

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

In the Matter of the Application of KCP&L )  
Greater Missouri Operations Company for )  
Approval of a Special Incremental Load )  
Rate for a Steel Production Facility )  
In Sedalia Missouri. )

**Case No. EO-2019-0244**

**STAFF'S RESPONSE TO MCEG'S MOTION TO QUASH DEPOSITION**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response to MCEG's Motion to Quash Deposition*, states herein as follows:

***Statement of the Case***

1. This matter arose on July 12, 2019, when KCP&L Greater Missouri Operations Company filed its *Application* for authority to serve Nucor, a steel producer, pursuant to a special incremental load rate under its proposed SIL Tariff.

2. On the same day, the Commission issued its *Order Directing Notice, Establishing Time to Intervene, and Scheduling a Procedural Conference*.

3. On July 22, 2019, MCEG filed its *Application to Intervene*, stating that it "is an incorporated association representing the interests of large commercial and industrial users of electricity" and "[a]s a group of large commercial and industrial customers of KCPL-GMO, MCEG's interest in this case is different than that of the general public."

4. By seeking intervention, MCEG accepted the duties, obligations and responsibilities of a party to this action.

5. On September 19, 2019, GMO, Nucor, and the Commission Staff entered into a *Non-Unanimous Stipulation and Agreement* resolving this matter.

6. On September 24, 2019, Intervenor Midwest Energy Consumers Group

(“MECG”), pursuant to Commission Rule 20 CSR 4240-2.115(2)(D), filed its *Objection to Non-Unanimous Stipulation and Agreement*.

7. On the same day, Staff filed its *Motion to Quash Purported Objection* and its *Motion to Dismiss Purported Party*.

8. On September 25, 2019, Staff filed its *Notice of Deposition*, requiring MECG to designate a corporate representative “prepared to testify on behalf of MECG concerning the identity of the large commercial and industrial electricity users whose interests MECG claims it is representing,” to be deposed on oral examination on October 2, 2019, at 200 Madison Street, Room 810, Jefferson City, Missouri, 65101, commencing at 9:00 A.M.

#### ***MECG’s Motion to Quash Deposition***

9. On September 30, 2019, MECG filed its *Motion to Quash Deposition*, asserting that it is a “nonprofit corporation in good standing,” created for the purpose of “representing commercial and industrial customers regarding energy matters.” MECG actually claims, that by virtue of its corporate charter, it “is statutorily authorized to represent the interests of all commercial and industrial customers and not the interest of any specific GMO customer.” MECG’s novel theory is that “the state-approved purpose in its Articles of Incorporation provides the basis for it to participate in Missouri utility cases.” MECG goes on to assert that it is similar to other special-interest corporations regularly permitted to intervene in Commission proceedings, such as Sierra Club, Renew Missouri, Consumers Council of Missouri, who “do not represent specific utility customers,

but are allowed to intervene in utility dockets based upon the purposes contained in their corporate charters.”<sup>1</sup>

10. MEGC urges the Commission to quash the *Notice of Deposition* served upon it by Staff because, MEGC claims, “[t]he Staff subpoena to depose an MEGC witness is designed simply to harass MEGC for daring to object to the latest settlement between Staff and KCPL / GMO.” MEGC goes further and alleges that “Staff’s subpoena was submitted in bad faith and fails to recognize the basic legal concept that a corporation is a lawful entity and is permitted to intervene as a separate entity under Commission rule[.]”

***Staff’s Response to MEGC’s Accusation of Bad Faith***

11. Staff categorically denies MEGC’s assertion that it noticed the subject deposition in bad faith or for purposes of harassing or punishing an opponent.<sup>2</sup> Staff seeks discovery from MEGC because, based on statements made by Mr. Woodsmall in settlement conferences, which Staff shall not further reveal here, Staff strongly doubts that MEGC is indeed representing the interests of any large commercial or industrial customers of GMO.

12. Staff expects the deposition to be extremely short. As stated in the *Notice of Deposition*, Staff intends to inquire as to the identities of the specific large commercial and/or industrial customers of GMO whose interests MEGC is representing in this matter and, once those identities are disclosed, Staff intends to pursue discovery from those

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<sup>1</sup> As is characteristic of Mr. Woodsmall’s drafting style, the *Motion to Quash* also contains objectionable sniping, insinuations, and *ad hominem* attacks. Staff suggests that it should be clear to the Commission who is actually acting in bad faith in this proceeding.

