that purported to remedy all alleged deficiencies and concerns in the 2009 IRP filing.<sup>32</sup>

14. The same parties executing the Agreement also executed and filed a “Stakeholder Process Agreement” as an appendix to the Agreement.<sup>33</sup>

15. The remaining parties, the Sedalia Industrial Energy Users’ Association (“SIEUA”), the City of Kansas City, Missouri (“KCMO”), and the Missouri Joint Municipal

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<sup>28</sup> Transcript, p. 27 (Official Notice). See also EFIS Docket Entries 14-18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Transcript, pp. 103, 131-132, 145-146, 148, 151.

<sup>31</sup> Transcript, pp. 120-121, 137-138.

<sup>32</sup> MDNR Exh. 2; Transcript, pp. 112, 118-119.

<sup>33</sup> MDNR Exh. 2; Transcript, pp. 65-66.

Electric Utility Commission (“MJMEUC”), were not signatories to the Agreement or the Stakeholder Process Agreement, but those parties did not oppose either Agreement.<sup>34</sup>

**16.** On June 2, 2010, the Commission, after conducting its own independent review, approved the Agreement and found the IRP to be compliant with the Commission’s Rules.<sup>35</sup>

**17.** The Agreement reflects that some concerns were not fully resolved by the Agreement itself, but rather an alternative solution had been agreed upon in the attached Stakeholder Process Agreement.<sup>36</sup>

**18.** The signatories to the Agreement executed the Stakeholder Process Agreement and agreed that the stakeholder process would serve as the means for planning and implementing remedies for any identified concerns or deficiencies.<sup>37</sup>

**19.** The Stakeholder Process Agreement expressly states: “The parties agree that one of the objectives of the meetings described and schedule herein is to discuss and attempt to come to terms regarding specific action items and elements to be addressed in the supplements and revised IRP to be filed by GMO.”<sup>38</sup>

**20.** The specific action items in the Stakeholder Process Agreement are delineated in paragraphs 7 through 33.<sup>39</sup>

**21.** The majority of the action items are couched terms that do not mandate specific filings with the Commission, i.e. agreements: to discuss, to define, to present, to

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<sup>34</sup> MDNR Exh. 2.

<sup>35</sup> Transcript, p. 33; EFIS Docket Entry No. 48, *Order Approving Nonunanimous Stipulation and Agreement and Accepting Integrated Resource Plan*, issued June 2, 2010, effective June 12, 2010.

<sup>36</sup> MDNR Exh. 2; Transcript, pp. 65-66.

<sup>37</sup> MDNR Exh. 2; Transcript, pp. 65-66.

<sup>38</sup> MDNR Exh. 2.

<sup>39</sup> MDNR Exh. 2.

examine, to propose, to work with, to identify, and to evaluate.<sup>40</sup>

**22.** The signatories to the Agreement and Stakeholder Process Agreement reserved the right to take any disputes concerning implementation or action items related to GMO's IRP, revised IRP or supplemental filings to the Commission for resolution.<sup>41</sup>

**23.** No language in either the Agreement or Stakeholder Process Agreement provides that stakeholder meetings, held subsequent to the Commission approval of the Agreement and Stakeholder Process Agreement, will create additional terms, conditions or obligations for the parties that would become part of the Commission-approved Agreement or the Stakeholder Process Agreement.<sup>42</sup>

**24.** No additional agreements, or modifications to the Agreement and Stakeholder Process Agreement, were filed by the signatories with the Commission after April 12, 2010.<sup>43</sup>

**25.** No additional agreements, or modifications to the Agreement and Stakeholder Process Agreement, were approved by the Commission after the Commission approved the April 12, 2010 Agreement on June 2, 2010.<sup>44</sup>

### **Findings of Fact – Provisions of the Agreement and Stakeholder Process Agreement Related to the Allegations**

**26.** Paragraph 1 to the Agreement requires GMO to file “a revised IRP filing.” It does not require GMO to file a completely new or a “complete” IRP. The terms used indicate that the additional filings will consist of revisions to the IRP already filed.<sup>45</sup>

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<sup>40</sup> MDNR Exh. 2.

