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 REPLY TO OFFICE OF THE PUBLIC COUNSEL'S
OCTOBER 19, 2007 RESPONSE TO STAFF'S MOTION

Comes now the Staff of the Missouri Public Service Commission (Staff), and for its reply to the Office of Public Counsel's (OPC) "Response to 'Staff's Response to 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'" and responds that OPC has not correctly stated the applicable law in its pleading. In support of its response, the Staff states as follows:

1. In its Response filed October 19, 2007 the OPC correctly quotes the law in its numbered paragraph 6 that "[t]he mere fact the parties disagree upon the interpretation of a document does not render it ambiguous," *Boatmen's Trust Co. v. Sugden*, 827 S.W.2d 249, 254 (Mo.App. 1992). The OPC also correctly quotes the law in its numbered paragraph 7, stating that "[w]ords with a technical meaning should be construed according to their technical meaning unless a contrary meaning appears in the granting instrument," [internal citations omitted].

2. The OPC correctly asserts that despite the fact that there is no definition of the phrase "changes in rate structures," or of the term "rate structure," in the KCPL Experimental Regulatory Plan Stipulation and Agreement finally agreed to in Case No. EO-2005-0329 (S&A), that the Staff would have the Commission look to Staff's definition of the term "rate structure" given in Staff's direct case in this cause, as

illustrative of the meaning of that term. The OPC is also correct in asserting that the Staff would have the Commission look to communications among the drafters of the S&A as illustrative of what the phrase "changes to rate structures," does not encompass.

3. The OPC errs in asserting that Staff's reference to the two above-referenced sources, including the S&A and the communications among the drafters of the S&A in particular, is an attempt by Staff to have the Commission look to those sources "in order to determine" the meaning of the phrase "changes to rate structures," or the meaning of the term "rate structures." Rather, the Staff refers to its direct case for a depiction of the exact meaning that the Staff attributes to the term "rate structure," and that meaning is entirely consistent with the use of said term in the S&A.

4. Missouri courts have held that "[t]he parol evidence rule as a principle of substantive law prohibits the *contradiction* of integrated contracts. *Wulfing v. Kansas City Southern Indus. Inc*., 842 S.W.2d 133, 146[6] (Mo.App.1992). It simply does not apply to parol testimony that does not contradict the certain terms of an integrated agreement.... Even a complete and integrated contract must be interpreted. Admission of oral testimony of agreements or negotiations contemporaneous with the execution of the written agreement are admissible to establish the meaning of the contract. *Rufkahr Constr. Co. v. Weber,* 658 S.W.2d 489, 497[8, 9] (Mo.App.1983); CORBIN ON CONTRACTS § 579 (1960); RESTATEMENT (SECOND) CONTRACTS § 214 comments a-c (1981)." *Cameron v. Morrison* 901 S.W.2d 171, 177 (Mo.App. W.D. 1995) (footnote omitted).

5. 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…." *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]; *Jake C. Byers, Inc. v. J.B.C. Investments,* 834 S.W.2d 806, 811 (Mo.App. E.D. 1992); *Poelker v. Jamison,* 4 S.W.3d 611, 613 (Mo.App. 1999); *Missouri Dept. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 32 (Mo.App. E.D. 2002); *Craig v. Jo B. Gardner, Inc.,* 586 S.W.2d 316, 324 (Mo. banc 1979); *Commerce Trust Co. v. Watts, supra,* 231 S.W.2d at 820; see*, Tracy v. Union Iron-Works Co.,* 104 Mo. 193, 16 S.W. 203, 204-205 (1891). Quoting the Missouri Western District Court of Appeals, the Eastern District has stated:

> "A written contract that appears to be a complete agreement on its face is presumed to be a final and complete agreement between the parties. *Jake C. Byers, Inc. v. J.B.C. Investments,* 834 S.W.2d 806, 812 (Mo.App. E.D.1992). Therefore, only when a written contract appears to be an incomplete agreement on its face may extrinsic evidence be admitted to show the final and complete agreement between the parties. *Id.* However, **the parol evidence rule does not apply to extrinsic evidence that does not contradict the actual terms of a complete and final agreement**." *Gibson v. Harl,* 857 S.W.2d 260, 270 (Mo.App. W.D.1993).

