BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	))))))	**Case No. EM-2007-0374**

PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION

COMES NOW the Office of the Public Counsel and for its Motion for Reconsideration states as follows:

1. Public Counsel files this Motion for Reconsideration pursuant to 4 CSR 240-2.160(2). The Commission's Order Denying Motion to Dismiss is in error at a number of levels. It is wrong on the law, on the facts, and as a statement of policy. As a statement of policy, the Commission's strident defense of holding secret meetings with utility executives is even more troubling than the fact that these particular meetings happened in this particular case. The Commission's opinion that there was not "even a remote appearance of impropriety" is self-serving and conclusory, and the Commission's assertion that this case and these very issues were "speculatively looming in the distance" at the time of the meetings is simply wrong. Great Plains Energy knew that this case would be filed in short order, and it knew the ratemaking treatments it requested would certainly be contested issues. Either the Commissioners were duped, or they were willing participants in the process. Given the Commission's vigorous defense of the process, and its readiness to attack any party who dares question it, it appears that the Commission is a

willing participant. The Commission's Order Denying Motion to Dismiss is unlawful, unjust or unreasonable for the following reasons.

The Commission's legal analysis is flawed and unclear.

2. The Commission fails to understand that "actual bias" and "the appearance of impropriety" are two separate and distinct standards, and that only the latter is at issue here. The Commission's discussion is so vague and general that it is difficult to tell what standard the Commission used to determine that recusal is not required. For example, under its heading "Legal Standard for Recusal," the Commission appears to state that the legal standard for recusal is "having prejudged a matter or … being biased." In this section, the Commission alternates quotes from cases about bias with quotes from cases about the appearance of impropriety.

3. Lest there be any doubt, Public Counsel did not and does not allege actual bias or unalterable prejudgment. But actual bias or unalterable prejudgment is not the legal standard for recusal. The proper legal standard is whether "a reasonable person, giving due regard to that presumption [of impartiality], would find an appearance of impropriety and doubt the impartiality of the Court."[1] The Commission appears to acknowledge the appearance of impropriety standard, but dismisses it by simply concluding – without explanation – that there was not "even a remote appearance of impropriety."

4. The Commission erred when it concluded that the Commissioners themselves are the best judge of their own impartiality. Even the Staff, staunch defender of the Commissioners' right to be held to a lower standard than judges, acknowledges

[1] State v. Kinder, 942 S.W.2d 313, 324 (Mo. 1996).

that: "[A]dministrative decisionmakers are no more expert at determining their impartiality than judges are at determining theirs."[2]

5. The Commission erred when it decided that the Judicial Canons do not apply to PSC Commissioners. Although the Slavin[3] case does not specifically refer to the Judicial Canons, it makes clear that the "rules and standards" that apply to judges apply equally to PSC Commissioners. The Commission Staff and the Commission interpret Slavin much too narrowly. It is true that Commissioner Slavin was found to be interested in the outcome of the case, and such interest is not alleged here. But the Slavin court did not so limit its decision. It stated: "However, the courts in this state have held officials occupying quasi-judicial positions to **the same high standard as apply to judicial officers** by insisting that such officials be free of any interest in the matter to be considered by them" and "It is clear from King's Lake, Forest Hills Utility Company, and American General Insurance that **the same standards and rules apply to quasi-judicial officers** as to judicial officers."[4] Until the Commission Staff filing and the Commission's own order, it did not appear that this fundamental premise was in question.

6. Despite the strong language in Slavin, it appears that the Commission does not concede that the Judicial Canons apply because no Missouri court has explicitly and specifically stated that "the Judicial Canons apply to PSC Commissioners." Public Counsel has not found a Missouri case that would satisfy the Commission that the Judicial Canons apply to PSC Commissioners. But states other than Missouri have

[2] Orion Security, Inc. v. Board of Police Commissioners of Kansas City, 90 S.W.3d 157, 164 (Mo. App., W.D. 2002).
[3] Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App. 1979).
[4] *Ibid.*, at 137 and 139.

clearly applied Judicial Canons to quasi-judicial officers. The Montana Supreme Court stated:

