

Exhibit No.: Gmo-36(NP)
Issue: Jeffrey Energy Center
Witness: Leonard R. Ruzicka Jr.
Type of Exhibit: Rebuttal Testimony
Sponsoring Party: KCP&L Greater Missouri Operations Company
Case No.: ER-2010-0356
Date Testimony Prepared: December 15, 2010

MISSOURI PUBLIC SERVICE COMMISSION

CASE NO.: ER-2010-0356

REBUTTAL TESTIMONY

OF

LEONARD R. RUZICKA, JR.

ON BEHALF OF

KCP&L GREATER MISSOURI OPERATIONS COMPANY

**Kansas City, Missouri
December 2010**

*** [REDACTED] *** Designates "Highly Confidential" Information
Has Been Removed
Pursuant To 4 CSR 240-2.135.

KCP&L Exhibit No Gmo 36-NP
Date 2-16-11 Reporter VR
File No. ER-2010-0356

REBUTTAL TESTIMONY
OF
LEONARD R. RUZICKA, JR.
Case No. ER-2010-0356

1 **Q: Please state your name and business address.**

2 A: My name is Leonard R. Ruzicka Jr. My business address is 7700 Forsyth Boulevard
3 Suite 1100, St. Louis, Missouri 63105.

4 **Q: By whom and in what capacity are you employed?**

5 A: I am a partner in the law firm of Stinson Morrison Hecker LLP. I am a member of the
6 business litigation group of the firm.

7 **Q: Please describe your education, experience and employment history.**

8 A: I received a Bachelor of Arts Degree in Economics from Georgetown University in 1967.
9 I served for three years as an officer in the US Navy and was honorably discharged. I
10 attended St. Louis University School of Law graduating in 1974. I have been a member
11 of the Missouri Bar since 1974 and my law practice has focused primarily on
12 construction law including 20 years as Senior Vice President and General Counsel for
13 Fru-Con Corporation. Fru-Con is a large, international company engaged in construction,
14 engineering and real estate development and I had management responsibility for all of
15 their legal needs including claims and litigation. I have been a partner at Stinson
16 Morrison Hecker since 2005 and my practice has been focused on construction related
17 matters representing owners, contractors, subcontractors and vendors involved in the
18 construction process. I attach for review my Resume which is attached as Schedule
19 LRR2010-1.

1 Q: Have you previously testified in proceedings before the Missouri Public Service
2 Commission or before any other utility regulatory agency?

3 A: No.

4 Q: What is the purpose of your testimony?

5 A: I was retained by KCP&L to review documents and interview individuals as necessary to
6 determine the appropriateness of the awarding of a contract to Powerplant Maintenance
7 Specialists, Inc. ("PMSI") for the general construction work on the rebuild of the
8 scrubber systems on the three units of the Jeffrey Energy Center coal-fired generating
9 facility in St. Marys, Kansas. I was also asked to determine the appropriateness of the
10 conversion of that contract from a lump sum contract to a cost plus contract. Finally, I
11 was asked to review the testimony in this case of Mr. Keith A. Majors of the PSC staff
12 and give my assessment of the opinions expressed by Mr. Majors in that testimony.

13 Q: In your opinion, did Westar/GMO act appropriately and reasonably in its decision
14 to award the general construction contract to PMSI?

15 A: ** [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] **

22 At the time that Westar/GMO was considering awarding this contract to PMSI, many
23 Owners were faced with a similar challenge of awarding a contract without a bond. This

1 is a result of a combination of a decrease in the number of bonding companies in recent
2 years and the more stringent underwriting requirements for issuing bonds. In addition,
3 the underwriting requirements become increasingly more stringent as the amount of the
4 contract/bond increases even though the challenges of the work may be no greater than
5 for a contract/bond for a lower amount. This is because the bonding companies have a
6 greater amount at risk. ** [REDACTED]

7 [REDACTED]

8 [REDACTED]**

9 When the spread between low and second low bidder is substantial, it would be
10 appropriate and reasonable to consider waiving the bonding requirement but only after
11 conducting the same type of due diligence that is conducted by the sureties. ** [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]** In accepting that recommendation, Westar/GMO acted
20 appropriately and reasonably and consistent with what a prudent owner would do in
21 similar circumstances.

22 **Q: Did Westar/GMO act appropriately and reasonably in entering into Addendum No.**
23 **1?**

1 A: Yes. Defaulting a contractor under a construction contract is considered in the
2 construction industry the equivalent of capital punishment and courts are reluctant to
3 affirm such defaults except in very clear circumstances such as an abandonment of the
4 work by the contractor, delayed performance with no ability to recover schedule or
5 defective work and a refusal to cure the defects. ** [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
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[REDACTED]

[REDACTED]**

Q: Assuming Staff's theory regarding the performance bond is correct, do you agree with Mr. Majors' adjustment amount in this case?

A: ** [REDACTED]

[REDACTED]**

1 Mr. Majors also incorrectly calculated the total PMSI costs by adding to the cost incurred
2 after Addendum No. 1 the full original contract price of \$44,200,000 and the full amount
3 of the change orders of \$11,081,526. At the time of the conversion to cost plus under
4 Addendum No. 1, PMSI had only been paid \$51,643,505 on the contract and change
5 orders. Under Addendum No. 1, there was no further obligation to make payment on the
6 original contract price or change orders so Mr. Majors calculation is overstated by
7 \$3,638,021.

8 **Q: Do you agree with Mr. Majors assertion that had PMSI obtained a performance**
9 **bond, Westar/GMO would have had proceeds to complete the contract or**
10 **compensation for loss in the event of PMSI's non performance?**

11 A: **** [REDACTED]**
12 **[REDACTED]**

13 **[REDACTED]**** Under the terms of a performance bond, the surety has no obligations to the
14 obligee (Westar/GMO) under the bond unless its principal (PMSI) is in default on the
15 contract that is covered by the bond. In the event a default is declared by the obligee, the
16 surety under both Kansas and Missouri case law has available to it all rights, defenses and
17 remedies that are available to its principal under the contract. Typically, a principal will
18 be found in default under a construction contract for failure to timely perform; or for
19 performing the work defectively and refusing to cure the defects; or a combination of
20 both. **** [REDACTED]**

21 **[REDACTED]**
22 **[REDACTED]**
23 **[REDACTED]**

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED]

5

[REDACTED]

6

[REDACTED]

7

[REDACTED]

8

[REDACTED]

9

[REDACTED]**

10 Q: Does that conclude your testimony?

11 A: Yes, it does.



Len R. Ruzicka, Jr.

Partner

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Len Ruzicka is a partner in the business litigation division of Stinson Morrison Hecker LLP. Prior to joining the firm, Len served as general counsel and senior vice president for a major construction and engineering group. He has more than 25 years experience in large and complex construction litigation, both in the private sector and in the public sector. Len has been involved in the drafting and negotiation of various contracting methods including design-build, construction management and engineer-procure-construct. He has prepared, negotiated and participated in numerous mediations involving substantial construction claims. Len has served as legal advisor to numerous joint ventures and consortiums involving power plants, bridges, locks and dams and large industrial projects throughout the U.S. and internationally. In addition, Len is a chapter author of *Aspen Publishers Construction Law Update* and has contributed articles on construction related topics to the ABA Construction Law Forum and the Construction Law Super Conference.

Practice Areas

- Construction Litigation
- Construction and Engineering related labor, employment and regulatory issues

Representative Experience

- Counsel in numerous construction claims involving differing site conditions, defective, ambiguous and/or incomplete design, extra work, access and other issues for heavy civil, industrial and commercial projects
- Counsel in numerous claims involving alleged engineering failures
- Developed a comprehensive training program for contract and subcontract administration for all participants in the engineering and construction process
- Prepared and negotiated claims packages involving extended and additional site overhead, home office overhead and loss of productivity damages
- Involved in due diligence on numerous construction and engineering-related target companies and participated in the acquisition of three companies in recent years
- Represented owners, engineers and contractors in the negotiating and drafting of engineer-procure-construct agreements and other related agreements for a number of biofuels facilities using both grain and livestock byproduct as a feedstock. Also provided ongoing advice during construction and start-up for such projects
- Counsel in numerous construction related labor grievances and arbitrations
- Counsel in numerous OSHA citations related to construction

Education

St. Louis University School of Law, J.D., 1974

Georgetown University, B.A., Economics, 1967

Of Note

Len's extensive experience as general counsel and senior officer of construction, engineering and real estate development companies has made him uniquely qualified to advise participants in all aspects of this industry.

Bar Admissions

- Missouri, 1974
- United States District Court, Eastern District of Missouri

Professional Activities

- American Bar Association, Forum on the Construction Industry
- Missouri Bar Association
- Bar Association of Metropolitan St. Louis
- American Arbitration Association, Advisor Panel
- Associated General Contractors of America
 - Contract Documents Committee
 - Risk Management Committee

Articles

- "Best Practices for Complying with Government Contracts," *Aspatore's Government Contracts Compliance*, 2010.
- Missouri Chapter, *A State-by-State Guide to Construction & Design Law*, American Bar Association, 2009 edition.
- "Review of Three Unique ConsensusDocs Forms," *St. Louis Construction News and Real Estate*, September-October 2008.
- "A Review of the New Family of Construction Agreements, the ConsensusDocs," *St. Louis Bar Journal*, Spring 2008.
- "Termination for Default Under Construction Contracts," *Aspen Publishers Construction Law Update*, 2006.
- "Mechanic's Liens in Missouri," *Business Credit*, November/December 2006.
- "Recent Developments in Arbitration Law," *Wiley Construction Update*, 2005.

Presentations

Len is a frequent speaker and author on topics related to the construction business. He has made presentations to the American Bar Association, Construction Forum; the Missouri Bar Association; the Bar Association of Metropolitan St. Louis; the Construction Consumers Council; the Engineer's Club of Missouri; the National Association of Professional Estimators; the Annual Construction Law Super Conference. Len is an Affiliate Professor with Washington University's School of Engineering. He made a presentation at the Associated General Contractors annual national meeting in 2010, and is a frequent presenter at the Associated General Contractors of St. Louis early bird seminar series.