Barone v. United Industries Corp., 146 S.W.3d 25, 29 (Mo.App. E.D. 2004) (emphasis added).

6. Similarly, Missouri courts have also stated that "[t]he attendant extrinsic facts, perhaps, may be used to aid in the interpretation of an unambiguous contract, but these facts may not be used to change the obligations defined in the contract." *Jake C. Byers, Inc. v. J.B.C. Investments* 834 S.W.2d 806, 814 (Mo.App. E.D. 1992). Also, "[c]ollateral facts may be introduced to ascertain the subject matter of the contract and to

aid in its interpretation, but such facts cannot cause the Court to read into the contract something it does not say, create an ambiguity or show an obligation other than expressed in the written instrument." *Id.*, at 814. Further, "[t]he essence of the parol evidence rule is, therefore, that evidence outside a completely integrated contract cannot be used to change the agreement." *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land Partnership* 62 S.W.3d 485, 489 (Mo.App. E.D. 2001).

7. The legal tenets cited above are also found in the legal treatises such as American Jurisprudence, Second, as follows:

> The parol evidence rule does not, in a controversy between the parties, forbid the use of parol evidence to establish any fact that does not vary, alter, or contradict the terms of the instrument or the legal effect of the terms used. In other words, extrinsic evidence of a fact which is consistent with the terms of, or tends to confirm, the writing may be admitted. In addition, parol evidence of the intention of the parties in executing the instrument, and evidence as to the interpretation put upon a written contract by one of the parties, is also admissible under certain circumstances. [footnotes omitted.] AMJUR EVIDENCE2d § 1106.

8. AMJUR EVIDENCE § 1140, "Prior or contemporaneous negotiations, dealings, events, or declarations" provides:

> The parol evidence rule generally does not permit, in order to ascertain the meaning of an ambiguous instrument, the admission of extrinsic evidence of oral declarations of a party to a written instrument made before or at the time of its execution, of an intention or purpose that is not expressed in the written instrument, or that is different from the intention to be derived from the terms of the written instrument. However, where one party has been permitted to introduce extrinsic evidence of the facts and circumstances leading up to, and connected with, the execution of a written contract, the other party may introduce evidence as to the same matters, even if such evidence tends to vary or contradict the writing.
>
> **Evidence of previous negotiations between the parties to an ambiguous written agreement may be admitted to the extent that such evidence sheds light on how the parties understood the terms of the agreement. The parol evidence rule permits resort to antecedent negotiations to explain the meaning of the words used in a contract of**

> **uncertain meaning. However, previous negotiations cannot be admitted to give an integrated agreement a meaning to which the language of the instrument is not reasonably susceptible.**
>
> Although, as a general rule, testimony concerning events which occurred prior to the execution of a contract is inadmissible in an action for breach of contract, nevertheless such testimony is admissible to clarify an ambiguous portion of the contract. Where parties contract with reference to the provisions of previous dealings, evidence of the terms of such dealings is admissible to show the intention of the parties. However, where the language employed in a written instrument is plain and unambiguous, evidence of a prior course of dealings between the parties is not admissible to modify the plain language used by the parties in the instrument, nor may it be used to supply an interpretation of the instrument. (footnotes omitted; emphasis added.)

9. AMJUR EVIDENCE § 1142, "Words and phrases" provides:

> Parol evidence has been admitted to explain a wide variety of particular words and phrases which, in the instruments containing them, were of ambiguous or uncertain meaning, particularly where the words and phrases have technical or local meanings not commonly known, and where abbreviations, symbols, or figures, etc., are used in substitution for words and phrases. Where a new and unusual word or phrase is used in a written instrument, extrinsic evidence is admissible to explain or illustrate the meaning of that word or phrase. However, **where the particular words and phrases used in a written agreement have a well-understood general meaning, parol evidence is not admissible for the purpose of showing a meaning other than the generally accepted meaning**. (footnotes omitted, emphasis added.)

