BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Eighth Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of KCP&L Greater Missouri Operations Company	)	Case No. EO-2019-0067
In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Kansas City Power and Light Company	)	Case No. EO-2019-0068
In the Matter of the Application of KCP&L Greater Missouri Operations Company Containing Its Semi-Annual Fuel Adjustment Clause True-Up	)	Case No. ER-2019-0199

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Response to Arguments Concerning Issue 1

A. There is a "serious doubt as to the prudence" of KCPL's analysis and consideration of the REC sale issue

KCPL's initial brief begins the discussion of the first issue raised in this proceeding by claiming that neither Staff nor OPC have demonstrated serious doubt as to the prudence of KCPL's decision not to sell or even attempt to sell its RECs. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 3 – 4. This is wrong. There was a market for the sale of RECs during the pendency of this prudence review period. We know this for certain because Staff used data related to the sale of other RECs during the prudence review period to calculate how much KCPL could have made if the Company had sold its RECs. Tr. pg. 96 lns. 6 – 25. Yet, despite the existence of this market, KCPL never sold any RECs or even attempted to sell any RECs during this review period. *Boustead Rebuttal*, schedule KJB-r2 pg. 28; Tr. pg. 84 lns. 5 – 11; Tr. pg. 86 lns. 19 – 23. By failing to sell or even attempting to sell its RECs, KCPL passed up the opportunity to generate readily available revenue through the sale of unnecessary assets. This failure is intrinsically imprudent in that no prudent company would ever do such a thing. The only thing that any reasonable company would do if it possessed time-sensitive assets the company did not need would be to monetize those assets instead of allowing them to expire and thereby become worthless or nearly worthless.[1] The OPC and Staff have thus unquestionably raised

[1] As OPC witness Dr. Marke explained during the hearing, RECs – much like milk – will expire and thus become less valuable over time. Tr. pg. 100 ln. 17 – pg. 101 ln. 11.

"a serious doubt as to the prudence" of KCPL's decision not to sell or even attempt to sell its RECs.

B. The OPC's position does not create a requirement to always sell its excess RECs

The second argument that KCPL raises is a claim that the OPC's position would require that KCPL **always** sell its excess RECs. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 4 – 5. Again, this is not true. There are several instances where it would be prudent for KCPL to not sell its RECs; for example, when the costs inherent in selling the RECs would be greater than the value that could be obtained by the sale.[2] If it would cost more to sell the RECs than KCPL would gain by the sale, then the sale would be unprofitable and thus imprudent to perform. Consequently, the OPC's position does not require KCPL to always sell its RECs, it only requires KCPL to behave prudently.

C. KCPL can still advertise its commitment to renewable energy even if it sells its excess RECs

The third argument KCPL raises is a claim that, if it sold its RECs, it would be unable to make certain representations to its customers. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 5 – 6. This inaccurate claim is worth exploring; but first, the OPC will address KCPL's claim regarding the City of Kansas City, Missouri's declared emission reductions. KCPL's *Initial Brief* doubles down on the specious

[2] The OPC recognizes that there is a cost inherent in the sale of RECs and has already accounted for that cost in calculating the amount of its proposed disallowance. *Mantle Supplemental Rebuttal*, pg. 1.

claim made by its witness that KCPL not selling its RECs was directly responsible for a "substantial portion" of the City of Kansas City's recent announcement that it had cut greenhouse gasses by 40% below year 2000 levels. *Initial Post-Hearing Brief*, KCPL & GMO, pg. 5; *Martin Direct* pg. 6. However, as the OPC has already pointed out, KCPL's non-sale of historic RECs **is not cited** as one of the eleven tangible actions undertaken to reduce emissions levels by the City of Kansas City. *Initial Brief*, OPC, pg. 8; *Marke Rebuttal*, pg. 10. In fact, here are the eleven tangible actions that the City of Kansas City did cite:

1. In 2013, Mayor Sly James issued an Energy Challenge for building owners to voluntarily benchmark energy use by 2014. As a result, 175 building owners committed to benchmarking, representing 25-million square feet of floor space.

2. In 2014, the mayor issued an Energy Challenge for building owners to improve their ENERGY STAR scores. As a result, 38 buildings showed improved energy efficiency from 2014 to 2016 (including 25 school buildings), representing more than 5-million square feet of floor space.

3. In 2015, the city adopted an ordinance establishing the Energy Empowerment Program, which requires owners of private and public buildings to benchmark their energy use with the Environmental Protection Agency's (EPA) Portfolio Manager and report that energy use to the city annually.

4. Since 2013, the city has installed 1.5 megawatts (MW) of solar-energy generating capacity on the rooftops of 60 municipal buildings.

5. The city converted 380 streetlights to LEDs since 2013.

6. Beginning in 2016, Kansas City Power & Light Company (KCP&L) conducted a two-year Strategic Energy Management program to support energy-efficiency improvements by 20 of its largest commercial and industrial customers, including city facilities.

7. The city launched a new streetcar in the loop from the River Market area to Union Station in 2015.

8. Property Assessed Clean Energy (PACE) loans have been used to implement $15 million in energy-efficiency improvements to nine commercial buildings and $8.16 million in the residential sector to complete 847 energy-efficiency and solar projects since September 2016.

9. Kansas City was one of 10 cities nationwide selected to participate in the City Energy Project, a three-year initiative to promote energy efficiency in large commercial and institutional buildings from 2014 to 2016.

10. An Energy Data Accelerator was a two-year initiative partnership with KCP&L to help aggregate energy use data in multi-metered buildings to prepare for energy use benchmarking.

11. Bike KC is a plan to develop a transportation network, including 600 miles of on street bicycle facilities.

Martin Direct, Schedule JM-1 pgs. 2 – 3. As can plainly be seen, the non-sale of RECs is not listed among these eleven actions. It appears then that KCPL's claim that **it** was somehow "substantially responsible" for Kansas City's emission reductions is just an attempt by the Company to take credit for the hard work of others.

