

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

In the Matter of the Application of KCP&L Greater)
Missouri Operations Company for Approval to)
Make Certain Changes in its Charges for Electric) Case No. ER-2009-0090
Service)

In the Matter of the Application of KCP&L Greater)
Missouri Operations Company for Approval to) Case No. HR-2009-0092
Make Certain changes in its Charges for Steam)
Heating Service)

MOTION TO RECUSE

COME NOW the Sedalia Industrial Energy Users' Association ("Industrial Intervenors"), and Ag Processing, Inc, a cooperative, and for their Motion to Recuse Commissioner Davis respectfully state as follows:

1. On September 5, 2008, KCP&L Greater Missouri Operations Company ("GMO") submitted proposed tariffs designed to implement an increase in its charges for electric and steam heat service. Simultaneous with these filings, Kansas City Power & Light Company (KCP&L), an affiliate of GMO, also filed for an increase in its electric rates. This KCP&L rate increase has been docketed by the Commission as ER-2009-0089.

2. On February 13, 2009, the Industrial Intevenors in Case No. ER-2009-0089, with the support of the Office of the Public Counsel, filed its Motion to Recuse Commissioner Davis from any further participation in that docket. As detailed in that pleading, the basis for the Industrial Intervenors' motion was Commissioner Davis' admitted solicitation of information from the Staff, a party to each of these proceedings. On March 19, 2009, Commissioner Davis recused himself from any further participation

in Case No. ER-2009-0089. Claiming that “the public needs to have absolute confidence in the process,”¹ Commissioner Davis recused himself from that proceeding. By taking this action, Commissioner Davis intended to assure the public that “this proceeding and that all proceedings here at the PSC are conducted in a fair and impartial manner.”²

3. It has become apparent, that the same need to assure that the public has “absolute confidence in the process,” is also applicable to the pending GMO proceedings. Commissioner Davis’ recusal is mandated by the following three factors. *First*, the pending GMO and KCP&L proceedings are fundamentally and inextricably intertwined. These cases involve the same management, employees, capital structure, risk profile, and return on equity. Moreover, these cases have common issues that will be presented in each case. It is essentially impossible for any Commissioner to effectively recuse him/herself from participation in one of these intertwined cases without continuing to have influence over that case by their participation in the interlocked rate cases. *Second*, by his questions in the April 6, 2009 oral argument, it is apparent that Commissioner Davis has developed a predisposition against the Staff.³ Realizing that consumers are incapable of presenting a complete case addressing each of the utility’s requested costs, these consumers necessarily rely upon the Staff for the presentation of a comprehensive cost of service analysis of the utility’s request. Therefore, any predisposition demonstrated against the Staff and in favor of the utility will necessary affect these consumers. *Third*, as reflected in evidence presented and accepted in Case No. EM-

¹ Notice of Non-Participation, Case No. ER-2009-0089, issued March 19, 2009, at page 1.

² *Id.* at page 2.

³ Vol 10 [04-06-09]: 66:7 - 66:11:

7 COMMISSIONER DAVIS: Mr. Dottheim, I'm
8 going to go back to my original question to you, and
9 that is tell me again why I should believe that this
10 is not just another attempt by Staff to either gain [game]
11 the system now or gain [game] the system at a later date?

2007-0374, Commissioner Davis may have already predetermined the merits of Case Nos. ER-2009-0090 and HR-2009-0092. Given this apparent predetermination, he unfortunately does not meet the constitutional guarantee of a fair and impartial decisionmaker.

A. **THE INTERTWINED NATURE OF THESE CASES DICTATES RECUSAL
FROM ALL THREE CASES.**

4. It is unquestioned that Case Nos. ER-2009-0089, ER-2009-0090 and HR-2009-0092 are all intertwined. While he has recused himself from any future participation in Case No. ER-2009-0089, Commissioner Davis has not taken a similar action with regards to these other related cases and has continued to participate in them. While claiming that he would not participate in ER-2009-0089 and would not “engage in any discussions with Commissioners, Advisory Staff, PSC Staff or the parties regarding this matter,” Commissioner Davis’ continued participation in the other two proceedings and discussion on the record regarding common issues in those cases minimizes the effectiveness of his recusal commitment. For instance, despite the fact that the issue of return on equity is identical between the cases, Commissioner Davis apparently intends to participate on this issue as it applies to the GMO cases. Such participation ignores the fact that this is an identical issue as in the KCPL case. This issue involves: (1) the same parent company; (2) the same parent company risk profile; (3) the same comparable company group; (4) the same witnesses; and (5) the same models. For all intents and purposes, it is impossible for Commissioner Davis to recuse himself from participating in regards to the return on equity for KCPL while simultaneously judging the same matter in the GMO cases. Further, continued participation in the GMO cases necessarily affects the deliberations of the Commission in the KCPL case.

5. The intertwined nature of these proceedings is not only reflected in the substantive issues, but also in the procedural issues in this case. In an effort to accommodate Commissioner Davis' intended participation in the GMO cases, the Commission held two oral arguments on April 6, 2009, but then endeavored to combine the transcripts from the proceeding in ER-2009-0089.⁴ In the questioning at that second oral argument, Commissioner Davis repeatedly asked questions that were relevant to the KCPL case, from which he has recused himself, that would have no relevance to the GMO cases. Several examples are easily identified.⁵

⁴ Vol 10 [04-06-09]: 27:15 - 27:19.

⁵ Vol 10 [04-06-09]: 33:13 - 33:24 :

13 COMMISSIONER DAVIS: Yes, I do. I guess
14 since you responded, Mr. Williams, I'll address this
15 to you. How many data requests has the PSC sent to
16 KCP&L in this case?

Vol 10 [04-06-09]: 34:17 - 34:23:

17 MR. FISCHER: Judge, I think on the
18 Iatan question specifically, on one day there were
19 150 filed on one day in EFIS. There were a total
20 of over 1,000 data requests for Staff in three case.
21 608 were filed, I know, in the KCP&L case. The
22 remainder were filed in the GMO steam and electric
23 cases.

Vol 10 [04-06-09]: 35:10 - 35:12:

10 COMMISSIONER DAVIS: So is it fair to
11 say that the auditing Staff is -- is familiar with
12 the -- the books and the works of KCP&L?

Vol 10 [04-06-09]: 46:16 - 46:21:

16 COMMISSIONER DAVIS: Okay. And I guess,
17 let me back up. Mr. -- Mr. Zobrist, can you -- can
18 you estimate what -- what portion of the receipts for
19 Iatan 1 have you -- has -- has KCP&L GMO or KCP&L
20 already submitted to the Staff, what percentage, what
21 portion?

Vol 10 [04-06-09]: 46:25 - 47:11:

25 MR. FISCHER: Commissioner, the company
00047
1 has been providing cost information on Iatan 1 every
2 month for the last couple of years. I understand
3 that the last, most recent information would have

6. The intertwined nature of these proceedings is best reflected in Commissioner Davis *ex parte* submission which commenced his recusal action. That *ex parte* filing, involving certain information related to KCPL, **was filed by Commissioner Davis in the GMO case.** The intertwined nature of these cases is also reflected in numerous Commission orders. For instance, the Commission issued the same: (1) Order Setting Procedural Schedule; (2) Order Expanding Access to Public Comment Hearings; (3) Order Establishing Time for Response; (4) Order Granting Motion for Extension of Time; (5) Order Modifying Procedural Schedules for True-Up Proceedings and Formally Adopting Test Year and Update Period; and (6) Order Establishing Time for Response in all three interrelated cases. If the objective is to provide the public with absolute certainty about the fairness of the process, to any member of the public watching these dockets, they are intertwined to the point that Commissioner Davis' participation in any one of the dockets will necessarily influence the deliberations and outcome of any other

4 been through probably February, so there's very
5 little information that has not been provided. And
6 we'll -- we will be getting some additional
7 information up to the cutoff date, and that will be
8 turned around within the cutoff period as required by
9 the Commission's order. Missouri Staff's been
10 basically getting the same information the Kansas
11 Staff has been getting on an ongoing basis, so..

Vol 10 [04-06-09]: 63:20 - 64:5

20 COMMISSIONER DAVIS: All right. I found
21 your -- I found comments regarding creating a quote,
22 pot of money very interesting. Do you recall KCP&L's
23 first rate case after the adoption of the
24 experimental regulatory plan?

25 MR. DOTTHEIM: Yes.

00064

1 COMMISSIONER DAVIS: Okay. And you
2 recall that as a part of the experimental regulatory
3 plan, it was contemplated that KCP&L would require
4 approximately \$17 million in amortizations. Do you
5 recall that?

proceeding. For this reason, Commissioner Davis' recusal from the GMO cases in mandated.