> Canon 17 of the Canons of Judicial Ethics establishes that "[a] judge should not permit private interviews, arguments or communications designed to influence his judicial action . . . ." While a referee is not a judge, a referee does act in a quasi-judicial capacity. Here, the District Court's order charged the referee with considering the contentions of each party and providing the District Court with findings of fact and conclusions of law. While this is a case of first impression here in Montana, case law does address the impropriety of ex parte communications in other similar situations.
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> In Cascade County Consumers Ass'n v. Public Serv. Comm'n (1964), 144 Mont. 169, 188, 394 P.2d 856, 866, we held that just as it was improper for a judge to engage in ex parte communications, it was "equally improper" for the Montana Public Service Commission to engage in an ex parte relationship. We noted that "if one is empowered to act as a judge he should conduct himself as one." Cascade County, 144 Mont. at 188, 394 P.2d at 866.[5]

A New Jersey appeals court has held:

> Granting a variance is the exercise of quasi-judicial governmental authority. Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 282 (1965). The canons of the Code of Judicial Conduct [footnote 2] are therefore a relevant guide to whether consent in these circumstances would be a legally effective waiver. Canon 3C(1) provides in part, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." Canon 3D provides, A judge disqualified by the terms of this Canon may not avoid disqualification by disclosing on the record his interest and securing the consent of the parties.
>
> [footnote 2]: The Code of Judicial Conduct and the Rules of Professional Conduct govern the conduct of judges and members of the bar of New Jersey.[6]

A New York appeals court stated:

> Basic to every judicial and quasi-judicial proceeding is that the integrity of the decision-making body must be above reproach and even the appearance of impropriety should be avoided (Code of Judicial Conduct,

[5] Myers v. Vincent, 2004 MT 176N, P16-P17 (Mont. 2004). Lexis® notes that "pursuant to the applicable Montana code section this opinion is not designated for publication."
[6] McVoy v. Bd. of Adjustment, 213 N.J. Super. 109, 113 (App. Div. 1986).

canon 2; *cf*. Matter of Labor Relations Section of Northern N. Y. Bldrs. Exch. v Gordon, 41 AD2d 25; Matter of Cross Props. [Gimbel Bros.], 15 AD2d 913, affd 12 NY2d 806; Casterella v Casterella, 65 AD2d 614). [7]

A Colorado appeals court held:

> When administrative proceedings are quasi-judicial in character, agency officials should be treated as the equivalent of judges. Hadley v. Moffat County School District RE-1, 641 P.2d 284 (Colo. App. 1981), rev'd on other grounds, 681 P.2d 938 (1984). Under the Code of Judicial Conduct Canon 2, a judge should avoid "impropriety and the appearance of impropriety in all his activities." (emphasis added) Even though a judge may believe in his or her own impartiality, it is the court's duty to eliminate every semblance of reasonable doubt or suspicion that a trial by a fair and impartial tribunal may have been denied. Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1987). See also Wood Brothers Homes v. City of Ft. Collins, 670 P.2d 9 (Colo. App. 1983).[8]

The Hawaii Supreme Court explained the rationale at length:

> "[T]here are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding." R. Pound, Administrative Law 75 (1942). "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts.
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> …
>
> Our Code of Judicial Conduct and a recent opinion of this court reflect these teachings.
>
> An issue in State v. Brown was "whether a judge who causes a criminal contempt proceeding to be instituted may then sit with impunity in judgment of the accused." 70 Haw. at 465, 776 P.2d at 1187. We ruled the judge could not do so, relying in part on Tumey v. Ohio, 273 U.S. 510, 532 (1927), where the Court said:
>
> > Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."
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> Our ruling, we noted, was "consistent with our general admonition [to judges] that 'A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities,' Code of Judicial Conduct, Canon 2, and

[7] De Camp v. Good Samaritan Hospital, 66 A.D.2d 766, 768 (N.Y. App. Div. 1978).

[8] Wells v. Del Norte School Dist., 753 P.2d 770, 772 (Colo. Ct. App. 1987).

> our expectation that [a judge would] 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]' Code of Judicial Conduct, Canon 3 C.(1)." State v. Brown, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3.
>
> Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts[,]" Withrow v. Larkin, 421 U.S. at 46, we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality. State v. Brown, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3.[9]

An exhaustive search would likely yield other states taking the same approach.