The problems with KCPL's claim about representations the Company has made or would like to make regarding emission reductions does not just end with the concerns regarding the City of Kansas City, Missouri. Simply put, the non-sale of RECs won't have the impact that KCPL claims regarding what it can tell its captive customers. As the OPC pointed out in its initial brief, the concept of RECs only limits who can claim the "renewable attributes" of the energy **as it is used**, and there is nothing about the RECs that limit KCPL's ability to advertise the amount of renewable energy that it **produces**. *Initial Brief*, OPC, pg. 11; *Marke Rebuttal*, pg. 3. KCPL could therefore sell all the excess RECs it has and still advertise to its

customers that it is committed to environmental energy by promoting the amount of "clean" energy **produced** by its generation fleet.

D. Selling excess RECs does not turn the Missouri RES into a cap on renewables

The last argument that KCPL makes is a claim that Staff and OPC's position would turn the Missouri Renewable Energy Standard ("RES") into a "cap" on the amount of environmental attributes that KCPL's customers could receive. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 6 -7. To start off with, it is important to note that the sale of a REC does not actually change who is receiving the renewable energy that is produced. *Marke Rebuttal*, pg. 3. Therefore, KCPL's customers will still receive renewable energy (and all the benefits that come from renewable energy) regardless of whether the company sells its excess RECs. Moreover, as the OPC has already pointed out, KCPL could still advertise the amount of renewable energy that it produces **regardless** of whether or not it sells its RECs. Finally, if KCPL really cares that much about being able to tell its customers that some of the energy they use had "environmental attributes," then KCPL could always just buy the RECs itself and pass the costs on to its shareholders. Thus, the idea that forcing the company to sell excess RECs would turn the RES into a "cap" on KCPL's ability to advertise its commitment to renewable energy sources is simply wrong.

E. The Commission should definitely order an imputation of revenues

In addition to trying to excuse its clearly imprudent decision, KCPL also argues that the Commission should not impute lost revenue to it as a result of that imprudence. *Initial Post-Hearing Brief*, KCPL & GMO, pg. 7. KCPL appears to take this position solely because "this is the first time [KCPL] has been confronted with this position by Staff or OPC," which the company somehow believes should give them a "free pass" to make whatever imprudent decision it chooses. *Id.* at 8. But that is not how utility regulation works. The testimony at the hearing made it clear that this was the first time that this issue had been **capable** of being raised:

> Q. Sure. Whether or not you agree that this is the first time that KCP&L has been confronted with the position, with staff's position, that it should sell all of the RECs that it holds in excess of Missouri's RES compliance?
> A. No. Well, it's the first time they've expired since it's gone through the FAC. It's the first time it had an opportunity to be presented.
> Q. Okay. So it is the first time?
> A. Yes.
> Q. By virtue of the reality of how the FAC functions?
> A. As far as the first time, yes, to mention it.

Tr. pg. 85 lns. 12 – 24. So if the Commission finds that KCPL was imprudent, then the company should not be permitted to escape the repercussions of that fact simply because it had not previously taken such actions. KCPL either knew or should have known that what it was doing was imprudent because no reasonable person would have been foolish enough to leave money on the table in the manner the company did. KCPL cannot elude castigation for this transgression just by feigning ignorance as to the nature of its mistake.

Response to Arguments Concerning Issue 2

A. The adoption of the seven allocation factors in prior rate cases has no impact on the allocation of the cost of fuel burned to produce auxiliary power for steam operations at the Lake Road facility because those seven allocation factors are concerned with allocating other costs

GMO spends a great deal of time in its brief discussing the adoption of the "seven allocation factors" in ER-2009-0090 and HR-2009-0092. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 8 – 11. The problem that GMO does not seem to grasp is that the seven allocation factors adopted in those cases do not allocate the cost of **fuel** consumed to produce auxiliary power. The OPC has already addressed this point in its initial brief, but will, nonetheless, take this opportunity to reiterate its previous arguments. *Initial Brief*, OPC, pgs. 28 – 29.

The seven allocation factors that GMO spends so much time discussing do not allocate the cost of fuel burned to produce auxiliary power at the Lake Road facility because auxiliary power costs were allocated using a different methodology during the same rate case where the seven allocation factors were developed. *Initial Brief*, OPC, pg. 28; Tr. pg. 205 lns. 19 – 22. Specifically, the auxiliary fuel used in the steam and electric operations was allocated through a modeling process performed by company witness Tim Nelson.[3] *Initial Brief*, OPC, pgs. 28 – 29; Tr. pg. 217 lns. 1 –

[3] They were allocated in a spreadsheet that existed outside of the model, but which was still part of the modeling process Tr. pg. 217 lns. 12 – 14.

16; pg. 205 lns. 19 – 22. The ability to allocate auxiliary fuel power between steam and electric operations was the direct result of the fact that a steam and electric rate case were brought **at the same time**. *Compare Order Approving Non-unanimous Stipulations and Agreements and Authorizing Tariff Filing,* ER-2009-0090, pg. 2, *and Order Approving Unanimous Stipulation and Agreement and Authorizing Tariff Filing,* HR-2009-0092, pg. 1. The allocation of steam auxiliary **fuel** costs via the modelling process dispensed with the need to develop a separate allocation factor to allocate auxiliary **fuel** costs, which is the whole reason for why auxiliary power **fuel** costs are not included in the seven allocation factors that were developed as part of those rate cases.

The whole problem with this case is that allocation of auxiliary power **fuel** costs can no longer be dealt with in the same manner as was used in ER-2009-0090 and HR-2009-0092 (that is, by modeling the steam and electric operations together) because GMO is no longer bringing steam and electric rate cases at the same time. Tr. pg. 211 ln. 23 – pg. 212 ln. 5. Instead, only the **electric** auxiliary power is estimated in the **electric** rate case, which is why no allocation for **steam** auxiliary power appears in the NBEC calculated during GMO's general **electric** rate cases. *Initial Brief*, OPC, pg. 29; *Mantle Rebuttal*, pg. 10. Further, the seven allocation factors do not help to address this issue as they are busy allocating **other costs** that are unrelated to auxiliary power fuel costs. GMO's heavy reliance on these seven allocation factors is thus simply misplaced.