<sup>2</sup> Mr. Woodsmall’s repeated use of the word “subpoena” is a puzzler. Staff served a *Notice of Deposition* upon MEGC, not a subpoena. A subpoena is not necessary to compel the attendance of a party opponent at a deposition.

entities in order to ascertain their interests and positions in this matter. Staff also intends to inquire of MEEG as to its business locations; whether or not it is a large commercial or industrial user of electricity; and whether or not it is a customer of GMO.

13. MEEG has asserted inconsistent positions herein. In its *Application to Intervene*, MEEG characterized the entities whose interests it purports to represent as “a group of large commercial and industrial customers of KCPL-GMO . . . ,” plainly indicating that it is representing specific GMO customers. In its *Motion to Quash Deposition*, however, MEEG claims it is “statutorily authorized to represent the interests of all commercial and industrial customers and not the interest of any specific GMO customer,” indicating equally plainly that it is not representing specific GMO customers. Consequently, it appears that MEEG may have purposefully misled the Commission in its *Application to Intervene* in that it asserted that it represented the interests of specific GMO customers, when in fact it does not.

***MEEG Does Not Qualify for Intervention in PSC Proceedings***

14. Intervention in Commission proceedings is governed by Rule 20 CSR 4240-2.075, which provides in pertinent part:

(3) The commission may grant a motion to intervene or add new member(s) if—

(A) The proposed intervenor or new member(s) has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

15. The Commission’s rule makes clear that intervention may be granted on either of two bases: Either an interest different from that of the general public that may

be adversely affected by the outcome of the case, or because granting intervention would serve the public interest. Based upon what we now know, MCEG does not qualify under either prong of the rule.

16. As Mr. Woodsmall insists, MCEG is a non-profit corporation, a legal entity. According to the records of the Missouri Secretary of State, its registered office is located at 308 East High Street, Suite 204, Jefferson City, Missouri 65101. On information and belief, it is not itself a customer of GMO, nor is it a large commercial or industrial user of electricity. Indeed, its charter does not authorize it to engage in those activities.<sup>3</sup> According to its *Articles of Incorporation*, it has no members.<sup>4</sup> Its interest in this proceeding, therefore, is demonstrably less than that shared by GMO's several thousands of residential customers, in that MCEG has no monetary or service quality stake in this matter. If its *Articles of Incorporation* are taken as evidence of interest different from that of the general public, as Mr. Woodsmall insists, still those articles do not show that MCEG's interest is subject to any adverse impact. It is apparent that MCEG does not qualify for intervention under the first prong of the rule.

17. Nor does the public interest support MCEG's intervention. Unlike GMO's general residential ratepayers, its large commercial and industrial electricity customers are well-able to represent their own interests in Commission proceedings, and often do. Their participation is helpful to all parties and to the Commission, whatever their position may be on the pending matter. These intervenors will often sponsor expert witnesses, whose testimony assists the Commission and other parties by adding to the knowledge

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<sup>3</sup> Ex. B attached to the *Motion to Quash*, Question 8.

<sup>4</sup> Ex. B attached to the *Motion to Quash*, Question 6.

base upon which the decision will be founded. In this proceeding, in addition to having no identifiable clients or members that are actually customers of GMO and stakeholders in this matter and thus subject to some degree of possible economic or other harm, Mr. Woodsmall has – so far, at least – no witnesses. He has nothing of any value to add. The public interest does not favor the quixotic participation of an officious intermeddler, which is all that MEEG appears to be.

***MEEG is Not Entitled to Intervention Based on its Corporate Charter***

18. Mr. Woodsmall misunderstands the Commission’s intervention rule. MEEG may not intervene as a matter of right simply because it is a corporate entity interested in the energy affairs of large commercial and industrial customers.<sup>5</sup> The rule is intended to limit intervention to (A) stakeholders and (B) non-stakeholders that, nonetheless, bring something useful to the table. MEEG is not a stakeholder. In the language of the courts, MEEG lacks *standing*.<sup>6</sup> It is not a customer of GMO and it is not susceptible to an adverse economic impact by the Commission’s decision in this case. MEEG has no demonstrable economic interest in this matter. In fact, MEEG is exactly the entity whose participation the public interest disfavors. Because MEEG has no real stake in this matter, its participation can only disrupt the proceedings and skew them in a way that disfavors some or all of the actual stakeholders. Let MEEG participate as an *amicus* if it has something of value to say, but not as a party.

