BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**Case No. EC-2015-0309**
Kansas City Power & Light Company	)	
and	)	
KCP&L Greater Missouri Operations Company,	)	
Respondents	)	

STAFF'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Suggestions in Support of its Motion for Summary Determination* pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

Introduction:

Staff filed its *Complaint* on May 20, 2015, charging that Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO"; together, "KCP&L-GMO") are violating Missouri statutes and Commission rules by (1) transferring valuable system assets, namely, customer names, addresses, telephone numbers, and the like, to Allconnect without first obtaining authorization from the Commission to do so, in violation of § 393.190.1, RSMo.; (2) by making the aforementioned transfers without the consent of the affected customers, in violation of

Commission Rule 4 CSR 240.015(2)(C); and (3) by transferring certain customer phone calls to Allconnect and relinquishing KCP&L-GMO control and responsibility to Allconnect's personnel to investigate and respond to customer inquiries and complaints in violation of Commission Rule 4 CSR 240-13.040(2)(A). KCP&L-GMO customers do not initiate calls to Allconnect but rather initiate calls to their respective regulated utility. For relief, Staff prays that the Commission will enter its order (1) finding that KCP&L-GMO violated § 393.190.1, RSMo.; (2) finding that KCP&L-GMO violated Commission Rule 4 CSR 240.015(2)(C); and finding that KCP&L-GMO violated Commission Rule 4 CSR 240-13.040(2)(A); and (4) authorizing its General Counsel to seek penalties under Sections 386.570, and 386.590; and (5) requiring KCP&L-GMO to improve and modify their operations so that they are no longer in violation of the above provisions via their relationship with Allconnect.

Argument

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes summary determination "if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." Filed simultaneously herewith are Staff's motion and affidavits; these *Suggestions* constitute the "separate legal memorandum" that must be "attached" to a motion for summary determination pursuant to Rule 4 CSR 240-2.117(1)(B).[1]

[1] Rule 4 CSR 240-2.117(1) states certain other requirements for summary determination, all of which are met here as detailed in Staff's accompanying motion.

Staff suggests that its motion, affidavits and suggestions demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff's complaint be sustained.

Staff urges the Commission to understand that summary determination should be favored, not disfavored. In a proper case, summary determination conserves scarce resources, both fiscal and human, for the Commission and for all the parties. Why hold an evidentiary hearing in a case like the present, which presents issues of law and public policy, but not issues of fact? Evidentiary hearings are lengthy and expensive and the Commission would gain nothing thereby that it cannot get from holding an oral argument on Staff's motion and KCP&L-GMO's anticipated opposition to that motion.

What Is This Case About?

This case presents a legal and policy controversy; there are no material facts in dispute. KCP&L and GMO are regulated electric utilities and affiliates. Another affiliate, GPES, an unregulated company, entered into an agreement with a third-party marketing company, Allconnect, whereby KCP&L-GMO personnel[2] transfer customers calling to establish or relocate their utility service to Allconnect at the point of the call where the confirmation number is to be provided to the customer. Allconnect employees then attempt to sell other products and services to the KCP&L-GMO customers; they are also supposed to give the customers their confirmation numbers and "verify" the very information that the customers moments before provided to the KCP&L-GMO call center representatives. These transfers are made without prior authority of the Commission

[2] Although GMO is a separate and distinct utility company, it has no employees; KCP&L's employees operate both companies. KCP&L's employees also operate GPES.

and without the consent of the customers. Allconnect pays KCP&L for each transferred call and, if products or services are sold, Allconnect pays an additional amount to KCP&L. All of the revenue received by KCP&L from Allconnect is booked "below the line," that is, as unregulated income, although it is earned using regulated assets.

