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	))))))))	Case No. EA-2015-0256

APPLICATION FOR REHEARING

COMES NOW the Missouri Office of the Public Counsel ("OPC" or "Public Counsel") pursuant to § 386.500 RSMo 2015 and 4 CSR 240-2.160(2) and for its Application for Rehearing of the Public Service Commission's ("PSC" or "Commission") March 2, 2016 Report and Order states as follows:

INTRODUCTION

Review of the Commission's Report and Order in conjunction with the evidentiary record and law applicable in the above-captioned case establishes its Report and Order is unlawful, unsupported by competent and substantial evidence upon the whole record, was not subject to lawful procedure, and is arbitrary, capricious, and unreasonable. It is therefore unreasonable and should be given additional consideration through the granting of this application.

Commission decisions must be lawful and must be reasonable.[1] An order is lawful if the Commission acted within its statutory authority.[2] An order is reasonable if it is "supported by substantial, competent evidence on the whole record, the decision of the Commission is not arbitrary or capricious or where the [PSC] has not abused its discretion."[3] Commission decisions must not be in violation of Constitutional provisions, must be supported by competent and

[1] *State ex rel Atmos Energy Corp. v Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003).
[2] *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d, 442 (Mo. App. W.D. 2015).
[3] *State* ex rel. *Praxair, Inc. v. Mo. PSC*, 344 S.W.3d 178, 184 (Mo. banc 2011).

substantial evidence upon the whole record, must be made upon lawful procedure, and must not be arbitrary, capricious, or unreasonable.[4] The Commission is a creature of statute and it has only the powers conferred on it by the Legislature.[5] Shortly after the creation of this Commission, the Missouri Supreme Court declared "[t]he act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition.[6] *The spirit of this policy is the protection of the public. The protection given the utility is incidental*." (Emphasis added)[7]

ARGUMENT

I. THE REPORT AND ORDER IS UNLAWFUL

A. Environmental Advocacy

The Commission's Order in this matter unlawfully and unreasonably concludes GMO's (sometimes hereafter referred to as "the Company") proposed project is in the public interest.[8] At several points in the Order, the Commission pointed to the role solar generated electricity is expected to play in the future.[9] The Commission explained in the Order that the "general public [has] 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."[10] OPC agrees the Commission should require electric utilities to utilize economical energy sources to provide safe, reliable, and affordable service to customers. Importantly, the Commission does have a role to play in environmental compliance vital to the protection of ratepayers. Once the Legislature, the Environmental

[4] Section 536.140.2, RSMo 2015.
[5] *State ex rel City of St. Louis v. Pub. Serv. Comm'n,* 73 S.W.2d 393, 299 (Mo. banc 1935).
[6] *State ex rel. Electric Co. of Missouri v. Atkinson,* 204 S.W. 897, 899 (Mo. Banc 1918).
[7] *Id.* (emphasis added).
[8] Report and Order p. 15.
[9] Report and Order pp. 7-9, 14-15
[10] Report and Order p. 15.

Protection Agency, or appropriate state agencies tasked with air-quality establish a lawful standard the utilities must comply, the Commission should ensure utilities minimize costs when pursuing compliance but until they do, the Commission must require utilities to utilize economical energy sources to provide safe, reliable, and affordable service to customers.

In this case, the evidence shows GMO currently meets all federal and state environmental standards. Furthermore, GMO is positioned to comply with any standards for a number of years. Nowhere in the enabling statutes of this Commission did the Legislature empower it to "reduce the amount of carbon dioxide released into the atmosphere" or with otherwise improving the environment.[11] The Commission's Order is outside of its scope within utility regulation, is not lawful, and should be reheard.

B. No certification of compliance with § 536.080.

Missouri law requires all commissioners who vote on an order and decision to either (1) hear all the evidence, (2) read the full record, including all the evidence, or (3) personally consider the portions of the record cited or to which reference was made in the arguments or briefs.[12] At some time during the course of a proceeding, the parties may be asked if they are willing to waive this requirement. This did not occur in this case. Section 386.130 RSMo also requires a quorum to meet for voting on the order and decision.[13] Although Missouri law presumes that a member of an agency has complied with the law, the Supreme Court in *State ex rel. Jackson County v. Public Service Commission* remanded an order and decision to the Commission for one member to certify he had complied with Section 536.080 RSMo.[14] The

[11] See Mo. Rev. Stat. § 386.010, et. seq.; Mo. Rev. Stat. §393.010, et. seq.; Report and Order p. 15.
[12] Section 536.080, RSMo 2015.
[13] *State ex rel. Philipp Transit Lines, Inc. v. Public Serv. Comm'n*, 552 S.W.2d 696 (Mo. banc 1977) referring to Section 386.130, RSMo.
[14] *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 30 (Mo. banc 1975), *cert. den.*, 429 U.S. 822 (1976) citing *Dittmeier v. Missouri Real Estate Commission*, 316 S.W.2d 1 (Mo. banc 1958), cert. denied 358 U.S. 941, 3 L.Ed. 2d 348, 79 S.Ct. 347.

circumstances and timeline of this case require closer examination and attestation of compliance with the provisions of this statute.