B. COMMISSIONER DAVIS' BIAS TOWARDS STAFF UNDERMINES THE NOTION OF A FAIR AND IMPARTIAL DECISIONMAKER

7. On April 6, 2009, the Commission convened an oral argument to consider the effect that recent start-up events at the Iatan 1 generating station would have on the procedural schedule in these cases. In order to accommodate Commissioner Davis' recusal from Case No. ER-2009-0089, the Commission scheduled one oral argument for the 0089 case and a separate oral argument for ER-2009-0090 and HR-2009-0092. In that case, despite repeated references to Staff's lack of resources and other work commitments, Commissioner Davis repeatedly questioned whether Staff's inability to conduct a prudence audit of the Iatan 1 AQCS costs was part of a "calculated legal strategy"⁶ or an attempt by Staff "to game the system."⁷

8. Given the absence of evidence to support such a contention by Commissioner Davis, it is apparent that these type of comments merely reflect an ongoing predisposition against the Commission's Staff. Unfortunately, Staff is not the only party that may get harmed by this ongoing predisposition. Given that consumers are incapable of mustering the resources to mount a comprehensive audit of the utility's books and records, these consumers rely on the Staff to present a fair and impartial review of the Company's cost of service. Recognizing that issues in which the Staff and Company agree would rarely be presented, the Commission would likely only be presented with issues in which the Staff has opposed the utility's position. Therefore, a predisposition against Staff – or an initial perception that Staff's effort constitutes "just

⁶ Tr. 58.

⁷ Tr. 66.

another attempt” to “game” the system⁸ on a litigated issue would virtually always result in a predisposition in favor of the utility. For this reason, Commissioner Davis’ inclination against the Staff has the practical effect of depriving all consumers of a fair and impartial decisionmaker. The only remedy to rectify such bias is Commissioner Davis’ recusal from this case.

C. EVIDENCE OF PREJUDGMENT

9. On December 3, 2007, the Commission convened an evidentiary hearing for the purpose of considering Great Plains Energy’s request to acquire Aquila, Inc. During that hearing, certain evidence was offered which detailed *ex parte* meetings which occurred between Aquila and Great Plains’ management with Commissioners. In particular, a memorandum written by Aquila’s Chief Executive Officer indicated that he had met with then Chairman Davis and had received support for the transaction. As a result of that evidence, the recusal of Chairman Davis was sought and eventually received.⁹

A careful review of the evidence elicited in that case indicates that, not only did Chairman Davis provide support for the acquisition of Aquila, he also provided support for this rate proceeding. Specifically, while the Staff indicated some trepidation regarding the transaction, the Chairman was more enthusiastic about the merger and this rate case.

I also had another meeting with Mike Chesser. He confirmed that they received the same mixed results in Jefferson City. **Chairman Davis indicated he would support the transaction – including the 2007 rate case** while the Staff of the Missouri Public Service Commission indicated they would oppose anything but a generic merger application.¹⁰

⁸ Vol 10 [04-06-09]: 66:7 - 66:11.

⁹ See, Notice of Recusal of Chairman Davis, Case No. EM-2007-0374, issued December 6, 2007.

¹⁰ Ex. 304, Case No. EM-2007-0374 (emphasis added).

As a result of Company-sought delays, the merger closing did not occur as planned. In fact, since the closing did not happen until July 14, 2008, Great Plains was unable to file an explicitly-designated “2007” rate case. Nevertheless, less than two months after the merger closing, this immediate case was filed. Therefore, while the evidence refers to a “2007” rate case, it is apparent that **this pending case** is that referenced. Given Chairman Davis’ stated support for this case, there are significant concerns that he has prejudged this matter in opposition to any position that Staff might develop or offer. As a result, in order to assure the public’s “absolute confidence” to which he recently referred, he should immediately recuse himself from any further participation in Case Nos. ER-2009-0090 and HR-2009-0092 and avoid further contamination of the record in these interrelated and intertwined proceedings

WHEREFORE, these Industrial Intervenors respectfully request that Commissioner Davis recuse himself from any future participation in the above-captioned proceedings including communications with other Commissioners regarding the cases.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Woodsmall". The signature is written in a cursive style with a large initial "D".

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ATTORNEYS FOR AG PROCESSING,
INC., A COOPERATIVE, AND THE
SEDALIA INDUSTRIAL ENERGY
USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

David Woodsmall

Dated: April 15, 2009