<sup>41</sup> MDNR Exh. 2.

<sup>42</sup> MDNR Exh. 2; Transcript, pp. 112-113.

<sup>43</sup> Transcript, pp. 111-113, 118.

<sup>44</sup> *Id.* See also EFIS Docket Entries for File No. EE-2009-0237.

<sup>45</sup> MDNR Exh. 2.

**27.** The Agreement does not require that a preferred resource plan be selected through the stakeholder process.<sup>46</sup> Nor does the Agreement require GMO to accept any particular preferred plan.<sup>47</sup>

**28.** Paragraph 30 to the Stakeholder Process Agreement states, in pertinent part:

However, GMO and the other Parties agree that at the completion of the revised integration analysis (through MIDAS modeling) GMO will use a spreadsheet analysis approach to quantify the impact on company revenues and earnings resulting from the preferred resource plan selected by GMO in its revised IRP filing, both with and without the non-traditional accounting procedures requested in GMO's 2010 revised IRP filing and any associated ratemaking treatment to be sought by GMO for demand-side resources. GMO's revised filing will include discussion and identification of an alternative resource plan as a contingency option should GMO determine there to be inadequate DSM cost recovery available to it and an alternative resource acquisition strategy is thus preferred. (Emphasis added.)<sup>48</sup>

**29.** The language in Paragraph 30 to the Stakeholder Process Agreement, while vague, creates an expectation for the *selection* of a preferred resource plan in GMO's revised IRP filing. This language does not require a new selection that is different than the preferred resource plan already selected when the original IRP was filed on August 5, 2009. Nor does this language require that a completely new preferred resource plan be filed.

**30.** Paragraphs 19-32 of the Agreement direct that various concerns regarding GMO's DSM resources analysis will be addressed by the terms in the Stakeholder Process Agreement.<sup>49</sup>

**31.** Paragraphs 20 through 25 and Paragraph 30 of the Stakeholder Process Agreement address action items related to GMO's DSM program.<sup>50</sup>

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<sup>46</sup> MDNR Exh. 2.; Transcript, pp. 58, 128.

<sup>47</sup> MDNR Exh. 2.; Transcript, p. 123.

<sup>48</sup> MDNR Exh. 2.

<sup>49</sup> MDNR Exh. 2.

**32.** Paragraphs 20 and 21 of the Stakeholder Process Agreement specifically address “Alternative Levels of DSM Program Implementation.” Paragraph 21 provides, in pertinent part:

GMO agrees to include one or more portfolios of new DSM programs in addition to the all-DSM portfolio in the revised IRP scheduled to be filed December 17, 2010. At least one of these additional portfolio(s) of DSM programs will incorporate a more aggressive level of DSM implementation than the "all-DSM" portfolio. These additional portfolios will be treated as resources that are available for selection of alternative resource plans that are included in the integrated analysis. Agreement on criteria to be met by the additional, alternative portfolio will be discussed at the April and May 2010 stakeholder meetings and decided prior to the June 2010 stakeholder meeting.

**33.** The language in Paragraph 21 of the Stakeholder Process Agreement references discussing and deciding upon “criteria” for the additional alternative portfolio.

**34.** There is no language in the Agreement or the Stakeholder Process Agreement requiring GMO to use specific DSM programs for the portfolios to be included in the revised IRP.

**35.** There is no language in the Agreement or the Stakeholder Process Agreement requiring stakeholder agreed to demand-side programs to be included in GMO’s updated analysis and its preferred plan.<sup>51</sup>

**36.** There is no language in the Agreement or the Stakeholder Process Agreement requiring a new cost-effectiveness test when GMO made its revised IRP filings, or requiring cost effectiveness testing of any of the DSM programs included in the revised IRP supplemental filings.<sup>52</sup>

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<sup>50</sup> MDNR Exh. 2.

<sup>51</sup> Transcript, p. 58.

<sup>52</sup> MDNR Exh. 2; Transcript, pp. 120-122, 137-138.



**37.** On-going electronic mail discussions following the approval of the Agreement and Stakeholder Process Agreement between various stakeholders in July and October of 2010 demonstrate an on-going discussion regarding DSM portfolios. This discussion was non-binding and subject to change. Nothing in the electronic mail offered into evidence at the hearing can be construed as a being a formally executed agreement to modify or further qualify the terms of the Agreement and Stakeholder Process Agreement. No finalized agreement from any electronic mail discussion was submitted to the Commission for approval.<sup>53</sup>

**38.** Paragraph 8 of the Agreement requires the analysis of retiring Sibley 3 to be addressed by the terms in the Stakeholder Process Agreement.<sup>54</sup>

**39.** Paragraph 11 of the Stakeholder Process Agreement provides, in pertinent part:

GMO agrees to develop at least one alternative resource plan that includes retirement of Sibley 3 and to include this alternative resource plan in the revised integration analysis for the filing due December 17, 2010.<sup>55</sup>

**40.** The language of the Stakeholder Process Agreement does not require an alternative resource plan be included that evaluates the retirement of Sibley 3 separately from the retirement of any other plants.

### **Findings of Fact – The January 18, 2011 IRP Filing**

**41.** GMO filed its Revised Integrated Resource Analysis on January 18, 2011 after being granted a one-month extension of time.<sup>56</sup>

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<sup>53</sup> MDNR Exhs. 4 and 5; Transcript, pp. 71-74, 111-113.

<sup>54</sup> MDNR Exh. 2.

<sup>55</sup> MDNR Exh. 2.

<sup>56</sup> Transcript, pp. 27 (Official Notice), 74, 77, 125; See EFIS Docket Entry No. 57, *KCP&L Greater Missouri Operations Company's Submission of Its Revised Integrated Resource Analysis* (NP and HC), filed on January 18, 2011.

**42.** The revisions filed on January 18, 2011, supplement the original IRP filing on August 5, 2009.<sup>57</sup>

**43.** GMO's Revised IRP submission included revisions to: Volume 6, Revised Integrated Analysis, which included Appendix A - Integrated Analysis Report (HC and NP versions); Volume 8, Filing Schedule and Requirements - Nontraditional Accounting; and Exhibit 1, a DSM example (HC and NP versions).<sup>58</sup>

**44.** GMO included eleven alternative resource plans in the revised analysis, nine of which were devised in the stakeholder process to analyze different levels of supply-side resources that included base load generation and renewable resource inclusion, peak-load generation, and retirement scenarios.<sup>59</sup>

**45.** GMO included four alternative resource plans in the revised Volume 6 that included the retirement of the entire Sibley Station (i.e. Sibley 1, 2 and 3).<sup>60</sup>

**46.** MDNR knew that retirement of the Sibley Station included the retirement of Sibley 3.<sup>61</sup>

**47.** GMO included DSM portfolios and energy programs in the revised analysis.<sup>62</sup>

**48.** GMO did not, nor was it required to, refresh the cost effectiveness study of the DSM portfolios from its August 5, 2009 filing.<sup>63</sup>

**49.** GMO's revised analysis did not include a new selection of a preferred resource plan or a completely new preferred resource plan.

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<sup>57</sup> MDNR Exh. 2; Transcript pp. 130-201.

<sup>58</sup> MDNR Exh. 6.

<sup>59</sup> MDNR Exh. 6.

<sup>60</sup> MDNR Exh. 6, pp. 8-11, Plans 3, 7, 8, and 9.

<sup>61</sup> Transcript, p. 102.

<sup>62</sup> MDNR Exh. 6.

<sup>63</sup> Transcript, p. 154. See finding of Fact Number 36.

