BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service.	))))	**File No. ER-2010-0356**

STAFF'S RESPONSE TO KCP&L GREATER MISSOURI OPERATIONS COMPANY'S OPPOSITION TO STAFF'S MOTION IN LIMINE REGARDING DSM PROGRAMS COST RECOVERY

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and states the following to the Commission for its response to KCP&L Greater Missouri Operations Company's (GMO or Company) opposition to the Staff's November 24, 2010, *Motion in Limine Regarding DSM Programs Cost Recovery* (*Motion in Limine*):

> Commission Rule 4 CSR 240-2.130 (7) provides in part:
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> > For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows: (A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's *entire case-in-chief*; (B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case…. (D) Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.

(emphasis added). Pursuant to rule, parties prefile rate case testimony with the Commission prior to an evidentiary hearing on the issues. 4 CSR 240-2.130. In limine is defined as "in or at near the beginning," and such a motion is designed to accomplish *at the beginning of litigation* some purpose which may be known only by reference to its' content. *Rhodes v. Blair*, 919 S.W.2d 561, 563 (Mo. App. 1999) (emphasis added). A motion in limine is proper even where there is no jury. *See Hemsath v. City of O'Fallon,* 261 S.W.3d 1 (Mo App. 2008) (motion in

limine used in a bench trial). The Commission has characterized a motion in limine as a procedural device "which is properly used to exclude tainted or prejudicial evidence." *See In re Lake Region Water & Sewer Co.*, Case No. SR-2010-0110, Order Regarding Staff's Motion in Limine at 3 (Mar. 24, 2010). Parties have used such motions in practice before the Commission to move for the exclusion of certain testimony. *See e.g. Ag Processing, Inc. v. KCPL Greater Missouri Operations Company*, File No. HC-2010-0235, Order Shortening Time for Response (October 29, 2010) (motion to strike interpreted by Commission as motion in limine).

Staff's *Motion in Limine* is an appropriate procedural device to prevent GMO's prejudicial testimony from entering the record for consideration by the Commission. A prehearing motion is the best way to address the irrelevant testimony as parties prefile rate case testimony before the Commission. The Company's direct filed testimony on Demand Side Management (DSM) "X. Missouri Energy Efficiency Investment Act of 2009" states in part:

> ….The Company has not taken any action in this filing beyond what is currently in place and was established in the Regulatory Plan. KCP&L [GMO] hopes that rules will become effective in sufficient time prior to the conclusion of this case and will become part of the outcome in this proceeding….The Company *hopes* that the Commission changes the current method used to recover the costs of implementing these DSM programs.

Direct Testimony of Tim M. Rush, page 23, lines 17 through 20, and page 28, lines 4 through 6. (emphasis added). While the Company's statement that it "hopes" the Commission will change the current cost recovery method, the Company leaves the other parties without a clear and perceptible proposal to address in testimony. Without objecting to the Company's position, the Commission may rely on it for its decision.

The Staff readily agrees with GMO's contention that the Commission is an "experienced, sophisticated, and knowledgeable" body of fact-finders. That was never at issue; prejudicial testimony remains just that, even before a body of educated fact-finders. Any party wishing to

rebut the Company's "hope" is left to waste valuable time and resources in preparing prefiled or live testimony that can only speculate possible cost recovery methods. The Commission expects "….the majority of the "evidence" in Commission cases, especially in relation to expert and technical evidence, to be fully developed at an evidentiary hearing." *In re Lake Region* at 2.

Most telling is the fact that in *Ag Processing, Inc. v. KCPL Greater Missouri Operations Company*, cited above, GMO never challenged as an improper tool Ag Processing, Inc.'s use of a motion in limine (as interpreted by the Commission) to exclude prefiled evidence of GMO's witness. The Staff's *Motion in Limine* states that because GMO is not requesting a change in its current method for recovery of DSM programs, the identified portions of the Company's prefiled direct testimony and schedules are irrelevant to the rate case, and therefore, the Commission should find the testimony inadmissible. The Company uses arguments such as the lack of a jury or the Staff's timing to argue that the motion is an improper procedural tool. The Court in *Rhodes* and *Hemsath* find otherwise. In this case, GMO's response never addressed the identified testimony's relevancy, and as such, provided no basis for the Commission to deny the Staff's *Motion in Limine*.

The Staff's *Motion in Limine* does not "choke off" any claim made by GMO. GMO has not requested a change in its cost recovery mechanisms for its committed DSM programs under its resource plans. As such, there is nothing for the Staff to "choke." The Company argues that it is unfair to limit testimony on the cost recovery issue because it does not know if another party will raise the issue. However, the Company fails to point out an important factor; the Company's testimony on DSM was specific to recovery mechanisms proposed under any Commission specific rules for the Missouri Energy Efficiency and Investment Act of 2009 (MEEIA).

Based on the Commission's October 5, 2010, transmittal of proposed rules[1] and the rulemaking hearing[2] on the proposed rules set for December 20, 2010, it is unlikely the Commission's DSM program cost recovery rules will become effective prior to the submission of this case for the Commission's decision. The opportunity for the filing of direct and rebuttal testimony has passed. The procedural schedule in this case has surrebuttal testimony due on January 12, 2011. Using this time table, any Company proposal for a different cost recovery method pursuant to MEEIA rules will occur well beyond the rounds of filed testimony, after the evidentiary hearing that is set to begin on February 14, 2011, and only shortly prior to the operation of law date on the Company's proposed tariffs. If the Commission's Report and Order for this case allowed a different method than that asserted or explained as part of GMO's case in chief, such change would violate Commission rule and the requirement of due process.

The language of MEEIA allows GMO to propose a different method of recovery regardless of whether specific Commission rules are in place. However, GMO choose not to in this rate case. As such, the Staff's *Motion in Limine* requests that the Commission issue an order that finds the identified portions of Mr. Rush's pre-filed direct testimony irrelevant and inadmissible as evidence in this case.

WHEREFORE, the Staff requests that the Commission issue an order granting the *Staff's Motion in Limine Regarding DSM Programs Cost Recovery*.

Respectfully submitted,

/s/ Jennifer Hernandez
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[1] 4 CSR 240-3.163, 4 CSR 240-3.164, 4 CSR 240-20.093 and 4 CSR 240-20-094
[2] File No. EX-2010-0368

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing have been mailed U.S. first class mail, postage prepaid, emailed, sent by facsimile or hand-delivered to all counsel/parties of record as kept on the Commission's EFIS service list this 16th day of December, 2010.

/s/ Jennifer Hernandez