19. MEEG claims it is like other incorporated associations that often intervene

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<sup>5</sup> It should be apparent as a matter of common sense that MEEG cannot constitute itself as some sort of utility watchdog simply by paying \$100 to incorporate.

<sup>6</sup> “Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” ***Black’s Law Dictionary*** p. 1413 (7<sup>th</sup> ed., 1999).

in Commission cases. It is not. The Sierra Club, cited as an example by Mr. Woodsmall, represents environmental interests and is supported by thousands of subscribers, many of whom are GMO ratepayers. The Consumers Council represents the interests of residential ratepayers, many of whom are GMO customers. Both of these entities, and others, such as AARP and the School Boards Association, bring a useful and constructive point of view to the proceedings in which they participate. The public interest therefore favors their participation, because they articulate points of view that might otherwise not be considered. MCEG does not perform a similar function; to the extent that it actually represents the interests of any GMO large commercial or industrial customers, it merely echoes those companies' own efforts. If in fact MCEG does not represent any GMO customers, then it does not qualify as a party to this proceeding.

***MCEG Lacks Standing and Should Be Dismissed***

20. “Standing requires that a party have a personal stake arising from a threatened or actual injury.” ***Schweich v. Nixon***, 408 S.W.3d 769, 774 (Mo. banc 2013). “When considering standing, there is ‘no litmus test for determining whether a legally protectable interest exists.’ The issue is whether plaintiff has ‘a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief.’ A party establishes standing, therefore, by showing that it has ‘some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome.’” *Id.*, at 775.

21. When considering the standing of an incorporated association, the association’s standing is dependent on the standing of its members:

In order for appellants to have standing in a representative capacity, “(1) the members must have standing to bring suit in their own right; (2) the interests

the association seeks to protect must be germane to its purpose; and (3) neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit.”

**Querry v. State Highway & Transp. Comm'n**, 60 S.W.3d 630, 634 (Mo. App., W.D. 2001).

22. Likewise, standing to challenge an administrative agency action is dependent upon a demonstrable adverse impact:

For a party to have standing for review under § 536.150, the agency action must directly affect the private rights of the person seeking judicial review. **Mo. Nat. Educ. Ass'n v. Mo. State Bd. of Educ.**, 34 S.W.3d 266, 275 (Mo. App., W.D. 2000).

**Querry**, *supra*, 60 S.W.3d at 636.

23. MECG has no members, therefore, it cannot assert standing based on their standing to participate in this case.<sup>7</sup> It is not a customer of GMO and has no economic interest in this case. It has no legitimate interests that can be adversely affected by the outcome. Where intervention has been improvidently granted, the Commission should revoke it.

### **Conclusion**

24. MECG's *Motion to Quash Deposition* should be denied because the noticed deposition is a legitimate effort to discover relevant facts going to a significant issue, namely, whether or not MECG should be permitted to continue as an intervenor in this case. There is no improper purpose on Staff's part and, indeed, it is difficult to understand how a deposition can be construed as punishment. MECG should be permitted to continue as an intervenor in this case if it can show that it actually meets the requirements

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<sup>7</sup> Ex. B attached to the *Motion to Quash*, Question 6.



of the rule. Otherwise, the Commission should dismiss MEEG as a party and allow it to participate as an *amicus*.<sup>8</sup> The Commission would, in that case, continue to enjoy the benefits of MEEG's input.

**WHEREFORE**, Staff prays that the Commission will **DENY** MEEG's *Motion to Quash Deposition*; and grant such other and further relief as is just in the premises.

Respectfully submitted.

/s/ Kevin A. Thompson

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served electronically upon all parties of record or their representatives pursuant to the Service List maintained for this case by the Commission's Data Center **on this 1<sup>st</sup> day of October, 2019**.

/s/ Kevin A. Thompson

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<sup>8</sup> Participation as an *amicus* is allowed under Rule 20 CSR 4240-2.075(11).