B. The cost of fuel burned to produce auxiliary power was not "subsumed" into other operation and maintenance accounts because those are non-fuel accounts

GMO's brief refers to the idea that auxiliary power fuel costs have been "subsumed" into operation and maintenance accounts on at least two occasions. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 10, 12. This is plainly wrong. To see why, it is necessary to understand two simple points:

1. <u>The OPC's concern in this case is exclusively with the cost of *fuel* being burned to produce auxiliary power fuel for the Lake Road Facility</u>

GMO's argument is premised on its coy attempt to convince the Commission that auxiliary power costs are exclusively limited to some unidentified operation and maintenance costs. That is not the case. As already stated in the OPC's initial brief: "[a]uxiliary power is the electricity used by [a] generating facility in the process of generating electricity or, in the case of the Lake Road generating facility, the process of generating steam for its steam operations and electricity for its electric operations[.]" *Initial Brief*, OPC, pg. 14; *Mantle Rebuttal*, pg. 7. That electricity is either being produced at the Lake Road Facility or else it is being bought off the grid. Tr. pg. 193 lns. 11 – 22. When the Lake Road facility is generating its own auxiliary power, it must be doing so by burning fuel because all of the electric generation at the Lake Road facility require fuel to operate. Tr. pg. 169. lns. 1- 12; *Mantle Rebuttal*, pg. 5 – 6. It is the allocation of the cost of this auxiliary power <u>**fuel**</u> that the OPC is

concerned with, and nothing more. Further, this **fuel** cost is clearly not being "subsumed" into any operation and maintenance accounts for an exceedingly simple reason.

2. The "operation and maintenance accounts" to which the seven allocation factors are applied are non-fuel accounts and thus fuel costs would not be subsumed into them

GMO's own witness has already admitted that the seven allocation factor are being applied to **non-fuel** costs. *Nunn Surrebuttal* pg. 4. The OPC has also gone to very great lengths in its initial brief to show that none of the accounts that GMO was applying the relevant allocation factor to included fuel costs. *Initial Brief*, OPC, pgs. 16 – 28. There are, however, separate accounts that do deal specifically with fuel. The OPC addressed one such account (Account 501, which is titled simply "fuel") in its initial brief. *Initial Brief*, OPC, pg. 24. One of the specific cost items the USoA lists under "materials" in this account is literally the "[c]ost of fuel including freight, switching, demurrage and other transportation charges." 18 CFR Part 101 (1992). It is most likely in **this** account that the cost of fuel burned to produce auxiliary power at the Lake Road facility is going to be booked.[4] Thus when GMO's brief argues that there "is no separate line item or account for auxiliary power" it completely misses

[4] If not in Account 501, fuel costs would most likely be booked to account 547 (an Account that is also titled "fuel" but which refers to natural gas and oil as opposed to Account 501 which concerns only coal) and 555 (which refers to power purchased to meet demand that may have included the demand needed to provide auxiliary power to steam operations at the Lake Road facility). 18 CFR Part 101 (1992).

the point because there **is** a separate line item for **fuel**, and that is all the OPC is concerned with.[5] *Compare Initial Post-Hearing Brief*, KCPL & GMO, pg. 12, *and* account 501 & 547 of the USoA 18 CFR Part 101 (1992).

3. Conclusion

The cost of **fuel** burned to produce auxiliary power is not being "subsumed" into the operation and maintenance accounts that GMO's seven allocation factors are being applied to because those are **non-fuel** accounts. The simplicity of this point is so readily apparent, the OPC struggles to even understand why GMO has bothered to make this argument at all. Further, as the OPC laid out extensively in its initial brief, the cost of the **fuel** that was burned to produce auxiliary power was recorded along with all the other fuel consumed at the Lake Road facility and thus has been included in GMO's ANEC. *Initial Brief*, OPC, pgs. 27 – 28; *Mantle Rebuttal*, pg. 10. Therefore, "[i]f the cost to provide auxiliary power to the steam operations is not removed from the [ANEC] of the FAC, then the electric customers are paying all of the fuel costs for the auxiliary power and therefore subsidizing GMO's steam operations." *Initial Brief*, OPC, pg. 28; *Mantle Rebuttal*, pg. 8.

C. The OPC's allegation that GMO is not properly allocating the auxiliary power fuel costs incurred at the Lake Road Facility

[5] These separate line items are found in the USoA fuel accounts (501 and 547) previously discussed, which also happen to be the same accounts that are used to calculate GMO's FAC. Mo. PSC Tariff 1, 14th revised sheet No. 127.2. This connection between the fuel accounts and the FAC is the very reason that the OPC has raised this issue in an FAC case. The un-allocated fuel costs that the OPC is concerned with are found in the same accounts that are currently being used to set GMO's FAC which is the whole root of the problem.

is a direct claim of imprudence because it asserts that GMO is in violation of its tariff and this issue therefore needs to be addressed in this FAC prudence review case.

The second argument GMO makes with regard to this second issue is a claim that this is not a prudence issue and thus not fit for evaluation in a FAC prudence case. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 14 – 16. On this point, GMO is clearly mistaken. The Commission has previously found that the purposeful violation of its FAC tariff by a utility is imprudent. *In the Matter of Ameren Missouri's First FAC Prudence Review*, EO-2010-0255, *Report & Order*, pg. 2 ("Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenue when calculating the rates charged under its fuel adjustment clause"). This decision was appealed to, and ultimately upheld by, the Missouri Western District Court of Appeals, who held as follows:

> Ameren's point relied on only addresses the PSC's finding that Ameren acted prudently in entering into the AEP and Wabash contracts. Ameren's point relied on ignores that the PSC based the decision to order refunds on its finding that Ameren imprudently characterized the contracts as "long-term full and partial requirements sales." Clearly, the PSC had the statutory authority to make such a determination. As we have held supra, the AEP and Wabash contracts were off-system sales that should have been included in the actual net fuel costs calculation. **Accordingly, the PSC reasonably concluded that Ameren was imprudent when it violated the terms of its tariff.** The PSC was thus **required** to order a "refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rate." Section 386.266.4(4). **Obviously, if an electric utility fails to properly account for revenue in a fuel adjustment clause, then it will have skewed the calculation of incurred costs passed through to ratepayers by the fuel adjustment.** Ameren does not argue to the contrary.