7. The Commission relies to a great extent on Fitzgerald.[10] Fitzgerald is more about the Rule of Necessity than it is about some lesser standard for disqualifying administrative officers acting in a quasi-judicial capacity. It appears that the court in Fitzgerald believed that the three challenged councilmen should have been disqualified because of an appearance of impropriety, but that the "so-called Rule of Necessity" allowed them to remain in a decision-making capacity. Fitzgerald held:

> In the present case, all three councilmen challenged for bias had been the object of pointed personal criticism from the Mayor. In a letter to the St. Louis County Prosecuting Attorney, the Mayor accused all three councilmen of unethical behavior, including the following allegations: one Councilman had a conflict of interest because he served on a council committee which wrote the City's solid waste ordinance at the same time that he formed an infectious waste hauling business; the same Councilman resisted arrest when stopped on suspicion of driving while intoxicated; the letter implied that another challenged Councilman attempted to have a speeding ticket issued to his brother "fixed"; the third Councilman challenged for bias had a conflict of interest when he worked for the City's health insurance carrier while serving as both City Treasurer and councilman. The Mayor had even requested one Councilman's resignation because of the councilman's alleged ticket-fixing. **These councilmen's protestations of impartiality notwithstanding, the foregoing evidence, we believe, would lead reasonable people, willing to presume the councilmen's integrity, to question the councilmen's impartiality at**

[9] Sussel v. Honolulu Civil Serv. Comm'n, 71 Haw. 101, 108-109 (Haw. 1989)

[10] Fitzgerald v. Maryland Heights, 796 S.W.2d 52, (Mo. Ct. App. 1990).

> **the impeachment proceedings. The appearance of bias created by this evidence should have been avoided if possible.**
> However, disqualifying the three challenged councilmen would have disabled the Board of Impeachment, which could only act upon the vote of two-thirds, or six, of its eight elected members. § 77.340. Due process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make. **Under such circumstances, the so-called Rule of Necessity permits an adjudicative body to proceed in spite of its possible bias or self-interest.**
> *Ibid.*, at 60; emphasis added.

8. Ross,[11] too, is easily distinguished. In pertinent part, Ross simply states:

> Finally Ross charges that the action of the Board dismissing him from service was based upon unlawful procedures that denied him a fair trial. He asserts that the participation of the Board's attorney in the drafting of charges and suggested findings of fact, ultimately brought and adopted by the Board, represented an abdication of the Board's deliberative function; that this abdication rendered the Board prosecutor, judge and jury, resulting in the denial of a fair trial.
> That an administrative body initiates a charge and then tries it does not alone vitiate the proceedings, if judicial review is provided. Aubuchon v. Gasconade County R-1 School District, 541 S.W.2d 322, 326 (Mo. App. 1976). And the active participation of a school board's attorney in the conduct of a hearing, including the examination and cross-examination of witnesses, does not in itself deprive one of a fair trial; nor does the preparation of findings of fact and conclusions of law. Eddington v. St. Francois Cty. R-III Bd. of Ed., 564 S.W.2d 283, 286 (Mo. App. 1978). **Absent a showing in the record that, as a result of the attorney's participation, the Board heard the evidence with an unbendable or preconceived notion that petitioner was guilty as charged, no denial of a fair trial occurred.** Harrisburg R-VIII School District v. O'Brian, 540 S.W.2d 945, 950 (Mo. App. 1976). The record shows that the Board conducted the hearing properly, fairly, reasonably and within its statutory authority.[12]

Ross is part of a long line of cases in which the general claim of the dismissed teacher is that: "The charge that a *de facto* combination of investigatory, prosecutory, and adjudicatory functions in an administrative tribunal statutorily vested to initially pass

[11] Ross v. Robb, 662 S.W.2d 257, (Mo. 1983).

[12] *Ibid.*, at 260; emphasis added.

judgment or make a decision after a hearing, stamps any hearing so held with unfairness, and renders it constitutionally infirm because violative of due process…."[13] The factual underpinnings, including the structural makeup of a school board and the procedures involved in bringing a preferment of charges against a teacher, are so different from the instant facts as to make any general statements about what constitutes due process meaningless here. Sheperd,[14] another in the Ross line of cases, discusses the procedures for school board actions against a teacher and concludes:

> [U]nder the statutory scheme providing for termination hearings the Board and its representatives will be involved both in prosecuting and judging cases. This combination of roles has been held not to result in a denial of fair trial unless the Board is prejudiced, so that it has predetermined to reach a particular result no matter what the evidence.