Staff believes that the uncontested facts summarized above set out at least three violations of Missouri statutes and Commission rules and Staff has thus brought a *Complaint* of three counts against KCP&L-GMO. First, because KCP&L and GMO's customer specific information constitutes a valuable and necessary part of their regulated operations, Staff charges that KCP&L-GMO have violated § 393.190.1, RSMo., by transferring these assets to Allconnect without first obtaining permission to do so from the Commission. Second, the role played by affiliate GPES in the scheme brings the Commission's affiliate transactions rules into play, which at 4 CSR 240-20.015(2)(C) forbid the transfer of customer specific information to either an affiliated entity or an unaffiliated entity without the consent of the customer. Third, the delegation to Allconnect to provide meaningful customer service to KCP&L-GMO's customers violates 4 CSR 240-13.040(2)(A), which requires that "[a]t all times during normal business hours qualified personnel shall be available and prepared to receive and respond to all customer inquiries, service requests, safety concerns, and complaints." Staff understands "qualified personnel" to mean "utility employees."

Count I

Violation of Section 393.190.1, RSMo.

Section 393.190.1, RSMo., provides in pertinent part:

> No . . . electrical corporation . . . shall hereafter . . . transfer . . . any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do.

The undisputed facts show that when a customer calls KCP&L or GMO to initiate or relocate electric service, a KCP&L employee takes the necessary information from the customer and then, prior to providing a service confirmation number, transfers certain of the customer's specific information, as well as the customer's call, to Allconnect, all without customer permission or consent. KCP&L receives a fee for each such transfer. That conduct has never been authorized by the Commission.

The Commission has determined that a utility's system is the whole of its operations which are used to meet its obligations to provide service to its customers."[3] Considering SO2 emission allowances under the federal Clean Air Act Amendments of 1990, the Commission held that the allowances are necessary and useful in the performance of KCP&L's duties to the public and are thus part of KCP&L's "system" and that any sale or transfer of these allowances is void without prior Commission approval, pursuant to Section 393.190.1 RSMo.[4] It follows that customer specific information, such as a customer's name, service address, billing address, unique customer number, dates of turn-on and turn-off, and service confirmation number, are also part of the utility's system. Furthermore, customer specific information constitutes both a necessary and a useful part of the system because the utility is unable to deliver services to its customer, or bill its customer, without it. A customer list may constitute a

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[3] ***In the Matter of Kansas City Power & Light Co., Order Establishing Jurisdiction And Clean Air Act Workshops,*** 1 Mo.P.S.C.3d 359, 362 (August 26, 1992).

[4] *Id.*

valuable trade secret,[5] so it must be considered to be a utility asset.

The undisputed facts thus state a *prima facie* case of violation of § 393.190.1, RSMo., by KCP&L-GMO.

Count II

Violation of Rule 4 CSR 240-20.015(2)(C)

Rule 4 CSR 240-20.015(2)(C) provides:

> Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders.

The undisputed facts show that when a customer calls KCP&L or GMO to initiate or relocate electric service, a KCP&L employee takes the necessary information from the customer and then, prior to providing a service confirmation number, transfers the customer's specific information, as well as the customer's call, to Allconnect. KCP&L receives a fee for each such transfer. KCP&L does not seek or obtain the customer's consent before the transfer.

The cited rule is part of the Commission's affiliate transactions rules for electric utilities at 4 CSR 240-20.015. Those rules apply to KCP&L-GMO's dealings with Allconnect because it is GPES, an unregulated affiliate of both KCP&L and GMO, that actually entered into a contract with Allconnect. The activities that KCP&L-GMO engage in with Allconnect are performed in furtherance of the GPES-Allconnect contract. In a very real sense, KCP&L and GMO provide not only their specific customer information to Allconnect on GPES' behalf, but also the use of regulated equipment, facilities and personnel.

[5] ***National Rejectors, Inc. v. Trieman,*** 409 S.W.2d 1, 18-19 (Mo. banc 1966).

The undisputed facts state a violation of Rule 4 CSR 240-20.015(2)(C) because KCP&L employees, acting for both KCP&L and GMO, provide specific customer information to Allconnect without the consent of the affected customers.

Count III

Violation of Rule 4 CSR 240-13.040(2)(A)

Rule 4 CSR 240-13.040(2)(A) requires:

> At all times during normal business hours qualified personnel shall be available and prepared to receive and respond to all customer inquiries, service requests, safety concerns, and complaints.

The undisputed facts show that when a customer calls KCP&L or GMO to initiate or relocate electric service, a KCP&L employee takes the necessary information from the customer and then, prior to providing a service confirmation number, transfers the call to Allconnect. KCP&L receives a fee for each such transfer. KCP&L-GMO assumed limited responsibility to investigate complaints regarding Allconnect. KCP&L and GMO under Rule 4 CSR 240-13.040(2)(A) solely bear the responsibility for responding to customer inquiries, concerns, and complaints of their regulated electric customers. Allconnect's sales personnel are not "qualified" within the intendments of the rule and cannot appropriately "respond to all customer . . . complaints."[6]

The undisputed facts state a violation of Rule 4 CSR 240-13.040(2)(A).

KCP&L-GMO's Affirmative Defenses

With respect to affirmative defenses, the Missouri Supreme Court has held:

> where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant's claim. It does not

[6] Rule 4 CSR 240-13.040(2)(A).

> matter that the non-movant will bear the burden on this issue at trial. Summary judgment permits the "claimant" to avoid trial; in order to do so, the claimant must meet the burden imposed by Rule 74.04(c) by showing a right to judgment as a matter of law. **Therefore, a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law.** Unlike the burden of establishing all of the facts necessary to his claim, however, **the claimant may defeat an affirmative defense by establishing that any one of the facts necessary to support the defense is absent.** At this stage of the proceeding, the analysis centers on Rule 74.04(c); it is irrelevant what the non-movant has or has not said or done.[7]

First Affirmative Defense:

For their first affirmative defense, Respondents assert that *Staff's Complaint* fails to state a claim upon which relief may be granted.[8] A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.[9] All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint and the complainant enjoys the benefit of all reasonable inferences.[10]

The Missouri Supreme Court has stated that a complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.[11] That means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice

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[7] ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

[8] *Answer,* p. 8, *Affirmative Defenses,* ¶ 1.

[9] J. Devine, ***Missouri Civil Pleading and Practice,*** § 20-3 (1986).

[10] ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[11] ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,*** 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

pleading rather than the stricter standard of fact pleading. The Eastern District of the Missouri Court of Appeals has said the same thing:

> On appeal, petitioner contends that the charges stated for his dismissal . . . were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.[12]

The Commission is a creature of statute and "[w]hatever power [it] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective."[13] The Commission is specifically and expressly authorized, in § 386.390.1, RSMo, to hear and determine complaints against public utilities. That statute provides:

> Complaint may be made . . . in writing, setting forth any act or thing done or omitted to be done by any corporation . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the Commission . . . .

Turning to Staff's *Complaint,* it is clear that each count successfully states a cause of action. The Commission's general complaint authority at § 386.390.1, RSMo., authorizes the Commission to determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the

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[12] ***Sorbello v. City of Maplewood,*** 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); ***Schrewe v. Sanders,*** 498 S.W.2d 775, 777 (Mo. 1973); *and see* ***Giessow v. Litz,*** 558 S.W.2d 742, 749 (Mo. App.1977).

[13] ***State ex rel. City of St. Louis v. Public Service Commission of Missouri,*** 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (banc 1934).

commission[.]" Such a complaint may be brought by anyone,[14] and such a complaint may even be brought to challenge a "rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility[.]"[15] A complaint brought under this authority necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.[16] For each count of its *Complaint,* Staff has set out the statute or rule violated and the violative conduct. For remedies, Staff has prayed for a determination, for the Commission's General Counsel to be authorized to seek penalties, and for an order under §§ 393.140(2) and 393.270.2, RSMo.,[17] requiring KCP&L-GMO to revise their conduct so that it is no longer violative. Staff has met all of the pleading requirements with its *Complaint* and KCP&L-GMO's first affirmative defense must fail as a matter of law.

Second Affirmative Defense:

KCP&L-GMO's second affirmative defense asserts that Staff "seeks to unfairly and unconstitutionally punish Respondent for conduct in which other utilities in the State regularly engage."[18] Staff admits that it has never brought a complaint against any utility for transferring customer information to a collection agency for purposes of

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[14] Specifically, "[c]omplaint may be made by the commission on its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation[.]" Section 386.390.1, RSMo.

