BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service.	)))))	File No. ER-2010-0356

DOGWOOD ENERGY, LLC'S APPLICATION FOR REHEARING

Comes now Dogwood Energy, LLC pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160, and for its Application for Rehearing states to the Commission:

1. The Commission issued its Report and Order herein on May 4, 2011, with an effective date of May 14, 2011. Dogwood hereby timely files its Application for Rehearing prior to that effective date. Dogwood does not simply reargue points previously made and addressed by the Commission, but rather identifies incomplete, false, contradictory, unfounded, unreasonable, and unlawful provisions of the Report and Order that require the Commission to change its decision in this case that would currently allow GMO to include the Crossroads Energy Center in rate base, and earn a return on it, **even though the undisputed evidence shows that the Crossroads plant is actually owned and operated by the City of Clarksdale, Mississippi, from whom GMO simply purchases power.** The Commission should stay the effectiveness of its Report and Order and not allow rate increases based on this erroneous aspect of its decision.

2. Dogwood seeks rehearing on the Commission's Report and Order for the reasons stated herein. In further support of this Application for Rehearing, Dogwood incorporates herein by this reference the initial and reply briefs it filed in this matter after the conclusion of the evidentiary hearing.

3. The Commission acted unlawfully, unjustly and unreasonably, and erred in reaching its decision and issuing its Report and Order in the following respects:

(a) The Commission makes only a passing reference to Dogwood raising "a number of legal challenges to inclusion of Crossroads in rates" (page 97). The Commission never identifies those arguments and does not express any conclusions about them in its Report and Order.

In giving such short (i.e. none) shrift to the issues raised by Dogwood, the Commission fails to address the illegality of including the Crossroads plant in GMO's rate base to generate a return for shareholders, given that GMO does not own the plant and its shareholders do not bear the risks of ownership. Starting at page 88, the Commission finds that Crossroads is actually owned by the City of Clarksdale, and is the subject of an agreement for capacity and energy sales to GMO. The Commission also finds that while the agreement provides GMO with an option to purchase the plant, GMO admits that it does not plan to exercise that option because of the resulting negative impacts on the tax exempt financing currently associated with the municipal ownership of the plant. The Commission discusses various aspects of the agreement that are associated with the City's ownership and operation of the plant, and correctly finds at page 89 that GMO does not own and operate the plant itself.

The Commission recites authority for the principle that a public utility is entitled to include "its property" in rate base and earn a return thereon (page 16, 98). However, the Commission does not identify any authority that would allow a public utility to include in rate base (to generate a return) property owned and operated by someone else, who merely sells capacity and energy to the utility. Nor is there any such authority. The "fair return" required on rate base is meant to compensate shareholders for the risk of investment in the utility's assets. *See, e.g., State ex rel. Associated Natural Gas Co. v. PSC,* 706 SW2d 870, 875 (Mo. App. 1985). There is no investment, and no corresponding risk, when power is simply purchased from a plant owned by another entity as in this instance. *State ex rel. Public Counsel v. PSC,* 274 SW3d 569, 580-81 (Mo. App. 2009). As found by the Commission, the agreement between GMO and Clarksdale places the risks of

ownership and operation on the City. (Report and Order, p. 88-90). GMO simply purchases power from the Crossroads plant and cannot lawfully include it in rate base or earn a return on it.

The Commission did not include Crossroads in rate base when GMO (then Aquila) was purchasing power from Clarksdale through Aquila Merchant. There is no evidence of any change in fact that would now allow inclusion in rate base. Instead, the record shows that agreement has simply been assigned from one energy buyer to another.

The Commission does not explain in the Report and Order how it can possibly be appropriate or lawful for the Crossroads plant to achieve tax exempt financing through municipal plant ownership, and yet be included in rate base and generate a return for shareholders as if it were subject to utility ownership. As the Commission correctly found (page 88-89), GMO cannot exercise its option to purchase the plant without invalidating this tax exempt status.

