BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MOTION FOR VARIANCE DETERMINATIONS AND MOTION FOR EXPEDITED TREATMENT

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and, due to the 120-day decision time frame of Rule 4 CSR 240-20.094(3),[1] moves the Commission to give Staff guidance as to how to proceed in this docket by determining as expeditiously as possible, ideally by February 17, 2012, (1) which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant KCP&L Greater Missouri Operations Company ("GMO") before the Commission can approve GMO's proposed demand-side programs and proposed demand-side programs investment mechanism ("DSIM"); (2) whether GMO has shown good cause for the Commission to make decisions on each of those variances; (3) whether the 120-day decision time frame of Rule 4 CSR 240-20.094(3) does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to grant the variances; and (4) for each required variance for which GMO has not shown good cause, (i) order GMO to do so expeditiously, (ii) order Staff to file its recommendation on GMO's good cause showings within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance.

[1] Rule 4 CSR 240-20.094(3) provides, in part, "The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one hundred twenty (120) days of the filing of an application …."

Staff is not suggesting in this motion that the Commission grant GMO any of these variances or that the Commission should approve GMO's proposed demand-side programs or proposed DSIM. While GMO thus far has not presented sufficient good cause to support these variances, requested and unrequested, GMO may be able to present additional information to justify the variances not expressly prohibited by MEEIA. However, consideration of such additional information would necessarily require additional time. Staff would present its position on the propriety of each variance in its recommendations on GMO's good cause showings.

Staff supports the creation and implementation of quality demand-side programs. Staff's goal with this pleading is not to obstruct implementation of demand-side programs, but to bring the benefits of energy efficiency to utilities, their customers and the general public in compliance with the law, including the Missouri Energy Efficiency Investment Act of 2009[2] ("MEEIA") and the Commission's rules to implement the MEEIA.

In support of its *Motion*, Staff states:

Background

The MEEIA became law on August 28, 2009. The MEEIA permits electric corporations to implement Commission-approved demand-side programs "with the goal of achieving all cost-effective demand-side savings." Based upon the legislature's mandate, the Commission initiated a rulemaking to implement the MEEIA.[3] Several stakeholders, including GMO, participated in the rulemaking, File No. EX-2010-0368. After the proper comment period, where GMO filed comments, a public hearing, at which GMO participated, on February 9, 2011, after carefully considering the comments filed in the rulemaking, the Commission filed an *Order of*

[2] § 393.1075, RSMo Supp. 2011.
[3] File No. EX-2010-0368, Commission's *Notice Finding Necessity for Rulemaking*, June 17, 2010.

Rulemaking with the Office of the Missouri Secretary of State for each of the following proposed rules: 4 CSR 240-3.163, 3.164, 20.093, and 20.094 (*Orders of Rulemaking*).[4] The rules became effective on May 30, 2011.

On December 22, 2011, GMO filed its application, *Application of KCP&L Greater Missouri Operations Company* (*"Application"*), for Commission approval of proposed demand-side programs and for authority to establish a Demand-Side Programs Investment Mechanism ("DSIM") creating Case No. EO-2012-0009.

As part of its *Application*, GMO specifically requests variances from three (3) provisions of the MEEIA rules: 4 CSR 240-20.093(4)(A), 4 CSR 240-20.093(H) and 4 CSR 240-20.094(J).[5] While GMO has provided some qualitative testimony in an effort to meet the good cause (Rules 4 CSR 240-20.093(13) and 4 CSR 240-0.094(9)) required for these variances, that testimony is an insufficient basis for the Commission to grant them.

GMO's proposed prospective shared benefit performance incentive component of its proposed DSIM does not comply with Rule 4 CSR 240-20.093. For the Commission to find a variance from Rule 4 CSR 240-20.093 is necessary to avoid a manifest injustice—the standard for good cause which is discussed below—GMO's proposed prospective shared benefit performance incentive component of its proposed DSIM must quantitatively be shown to be superior to a baseline DSIM that complies with Rule 4 CSR 240-20.093. GMO has not yet even attempted to do so.

