

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

In the Matter of the Application of Kansas City	)	
Power & Light Company for Approval to Make	)	Case No. ER-2007-0291
Certain Changes in its Charges for Electric	)	
Service to Implement its Regulatory Plan	)	

**KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE  
TO MOTION FOR RECUSAL OF COMMISSIONER APPLING**

Applicant Kansas City Power & Light Company ("KCPL" or "Company") states the following for its response to the Motion for Recusal of Commissioner Appling filed by the Office of the Public Counsel ("OPC"):

OPC requests that Commissioner Linward Appling recuse himself from further participation in this case based upon its belief that the October 1, 2007 transcript reveals a prohibited ex parte discussion between Commissioner Appling and KCPL's Vice President of Regulatory Affairs, Chris B. Giles. OPC asserts that this communication suggested that the Commissioner could not be impartial and that his recusal is warranted to avoid the appearance of impropriety.

However, as the attached Affidavit of Mr. Giles states, no discussion relating to this case took place between Commissioner Appling and him. See Ex. A, Affidavit of Chris B. Giles. What the conversation of April 13, 2007 at the Iatan Generating Station pertained to, among other things, was the return on equity ("ROE") granted to KCPL by the Commission in the last rate proceeding, Case No. ER-2006-0314.<sup>1</sup> OPC's argument fails to acknowledge the unclear reference point in the transcript when Commissioner Appling referred to the fact that "[y]ou and

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<sup>1</sup> The Commission closed this case on January 19, 2007. It is now on appeal through the writ of review process, awaiting a decision by Judge Beetem, who is presiding over the three consolidated actions. State ex rel. Office of the Public Counsel, No. 07AC-CC00131 (Cir. Ct. Cole Co., Mo.).

I talked a lot about this when I visited the plant up there ....” See Transcript at 101, lines 9-10 (emphasis added).

The question whether “this” referred to the 2006 closed case or the pending case has been answered by Mr. Giles. Because their discussion related to KCPL’s previous rate case and was not an improper ex parte communication, recusal is not required by the Commission’s Rule 4 CSR 240-4.020, by the Code of Judicial Conduct found in Supreme Court Rule 2, or by Missouri case law.

## **I. Legal Standard**

KCPL understands OPC’s concern for the public confidence in the impartiality of the Commission. However, KCPL does not believe that the facts submitted by OPC show bias or prejudice, or even the appearance of impartiality on the part of Commissioner Appling.

Under Missouri law, “the test for recusal when the judge’s impartiality is questioned is ‘whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.’” Moore v. Moore, 134 S.W.3d 110, 115 (Mo. App. S.D. 2004)(emphasis added). It is, therefore, a factual analysis that must occur to determine whether recusal is necessary under the guidance provided by the case law and the Canons contained in Supreme Court Rule 2.03.

A presumption exists that administrative decision makers act honestly and impartially, and a party challenging the partiality of the decision maker has the burden to overcome that presumption. AG Processing Inc. v. Thompson, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003). Moreover, a commissioner or a judge “has an affirmative duty not to disqualify himself unnecessarily.” Helton Constr. Co. v. Thrift, 865 S.W.2d 419, 422 (Mo. App. S.D. 1993).

## II. Discussion

The transcript passage cited by OPC shows that at the October 1, 2007 hearing Commissioner Appling spoke about both the ROE ordered by the Commission in KCPL's last case and the ROE requested in KCPL's current case in his questioning of Mr. Giles. The Commissioner's statement which triggered OPC's motion was: "You and I talked a lot about this when I visited the plant up there three or four months ago." See Transcript at 101, lines 9-10 (emphasis added).

There are two possible predicates for "this." The first is found in the Commissioner's question, "Last year, we gave you 11.25, correct?" -- to which Mr. Giles responded: "Correct." See Transcript at 100, line 25 to 101, line 1. The second possibility is contained in lines 2-4 on page 101:

"Q. And that's what you're asking for again this year?

"A. Correct."

Commissioner Appling then continued:

"Q. Is that going -- is that going to do what you need to do? Is that going give you what you need for this next year? ...

"Q. You and I talked a lot about this when I visited the plant up there three or four months ago. We walked the whole thing, and we talked about a lot of things. What I'm trying to get in my own mind, what did you --- what did you find there, you know?" See Transcript at 101, lines 9-13 (emphasis added).

The point of reference for "this" is simply unclear and does not provide the factual basis necessary for recusal. OPC's concluding paragraph admits as much when it says "the conversation about return on equity took place," presuming that the conversation about ROE related to the pending case, not the 2006 case. See OPC Motion for Recusal at 10. Similarly, in footnote 3, OPC jumps to the conclusion that the transcript showed that Commissioner Appling

and Mr. Giles talked about return on equity “during the pendency of this case.” Id. at 4, n.3. However, it is equally plausible that the Commissioner was referring to the 2006 case.

Discussions about the ROE established in the last case are not prohibited under the Commission’s rules because ex parte communications do not apply to a matter that is no longer pending. See 4 CSR 240-4.020 (“Conduct During Proceedings”). Because the transcript passages cited by OPC do not provide the necessary factual basis to support its motion for recusal, OPC has not met its burden of proof.

In the cases involving ex parte contacts cited by OPC, the existence of the contact was not in dispute. In Hall v. Jennings School District, 133 S.W.3d 112, 114 (Mo. App. E.D. 2004), it was clear that the “District’s Superintendent had, in fact, engaged in ex parte conversations with the Board and participated in its deliberations with regard to” the teacher’s case.

Similarly in Moore v. Moore, 134 S.W.3d 110, 112 (Mo. App. S.D. 2004), a family court commissioner presiding over a child custody dispute had received a report detailing hotline calls, family assessments and other information from the an assistant to the Greene County Juvenile Officer. The commissioner’s finding and recommendation on custody was made before any of the parties had an opportunity to be heard on the issue. Id. at 114. The Court of Appeals concluded that the “report was clearly an ex parte communication made to Commissioner Davis, outside the presence of the parties, that obviously influenced Commissioner Davis’s findings and recommendations on temporary custody.” Id. at 115.

In contrast to these cases, Commissioner Appling’s conversation with Mr. Giles appears to have been entirely proper, even if deemed to be an ex parte communication, because it related to the exercise of his general supervisory or administrative duties as a member of the Public Service Commission, which is charged with overseeing the activities of the regulated companies under its jurisdiction. See § 393.140, Mo. Rev. Stat. (2000). In McPherson v. U.S. Physicians

Mutual Risk Retention Group, 99 S.W.3d 462, 489 (Mo. App. W.D. 2003), the Court of Appeals declared: “ ... A judge’s ex parte communication occasioned by a related judicial function -- for example, the judge’s exercise of her administrative duties -- is generally not deemed to provide a cognizable ground for judicial disqualification[.]” In a concurring opinion, Judge Smart noted that “it must be remembered that receivership judges routinely engage in exclusive communications with receivers and their deputies.” Id. at 493. This is also true for members of the Public Service Commission who continuously communicate with officials of the companies they regulate.

Here, OPC’s motion is based on a few lines from the hearing transcript which are unclear as to their meaning. The affidavit of Mr. Giles makes clear from KCPL’s perspective that no discussion of the current rate case ever occurred between him and Commissioner Appling.

Canon 3(B)(7) of Supreme Court Rule 203 states that a judge “shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding ... [emphasis added].” Because the Giles Affidavit shows that the current rate case was not discussed with Commissioner Appling, the conversation described in the October 1 transcript is not a prohibited ex parte communication and is not a basis for recusal.

Finally, it must be recognized that the April 13, 2007 meeting between Commissioner Appling, Mr. Wood, Mr. Giles and others was disclosed over six weeks ago on August 14 in response to data requests submitted by one of the parties to this case. See Ex. B, Response to Praxair, Inc. Data Request 2007-0731, Question No. 3. Plainly, there was no intent by KCPL to hide the fact of the Commissioner’s meeting with KCPL.

### III. Conclusion

KCPL does not believe that an ex parte communication between Commissioner Appling and Mr. Giles took place because the conversation did not concern a pending Commission proceeding.

However, Missouri courts have held that when the record reflects facts indicating potentially improper extra-judicial communications, the judge should err on the side of caution and “make a statement on the record as to the pertinent facts showing no objectively reasonable concern as to bias.” Sewell-Davis v. Franklin, 174 S.W. 3d 58, 63 (Mo. App. W.D. 2005).

Although KCPL does not believe that the record supports recusal, a statement by Commissioner Appling that places the pertinent facts on the record of this case would be appropriate.

Respectfully submitted,

/s/Karl Zobrist

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Attorneys for Kansas City Power & Light Co.

**CERTIFICATE OF SERVICE**

I do hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 9th day of October, 2007.

/s/Karl Zobrist  
Attorney for Kansas City Power & Light Co.

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OF THE STATE OF MISSOURI**

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<b>City Power and Light Company for</b>	)	
<b>Approval to Make Certain Changes in its</b>	)	<b>Case No. ER-2007-0291</b>
<b>Charges for Electric Service to Implement</b>	)	
<b>Its Regulatory Plan.</b>	)	

**AFFIDAVIT OF CHRIS B. GILES**

STATE OF MISSOURI     )  
                                      )  
COUNTY OF JACKSON    )

Chris B. Giles, being first duly sworn on his oath, states:

1. My name is Chris B. Giles. I am employed by Kansas City Power & Light Company ("KCPL") as Vice President, Regulatory Affairs.

2. This Affidavit responds to the factual allegations contained in the Office of the Public Counsel's Motion for Recusal of Commissioner Appling filed in this case on October 5, 2007.

3. Commissioner Appling's questions to me during the October 1 hearing in this case indicated that he and I had a conversation earlier this year when he toured KCPL's Iatan Generating Station in Platte County, Missouri. This tour occurred on April 13, 2007. Other persons present during the tour were Tom Mackin, Iatan 1 plant manager; Brent Davis, construction director for Iatan 2; Sheryl Gregory, Commissioner Appling's Assistant; and Warren Wood, then Director of the Utility Operations Division, Missouri Public Service Commission. At no time did Commissioner Appling and I have any discussion concerning any of the requests that KCPL is making in this case. Our only conversation concerning rate of

EXHIBIT A



return pertained to KCPL's last rate case, No. ER-2006-0314, that was heard in 2006. To the extent that Commissioner Appling's comments at the October 1 hearing gave a contrary impression, I believe he simply misspoke.

4. Commissioner Appling and I did briefly discuss the return on equity that the Commission determined in the 2006 rate case. He stated that he voted for the return on equity decision in the 2006 case because of KCPL's construction program. We did not discuss any of KCPL's requests in this case, including the requested return on equity sought in this proceeding.

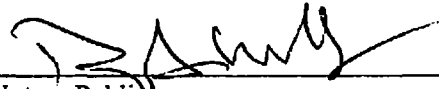
5. The main topics of our discussion related to KCPL's current operations at Iatan 1, the plans for the construction of Iatan 2, and general operational performance issues.

6. I have knowledge of the matters set forth above, and hereby swear and affirm that the foregoing statements are true and accurate to the best of my knowledge and belief.



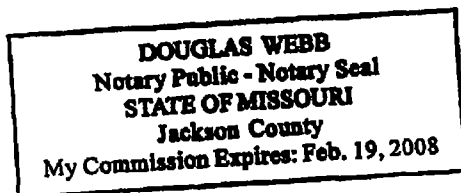
Chris B. Giles

Subscribed and sworn to before me this 9<sup>th</sup> day of October, 2007.



Notary Public

My commission expires: \_\_\_\_\_



DATA REQUEST-- Set Praxair\_20070731

Case: ER-2007-0291

Date of Response: 08/14/2007

Information Provided By: Mark English

Requested by: Stuart Conrad

Question No. : 3

Please provide a list of all communications held between members of senior management for Great Plains and/ or Kansas City Power & Light and Commissioners of the Public Service Commission. For purposes of this data request, senior management refers to vice president and above. Please identify the date, method of communication (in-person, telephone, written, etc.), description of information communicated, member of Great Plains /KCPL management involved, and Public Service Commissioner involved.

Response:

Attached are two e-mail communications from Michael Deggendorf to Jeff Davis regarding demand response and energy efficiency. Mr. Deggendorf met with individual Commissioners on January 31, 2007 to inform them of KCP&L's intent to pursue energy efficiency measures in future energy resource planning.

Michael Chesser, Bill Downey and Chris Giles met with individual Commissioners on January 17, to inform them of ongoing negotiations to acquire Aquila. In addition, Mr. Chesser called Mr. Davis to inform him the night before the announcement of the agreement.

On April 13, Commissioner Appling and Warren Wood met with Chris Giles and Bill Downey to discuss progress at Iatan 2. Mr. Wood and Commissioner Appling toured the Iatan site with Chris Giles.

Attachments:

Q\_3\_Presentation.pdf

Q\_3\_Communication.pdf

Q\_3\_Communication1.pdf