Thus, despite correctly finding that GMO does not own the plant, the Commission erred by concluding that the plant should nonetheless be included in rate base so as to generate a return for shareholders (page 90). In making this decision, the Commission only examined the prudence of a purported acquisition and overlooked the fact that (as it finds in the Report and Order) there has never actually been such an acquisition. Thus, the Commission did not fully address the issue of: "should Crossroads be included in rate base."[1]

(b) The Commission also fails to recognize that GMO cannot lawfully include the Crossroads plant in rate base because it did not obtain advance Commission approval to acquire the plant under Section 393.170 RSMo. Despite being twice rebuked by the Court of Appeals regarding the South Harper plant, in its Report and Order the Commission continues to disregard its responsibilities to review, in advance, proposed new electric generation plants under Section

[1] GMO Statement of Issues, items IV.1.a-d; Dogwood Position Statement.

393.170.[2] *See Stopacquila.org v. Aquila, Inc.*, 180 SW3d 24 (Mo. App. 2005); *State ex rel Cass County v. PSC*, 259 SW3d 544 (Mo. App. 2008). In the Report and Order, the Commission relies on a purported transfer of the Crossroads plant to regulated MPS operations in 2008 after GPE acquired GMO[3] (despite having also found that it is really only a purchase power agreement as discussed above) as the basis for including the plant in rate base (table, page 80, page 85, page 100). But the Commission can only approve such a transaction in advance, not three years later in a rate case. *Id.*[4] Again, the Commission failed to resolve issues presented to it.

(c) In portions of the Report and Order, the Commission unreasonably (and inconsistently) finds that ownership of the Crossroads plant was transferred to GMO, rather than that energy buying rights were assigned to it. The Commission finds that a non-regulated entity, Aquila Merchant, built the Crossroads facility – ignoring the involvement of Clarksdale (page 78). But the Commission also finds that the Clarksdale agreement has been in place from the beginning (page 88). The Commission finds that GPE acquired Crossroads as an unregulated merchant plant when it acquired Aquila, Inc. (page 92-94). But it also finds that this actually simply involved assignment of the Clarksdale agreement (page 88). The Commission finds that GMO was purchasing power from Crossroads in 2005 (page 84). As discussed above the Commission finds that the City of Clarksdale owns and operates the plant (page 88-90). But then the Commission inexplicably finds that the plant ownership was somehow transferred by accounting measures to MPS "regulated books" in 2008, after Great Plains Energy acquired GMO (then named Aquila) (table, page 80, and page 85). There is no evidence of any such transfer of the plant itself – the record shows instead (and the Commission finds elsewhere in the decision) that the purchase power agreement with the City of Clarksdale was

[2] KCPL now appears to recognize the requirements of Section 393.170, and has filed for approval of new solar generation facilities under this statute. Case EA-2011-0368

[3] The Commission expressly did not approve any such transaction when it approved the acquisition of Aquila by GPE. See Report and Order, Case No. EM-2007-0374 (July 2008), page 8, 147 & note 566 (appeal pending SC91322).

[4] As explained in Dogwood's trial briefs, GMO would also need advance approval from FERC of such an affiliate transaction.

already in effect and it was only the rights to buy energy under that agreement that were ultimately assigned to GMO, not plant ownership.

In fact, the competing financial evidence in this case concerned the appropriate hypothetical "valuation" of Crossroads, rather than evidence of an actual transaction price. There is no evidence of how much GPE paid for the acquisition of the Clarksdale contract, if anything. There is no evidence that GMO paid anything when the contract was assigned to it. There is most assuredly no evidence of a purchase price for a plant that has never been purchased. Moreover, the evidence concerning surplus disposal or discounted sale of the plant all necessarily presupposed that there would first be an exercise of the option to purchase the plant from Clarksdale (which as the Commission found has not occurred).

Thus, the Commission erroneously and inconsistently presumes a change in ownership that has not happened.

