

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Office of the Public Counsel and The Midwest)	
Energy Consumers Group,)	
)	
Petitioners,)	
)	Case No. EC-2019-0200
v.)	
)	
KCP&L Greater Missouri Operations Company,)	
)	
Respondent.)	

**RESPONSE TO OPPOSITION OF KCP&L GREATER MISSOURI OPERATIONS
COMPANY TO PUBLIC COUNSEL’S MOTION TO COMPEL**

COMES NOW, the Office of the Public Counsel (OPC), by and through counsel, and states as follows:

Being unable to resolve a discovery dispute with KCP&L Greater Missouri Operations Company (GMO), the OPC filed a Motion to Compel on March 20, 2019. Thereafter, GMO responded with its Opposition to the OPC’s Motion on March 27, 2019. The OPC feels the need to respond to correct significant misunderstandings and misstatements.

GMO begins its Opposition with an Introduction illuminating Missouri’s relevancy standard as to the admissibility of evidence. Although informative, GMO neglects to account for the relevance threshold for admissibility being higher than that of a relevancy determination as to discovery inquiries. As both Missouri’s Civil Procedure rules and Supreme Court explain, “It is not grounds for objection that the information may be inadmissible at trial, but it is sufficient if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”¹ That is to say, that discovery questions themselves are relevant even if the information

¹ *State ex rel. BNSF Ry. Co. v. Neil*, 356 S.W.3d 169, 172 (Mo. banc 2011) (quoting *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992); Mo. Civ. R. Proc. 56.01(b)(1).

procured therefrom is inadmissible or is later determined to be irrelevant. GMO ironically quotes the same language verbatim on page 5 of its Opposition, and yet fails to recognize that it is conflating the “relevance” of admissibility with discovery.

GMO continues its introduction by artificially circumscribing the scope of discovery. GMO claims that OPC and MECG (Petitioners) request for an accounting order “only requires a determination of whether the retirement of the three Sibley units was an extraordinary item under the USOA [Uniform System of Accounts].”² GMO’s use of “only” is misplaced because it portrays the determination of “extraordinary” myopically. Whether an accounting order is justified is a multi-factored test, not a single variable analysis. The USOA’s General Instructions as to accounting orders provides that those:

“[I]tems related to the effects of events and transactions which have occurred during the current period and which are of *unusual nature and infrequent occurrence* shall be considered extraordinary items. Accordingly, they will be events and transactions of *significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future*. ...To be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income, computed before extraordinary items...”³

Accordingly, in order for Petitioner’s request for an accounting order to be approved by the Public Service Commission (Commission), the OPC and MECG must demonstrate that 1) the closure of the Sibley Station was an unusual and infrequent event that was abnormal and significantly

² *Opposition of KCP&L Greater Missouri Operations Company to Public Counsel’s Motion to Compel*, EC-2019-0200 p. 2 (Mar. 27, 2019).

³ 18 CFR Part 101 (1993) (emphasis added).

different from the ordinary course of GMO's business, and 2) that Sibley's retirement accounts for at least five percent of GMO's income. Thus, the burden of proof for an accounting order is met by showing both abnormality and the five percent threshold.

By contrast, GMO overlooks the numerical requirements for an accounting order and instead presents the issue of extraordinariness as a single determination of "rarity" or "planning" alone.⁴ GMO then frames this Commission's prior 2014 order disapproving its request for an accounting authority order (AAO) for transmission costs as the authority for its position that an event that "has been known for some time" is de facto not extraordinary. This position is fallacious in its Opposition for four reasons.

Firstly, GMO has frankly misapplied the Commission order. GMO cites to paragraph 11 of this Commission's Report and Order, which states, "The expansion of SPP's regional projects and the potential funding required by SPP's members has been known for some time."⁵ GMO interprets this language to mean that an accounting order may not track expense or values for events that were planned or foreseen. However, GMO is only quoting this Commission's Findings of Fact, not its application of law. In the latter regard, this Commission disapproved of GMO's request for an AAO for its SPP transmission costs because the "increase in transmission costs was anticipated *and* is indeed the norm for all electric utility members of SPP."⁶ By focusing on the findings of fact instead of the actual decision, GMO fails to appreciate that this Commission did not predicate deferral accounting on the planned nature of an event alone, but rather abnormality as well. This Commission rightfully recognized that there are multiple considerations when determining "extraordinary," not just whether an event was planned.

⁴ *Opposition*, EC-2019-0200 p. 3.