10. In that the definition provided in the Staff's direct case is entirely consistent with the meaning of that term as it is used in the S&A, the parol evidence rule effects no bar to its admission and consideration.

11. In its paragraph numbered 8, the OPC asserts that the court in *Friedman Textile Co. v. Northland Shopping Center, Inc.*, 321 S.W.2d 9, 16 (Mo. App. 1959) found that negotiations and prior drafts are inadmissible under the parol evidence rule, *per se*. This assertion is wrong. What the court in *Friedman* court said was that because the term disputed before the court – "primarily" – was unambiguous, it was improper to resort to

evidence outside of the lease agreement to contradict the plain meaning of the word "primarily". The evidence proffered for varying the plain meaning of the word "primarily" were negotiations and prior drafts of the lease. The court's statement cannot be taken for anything more than an assertion that parol evidence, of any type, was inadmissible to ***contradict*** the plain meaning of the disputed word "primarily." The fact that the rejected proffered evidence in the *Friedman* case was prior drafts of a contract was immaterial to the reason for the court's rejection of that proffered evidence. The OPC's reliance on *Friedman* to support its position is misplaced.

12. Further, Missouri law explicitly provides that "[e]vidence of agreements or negotiation prior to or contemporaneous with the execution of [the] written agreement are admissible to establish the meaning of the written contract. *Fisher v. Miceli,* 291 S.W.2d 845, 848[3-5] (Mo. 1956); *Fabick Brothers Equipment Co. v. Leroux,* 375 S.W.2d 887, 890[1] (Mo.App. 1964). Restatement, Second, Contracts, § 214(c)." *Rufkahr Construction Co. v. Weber,* 658 S.W.2d 489, 497 (Mo.App. 1983).

13. In its paragraph numbered 10, OPC refers to the "authoritative sources" that were cited in the Rebuttal Testimony of OPC witness Barbara Meisenheimer. OPC is incorrect in its veiled assertion that a given published source is dispositive *ab initio* of the technical meaning of terms used in contracts.

14. The OPC provides no support in its paragraph numbered 10 or elsewhere for its assertion that Charles Phillips' The Regulation of Public Utilities, Second Edition, 1988, and Principles of Public Utility Rates, 1961, are "the leading authoritative sources on the regulation of public utilities." Based on OPC's statement, apparently OPC is willing to accept uncritically anything and everything Phillips and Bonbright say in their

1988 and 1961, respective, books. Staff notes there is at least a Third Edition of Phillips' book, published in 1993, although OPC cites to an earlier edition.

15. The problematic nature of OPC's use of what OPC terms "the leading authoritative sources" is demonstrated by reference to what other interested entities would undoubtedly refer to as authoritative sources. If, despite the fact that the term "rate structure," as used in the S&A, is unambiguous, one wishes to peruse the use of that term in published glossaries, one would readily discern that that term is not used with any true consistency. Some published works use the term "rate structure" precisely how the Staff uses that term, i.e., to refer to the presence or absence of various components that constitute a rate schedule.[1] Some published glossaries use the term "rate structure" to refer to everything in a rate case that is not considered part of the revenue requirement.[2] An examination of texts, treatises, journals, and cases is likely to reveal a plethora of degrees and variations of inclusion and exclusion in what exactly is encompassed within the term "rate structure." This exercise would yield no definitive definition of the term "rate structure," among asserted "authoritative" sources. However, this exercise would not yield the term "rate structure" as that term is used in the S&A ambiguous, as the resort to sources outside of the four corners of the document is not allowed to contradict the plain meaning of the terms of that document.