In short, the premise that the Commission relies upon so heavily – that an administrative decision maker is not required to disqualify unless he has determined to reach a particular result regardless of the evidence – is limited to a very narrow set of circumstances and a very narrow line of cases. It simply finds no credence outside of the very limited context of school board actions when the board and its representatives are involved in both prosecuting and judging cases.

9. The Commission, despite quoting 4 CSR 240-4.020 in its entirety at pages 6-8, later (at page 17) comes to the conclusion that it is "totally irrelevant to this discussion." Public Counsel agrees, and in fact did not cite to that rule in its motion to dismiss. Neither the Commission in its rules, nor the legislature in its laws, can permit procedures that contravene Public Counsel's due process rights. Regardless of how the Commission's rule 4 CSR 240-4.020 defines "Conduct During Proceedings" or how

[13] Harrisburg R-VIII School District v. O'Brian, 540 S.W.2d 945, 950 (Mo. App. 1976).
[14] Shepard v. South Harrison R-II School Dist., 718 S.W.2d 195 (Mo. Ct. App. 1986).

Section 386.210 defines permissible conversations with Commissioners, if such conversations preclude Public Counsel from having a contested case decided by a tribunal that not only is impartial, but appears impartial, then disqualification is required. The fact that the law does not prohibit every contact as unauthorized does not mean that a particular contact – given its context and content – can never undermine due process protections.

10. The Commission erred in its determination that the meetings at issue were not *ex parte*. Even if the Commission's narrow literal translation of *ex parte* from the Latin is accurate, it is hardly the way the phrase is typically used. Had the Commission consulted a more recent *Black's Law Dictionary*,[15] it would have found the following definition of *ex parte*: "Done or made at the instance and for the benefit of one party only, **and without notice to, or argument by, any person adversely interested.**" According to this definition, the Commissioners' meetings were indeed *ex parte*: they were made at the instance and for the benefit of GPE only, and there was certainly no notice to any of the persons adversely interested, nor was there argument by adversely affected persons.

11. The due process concerns that generally prohibit *ex parte* communications are not strictly limited by the date or time of filing. According to the Commission, a conversation that would be improper after a filing is – in all circumstances – proper so long as a filing has not been made. Due process does not turn on such fine nuances of timing. Mr. Chesser and Mr. Downey coming to the Commissioners to explain the issues and judge the Commissioners' reactions to their framing of the issues is just as

[15] *Black's Law Dictionary*, Seventh Edition, West Group, 1999, page 597; emphasis added.

improper a couple of months before the filing as it would have been a couple of minutes after the filing. This is not a situation in which utility representatives were briefing the Commissioners on topics of general interest in the utility field; this is a situation in which utility representatives were giving their perspective on specific, discrete issues that they knew would be put to the Commissioners for decision in a very short time.

12. The Commission completely failed to address why, if these meetings were so routine and so unremarkable, they were not scheduled in such a manner as to be public meetings subject to the Sunshine Law. Section 610.011 RSMo 2000 provides that:

> It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.

The Commission's failure to address the facts makes its conclusion that there was no appearance of impropriety unreasonable.

13. The majority[16] never addresses the question of whether the meetings took place and whether Public Counsel's understanding of them based on information in the record is correct. The public would have been better served if the Commissioners involved had explained – if they could – that the record evidence cited by Public Counsel is misleading or that the conclusions Public Counsel drew are incorrect. Instead, the Commission scrambles to undertake a reading of the law such that anything short of "a determin[ation] to reach a particular result regardless of the evidence" will not require

[16] Commissioner Clayton, in his concurrence, goes to great length to point out that the date of the meetings has not been conclusively pinned down, but does not dispute Mr. Chesser's and Mr. Downey's testimony that the purpose of the meetings was to sound out Commissioners' views on the ratemaking proposals that were anticipated to become – and indeed have become – the contested issues in this contested case.

disqualification. The Commission, rather than explain what happened here, chose to defend the practice of meeting in secret with utility executives to discuss issues from the utility's point of view just before a contested case is filed. Without ever deigning to tell the public what the Commissioners thought the meetings were about, or even conceding or denying that they took place, the Commission simply opines that the evidence is not strong enough to make a reasonable observer question the propriety of the meetings. The Commission clearly has little comprehension of how a reasonable person would judge these secret meetings.