State ex rel. Union Elec. Co. v. PSC, 399 S.W.3d 467, 491 (Mo. App. WD 2013) (emphasis added). In this case, GMO's failure to properly allocate the cost of fuel used to produce auxiliary power at the Lake Road facility violates the FAC rider in GMO's tariff. Specifically, GMO's FAC rider only permits recovery of fuel costs incurred to support electric sales. Mo. PSC Tariff 1, 14th revised sheet No. 127.2. By including the cost of fuel burned to maintain steam operations (*i.e.* steam auxiliary power fuel) alongside the cost of fuel used to support electric sales, GMO has recovered more costs than is permitted under the FAC rider in its tariff and, therefore, has violated its tariff. By violating its tariff, GMO has acted imprudently. *State ex rel. Union Elec. Co.*, 399 S.W.3d at 491.

D. The Commission should both order an adjustment for this prudence case as well as order GMO to change the method by which it allocates auxiliary power fuel costs for the 23rd accumulation period and any future FAC rate change cases.

As the OPC has just pointed out, GMO is violating the FAC rider in its tariff by allowing the cost of fuel consumed to produce auxiliary power needed for steam operations at its Lake Road facility to be recovered from its electric rate payers. GMO's decision to violate its tariff was, and is still, imprudent. *State ex rel. Union Elec. Co.*, 399 S.W.3d at 491. GMO should therefore return the money it has already imprudently collected and cease imprudently collecting such costs in the future by

properly allocating auxiliary power fuel costs between steam and electric operations at the Lake Road facility.

Response to Arguments Concerning Issue 3

A. The OPC is not engaged in hindsight analysis and KCPL & GMO have completely failed to address the primary arguments raised by the testimony of the OPC's witness

Much as the OPC suspected, KCPL & GMO primarily rely on the claim that the OPC's arguments are based on hindsight analysis. *See, e.g.*, *Initial Post-Hearing Brief*, KCPL & GMO, pg. 20. Fortunately, the OPC predicted that KCPL & GMO might resort to making such inaccurate claims, and so made sure to address this issue in its initial brief. *See, e.g.*, *Initial Brief*, OPC, pgs. 34 – 35. The OPC will thus keep this short by simply restating the point it made in the initial brief and requesting that the Commission read the OPC's initial brief for a more detailed examination of the issue:

> Neither KCPL & GMO nor Staff have offered any evidence to refute what has thus far been proven by the OPC, which is that, **at the time the Rock Creek and Osborn PPAs were executed**, KCPL & GMO knew or should have known that their forecasted price models were inaccurate and, even if their forecasts had been accurate, that cheaper wind projects were available. Moreover, either of these factors standing alone should be sufficient to establish that the Rock Creek and Osborn PPAs were imprudent as it is equally and independently imprudent to either enter into business decisions based on data one knows to be inaccurate or to pay more than is necessary for goods or services (especially when the purpose of buying said goods or services is to then resell them for profit). Thus, the decision to enter into the Rock Creek and Osborn PPAs under the terms as executed was undeniably imprudent.

See, e.g., *Initial Brief*, OPC, pgs. 41 – 48.

B. KCPL & GMO could not reasonably have believed that it was absolutely necessary to have Missouri-based wind at the time it entered into the Rock Creek and Osborn wind PPAs

KCPL & GMO has no answer to the overwhelming evidence that the OPC has put forward to show that there was cheaper wind available to the companies (**at the time the Rock Creek and Osborn PPAs were entered into**) other than to claim that Rock Creek and Osborn were the best prices available for **Missouri-based** wind.[6] Thus, KCPL & GMO seek to escape the imprudence of their decision by presenting an argument that turns entirely on convincing the Commission the companies needed Missouri-based wind. If the companies cannot prove that they needed Missouri-based wind, then their decision to enter into the Rock Creek and Osborn PPAs was imprudent because the uncontroverted evidence of the OPC shows that cheaper wind PPAs were available. *See Initial Brief*, OPC, pgs. 34 – 42. However, the only thing the companies can point to in hopes of proving they needed Missouri-based wind is the formerly proposed federal Clean Power Plan ("CPP"). This presents a problem for KCPL & GMO, though, as there is a litany of reasons why it was imprudent for the companies to have immediately entered into the Rock Creek and Osborn PPAs in order to meet the CPP.

[6] Never mind the fact that they cannot prove this point either because they performed no request for proposal prior to entering into the Rock Creek and Osborn PPAs. *Mantle Rebuttal*, pg. 28.

a. The CPP proposed state-wide goals without clear indication of what would be required of any one utility

As stated in the testimony of KCPL & GMO witness Burton L. Crawford "The proposed [CPP] rule included state-specific CO_2 reduction targets for Missouri and Kansas." *Crawford Surrebuttal* pg. 14. This meant that the CPP would have required the **entire state of Missouri** to reduce its CO_2 emissions by set dates. 79 FR 34829, 34833. What Mr. Crawford's testimony does not take into consideration, however, is that KCPL & GMO are not the only CO_2 producers in the state. Every other power producer who operated in this State, including both the large publicly traded companies like Ameren and Liberty Utilities as well as unregulated entities such as electric cooperatives and municipalities, would end up included in the CPP compliance plan that would be developed by the state. There was even the possibility under the CPP for Missouri to establish what the CPP called a "mass-based goal" that would have allowed Missouri to set goals as a single combined entity as opposed to setting goals for each power producer to meet, as seen here:

> The EPA is proposing to allow each state flexibility with regard to the form of the goal. A state could adopt the rate-based form of the goal established by the EPA or an equivalent mass-based form of the goal. A multi-state approach incorporating either a rate- or mass-based goal would also be approvable based upon a demonstration that the state's plan would achieve the equivalent in stringency, including compliance timing, to the state-specific rate-based goal set by the EPA.

79 FR 34830, 34837. And here:

> Each state will determine, and include in its plan, emission performance levels for its affected EGUs that are equivalent to the state-specific CO_2 goal in the emission guidelines, as well as the measures needed to

> achieve those levels and the overall goal. As part of determining these levels, the state will decide whether it will adopt the rate-based form of the goal established by the EPA or translate the rate-based goal to a mass-based goal. The state must then establish a standard, or set of standards, of performance, as well as implementing and enforcing measures, to achieve the emission performance level specified in the state plan. The state may choose the measures it will include in its plan to achieve its goal. The state may use the same set of measures as in the EPA's approach to setting the goals, or the state may use other or additional measures to achieve the required CO_2 reductions.

79 FR 34830, 34837. And here:

> A state plan must identify the rate-based or mass-based level of emission performance that must be met through the plan, (expressed in numeric values, including the units of measurement for the level of performance, such as pounds of CO_2 per net MWh of useful energy output or tons of CO_2). As noted, in the emission guidelines, the EPA will establish the state goal in the form of a CO2 emission rate, and the state may, for its emission performance level, either adopt that rate or translate it into a mass-based goal. If the plan adopts a mass-based goal, the plan must include a description of the analytic process, tools, methods, and assumptions used to translate from the rate-based goal to the mass-based goal.

79 FR 34830, 34911. As one can plainly see, the proposed CPP rule offered significant flexibility in how a state could meet its CO_2 emission reduction requirements and there was no way of telling what exactly KCPL or GMO would have been required to do under the proposed rule.

b. The CPP as drafted didn't require Missouri utilities to have Missouri-based wind and there were multiple indications that KCPL & GMO could have used Kansas-based wind

KCPL & GMO would have the Commission believe that the CPP was likely going to require them to have Missouri-based wind, but this is patently untrue. In

reality, the CPP **as proposed** required the exact opposite of what KCPL & GMO claim which can be seen in the following excerpt:

> The EPA is proposing that, for renewable energy measures, consistent with existing state RPS policies, a state could take into account all of the CO_2 emission reductions from renewable energy measures implemented by the state, **whether they occur in the state or in other states**. This proposed approach for RE acknowledges the existence of renewable energy certificates (REC) **that allow for interstate trading of RE attributes and the fact that a given state's RPS requirements often allow for the use of qualifying RE located in another state to be used to comply with that state's RPS**. The EPA is also seeking comment on how to avoid double counting emission reductions using this proposed approach. **The agency is also proposing that states participating in multi-state plans could distribute the CO_2 emission reductions among states in the multi-state area**, as long as the total CO_2 emission reductions claimed are equal to the total of each state's in-state emission reductions from RE measures. We also request comment on the option of allowing a state to take into account only those CO_2 emission reductions occurring in its state. **We are also proposing that states could jointly demonstrate CO_2 emission performance by affected EGUs through a multi-state plan in a contiguous electric grid region, in which case attribution among states of emission reductions from renewable energy measures would not be necessary**. **We also request comment on whether a state should be able to take credit for emission reductions out of state due to renewable energy measures if the state can demonstrate that the reductions will not be double-counted when the relevant states report on their achieved plan performance**, and on what such a demonstration should entail. We request comment on these and other approaches for taking into account CO_2 emission reductions from renewable energy measures.

79 FR 34830, 34922. This excerpt shows that the CPP was not only **designed** to allow KCPL & GMO to claim Kansas-based wind to meet the CPP requirements, but also that the EPA was considering going even further and allowing multi-state plans to meet CPP requirements. It also shows that the EPA was specifically sensitive to the existence and use of RECs and was actively attempting to incorporate the existing

REC based structure into the CPP. Thus, it was actually **far more likely** that KCPL & GMO would end up being able to claim Kansas-based wind projects for Missouri CPP compliance purposes. Consequently, KCPL & GMO did not need Missouri specific wind to meet the proposed CPP in the manner they claim.

c. The EPA was only soliciting comments as to whether a state should have the option to require state specific wind and it was imprudent for KCPL & GMO to rush into immediately entering wind PPAs based on mere comments

The claim made by KCPL & GMO that it was reasonable for them to believe that Missouri-based wind would be needed as a result of the CPP is essentially premised on a single sentence in the above referenced excerpt that stated the EPA was "also request[ing] comment on the **option** of allowing a state to take into account only those CO2 emission reductions occurring in its state." 79 FR 34830, 34922. (emphasis added). The first and most important thing to note about this statement is that the request was for comment about whether a state should be able to **voluntarily elect** to put a restriction **on their own power producers** to count only in-state renewables. In other words, if the EPA had changed its proposed rule to incorporate the subject of this comment, it would mean only that the States of Missouri could **choose** to restrict KCPL & GMO to using only Missouri-based wind. In addition, it is important to remember that the EPA was only requesting **comments** and thus this statement provided no indication what-so-ever as to whether such a requirement would actually be created. Finally, that same section of

the proposed CPP also stated that the EPA was simultaneously requesting comments "on whether a state should be able to take credit for emission reductions out of state due to renewable energy measures," so there was an equal amount of evidence that KCPL & GMO would **not** have needed Missouri-based wind. 79 FR 34830, 34922.

It was completely unreasonable for KCPL & GMO to run out and **immediately** enter into two separate wind PPAs just because the EPA was **potentially considering** giving Missouri the **option** of allowing only Missouri-based renewables to count toward Missouri meeting the federally imposed CO_2 reduction requirements. Given this degree of massive uncertainty, the obviously prudent thing for KCPL & GMO to have done would have been to wait and see if any such requirement was going to actually be imposed before committing to these otherwise unnecessary PPAs. Unfortunately for their customers, KCPL & GMO chose to act imprudently.

d. No other utility believed it was necessary to immediately enter into new wind contracts or begin new construction of wind projects to comply with the draft CPP

During the evidentiary hearing, KCPL & GMO submitted into the record a data response that the companies had provided to the OPC's request for "**all** documentation related to GMO's analysis of the impact of the proposed federal Clean Power Plan on the company's operation." Ex. 9 pg. 1 (emphasis added). The **only** response that KCPL & GMO was capable of providing was statements that it and **other** parties had made during a CPP based Commission workshop. Ex. 9 pgs. 1- 2. The most interesting thing about this response, however, is the fact that **none** of the

other parties that KCPL & GMO cite in their response to the OPC's data request stated a belief that it was necessary to **immediately** buy or develop new Missouri-based wind in order to meet the CPP. In fact, all of the other commenters would appear to have decided to take the reasonable and prudent action of waiting to see what the final rule would actually require as demonstrated in the comments supplied by then Empire Electric who stated that the current information supplied by the EPA had left it unsure "how, when and if Empire complies with the rule in each state." Ex. 9 pg. 1. According to the evidence that KCPL & GMO entered into the record, they **alone** were the only utility companies that made the decision to immediately start acquiring new wind for the purpose of meeting the draft CPP rule instead of waiting to see what the final rule had to say.

e. The data supplied by KCPL & GMO shows a rapid decline in the price of Missouri wind which meant it was imprudent not to wait

The surrebuttal testimony of KCPL & GMO witness Burton L. Crawford includes a graph depicting the price of various wind PPA contracts for Missouri over time:

**

**

Crawford Surrebuttal, pg. 11. This graph shows that the price of Missouri-based wind was essentially in a state of free-fall at the time the Rock Creek and Osborn PPAs were entered into. The price being offered for the Osborn PPA, for example, is seen to drop as much as $30 per MW/hr in just four years while the price for Rock Creek drops nearly $20 per MW/hr in even less time. *Crawford Surrebuttal*, pg. 11. Given such a drastic and rapid decrease in prices for Missouri-based wind, it was manifestly imprudent for KCPL & GMO to have rushed into these two PPAs given that the companies **did not even know if these PPAs would be needed to meet the CPP**. KCPL & GMO had between five and fifteen years to meet any requirements that **might** have been imposed on them by the CPP; who knows how much better a deal

the companies could have achieved had they waited to see if the CPP was actually implemented.

f. The CPP was challenged in court even before it became final, so delay in the implementation was highly likely which gave KCPL & GMO even more time to wait for wind prices to fall

Anyone who even remotely followed the development of the proposed CPP knew that the fate of the rule would ultimately be decided by the courts. In an almost humorous twist, some parties didn't even wait until a final rule was in place before bringing a legal challenge. Murray Energy Corporation (a coal company) filed suit challenging the CPP "[s]hortly after EPA issued its proposed rule" and was ultimately joined by the States of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming. *West Virginia v. EPA (In re Murray Energy Corp.)*, 788 F.3d 330, 334 (2015). This case had made it all the way to being argued on appeal before the United States Court of Appeals for the District of Columbia as early as April 16, 2015, meaning that it had been working its way through the federal court system long before the Rock Creek and Osborn PPAs were entered into. *West Virginia v. EPA (In re Murray Energy Corp.)*, 788 F.3d 330. While the case was ultimately dismissed for being **too** early, the point is that absolutely any utility knew or should have known that the CPP was going to be the subject of legal challenges no matter what the final rule looked like. For KCPL & GMO to have thought that they needed to rush into two PPAs to meet a

requirement that was not even part of the drafted version of the CPP at a time when the cost of Missouri wind was rapidly plummeting was therefore plainly imprudent.

g. The CPP proposed targets that had to be met by 2020 and 2030 respectively leaving significant time to determine the best possible means for utilities to reach those goals.

The CPP's targets for CO_2 reductions required them to be met by 2030 with intermediate goals proposed for 2020. 79 FR 34830, 34837. This just emphasizes a point that the OPC has already expressed repeatedly, which is that there was significant time available for utilities to determine what the best possible means of meeting the CPP would be based on the requirements that were **actually imposed**. KCPL & GMO would have the Commission believe that they acted prudently when they ignored this fact and decided instead to immediately scramble towards acquiring two different PPAs that ultimately proved disastrously un-profitable to their ratepayers. Had KCPL & GMO instead chosen to wait to see what the CPP would actually require, they could have easily avoided the massive mistakes that are the Rock Creek and Osborn PPAs and the tens of millions of dollars in losses that have now been foisted upon their customers as the direct result of these PPAs.

h. The CPP proposed a reduction in CO_2 emissions that could be achieved by multiple means and KCPL & GMO has offered no evidence to show that Rock Creek and Osborn were the best means of meeting those requirements.

As previously stated, the CPP was a proposed requirement to reduce CO_2 levels, not to build new renewable generation. 79 FR 34829, 34833. This meant that there were multiple ways that the CPP could be complied with **without** acquiring new wind, as demonstrated in the excerpt below:

> The second aspect noted above concerns the proposed choice of state-specific output-weighted-average emission rates for all affected EGUs in each state rather than nationally uniform emission rates for particular types of affected EGUs. Here, the EPA's main consideration has been to ensure that the proposed goals reflect opportunities to manage CO_2 emissions **by shifting generation among different types of affected EGUs**. Specifically, because CO_2 emission rates differ widely across the fleet of affected EGUs, and because transmission interconnections typically provide system operators with choices as to which EGU should be called upon to produce the next MWh of generation needed to meet demand, **opportunities exist to manage utilization of high carbon-intensity EGUs based on the availability of less carbon-intensive generating capacity**. **For states and generators, this means that CO_2 emission reductions can be achieved by shifting generation from EGUs with higher CO_2 emission rates, such as coal-fired EGUs, to EGUs with lower CO_2 emission rates, such as [Natural Gas Combined Cycle] units**. **Our analysis indicates that shifting generation among EGUs offers opportunities to achieve large amounts of CO_2 emission reductions at reasonable costs.** These opportunities can be reflected in a goal established in the form of an output-weighted-average emission rate for multiple affected EGU types. Our approach is also consistent with the fact that the proportions of different EGU types and hence the magnitudes of the generation-shifting opportunities vary across states, and that CAA section 111(d) calls for standards of performance to be established in state plans rather than on a nationwide basis.
>
> The third aspect noted above regarding the proposed form of the goals concerns the adjustments made to the output-weighted-average emission rates in order to accommodate reduced utilization of affected EGUs associated with measures such as increases in low- and zero-carbon generating capacity **and demand-side energy efficiency**. We recognize that these measures support reduced overall CO_2 mass emissions from affected EGUs through reductions in the quantity of generation from affected EGUs, and not necessarily through reductions in the weighted-average CO_2 emission rates of affected EGUs.

> **Accordingly, we have constructed the emission rate goals in a manner that is intended to account for these generation quantity-reducing measures by making adjustments to the values used in the emission rate computations**. The specific adjustments are summarized below in the context of the goal computation methodology and are described in greater detail in the Goal Computation TSD. As described below in Section VIII on state plans, we are proposing that a state choosing a rate-based form of goal would be able to make analogous adjustments when assessing monitored emission performance **so that measures that support avoided generation at affected EGUs could be used to help the state meet the rate-based emission performance level reflected in its plan**..

79 FR 34829, 34894. While this excerpt may appear dense on the surface, in short it describes how the CPP's CO_2 reduction targets could have been met by various means including shifting from coal-fired generation units to natural gas combined cycle units and implementing demand-side energy efficiency investments. The latter is especially interesting as it means that KCPL & GMO could have applied the demand side energy efficiency investments that it was making pursuant to the Missouri Energy Efficiency Investment Act ("MEEIA") to any CO_2 reduction requirements that the CPP may have ultimately required. Yet, KCPL & GMO never provided **any** analysis as to whether it could have met any proposed CPP requirements through the use of a MEEIA or by shutting down existing CO_2 generation. Instead, KCPL & GMO have chosen to pretend as though it **had** to enter into these two PPAs to meet the requirements of a proposed rule despite the language of the proposed rule itself. Given the vast array of options for KCPL & GMO to have possibly met whatever CPP requirements might have been imposed on it, it was manifestly imprudent for the companies to have immediately entered into the Rock Creek and Osborn PPAs.

Summary

KCPL & GMO cannot prove that the decision to enter into the Rock Creek and Osborn PPAs were prudent based on the economic analysis they provided because the evidence shows that economic analysis was premised on faulty price models and, more importantly, KCPL & GMO selected windfarms that were far more expensive to purchase power from than what was otherwise available on the market. *See Initial Brief*, OPC, pgs. 34 – 42. Realizing this point, KCPL & GMO have been forced to shift gears to argue that it was prudent for them to enter into these more expensive Missouri-based wind PPAs in order to meet the proposed federal CPP. However, this new justification is as equally illogical as the economic one.

The CPP, as proposed, did not require Missouri-based wind and there was little evidence that it ever would. In fact, the proposed version of the CPP suggested the exact opposite given that it is riddled with methods by which KCPL & GMO could have made use of Kansas-based wind. Moreover, the CPP offered many different means to meet the CO_2 reduction targets it was attempting to set and KCPL & GMO has offered absolutely no analysis that Rock Creek and Osborn were the best means (or even good means) of meeting whatever requirements the CPP might have imposed. On top of that, even the evidence supplied by KCPL & GMO shows that the price of wind (including Missouri-based wind) was falling rapidly at the time the Rock Creek and Osborn PPAs were executed and that all the other electric utilities were **waiting** to see what would come of the rule before deciding to act. In light of these factors, the decision of KCPL & GMO to immediately enter into two PPAs that the companies could not prove would ever actually be needed is unmistakably imprudent.

The only thing that a prudent utility would do in that situation is wait to see if the CPP would require Missouri-based wind, thereby allowing the utility to capitalize on improvements in the wind generation market and the reduced prices brought on by increased development. KCPL & GMO, sadly, did not act prudently and their ratepayers are now paying the price.

C. The expiration of certain federal production tax credits ("PTCs") has no real meaning given the history of renewable energy PTCs

KCPL & GMO have included in their brief several claims that it was prudent for them to have entered into the Rock Creek and Osborn PPAs because those two PPAs were eligible for certain federal PTCs and it was uncertain if the PTCs were going to be continued in the future. *See Initial Post-Hearing Brief*, KCPL & GMO, pgs. 19, 22. However, if one looks at the long history surrounding the PTCs, then one would quickly realize the idea that they were unlikely to be continued was, in reality, very far-fetched. Just consider this chart from the report on the renewable energy tax credits prepared by the Congressional Research Department of the United States Library of Congress:

Table 2. Renewable Electricity PTC Expirations and Extensions

Legislation	Date Enacted	PTC Eligibility Window	Lapse Before Extension?
Energy Policy Act of 1992 (P.L. 102-486)	10/24/1992	1/1/1993-6/30/1999 (closed-loop biomass) 1/1/1994-6/30/1999 (wind)	—
Ticket to Work and Work Incentives Improvement Act of 1999 (P.L. 106-170)	12/17/1999	7/1/1999-12/31/2001	Yes 7/1/1999-12/17/1999
Job Creation and Worker Assistance Act (P.L. 107-147)	3/9/2002	1/1/2002-12/31/2003	Yes 1/1/2002-3/9/2002
Working Families and Tax Relief Act (P.L. 108-311)	10/4/2004	1/1/2004-12/31/2005	Yes 1/1/2004-10/4/2004
The Energy Policy Act of 2005 (P.L. 109-58)	8/8/2005	1/1/2006-12/31/2007	No
The Tax Relief and Health Care Act of 2006 (P.L. 109-432)	12/20/2006	1/1/2008-12/31/2008	No
The Emergency Economic Stabilization Act of 2008 (P.L. 110-343)	10/3/2008	1/1/2009-12/31/2010 10/3/2008-12/31/2011 (marine and hydrokinetic) 1/1/2009-12/31/2009 (wind)	No
The American Recovery and Reinvestment Act of 2009 (P.L. 111-5)	2/17/2009	1/1/2011-12/31/2013 1/1/2010-12/31/2012 (wind)	No
The American Taxpayer Relief Act of 2012 (P.L. 112-240)	1/2/2013	1/1/2013-12/31/2013 (wind)	No[a]
Tax Increase Prevention Act of 2014 (P.L. 113-295)	12/19/2014	1/1/2014-12/31/2014	Yes 1/1/2014-12/19/2014
Consolidated Appropriations Act, 2016 (P.L. 114-113)	12/18/2015	1/1/2015-12/31/2016 1/1/2015-12/31/2019 (wind)[b]	Yes 1/1/2015-12/18/2015
Bipartisan Budget Act of 2018 (P.L. 115-123)	2/9/2018	1/1/2017-12/31/2017	Yes 1/1/2017-2/9/2018[c]

Source: Information compiled by CRS using the Legislative Information System (LIS).

Notes: For all lapse periods, the PTC was retroactively extended. See text for full details on qualifying technologies during different time periods.

a. The PTC expired in January 1, 2013, before being extended on January 2, 2013.

b. For wind facilities beginning construction in 2017, the credit is reduced by 20%. The credit is reduced by 40% for facilities beginning construction in 2018, and reduced by 60% for facilities beginning construction in 2019.

c. The extension was fully retroactive, in that the extension only covered a time period prior to the extension's date of enactment.

Cong. Research Serv., R43453, The Renewable Electricity Production Tax Credit: In Brief 4 (2018) available at https://crsreports.congress.gov/product/pdf/R/R43453. As

this chart shows, the PTCs had been in effect in one form or another since 1992 and had been renewed many, many times. The idea that Rock Creek and Osborn were going to be the last Missouri-based wind PPAs subject to federal PTCs is unfounded. Based on the foregoing, KCPL & GMO could easily have waited to see if the CPP was going to actually be enacted and still have expected to find wind PPAs subject to federal PTCs. The companies' claim that they **needed** to enter into the Rock Creek and Osborn PPAs in order to see federal PTC related tax benefits is simply wrong.

D. The response KCPL & GMO provide to the OPC's argument regarding a lack of any request for proposal ("RFP") for the Rock Creek and Osborn wind projects suggest that the companies do not understand what the purpose of an RFP is.

The initial brief of KCPL & GMO doubles down on the spurious claim that the Rock Creek wind farm somehow "arose" out of an RFP that was issued two years earlier, that did not even include the Rock Creek wind project, and in which the companies selected a completely separate project, produced by a different developer, and with a higher price. *Initial Post-Hearing Brief*, KCPL & GMO, pgs. 23 – 24. The OPC will not bother addressing this illogical claim and instead will simply direct the Commission to the portion of the OPC's own initial brief dealing with this argument. *Initial Brief*, OPC, pgs. 44 – 46. The OPC will, however, address the argument KCPL & GMO appear to make by citing to portions of the transcript. *Initial Post-Hearing Brief*, KCPL & GMO, pg. 24. Basically, the companies cite to the testimony of their own witness, Burton Crawford, who described how Rock Creek and Osborn appeared

in KCPL & GMO RFPs issued four years and five years earlier, respectively. *Id.* KCPL & GMO appear to be operating under the assumption that, as long as the wind projects appeared in an RFP **at some point in time**, they could be selected at any point in the future without needing to re-evaluate using a new RFP to determine if better, more affordable bids had developed in the interim. This argument misses the point of performing RFPs at all.

The whole idea behind an RFP is to ensure that you find the best bid available at the time that the costs for which bids are being requested are to be incurred. As such, it is important to perform a separate RFP whenever there has been a significant delay in time between cost occurrences in order to account for possible changes in price and even new potential bidders. This is something that even the Commission itself has already stated in past cases:

> While recognizing that gas purchasing decision-making is an ongoing process, the Commission notes that the written proposals were obtained in 1988, at least two years before the execution of the contract with SEECO. The gas industry was in flux at this time, and to a great extent still is. **Thus a two-year time period could make a significant difference in what contract terms gas suppliers would be willing to offer**.

Report and Order, GR-90-38, pg. 14 (emphasis added). Therefore, the fact that KCPL & GMO had received bids for the Rock Creek and Osborn wind PPAs four and five years prior to the time that they were actually entered into is completely immaterial.[7] KCPL & GMO needed to perform a **new** RFP prior to entering into the Rock Creek

[7] As can be seen in the graph previously provided, the prices of wind PPAs dropped substantially over four years meaning that four to five years is a significant delay in time in the wind industry. *Crawford Surrebuttal* pg. 11.

and Osborn PPAs to ensure that, **at the time they were entered into**, there was no better deal available. But the companies did not do this simple thing, which is why their decision was imprudent.

E. The Commission should absolutely order some form of imprudence disallowance related to the Rock Creek and Osborn wind PPAs

KCPL & GMO acted imprudently when they entered into the Rock Creek and Osborn PPAs because they should have known, **at the time those PPAs were executed**, that cheaper wind was available. *See Initial Brief*, OPC, pgs. 34 – 42. Faced with this truth, KCPL & GMO attempt to claim that it was prudent for them to have entered into Rock Creek and Osborn regardless because those PPAs were needed to meet the proposed CPP, but the OPC has now shown why that assertion is false. Nor can KCPL & GMO say that the Rock Creek and Osborn PPAs had to be entered into because of the diminishing availability of federal PTCs for the reasons already discussed above. Finally, even if all the foregoing is ignored, KCPL & GMO still acted imprudently when they failed to issue an RFP prior to entering into these wind PPAs. *See Id.*, pgs. 42 – 46. Given all that, KCPL & GMO should not be permitted to pass on the excessive losses they have incurred because of these two PPAs. The OPC has offered multiple means by which the Commission could resolve this issue and requests that the Commission adopt the OPC's preferred proposal and disallow all of the losses KCPL & GMO incurred because of these imprudent PPAs. *See Id.*, pgs. 46 – 47.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Reply Brief* and rule in the OPC's favor as to all issues presented in this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this fourth day of October, 2019.

/s/ John Clizer