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[1] EEI Glossary of Electric Utility Terms, p. 54: "**Rate Structure -** The design and organization of billing charges to customers. A rate structure can comprise one or more of the rate schedules defined herein."; Duke-Energy.com/glossary-of-energy-terms: "Rate – The unit charge or charges made by an energy company or utility to customers for energy. Rate structures include: Block [definition omitted], Flat [definition omitted], Lifeline [definition omitted], Mileage-Based [definition omitted], One-Part [definition omitted], Postage-Stamp [definition omitted], Seasonal [definition omitted], Straight-Line [definition omitted], Three-Part [definition omitted], Two-Part [definition omitted], Volumetric [definition omitted], Zone [definition omitted]"

[2] McQuillin The Law of Municipal Corporations, 12 McQuillin Mun. Corp. § 35:66 (3rd ed.); Law of Independent Power, 1 L. of Indep. Power § 10:119 (2007)

16. In the alternative, if resort to these asserted authoritative sources renders the term "rate structure" as used in the S&A, ambiguous, the meaning of that term must be resolved in favor of the Staff. It is a virtual certainty that the parties to the S&A understood the meaning of the straightforward "equal percentage," language that was found in the early drafts of the S&A. It readily follows that in consciously choosing to use language other than "equal percentage", the parties understood the substitute language to mean to effectuate something other than the protocol mandated by the "equal percentage" language.

17. Only two meanings of the sentence "[t]he 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," have been proffered. Clearly, as evidenced by the rejection of the "equal percentage" language, the agreed-upon substitute language does not, in the parties' estimation, equate to the effect of the rejected "equal percentage" language. The surviving proffered meaning of the executed language is Staff's interpretation: that intraclass shifts and interclass shifts are allowable under the S&A, but the introduction or deletion of classes, rate components, and rate blocks, is not allowable under the S&A. Therefore, the Staff's interpretation, which is given in greater detail in its direct case, is necessarily the meaning comprehended by the phrase "changes to rate structures," as that phrase was interpreted by the parties signatory to the S&A.

18. "The cardinal principle for contract interpretation is to ascertain the intention of the parties and to give effect to that intent. In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties, but subsidiary agreements, the relationship of the parties, the subject matter of the contract,

the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties." (Internal citation omitted.) *Butler v. Mitchell-Hugeback, Inc.,* 895 S.W.2d 15, 21 (Mo. banc 1995); *Silver Dollar City, Inc. v. Kitsmiller Const. Co., Inc*. 931 S.W.2d 909, 914 (Mo.App. S.D. 1996).

19. In its paragraph numbered 9, OPC again misconstrues the law. The *Sterling* court began with an unambiguous term "bank account," and then excluded parol evidence of what that term might mean that contradicted the plain meaning of that term. The court's reference to the Uniform Commercial Code, Black's Law Dictionary, and a treatise as to the meaning of the term "bank account," were admissible under the parol evidence rule not strictly because these are "authoritative sources," but rather because they did not contradict the meaning of the term "bank account" as it was unambiguously used in the document in question. The meanings given in the Uniform Commercial Code, Black's Law Dictionary, and the treatise served only to bolster the plain meaning of the term "bank account" and were entirely in congruency with a layman's understanding of the plain meaning of that term, and were therefore admissible.

20. [Possible analogy to *Jake C. Byers, Inc. v. J.B.C. Investments* 834 S.W.2d 806, 817 (Mo.App. E.D. 1992), where evidence of "usage" was inadmissible to contradict facially unambiguous term – "usage" here being treatises.]