14. The Commission rests its denial of Public Counsel's motion entirely on its conclusion that Public Counsel has not made a showing sufficient to meet the Commission's standard for disqualification. The Commission does not dispute:

- That the meetings took place;
- That they were conducted in such a way that notice was technically not required under the Sunshine Law;
- That no notice was ever given;
- That the meetings were a necessary and critical part of the process from GPE's perspective;
- That the specific three "regulatory support" mechanisms were explained to each Commissioner;
- That these three mechanisms are now contested issues requiring Commission resolution;
- That GPE needed some feedback – at least a lack of a negative reaction – from the Commissioners about these issues; and
- That GPE understood the Commissioners' reactions to be generally positive.

15. The Commission states that "Public Counsel **apparently asserts** that … unlawful promises [were] made by the Commissioners." (page 18). Public Counsel never asserted anything of the kind. The Commission simply sets up this straw-man argument so that it has something easy to knock down.

16. The Commission seizes on the statement – repeated many times almost word-for-word by both Mr. Chesser and Mr. Downey – that Great Plains "asked for no commitment and received no commitment." But a "commitment" to act in a certain way is not necessary in order for disqualification to be required. Great Plains needed something from the Commissioners (at the very least, no negative reactions), and Great Plains believed that it got what it needed. The facts that these meetings took place with no notice to those who could be adversely affected, that contested issues were discussed, and that the party initiating the meetings did so for the express purpose of briefing the decision makers on what would be contested issues and judging the decision makers' reactions, all create an appearance of impropriety that necessitates disqualification.

17. The Commission erred in characterizing Public Counsel's assertion that utility companies have greater access to Commissioners than ratepayers as a "misrepresentation." Even the nationally recognized expert brought in by the Commission in Case No. AO-2008-0192 acknowledged that utility companies have greater access to Commissioners than other groups.

WHEREFORE Public Counsel respectfully requests that the Commission reconsider its January 2, 2008 Order Denying Motion To Dismiss.

Respectfully submitted,

OFFICE OF THE Public Counsel

By: /s/Lewis R. Mills, Jr.

Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 11th day of January 2008.

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Mills Lewis
Office Of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Thompson Kevin
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Kevin.Thompson@psc.mo.gov

Woodsmall David
AG Processing, Inc
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Conrad Stuart
AG Processing, Inc
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Parsons Renee
Aquila Networks
20 West 9th Street
Kansas City, MO 64105
renee.parsons@aquila.com

Swearengen C James
Aquila Networks
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
LRackers@brydonlaw.com

Boudreau A Paul
Aquila Networks
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
PaulB@brydonlaw.com

Davenport Aimee
Black Hills Corporation
314 East High Street
Jefferson City, MO 65101
adavenport@lathropgage.com

DeFord S Paul
Black Hills Corporation
2345 Grand Blvd
Suite 2800
Kansas City, MO 64108-2684
pdeford@lathropgage.com

Bishop Schwartz Dayla
City of Independence, Missouri
111 E. Maple St.
Independence, MO 64050
dschwartz@indepmo.org

Garner B. Allen
City of Independence, Missouri
111 E. Maple Street
Independence , MO 64050
agarner@indepmo.org

Robbins I Alan
City of Independence, Missouri
1700 Pennsylvania Ave, NW
Suite 500
Washington, DC 20006
arobbins@jsslaw.com

Roby D Debra
City of Independence, Missouri
1700 Pensylvania Ave., NW
Suite 500
Washington, DC 20006
droby@jsslaw.com

Danneil M Amy
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
adanneil@ksrlaw.com

Gifford L Raymond
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
rgifford@ksrlaw.com

Comley W Mark
City of Kansas City, Missouri
601 Monroe Street., Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comleym@ncrpc.com

Peters M Adam
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
apeters@ksrlaw.com

Shepherd E Willie
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
wshepherd@ksrlaw.com

Handley H Robert
City of Lee's Summit, Missouri
220 SW Green Street
Lees Summit, MO 64063
Colleen.Fetz@lees-summit.mo.us

Young Mary Ann
City of St. Joseph, Missouri
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
myoung@wdspc.com

Steinmeier D William
City of St. Joseph, Missouri
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
wds@wdspc.com

