BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Permission and Approval of a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage Solar Generation Facilities in Western Missouri	)))))))	**File No. EA-2015-0256**

APPLICATION FOR REHEARING OF
UNITED FOR MISSOURI, INC.

COMES NOW, UNITED FOR MISSOURI, INC. ("UFM"), by and through its counsel, and pursuant to §386.500.1 RSMo. and 4 CSR 240-2.160, for its Application for Rehearing, states as follows:

I. Introduction

1. On November 12, 2015, KCP&L Greater Missouri Operations Company ("GMO") filed an Application for a Certificate of Convenience and Necessity ("Application"), requesting permission from the Missouri Public Service Commission ("Commission") to own and operate a solar electric generating facility in rural Jackson County, Missouri.

2. On January 27, in response to two proposed procedural schedules, one from Staff and Public Counsel and the other from GMO, the Commission adopted a "live" hearing schedule. "The Commission believes that proceeding in the customary manner proposed by Staff and Public Counsel would unduly delay the project and effectively deny GMO's application without allowing the Commission an opportunity to decide whether the proposed solar project would serve the public interest."[1] The Commission adopted a procedural schedule, calling for an evidentiary hearing on February 11, two weeks and one day following the date of

[1] *Order Establishing Procedural Schedule,* p. 2.

its *Order Establishing Procedural Schedule*. The hearing was held as called, on February 11. Briefs were filed on February 18 according to the same order.

3. On February 24, in the Commission's weekly agenda meeting, the Commission expressed a unanimous view that the Application should be granted, and, on March 2, the Commission issued its *Report and Order* granting the Application.

4. The Commission's Decision in its *Report and Order* is Brief, consisting in its most significant and relevant parts of only four paragraphs (referred to hereinafter in the aggregate as the "Decision"):

> 1a. Does the evidence establish that there is a need for the project?
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> The evidence establishes that there is a need for the project. While the use of solar power in Missouri is limited at this time, solar power will become more prominent in the near future when its costs decrease due to improved technology and the cost of more carbon-intensive energy sources increase due to the cost to comply with current and future environmental regulation. That decrease in relative costs will make solar power more attractive to electric utilities, and importantly, more attractive to customers who have already demonstrated a strong interest in solar power by taking advantage of solar power rebates mandated by Missouri's RES statute.
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> GMO proposes to build a small, but utility-scale, solar power generating plant as a pilot program to give it "hands-on" experience in designing, constructing, and operating a solar facility with a view toward eventually building additional solar facilities. Gaining that experience now is important so that GMO can remain in front of the upcoming adoption curve. Furthermore, GMO will need to build more solar generating facilities, as well as other renewable generating resources, to comply with the federal Clean Power Plan or other regulations designed to reduce the injection of carbon dioxide and other pollutants into the atmosphere. This pilot plant represents a good first step.[2]
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> 1d. Is GMO's proposed project economically feasible?
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> GMO readily agrees that construction of the proposed pilot solar plant is not the least-cost alternative for obtaining an additional three megawatts of electric power it is not even the least cost alternative for obtaining that three megawatts of electric power from a renewable resource – wind power would be cheaper. But the purpose of this pilot solar plant is not solely to provide the cheapest power possible to GMO's customers.

[2] *Report and Order*, p. 14.

> Rather, its purpose is to help GMO to develop more and cheaper solar power in the future. The benefits GMO and its ratepayers will ultimately receive from the lessons learned from this pilot project are not easily quantifiable since there is no way to measure the amounts saved by avoiding mistakes that might otherwise be made. But it is likely that future savings will be substantial. The Commission concludes that as a pilot project, GMO's solar power plant is economically feasible.[3]

1e. Does GMO's proposed project promote the public interest?