(d) The Commission also failed to address Dogwood's argument that GMO has not complied with the Commission-approved stipulation from Case No. ER-2009-0090. There is no dispute that the stipulation required GMO to conduct a new analysis in order to reevaluate Crossroads and its generation needs by exploring "**all reasonable options** to add generating capacity to GMO's system and use its **best efforts** to determine the **best terms** available for each such option." Yet, the Commission apparently erroneously viewed this issue simply as a matter of Dogwood being upset that it was not contacted by GMO (page 87). What the record instead reflects is that GMO indisputably did not comply with the stipulation because it made no effort to obtain new information from Dogwood or anyone else before it ran the "new" study. (Tr. 4046-47, 4058, Janssen Rebuttal 17-18; Staff Schedule LMM-1). It did not explore "all reasonable options", it did not exert "best efforts", and it did not identify "best terms", notwithstanding the requirements of the stipulation.

Thus, the Commission erred in finding that GMO conducted "a thorough analysis of available options" to determine that Crossroads was the lowest cost option for meeting its requirements circa 2008 (page 85) (the Commission did not find that GMO's determination at the time was actually correct (page 85)). The Commission erred in finding and concluding that GMO conducted an analysis in 2010 "**per** the Stipulation and Agreement in GMO's last rate case" and that the analysis "showed that Crossroads would result in the lowest 20-year net present value of revenue requirement" (page 85). The Commission erred in finding that GMO considered Dogwood in that study (page 97). In all these respects, the Commission erroneously implies that GMO satisfied the aforesaid stipulation.

By not requiring GMO to fulfill the approved stipulation before including Crossroads in rate base, the Commission unlawfully and unconstitutionally impaired Dogwood's rights under that contract. Further, the Commission failed to resolve another objection to inclusion of the plant in rate base.

(e) The Commission erred in finding that "Dogwood has not been the lowest cost resource option" (page 97). The evidence shows that in fact Dogwood has been the lowest cost resource, and that GMO artificially constructed its studies to foreordain a different conclusion. (Janssen Rebuttal, p. 10-18; Rose Surrebuttal). In fact, the evidence shows that Dogwood is the preferred option even taking into account the reduced valuation of Crossroads applied by the Commission in the Report and Order. Mr. Rose testified that the savings that would result from using Dogwood exceed the higher capital costs of the Crossroads plant proposed by GMO. (Rose Surrebuttal p. 38). Again, the Commission erred in finding that GMO conducted "a thorough analysis of available options" to determine that Crossroads was the lowest cost option for meeting its requirements circa 2008 (page 85) (the Commission did not find that GMO's determination at the time was actually correct (page 85)). The Commission erred in finding and concluding that GMO conducted an analysis in 2010

"per the Stipulation and Agreement in GMO's last rate case" and that the analysis "showed that Crossroads would result in the lowest 20-year net present value of revenue requirement" (page 85). Thus, in addition to the other errors described above, the Commission erroneously concluded that it was prudent for GMO to "include Crossroads in the generation fleet" (page 90-91).

(f) The Commission erred in finding that delivered natural gas prices are lower at Crossroads than in the area where the Dogwood and South Harper plants are located (page 85, 97). Likewise, the Commission erred in finding that Crossroads creates an opportunity for GMO to take advantage of short-term disparities in natural gas prices between these two regions (page 86). The Commission erred in rejecting Staff's proposal to modify GMO's FAC so that ratepayers do not bear the incremental costs with higher gas prices at Crossroads (page 213). The record does not support these findings. To the contrary, the record shows that delivered natural gas prices are in fact lower in the Dogwood/South Harper region and that purported weather-based price shopping was not feasible. (Janssen Rebuttal, p. 7, 11; Janssen Surrebuttal, p. 1-10). The Commission then erred further in relying on its incorrect conclusion on this natural gas cost issue in making its decision on the issue of the prudence of including Crossroads in GMO's rate base.