Moore L Debra
County of Cass, Missouri
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701
dmoore@casscounty.com

Martin Cindy Reams
County of Cass, Missouri
408 S.E. Douglas
Lees Summit, MO 64063-4247
crmlaw@swbell.net

Comley W Mark
County of Cass, Missouri
601 Monroe Street., Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comleym@ncrpc.com

Turner E Alicia
County of Cass, Missouri
601 Monroe Street, Ste. 301
P.O. Box 537
Jefferson City, MO 65102-0537
turnera@ncrpc.com

Lumley J Carl
Dogwood Energy, LLC
130 S. Bemiston, Ste 200
St. Louis, MO 63105
clumley@lawfirmemail.com

Curtis Leland
Dogwood Energy, LLC
130 S. Bemiston, Suite 200
St. Louis, MO 63105
lcurtis@lawfirmemail.com

Campbell O Lewis
Federal Executive Agencies
P.O. Box 51508
Albuquerque, NM 87181-1508
LCampbell4@comcast.net

Jones N Paul
Federal Executive Agencies
PO Box 5400
Albuquerque, NM 87185-5400
pnjones@doeal.gov

English G Mark
Great Plains Energy Incorporated
1201 Walnut
Kansas City, MO 64106
mark.english@kcpl.com

Fischer M James
Great Plains Energy Incorporated
101 Madison Street--Suite 400
Jefferson City, MO 65101
jfischerpc@aol.com

Blanc D Curtis
Great Plains Energy Incorporated
1201 Walnut, 20th Floor
Kansas City, MO 64106
Curtis.Blanc@kcpl.com

Riggins G William
Great Plains Energy Incorporated
1201 Walnut
Kansas City, MO 64141
bill.riggins@kcpl.com

Zobrist Karl
Great Plains Energy Incorporated
4520 Main Street
Suite 1100
Kansas City, MO 64111
kzobrist@sonnenschein.com

Steiner W Roger
Great Plains Energy Incorporated
4520 Main Street, Suite 1100
Kansas City, MO 64111
rsteiner@sonnenschein.com

Williams L Jane
IBEW Local Union 1464
753 State Avenue, Suite 475
Kansas City, KS 66101
jlw@blake-uhlig.com

Waers James Richard
IBEW Local Union 1464
753 State Avenue, Suite 475
Kansas City, KS 66101

Williams L Jane
IBEW Local Union 1613
753 State Avenue, Suite 475
Kansas City, KS 66101
jlw@blake-uhlig.com

Waers James Richard
IBEW Local Union 1613
753 State Avenue, Suite 475
Kansas City, KS 66101

Williams L Jane
IBEW Local Union 412
753 State Avenue, Suite 475
Kansas City, KS 66101
jlw@blake-uhlig.com

Waers James Richard
IBEW Local Union 412
753 State Avenue, Suite 475
Kansas City, KS 66101

Williams L Jane
IBEW Local Union No. 695
753 State Avenue, Suite 475
Kansas City, KS 66101
jlw@blake-uhlig.com

Waers James Richard
IBEW Local Union No. 695
753 State Avenue, Suite 475
Kansas City, KS 66101

Williams L Jane
IBEW Local Union No. 814
753 State Avenue, Suite 475
Kansas City, KS 66101
jlw@blake-uhlig.com

Waers James Richard
IBEW Local Union No. 814
753 State Avenue, Suite 475
Kansas City, KS 66101

English G Mark
Kansas City Power & Light Company
1201 Walnut
Kansas City, MO 64106
mark.english@kcpl.com

Fischer M James
Kansas City Power & Light Company
101 Madison Street--Suite 400
Jefferson City, MO 65101
jfischerpc@aol.com

Blanc D Curtis
Kansas City Power & Light Company
1201 Walnut, 20th Floor
Kansas City, MO 64106
Curtis.Blanc@kcpl.com

Riggins G William
Kansas City Power & Light Company
1201 Walnut
Kansas City, MO 64141
bill.riggins@kcpl.com

Zobrist Karl
Kansas City Power & Light Company
4520 Main Street
Suite 1100
Kansas City, MO 64111
kzobrist@sonnenschein.com

Steiner W Roger
Kansas City Power & Light Company
4520 Main Street, Suite 1100
Kansas City, MO 64111
rsteiner@sonnenschein.com