> GMO's customers and the general public have a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment and reducing the amount of carbon dioxide released into the atmosphere. It is clear, solar power will be an integral part of this development, building a bridge to our energy future. The Commission can either act to facilitate that process or temporarily hinder it. GMO's proposed pilot solar plant will do the former and, thus, it will promote the public interest.[4]

II. Legal Standard

5. The Missouri Public Service Commission must first recognize that it is an agency of limited authority.

> The PSC "is a creature of statute and can function only in accordance with" its enabling statutes. *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 796 (Mo. banc 1986). Its "powers are limited to those conferred by ... statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Util. Consumers' Council of Missouri, Inc.*, 585 S.W.2d at 49; *see also* § 386.040 (creating the PSC and vesting it with "the powers and duties ... specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes" of its governing statutes). If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power.[5]

The Commission has no authority to go beyond statute and do what is right in its own eyes. It has no authority to go beyond what the legislature has said in setting fundamental policy. It must follow the statutory requirements in section 393.170.3 RSMo 2000.

6. Section 393.170.3 RSMo 2000, provides that the Commission may grant its permission to build a power plant if it determines, "that such construction or such exercise of the

[3] *Report and Order*, p. 15.
[4] *Report and Order*, pp. 15-16.
[5] *State ex rel. Mogas Pipeline LLC v. Mo. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo., 2012).

right, privilege or franchise is necessary or convenient for the public service." In *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n.*, 848 S.W.2d 593, 597-98 (Mo. App. 1993), the Western District Court of Appeals opined that in granting permission to build public services, while "necessity" does not mean "essential" or absolutely indispensable," the additional service must be an improvement justifying the cost. The Court also held that it is within the discretion of the Commission to determine when the awarding of a certificate is in the public interest.

7. However, there must be an absence of a service of a public character that constitutes a "failure, breakdown, incompleteness or inadequacy in the existing regulated facilities in order to prove the public convenience and necessity requiring the issuance of another certificate." *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission,* 600 S.W.2d 147, 154 (Mo. App. W.D. 1980).

8. The Commission typically discusses applications for public convenience and necessity under the rubric of what has been come to be known as the *Tartan* factors. They are: "(1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest."[6]

9. UFM will focus primarily on factors (1) the need for the service and (5) the public interest served by the project. As the Commission has rightly pointed out, the *Tartan* factors are guidelines for the Commission's discussion and were developed in the context of certificate applications for gas service to a particular service area.[7] It is also clear from the case law that factors (1) and (5) are the most important to the courts inasmuch as they are explicitly within the

[6] *Report and Order*, p. 13
[7] Id.

statutory scheme of section 393.170. UFM observes that while factors (1) and (5) can be considered as more of a deliberation over "decisional prudence," the other factors can be considered as a deliberation over "executional prudence." The former consider whether the service is appropriate in the initial proposal. The latter consider whether the service can be executed successfully. The former identify the need and public benefit. The latter consider whether the service can be effectively provided. Without the former, there is no reason to consider the latter.

10. The standard of review applicable to PSC decisions is whether the decision is "lawful" and "reasonable." *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997); § 386.430, RSMo. (2000). In determining whether a PSC order is lawful, courts "exercise . . . unrestricted, independent judgment and must correct erroneous interpretations of the law." *Associated Natural Gas*, 954 S.W.2d at 528. In deciding whether a PSC order is "reasonable," the courts will "determine . . . whether the [Commission's] decision was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious or unreasonable, or whether the [Commission] abused its discretion." *Id.* at 528. Evidence based on speculation is not substantial and competent evidence. *Tuf Flight Indus. v. Harris*, 129 S.W.3d 486, 491 (Mo. App. W.D. 2004). With regard to issues within the Commission's expertise, the courts will not substitute their judgment for that of the Commission. *Union Elec. Co. v. Pub. Serv. Comm'n.,* 136 S.W.3d 146, 151 (Mo. App. W.D. 2004).

11. GMO has the burden to prove by substantial and competent evidence that the project is necessary or convenient for the public service. Section 393.170.3 RSMo 2000.