The contested evidentiary hearing was held all day on February 11, 2016 with live direct testimony of eight witnesses spanning nearly fifteen hours wherein twenty-three exhibits were admitted.[15] The transcripts of the proceeding spanned 547 pages.[16] The record reflects the absence of some or all of the Commissioners during the extensive hearing.[17] Pertaining to the presence of Commissioners, the Regulatory Law Judge ("RLJ") indicated, while absent Commissioners could view the video feed, they were excluded during any *in camera* discussions or examination.[18]

The Commission's Report and Order does not indicate any of the Commissioners complied with Section 536.080 RSMo. In light of the absences of all Commissioners for significant portions of live testimony as well as *in camera* proceedings, combined with the compressed schedule of the case, said certifications are necessary. The absence of said certifications makes the Report and Order unlawful.

II. THE REPORT AND ORDER IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCEUPON THE WHOLE RECORD

The Commission's Order is unlawful and unreasonable because it is not supported by competent and substantial evidence upon the whole record. In many instances, the weight of the evidence directly refutes the Commission's finding that GMO's project is necessary or convenient for the public service within the meaning of Section 393.170 RSMo. In its Order, the

[15] In contested hearings such as this, typically the Commission will permit a procedural schedule wherein the parties' respective witnesses are given the opportunity to pre-file their direct testimony, rebuttal testimony and sur-rebuttal testimony. The Commission deviated from that practice and directed the parties to present their entire cases in chief through live testimony at the hearing.
[16] See Tr. Vol. 2 and Tr. Vol. 3.
[17] Tr. Vol. 2, pp. 39, 40, 356, 463, 464.
[18] Tr. Vol. 2, p. 464.

Commission appears inconsistent in that it initially attempts to distinguish the ***Tartan*** factors in its Conclusions of Law section but then specifically applies those factors in its decision section.[19]

A. Conclusions that *Tartan* Factors were met are against the weight of the evidence

The Commission's Order is unlawful and unreasonable because its decision on each *Tartan* factor is against the weight of the evidence for the reasons explained in detail below.

i. Need for the Project

The Commission's Order is unlawful and unreasonable because the Commission's conclusion there is a need for the project is against the weight of the evidence.[20] In order to establish whether there is a need for service, the Commission must have concluded the additional service proposed by GMO would be such an improvement to its current service that the cost associated with the construction and implementation of the plant is justified.[21] Despite the Commission's conclusion to the contrary, GMO did not establish a need in its application nor did any party present competent and substantial evidence at the hearing. The evidence overwhelmingly showed there is no need for additional S-RECs, no federal mandate requiring the project, no state mandate requiring the project, and no evidence of customer demand for the project. Accordingly, the Order is unreasonable and this matter should be reheard.

ii. Qualifications of GMO

The Commission's Order is unlawful and unreasonable because it concludes GMO is qualified to construct and operate the proposed plant without substantial or competent evidence to support its decision.[22] It is unreasonable that the Commission's order concluded the evaluation of the qualification of the Company to provide the proposed services "does not really apply to

[19] See Report and Order p. 13.
[20] See Report and Order p. 14.
[21] *See State* ex rel. *Intercon Gas v. P.S.C,* 848 S.W.2d 593, 597 (Mo. App. W.D. 1993).
[22] See Report and Order pp. 14-15.

GMO's application for authority to construct a solar power generation plant."[23] The Commission's decision explains the Company's desire to gain experience operating a utility-scale solar plant when it concluded the evidence "provides no reason to doubt its ability to build and operate that plant."[24] GMO had the burden of proving it has the qualifications requisite for this project in its case in chief by a preponderance of the evidence and it did not. The Commission should have considered the relative experience and reliability of competing suppliers when weighing this factor.[25] It is unclear whether it did so based on the Report and Order.

