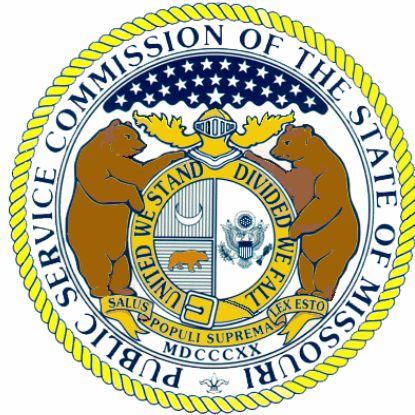


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



In the Matter of the Application of KCP&L Greater Missouri
Operations Company for Permission and Approval and a
Certificate of Public Convenience and Necessity Authorizing
it to Acquire, Construct, Install, Own, Operate, Maintain,
and Otherwise Control and Manage Electrical Production
and Related Facilities in Certain Areas of Cass County,
Missouri Near the City of Peculiar)

Case No. EA-2009-0118

REPORT AND ORDER

Issue Date: March 18, 2009

Effective Date: March 28, 2009

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of KCP&L Greater Missouri Operations Company¹ for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Certain Areas of Cass County, Missouri Near the City of Peculiar)
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REPORT AND ORDER

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¹ On November 20, 2008, in Case No. EN-2009-0164 and in Case No. HN-2009-0165 the Commission granted the Company's applications regarding its change of name from Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. On December 4, 2008, the Commission issued its order setting the date for the On-The-Record Presentation in this matter. In that same order, the Commission, recognizing Aquila, Inc.'s approved name change, ordered the caption of this case be changed to remove any reference to Aquila, Inc. and replace it with KCP&L Greater Missouri Operations Company. See EFIS Docket Entry No. 13, *Order Scheduling an On-The-Record Presentation*, issued on December 4, 2008. EFIS is the Commission's Electronic Information and Filing System.

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APPEARANCES

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REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Syllabus: This order grants KCP&L Greater Missouri Operations Company certificates of convenience and necessity for the South Harper power plant and the Peculiar 345 kV substation, both being located in Cass County, Missouri.

I. Procedural History

A. Application and Ancillary Filings

On September 30, 2008, KCP&L Greater Missouri Operations Company (“GMO”) filed an application² with the Commission requesting Certificates of Convenience and Necessity (“CCNs”) for two facilities previously approved by the Commission; (a) the South Harper power plant and related infrastructure and (b) the Peculiar 345 kilovolt (“kV”) substation recently annexed by the City of Peculiar.³

The Commission had previously concluded that GMO, formerly Aquila Inc.,⁴ had specific authorization to construct these facilities in its Order Clarifying Prior Certificates of Convenience and Necessity in Case No. EA-2005-0248, issued April 7, 2005. The Commission also granted specific Certificates of Convenience and Necessity for these facilities in its Report and Order issued May 23, 2006, in Case No. EA-2006-0309. These

² The application was filed pursuant to Section 393.170, 393.171, RSMo 2000, 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B).

³ Both of these facilities are located in Cass County, Missouri. The Commission uses the word “facilities” throughout this order to mean “electric plant” or “electric plants” as contemplated by Section 393.171, RSMo, Cum. Supp. 2008.

⁴ On November 20, 2008, in Case No. EN-2009-0164 and in Case No. HN-2009-0165 the Commission granted the Company's applications regarding its change of name from Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. On December 4, 2008, the Commission issued its order setting the date for the On-The-Record Presentation in this matter. In that same order, the Commission, recognizing Aquila, Inc.'s approved name change, ordered the caption of this case be changed to remove any reference to Aquila, Inc. and replace it with KCP&L Greater Missouri Operations Company. See EFIS Docket Entry No. 13, *Order Scheduling an On-The-Record Presentation*, issued on December 4, 2008. EFIS is the Commission's Electronic Information and Filing System.

orders were overturned by Missouri courts after challenges;⁵ however, the Missouri General Assembly passed Section 393.171, RSMo Supp. 2008,⁶ granting the Commission authority for one year after the effective date of that statute to issue a certificate for facilities falling within its scope, which includes these Cass County facilities. Section 393.171 took effect on August 28, 2008, and the authority conveyed to the Commission in that section sunsets on August 28, 2009.

In conjunction with its Application, GMO filed appendices containing, *inter alia*: (1) a map of the tracks of land where the two facilities are located; (2) the legal descriptions of the tracks of land where the two facilities are located; (3) a list of all permits and clearances for both sites, including renewed Cass County building and occupancy permits; (4) a map showing by township number the major portion of GMO's service territory in Jackson and Cass Counties; and (5) a copy of the GMO's "Public Outreach Initiative"; and a copy of GMO's Cass County Special Use Permit application.⁷

B. Notice and Interventions

On October 7, 2008, the Commission issued notice and set a deadline for intervention requests. On October 21, 2008, the Commission granted timely requests for intervention to Dogwood Energy, L.L.C., the County of Cass, Missouri, and the Sedalia Industrial Energy Users' Association.

C. Procedural Schedule

The Commission held a procedural conference on November 6, 2008, and the parties jointly filed a status report on November 13, 2008. In the joint status report the

⁵ *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Cass County v. Public Serv. Comm'n*, 259 S.W.3d 544 (Mo. App. 2008).

⁶ All other references to the Missouri Revised Statutes refer to RSMo 2000, unless otherwise noted.

⁷ See EFIS Docket Entry No. 1, Application, filed on September 30, 2008; EFIS Docket Entry No. 2, Special Use Permit and Zoning Application, filed on October 1, 2008.

parties indicated that following a brief period of discovery they believed they would resolve any material differences by stipulation. No party requested an evidentiary hearing or a local public hearing.

D. Stipulation and Agreement

On January 9, 2009, the Commission's Staff, the Office of the Public Counsel ("Public Counsel"), KCP&L Greater Missouri Operations Company ("GMO"), Dogwood Energy, L.L.C. ("Dogwood"), and Cass County, Missouri ("Cass County") (collectively, the "Signatories," and individually, a "Signatory") submitted to the Commission a Stipulation and Agreement ("Agreement") regarding GMO's application.⁸ The Sedalia Industrial Energy Users' Association ("SIEUA") is the only party who is not a signatory to the Agreement; however, SIEUA through its counsel advised the Signatories that it would not oppose the Agreement and would not seek a hearing.⁹

Pursuant to Commission Rule 4 CSR 240-2.115(2), each party has seven days from the filing of a non-unanimous stipulation and agreement to file an objection and fail to so file constitutes a full waiver of that parties' right to a hearing. Additionally, should no party object, the Commission may treat the nonunanimous stipulation and agreement as if it were unanimous.¹⁰ No party objected to the Agreement within the time allowed by the Commission's rule and on January 21, 2009, the Commission issued a notice to the parties informing them that the nonunanimous Agreement would be treated as though it were unanimous. No party objected or sought reconsideration of the Commission's decision.¹¹

⁸ Exh. 5, *Stipulation and Agreement*, p. 1.

⁹ *Id.*

¹⁰ Commission Rule 4 CSR 240-2.115(2)(C).

¹¹ Commission Rule 4 CSR 240-2.160(2) requires that any motion for reconsideration of an interlocutory order must be filed within ten days of the date the order was issued.

E. On-The-Record Presentation and Case Submission

On February 19, 2009, to allow the Commissioners an opportunity to question counsel for the parties and witnesses about the specifics of the Agreement, the Commission convened an on-the-record presentation at its offices in Jefferson City, Missouri. The Commission admitted the testimony of one witness¹² and received six exhibits into evidence.¹³ No briefing schedule was requested or ordered. The transcript was filed on March 9, 2009, and the case was deemed submitted for the Commission's decision.¹⁴

II. Findings of Fact

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law. However, this permissive edict does not relieve the Commission of its statutory duty to properly evaluate GMO's application and determine if granting the requested certificate is necessary or convenient for the public service. The Signatories to the Agreement may believe that GMO has satisfied its burden for the grant of the requested CCNs, but the Commission must decide if the CCNs are justified based upon the factual record. Moreover, Missouri Courts, interpreting Section 386.420 have held that in

¹² The Commission heard the testimony of Scott H. Heidtbrink on behalf of GMO. However, the Commission's Staff made two witnesses available if the Commission wished to adduce further testimony. Those witnesses were Dan Beck, Supervisor of the Commission's Engineering Analysis Department and Lena Mantle, Manager of the Commission's Energy Department.

¹³ At the hearing, GMO did not have a copy of its Application to offer into evidence. The Commission reserved exhibit number 6 for the Application and instructed GMO to file a copy of the exhibit. Because all parties had been given the opportunity to previously review the Application, the Commission inquired as to whether there would be any objections to the admission of Exhibit 6 once it was properly filed. No party objected. Transcript pp. 35-37. On February 24, 2009, GMO filed a copy of the Application as Exhibit 6. The parties were given a second opportunity to respond and no party filed any objections to the admission of Exhibit 6. See EFIS Docket Entry No. 21, *Order Establishing Deadline for Objections*, issued February 25, 2009. The exhibit has been received into the record.

¹⁴ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written report.¹⁵ Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.¹⁶ Consequently, the Commission will include separately stated findings of fact and conclusions of law supporting its decision in this matter.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.¹⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.¹⁸

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it

¹⁵ Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18; however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

¹⁶ *Id.*

¹⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

¹⁸ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

rejected."¹⁹ Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."²⁰

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's discretion,²¹ but witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."²² An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.²³ In fact, the Commission "may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it."²⁴

¹⁹ *State ex rel. Int'l. Telecharge, Inc. v. Public Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Public Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

²⁰ *State ex rel. Monsanto Co. v. Public Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

²¹ *State ex rel. Missouri Gas Energy v. Public Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

²² *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

²³ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users' Ass'n. v. Public Service Comm'n.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Comm'n*, 703 S.W.2d 577 (Mo. App. 1986).

²⁴ *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.²⁵ And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.²⁶ Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.²⁷

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.²⁸ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.²⁹ Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.³⁰

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

²⁵ *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

²⁶ *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

²⁷ *Id.*

²⁸ *State ex rel. Beaufort Transfer Co. v. Public Serv. Comm'n of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Serv. Comm'n*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Serv. Comm'n*, 110 S.W.2d 364, 366 (1937).

²⁹ *Id.*

³⁰ *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

A. The Parties

1. **Kansas City Power and Light Greater Missouri Operations Company** ("GMO") is a Delaware corporation (formerly known as Aquila, Inc.) with its principal office and place of business at 1201 Walnut Street, Kansas City, Missouri 64106-2124. GMO became a wholly-owned subsidiary of Great Plains Energy Incorporated ("GPE")³¹ following its acquisition on July 14, 2008. GMO is an "electrical corporation," "heating company," and "public utility" as those terms are defined by Section 386.020 and is engaged in providing electrical and industrial steam utility service in those areas of the state certificated to it by the Commission.³²

2. **Dogwood Energy, L.L.C.** ("Dogwood") is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. Dogwood owns the 625 MW combined cycle generating facility located in Pleasant Hill, Missouri, which is within GMO's service territory.³³

3. **The County of Cass, Missouri** ("Cass County") is a First Class County of the State of Missouri under the county classification provisions of Chapter 48, RSMo 2000, and is a political subdivision of the state with powers, duties and obligations as provided by law. Its offices are located in Harrisonville, Missouri, the county seat.³⁴

4. **The Sedalia Industrial Energy Users' Association** ("SIEUA") is an unincorporated voluntary association consisting of large commercial and industrial users of

³¹ Great Plains Energy Incorporated is also the parent company of Kansas City Power & Light Company ("KCP&L"). See Footnote 32, *infra*.

³² EFIS Docket Entry No. 1, *Application*, filed on September 30, 2009. See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

³³ EFIS Docket Entry No. 6, *Dogwood Energy, L.L.C.'s Application to Intervene*, filed October 16, 2008.

³⁴ EFIS Docket Entry No. 5, *Application to Intervene*, filed on October 15, 2008.

natural gas and electricity in the Sedalia, Missouri and in the surrounding area. SIEUA was formed for the purpose of economical representation of its members' interests through intervention and other activities in regulatory and other appropriate proceedings.³⁵

5. **The Office of the Public Counsel** ("Public Counsel") is a statutorily-created entity that "*may* represent and protect the interests of the public in any proceeding before or appeal from the public service commission."³⁶ Public Counsel "*shall* have discretion to represent or refrain from representing the public in any proceeding."³⁷

6. **The Staff of the Missouri Public Service Commission** ("Staff") is a party in all Commission proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.³⁸ Staff is represented by the **General Counsel of the Missouri Public Service Commission** who "represent[s] and appear[s] for the commission in all actions and proceedings involving any question

³⁵ EFIS Docket Entry No. 4, *Application to Intervene Without Prejudice of Sedalia Industrial Energy Users' Association*, filed October 14, 2008. Current members of SIEUA are as follows: Pittsburgh Corning Corporation, a manufacturer of cellular glass insulation; Waterloo Industries, a manufacturer of tool storage equipment; Hayes-Lemmerz International a manufacturer of automobile wheels; EnerSys Inc. a manufacturer of industrial batteries; Alcan Cable Co. a manufacturer of aluminum electrical conductors; Gardner Denver Corporation a manufacturer of industrial compressors and blowers; American Compressed Steel Corporation a scrap metal recycling facility; and Stahl Specialty Company, a manufacturer of specialty and precision aluminum castings. Collectively, these SIEUA members provide gainful employment for approximately 3,815 workers in central Missouri.

³⁶ Sections 386.700 and 386.710; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

³⁷ Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id.*

³⁸ Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”³⁹

B. Witness Demeanor, Credibility and Testimony

7. No prefiled testimony was directed to be filed with the Commission pursuant to Commission Rules and none was received into evidence.⁴⁰

8. GMO proffered one witness, Mr. Scott H. Heidtbrink, who provided direct testimony and was subject to cross-examination by the parties and the Commission.⁴¹

9. Mr. Heidtbrink is currently GMO’s Senior Vice President of Supply.⁴²

10. Mr. Heidtbrink was formerly employed by GMO’s predecessor-in-interest, Aquila, Inc., and when controversy began concerning the South Harper power plant and Peculiar substation (collectively “the Facilities”) he was leading Aquila’s Six Sigma deployment operations across Aquila’s service area. In early 2006 he became Aquila’s Vice President of Generation and Energy Resources which put him in charge of Aquila’s power plants and energy resources, including the Facilities.⁴³

³⁹ Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

⁴⁰ See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

⁴¹ Transcript, p. 22.

⁴² Transcript, pp. 21-23. Mr. Heidtbrink earned a Bachelor of Science Degree in Electrical Engineering from State University in 1986. As Vice President of Supply, he is responsible for the generating fleet including 3,200 MW of coal, 548 MW of nuclear, 101 MW of wind and over 2,400 MW of gas/oil. He is responsible for oversight of generation dispatch and wholesale marketing functions; management of the fleets environmental (SO₂, NO_x, etc.) program; and coal, rail and natural gas contracts. He is also accountable for over 1,200 employees; a non-fuel O&M budget of \$214 million; a fuel and purchased power budget of \$533 million and a capital budget of \$163 million. Curriculum Vitae filed with GMO’s *Status Report and Notice of Witness*, EFIS Docket Entry No. 17, filed on February 11, 2009.

⁴³ *Id.*

11. When Aquila became a subsidiary of Great Plains Energy, Mr. Heidtbrink became GMO's Senior Vice President of Corporate Services, and approximately at the beginning of 2009, he became GMO's Senior Vice President of Supply.⁴⁴

12. Mr. Heidtbrink was in charge of operating the Facilities throughout the time period in which the previous CCNs granted for the Facilities were challenged and ultimately held to have been unlawfully granted.⁴⁵ Mr. Heidtbrink was in charge of operating the Facilities throughout the time period in which agreement with Cass County was reached and all other lawsuits involving the Facilities were settled.⁴⁶

13. Because of his work with GMO, as well as with GMO's predecessor Aquila, Inc. Mr. Heidtbrink is thoroughly familiar with the issues relating to the South Harper Plant and the Peculiar Substation.⁴⁷

14. No party challenged Mr. Heidtbrink's credentials or his expertise with regard to South Harper Plant and the Peculiar Substation.

15. Mr. Heidtbrink confirmed that all of the factual representations encompassed in GMO's current certificate application (filed on September 30, 2008) and in the Agreement (filed on January 9, 2009) are true and accurate.⁴⁸

16. While on the witness stand, Mr. Heidtbrink was direct, articulate, calm, composed, confident, sincere, and unwavering in his testimony.

17. The testimony provided by Mr. Heidtbrink was substantial and credible.

⁴⁴ *Id.*

⁴⁵ Transcript pp. 23-25. See also Exh. 5, *Stipulation*, pp. 2-3; *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Cass County v. Public Service Comm'n*, 259 S.W.3d 544 (Mo. App. 2008).

⁴⁶ Transcript pp. 23-35.

⁴⁷ Transcript pp. 21-44.

⁴⁸ Transcript p. 43.

18. Mr. Heidtbrink possesses and provided technical and specialized knowledge that assisted the Commission with understanding the evidence and determining the facts in issue.

19. The Commission finds that Mr. Heidtbrink is a subject matter expert with regard to the South Harper Plant and the Peculiar Substation based upon his uncontroverted education, training, knowledge, skill, and experience with operating the Facilities, and his involvement with the legal issues surrounding the Facilities.⁴⁹

C. The South Harper and Peculiar Substation Facilities

20. GMO's western Missouri service area includes the majority of Cass County, a first-class non-charter county.⁵⁰

21. The Commission previously authorized GMO's predecessors-in-interest to construct, operate, and maintain electrical facilities and to render electrical service

⁴⁹ Section 490.065 sets forth the standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings. Section 490.065 states:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

In *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), the Missouri Supreme Court held that Section 490.065 applied to administrative cases. *Id.* at 153.

⁵⁰ Exh. 5, *Stipulation and Agreement*, p. 4; Transcript p. 43.

throughout portions of Cass County to further the public convenience and necessity, pursuant to various prior Commission orders.⁵¹

22. In October 2004, GMO's predecessor-in-interest (Aquila, Inc. or "Aquila") began land clearance and site preparation on two tracts of land in Cass County; one for the construction of a peaking power production facility ("South Harper Facility") and one for construction of a related electrical transmission substation ("Peculiar Substation").⁵²

23. Construction of the South Harper Facility and the Peculiar Substation was completed during the summer of 2005, and both were placed into commercial operation and began serving Aquila's (now GMO's) customers during late June and early July of that same year.⁵³

24. The location of the South Harper Facility and the Peculiar Substation are within the service area certificated to Aquila (GMO's predecessor in interest), by the Commission in Case No. 9,470 (1938) and Case No. 11,892 (1950).⁵⁴

25. The South Harper Plant is a peaking electrical production facility that consists of three 105 megawatt ("MW") natural gas-fired combustion turbine units, located on a site designed for six such units, and an associated electric transmission substation, all located on approximately 38 acres of a 74-acre tract of land in an unincorporated area of Cass County, near the City of Peculiar at East 243rd Street and South Harper Road.⁵⁵

⁵¹ Exh. 6, *Application*, pp. 5-6; See also PSC Case Nos. 1,074, 1,449, 3,171, 5,109, 9,470 and 11,892; Transcript p. 43.

⁵² Exh. 6, *Application*, pp. 5-6; Transcript p. 43.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 9 and Appendix A. This track of land is more particularly described as "Tract A" in Appendix A to the Application, and it is generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West in the County. See also Transcript p. 43.

26. The Peculiar Substation is an electrical transmission substation located on approximately 7.5 acres of a 55-acre tract of land at the intersection of 203rd Street and Knight Road in the City of Peculiar. This tract is directly south of 203rd Street, approximately one-half mile west of U.S. 71 Highway, and is adjacent to the intersection of an existing 345 kV electrical transmission line and an existing 161 kV electrical transmission line, both owned by the Company.⁵⁶

27. The South Harper Plant is interconnected to two natural gas pipelines operated by Southern Star Central Gas Pipeline, Inc. ("Southern Star") that cross to a compressor station that is located within the original tract on which the plant is built. These two fuel lines have the necessary capacity and pressure to provide natural gas service to the South Harper Plant as built.⁵⁷

28. Panhandle Eastern Pipe Line Company ("Panhandle Eastern") operates natural gas pipelines located approximately two miles south of the tract that are also interconnected with the South Harper Plant.⁵⁸

29. The South Harper Plant has adequate transmission for the supply of fuel from either Southern Star or Panhandle Eastern, and is not dependent upon a single fuel transmission supplier.⁵⁹

30. Public Water Supply District No. 7 has a major water line located on the eastern edge of the South Harper Facility, convenient for interconnection. The process and potable water capacity required for the South Harper Facility are served by this interconnection. In

⁵⁶ Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 9 and Appendix A. This tract of land is more particularly described as "Tract B" in Appendix A to the Application, and is generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in the County. See also Transcript p. 43.

⁵⁷ Exh. 5, *Stipulation and Agreement*, p. 7; Transcript p. 43.

⁵⁸ *Id.*

⁵⁹ *Id.*

addition, sufficient water supply capacity is available from this connection to meet the fire fighting requirements that are approved by the West Peculiar Fire Protection District.

31. The South Harper Plant and Peculiar Substation are located near electrical transmission lines that existed when the Facilities were built. As part of the construction of these Facilities, a new 161 kV line was built from the South Harper Plant to the Belton South Substation allowing for the future upgrade of existing 69 kV transmission lines as load growth continues to occur in the Raymore/Peculiar area.⁶⁰

D. The Need for Electrical Service

32. Cass County is one of the fastest growing counties in the State.⁶¹

33. The two fastest growing areas in Cass County, formerly served by Aquila's Missouri operations and now served by GMO's operations, are in and around Lee's Summit and from Belton southward to Peculiar.⁶²

34. Regarding transmission needs, a 2002 study analyzed the Grandview, Belton, Harrisonville and Pleasant Hill areas of Cass County and concluded that there was a need to upgrade the 69 kV transmission system serving these areas.⁶³

35. From 2001 to 2007, the number of Aquila's (GMO's) residential customers in Cass County grew by 26.2%. Energy sales expressed as megawatt-hours ("MWh") grew by 36.3%, and usage per residential customer grew by 8.0%. The Company's total system

⁶⁰ *Id.* The existing 69 kV lines that are planned for upgrade consist of a line that runs north from the Peculiar Substation to the Belton South Substation, and a line that runs from a switch that is mid-point on the Peculiar/Belton South line near 58 Highway to the Raymore Substation to the east and then farther east to the Pleasant Hill Substation. *Id.*

⁶¹ Exh. 6, *Application*, pp. 11; Transcript p. 43. The Missouri Office of Administration has identified Cass County as one of the top five or six fastest growing counties in the State (based on percentage growth or absolute population growth, respectively) showing an aggregate population increase of 12.5% from 2000 to 2005, and projecting a 24.8% increase from 2000 to 2010. See OA News Release (Apr. 25, 2008). *Id.*

⁶² Exh. 6, *Application*, pp. 19; Transcript p. 43. Lee's Summit is partially located in Cass County and Belton and Peculiar are both situated in Cass County.

⁶³ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

demand for electricity at peak hit an all-time high of 1,967 MW in 2006, an increase of 15.8% from the previous system peak set in 2001.⁶⁴

36. Since as early as May of 2003, Aquila has presented to representatives of the Commission's Staff and Public Counsel information demonstrating the need for peaking capacity of 300 MW during regular reviews of its Integrated Resource Plan ("IRP").⁶⁵

37. Construction of the South Harper Facility is consistent with the Company's IRP, and experience has borne out the need for capacity and energy from this generating plant. Since the time the plant entered service in July 2005 through mid-August 2008, the South Harper Facility has operated for 291 days and 2,355 plant operating hours, and supplied over 429,000 MWh of energy to Aquila's customers (now GMO's customers). The South Harper Facility has operated an average of 94 days and 758 plant hours per year, including the period from late January through May 2006 when court orders precluded it from operating.⁶⁶

38. On May 31, 2005, Aquila's (GMO's predecessor-in-interest) Purchased Power Agreement ("PPA") with Calpine, Inc. ("Calpine") expired. The PPA provided for 500 MW of capacity during the summer months from Calpine's natural gas combined-cycle power plant in Pleasant Hill, Missouri, as well as 200 MW in the winter months. Dogwood now owns and operates that power plant formerly known as the "Aries" plant.⁶⁷

39. The 315 MW of capacity provided by the three CTs at the South Harper Facility serve as partial replacement for the expired 500 MW PPA which Aquila had with Calpine and to accommodate load growth. The capacity is also required to comply with Southwest

⁶⁴ Exh. 6, *Application*, pp. 11-12; Transcript p. 43.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

Power Pool, Inc. and North America Electric Reliability Corporation criteria to ensure reliable service.⁶⁸

40. The location of the Facilities is desirable because of their relative proximity to the load center of the western side of the GMO's service area, existing electrical transmission facilities and the availability of fuel from natural gas pipelines near the Project site.⁶⁹

41. South Harper Plant's three 105 MW simple-cycle natural gas-fired combustion turbines provide generating capacity and flexibility to meet the demand for electricity for GMO and its customers in GMO's Missouri service area, including Cass County.⁷⁰

E. GMO's Financial, Technical and Managerial Ability to Provide Electric Service

42. GMO and its predecessors have been authorized by the Commission to conduct business as a regulated public utility and electrical corporation in their certificated areas in Missouri.⁷¹

43. GMO and its predecessors have been engaged in providing electrical service to Cass County, Missouri since the Cass County Court granted its permission and consent in the form of a franchise to one of GMO's predecessors in January 1917.⁷²

44. GMO's predecessors financed the construction of the South Harper Facility with \$140 million of tax-advantaged revenue bonds issued under the economic development

⁶⁸ Exh. 6, *Application*, pp. 20; Transcript p. 43.

⁶⁹ Exh. 6, *Application*, pp. 11-12; Transcript p. 43.

⁷⁰ Exh. 5, *Stipulation and Agreement*, p.6; Exh. 6, *Application*, p. 10; Transcript p. 43.

⁷¹ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

⁷² *Id.*

authority of the City of Peculiar, pursuant to Article VI, Section 27(b) of Missouri's Constitution, as well as the statutory provisions of Sections 100.010 through 100.200.⁷³

45. GMO's predecessors constructed the Facilities and GMO and its predecessors have been operating the Facilities since 2005.⁷⁴

46. The Facilities are economically feasible and currently provide reliable service.⁷⁵

47. Since beginning operations in 2005, the Facilities have been operated in a safe and responsible manner.⁷⁶

48. GMO has the financial ability to own, operate, control and manage the Facilities.⁷⁷

49. GMO is qualified to own, operate, control and manage the Facilities.⁷⁸

G. Service Quality

50. The Facilities were incorporated into Southwest Power Pool's transmission expansion plan, and now provide consumers with greater access to generation resources in the region.⁷⁹

51. The Facilities improve transmission system reliability to the Cass County portion of GMO's service territory and to the local rural electric cooperative.⁸⁰

⁷³ Exh. 5, *Stipulation and Agreement*, pp. 5-6; Transcript p. 43.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Exh. 5, *Stipulation and Agreement*, pp. 4-5; Transcript p. 43.

52. The Facilities have improved the reliability of the transmission system, have improved the overall efficiency and economics of transmission operations, and provide reactive power to control voltage on the transmission network.⁸¹

53. The Peculiar Substation relieves the load on other transmission facilities in southern Kansas City, and enhances the overall operation and reliability of the transmission system in that area.⁸²

J. Local Regulatory Requirements

54. As a result of an agreement between Aquila (GMO's predecessor) and Cass County, Aquila filed a special use permit ("SUP") application for the South Harper Plant in May 2008. On July 31, 2008, the Cass County Commission voted 3-0 to approve the South Harper Plant SUP application and directed the County Zoning Officer to work with the GMO, which by that time had acquired Aquila's assets through a merger, to prepare and issue an SUP. The Zoning Officer issued an SUP in accordance with the Cass County Commission's approval and in a form acceptable to GMO on September 12, 2008.⁸³

55. With regard to the Peculiar Substation, GMO filed a Zoning Application with the City of Peculiar ("Peculiar") on September 5, 2008. At the City's request, the application was revised and re-submitted as a SUP application on November 19, 2008. Peculiar's City Planner recommended that the SUP application be approved, and the City Planning &

⁸¹ Exh. 5, *Stipulation and Agreement*, pp. 5-6; Transcript p. 43.

⁸² *Id.*

⁸³ Exh. 1, *Memorandum of Agreement*, April 21, 2008; Exh. 2, *Addendum to Memorandum of Agreement*, July 31, 2008; Exh. 3, *Special Use Permit Application*; Exh. 4, *Resolution 2009-7*, Board of Aldermen of the City of Peculiar, February 3, 2009; Exh. 5, *Stipulation and Agreement*, pp. 7-8; Exh. 6, *Application*, see in particular Appendices 1-9; Transcript pp. 24-35, 37-43.

Zoning Commission approved the SUP on January 8, 2009. Peculiar's Board of Aldermen approved the SUP application at its February 3, 2009 meeting.⁸⁴

56. All local, state and nationally required permits were obtained for construction of the Facilities including: Cass County Construction Permit; Cass County Road, Bridge and Driveway Permit; Public Water Supply District Number 7 Water Supply Agreement; West Peculiar Fire Protection District Fire Protection Agreement; Missouri Department of Natural Resources Construction and Operation Permits; National pollution discharge Elimination System ("NPDES") Land Disturbance Permit; NPDES Land Irrigation Permit; Cass County Health Department Sanitary Water/Sewage Permit.⁸⁵

57. All private claims and lawsuits relating either to the South Harper Plant or the Peculiar Substation have been resolved and settled.⁸⁶

58. There are no pending claims or lawsuits relating to the Facilities.⁸⁷

K. Ultimate Material Facts Contained Within the Agreement

59. In addition to other facts agreed upon by the Signatories to the Agreement, the Signatory Parties have stipulated to the following facts:⁸⁸

⁸⁴ *Id.*

⁸⁵ Exh. 3, *Special Use Permit Application*; Exh. 6, *Application*, see in particular Appendix 6; Transcript p. 43. In addition to the permits obtained GMO included, with its SUP Application and with the Application pending before the Commission, all supporting documentation involved with obtaining required permits and with situations in which no permits were required including: Noise Study, Residential Noise Assessment Study, Facility Lighting Plan, Facility Security Guidance Documents, West Peculiar Fire Department Equipment List, Ground Level Emissions Comparison Memorandum, Dust Control Notification, United States Army Corps of Engineers Correspondence, United State Fish and Wildlife Correspondence, Missouri Department of Conservation Correspondence, State Historic Preservation Office Correspondence, Structure Height Notification Memorandum, Federal Emergency Management Administration Flood Insurance Rate Map. Exh. 6, *Application*, see in particular Appendix 6.

⁸⁶ *Id.*

⁸⁷ Exh. 5, *Stipulation and Agreement*, p. 8; Transcript p. 43.

⁸⁸ The Signatories stipulate to these matters as being facts, but the issues encompassed by these particular stipulations involve mixed issues of fact and law. The Commission will make the legal determinations on these matters in the Conclusions of Law section of this Report and Order.

- a. GMO has the financial ability to own, operate, control and manage the Facilities;⁸⁹
- b. GMO is qualified to own, operate, control and manage the Facilities;⁹⁰
- c. the Facilities are economically feasible and currently provide reliable service;⁹¹ and,
- d. the Facilities promote the public interest by providing generation and transmission capacity available to serve the public's increasing demand for electrical power in Cass County, as well as nearby areas.⁹²

60. The Agreement does not constitute a contract with the Commission. Acceptance of the Agreement by the Commission shall not be deemed as constituting an agreement on the part of the Commission to forego the use of any discovery, investigative or other power of the Commission. Nothing in the Agreement impinges upon or restricts in any manner the exercise by the Commission of any statutory right, including the right to access information, or any statutory obligation.

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Jurisdiction, Authority, Requirement for a Hearing and Burden of Proof⁹³

1. Personal Jurisdiction

Section 386.020(15) defines "electrical corporation" as including:

⁸⁹ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

⁹⁰ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

⁹¹ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

⁹² Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 11; Transcript p. 43. The Missouri Office of Administration has identified Cass County as one of the top five or six fastest growing counties in the State (based on percentage growth or absolute population growth, respectively) showing an aggregate population increase of 12.5% from 2000 to 2005, and projecting a 24.8% increase from 2000 to 2010. See OA News Release (Apr. 25, 2008). *Id.*

⁹³ See Findings of Fact Numbers 1, 20-41 as they relate to this section.

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

Section 386.020(42) defines "public utility" as including "every . . . electrical corporation . . . as [this term is] defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

GMO is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (42), and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.⁹⁴ The Commission has personal jurisdiction over GMO pursuant to these statutes, and, by the act of entering its appearance before the Commission, GMO submitted to the personal jurisdiction of the Commission.

2. Subject Matter Jurisdiction – The Application of Section 393.170

"[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto."⁹⁵ Because the Commission is an administrative agency with limited jurisdiction, "the lawfulness of its actions depends directly on whether it has statutory power and

⁹⁴ Because GMO's application involves a request for a CCN for electric facilities, the Commission cites to its specific jurisdiction over those facilities. However, GMO is also a "heating company" and "public utility" as defined in Sections 386.020(20) and (42) respectively, and is subject to the jurisdiction, supervision, control and regulation of the Commission, and all of its powers pursuant to Section 393.290 with regard to its steam heating service.

⁹⁵ *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943); *State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

authority to act.”⁹⁶ Subject matter jurisdiction is a tribunal's statutory authority to hear a particular kind of claim.⁹⁷

GMO filed its application for a CCN pursuant to Section 393.170, which provides:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Because KCPL is requesting the grant of a CCN pursuant to Section 393.170, which confers the power to grant that certificate to the Commission, the Commission has subject matter jurisdiction. No party disputes the Commission’s subject matter jurisdiction over this matter.

3. Commission Authority – The Application of Section 393.171

As the Court of Appeals described in *State ex rel. Cass County v. Public Service*

⁹⁶ *State ex rel. Gulf Transp. Co. v. Public Serv. Comm'n*, 658 S.W.2d 448, 452 (Mo. App. 1983).

⁹⁷ *In re Expungement of Arrest Records Related to Brown v. State*, 226 S.W.3d 147, 150 (Mo. banc 2007); *Burton v. Swann*, 258 S.W.3d 563, 567 (Mo. App. 2008).

Com'n.,⁹⁸ the permission and approval that may be granted pursuant to section 393.170 is of two types:

The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a “line certificate.” See 4 CSR 240-3.105(1)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170. Permission to exercise a franchise by serving customers is generally granted in the form of an “area certificate.” See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170. (Internal citations omitted).⁹⁹

The clear language of Section 393.170 grants the Commission approval authority only if that authority is exercised prior to start of construction.¹⁰⁰ However, Section 393.171, RSMo Supp. 2008, which became effective on August 28, 2008, provides:

1. The commission shall have the authority to grant the permission and approval specified in section 393.170 after the construction or acquisition of any electric plant located in a first class county without a charter form of government has been completed if the commission determines that the grant of such permission and approval is necessary or convenient for the public service. Any such permission and approval shall, for all purposes, have the same effect as the permission and approval granted prior to such construction or acquisition. This subsection is enacted to clarify and specify the law in existence at all times since the original enactment of section 393.170.

2. No permission or approval granted for an electric plant by the commission under subsection 1 of this section, nor any special use permit issued for any such electric plant by the governing body of the county in which the electric plant is located, shall extinguish, render moot, or mitigate any suit or claim pending or otherwise allowable by law by any landowner or other legal entity

⁹⁸ 259 S.W.3d 544 (Mo. App. 2008).

⁹⁹ *State ex rel. Cass County v. Public Serv. Comm'n.* 259 S.W.3d 544, 548-549 (Mo. App. 2008).

¹⁰⁰ *Id.* It should be noted that in *State ex rel. Cass County v. Public Serv. Comm'n.* the Court of Appeals did not hold that the Commission lacked subject matter jurisdiction pursuant to Section 393.170 when reversing the grant of the CCN to Aquila, Inc., but rather that it lacked authority pursuant to that section to grant a post-construction CCN. *Id.* at 550.

for monetary damages allegedly caused by the operation or existence of such electric plant. Expenses incurred by an electrical corporation in association with the payment of any such damages shall not be recoverable, in any form at any time, from the ratepayers of any such electrical corporation.

3. The commission's authority under subsection 1 of this section shall expire on August 28, 2009.

Cass County, where the facilities in question are located, is a first class county without a charter form of government. Consequently, the Commission has the authority to grant GMO a post-construction CCN for the South Harper power plant and the Peculiar substation, which are located in Cass County. No party disputes the Commission's authority to grant the requested CCN.

4. Requirement for a Hearing

Section 393.170.3 directs that any determination to grant a CCN shall follow a "due hearing."¹⁰¹ The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues between adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'.¹⁰² (Emphasis added.) The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence.¹⁰³

The Commission met its requirement for the hearing contemplated by Section 393.170 when it issued notice, allowed interested entities to intervene, and allowed an opportunity for any party to be heard on any identified issue in this matter. No party

¹⁰¹ Section 393.170.3; *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Serv. Comm'n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989).

¹⁰² *Id.*; See also 39A C.J.S. Hear, p. 632, et seq.

¹⁰³ *Id.*

requested an evidentiary hearing or trial-type contested proceeding when given the opportunity. However, the Commission further ensured this statutory mandate was satisfied and provided additional process by convening an on-the-record presentation to allow all parties an opportunity to present their Agreement and address any questions the Commission had with regard to that Agreement.

5. Burden of Proof – Preponderance of the Evidence Standard

As petitioner, GMO has the burden of proving that CCNs for the Facilities are necessary or convenient for the public service. To carry its burden, GMO must meet the preponderance of the evidence standard.¹⁰⁴ And in order to meet this standard, GMO must convince the Commission it is “more likely than not” that the grant of the CCN is necessary or convenient for the public service.¹⁰⁵

¹⁰⁴ “The general standard of proof for civil cases is preponderance of the evidence.” *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007). See *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003) (stating that the burden of proof in “ordinary civil cases” is “preponderance of the evidence”). See also *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979). The function of the standard of proof is to “allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Id.*

¹⁰⁵ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992). Preponderance is the minimum standard in civil disputes. *Rodriguez*, 936 S.W.2d at 109-111, citing to, *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982). The burden of proof has two parts: the burden of production and the burden of persuasion. The burden of production requires GMO to introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against GMO in a peremptory ruling such as a summary determination or a determination on the pleadings. *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001); *State v. Ramires*, 152 S.W.3d 385, 395 (Mo. App. 2004). The burden of persuasion requires GMO to convince the Commission to favor its position, *Id.* and this burden always remains with GMO. *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005); *R.T. French Co. v. Springfield Mayor's Comm'n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

B. Commission Standards for Approval of the Grant of a Certificate

1. Statutory Standards

Section 393.170 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."¹⁰⁶ The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"¹⁰⁷ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.¹⁰⁸ It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.¹⁰⁹

2. The “Intercon” or “Tartan” Factors

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide electric service, and while Section 386.171 extends that authority to facilities that are already constructed, neither statute provides guidance as to any specific criteria that must be satisfied prior to the grant of such certificates. Moreover,

¹⁰⁶ Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Serv. Comm'n*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

¹⁰⁷ *Id.*; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

¹⁰⁸ *Id.* *Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

¹⁰⁹ *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra*, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

The Commission has articulated the filing requirements for electric utility CCNs in Commission Rule 4 CSR 240-3.105, and the specific criteria to be used when evaluating applications of electric utility CCNs are more clearly set out in the case *In Re Empire District Electric Company*, 2000 WL 228658 (Mo. P.S.C.).¹¹⁰ Those criteria are commonly referred to as the “*Intercon*”¹¹¹ or “*Tartan*”¹¹² factors because of the prior cases articulating them, and they are as follows: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.¹¹³

3. Public Interest Defined

Evaluating part five of the *Intercon* factors necessarily requires determining what constitutes the “public interest.” “The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law,

¹¹⁰ See Report and Order issued December 7, 1999, Effective December 17, 1999. Also cited as *In The Matter of the Application of the Empire District Electric Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain an Electric Transmission and Distribution System to Provide Electric Service in an Area in Greene County, Missouri*, Case No. EA-99-172. See also *In re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991).

¹¹¹ *In re. Tartan Energy Company*, 3 Mo. P.S.C.173 (1994).

¹¹² *In re. Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554 (1991).

¹¹³ *Id.* See also Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 177 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.); Report and Order, *In re Missouri Gas Energy, a Division of Southern Union Company*, Case No. GA-2007-0289, 2008 WL 506279 (Mo. P.S.C.).

as to what they themselves believe to be the demands or interests of the public.”¹¹⁴ “[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.”¹¹⁵ The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities.¹¹⁶ The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission’s authority.

The public interest is a matter of policy to be determined by the Commission.¹¹⁷ It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.¹¹⁸ Determining what is in the interest of the public is a balancing process.¹¹⁹ In making such a determination, the total interests of the public served must be assessed.¹²⁰ This means that some of the public may suffer adverse consequences for the total public interest.¹²¹ Individual rights are subservient to the rights

¹¹⁴ *In re Rahn’s Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (Mo. 1926).

¹¹⁵ *Morrhead v. Railways Co.*, Mo. 121 165, 96 S.W. 261, 271 (Mo. banc 1907).

¹¹⁶ *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

¹¹⁷ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

¹¹⁸ *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

¹¹⁹ *In the Matter of Sho-Me Power Electric Cooperative’s Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993 , 1993 WL 719871 (Mo. P.S.C.).

¹²⁰ *Id.*

¹²¹ *Id.*

of the public.¹²² The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

C. Application of the Statutory Standards and *Intercon* or *Tartan* Factors¹²³

1. The Need for Electric Service

The undisputed facts demonstrate that the location for the Facilities was selected because of the rapid growth occurring in Cass County and the increase in demand for electricity in this portion of GMO’s service area. Moreover, this need for capacity and energy from the Facilities was borne out after the Facilities were put into operation. In addition to increased demands for generation, there was a need to upgrade the 69 kV transmission system serving the Grandview, Belton, Harrisonville and Pleasant Hill areas in Cass County.

No party contested the need for the electric service in this portion of GMO’s service area, and there is no controverting evidence in the record to weigh against the conclusion that the service provided by these Facilities is needed to serve the public. The Signatories to the Agreement affirmatively stated that the Facilities are necessary and convenient for the public service. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the electric service provided by GMO’s Facilities is needed.

2. GMO’s Financial, Technical and Managerial Ability to Provide Electric Service

The undisputed facts demonstrate that GMO has the financial, technical and

¹²² *State ex rel. Mo. Pac. Freight Transport Co. v. Public Serv. Comm’n*, 288 S.W.2d 679, 682 (Mo. App. 1956).

¹²³ See Findings of Fact Numbers 20-52 as they relate to this section.

managerial ability to provide electric service in this portion of GMO's service area. GMO, and its predecessors-in-interest, have been engaged in providing electrical service to Cass County, Missouri, since 1917. The Facilities have been serving the demands of GMO's customers since 2005, and the Facilities have been operated safely and responsibly to provide reliable service to GMO's customers.

The selection of the site for the Facilities ensured adequate sources of fuel transmission and supply to the Facilities and allowed for effective transmission of the generated power, as well as for future upgrading of the transmission lines. The site also made for easy access to the process and potable water capacity required for the Facilities.

No party contested GMO's financial, technical and managerial ability to provide electric service, and there is no controverting evidence in the record to weigh against the conclusion that GMO has the financial, technical and managerial ability to provide electric service by use of the Facilities. The Signatories to the Agreement affirmatively stated that GMO has the financial, technical and managerial ability to provide electric service by use of the Facilities. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that GMO has the financial, technical and managerial ability to provide this electric service.

3. Economic Feasibility

The undisputed facts demonstrate that GMO's predecessors financed the construction of the South Harper Facility with \$140 million of tax-advantaged revenue bonds issued under the economic development authority of the City of Peculiar. The Facilities provide sufficient additional service to justify their cost, and the inconvenience of GMO not having them is sufficient to arise to the level of them being necessities. Furthermore, no party has adduced any evidence that the Facilities were not economically

feasible for GMO's operations. The Signatories to the Agreement affirmatively stated that the Facilities are economically feasible and currently provide reliable service. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the Facilities are economically feasible.

4. Service Quality

The undisputed facts demonstrate that the Facilities were incorporated into Southwest Power Pool's transmission expansion plan, and now provide consumers with greater access to generation resources in the region. Additionally, the Facilities relieve the load on other transmission facilities in southern Kansas City and enhance the overall operation and reliability of the transmission system in that area.

No party has contested the enhanced service quality that resulted from the addition of these Facilities and no controverting evidence exists in this record to weigh against the conclusion that the Facilities have improved service quality and reliability for GMO's customers and have improved the overall efficiency and economics of GMO's transmission operations. The Signatories to the Agreement stipulated to these facts and affirmatively stated that the Facilities are necessary and convenient for the public service and in the public interest. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the Facilities enhance the overall operation and reliability of the transmission system in southern Kansas City.

5. The Public Interest

The undisputed facts demonstrate that the South Harper Plant and the Peculiar Substation are each improvements that provide sufficient additional service to justify their cost, and GMO's and their customers' inconvenience of not having them is sufficient to arise to the level of them being necessities. GMO needs the 315 MW of generation

capacity at the South Harper Plant (three 105 MW units) to provide reliable service to its native load customers. The Facilities have improved the reliability of the transmission system, have improved the overall efficiency and economics of transmission operations, and today provide reactive power to control voltage on the transmission network. And as previously noted, the Signatories to the Agreement affirmatively stated that the Facilities are necessary and convenient for the public service and in the public interest. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that granting GMO certificates of convenience and necessity for the Facilities is in the public interest. GMO has met its burden by the preponderance of the evidence that the grant of CCNs for these Facilities is in the public interest.

D. Local Regulatory Requirements¹²⁴

The substantial and competent evidence on the record as a whole demonstrates that: (1) GMO has acquired all necessary local, state and national permits for construction of the Facilities, and (2) all required local zoning permits for construction, maintenance and operation of the Facilities. Additionally, the record confirms that all private claims and lawsuits relating either to the South Harper Plant or the Peculiar Substation have been resolved or settled.

E. Requested Waiver of 4 CSR 240-3.105(1)(B)2

GMO requests a waiver from the requirement of Commission Rule 4 CSR 240-3.105(1)(B)2, that it submit a study containing the plans and specifications for the Project and the estimated cost of construction. In its Application, GMO represented that it was prepared to make these materials available to the Commission, and any party to this matter, at a mutually agreeable location as those materials are extremely voluminous and

¹²⁴ See Findings of Fact Numbers 53-57 as they relate to this section.

burdensome to reproduce or electronically submit on the Commission's Electronic Filing & Information System ("EFIS"). GMO also claims waiver of this requirement is particularly appropriate since the actual construction costs of the South Harper Facility and Peculiar Substation are known.¹²⁵ Moreover, the Signatories to the Agreement affirmatively stated that because the Facilities are already constructed, GMO should be granted a variance from the requirement of 4 CSR-240-3.105(1)(B)(2).¹²⁶

The Commission concludes that the substantial and competent evidence in the record establishes good cause for granting a waiver of Commission Rule 4 CSR-240-3.105(1)(B)(2).¹²⁷ Good cause exists because the actual costs of constructing the Facilities, and the methods employed to finance the construction, are already known. The Facilities have already been constructed and are in operation.

F. Contingent Terms of the Stipulation and Agreement

In addition to stipulating to many facts regarding GMO's request and agreeing that the Facilities at issue are necessary and convenient for the public service and in the public interest, the Signatories to the Agreement have agreed to be bound by certain conditions in the event the Commission accepts the specific terms of the Agreement. For example, if approved and adopted by the Commission, except as specified within the Agreement, the Signatories shall not be prejudiced, bound by, or in any way affected by the terms of the Agreement: (i) in any future proceeding; (ii) in any proceeding currently pending under a separate docket; or (iii) in this proceeding should the Commission decide not to approve

¹²⁵ Exh. 6, *Application*, p. 10.

¹²⁶ Exh. 5, *Stipulation and Agreement*, p. 9; Transcript p. 43.

¹²⁷ Commission Rule 4 CSR 240-2.015.

this Agreement or in any way condition its approval of the Agreement.¹²⁸ Additionally, if approved and adopted by the Commission, the Agreement shall constitute a binding agreement among the Signatories who shall cooperate in defending the validity and enforceability of the Agreement and the operation of the Agreement according to its terms.¹²⁹ The provisions of the Agreement are interdependent. In the event that the Commission does not approve and adopt the terms of the Agreement in total, or approves the Agreement with modifications or conditions that a Signatory objects to, it shall be void and no Signatory shall be bound, prejudiced, or in any way affected by any of the agreements or its provisions.¹³⁰

The Signatories also agreed that by entering the Agreement none of them shall be deemed to have approved or acquiesced in any question of Commission authority, accounting authority order principle, cost of capital methodology, capital structure, decommissioning methodology, ratemaking principle, valuation methodology, cost of service methodology or determination, depreciation principle or method, rate design methodology, jurisdictional allocation methodology, cost allocation, cost recovery, or question of prudence that may underlie this Agreement or for which provision is made in this Agreement.¹³¹ Further, if the Commission approves the Agreement without modification or condition, the Signatories agree to waive their respective rights to call, examine and cross-examine witnesses, pursuant to Section 536.070(2); their respective rights to present oral argument and written briefs pursuant to Section 536.080.1; their respective rights to seek rehearing, pursuant to Section 386.500; and their respective rights to judicial review

¹²⁸ Exh. 5, *Stipulation and Agreement*, p. 10-12.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

pursuant to Section 386.510.¹³² The Signatories also agreed that this waiver applies only to a Commission Report and Order respecting this Agreement issued in this proceeding, and does not apply to any matters raised in any subsequent Commission proceeding, or any matters not explicitly addressed by this Agreement.¹³³

The Commission concludes that none of these provisions to the Agreement are contrary to any statute or rule, or in any way violative of the public interest.

G. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.¹³⁴ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.¹³⁵

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.¹³⁶ “Courts are not concerned with alleged

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

¹³⁵ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

¹³⁶ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172-173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”¹³⁷ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.¹³⁸ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”¹³⁹

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions of all of the parties, the stipulated facts and all of the specific terms of the Agreement filed by the Signatories on January 9, 2009. Failure to specifically address a stipulated or undisputed fact or a specific position of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not

¹³⁷ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

¹³⁸ *Id.*

¹³⁹ *State ex rel. Gulf Transport Co. v. Public Serv. Comm'n*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Serv. Comm'n*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Serv. Comm'n*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); Sections 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

GMO has met its burden of proof, by a preponderance of the evidence, that granting CCNs for the Facilities is required by the public convenience and necessity. With demand increasing in GMO's Missouri service area, including Cass County, and the need for year-around peaking capability, the South Harper Facility's three 105 MW simple-cycle CTs provide greater flexibility to meet the needs of the GMO's customers. Granting GMO's Application is in the public interest because the electrical power generated by the South Harper Facility will be rate-based capacity available to serve the increasing demand for electrical power GMO's customers,¹⁴⁰ and the Facilities improve the reliability of GMO's transmission system, improve the overall efficiency and economics of GMO's transmission operations, and provide reactive power to control voltage on the transmission network.

Indeed, all of the Signatories to the Agreement expressly agree that: (a) the exercise by GMO of the rights, privileges and franchises set forth in the Application with regard to the Facilities are necessary and convenient for the public service, and in the public interest; (b) the Commission should grant GMO permission and approval to construct, install, own, operate, maintain, and otherwise control and manage the Facilities; and (c) pursuant to Sections 393.170 and 393.171, the Commission should issue GMO certificates of convenience and necessity regarding the Facilities.¹⁴¹ Consequently, the Commission shall approve the Agreement filed by the parties and grant GMO CCNs for the Facilities.

¹⁴⁰ The Commission has stated its preference for company-owned generation instead of heavy reliance on Purchase Power Agreements to meet Missouri load requirements and to protect Missouri customers. See *In re Ameren Generating Co.*, 108 FERC ¶ 61,081 at 61,405, Order 473 at Para. 27 (July 29, 2004).

¹⁴¹ Exh. 5, *Stipulation and Agreement*, p. 8; Transcript p. 43.

THE COMMISSION ORDERS THAT:

1. The unopposed Non-Unanimous Stipulation and Agreement filed on January 9, 2009, is hereby approved and adopted as a resolution of all factual issues in this case. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Attachment A.

2. The Signatory Parties to the Stipulation and Agreement are ordered to comply with the terms of the Non-Unanimous Stipulation and Agreement.

3. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a certificate of public convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage electrical power production and related facilities at the South Harper Facility consisting of three 105 MW natural gas-fired combustion turbines and an associated transmission substation, as well as all facilities, structures, fixtures, transformers, breakers, installations, and equipment related thereto now existing or to be constructed for the production and transmission of electrical power and energy at the following described location in Cass County, Missouri:

The Southeast Quarter (SE 1/4) of the Southeast Quarter (SE 1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32) containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road.

4. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a certificate of public convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage the Peculiar Substation together with any and all other facilities, structures, fixtures, equipment and installations

related thereto, now existing or to be constructed for the transmission of electrical power and energy at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW 1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW ¼ a distance of 2,508.18 feet more or less to the South line of said NW ¼; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

5. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.

6. Nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions or facilities herein involved. This order has no ratemaking effect.

7. This order does not limit any Signatory to the Non-Unanimous Stipulation and Agreement from asserting in a case where KCP&L Greater Missouri Operations Company's rates are at issue that KCP&L Greater Missouri Operations Company should have constructed one or more additional generating units at the South Harper Plant, or that Dogwood Energy, L.L.C.'s plant remains available as a source of generating capacity for KCP&L Greater Missouri Operations Company.

8. This order, approving the unopposed Non-Unanimous Stipulation and Agreement filed on January 9, 2009, shall not be interpreted or construed in this or any other proceeding, administrative or judicial, as an amendment, alteration, modification or waiver of any of the terms, conditions, provisions, rights, obligations and duties set forth in the

Memorandum of Agreement entered into on April 21, 2008, as amended, by and between Cass County and the Company.

9. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

10. This Report and Order shall become effective on March 28, 2009.

11. This case shall be closed on March 29, 2009.

BY THE COMMISSION



**Colleen M. Dale
Secretary**

(S E A L)

Clayton, Chm., Murray, Davis, Jarrett
and Gunn, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 18th day of March, 2009.