Rule 4 CSR 240-20.094(6)(J) allows GMO customers to opt out of participation in GMO's demand-side programs. GMO's request to exclude such customers from taking

[4] File No. EX-2010-0368, *Memorandum*, February 9, 2011.
[5] *Direct Testimony of Tim M. Rush*, pp. 22-24. Staff notes that the correct and complete subsection references for GMO's requested variances are Rules 4 CSR 240-20.093(2)(H)3 and 4 CSR 240-20.094(6)(J).

interruptible or curtailable service from it directly conflicts with the MEEIA.[6] This is because Rule 4 CSR 240-20.094(6)(J) simply restates a MEEIA requirement that is statutorily codified at § 393.1075.10, RSMo Supp. 2011. The Commission does not have the authority to grant a variance from the MEEIA; therefore, a variance from compliance with Rule 4 CSR 240-20.094(6)(J) would be ineffectual.

GMO has not requested all the variances the Commission would need to grant before the Commission could approve GMO's proposed DSIM. Based on Staff's limited review, GMO has not requested variances from Rule 4 CSR 240-3.164(2)(A) concerning energy and demand market potentials, and baseline energy and demand forecasts for its service territory, or from Rule 4 CSR 240-20.093(2)(H) concerning the use of annual *net* shared benefits when defining the methodology for the utility incentive component of its proposed DSIM. The Commission must grant variances from each of these rules before it could approve GMO's proposed DSIM. Staff is not suggesting now that the Commission grant any of these variances or that the Commission should approve GMO's proposed DSIM. Staff discusses each of these variance issues further below.

Certain parties, including Staff and GMO, have agreed to a procedural schedule for this case, which the Commission has approved and ordered all the parties to comply with.[7] Staff, as well as other parties, made it clear to GMO that Staff did not view Staff's agreement to that procedural schedule precludes Staff from requesting the Commission to decide which variances are required for GMO's proposed demand-side programs and proposed DSIM, and whether to grant them, as a preliminary matter now, before the Commission addresses the merits of GMO's

[6] § 393.1075.10, RSMo Supp. 2011, provides, "Customers electing not to participate in an electric corporation's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation."
[7] *Order Setting Procedural Schedule*, issued January 31, 2012, effective February 7, 2012.

demand-side programs and proposed DSIM. In the joint pleading proposing the procedural schedule Staff and other parties indicated this concern to the Commission in the following sentences found in paragraph seven (7):

> Additionally, certain parties allege that the Company's Application requires more analysis due to the number of variances requested. The additional time to analyze the Application would serve a remedial purpose and allow the Parties to complete a thorough review and submit recommendations to the Commission.

The procedural schedule does not preclude any party from requesting more time from the Commission, if needed. In its January 31, 2012, *Order* where it adopted the procedural schedule for this case the Commission states, "Further, the Commission finds good cause to waive the 120-day requirement of [Rule 4 CSR 240-20.094(3)]." It is Staff's position that this variance from the 120-day requirement does not mean that the 120-day time frame has started. Staff takes this position because GMO's *Application* does not comply with the Commission's MEEIA rules and the Commission has not granted GMO any relief from complying with those rules. Alternatively, if the Commission determines that requests for variances from the MEEIA rules that a utility makes when it files its application for Commission approval of its proposed demand-side programs and proposed DSIM under MEEIA are sufficient to trigger the 120-day decision time frame, it is Staff's position GMO's application and variance requests do not do so because GMO's variance requests are deficient, both for not requesting all the variances the Commission must grant to approve its proposed demand-side programs and proposed DSIM and for not quantitatively showing the variances it does request are necessary to avoid a manifest injustice. Staff has always viewed, and informed others, that the 120-day timeframe is for processing MEEIA filings that comply with the MEEIA rules, and that it is impracticable for a request for a variance from any portion of those rules to be considered during that 120-day time frame.