[15] *Id.* But not, however, to challenge a rule, regulation or charge previously approved by the Commission. *See* ***State ex rel. Licata v. PSC,*** 829 S.W.2d 515 (Mo. App., W.D. 1992).

[16] ***State ex rel. Ozark Border Electric Cooperative v. PSC,*** 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

[17] Each of these statutes authorizes the Commission to order improvements to a utility's works, system or methods of operation.

[18] *Answer,* p. 8, *Affirmative Defenses,* ¶ 2.

collecting unpaid bills for utility service. Nor has Staff now brought such a complaint against KCP&L-GMO because bill collecting is not the issue. The issue is KCP&L-GMO's relationship with Allconnect.

A utility that transfers customer information to a collection agency for purposes of collecting unpaid bills does so in support of regulated utility operations. A collection agency is not provided customer information to use for commercial purposes and is provided customer information to use for a narrow regulatory context. Allconnect is sold customer information to use for commercial purposes outside of the regulatory context. The funds that KCP&L-GMO receive from the collection agency in the successful performance of its regulatory-related services are booked to KCP&L-GMO's regulated operations. Allconnect's payments to KCP&L-GMO are booked to KCP&L-GMO's non-regulated operations. The verification of customer information and the provision of a service confirmation number to customers, which activity Allconnect now performs for KCP&L-GMO, was successfully performed by KCP&L-GMO's customer representatives prior to Allconnect's engagement with KCP&L-GMO.

The defense KCP&L-GMO raises is called "selective prosecution." It is a defense sometimes employed in criminal cases that asserts that a prosecution cannot proceed because the defendant has been selected for prosecution from among others similarly situated for invidious reasons such as race, religion, etc., in violation of the Due Process and Equal Protection Clauses of the United States and Missouri Constitutions.[19] First, Staff notes that such questions are beyond the decisional

[19] U.S. Const., Amd. XIV; Mo. Const., Art. I, §§ 2 and 10. *See* ***State v. Camillo,*** 610 S.W.2d 116, 120-21 (Mo. App., W.D. 1980), discussing Missouri and federal jurisprudence of Selective Prosecution.

authority of administrative tribunals.[20] Second, Respondents have not sufficiently pleaded this affirmative defense. It is not sufficient to simply state the conclusion; Respondents must plead facts sufficient to show that Staff has engaged in illegal discriminatory conduct by bringing its *Complaint.*[21] KCP&L and GMO do not explain how Staff's *Complaint* violates their constitutional rights and it is apparent that it does not. This affirmative defense should not detain the Commission for long and certainly is not an obstacle to summary determination.

Third Affirmative Defense:

KCP&L-GMO's third affirmative defense asserts that "[t]he rules Staff alleges Respondent has violated (4 CSR 240-20.015(2)(C) and 4 CSR 240-13.040(2)(A)) are unconstitutionally vague and overbroad."[22] Before discussing the specific constitutional defenses raised here by Respondents and showing that they must fail, Staff notes that only a court, and not this or any other administrative tribunal, may determine the constitutional invalidity of an administrative rule.[23]

The constitutional defense of vagueness is also based upon the Due Process Clause.[24] "[A] basic principle of due process [is] that an enactment is void for vagueness if its prohibitions are not clearly defined."[25] The void for vagueness doctrine addresses two potential problems. One is the lack of notice given a potential offender

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[20] ***Fayne v. Department of Social Services,*** 802 S.W.2d 565, 567 (Mo. App., W.D. 1991).

[21] ***Moore v. Weeks,*** 85 S.W.3d 709, 721 (Mo. App., W.D 2002) (Respondents have the burden of proof as to their affirmative defenses).

[22] *Answer, Affirmative Defenses,* ¶ 3.

[23] ***State Tax Commission v. Administrative Hearing Commission,*** 641 S.W.2d 69, 75 (Mo. banc 1982).

[24] U.S. Const., Amd. XIV; Mo. Const., Art. I, § 10.

