

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 29th day
of February, 2012.

In the Matter of KCP&L Greater Missouri Operations)	
Company's Application for Approval of Demand-)	
Side Programs and for Authority to Establish a)	<u>File No. EO-2012-0009</u>
Demand-Side Programs Investment Mechanism)	

ORDER DENYING STAFF'S MOTION FOR VARIANCE DETERMINATIONS

Issue Date: February 29, 2012

Effective Date: February 29, 2012

On December 22, 2011, KCP&L Greater Missouri Operations Company ("GMO") filed the above-titled application. On February 10, 2012, the Staff of the Commission ("Staff") filed a Motion for Variance Determinations and Motion for Expedited Treatment.

Discussion

Staff states that GMO has requested a variance from three different MEEIA rules, and that GMO has failed to show good cause for granting those variances.¹ Next, Staff argues that GMO should have asked for five other variances which GMO failed to request, and that the Commission should order GMO to request those variances.²

¹ GMO asks for a variance from Commission Rules 4 CSR 240-20.093(4)(A) (requirement to adjust DSIM rates annually), 4 CSR 240-20.093(2)(H)(3)(requirement that a utility incentive component of DSIM shall be implemented on a retrospective bases, and verified through Evaluation, Measurement and Verification reports), and 4 CSR 240-20.094(6)(J)(requirement that a customer choosing not to participate in DSM still being allowed to participate in interruptible or curtailable rates).

² Staff claims GMO should have requested a variance from Commission Rule 4 CSR 240-20.093(4)(discussed above), two variances from 4 CSR 240-3.164(2)(A)(requirement of current market potential study) and two variances from 4 CSR 240-20.093(2)(H)(requirement of how to define a methodology for annual net shared benefits).

Because of Staff's opinion that GMO's application is deficient, Staff argues that the 120-day deadline for the Commission to render a decision has not yet begun.³ In the alternative, Staff argues that even if it has begun, good cause exists for the Commission to toll the running of the deadline until after the Commission determines whether to grant the afore-mentioned variances. The Office of the Public Counsel ("OPC") and Missouri Energy Users' Association ("MEUA") support Staff's motion.

GMO states that the Commission should review its requests for variances as part of its overall review of the entire filing. The proposed variances are part and parcel of its proposed Demand Side Management ("DSM") and Demand Side Programs Investment Mechanism ("DSIM"). For the variances for which Staff believes the Commission should not grant, GMO believes it can produce competent and substantial evidence to prove that the Commission should grant its requests.

Further, GMO believes that its application complies with the MEEIA rules as filed, and no further variances are needed. Finally, GMO objects to Staff's position that the 120 days has not yet started, stating that the rule clearly states what it states: The Commission has 120 days. What is more, GMO has agreed to a 60-day extension, but is unwilling to agree to further extensions. The Missouri Department of Natural Resources ("DNR") and Union Electric Company, d/b/a/ Ameren Missouri ("Ameren") support GMO's position.

³ Commission Rule 4 CSR 240-20.094(3) states that "(t)he commission shall approve, approve with modification acceptable to the electric utility, or reject such applications . . . within one hundred twenty (120) days of the filing of an application . . . "

Decision

Commission Rule 4 CSR 240-20.094(3) gives the Commission 120 days to rule on an application for approval of demand-side programs. Commission Rule 4 CSR 240-20.094(9) allows the Commission to grant a variance from that rule upon request and for good cause shown.

Although the term “good cause” is frequently used in the law,⁴ the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.⁵

Good cause “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.”⁶ Similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.”⁷

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical.”⁸ And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.⁹

The gist of Staff’s argument is that to review and evaluate the case without the variances decided upfront essentially results in GMO putting the case before the

⁴ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

⁵ See *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

⁶ *Black’s Law Dictionary* 692 (6th ed. 1990).

⁷ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

⁸ *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

⁹ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

Commission as an “all or nothing” request.¹⁰ Staff argues that the Commission should not, and the rule does not intend to, deal with such a result.

However, Commission Rule 4 CSR 240-20.094(3) gives the Commission three options: approve the application, approve with modifications that are acceptable to the utility, or reject it. Staff’s request to bifurcate the case is not acceptable to GMO, as GMO states that the variances are critical to implement its proposed DSM and DSIM programs. What is more, GMO has already agreed to an extra 60 days for the Commission to rule on the application.

Between the plain language of the rule requiring modifications to the application to be acceptable to the utility, and GMO’s prior agreement to allow an extra 60 days to process the application, the Commission finds that Staff has not stated good cause to bifurcate the issues in this case. Thus, the Commission will deny Staff’s motion.

THE COMMISSION ORDERS THAT:

1. The Staff of the Commission’s Motion for Variance Determinations is denied.
2. This order shall become effective immediately upon issuance.

(S E A L)

Gunn, Chm., Jarrett, Kenney,
and Stoll, CC., concur.

Pridgin, Senior Regulatory Law Judge

BY THE COMMISSION



Steven C. Reed
Secretary

¹⁰ Staff’s Motion for Variance Determinations and Motion for Expedited Treatment, p. 20 (filed February 10, 2012).