**50.** GMO gave notice that the preferred resource plan selected with the August 5, 2009 IRP filing was no longer appropriate related to changes in projected natural gas costs, CO2 emission costs and new EPA regulation proposals pursuant to Commission Rule 4 CSR 240-20.070(10).<sup>64</sup>

**51.** The Commission's IRP rules that were in effect at the time of GMO's IRP filing do not require a company to prepare and file a completely new IRP when a company finds it is no longer appropriate to use the preferred plan that was originally selected.<sup>65</sup>

### **Findings of Fact – The July 1, 2011 IRP Filing**

**52.** GMO submitted its completed analysis for its 2009 IRP, and filed a new preferred resource plan on July 1, 2011.<sup>66</sup>

**53.** The July 1, 2011 filing was authorized by Commission orders.<sup>67</sup>

**54.** The revisions filed on July 1, 2011 supplement the original IRP filing on August 5, 2009.<sup>68</sup>

**55.** This final filing included revisions to: Volume 1, the Executive Summary of the IRP; Volume 6, Integrated Resource Analysis; and Volume 7, Risk Analysis and Strategic Selection.<sup>69</sup>

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<sup>64</sup> Transcript, pp. 25-43 (Judicial Admission), 86-87, 115-116, 131-132, 139, 146, 154, 167, 190-191, 197-198. See also Staff Exh. 1.

<sup>65</sup> Staff Exh. 1; Transcript, pp. 118-121.

<sup>66</sup> Transcript, pp. 27 (Official Notice), 46, 77, 119, 131-133; MDNR Exhs. 9 and 10; EFIS Docket Entry No. 62, *KCP&L Greater Missouri Operations Company's Submission of Its Completed Analysis for Its Integrated Resource Plan and Its Preferred Resource Plan*, filed July 1, 2011.

<sup>67</sup> Transcript, pp. 37 (Judicial Admission), 149; EFIS Docket Entry No. 59, *Order Directing Filing*, issued April 19, 2011; EFIS Docket Entry No. 61, *Order Directing Filing, Providing Notice and Setting Hearing*, issued April 27, 2011.

<sup>68</sup> MDNR Exh. 2; Transcript, pp. 130-201 (See page 132 in particular).

<sup>69</sup> MDNR Exh. 9.

**56.** Twelve alternative resource plans were developed for integrated resource analysis, each of which included sufficient renewable resources to meet the Missouri Renewable Energy Standard.<sup>70</sup>

**57.** A preferred resource plan was selected that replaced the previously selected plan in the August 5, 2009 IRP filing.<sup>71</sup>

**58.** The revisions addressed the changed circumstances that prompted GMO to select a new preferred resource plan.<sup>72</sup>

**59.** The selected preferred resource plan includes an enhanced level of proposed DSM programs starting in 2012, subject to receiving acceptable approval under the Missouri Energy Efficiency Investment Act (MEEIA), and renewable resources additions beginning in 2014.<sup>73</sup>

**60.** The level of DSM investment in the July 1, 2011 preferred plan and supplemental filing is an increase from current levels of DSM investment for GMO.<sup>74</sup>

**61.** GMO did not, nor was it required to, refresh the cost effectiveness study of the DSM portfolios its August 5, 2009 filing.<sup>75</sup>

### **Conclusions of Law - The 2009 IRP Filing, the Agreement and the Stakeholder Process Agreement**

The substantial and competent evidence in the record as a whole supports the following conclusions of law:

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<sup>70</sup> MDNR Exh. 9; Transcript, p. 133.

<sup>71</sup> Transcript, pp. 46, 131; See also Footnote 66.

<sup>72</sup> See Finding of Fact Number 50 and accompanying footnote.

<sup>73</sup> MDNR Exh. 9. Transcript, pp. 133-139.

<sup>74</sup> Transcript, pp. 138-139.

<sup>75</sup> Transcript, p. 154. See Finding of Fact Number 36.

The August 5, 2009 IRP filing was supplemented by the January 18, 2011 and July 1, 2011 filings. It is clear from reviewing the documents and the testimony, that together, these three filings comprise a single IRP. GMO selected a preferred resource plan when it originally filed its IRP. That selection did not change at the time of the supplemental filing on January 18, 2010, nor was GMO required to select a different preferred plan. GMO's IRP was not deficient in terms of selecting a preferred resource plan.