[25] ***Cocktail Fortune, Inc. v. Supervisor of Liquor Control,*** 994 S.W.2d 955, 957 (Mo. banc 1999).

because the statute is so unclear that "men of common intelligence must necessarily guess at its meaning."[26] The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application.[27]

Rule 4 CSR 240-20.015(2)(C) provides "[s]pecific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders"; and Rule 4 CSR 240-13.040(2)(A) requires that "[a]t all times during normal business hours qualified personnel shall be available and prepared to receive and respond to all customer inquiries, service requests, safety concerns, and complaints." Neither of these provisions is so vague as to leave a reader of normal intelligence in any doubt as to what is prohibited or required.

The constitutional notion of overbreadth arises from the jurisprudence of the First Amendment.[28] The Missouri Supreme Court has explained that it resulted from the U.S. Supreme Court's recognition that the right to free expression is of ultimate importance to a democratic government, so that it is better to invalidate laws that potentially could be construed to punish protected speech, even if those laws might be

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[26] ***Connally v. General Constr. Co.,*** 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); ***Grayned v. City of Rockford,*** 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); ***Broadrick v. Oklahoma,*** 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); ***Papachristou v. City of Jacksonville,*** 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); ***State ex rel. Williams v. Marsh,*** 626 S.W.2d 223 (Mo. banc 1982).

[27] ***State v. Young,*** 695 S.W.2d 882, 884 (Mo. banc 1985).

[28] U.S. Const., Amd. I; *see* ***New York v. Ferber,*** 458 U.S. 747, 768, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

constitutionally applied, rather than to let such a law stand and chill protected speech.[29] "The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"[30]

The Missouri Supreme Court has adopted the overbreadth doctrine and limits its application to the First Amendment context.[31] Therefore, it has no application to Rule 4 CSR 240-13.040(2)(A), which has nothing to do with speech but rather imposes requirements for customer service staffing. As for Rule 4 CSR 240-20.015(2)(C), commercial speech is protected under the First Amendment only if it deals with lawful activity.[32] Respondents have not cited any provision that authorizes them to sell their customers' private information to a third party and Rule 4 CSR 240-20.015(2)(C) forbids it without the prior approval of the customer. Furthermore, an overbreadth challenge is a facial challenge to a statute or regulation. Generally, to prevail in a facial challenge, the party challenging the statute must demonstrate that no set of circumstances exists under which the statute may be constitutionally applied.[33] Respondents have made no such showing.

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[29] ***State v. Jeffrey,*** 400 S.W.3d 303, 307-8 (Mo. banc 2013).

[30] ***Ferber,*** *supra,* 458 U.S. at 768-69.

[31] ***Jeffrey,*** *supra,* 308; ***State v. Richard,*** 298 S.W.3d 529, 531 (Mo. banc 2009).

[32] ***Colwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Commission,*** 712 S.W.2d 666, (Mo. banc 1986); ***Bates v. State Bar of Arizona,*** 433 U.S. 350, 384, 97 S.Ct. 2691, 2709, 53 L.Ed.2d 810 (1977).

[33] ***Jeffrey,*** *supra;* ***State v. Perry,*** 275 S.W.3d 237, 243 (Mo. banc 2009).

Conclusion

Staff has shown that there are no material facts in dispute; that it is entitled to a favorable determination as a matter of law; and that the public interest favors granting summary determination. Staff has also shown that Respondents' purported affirmative defenses must fail. For these reasons, the Commission should grant *Staff's Motion for Summary Determination* herein.

WHEREFORE, Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order (1) finding that KCP&L-GMO violated § 393.190.1, RSMo.; (2) finding that KCP&L-GMO violated Commission Rule 4 CSR 240-20.015(2)(C); and finding that KCP&L-GMO violated Commission Rule 4 CSR 240-13.040(2)(A); and (4) authorizing its General Counsel to seek penalties under Sections 386.570, and 386.590; and (5) requiring KCP&L-GMO to improve and modify their operations so that they are no longer in violation of the above provisions via their relationship with Allconnect; and granting such other and further relief as the Commission deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 6th day of October, 2015, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

/s/ Kevin A. Thompson