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 Certain Changes in its Charges for Electric Service to Implement its Regulatory Plan	))))	Case No. ER-2007-0291

STAFF'S RESPONSE TO THE MOTIONS TO STRIKE OF THE OFFICE OF PUBLIC COUNSEL AND KANSAS CITY POWER & LIGHT COMPANY, AND STAFF'S MOTION TO LIMIT THE TESTIMONY OF OPC WITNESS BARBARA MEISENHEIMER

Comes now the Staff of the Missouri Public Service Commission (Staff), and files this response to the Motions To Strike Portions Of The Prefiled Testimony Of Staff witness Janice Pyatte (Ms. Pyatte) filed separately by the Office of the Public Counsel (OPC) and Kansas City Power & Light Company (KCPL)[1]. The Staff also moves the Commission to limit the testimony of OPC witness Barbara Meisenheimer (Ms. Meisenheimer). The Staff provides this response in support of the Surrebuttal Testimony of Ms. Pyatte filed on September 20, 2007, and in support of its Motion to Limit the testimony of Ms. Meisenheimer. The Staff has made a serious effort to address the issues raised by this matter and asks that the Commission bear with the discussion contained herein rather than react to the facile arguments raised by OPC and KCPL.[2] The Staff requests that the Commission deny the Motions filed by the OPC and KCPL[3], and limit Ms. Meisenheimer's testimony on the grounds following:

1. The motions of the OPC, KCPL and the Staff all arise from a dispute over the meaning of Commission-approved language found in the KCPL Experimental

[1] Praxair, Inc. has made a filing in support of the motions of the OPC and KCPL, and thus this Staff response also seeks a denial of the Joinder In Motions To Strike By Praxair, Inc.

[2] And joined in by Praxair.

[3] And similarly deny the Joinder In Motions To Strike By Praxair, Inc.

Regulatory Plan Stipulation and Agreement entered into in Case No. EO-2005-0329 (S&A). That language follows:

> The Signatory parties agree not to file new or updated class cost of service studies or to propose changes to rate structures in Rate Filing #2. (pg 35 of S&A)

2. OPC and KCPL argue that the settlement communications the Staff has included in the prefiled Surrebuttal Testimony of Ms. Pyatte are privileged settlement communications that cannot be used to respond to the prefiled testimony of Mr. Rush and Ms. Meisenheimer in this case. The Staff believes they are admissible on two separate and independent bases. First, the settlement communications at issue are consistent with the plain language of the S&A and they support that the signatories to the S&A understood the language of the S&A to mean something other than an equal percentage increase to all rate components. Further, the Staff is not attempting to use those communications to bind OPC and KCPL to any position other than the plain meaning of the language found in the S&A. Therefore, the Staff is entitled to present the settlement communications, over the objections of any party. Second, as the Staff explains following, by their allegations, OPC and KCPL have ceded any right they might have to claim the settlement communications privilege against the Staff.

3. In this case the Staff is advocating that residential customers bear a larger percentage increase in rates than other KCPL customers and that KCPL customers served on medium general service class rates receive a correspondingly lesser percentage increase in rates, *i.e.*, the Staff is recommending shifts in interclass revenue responsibility. KCPL and the OPC are both taking the position that any increase in rates designed to increase KCPL's revenues should be implemented through an equal

percentage increase to all rate components for all customers. KCPL and the OPC argue that the Staff's position violates certain Commission-approved language the Staff, as a signatory, agreed to in the Experimental Regulatory Plan Stipulation and Agreement entered into in Case No. EO-2005-0329 (S&A). KCPL and the OPC claim that the agreed-to language dictates that increases in KCPL's revenues **must** be implemented in the manner they propose in this case. When the Staff seeks to refute these claims through documents created during negotiation communications that culminated in the S&A, KCPL and the OPC claim the privilege of settlement discussion, a privilege they forfeited by alleging that the Staff is breaching the S&A when the Staff recommends shifts in interclass revenue responsibility in this case. But OPC introduces external "evidence" even before the Staff introduces the e-mails.

4. It should also be noted that Mr. Lewis R. Mills, Jr. was a Deputy Chief Regulatory Law Judge when the S&A was negotiated, and although Ms. Meisenheimer was in the employ of OPC at the time the S&A was negotiated, she was not involved in the negotiation of the S&A. Ms. Pyatte was involved in the negotiation of the S&A. Through Ms. Meisenheimer's prefiled Rebuttal Testimony, OPC seeks to introduce parol evidence in support of its interpretation of the S&A (by reference to a book on utility regulation, The Regulation of Public Utilities, by Charles F. Phillips, Jr., and by reference to another author, James Bonbright). However, through Motions to Strike, OPC and KCPL seek to deny the Staff the legal right to utilize an exception to the settlement discussions privilege and the Commission's rule embodying that privilege.