But, in the same thought, GMO tries to have it both ways by saying it needs the experience in running the project and yet it is qualified to run the project. Its failure to demonstrate qualifications in its case in chief should lead the Commission to conclude it had not met its burden on this factor and denied the CCN. There is no competent or substantial evidentiary basis for the Commission's decision on this point and should be reheard accordingly.

iii. Financial Ability

The Commission's Order is unlawful and unreasonable because its decision related to GMO's financial ability does not rest on competent or substantial evidence. As the proponent, GMO failed to meet its burden of proof on this issue and when weighed with the other factors, the Commission should have denied the CCN for GMO's failure to establish a *prima facie* case. In weighing the *Tartan* factor, any factual determination must be based upon the evidence from the record.

GMO did not present any direct evidence to the Commission of its financial status. No facts or figures were introduced to show the company's financial outlook. Rather than finding

[23] Report and Order p. 14.
[24] Report and Order p. 15.
[25] *Intercon Gas* at 597.

the company had not met its burden to prove its financial ability, the Commission concludes "the cost to construct the … plant is relatively small compared to GMO's financial resources."[26]

Again, GMO had the burden of proving this in its case in chief by a preponderance of the evidence and failed to do so.

iv. Economic Feasibility

The Commission's Order is unlawful and unreasonable because its determination that the project is economically feasible is not supported by, and is in fact contrary, to the weight of evidence. There was no quantification or justification provided by GMO that could allow the Commission to conclude the project is economically feasible. The evidence presented by Staff and Public Counsel established the project is not economically feasible at this time. The Commission's Order recognizes this project is not the least-cost alternative for obtaining electric power – or even for obtaining electric power from a renewable resource.[27] Those facts were overwhelmingly supported by the evidence presented to the Commission. Contrary to the weight of the evidence, the Commission's Order explains the basis of its decision saying "the benefits GMO and its ratepayers will ultimately receive from the lessons learned … are not easily quantifiable since there is no way to measure the amounts saved by avoiding mistakes that might otherwise be made."[28] The Commission's conclusions about economic feasibility cannot be based on competent and substantial evidence. Besides Dr. Proctor's analysis showing the project was *not economically feasible* at this time, the record does not contain *any* quantification of "benefits" GMO will receive. Nor does the record contain any quantification of any putative benefits ratepayers would receive. The record contains no evidence pursuing the project now will save money by avoiding mistakes that might be made in the future.

[26] Report and Order p. 15.
[27] *Id*.
[28] *Id*.

GMO did not offer any of this information in its case in chief (or in the form of any rebuttal testimony for that matter) despite the opportunity this hearing provided. GMO is a sophisticated litigant and the absence of such evidence suggests there is no evidence to support this contention and should be taken as an admission from GMO that its project is not economically feasible.

Public Counsel expert witness Dr. Mike Proctor provided analysis quantifying regarding GMO's plan in reaching his conclusion that the project is not economically viable. Dr. Proctor's Exhibit 22 is the *only* cost-benefit study in the record evaluating the costs and benefits to ratepayers of the proposed solar project. He based his calculations on GMO's claim that the need for the project was in order to gain experience for a future implementation of solar. It is one thing to claim benefits for a project and yet another thing to provide a quantification of the costs and benefits are forthcoming from a project. The Company had the burden of proof the benefits to ratepayers they claim result from this project exceed the costs of the project. As explained above, the Company did not provide any quantification of benefits it expects to receive from implementing a relatively small solar project in 2016 in order to gain experience for the potential, but uncertain, implementation of a future solar project. Further, there was testimony from Staff witness Dan Beck that the company's Integrated Resource Plan ("IRP") did not include any additional solar generation plants for at least ten years.[29] The Commission's conclusion that "it is likely that future savings will be substantial" is not supported by any evidence in the record.[30]

Based upon all the evidence presented in the case, and the significant lack of evidence GMO presented in its case in chief thereof, it is clear GMO's project is not economically feasible

[29] Tr. Vol. 2, p. 353.
[30] Report and Order p. 15.

and fails this test under the *Tartan* factors. As such, the Commission's decision on this point is against the weight of the substantial and competent evidence and should be reheard.

v. Public Interest

The Commission's Order is unlawful and unreasonable because its decision that the project promotes the public interest is not supported by competent and substantial evidence. If any *one* of the *Tartan* factors are not met, the Commission could have concluded that the project did *not* promote the public interest. "Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest."[31] Because GMO would save a substantial amount of money by delaying this project, even by a couple years, the Commission in weighing the evidence fairly should not have concluded this project promotes the public interest. Because GMO ratepayers will bear the cost in a subsequent rate case when they do not need the extra electricity generated by the plant, the public interest element fails here.