GMO properly gave notice pursuant to the Commission's rules that its preferred plan was no longer appropriate. This notice did not alter the selection of the preferred plan; rather it provided the Commission with the basis for GMO to revise that plan. Contemporaneously with this notice, GMO should have requested an extension of time to revise the preferred plan or select a new preferred plan. While the supplemental filing on July 1, 2011, was late in terms of the deadline established by the Agreement, the late filing was authorized by Commission orders.

Similarly, recognizing the three filings comprise one IRP, there is no language in the Commission's rules, the Agreement or the Stakeholder Process Agreement that supports the alleged violations in relation to GMO's DSM portfolios. The programs were adequately described and cost-effectiveness testing was performed. GMO also included a more aggressive level of DSM investment in the July 1, 2011 preferred plan as required by the Agreement and the Stakeholder Process Agreement. While MDNR complains that the level of DSM energy savings was less than what it believes was agreed to in the July 21, 2010

electronic mail,<sup>76</sup> all that the Agreement and Stakeholder Process Agreement required was a level of DSM savings greater than current levels.<sup>77</sup>

MDNR's contention that e-mails between the parties describing DSM programs became binding agreements in terms of what was required in GMO's DSM portfolios are erroneous. These documents demonstrate nothing more than an on-going discussion between various parties, a discussion which is subject to change. No "agreements" to modify or further qualify the terms of the Agreement and Stakeholder Process Agreement were formalized, executed or submitted to the Commission for approval. No additional agreements were reached pursuant to the terms of the Agreement or the Stakeholder Process Agreement that modified the terms of those Commission-approved documents.

With regard to alternative resource plans including an analysis of the Sibley 3 unit, MDNR and Public Counsel examine GMO's filings separately to allege a violation of the Agreement. As previously noted, the supplemental filings are all part of a singular IRP, and GMO has met the requirement to include alternative resource plans analyzing the retirement of Sibley 3. MDNR's and Public Counsel's argument in this regard are without merit.

**In summary:** The substantial and competent evidence in the record as a whole supports the conclusion that GMO did not violate any Commission IRP rules when filing its 2009 IRP and the supplements to the IRP. The substantial and competent evidence in the record as a whole supports the conclusion that GMO did not violate the Agreement or the Stakeholder Process Agreement.

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<sup>76</sup> Transcript, p. 103.

<sup>77</sup> See Findings of Fact Numbers 32, 59, and 60.

### **III. Final Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts, as it has found them, to the law to reach its conclusions, the Commission has reached the following final decision.

MDNR and Public Counsel have failed to meet, by a preponderance of the evidence, their burden of proving that GMO violated the Commission's Chapter 22 rules, the Agreement or the Stakeholder Process Agreement. This is not to say that the Commission is unsympathetic to concerns raised by the stakeholders during this proceeding. While these concerns are not deficiencies, the Commission expects GMO to address them fully. GMO is required to file its next full triennial IRP under the Commission's recently promulgated changes to the Chapter 22 rules in April 2012. GMO will be required to address the concerns raised by the stakeholders in this proceeding in April IRP filing.

#### **THE COMMISSION ORDERS THAT:**

1. The Missouri Department of Natural Resources KCP&L and the Office of the Public Counsel failed to establish any violations on the part of KCP&L Greater Missouri Operations Company in relation to its 2009 Integrated Resource Plan and supplemental filings.
2. The relief requested by the Missouri Department of Natural Resources is denied.
3. The relief requested by the Office of the Public Counsel is denied.
4. KCP&L Greater Missouri Operations Company shall address all concerns raised by the parties to this action in its April 2012 Integrated Resource Plan filing.
5. This Report and Order shall become effective on October 29, 2011.

6. This file shall be closed on October 30, 2011.

**BY THE COMMISSION**



**Steven C. Reed  
Secretary**

( S E A L )

Gunn, Chm., Davis, Jarrett, and  
Kenney, CC., concur;  
and certify compliance with the provisions  
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 19<sup>th</sup> day of October, 2011.