5. The Staff does not dispute that there is a general prohibition against introducing into the record confidential settlement communications; however, there are

certain circumstances where revealing settlement communications is acceptable, and as described more fully below, necessary. *See Lindsey Masonry Co., Inc. v. Jenkins & Associates, Inc*., 897 S.W.2d 6, 18 (Mo.App. W.D. 1995). The privilege accorded to settlement communications is not applicable where, as here, there is no attempt to hold a party to an offer that party may have made, or to a position they may have earlier been willing to yield, in the name of facilitating settlement.

The Term "Rate Structure" Used in the Experimental Regulatory Plan Stipulation and Agreement Entered into in Case No. EO-2005-0329 is Not Facially Ambiguous.

6. A settlement agreement is a contract construed by the same rules used to construe any other contract. *Baker-Smith Sheet Metal, Inc. v. Building Erection Services Co.* 49 S.W.3d 712, 715 (Mo.App. W.D., 2001). The goal of construing contracts is to determine the parties' intent, and where the language used in a contract is plain and unambiguous, the parties' intent is to be gleaned from that language alone. *Id*. at 715-6.

7. In Missouri, with regard to the design of the rates of energy corporations regulated by this Commission, as defined in Staff's Class Cost of Service and Rate Design Report (Report) and elaborated in the Surrebuttal Testimony of Staff Witness Pyatte, "rate structure" means the following:

> **Rate Structure:** Rate structure is composed of the various types of monthly prices charged for the utility's products. At the most basic level there are: a) customer charges, a fixed dollar amount to be paid each month irrespective of the amount of the product taken; b) usage (energy)

> charges, a price per unit charged on the total units of the product consumed over the month; and c) peak (demand) usage charges, a price per unit charge on the maximum units of the product taken over a short period of time (for electricity, usually 15 minutes or 30 minutes). Onto these three basic rate forms can be added more elaborate variations such as seasonal differentials (different charges for different seasons of the year), time-of-day differentials (different charges for different times during the day), declining block rates (lower per-unit charges for higher usage), hours-use rates (rates which decline as the customer's hours of use – the ratio of monthly usage to maximum hourly usage – increases); and many more. . . .

The definition quoted above is based on the use of that term as observed in Ms. Pyatte's lengthy experience as a Class Cost of Service and Rate Design expert, who has participated in virtually all cases and investigations regarding electric utility rate structure to have come before this Commission over the last 30 years.

8. In its discussion of the admissibility of parol evidence concerning an allegedly ambiguous settlement agreement releasing liability the Court stated that "… the primary rule of construction is that the intention of the parties shall govern." *Baker-Smith*, 49 S.W.3d at 715. Further, "[a]ny question regarding the scope and extent of the release is to be resolved according to what may fairly be said to have been within the contemplation of the parties at the time the release was given. This, in turn, is to be resolved in light of all the surrounding facts and circumstances under which the parties acted." *Baker-Smith,* 49 S.W.3d at 715-6. The *Baker-Smith* court went on to state:

> **Where the language used in a release is plain and unambiguous, we will determine that intent based on the contract's language, and not based on parol or extrinsic evidence**. In determining whether the language is ambiguous, however, we do not look at provisions in isolation, but rather look at the document as a whole. If language which appears plain considered alone conflicts with other language in the contract, or if giving effect to it would render other parts of the contract a nullity, then we will find the contract to be ambiguous. Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning. (Citations omitted.)

> "An ambiguity arises when there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Alack v. Vic Tanny Int'l of Missouri, Inc.,* 923 S.W.2d 330, 337 (Mo. banc 1996)*.,* quoting *Rodriguez v. General Accident Ins. Co. of Am.,* 808 S.W.2d 379, 382 (Mo. banc 1991). "An ambiguity in a contract arises only from the terms susceptible to fair and honest differences, not mere disagreements as to construction." *CB Commercial Real Estate Group, Inc. v. Equity P'ships Corp.,* 917 S.W.2d 641, 646 (Mo.App. W.D.1996). "**We will not allow parol evidence to create an ambiguity in order to distort the clear language of the document.**" *JCBC, L.L.C. v. Rollstock, Inc.,* 22 S.W.3d 197, 204 (Mo.App. W.D.2000), quoting *Ironite Prods. Co. v. Samuels,* 985 S.W.2d 858, 862 (Mo.App.1998). [emphasis added].