III. Argument

12. The Commission's Decision quoted above is not supported by substantial and competent evidence in the record. The Commission's Decision in its *Report and Order* is contradicted by the facts. The entirety of the Decision is based on speculation and an articulation of policy initiatives that have no foundation in Missouri law. Speculation and a public policy agenda unsupported by Missouri law is not substantial and competent evidence. It is an arbitrary and capricious decision, a decision that is unreasonable. Since the Commission's Decision is entirely based on speculation and a desire based on a perceived public opinion, it is not within the Commission's expertise and is not due deference. The Commission must grant a rehearing and deny GMO's Application.

A. The Project is Not Necessary or Convenient to the Public Service Because There is No Public Need for the Service.

13. One thing is abundantly clear in this case. There is no public need for the project. The Commission found that, "In fact, GMO does not need an additional three megawatts of generating capacity to meet the energy requirements of its customers at this time."[8] This finding alone is sufficient to require the Commission to grant rehearing and to deny the Application.

14. The statute and the case law require that there be a "public" need for the project in order for it to receive a CCN. Section 393.170 requires the Commission find "that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the **public** service." [emphasis added]. As the Court put it in *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, there must be a "failure, breakdown, incompleteness or inadequacy in the existing regulated facilities in order to prove the

[8] *Report and Order*, p. 9.

public convenience and necessity requiring the issuance of another certificate." 600 S.W.2d 147, 154 (Mo. App. W.D. 1980).

15. There is no legal or regulatory compliance need for the project. There is no need for the project to comply with Missouri's Renewable Energy Standard. The Commission's *Report and Order* states that, "GMO does not need to add this solar plant to meet Missouri's current RES standards."[9]

16. There is no need for the project to comply with the Federal Environmental Protection Agency's ("EPA's") Clean Power Plan. The Commission's *Report and Order* states that, "GMO's greatest need for additional solar production at this time may be its need to comply with the federal Environmental Protection Agency's (EPA's) Clean Power Plan regulation, which is aimed at reducing the amount of carbon injected into the atmosphere. Nearly everything about the Clean Power Plan is still uncertain."[10] Uncertainty is not a justification tantamount to need. The *Report and Order* goes on to observe that the state of Missouri does not have a plan in place yet.[11] This fact, rather than indicating GMO should comply with a nonexistent plan, increases the uncertainty, reinforcing the conclusion that the project is not needed and not in the public interest. The undisputed evidence also shows that the stay of the United States Supreme Court on the Clean Power Plan is based upon a finding that there is a substantial likelihood that the parties seeking the stay and challenging the Clean Power Plan will be successful on the merits.[12] This set of circumstances does not indicate a need. They indicate it would be imprudent to proceed.

[9] *Report and Order*, p. 7.
[10] Id.
[11] Id.
[12] Tr. 137.

17. There is no evidence of an inadequacy of service. Uncertainty is not a factual foundation on which to build a conclusion of neither need nor public interest. The *Report and Order* is not based on substantial and competent evidence. The *Report and Order* is arbitrary and capricious; it is unreasonable. The Commission must grant rehearing and deny the Application.

B. The Commission's Decision in its Report and Order is Based on Speculation and an Unsupportable Desire to Achieve Certain Policy Goals, None of Which Are Substantial and Competent Evidence. Therefore, the Decision in Report and Order is Unreasonable.

18. There is no objective, definitive evidence in the record on which the Commission can base its conclusion that the project is needed. What is in the Decision is speculation. The *Report and Order* proposes that there will be an increased demand in solar energy due to the oncoming price decreases in solar power or price parity with other generation resources. The *Report and Order* observes that GMO must get in on this activity now.[13] The *Report and Order* cites the discussion of Mr. Ives on pages 170-171 of the transcript for its conclusion on price parity:[14]

> One of the -- one of the conclusions the team drew in that strategic work in looking at what was going on across the country, looking at rate increases that were occurring in the regulated utility space, and all the factors that play into price parity, their best estimate for our service territory was somewhere in the range of 2017 to 2020 solar would reach price parity.

This discussion by Mr. Ives provides no definitive analysis of prices. It is the work of a multi-functional group of employees, what could otherwise be described as GMO's star chamber. This is not substantial and competent evidence. Rather, as Staff Witness Beck pointed out, the so-

[13] *Report and Order*, p. 13.
[14] *Report and Order*, p. 10, fn. 49.

called theory of price parity is very uncertain.[15] In short, the price parity theory is vanity and speculation.

19. The speculation extends to how GMO will leverage the cost parity to gain even greater cost savings. The Commission argues, as follows:

> Rather, its purpose is to help GMO to develop more and cheaper solar power in the future. The benefits GMO and its ratepayers will ultimately receive from the lessons learned from this pilot project are not easily quantifiable since there is no way to measure the amounts saved by avoiding mistakes that might otherwise be made. But it is likely that future savings will be substantial. The Commission concludes that as a pilot project, GMO's solar power plant is economically feasible.[16]

The Commission observes that mistakes that have not occurred yet will be avoided. How is this done? In order to make this avoided cost analysis, the Commission must first project what mistakes will be made and then determine this project will help GMO avoid those mistakes. Even though it finds the benefits are not easily quantifiable, it concludes that it is likely that the cost savings will be substantial. This is not a factual determination. It is speculation based on speculation.

20. The *Report and Order* cites public opinion as the basis of its Decision.

> GMO's customers and the general public have a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment and reducing the amount of carbon dioxide released into the atmosphere. It is clear, solar power will be an integral part of this development, building a bridge to our energy future. The Commission can either act to facilitate that process or temporarily hinder it. GMO's proposed pilot solar plant will do the former and, thus, it will promote the public interest.[17]

While these words sound nice and might be motivational to a certain segment of the public, they are not substantial or competent evidence. There is nowhere in the Public Service Commission Law that directs the Commission to take into consideration public opinion. The Legislature has

[15] Tr. 366, 367.
[16] *Report and Order*, p. 15.
[17] *Report and Order*, pp. 15-16.

invited state agencies to make judgment calls on public opinion when it relates to obscenity. See *Gettler v. Dir. of Revenue*, 411 S.W.3d 339 (Mo. App., 2013). The legislature has not so endowed this Commission to make judgments based on public opinion, even if the public opinion is quantified, which it is not. Utilities must be driven by sound business principles and providing what is in the public convenience and necessity, not on public opinion. The Commission must base its decisions on what is necessary or convenient for the public service.

21. While "building a bridge to our energy future," might be a nice thing, in order to build a bridge between two points, you must be able to see where the bridge is going in order to design it. To UFM's knowledge, the Commission has not been endowed with a vision of the future either by the legislature or a higher power. And it has not been asked to develop such a vision by the legislature. The Commission has been tasked with regulating electric corporations with decisions based on substantial and competent evidence. The Commission's view of the future is not in evidence in this case. The Decision in the *Report and Order* is speculation.

C. The Procedural Schedule Conscripted on the Parties in this Case was Unlawful, Unreasonable and Unjust as described in Office of Public Counsel's *Motion for Reconsideration and Motion for Expedited Consideration.*

22. On January 28, 2016, the Office of Public Counsel ("OPC") filed its *Motion for Reconsideration and Motion for Expedited Consideration* in response to the Commission's *Order Establishing Procedural Schedule.* Among other things, OPC's motion made the case that the Commission's *Order Establishing Procedural Schedule* was unlawful, unreasonable and unjust. UFM will not restate OPC's arguments in its motion but will state that in light of the Commission's *Report and Order*, the OPC's motion is well taken. Among OPC's argument is the argument that the procedural schedule did not permit adequate time to perform discovery in order to fully analyze the costs and benefits of the project. The fact that the *Report and Order*

makes the stretch to base its decision on speculation indicates that OPC's argument is borne out. UFM reserves these issues for appeal.

WHEREFORE, for the reasons stated above, UFM requests the Commission grant this application for rehearing and deny GMO's Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record in File No. EA-2015-0256 via electronic transmission this 10th day of March, 2016.

/s/ David C. Linton