Staff requests the Commission to expeditiously decide, before it addresses the merits of GMO's proposed demand-side programs and proposed DSIM, which, if any, variances to grant for GMO's proposed demand-side programs and proposed DSIM. Specifically, Staff requests the Commission at this time (1) determine which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant GMO before the Commission can approve GMO's proposed demand-side programs and proposed DSIM; (2) determine whether GMO has shown good cause for the Commission to make decisions on each of those variances; (3) find the 120-day decision time frame of Rule 4 CSR 240-20.094(3)[8] does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to grant the variances; (4) for each required variance for which GMO has not shown good cause, (i) order GMO to do so expeditiously, (ii) order Staff to file a recommendation on GMO's good cause showings within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance. Again, Staff is not suggesting in this motion that the Commission grant GMO any of these variances or that the Commission should approve GMO's proposed demand-side programs or proposed DSIM. While GMO thus far has not presented sufficient good cause to support these variances, requested and unrequested, GMO may be able to present additional information to justify the variances not expressly prohibited by MEEIA. Staff would present its position on the propriety of each variance in its recommendations on GMO's good cause showings.

GMO's MEEIA Rulemaking Position

In reviewing the variances GMO requests, it is important to review the various filings GMO made in the Commission's MEEIA rulemaking. Essentially, GMO is seeking through

[8] Rule 4 CSR 240-20.094(3) provides, in part, "The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one hundred twenty (120) days of the filing of an application …."

variances to rewrite the rules to conform to the versions of the proposed rules it supported in the rulemaking, but that the Commission rejected by the rules it adopted. What GMO seeks here is analogous to the Commission having issued a rule requiring the game to be Bridge and GMO proposing variances to make the game Pinochle instead, after the Commission had considered Pinochle in the rulemaking and rejected it in favor of Bridge. As explained below, GMO is requesting a shared benefit incentive component as part of its DSIM. Its shared benefit incentive component is not based on actual annual energy and demand savings levels as measured and verified through evaluation, measurement and verification (EM&V) of MEEIA programs. Instead, GMO is asking to collect an incentive on the ***expected*** results of its MEEIA programs as soon as the programs start, *i.e.*, based on the annual energy and demand savings levels measured and verified from ***past*** performance.

Similar to the approach it takes here, GMO argued, unsuccessfully, in the rulemaking that semi-annual adjustments should apply to all components of a DSIM.

> GMO argued in the rulemaking that the provisions of Rule 4 CSR 240-20.093(4)
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> > are unlawful, unjust, unreasonable, arbitrary and capricious, and contrary to the spirit and letter of the enabling legislation. This language, which sets forth the requirements for semi-annual adjustments of DSIM, should have been modified to apply not only to the cost recovery component of DSIM, but to all components of DSIM: cost recovery, lost margins or lost revenues, and incentive. In order to comply with the intent of the MEEIA … adjustments of DSIM rates between general rate proceedings should apply to all components of the DSIM. These three cost components must be addressed in concert to provide a sustainable business model for utilities to pursue DSM programs and both benefit customers and satisfy shareholders.[9]

Staff provides this example to illustrate that the relief GMO seeks in its variances here is the same type of relief that GMO, and other stakeholders, promoted, and the Commission considered and rejected, during the Commission's MEEIA rulemaking. GMO argues in this case that the

[9] File No. EX-2010-0368, *Application For Rehearing And Request For Stay*, p. 6 ¶ 7.

Commission should allow it to collect upfront shared benefits from its demand-side programs. Because Rule 4 CSR 240-20.093 contemplates utility incentives be collected on a retrospective basis only, there is no consideration in the MEEIA rules for the prospective recovery of a utility performance incentive as part of its DSIM through a rider (tariffed rates), tracker or any other means.

Variances GMO Requests

In its *Application* GMO requests variances from Rules 4 CSR 240-20.093(4)(A), 4 CSR 240-20.093(2)(H)3 and 4 CSR 240-20.094(6)(J).

Rule 4 CSR 240-20.093(4)(A)

GMO requests a variance from Rule 4 CSR 240-20.093(4)(A), which provides, "An electric utility with a DSIM shall file to adjust its DSIM rates once every six (6) months." GMO's proposal would recalculate DSIM rates annually, but includes the option to make a semi-annual filing to adjust the cost recovery revenue requirement, lost revenue requirement and utility incentive revenue requirement.[10] While GMO provides a qualitative assumption that a mandatory six-month DSIM adjustment will be counterproductive until it has more experience with the MEEIA rules,[11] GMO has not provided good cause—quantification of a comparison of its proposal with an appropriate rule compliant proposal—for why the Commission should grant this variance. Additionally, Rule 4 CSR 240-20.093(4) allows adjustments of DSIM rates between rates cases, but only for the cost recovery revenue requirement. This is a variance the Commission must grant before it can approve GMO's DSIM and is discussed further below.

[10] *Direct Testimony of Tim M. Rush*, p.23.
[11] *Direct Testimony of Tim M. Rush*, p.23.

Rule 4 CSR 240-20.093(2)(H)3[12]

Through Tim Rush's prefiled direct testimony GMO states that it is requesting a variance from 4 CSR 240-20.093(H). That rule "requires that any utility incentive component of a DSIM shall be implemented on a ***retrospective*** basis and all energy and demand savings used to determine a DSIM utility incentive revenue requirement must be measured and verified through ***EM&V***."[13] (Emphasis added). As part of its *Application*, GMO asks for an incentive in two parts: a "shared benefit"[14] component and a "performance incentive" component.

GMO's incentive proposal does not comply with Rule 4 CSR 240-20.093, the MEEIA DSIM rule, in several respects. First, GMO proposes recovery of its shared benefit component on a ***prospective*** basis. GMO bases recovery of the shared benefit component on a "percent[age] of the overall energy and capacity benefits from the programs that are ***planned*** to be implemented based on the first three years in the initial filing and covering the savings to customers over a fifteen-year period."[15] (Emphasis added). The proposed computation is twelve percent (12%) of the net present value of the anticipated energy and capacity benefits, if imputed to the level GMO plans. GMO's proposal includes that the energy and capacity benefits be discounted at a rate to represent the net present value of the benefits over a 15-year period.

Second, because GMO proposes to collect the shared benefit component on a ***prospective*** basis, it also proposes a corresponding DSIM Rider (separate rate) which it describes as follows: "The DSIM Rider will initially include these costs based on the filed plan, but will be trued-up to account for the actual experienced changes reflective of actual participants/measures achieved in

[12] GMO cites Rule 4 CSR 240-20.093(H) within the *Direct Testimony of Tim M. Rush*, p.26. However, Staff believes the variance is from Rule 4 CSR 240-20.093(2)(H)3.
[13] *Direct Testimony of Tim M. Rush*, p.23.
[14] The Staff will discuss the difference between "shared benefit" and "net-shared benefit" in the section concerning additional applicable variances.
[15] *Direct Testimony of Tim M. Rush*, pp. 16-17

the programs."[16] GMO does not propose to true-up the shared benefits based on actual energy and demand savings that are measured and verified through EM&V, as required by the rule. Instead, it requests the true-up be based on the benefits it now estimates. EM&V after the fact balances the risk of GMO's demand-side programs on both GMO and its customers. Basing the shared benefits of a program on EM&V, as set out in the rule, ensures that GMO is not just going through the motions of particular demand-side programs, but ensures that both GMO and its customers benefit from them.

During the MEEIA rulemakings, Staff consistently advocated that retrospective recovery is appropriate because the MEEIA states that investments in demand-side resources should be valued on an equivalent basis as investments in supply-side resources. A utility's recovery of its investment in a supply-side resource does not begin, *i.e*., it lags, until after that resource is "fully operational and used for service."[17] In addition, the MEEIA directs that "the Commission shall . . . [p]rovide timely earnings opportunities associated with cost-effective measureable and verifiable efficiency savings." Savings are measured and verified through the EM&V process.

Rule 4 CSR 240-20.094(6)(J)[18]

Rule 4 CSR 240-20.094(6)(J) mirrors almost word-for-word that part of the MEEIA codified at § 393.1075.10, RSMo Supp. 2011. That statute provides, "A customer electing not to participate in an electric utility's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric utility." In its *Application* GMO states that "should the Commission determine that this rule permits participation in the curtailment or interruptible programs in GMO's DSM portfolio

[16] *Direct Testimony of Tim M. Rush*, p. 17.
[17] §393.135, RSMo 2000.
[18]GMO cites 4 CSR 240-20.094(J) within the *Direct Testimony of Tim M. Rush*, p.27. However, Staff believes the variance it is requesting is from 4 CSR 240-20.094(6)(J).

[(demand-side programs)], GMO requests a variance pursuant to 4 CSR 240-20.094(9). Good cause exists for such a variance since GMO's proposal ensures that those customers that are paying for the DSM programs get to participate in the programs."[19] However, granting the variance would be ineffectual because of the MEEIA requirement codified at § 393.1075.10, RSMo Supp. 2011, would still apply. GMO is seeking by this variance request to prevent customers who have opted out of GMO's MEEIA demand-side programs from participating in its MPower Program, which is a demand response program with interruptible or curtailable rates.

Section 393.1075.10, RSMo Supp. 2011, provides, "Customers electing not to participate in an electric corporation's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation." Another part of the MEEIA, codified as § 393.1075.2(5), RSMo Supp. 2011, defines "interruptible or curtailable rate" as "a rate under which a customer receives a reduced charge in exchange for agreeing to allow the utility to withdraw the supply of electricity under certain specified conditions." The MPower program has an "interruptible or curtailable rate," because customers receive a credit on their bill for reducing usage during certain periods of time, which in turn reduces their overall charges for electricity. The Commission has no authority to permit GMO to ignore a requirement of MEEIA.

Variances GMO is Not Requesting

Based on Staff's limited review, GMO requires five variances for its proposed demand-side programs and proposed DSIM that GMO is not requesting in its *Application* - variances it should have requested, and received, prior to filing its *Application*. GMO should have requested a variance from Rule 4 CSR 240-20.093(4), two (2) variances from Rule 4 CSR 240-3.164(2)(A) and two (2) variances from Rule 4 CSR 240-20.093(2)(H). Staff

[19] *Direct Testimony of Tim M. Rush*, p.27.

cannot state its position on whether the Commission should grant these variances until after GMO provides what GMO considers to be the good cause required for the Commission to grant them.

Rule 4 CSR 240-20.093(4)

Rule 4 CSR 240-20.093(4) provides, "Semi-annual adjustments to DSIM rates between general rate proceedings shall only include adjustments to the DSIM cost recovery revenue requirement and ***shall not include*** any adjustments to the ***DSIM utility lost revenue requirement*** or the ***DSIM utility incentive revenue requirement***." (Emphasis added).

As discussed above, GMO requests a variance from the mandatory six-month DSIM adjustment required by Rule 4 CSR 240-20.093(4)(A).[20] In its proposed DSIM GMO proposes that the "DSIM rates are recalculated annually, with the option for a semi-annual filing, to reflect changes in DSIM cost recovery revenue requirement, lost revenue requirement and utility incentive revenue requirement."[21] However, GMO does not discuss in its request the need for a variance from the Rule 4 CSR 240-20.093(4) requirement that the DSIM semi-annual adjustments ***shall not*** include ***the lost revenue requirement*** or ***utility revenue requirement***. Proposing that semi-annual adjustments should apply to all components of the DSIM is the same proposal GMO argued for in the MEEIA rulemakings discussed above. The Commission rejected this proposal by not including it in the final MEEIA rules, and until and unless GMO provides good cause for this variance, neither the Staff nor the Commission can consider it.

Rule 4 CSR 240-3.164(2)(A)

Rule 4 CSR 240-3.164(2)(A) requires GMO to file a current market potential study, as follows:

[20] *Direct Testimony of Tim M. Rush*, p.23.
[21] *Direct Testimony of Tim M. Rush*, p.23.

(2)(A)…The current market potential study shall use primary data and analysis for the utility's service territory…. To the extent that primary data for each utility service territory is unavailable or insufficient, the market potential study may also rely on or be supplemented by data from secondary sources and relevant data from other geographic regions."

It also requires the study include:

1. Complete documentation of all assumptions, definitions, methodologies, sampling techniques, and other aspects of the current market potential study;
2. Clear description of the process used to identify the broadest possible list of measures and groups of measures for consideration;
3. Clear description of the process used to determine technical potential, economic potential, maximum achievable potential, and realistic achievable potential for a twenty (20)-year planning horizon for major end-use groups (e.g., lighting, space heating, space cooling, refrigeration, motor drives, etc.) for each customer class; and
4. Identification and discussion of the twenty (20)-year baseline energy and demand forecasts. If the baseline energy and demand forecasts in the current market potential study differ from the baseline forecasts in the utility's most recent 4 CSR 240-22 triennial compliance filing, the current market potential study shall provide a comparison of the two (2) sets of forecasts and a discussion of the reasons for any differences between the two (2) sets of forecasts. The twenty (20)-year baseline energy and demand forecasts shall account for the following:
    A. Discussion of the treatment of all of the utility's customers who have opted out;
    B. Changes in building codes and/or appliance efficiency standards;
    C. Changes in customer combined heat and power applications; and
    D. Third party and other naturally occurring demand-side savings.

With its *Application* GMO supplied potential studies for a number of specified programs or market segments using primary data from both GMO's and Kansas City Power & Light Company's ("KCPL") service territories in Kansas and Missouri, and specified programs or market segments using secondary data. While not preferred, this is contemplated by the

Commission's MEEIA rules. Through various discussions with GMO and KCPL personnel prior to GMO filing its *Application*, Staff understands GMO and KCPL are currently conducting their own market potential studies, but that these studies will not be complete for another year. To prevent delay of a MEEIA filing until primary data is available, Staff is not adverse to GMO using secondary studies, so long as GMO provides an analysis that shows why the secondary studies are comparable to the required current market potential study and are appropriate to use in the circumstances.

Regardless, GMO's *Application* does not comply with the rule because it fails to show for its service territory energy and demand savings potentials, including technical, economic, realistic achievable and maximum achievable potentials for energy savings and for demand savings, or baseline forecasts for energy and demand. Without showing realistic achievable annual energy and annual demand saving potentials, neither Staff nor the Commission can even begin to review whether GMO's proposed demand-side programs can be expected to make reasonable progress towards MEEIA's goal of "…achieving all cost-effective demand-side savings."

This same rationale is why an evaluation of a baseline energy forecast and a baseline demand forecast is needed. A baseline energy forecast and a baseline demand forecast are needed to compare the energy and demand savings of a "business as usual approach"—as if GMO implemented no new programs—and the technical, economic, realistic achievable and maximum achievable potentials for energy and demand savings within GMO's service territory. For these two non-compliance issues, Staff requests the Commission to order that GMO requires these variances and order GMO to show good cause for why the Commission should grant them.

Rule 4 CSR 240-20.093(2)(H)

Rule 4 CSR 240-20.093(2)(H) requires the incentive component of GMO's DSIM to define a methodology for determining GMO's portion of "annual net shared benefits." The rule requires, in part:

> (H) Any utility incentive component of a DSIM shall be based on the performance of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and shall include a methodology for determining the utility's portion of *annual net shared benefits* achieved and documented through EM&V reports for approved demand-side programs. Each utility incentive component of a DSIM shall define the relationship between the utility's portion of *annual net shared benefits* achieved and documented through EM&V reports, annual energy savings achieved and documented through EM&V reports *as a percentage* of annual energy savings targets, and annual demand savings achieved and documented through EM&V reports *as a percentage* of annual demand savings targets. . . . .

(Emphasis added).

First, Rule 4 CSR 240-20.093(1)(C) defines "annual net shared benefits" to be "the utility's avoided costs measured and documented through evaluation, measurement, and verification (EM&V) reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies, and technical resource manual on an annual basis." GMO's *Application* and testimony supporting it use the terms "annual shared benefits" and "shared benefits" when describing and discussing GMO's proposed shared benefit incentive component. The Commission's Rule 4 CSR 240-20.093(2)(H) requires GMO to include in its filing a methodology for determining the "annual ***net*** shared benefits" (Emphasis added.) of demand-side programs.

GMO requests a variance from Rule 4 CSR 240-20.093(2)(H) for other matters, but not from the required use of "annual ***net*** shared benefits." (Emphasis added.) Staff believes there

are differences in the calculation of "net" values and "non-netted" values, and requests the Commission to order GMO to show good cause for the Commission to grant a variance to allow the use of "annual shared benefits" and "shared benefits" rather than the required "annual ***net*** shared benefits."

Second, in its *Application* and supporting testimony GMO uses four tiers of fixed incentive amounts, not a portion of "annual net shared benefits," when describing and discussing GMO's performance incentive.[22] Rule 4 CSR 240-20.093(2)(H) provides that a utility is to express "a portion of annual net shared benefits" as a percentage amount. Staff believes there is a difference between recovery of the four tiers of fixed dollar incentive amounts and "a portion of annual net shared benefits" expressed as a percentage. Staff requests the Commission order GMO to provide good cause for why the Commission should grant GMO a variance to use recovery of the four tiers of fixed dollar incentive amounts rather than the rule required "portion of annual net shared benefits" expressed as a percentage.

Good Cause

Although the term "good cause" is frequently used in the law,[23] Rules 4 CSR 240-3.163 (11), 4 CSR 240-3.164(6), 4 CSR 240-20.093(13) and 4 CSR 240-20.094(9) do not define it. The rules simply state, "Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule." Therefore, it is appropriate to resort to the dictionary to determine the term's ordinary meaning.[24] "Good cause" "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by

[22] *Direct testimony of Tim M. Rush*, p. 20.
[23] *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).
[24] *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.

law."[25] 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."[26] Similarly, it can refer "to a remedial purpose and is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one."[27]

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…."[28] Moreover, some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[29]

Neither in its *Application*, nor in its testimony, has GMO provided "good cause" for the Commission to consider when deliberating whether to grant it variances from the Commission's MEEIA rules. In its *Application* at paragraph 23 GMO states, "Pursuant to 4 CSR 240-20.093 (13) and 4 CSR 240-20.094 (9), GMO requests that the Commission grant a variance from certain provisions of the MEEIA rules." In one sentence of his prefiled direct testimony Tim Rush states that "good cause" for a variance exists, but that one sentence relates only to a variance for MPower, which as previously noted, would be ineffectual since that rule simply tracks a MEEIA requirement.[30]

GMO was aware Staff expected GMO to support its variance requests. In discussions and correspondence between Staff and GMO on August 19, 2011, September 27, 2011,

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[25] *Black's Law Dictionary*, p. 692 (6th ed. 1990).
[26] *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See Central. 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.")
[27] *Bennett v. Bennett*, 938 S.W.2d 952 (Mo. App. S.D. 1997).
[28] *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.).
[29] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975).
[30] *Direct Testimony of Tim M. Rush*, p. 24.

October 19, 2011, December 8, 2011, and December 14, 2011, Staff strongly encouraged GMO to request variances from the Commission's MEEIA rules before submitting an application seeking approval of its proposed demand-side programs and proposed DSIM, and to provide quantitative analysis supporting the need for the variance(s) at that time. It is Staff's position that GMO has not provided the Commission good cause to grant any variance; therefore, Staff moves the Commission to (1) order GMO to expeditiously to provide good cause to support each of the variances the Commission finds are required for GMO's proposed demand-side programs and proposed DSIM, requested or not, (2) order Staff to file its recommendation on those variances within five business days after GMO makes its "good cause" filing and, thereafter, (3) expeditiously rule on the variances. Part of GMO's showing of "good cause" should include providing a baseline DSIM model that complies with the rules and an explanation of why an alternative DSIM model is necessary to avoid a manifest injustice.

Good Cause for Expedited Treatment

Rule 4 CSR 240-2.080(14) provides:

> (14) Any request for expedited treatment shall include the words "Motion for Expedited Treatment" in the title of the pleading. The pleading shall also set out with particularity the following:
> (A) The date by which the party desires the commission to act;
> (B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party's customers or the general public, if the commission acts by the date desired by the party; and
> (C) That the pleading was filed as soon as it could have been or an explanation why it was not.