The Company's application and evidence at hearing required the Commission rely on matters not found in the record to support a finding that the project is in the public interest. There is no quantification presented to support the company's application.[32] As it relates to the experience the Company hopes to achieve as a result of constructing and operating the proposed project, GMO witnesses were insufficient. Mr. Ives testified GMO has "not quantified the hands-on experience that [the Company] hope[s] to gain from this solar project."[33]

As mentioned previously, environmental impact is an area that may be explored when weighing whether the project is in the public interest. However, this project will not reduce the

[31] *Tartan* at *41.
[32] *See* Tr. Vol. 2, p. 215 Mr. Ives testified that he has not quantified any economic development benefits of this project, but asserted that "it's rather intuitive."
[33] Tr. Vol. 2, p. 209.

company's environmental impact. No party has suggested this project is going to avoid any existing electrical generation. The Company does not need additional generation and this project is not going to displace any current carbon sources of generation. If the company did have a need or desire to pursue additional renewable energy, wind generation, for example, is less expensive.[34]

The evidence provided by GMO witnesses relied upon vague assumptions when responding to questions about the environmental impact of its project. Mr. Ives testified the company has made announcements for the unrelated cessation of coal at a number of its facilities in the upcoming years.[35] However, on cross examination, Mr. Ives could not state what GMO fossil fuel generation *this* project would displace.[36]

The record does not contain any competent and substantial evidence related to possible health benefits. GMO did not bring in any evidence related to any possible health benefits the project would provide in its implementation. The Company, again, relied upon generalities and assumptions versus concrete evidence. Mr. Ives, though he admitted he is not an expert in the area, testified this project *could* lead to health benefits for consumers but did not say what those health benefits could be.[37] Despite this claim, he admitted upon cross-examination that he has not done any health benefit quantification.[38]

The record does not contain any competent and substantial evidence related to potential economic benefits. Mr. Ives testified there are economic benefits he expects to occur related to

[34] Tr. Vol. 2, p. 302, 479; Ex. 18.
[35] Tr. Vol. 2, p. 175.
[36] Tr. Vol. 2, pp. 213-14.
[37] Tr. Vol. 2, pp. 175-76.
[38] Tr. Vol. 2, p. 214.

this project.[39] However, he was forced to admit in cross-examination he had not quantified any economic development benefits of this project.[40]

Even though GMO extols the myriad "benefits" that may result from this project, the Company did not perform any significantly reliable analysis to evaluate the putative public benefits of this project. As such, concluding the project is in the public interest goes against the overwhelming weight of evidence and the matter should be reheard.

b. Comparisons to customer-owned solar are inapposite

The Commission's order is unreasonable because it cites the prospect of community solar systems and customer "enthusiasm for solar power" as a basis for showing there is a need for the project.[41] Comparisons between customer-owned solar generation and utility-owned solar generation are inapposite. Thus, the Commission citing solar rebates as support for a utility-owned plant is unreasonable. Economic factors indicate when customers take advantage of a solar rebate and install solar panels, they will see a decrease in their bill because the energy generated will reduce their usage. However, if the utility owns the solar generation plant and includes it in rate base, customer bills will logically *increase*. When the utility does not need to install the solar generation to meet energy demand or to comply with federal or state environmental standards, it is unreasonable for the Commission to sanction the pursuit of additional generation.

[39] Tr. Vol. 2, p. 176.
[40] Tr. Vol. 2, p. 215.
[41] Report and Order pp. 5, 10, 11.

III. THE REPORT AND ORDER WAS NOT SUBJECT TO LAWFUL PROCEDURE

a. No due process

Prior to the contested hearing on February 11, 2016, the Commission abandoned its long-standing procedural scheduling tradition of having the parties' pre-file written direct testimony, rebuttal testimony, and surrebuttal testimony. The Commission's January 27, 2016 Order setting this matter for contested hearing on February 11, 2016 (fifteen calendar days from the date of the order) abandoned that tradition. Public Counsel objected to the schedule and sought a writ of mandamus with the Western District Court of Appeals that was denied without discussion on the merits of the claim. At the hearing, Public Counsel objected on the record and preserved its objection and was granted a standing objection to the case proceeding to contested hearing per the January 27, 2016 order.[42]

The Commission's Order to have a contested hearing with fifteen days preparation ran afoul of procedural due process. The procedural due process requirement of fair tribunals applies to an administrative agency acting in an adjudicative capacity[43] applicable to the Commission and to this case.[44] Procedural due process affords the parties in a contested case the right to engage in meaningful discovery.[45] Parties denied procedural due process in the discovery process are substantially impaired and prejudiced at an evidentiary hearing.[46] The Commission's procedural schedule did not require the Company to support its application with pre-filed testimony and did not provide other parties an opportunity to conduct the sort of discovery required to examine the testimony of an expert for trial preparation.