21. In its paragraph numbered 12, OPC's misunderstanding of the parol evidence rule is illustrated in OPC's sentence, "[t]hese references do not constitute parol evidence." *("These references" refers to the references to Bonbright and Phillips by Ms.*

Meisenheimer, which Staff seeks to exclude.) **Any** evidence not drawn solely from the four corners of the written agreement is parol evidence[3]. *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land Partnership* 62 S.W.3d 485, 489 (Mo.App. E.D. 2001). The parol evidence rule, however, only works to exclude from consideration that parol evidence which seeks to contradict or vary the unambiguous plain meaning of the language of a contractual document. *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land Partnership* 62 S.W.3d 485, 489(Mo.App. E.D. 2001); *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)); *Jake C. Byers, Inc. v. J.B.C. Investments,* 834 S.W.2d 806, 811 (Mo.App. E.D. 1992); *Poelker v. Jamison,* 4 S.W.3d 611, 613 (Mo.App.1999); *Missouri Dept. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 32 (Mo.App. E.D. 2002); *Craig v. Jo B. Gardner, Inc.,* 586 S.W.2d 316, 324 (Mo. banc 1979); *Commerce Trust*

[3] In its purest sense, "parol" evidence is any oral evidence, usually used in reference to an oral account of an agreement prior to or contemporaneous with the contract in dispute. *See* Black's Law Dictionary, Seventh Edition: ***parol; evidence-parol evidence.*** It cannot be overemphasized that **the drafts referenced in Janice Pyatte's Surrebutal Testimony were not *agreements***. Those drafts were never executed nor agreed to. Those drafts were not included in testimony in an attempt to impart their meaning to the executed S&A – that is the usage barred by the parol evidence rule. Those drafts were included as **evidence of what the S&A *could not possibly mean*** – as is evidenced by the rejection of the language that facially states the obligations that OPC is attempting to impart to the phrase "changes to rate structures." Black's defines **parol-evidence rule** as "The principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing…." The definition of **parol evidence** cross-references the definition of **extrinsic evidence**. The definition of **extrinsic evidence** states that term to be synonymous with parol evidence. As the term "parol evidence" is commonly used in the sense of the "parol evidence rule," "parol evidence" refers to any evidence drawn from any source outside the four corners of the contract. "The essence of the parol evidence rule is, therefore, that evidence outside a completely integrated contract cannot be used to change the agreement." *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land Partnership* 62 S.W.3d 485, 489 (Mo.App. E.D. 2001). "The parol evidence rule, therefore, is more authentically called the rule against contradiction of integrated writings. CORBIN ON CONTRACTS § 572C (Supp.1992)." *Wulfing v. Kansas City Southern Industries, Inc*. 842 S.W.2d 133, 146 (Mo.App. W.D. 1992).

Co. v. Watts, supra, 231 S.W.2d at 820; *see, Tracy v. Union Iron-Works Co.,* 104 Mo. 193, 16 S.W. 203, 204-205 (1891).

22. "[The parol evidence rule] simply does not apply to parol testimony that does not contradict the certain terms of an integrated agreement.... Even a complete and integrated contract must be interpreted. Admission of oral testimony of agreements or negotiations contemporaneous with the execution of the written agreement are admissible to establish the meaning of the contract. *Rufkahr Constr. Co. v. Weber,* 658 S.W.2d 489, 497[8, 9] (Mo.App.1983); CORBIN ON CONTRACTS § 579 (1960); RESTATEMENT (SECOND) CONTRACTS § 214 comments a-c (1981)." *Cameron v. Morrison* 901 S.W.2d 171, 177 (Mo.App. W.D. 1995). Subject to other evidentiary limitations, such as the cap on cumulative evidence, parol evidence *consistent* with the unambiguous and plain meaning of the language of a contractual document is admissible *ad naseum*, and that evidence is appropriately available for consideration. (*See Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 817 (Mo.App. E.D. 1992); "[e]vidence of agreements or negotiation prior to or contemporaneous with the execution of [the] written agreement are admissible to establish the meaning of the written contract. *Fisher v. Miceli,* 291 S.W.2d 845, 848[3-5] (Mo. 1956); *Fabick Brothers Equipment Co. v. Leroux,* 375 S.W.2d 887, 890[1] (Mo.App. 1964). Restatement, Second, Contracts, § 214(c).") This fundamental misunderstanding of the rule is the crux of the dispute comprehended in these motions.

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 urges its retention in

evidence; 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.

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 29th day of October, 2007.

/s/ Sarah Kliethermes