

**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

**MOTION TO STRIKE  
PORTIONS OF PREFILED SURREBUTTAL TESTIMONY  
OF STAFF WITNESS JANICE PYATTE**

COMES NOW Kansas City Power & Light Company ("KCPL"), pursuant to Section 536.070, RSMo. 2000, and Commission Rules 4 CSR 240-2.080, 2.090, 2.130 and 2.135, and for its Motion to Strike Portions of the Prefiled Surrebuttal Testimony of Staff Witness Janice Pyatte, respectfully states as follows:

1. On September 20, 2007, Staff Witness Janice Pyatte filed Surrebuttal Testimony (both HC and NP versions) on the issues of Rate Design and Class Cost of Service in the above-referenced matter. As set forth in the Executive Summary of this testimony, Ms. Pyatte identifies the purpose of her surrebuttal testimony and includes as Subparagraph (4) the following: "Respond to Mr. Rush's and Ms. Meisenheimer's contention that Staff's CCOS and Rate Design proposals area violation of the agreement of the KCPL Regulatory Plan [Rush Rebuttal, page 5, line 5-page 6. page 11] [Meisenheimer Rebuttal, page 3, line 14 – page 4 line 2]."<sup>1</sup>

2. Staff Witness Pyatte purports to address the "KCPL Regulatory Plan Language" issue at pages 7 through 11 of her Surrebuttal Testimony. Beginning at Page 9, Line 19, and continuing through Page 10, line 4, the following Question and Answer

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<sup>1</sup> Pyatte Surrebuttal, p. 3.

appear:

Q. Does Staff base its interpretation of what is and what is not permissible under the KCPL Regulatory Plan on the evolution of the language in the Regulatory Plan in addition to its interpretation of the term "rate structure"?

A. Staff would not otherwise get involved in a discussion of prior iterations of a settlement document. But by charging Staff with violating specific terms of the KCPL Regulatory Plan, KCPL and OPC have left Staff with no alternative other than to, on advice of Staff counsel, **reveal what are otherwise confidential settlement communications that took place during the negotiations of the sentence in question.** This otherwise confidential information is being disclosed solely for the purposes of explaining Staff's knowledge and understanding of that sentence and rebutting KCPL's and OPC's testimony respecting that language. (Emphasis added).

3. Thereafter, beginning at Page 10, Line 5 and continuing through Page 11, Line 12, Staff Witness Pyatte proceeds to discuss (as she explicitly admits above) privileged and confidential settlement communications that previously occurred between the parties. This particular testimony is designated Highly Confidential. However, as Missouri law and this Commission's Rules clearly provide, such privileged testimony should be struck and may not be heard or preserved in the record.

4. Section 536.070, RSMo 2000, which is part of the Administrative Procedure statute, provides, in part, as follows:

(7) Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, **unless it is** wholly irrelevant, repetitious, **privileged**, or unduly long.

(8) Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case. **The rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions.** Irrelevant and unduly repetitious evidence shall be excluded. (Emphasis supplied).

5. Indeed, the Commission's Rules adopt and embrace this basic precept of protecting privileged and confidential settlement discussions.

4 CSR 240-2.090 Discovery and Prehearing:

(7) Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless substantiated by other evidence. (Emphasis added)

4 CSR 240-2.130 Evidence:

(1) In any hearing, these rules supplement section 536.070, RSMo.

(3) The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, at the request of the party seeking to introduce the same or at the instance of the commission, nevertheless may be heard and preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence, **unless it is** wholly irrelevant, repetitious, **privileged**, or unduly long. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings shall be unnecessary and need not be taken. (Emphasis added).

(5) The rules of privilege are effective to the same extent that they are in civil actions.

4 CSR 240-2.135 Confidential Information:

(2)(C) This rule does not require the disclosure of any information that would be protected from disclosure by any privilege, rule of the commission, or the Missouri Rules of Civil Procedure.

6. The Commission should strike the identified portion of the Surrebuttal Testimony of Janice Pyatte beginning at Page 10, Line 5 and continuing through Page 11, Line 12 since this testimony violates the prohibition contained in 4 CSR 240-2.090(7) against the unilateral disclosure of privileged settlement negotiations without the agreement of the other parties to the settlement discussions. The fact that Staff has filed

this information as Highly Confidential does not mitigate the prejudicial impact of disclosure of this privileged information. The disclosure of such privileged information is intended to influence the Commission in its deliberations on the merits of the rate design issue. While filing the privileged information under seal protects the information from public disclosure, it does not mitigate the adverse impact of its disclosure to the decision-maker.

7. Setting aside the particular merits of the rate design controversy in this case, the unilateral disclosure of privileged information by Staff, from KCPL's perspective, is unfortunate and establishes a horrible precedent for parties' conduct in the future. The unilateral disclosure of such privileged information by any party, if countenanced by the Commission, will undoubtedly have a chilling effect upon frank and candid exchanges of information and compromise positions in the settlement process.

WHEREFORE, Kansas City Power & Light Company respectfully moves that the Commission strike the following portions of Staff Witness Janice Pyatte's Surrebuttal Testimony filed in this matter: beginning at Page 10, Line 5 and continuing through Page 11, Line 12.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 4th day of October, 2007, to all counsel of record.

/s/ James M. Fischer  
James M. Fischer