[42] Tr. Vol. 2, pp. 11, 12.
[43] *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. 2003).
[44] See *Fitzgerald v. Md. Heights*, 796 S.W.2d 52, 58 (Mo. Ct. App. 1990).
[45] *Id.*
[46] *Id.*

Arguably, had the Commission provided parties the opportunity to engage in meaningful discovery, the parties would have been better prepared and, may have even been able to resolve their differences without the need for a contested hearing. Instead, the parties engaged in the hasty collection of as much information as possible in the limited time they had, depose any witnesses they could get lined up and prepare to litigate a full contested hearing, and respond to live direct testimony in one fifteen hour-long hearing. These circumstances did not provide the parties the procedural due process litigants should be entitled and, as such, the Commission should reconsider its order and rehear the case giving the parties opportunities to explore alternative avenues to this proposal. Said alternatives could be beneficial for consumers as well as the Company's ability to gain experience from the project. When the Commission rejected a MEEIA plan in its Order in EO-2015-0055, the parties continued working together to reach an agreement that was a reasonable approach balancing the interests of parties moving forward. The Commission could extend a similar opportunity in this case by granting Public Counsel's application for rehearing allows the parties to consider and discuss other areas such as allocation of costs in pending or future rate cases and pursuing the project as customer-owned community solar project.

IV. THE REPORT AND ORDER IS ARBITRARY, CAPRICOUS, AND UNREASONABLE

a. The Commission's order is arbitrary

The Commission's Report and Order, along with a previous order[47], acknowledged GMO's representations that "the project is not the least cost option at this time and that it is not needed to comply with the current Missouri Renewable Energy Standard."[48] This project is

[47] EFIS Doc. No.32, p. 2.
[48] Report and Order p. 7.

expensive and unnecessary. Company witnesses admitted the project is not needed to comply with the Renewable Energy Standard ("RES") requirements and admitted GMO is able to meet its RES requirements for nearly another decade before being required to install more solar generation.[49] As such, the bases for the Commission's Report and Order are arbitrary.

b. Capricious orders harm KCPL ratepayers

The evidence failed to justify the proposition GMO ratepayers bear the millions of dollars for this project alone. Recognizing this, the Commission noted that it expected GMO to allocate costs to KCP&L customers as well based on the fact KCP&L will also benefit from the project.[50] However, this does not cure the problem. This only means KCP&L customers will pay for costs associated with a project that does not result in providing them any electric utility service. While the employees may have additional knowledge and GMO customers will have additional, yet unnecessary, electricity, all KCP&L customers will have is a higher bill. There is no evidence to support this nor is there direction from the Commission how the allocation of costs should occur. For these reasons, the Commission's Report and Order is capricious and should be reconsidered.

c. The Commission's order is unreasonable

While GMO owns the plant under their plan, KCP&L employees will construct maintain and operate the facility with the help of several independent contractors along the way. It is important to note GMO does not have any employees.[51] The employees that will be gaining experience are KCP&L employees.[52] According to the order, GMO and KCP&L ratepayers will be expected to bear the expense involved in this unnecessary project despite Mr. Ives' assertion

[49] Tr. Vol. 2, pp. 151, 260.
[50] See Commission Report and Order, p. 17: "At that time, the Commission will expect GMO to propose a means by which the costs will be shared with KCP&L's customers who will also benefit from the lessons learned from this pilot project."
[51] Tr. Vol. 2, pp. 218, 233, 330.
[52] *Id.*

that only GMO ratepayers would be expected to pay for the project.[53] The Company's proposal to have GMO ratepayers pay to build a project benefitting the ratepayers of an affiliate is a significant, unexplained, and unjustified departure from traditional cost-of-service rate-making. The Commission should have completely rejected the Company's plan to foist costs incurred to benefit an affiliate upon the "captive" GMO ratepayers versus just pointing out it expects a cost allocation to KCP&L. Failure to do so makes the order unreasonable.

CONCLUSION

The Commission's Report and Order in this case is unlawful, not supported by substantial and competent evidence, was not subject to lawful procedure, and is arbitrary, capricious and unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission grant its application for rehearing that may include direction to the parties to engage in further negotiations for the reasons set forth herein and for such other and further relief the Commission deems just and reasonable under the circumstances.

Respectfully submitted,

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[53] Tr. Vol. 2, p. 219.

CERTIFICATE OF SERVICE

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