⁵ *Report and Order*, EU-2014-0077 p. 8 (Aug. 29, 2014).

⁶ *Id.* at 10 (emphasis added).

Secondly, GMO's position has no basis in the USOA or Missouri law. The USOA does not demarcate an event as extraordinary or not based on whether the event was foreseen or planned, and the OPC can find nothing in Missouri case law endorsing such a conclusion. GMO does attempt to rely upon prior Commission orders, but, as already explained, its use is ineffective and skewed.

Third, GMO's position that an event is not extraordinary merely because GMO forecasted or planned the event is simply illogical. The decimation of communities is no less extraordinary merely because seasonally predictable hurricanes or tornadoes caused the damage. Likewise, a company that openly plans to cannibalize itself is acting abnormally and different from the ordinary course of business. There is simply nothing in the nature of being planned or predicted that precludes an extraordinary determination.

Fourth, GMO is misapplying its legal argument opposing the accounting order request itself to a discovery dispute. Despite objecting to the OPC's data requests (DR) on the grounds of relevance, GMO oddly interjects its arguments on "extraordinary" into a discovery dispute. GMO's views as to whether or not a planned event is not extraordinary are wholly irrelevant to deciding whether the OPC's questions appear reasonably calculated to obtain admissible evidence. GMO's opinion is merely a legal position that GMO may argue later at a hearing or in a brief.

After presenting an its introduction, GMO then contests OPC's DRs in categories. The OPC responds in similar fashion.

DRs 8505-07: Inquires into Resource Capacity

A utility that retires a generating unit may be abnormal or different from the ordinary course of business if it does so when the utility has a capacity shortfall. However, one must judge abnormality contextually. Therefore, the OPC seeks to have GMO's position as to how it will meet

its capacity obligations following the shuttering of the Sibley Station. GMO portrays these inquiries as seeking “to uncover facts related to the prudence of the decision to retire Sibley.”⁷ However, this objection fails to consider that abnormality and prudency determinations may overlap, and that certain facts underpinning one conclusion may also implicate the other. The possibility that the OPC’s questions may inadvertently lead to prudency related evidence is not the proper basis for an objection. Again, it “is not grounds for objection that the information may be inadmissible at trial.”⁸ GMO may rightfully object if Petitioners attempt to argue prudency as a basis for an accounting order, but it may not obstruct rightful investigations as to whether or not GMO acted abnormally or outside of its normal course of business.

DRs 8508-8510: Sibley Fuel Run Information

The Sibley Station’s fuel and purchased power expense is a component of the costs and revenues associated with retiring Sibley. Therefore, those values can help determine whether Sibley’s closure implicates at least five percent of GMO’s income in accordance with the USOA’s guidance on determining extraordinariness. In protest, GMO counters that the fuel adjustment clause (FAC) covers those values, and thus may not be subject to deferral accounting per its interpretation of statute and the EU-2014-0077 Commission Report and Order. GMO misinterpreted the Commission’s Order, because it in no way forecloses all accounting orders because certain values may be handled via an FAC. The OPC also finds nothing in the FAC’s enacting statute or accompanying regulations prohibiting an accounting order.⁹ Furthermore, GMO’s reliance on the Order belies its relevancy objection. GMO has not indicated why values that it may handle in a FAC are irrelevant. It merely says that the FAC forecloses discovery. GMO

⁷ *Opposition*, EC-2019-0200 p. 4.

⁸ *Neil*, 356 S.W.3d at 172.

⁹ *See* Section 386.266, RSMo. (2018); *see also* 4 CSR 240-20.090.

confuses a proper discovery objection with its interpretation of law as to what may rightfully justify an accounting order.

DR 8514: Stranded Costs and GMO Integrated Resource Planning

How a utility treats stranded costs in its integrated resource planning can speak to when or whether a utility planned a generation plant retirement. Thus, the OPC asks GMO to provide its understanding of how it treated stranded costs to better gauge our interpretation of available data. Given that GMO has repeatedly raised the defense of it planned to retire the Sibley units as a defense, the OPC cannot understand why GMO now finds this DR irrelevant.

WHEREFORE, the OPC responds to GMO's opposition to OPC's Motion to Compel, and again prays that the Commission grant said motion.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Caleb Hall
Caleb Hall, #68112
Senior Counsel
200 Madison Street, Suite 650
Jefferson City, MO 65102
P: (573) 751-4857
F: (573) 751-5562
Caleb.hall@ded.mo.gov

**Attorney for the Office of the Public
Counsel**

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 3rd day of April, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall