BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**Case No. EC-2015-0309**
Kansas City Power & Light Company	)	
and	)	
KCP&L Greater Missouri Operations Company,	)	
Respondents.	)	

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its Reply *Brief,* states as follows:

Introduction:

This matter arises from the relationship of Kansas City Power & Light Company ("KCPL") and KCP&L Greater Missouri Operations Company ("GMO") with Allconnect, a third-party reseller of communications, video, Internet, telephone, and home security services.[1] Allconnect's target population consists of consumers who are moving to a new residence.[2] KCPL and GMO, as regulated electric utilities serving thousands of

[1]On its website, Allconnect describes itself as "a leading multi-channel marketplace that simplifies the purchase of services for the connected home." www.allconnect.com/corporate/aboutUs; accessed February 22, 2016.

[2] *Respondents' Initial Brief,* p. 5: "The Company's relationship with Allconnect makes a service offering available to a specific group of customers -- residential customers initiating or moving service."

residential consumers in and around Kansas City and St. Joseph, are able to provide such consumers to Allconnect's waiting sales force; in return, Allconnect provides KCPL and GMO with money and the verification of certain customer account information. Staff has brought a *Complaint* of three counts against KCPL and GMO, the central and most distasteful element of which is the fact that the utilities transfer calling customers, and their private account information, to Allconnect without permission from either the consumers or this Commission. In fact, calling consumers are purposefully led to believe that the transfer to Allconnect's salespersons is part of their business call to the utility and necessary to complete their request for service.

Argument:

The Respondents' Initial Arguments:

The Respondents attempt to make two points at the opening of their brief: First, they accuse Staff of luring the Commission into improperly micro-managing the utilities, as though the charged violations were mere differences in management style.[3] The Respondents urge the Commission to just grant absolution by a variance if any violation is found.[4] Second, they insist that the transfer to Allconnect is actually beneficial to their customers and is appreciated by many of them.[5] However, even if true, this point is

[3] *Respondents' Initial Brief,* p. 1: "In this proceeding, Commission Staff ("Staff") and the Office of the Public Counsel ("Public Counsel") are requesting that the Commission micro-manage the Company by dictating that KCP&L and GMO cease their relationship with Allconnect, Inc. ("Allconnect") . . . ."

[4] *Id.,* pp. 1-2.

[5] *Id.,* p. 4: "Following discussions with Allconnect as well as discussions with other utilities that do business with Allconnect, the Company decided that entering into the relationship with Allconnect was likely to improve its customers' overall experience and satisfaction levels. Based upon the results of customer satisfaction surveys, this has been proven to be a correct assessment."

irrelevant if in fact the Allconnect relationship violates Missouri statutes or Commission rules.[6]

Staff's prosecution of the Respondents for violating a Missouri statute and Commission rules is hardly micro-managing the companies.[7] The accusation is ludicrous. Managerial discretion does not extend to breaking the law. The Commission is charged with administering certain statutes, including § 393.190.1, RSMo.[8] Likewise, pursuant to delegated authority, the Commission has promulgated various rules that regulate aspects of utility conduct, including Rule 4 CSR 240-20.015(2)(C) and Rule 4 CSR 240-13.040(2)(A). Among the duties of the Commission's Staff is that of prosecuting violations before the Commission. This is not micro-management; this is the regulatory scheme devised by the Legislature for the protection of the public.[9]

Count I -- Violation of Section 393.190.1:

Staff's first count charges that the Respondents sold or transferred necessary and useful utility assets without prior permission of the Commission in violation of § 393.190.1. The Respondents assert, "Staff is incorrectly arguing that the 'customer

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[6] As Mr. Caisley admitted. Tr. 4:444, line 10, to 445, line 3.

[7] ***State of Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Commission of Missouri*****,** 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, ___ (1923): "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

[8] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo) as currently supplemented.

[9] ***State ex rel. City of Sikeston v. Public Service Commission of Missouri,*** 336 Mo. 985, 999, 82 S.W.2d 105, 110 - 111 (Mo.1935): ""The act establishing the Public Service Commission * * * is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental."

information' provided to Allconnect is part of the utility's 'franchise, works or system.'"[10] They do not deny that the sales occurred or that the customer information in question is valuable, useful and necessary; instead, they depend on the hair-splitting defense that information is not part of what the Legislature intended by "franchise, works or system."

Staff relies on the Commission's 1992 determination that "[a] utility's system is the whole of its operations which are used to meet its obligations to provide service to its customers."[11] As Staff pointed out in its *Initial Brief, t*he Missouri Supreme Court has held that "[t]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight."[12] Respondents have not found any contrary judicial opinion and Staff urges the Commission to follow its 1992 determination.[13]

The Missouri Public Service Commission Law ("PSC Law"),[14] enacted in 1913, must now serve to regulate a very different world, one in which the management of information has much more prominence and its mismanagement poses much more risk. Despite this development, the Legislature has not amended § 393.190.1 for the simple reason that it does not need to – the phrase "franchise, works or system" continues to be expansive enough to encompass that a utility uses to serve the public, including

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[10] *Respondents' Initial Brief,* p. 12.

[11] ***In the Matter of Kansas City Power & Light Co., Order Establishing Jurisdiction And Clean Air Act Workshops,***1 Mo.P.S.C.3d 359, 362 (August 26, 1992).

[12] ***Foremost-McKesson, Inc. v. Davis,*** 488 S.W.2d 193, 197 (Mo. banc 1972).

[13] Respondents point to an inapposite Commission decision from 2004 that determined that local distribution plant, office equipment and personnel -- all located in Texas – were not part of a utility's "franchise, works or system." ***Order Closing Case*, *Re: Transfer of Assets, Including Much of Southern Union's Gas Supply Department, to EnergyWorx, a Wholly Owned Subsidiary*,** Case No. GO-2003-0354, 12 Mo.P.S.C.3d 488 (Aug. 5, 2004).

[14] Section 386.010 declares that Chapters 386 and 393, as well as some others not implicated here, shall be known as the "Public Service Commission Law."

information. If the Commission were to accept Respondents' position, then an emergency would exist, because the Commission would lack regulatory authority over the information collected and used by utilities in the course of serving the public. Fortunately, there is no emergency, because that is not the situation.

Staff suggests that the customer information in question is undoubtedly part of Respondents' "franchise, works or system."

Count II -- Violation of Rule 4 CSR 240-20.015(2)(C):

Staff's second count charges that the Respondents shared specific customer information with a third party, without consent or authorization, in the course of an affiliate transaction. Respondents claim that the cited rule does not apply because there was no affiliate transaction: "However, in the case at hand, Allconnect is not an affiliated entity with KCP&L or GMO, and there is no affiliated transaction involved in the arrangements between the Respondents and Allconnect. Therefore, 4 CSR 240-20.15(2)(C) should not be applicable to this case."[15] Of the various elements of Staff's Count II complaint, this is the only one that Respondents dispute.

Respondents' position is bold, to say the least, because the evidence is unrefuted that it was GPES, an affiliate of both KCPL and GMO, that actually entered into the contract with Allconnect that is the legal basis of the conduct that is the basis of Staff's *Complaint*.[16] It does not seem like much of a stretch to Staff to view a transaction

[15] *Respondents' Initial Brief,* p. 18.

[16] In fact, Respondents admit it in their *Initial Brief,* at p. 18: "Staff and Public Counsel have argued that since GPES contracts with Allconnect on behalf of KCP&L and GMO, this fact brings this case under the Affiliated Transaction Rule." (Internal citations omitted.)

that involves an affiliate as subject to the Commission's Affiliate Transactions Rule. Respondents go on to say:

> GPES contracts with many entities, as a matter of efficiency, on the behalf of KCP&L and GMO. This fact does not invoke the Affiliated Transaction Rule. There are no transactions between GPES and Allconnect. No money or customer information is exchanged between GPES and Allconnect. All transactions are between KCP&L/GMO and Allconnect. The Commission should therefore reject Staff's and Public Counsel's argument that the Allconnect relationship is an affiliated transaction.[17]

Respondents' argument is an example of what the late Justice Scalia has dismissed as "legalistic argle-bargle."[18] It sounds as though it ought to mean something, but in fact it is meaningless. The mere participation of an affiliate is all that is required for the Commission's rule to apply; furthermore, as Staff explained in its *Initial Brief,* the Allconnect relationship was *doubly* an affiliate transaction.[19] Characterizing GPES' participation as "a contracting vehicle" or "a matter of efficiency" has no legal meaning or effect.

Perhaps aware of the flimsy nature of their argument, Respondents also raise the dread specter of a constitutional violation:

> However, if the crux of Staff's complaint is that the Respondents provide specific customer information to Allconnect as an unaffiliated third party service provider assisting KCP&L/GMO in the provision of regulated utility service, and that this practice violates Commission Rule 4 CSR 240-20.015(2)(C), then 4 CSR 240-20.015(2)(C) is vague and overbroad and KCP&L/GMO are being subjected to disparate regulatory treatment from

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[17] *Id.,* pp. 18-19. (Internal citations omitted.)

[18] ***United States v. Windsor,*** ___ U.S. ___, ___, 133 S.Ct. 2675, 2709, 186 L. Ed. 2d 808 (2013) (Scalia, J., dissenting).

[19] *See Staff's Initial Brief,* pp. 13-18.

other utilities in Missouri in violation of the equal protection clause of the Missouri and United States Constitutions.[20]

These arguments are not well-taken.[21] Regulated utilities are members of no suspect class and so the Equal Protection argument is dead on arrival as Staff explains below. Vagueness and overbreadth is a Due Process argument and the Missouri Supreme Court has already upheld the Commission's Affiliate Transactions Rule against exactly this Due Process attack.[22]

There are two steps to an equal protection analysis.[23] The first step requires consideration of the classification at issue to determine the appropriate level of scrutiny to apply.[24] If the challenged state action draws a distinction on the basis of a suspect classification, such as race, or curtails the exercise of a fundamental right, then strict scrutiny applies.[25] If the challenged law makes a gender-based classification, it is subject to intermediate scrutiny.[26] If there is no suspect classification or fundamental right at issue, then rational-basis review is applied to determine whether the challenged action is rationally related to some legitimate purpose.[27] The second step of the analysis

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[20] *Respondents' Initial Brief,* p. 19.

[21] It is likely that Respondents recognize as much, judging by their failure to provide any analysis or citations of authority.

[22] ***State ex rel. Atmos Energy Corp. v. Public Service Commission,*** 103 S.W.3d 753, 765 (Mo. banc 2003).

[23] ***Amick v. Dir. of Revenue,*** 428 S.W.3d 638, 640 (Mo. banc 2014), *cert. denied sub nom.* ***Amick v. Missouri Dir. of Revenue,*** 135 S. Ct. 226, 190 L. Ed. 2d 171 (2014); ***State v. Young,*** 362 S.W.3d 386, 397 (Mo. banc 2012).

[24] *Id.*

[25] *Id.* State actions rarely survive strict scrutiny.

[26] ***Amick,*** *supra;* ***Comm. for Educ. Equality v. State,*** 294 S.W.3d 477, 496, n. 4 (Mo. banc 2009).

[27] ***Amick,*** *supra;* ***Young,*** 362 S.W.3d at 397. State actions rarely fail to survive rational-basis review.

requires the application of the appropriate level of scrutiny to the challenged state action.[28]

The Commission's Affiliate Transactions Rule does not classify on the basis of race, national origin, gender or any other arbitrary personal characteristic. A regulated utility is not a member of any suspect class.[29] Likewise, public utilities are subject to pervasive state regulation of their commercial activities; no fundamental rights are curtailed by the Affiliate Transactions Rule.[30] Respondents' argument, therefore, is subject to mere rational-basis review.

For the purposes of rational-basis review, there is a presumption that a state action has a rational basis and the challenging party must overcome this presumption by a "clear showing of arbitrariness and irrationality."[31] Rational-basis review does not question "the wisdom, social desirability or economic policy underlying a statute," and the state action will be upheld if it is justified by any set of facts.[32] Rational-basis review requires the challenger to "show that the law is wholly irrational."[33] Respondents have made no such showing. The Commission's Affiliate Transactions Rule is rationally

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[28] ***Amick,*** *supra;* ***Weinschenk v. State,*** 203 S.W.3d 201, 211 (Mo. banc 2006).

[29] That is, a class based on race, religion, gender, or the like.

[30] ***United C.O.D. v. State,*** 150 S.W.3d 311, 313 (Mo. banc 2004): "As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution." (No fundamental rights implicated by statutes regulating taxi cabs).

[31] ***Amick,*** *supra;* ***Foster v. St. Louis County,*** 239 S.W.3d 599, 602 (Mo. banc 2007) (*quoting* ***Fust v. Attorney General for the State of Missouri,*** 947 S.W.2d 424, 432 (Mo. banc 1997)).

[32] ***Amick,*** *supra;* ***Comm. for Educ. Equality,*** 294 S.W.3d at 491 (*quoting* ***Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot County,*** 256 S.W.3d 98, 102 (Mo. banc 2008)).

[33] ***Amick,*** *supra;* ***City of St. Louis v. State,*** 382 S.W.3d 905, 913 (Mo. banc 2012) (*quoting* ***Treadway v. State,*** 988 S.W.2d 508, 511 (Mo. banc 1999)).

related to the legitimate governmental objective of preventing the covert subsidization by captive ratepayers of the unregulated business activities of monopoly public utilities and their affiliates. Respondents' Equal Protection argument is a non-starter.

The thing that irks the Respondents is the perceived unfairness of prosecuting them for passing customer information to a third party without permission or authority when the fact is that every Missouri utility evidently does it all the time.[34] The palpable difference, however, is that the rest of the utilities do it for legitimate utility purposes, such as collecting from non-paying customers and for meter reading; they don't do it just to make a buck. Staff has simply exercised its prosecutorial discretion and has not pursued those instances in which it perceives a proper utility purpose for sharing customer information with third parties.

In the criminal law, a defense of selective prosecution is recognized, that perhaps could be applied in the regulatory arena as well. The Eighth Circuit has said, "(t)o support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the

[34] *Respondents' Initial Brief,* p. 19.

desire to prevent his exercise of constitutional rights."[35] Respondents have neither alleged nor shown any invidious purpose on Staff's part.[36]

Count III -- Violation of Rule 4 CSR 240-13.040(2)(A):

Staff's third count charges that the Respondents abdicated their customer service obligations by allowing Allconnect's personnel to perform tasks that should have been performed by trained utility customer service personnel. Respondents assert, "Staff has incorrectly alleged that 'KCP&L-GMO have transferred service quality responsibilities to Allconnect which, by Commission Rule 4 CSR 240-13.040(2)(A), KCP&L are required to provide.' KCP&L and GMO have qualified personnel available and prepared to receive and respond to all customer inquiries, service requests, safety concerns and complaints related to regulated service at all times during normal business hours."[37]

Respondents' defense is that "[t]he rule does not prescribe the manner in which this response is to be achieved and does not require that the personnel be employees of the utility. Complaints of KCP&L and GMO customers related to Allconnect may be handled by either KCP&L personnel, Allconnect personnel or both. Staff has not alleged that the Company lacks adequate resources to respond to customer complaints, customer inquiries, service requests and safety concerns, but instead appears to be arguing that customer complaints must be handled by employees of the utility, that is by

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[35] ***United States v. Swanson,*** 509 F.2d 1205, 1208 (8th Cir., 1975); ***Jones v. Mo. Dental Board,*** 687 S.W.2d 579, 581 (Mo. App., E.D. 1985).

[36] This defense is based on the Equal Protection Clause, *cf.* ***Oyler v. Bowles,*** 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446, ___ (1962).

[37] *Respondents' Initial Brief,* p. 21 (*quoting Staff's Complaint,* p. 30). (Internal citations omitted.)

KCP&L personnel."[38] Respondents go on to cite to the Missouri Court of Appeals for the proposition that "[n]either the Commission nor the Staff has the authority to tell the Company how to manage its business as long as the Commission's regulations are being satisfied."[39]

Respondents' reference to the Court of Appeals does not quote what the Court actually said, which is instructive:

> The utility's ownership of its business and property includes the right to control and management, subject, necessarily to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its affairs and conduct its business as it may choose, ***as long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare.***[40] (Emphasis added).

The Court listed three separate grounds on which the Commission may properly interfere with the utilities in the conduct of their business and the management of their affairs; Respondents have attempted to reduce these to just one. These grounds are:

1. Failure to perform a legal duty;
2. Failure to comply with lawful regulation; and
3. Doing harm to the public welfare.

In Counts I and II, Staff has charged that Respondents (1) failed to perform the

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[38] *Id.*

[39] *Id.,* pp. 21-22; *citing* ***State ex rel. Harline v. Public Service Commission,*** 343 S.W.2d 177, 181 (Mo. App. 1960).

[40] ***Harline,*** *supra.*

legal duty imposed by § 393.190.1 and (2) failed to comply with the Affiliate Transaction Rule, a lawful regulation. In Count III, Staff charged that the Respondents violated Commission Rule 4 CSR 240-13.040(2)(A), also a lawful regulation. Any one of these charges, if sustained, would authorize Commission interference with Respondents' management of their affairs. Under these circumstances, Respondents' reference to ***Harline*** seems inapposite.

Turning to the charged violation of Rule 4 CSR 240-13.040(2)(A), Staff notes that Respondents are absolutely correct that customer services may properly be provided by utility personnel or by the employees of a contractor. The issue is not who employs Allconnect's sales personnel, but rather the nature of their function and the focus of their training. Their function and training are ***sales,*** not service. That is the crux of Staff's complaint in Count III – the Respondents are, by trickery, delivering their unwitting customers into the hands of telemarketers and profiting nicely by doing so.[41]

Respondents route their customers' complaints about Allconnect to Allconnect for resolution.[42] Respondents' customers are thus left with no effective recourse but complaint to this Commission. Frankly, one would expect a company that purports to be concerned above all else with their customers' experience to insist on processing these complaints itself. This fact alone belies all of Respondents' claims of concern for their customers.

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[41] The record contains the amount of Respondents' profits, both gross and net. Respondents take pains to characterize these amounts as trivial in order to downplay the role of money in their motivation.

[42] Ex. 1, Kremer Direct, p. 6; Ex. 2, Kremer Surrebuttal, pp. 15-17.

Penalties:

Staff has requested that the Commission direct its General Counsel to seek monetary penalties from KCPL and GMO. Staff does not take this step lightly. Respondents argue "even if the Commission finds a violation of a statutory provision or a PSC rule, the Commission should not direct its General Counsel to seek monetary penalties against the Company. The Company had very good reasons to believe that the relationship with Allconnect did not violate Section 393.190.1 RSMo., 4 CSR 240-20.015(2)(C), or 4 CSR 240-13.040(2)(A). Moreover, the evidence establishes that there are substantial and robust governance processes in place to ensure that the Company's relationship with Allconnect is not detrimental to the interests of customers."

Respondents' arguments do not address the reasons that Staff has requested penalties: First, the element of betrayal of trust implicit in the Confirmation Model selected by KCPL and GMO;[43] second, Staff's determination that the Companies' primary motivation was financial;[44] third, the improper nature of the accounting treatment selected by Respondents, booking below-the-line the revenues derived from the Allconnect relationship although they were earned using regulated assets;[45] and fourth, the heightened danger of improper subsidization by ratepayers of Respondents' unregulated venture necessarily caused by Respondents' implementation of the

[43] *Staff's Initial Brief,* pp. 29-32.

[44] *Id.,* pp. 27-29, 32-33; Kremer Direct, Ex. No. 1HC, p. 5, lns. 1-12 and Schedule LAK-d2, p. 29 (Attachment 3 to the Report of Staff's Investigation, File No. EW-2013-0011, Company Data Request No. 0045) (emphasis added).

[45] Ex. 6, Hyneman Surrebuttal, pp. 10-11, 28.

Allconnect relationship.[46] It is Staff's position that these factors require a monetary penalty.

Conclusion:

By reason of all the foregoing, Staff has shown that Respondents' asserted defenses and arguments must fail. The evidence conclusively shows that Respondents purposely violated § 393.190.2 and Commission Rules 4 CSR 240-20.015(2)(C) and 4 CSR 240-13.040(2)(A) in order to aggressively increase unregulated revenues. For the reasons enumerated by Staff, monetary penalties are appropriate, both to ensure that Respondents do not profit by their conduct and to deter such violations in the future.

WHEREFORE, Staff prays that the Commission will find and determine that the Respondents have violated a statute and Commission rules as charged herein by Staff and enter its order (1) finding that KCPL and GMO violated § 393.190.2, RSMo.; (2) finding that KCPL and GMO violated Commission Rule 4 CSR 240-20.015(2)(C); (3) finding that KCPL and GMO violated Commission Rule 4 CSR 240-13.040(2)(A); (4) authorizing its General Counsel to seek penalties under §§ 386.570, and 386.590; and (5) requiring KCP&L and GMO to either end their relationship with Allconnect forthwith or, alternatively, to improve and modify their operations so that they are no longer in violation of the above provisions via their relationship with Allconnect; and granting such other and further relief as the Commission deems just.

[46] Ex. 6, Hyneman Surrebuttal, pp. 28-30.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 25th day of February, 2016, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson