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

MOTION FOR RECONSIDERATION AND
MOTION FOR EXPEDITED CONSIDERATION

COMES NOW the Missouri Office of the Public Counsel ("OPC") pursuant to 4 CSR 240-2.160(2) and for its Motion for Reconsideration of the Commission's January 27, 2016 Order Establishing Procedural Schedule, states as follows:

1. 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. *The spirit of this policy is the protection of the public. The protection given the utility is incidental*."[1] 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) betrays that spirit. The order is unlawful, unjust, and unreasonable. 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 is not arbitrary or capricious or where the [PSC] has not abused its discretion."[3]

[1] *State ex rel. Electric Co. of Missouri v. Atkinson*, 204 S.W. 897, 899 (Mo. Banc 1918) (emphasis added).
[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).

The Commission's order is unlawful

2. The Commission's order runs afoul of procedural due process. The procedural due process requirement of fair tribunals applies to an administrative agency acting in an adjudicative capacity.[4] The Public Service Commission is such an administrative agency and in this case will be acting in an adjudicative capacity.[5] Procedural due process affords the parties in a contested case the right to engage in meaningful discovery.[6] Parties that are denied procedural due process in the discovery process are substantially impaired and prejudiced at an evidentiary hearing.[7]

3. KCP&L Greater Missouri Operations ("GMO") filed its Application with the Commission on November 12, 2015; this, despite having given notice of a contested case April 6, 2015.[8] After having received certain Data Request responses, Public Counsel filed its Motion for Procedural Conference December 28, 2015. That motion was granted January 6, 2016, setting a conference for January 14, 2016. At the procedural conference, the parties were directed to seek a consensus on the procedural schedule and, in the event that they could not reach a consensus, for them to submit their respective proposed schedules. The parties were not able to reach a consensus and OPC, along with Commission Staff and United for Missouri submitted a proposed procedural schedule on January 19, 2016. GMO also submitted a proposed schedule the same day.

4. In its Proposed Procedural Schedule, GMO listed its primary reason for requesting the Commission abandon a typical procedural schedule was "to coordinate the

[4] *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. 2003).
[5] See *Fitzgerald v. Md. Heights*, 796 S.W.2d 52, 58 (Mo. Ct. App. 1990).
[6] *Id.*
[7] *Id.*
[8] EFIS No. 1 & 6.

construction of the Project with GMO's planned rate case filing."[9] In other words, GMO wants the Commission to approve its CCN so that it can install the unnecessary and expensive facility in time to attempt to include an untold several millions of dollars in rate base. Recall that "rate base" is the value of plant investment upon which the utility is able to earn a return on equity. For example, if the company's proposed project were to cost 10 million dollars, and the Commission authorized a ROE level of 9.0% that value would be multiplied by the authorized return on equity. In that case, GMO customers likely would be forced to pay an additional 900,000 dollars per year.[10]

5. Importantly, it is GMO that decides when it will file its rate case. It is GMO that decided when to file its CCN application. Regretting its timing choices, the company sought a procedural schedule that does not require it to file testimony supporting its application. Incredibly, and unlawfully, the Commission granted the company's request. The fact that the company is concerned about the timing of its rate case should not cause the Commission to disregard its regular procedures on pre-filed testimony or set a truncated schedule that prohibits the parties from conducting meaningful discovery.

6. As the regulatory law judge noted during the January 27, 2016, Commission agenda hearing, the Commission's rules do allow live testimony to be taken. However, this is not the common practice at the Commission. Nor should it be used without substantial justification. The company's choice to file a CCN application in proximity to a noticed – but not yet filed – rate case does not justify departure from the standard practice of requiring pre-filed testimony.[11] The practice of requiring pre-filed testimony lends itself to the technical nature of cases before the Commission. Under this system, experts explain the basis of their conclusions and

[9] *See GMO's Proposed Procedural Schedule* filed January 19, 2016 at p. 4.
[10] The actual amount will depend on the company's capital structure and cost of debt.
[11] *See* 4 CSR 240-2.130(7).

recommendations. A procedural schedule that allows time for rebuttal and surrebuttal to the expert testimony allows the parties to provide the Commission with sophisticated and detailed testimony that would be impossible to replicate efficiently with "live" direct testimony. Absent pre-filed testimony, parties to Commission cases would be required to pursue alternative forms of discovery including costly depositions to learn and test the basis of the other parties' experts.

7. The Commission's order does not require the company to support its application with pre-filed testimony and does not provide the other parties an opportunity to conduct the sort of discovery required to examine the testimony of an expert for trial preparation.

8. In its order, the Commission misstates and misunderstands the law when it explains "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."[12] Respectfully, the Commission is wrong. The customary procedural schedule requires the company to prove its case and allows other parties the opportunity to respond. For a CCN case, as here, the Commission must make a determination that the project is "necessary or convenient for the public service."[13] The fact that, as a result of the timing of the CCN application and the anticipated (but not yet filed) filing date of an upcoming rate case, the company may not be able to foist the cost of this unnecessary project on ratepayers has no bearing on whether the Commission can approve or deny the project. First, the timing of the CCN application and the upcoming rate case are controlled entirely by GMO. Second, when the project can be put into rate base is not a consideration the Commission considers when evaluating a CCN application. To make the determination that the law actually requires –

[12] EFIS Doc. No.32, p. 2.
[13] Mo. Rev. Stat. § 393.170.

whether the project is "necessary or convenient for the public service" – the Commission has set forth and applied certain criteria, referred to as the "Tartan factors."[14] Based on the putative "facts" proposed by the company in its proposed procedural schedule, it is unclear that the company's project would satisfy all of the Tartan factors. Failure to meet the tartan factors is what would cause the Commission to deny GMO's application – not the procedural schedule proposed by Public Counsel. However, at this stage, Public Counsel cannot state whether or not the company has met the Tartan factors and the procedural schedule adopted by the Commission does not provide adequate time to make that determination.

The Commission's order is unreasonable

9. The Commission's Order Establishing Procedural Schedule is arbitrary and capricious and does not give the parties time to adequately investigate and prepare the issues at stake in this matter for hearing.

10. The parties cannot engage in meaningful discovery in the two weeks provided by the order. Under the Commission's order, parties do not even have to provide the names of the witnesses that they intend to call until February 8, 2016 (three calendar days before the hearing). Providing the names for their intended witnesses three days prior to the hearing will not permit the parties the time necessary to schedule, notice and conduct depositions of those witnesses in preparation for the evidentiary hearing nor will it provide parties an opportunity, even if they were able to schedule depositions within that severely reduced timetable, to locate, retain and disclose any rebuttal witnesses necessary to contradict said witnesses. The unreasonableness of the Commission's truncated schedule is exacerbated by the fact that the order does not require expedited responses to discovery. To be clear, an order requiring expedited responses to

[14] *In Re Tartan Energy Company*, 3 Mo. P.S.C. 3d 173, 177 (1994).

discovery does not resolve the due process concerns, but it would at least allow the parties to determine the identities of witnesses that will be present at the hearing.

11. GMO elected to delay the filing of its application until November 12, 2015 despite filing its original notice April 6, 2015.[15] The other parties involved have done nothing dilatory or onerous to draw this matter out longer than necessary. Setting the contested evidentiary hearing in the severely truncated time period on the sole reason that failure to do so would affect GMO's projected rate case considers only the benefit to the company's shareholders, ignores the financial impact on ratepayers, and is arbitrary and capricious.

The Commission's order is unjust

12. The Commission's order grants the company the truncated schedule it requested without considering the impact on the other parties in the case. As explained above, the company is the only party that controls the timing of its filings. The Commission's order ignores entirely the due process rights of any other party, choosing instead to make it easier for the company. This is not the role of the Commission.

13. The Commission's order acknowledges 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."[16] This project is expensive and unnecessary. The company asks that the parties be required to stipulate to certain facts. Some of the putative "facts" offered by GMO in its proposed procedural schedule are wrong and others require further context. For example, the Company wants to stipulate that the project is not the least cost option, but does not offer any comparison to other alternatives so that the Commission can make an informed assessment. Similarly, the company wants to stipulate that the project is not needed to

[15] EFIS Doc. Nos. 1 & 6.
[16] EFIS Doc. No.32, p. 2.

comply with the Renewable Energy Standard ("RES") requirements, but does not inform the Commission that GMO is able to meet its RES requirements for nearly another decade before it would be required to install more solar generation. Even if the Commission could require parties to agree on facts – it cannot – the Commission's rules state that a stipulation of facts "shall not preclude the offering of additional evidence by any party[.]"[17] Based on the examples above, it should be clear to the Commission that the Public Counsel intends to offer additional evidence to dispute and provide context to whatever putative "facts" the Company offers. These facts cannot be sufficiently explored in the time period established by the Commission.

14. Furthermore, if the company's proposal had merit – which cannot be determined at this stage – the Commission's order is unjust because it requires GMO ratepayers to bear the total cost of the project. In its order, the Commission states "GMO wants to proceed with the project to provide the company experience in operating a solar production facility and to assist it in evaluating the potential of a future large-scale solar installation."[18] GMO does not have any employees. The employees that will be gaining experience will be KCPL employees. The company has not proposed, nor does the ordered schedule provide time for the parties to explore, why GMO ratepayers should bear the millions of dollars for this project alone. Even if the costs were properly allocated, the opportunity to gain experience operating a solar production facility is merely one consideration – and should not, by itself, outweigh all other considerations.

15. OPC asks that the Commission reconsider its Order Setting an Evidentiary Hearing, and that the Commission set forth a reasonable procedural schedule that allows the parties to engage in meaningful discovery, including expedited responses to discovery.

[17] 4 CSR 240-2.130(11).
[18] EFIS Doc. No.32, p. 2.

16. Pursuant to 4 CSR 240-2.080(16), OPC requests expedited consideration of this motion, and asks that the Commission act on the Motion for Reconsideration no later than February 3, 2016.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission: 1) grant OPC's request for expedited consideration, 2) reconsider its Order setting evidentiary hearing, and 3) to set a different procedural schedule wherein the parties will be afforded the opportunity to engage in meaningful discovery and preparation for this contested hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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