(g) The Commission correctly found that Crossroads faces transmission risks due to the constraints mandated by the Southwest Power Pool (page 87-88). The Commission properly decided to exclude transmission costs, and it should continue such exclusion upon correcting its decision and treating Crossroads as a purchase power arrangement with a municipality rather than a GMO-owned plant. However, at page 97 the Commission erred in inconsistently finding that transmission from Crossroads is reliable. The record shows that transmission for Crossroads is not reliable. (Janssen Rebuttal, p. 8; Crawford Tr. 4051, Rose Surrebuttal, p. 14, 31-33, Rose Tr. 4125). The Commission then erred further in relying on its incorrect conclusion on this transmission reliability issue in making its decision on the issue of the prudence of including Crossroads in GMO's rate base.

(h) In all the foregoing respects, the Commission's Report and Order is also unlawful and unreasonable, in that its findings of fact and conclusions of law are inadequate. Section 386.420.2 RSMo. requires that when the Commission makes a decision in a contested case it must "make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises." This requires the Commission to avoid making findings of fact that are " completely conclusory." *State ex rel. Laclede Gas Company v. Public Service Commission,* 103 SW2d 813, 816 (Mo. App. 2003)(*quoting State ex rel. Monsanto v. Public Service Commission,* 716 SW2d 791, 795 (Mo. Banc 1986). Section 386.420 RSMo. does not define what constitutes adequate findings of fact, but Missouri courts have filled this gap by applying Section 536.090 RSMo, from the state's administrative procedures statutes. The General Assembly declared in Section 536.090 that the statute applies to "[e]very decision and order in a contested case," and the statute says:

> Every decision and order in a contested case shall be in writing, and except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Whether or not the Commission has made adequate findings of fact is an issue of law. *Laclede Gas,* 103 S.W.3d at 816. The findings of fact must be: "'sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.' " *Id.* (*quoting Glasnapp v. State Banking Board,* 545 S.W.2d 382, 387 (Mo.App.1976). Findings are inadequate if they would require a reviewing court to speculate as to which part of the evidence the Commission believed. *Id.* 2 Am.Jur.2d Administrative Law 455

(p. 268) summarizes the overall principle that is generally subscribed to, as follows: "The most reasonable and practical standard is to require that findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence." *See also Glasnapp*, *supra*, at 387. The Commission is required to issue a full, written opinion, including findings of fact and conclusions of law, which explains the basis for its acts. *Weber v. Firemen's Retirement System,* 872 SW2d 477, 480 (Mo. Banc 1994).

The Commission's Report and Order fails to meet the foregoing requirements. It does not identify any factual basis for the decision to include the Crossroads plant in rate base, it identifies facts that indicate the Crossroads plant cannot lawfully be included in rate base, it makes inconsistent findings, and it fails to articulate any resolution of legal issues raised by Dogwood regarding GMO's proposal to include the Crossroads plant in rate base.

Conclusion

For all the foregoing reasons, the Commission's Report and Order herein is unlawful, unjust and unreasonable. It is not supported by substantial and competent evidence. It does not contain adequate findings of fact and conclusions of law. Dogwood has provided sufficient reason for the Commission to grant and hold rehearing pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160. Dogwood has not simply reargued points previously made and resolved, but rather has identified incomplete, false, contradictory, unreasonable, and unlawful provisions of the Report and Order. The Report and Order is unjust, unwarranted and should be changed. **The Commission should find and conclude that the Crossroads Energy Center cannot lawfully or reasonably be included in GMO's rate base, and accordingly adjust the remaining parts of its Report and Order.**

Pending such rehearing, the Commission should stay the effectiveness of the Report and Order and take such other and further action as may be required to preclude new rates taking effect for GMO pursuant thereto, in order to protect Dogwood and other ratepayers from unlawful rate increases resulting from the errors identified herein.

WHEREFORE, Dogwood Energy, LLC respectfully requests the Commission to grant and hold rehearing and thereupon grant the relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was emailed to the parties listed below on this 13th day of May, 2011.

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