Stewart B Charles
Missouri Joint Municipal Electric Utility Commission
4603 John Garry Drive, Suite 11
Columbia, MO 65203
Stewart499@aol.com

Jones N Paul
National Nuclear Security Administration (NNSA)-Kansas City Plant
PO Box 5400
Albuquerque, NM 87185-5400
pnjones@doeal.gov

Campbell O Lewis
National Nuclear Security Administration (NNSA)-Kansas City Plant
811 Lamp Post Cir. SE
PO Box 51508
Albuquerque, NM 87181
lcampbell4@comcast.net

Woodsmall David
Praxair, Inc.
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Conrad Stuart
Praxair, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Woodsmall David
Sedalia Industrial Energy Users Association
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Conrad Stuart
Sedalia Industrial Energy Users Association
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Coffman B John
South Harper Residents / Nearby Residents
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

Uhrig Matthew
South Harper Residents / Nearby Residents
3401 West Truman Blvd.
Jefferson City, MO 65109
muhrig_lakelaw@earthlink.net

Campbell O Lewis
United States Department of Energy
P.O. Box 51508
Albuquerque, NM 87181-1508
LCampbell4@comcast.net

Jones N Paul
United States Department of Energy
PO Box 5400
Albuquerque, NM 87185-5400
pnjones@doeal.gov

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Mills Lewis
Office Of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Thompson Kevin
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Kevin.Thompson@psc.mo.gov

Woodsmall David
AG Processing, Inc
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Conrad Stuart
AG Processing, Inc
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Parsons Renee
Aquila Networks
20 West 9th Street
Kansas City, MO 64105
renee.parsons@aquila.com

Swearengen C James
Aquila Networks
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
LRackers@brydonlaw.com

Boudreau A Paul
Aquila Networks
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
PaulB@brydonlaw.com

Davenport Aimee
Black Hills Corporation
314 East High Street
Jefferson City, MO 65101
adavenport@lathropgage.com

DeFord S Paul
Black Hills Corporation
2345 Grand Blvd
Suite 2800
Kansas City, MO 64108-2684
pdeford@lathropgage.com

Bishop Schwartz Dayla
City of Independence, Missouri
111 E. Maple St.
Independence, MO 64050
dschwartz@indepmo.org

Garner B. Allen
City of Independence, Missouri
111 E. Maple Street
Independence , MO 64050
agarner@indepmo.org

Robbins I Alan
City of Independence, Missouri
1700 Pennsylvania Ave, NW
Suite 500
Washington, DC 20006
arobbins@jsslaw.com

Roby D Debra
City of Independence, Missouri
1700 Pensylvania Ave., NW
Suite 500
Washington, DC 20006
droby@jsslaw.com

Danneil M Amy
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
adanneil@ksrlaw.com

Gifford L Raymond
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
rgifford@ksrlaw.com

Comley W Mark
City of Kansas City, Missouri
601 Monroe Street., Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comleym@ncrpc.com

Peters M Adam
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
apeters@ksrlaw.com

Shepherd E Willie
City of Kansas City, Missouri
1515 Arapahoe Street, Tower 1, Suite 1600
Denver, CO 80202
wshepherd@ksrlaw.com

Handley H Robert
City of Lee's Summit, Missouri
220 SW Green Street
Lees Summit, MO 64063
Colleen.Fetz@lees-summit.mo.us

Young Mary Ann
City of St. Joseph, Missouri
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
myoung@wdspc.com

Steinmeier D William
City of St. Joseph, Missouri
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
wds@wdspc.com

Moore L Debra
County of Cass, Missouri
Cass County Courthouse
102 E. Wall
Harrisonville, MO 64701
dmoore@casscounty.com

Martin Cindy Reams
County of Cass, Missouri
408 S.E. Douglas
Lees Summit, MO 64063-4247
crmlaw@swbell.net

Comley W Mark
County of Cass, Missouri
601 Monroe Street., Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comleym@ncrpc.com

Turner E Alicia
County of Cass, Missouri
601 Monroe Street, Ste. 301
P.O. Box 537
Jefferson City, MO 65102-0537
turnera@ncrpc.com

Lumley J Carl
Dogwood Energy, LLC
130 S. Bemiston, Ste 200
St. Louis, MO 63105
clumley@lawfirmemail.com

By: Lewis R. Mills, Jr.