9. While the OPC has every right to disagree with the direct case of the Staff, which was introduced as the Class Cost of Service and Rate Design Report (Report), the OPC does not have the right, absent an ambiguity, to resort to parol evidence to explain the unambiguous S&A. On page 7 of her Rebuttal Testimony at lines 11 though 15, and in a corresponding footnote, OPC witness Barbara Meisenheimer refers to authors James Bonbright and Charles Phillips and a book on public utility regulation by Phillips. Though innocuously posed as a simple refutation of positions taken by the Staff in its Report, the effect of this reference is to use parol evidence to create an ambiguity to distort the plain language of the S&A.

OPC Should Not Be Allowed to Retain the Benefit of Its Injected Ambiguity, and as Evidence in Conformity with the Terms of the S&A, Staff's Discussion of the Meaning of the Term "Rate Structure" Does Not Violate the Prohibition of the Introduction of Parol Evidence Inconsistent with the Underlying Document.

10. In the prefiled testimonies of Ms. Meisenheimer, Mr. Trippensee, and Mr. Rush, KCPL and the OPC mischaracterize the meaning and effect of the language finally adopted in the S&A when they assert that the S&A mandates that any rate increase implemented in the 2007 rate filing be effectuated only as an equal percentage increase to all rate components. While the proposals of KCPL and the OPC for equal percentage

increases to all rate components does not violate the S&A, neither does the S&A limit implementation of rate increases to equal percentage increases to all rate components. Staff has every right to respond to KCPL's and the OPC's characterization of the S&A in defense of, and support of, its own proposal.

10. To expose the errors of the characterizations of the rate design provision of the S&A in the prefiled testimony of KCPL witness Rush and the OPC witnesses Meisenheimer and Trippensee, the best evidence of the parties' intended true meaning of the terminology of the S&A is the evolution of the language giving rise to that language finally adopted in the executed S&A. See *Baker-Smith*, 49 S.W.3d at 715. In particular, the OPC cannot be allowed to, even unintentionally, erroneously convey the meaning of the parties' intentions behind the S&A's terminology by resort to inferior outside references, Bonbright and Phillips, and the Phillips book – these reference being inferior for the very fact that they are **outside references** – and then to cry foul when the Staff is obliged to resort to the best evidence of the parties' intentions – the drafts of the S&A – to refute the inferior evidence being proffered by OPC itself.

11. Staff's discussion of iterations of the S&A rate design language is appropriate as a response to prefiled testimony of the OPC and KCPL witnesses, in and of itself, as evidence consistent with the meaning of the term "rate structure" which appears in the S&A. With the discussion of the e-mails the Staff establishes that at one point there was language mandating that any changes to rates be implemented as "equal percentage" changes. However, over a series of drafts, this language was discarded in favor of the sentence that appears in the S&A as executed:

> The Signatory parties agree not to file new or updated class cost of service studies or to propose changes to rate structures in Rate Filing #2. [pg 35 of S&A]

As was first contended by the Staff in this case in its filing of the Report, and as is further demonstrated by the rejection of the "equal percentage" language by the signatory parties to the S&A, the final terminology adopted does not restrict the imposition of rate increases to an equal percentage change to all rate components.

12. As recently affirmed by the Western District in *Brown v. Mickelson,* 220 S.W.3d 442, 447 (Mo.App. W.D. 2007) "[t]he parol evidence rule bars evidence… …**that var[ies] or contradict[s] the terms** of an unambiguous, final, and complete writing, absent fraud, mistake, accident or duress. *Sherman v. Deihl,* 193 S.W.3d 863, 866 (Mo.App. S.D. 2006) (quoting *Building Erection Servs. Co. v. Plastic Sales Mfg. Co.,* 163 S.W.3d 472, 479 (Mo.App. W.D. 2005)) [emphasis added, internal quotations omitted]"

13. The e-mails Staff witness Pyatte cites in her Surrebuttal Testimony do nothing to contradict the meaning of the terminology and essential agreement finally entered into and executed in the S&A, and as such that testimony is admissible. Give-and-take took place among the parties to the S&A. The rejection of the "equal percentage" language in favor of the "rate structure" language establishes that the effect of the former language cannot rightly be imputed to the latter. That the Staff sought to explain the disparate effects accomplished by the finally adopted language as opposed to the "equal percentage" language demonstrates the consistency of the disputed portion of Staff witness Pyatte's Surrebuttal Testimony and the Staff's Class Cost of Service and Rate Design Report with the S&A.

14. For a number of years, the "equal percentage" language that was not adopted by the signatories to the S&A has been used extensively by and before the Commission wherever the effect of an equal percentage change to all rate classes or components is sought so as to maintain a particular rate design, and has made appearances in documents that the OPC, if not KCPL, is surely aware of, and to which in many instances, the OPC is a signatory.[5]

15. Consider the Direct Testimonies offered by Tim Rush of KCPL in this proceeding, Case No ER-2007-0291, and also in the immediately preceding rate increase proceeding, Case No. ER-2006-0314. If the "rate structure" language finally adopted in the S&A has the same effect as the rejected "equal percentage" language, why is it that Mr. Rush believed the need in his Direct Testimony filed in this case, at lines 21 and 22 on page 4, to refer to an "equal percentage increase" as opposed to simply quoting the "rate structure" language from the executed S&A to which KCPL is a signatory?

As Its Introduction Is Only for the Purpose of Establishing the Evolution of the Essential Agreement as Evidence that the Meaning of Earlier Drafts Cannot Be Rightly Ascribed to the Final Draft, Pyatte's Surrebuttal Testimony Falls within a Well-held Exception to the Prohibition of Admissibility of Settlement Communications.

16. Staff witness Pyatte's prefiled Surrebuttal Testimony disclosing the contents and distribution of drafts circulated in the development of certain language finally adopted as the Experimental Regulatory Plan Stipulation and Agreement entered

[5] *See* Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service and Rate Design entered into in Case No. ER-2001-299 In the matter of The Empire District Electric Company's Tariff Sheets Designed to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri service area of the Company; Unanimous Stipulation And Agreement entered into in Case No. ER-2002-424 In the Matter of The Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company; Report and Order entered in Case No. ER-2006-0315 In the Matter of the Tariff filing of the Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area; Stipulation and Agreement entered into in Case No. EC-2002-1 The Staff of the Missouri Public Service Commission v. Union Electric Company, d/b/a AmerenUE; Non-Unanimous Stipulation and Agreement Pertaining to Rate Design and Class Cost of Service entered into in Case No. ER-2004-0034 In the matter of the request of Aquila, Inc. d/b/a Aquila Networks L&P and Aquila Networks MPS to implement a general rate increase in electric rates; Nonunanimous Stipulation and Agreement entered into in Case No. ER-2005-0436 In the Matter of the Tariff Filing of Aquila, Inc to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its MPS and L&P Missouri Service Areas.

into in Case No. EO-2005-0329 is admissible, as its purpose is not related to those uses for which there is a general prohibition of the admissibility of settlement communications. The fact that these e-mails were exchanged in the course of settlement communications does not preclude their use, as the statements are not offered as an admission of liability, or to coerce the adoption of a position previously offered to advance settlement. Rather, Staff's use of these items as evidence of the meaning of a technical term is consistent with an exception to the general rule against the admission of settlement communications recognized in Missouri law.

17. The Western District's recognition of this exception was made clear in *Lindsey Masonry Co., Inc. v. Jenkins & Associates, Inc*., 897 S.W.2d 6, 18 (Mo.App. W.D. 1995), which dealt with a dispute between a contractor, Jenkins, and a sub-contractor, Lindsey. In response to an objection to Jenkins' introduction of evidence of an offer to pay Lindsey a sum of money, the appellate court held that allowing the introduction of evidence of the offer was not an abuse of discretion, in that the offer was made to persuade Lindsey to stay on the job. In doing so, the court stated that:

> Lindsey is correct to cite Missouri Evidence Restated § 408, which essentially mirrors Federal Rule of Evidence 408. Rule 408 **prohibits admission of offers of compromise and settlement except where such evidence is utilized for another purpose** [emphasis added]. Obviously, **this law was enacted to favor settlement of disputes**. Missouri courts of appeals have been consistent in excluding such offers and settlement negotiations because of the policy of the law. *Owen v. Owen,* 642 S.W.2d 410 (Mo.App.1982). However, **there are exceptions to this rule**. In *Aiple v. South Side Nat'l Bank,* 442 S.W.2d 145, 152 (Mo.App.1969), the court held that, when it is the party who extended the settlement offer that is seeking admission of the evidence, such evidence is admissible as an exception to the general rule. *Id.* **The reason for this exception is that the public policy encouraging settlements is not undermined because the evidence is not offered to show an admission of liability**. *Id.* at 152. [emphasis added].

18. Similarly here, the purpose for which the drafts are being disclosed is not to seek an admission of liability, or to indicate what KCPL or the OPC may have been willing to agree to in the name of settlement -- rather, the drafts are being disclosed to demonstrate the evolution of the language, which reveals insight as to what the language finally adopted means. The privilege accorded to settlement communications is not applicable where, as here, there is no attempt to hold a party to an offer that party may have made, or to a position the party may have earlier been willing to yield, in the name of facilitating settlement.

For the Aforementioned Reasons, the Assertions Made By KCPL and the OPC in Their Motions to Strike are Erroneous, and it is Appropriate to Strike The Portion of the Prefiled Rebuttal Testimony of OPC Witness Meisenheimer in Question.

19. The discussions of the privilege generally associated with settlement negotiations and the litany of rules and statutes cited by KCPL and the OPC are irrelevant in light of the purpose for which the disputed portion of Pyatte's Surrebuttal Testimony is included. Further, given the assertions made in the prefiled testimonies of OPC witnesses Meisenheimer and Trippensee, and KCPL witness Rush, these same parties left Staff no option, other than the lawful option it took -- requiring that Staff make use of the exception to the rule against disclosing settlement communications, thereby necessitating disclosure of the e-mails in question.

20. Through the allegation presented in Paragraph 5 of the OPC's Motion, the OPC misinterprets the thrust of the Commission's "Order Striking Suburban's Motion for Nonunanimous Stipulation and Agreement," entered in Case No. WC-2007-0452 et al. (Suburban). The Commission Order quotes the OPC's Objection and Motion filed in that

case requesting the Commission strike Suburban's August 30th filing of a "Nonunanimous Stipulation and Agreement":

> since they are "inappropriate communications with the Commission containing confidential settlement negotiation information between the parties" and represent "an inappropriate unilateral attempt to communicate *ex parte* with the Commission as well as to bypass the other parties in these cases and open settlement negotiations directly with the Commission."

The Commission goes on to refer to the "similar concerns" raised by the Staff in that case (see footnote 1 to Staff's Motion filed September 4, 2007 "No other parties have stipulated any facts, nor has any agreement been reached amongst any of the parties….") These concerns are not present here with Pyatte's Surrebuttal Testimony. The bulk of the excerpt cited in paragraph 5 of the OPC's motion in the instant case goes to the concerns raised in the Motions of the OPC and Staff in the Suburban case, such as the fact that the "agreement" had only one party, and the fact that the one party to the "agreement" attempted to strike a deal with the Commission in the Commission's role as an adjudicator. In the section of the Order quoted by the OPC in its Motion to Strike concerning Pyatte's Surrebuttal Testimony, only two brief clauses refer to the privilege associated with settlement communications, and these clauses go to the general prohibition discussed above. Also as discussed above, the general prohibition is irrelevant to the narrow exception utilized by Staff in Ms. Pyatte including the e-mails in question in her Surrebuttal Testimony.

21. In admitting the contested portion of Ms. Pyatte's Surrebuttal Testimony the Commission runs no risk of "chilling" future negotiations, as Staff is not making any assertion that any parties be bound by positions formerly conceded during settlement negotiations, and is willing to stipulate to that effect. The admission of Pyatte's

Surrebuttal Testimony, in its entirety, is also vital to avoid a scenario in which parties will be encouraged to assert that other parties have violated a stipulation and agreement, knowing full well that evidence showing the allegation to be untrue cannot be used against them, by asserting that the crucial evidence comprises settlement communications. The Commission is well aware of the proliferation of allegations in the last 18 months of parties violating stipulations and agreements. The Staff believes that unfortunately this recent development will only be encouraged if OPC and KCPL prevail in their motions to strike.

22. Recognizing that the law "… will not allow parol evidence to create an ambiguity in order to distort the clear language of the document." *Baker-Smith,* 49 S.W.3d at 715-6,, the sentence beginning with the word "For" in line 11 on page 7 of Ms. Meisenheimer's Prefiled Rebuttal Testimony in this case should be struck in its entirety, through line 15 on the same page, before it is admitted into evidence in this case, as its purpose is to inject an ambiguity into the otherwise unambiguous language of the S&A, as described above,.

WHEREFORE, in that the specified portion of Staff witness Janice Pyatte's Surrebuttal Testimony is admissible in recognition of the purpose for which the settlement communications e-mails were introduced, the Staff responds to the Motions of The Office of Public Counsel and Kansas City Power & Light Company[6] to strike portions of Ms. Pyatte's Surrebuttal Testimony, and requests that the Commission deny said Motions; and in that the specified portion of Ms. Meisenheimer's Rebuttal Testimony constitutes the inappropriate use of parol evidence, that it not be allowed into evidence in this case.

[6] Staff also responds to the Joinder In Motions To Strike By Praxair, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Sarah Kliethermes