Staff is filing its *Motion for Commission Determinations on Variances* as soon as it could. The *Application* in this case is voluminous, as is the supporting information GMO provided to Staff. It has taken Staff time to sufficiently review both and to file this pleading. Staff requests the Commission act as expeditiously on this pleading as possible, because the scope of Staff's

analysis and response to GMO's *Application* will be determined by how the Commission rules. Staff requests the Commission shorten response times to Staff's *Motion for Commission Determinations on Variances* and, ideally, rule on it by February 17, 2012. This is because how the Commission rules will affect the time Staff will have to process this case and, therefore, the scope and quality of Staff's analysis and response to GMO's *Application*; to the extent the Commission may rely on Staff's response in ruling on GMO's Application, delay in ruling on Staff's *Motion for Commission Determinations on Variances* may adversely affect GMO's customers and the general public. If the Commission does not act expeditiously Staff will undertake the broadest scope in responding to GMO's *Application*. The procedural schedule the Commission has ordered for this case requires Staff, and other parties, to file rebuttal testimony by March 13, 2012.

Relief Staff Requests

Rule 4 CSR 240-20.094(3) provides, "The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one-hundred twenty (120) days of the filing of an application under this section only after providing an opportunity for a hearing." Staff is concerned with the abilities of the Commission and Staff to conduct a meaningful review of GMO's *Application* and associated required variances, and that the Commission will not have an adequate time to determine whether to grant the necessary variances, evaluate the proposed demand-side programs and proposed DSIM in light of its determination on those variances, and then approve, modify or reject the proposed demand-side programs and DSIM, even within the 180 days certain parties, including Staff and GMO, jointly proposed and the Commission adopted in the procedural schedule for this case.

It would be impracticable to interpret the 120-day decision time frame stated in 4 CSR 240-20.094(3) as contemplating the Commission is to consider and rule on the variance requests within that time frame. Certainly, the time frame does not include the requirement of Staff to identify variances from the rule that GMO did not request, and then wait for GMO to supplement its *Application*. Staff cannot efficiently and effectively review and evaluate GMO's *Application* until the Commission decides the scope of the allowed variances. The multitude of permutations Staff would have to consider if some, all, or none of the variances were granted would result in an insurmountable barrier to a thorough review, evaluation and a comprehensive report concerning the *Application*. To review and evaluate the case without the variances decided upfront essentially results in GMO putting the case before the Commission as an "all or nothing" request. The Commission should not, nor did the rule intend to, box the Commission into such a corner. The rule allows the Commission to approve modifications.

As GMO has not provided good cause to support the variances it is requesting and has not requested all the variances its proposed demand-side programs and proposed DSIM would require for the Commission to approve them, the Commission should find that GMO's filing is deficient and that the 120-day time frame for decision has not yet begun. Alternatively, Staff believes the 120-day decision time frame was established with the expectation that a utility's MEEIA filing would comply with the Commission's MEEIA rules, and that any variances from those rules would necessarily need to be obtained prior to the utility making its MEEIA filing. Should the Commission find it must decide which MEEIA variances to grant GMO, requested and not, prior to proceeding with this case, such a finding is good cause to further extend the 120-day decision time frame, if the Commission determines the 120 days has started.

WHEREFORE, Staff moves the Commission to determine as expeditiously as possible, ideally by February 17, 2012, (1) which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant GMO before the Commission can approve GMO's proposed demand-side programs and proposed DSIM; (2) whether GMO has shown good cause for the Commission to make decisions on each of those variances; (3) the 120-day decision time frame of Rule 4 CSR 240-20.094(3) does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to grant the variances; (4) and for each required variance for which GMO has not shown good cause, (i) order GMO to do so expeditiously, (ii) order Staff to file its recommendation on GMO's good cause showing within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance. As stated above, Staff is not suggesting in this motion that the Commission grant GMO any of these variances or that the Commission should approve GMO's proposed demand-side programs or proposed DSIM. While GMO thus far has not presented sufficient good cause to support these variances, requested and unrequested, GMO may be able to present additional information to justify the variances not expressly prohibited by MEEIA. Staff would present its position on the propriety of each variance in its recommendations on GMO's good cause showings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 10th day of February, 2012.

/s/ Nathan Williams