BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Construction Audit and Prudence Review of Environmental Upgrades To Iatan 1 and Iatan Common Plant, Including All Additions Necessary for These Facilities to Operate	)))))	**File No. EO-2010-0259**

STAFF'S REPLY TO KANSAS CITY POWER & LIGHT COMPANY'S AND KCP&L GMO'S MARCH 22, 2010 RESPONSE TO STAFF AND KANSAS CITY POWER & LIGHT COMPANY'S AND KCP&L GMO'S RESPONSE TO COMMISSION'S MARCH 24, 2010 AGENDA SESSION

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the Staff Counsel Office of the Missouri Public Service Commission. On Monday, March 22, 2010, at 8:23 p.m, in the instant file, Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO) filed their (1) Response To Order Establishing Investigatory Docket And Setting On-The-Record Proceeding, And (2) Response To Staff Motion To Open Construction Audit And Prudence Review Investigation Case filed in the instant docket. On March 23, 2010, the Commission issued an Order Establishing A Deadline For Replies stating "[a]ny entity wishing to respond to Kansas City Power and Light Company and KCP&L shall file its reply no later than 10:00 a.m. on Monday, March 29, 2010. On Thursday, March, 25, 2010 at 6:24 p.m., KCPL and GMO filed their Response To Clarify Relief Being Requested From The On-The-Record Proceeding. In response to KCPL's and GMO's March 22, 2010 and March 25, 2010 filings the Staff states as follows:

1. The Staff will attempt to address some of the further indications of KCPL's/GMO's scorched earth, histrionic approach and some of the potential legal challenges that might arise from the approach proposed to the Commission by KCPL/GMO. As a preliminary matter, the Staff would note that although KCPL's/GMO's pleadings of February 16,

2010, March 22, 2010, and March 25, 2010 are not discovery matters, the Commission's rule on discovery, 4 CSR 240-2.090(8), requires counsel for a moving party in good faith to first confer or attempt to confer with opposing counsel concerning the discovery matter prior to filing the motion. Undersigned counsel and other Staff are not aware of counsel or other representative of KCPL/GMO attempting to talk with Staff about the matters addressed by KCPL/GMO in their pleadings of February 16, 2010, March 22, 2010, or March 25, 2010.

2. KCPL/GMO evidently have realized from watching the Commission's March 24, 2010 Agenda Session[1] that they overreached in particular with their March 22, 2010 Response, and thus attempted to recoup by their March 25, 2010 filing. The Staff will show that KCPL/GMO still overreach, even with the retrenchment of their March 25, 2010 filing. KCPL/GMO are attempting to have the Commission make substantive determinations for their impending, but yet to be filed rate cases, previously in File Nos. ER-2009-0089 and ER-2009-0090, and now in this investigatory docket. In this investigatory docket, there has not been an intervention period and the only parties are (a) KCPL/GMO, (b) the Staff, and (c) also the Office of the Public Counsel (Public Counsel). Pursuant to Section 386.710.1(3) RSMo., Public Counsel has the discretion to represent or refrain from representing the public in any proceeding. Rule 4 CSR 240-2.010(11) makes Public Counsel a party unless Public Counsel files a notice of his/her intention not to participate. Presumably, KCPL/GMO will seek that the Commission substantively and procedurally bind itself for purposes of their impending rate cases before the Commission. At page 3, paragraph 5 of their March 25, 2010 Response, KCPL/GMO still request that they be allowed to present witnesses whose testimony is designed to address substantive issues in their yet to be filed Iatan 2, Iatan 1, and Iatan common plant rate cases. For

[1] Does the Commission want to provide or has the Commission provided persons and entities guidance whether said persons and entities should be making filings with the Commission on the basis of Agenda Session's that are now being archived but not transcribed?

example, they want the Commission to make substantive determinations respecting KCPL's cost control system and whether the Staff has conducted what KCPL/GMO are calling a "financial audit" rather than a construction audit/prudence review of the Iatan Project. KCPL/GMO even request at page 3, paragraph 4.(a)6) in their March 22, 2010 Response that the Commission take testimony to determine whether the Staff is applying the correct legal standard concerning a prudence audit.

3. The Staff is not presently engaged in a construction audit or prudence review of the time frame already addressed by the period covered in the Staff's report filed on December 31, 2009, and it was not the Staff's intent to return to that time period to conduct further or new investigation and propose new, different or increased adjustments barring the developments listed in the Staff's March 9, 2010 Reply, which the Staff repeats as follows: (a) matters that a party other than the Staff may raise before this Commission, (b) matters that the public service commission staff in an adjoining State might raise in a contemporaneous proceeding in that adjoining State to a Missouri Commission proceeding or in a subsequent proceeding to a Missouri Commission proceeding involving the same construction project, (c) matters that an informant may bring to the attention of the Staff of which the Staff was not previously aware, (d) matters that may be raised by the media of which the Staff was not previously aware, (e) information not timely disclosed by KCPL or information disclosed by KCPL that is later found to be fraudulent, inaccurate, misleading, or incomplete, (f) matters that may originate as an inquiry by a member of the Legislature of which the Staff was not previously aware, (g) matters that the Staff may become aware of on its own, but too late in an audit to be entirely developed by a deadline in a particular case, and (h) matters that become an issue only after the "completed" construction project operates for a period of time, such as a unit not meeting design specifications, having high maintenance costs, experiencing low availability, etc.

4. Nonetheless, KCPL/GMO fail to acknowledge in their pleadings the fact that even though the Iatan 1 air quality control system (AQCS) is “fully operational and used for service,” as required by Section 393.135 RSMo., the Iatan 1 AQCS work and final costs are intertwined with the construction of the Iatan 2 generating unit and Iatan 2 common facilities. ** ____________________ **

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(KCPL Response to Staff Data Request No. 472.1 in File/Case No. ER-2009-0089).

5. If the Commission now by Order or other transcribed directive, such as a transcript of an Agenda Session or a hearing, relieves the Staff of further audit responsibilities regarding Iatan 1 AQCS and Iatan 1 common facilities inappropriate charges, the Staff will not further bother with such concerns.

6. The Staff has phrased the language of its Report and its prior pleadings as it did, in part, so as not to give a false impression of (a) what was being presented or (b) what can ever be presented by such a report. Also, if any of the matters listed in paragraph 2. above occurred, and caused the Staff to return to the period it had already audited, a return by the Staff to that prior period would not be met with the charge that the Staff's Report had said that the Report was definitively complete as of December 31, 2009. Through its audit of Iatan 2, the Staff is aware that its Iatan 2 audit involves items impacting its Iatan 1 AQCS audit as well. Thus, the matters known by the Staff at December 31, 2009 regarding Iatan 1 AQCS and Iatan common plant costs will likely change, as a result of the Staff's audit of Iatan 2 costs. KCPL/GMO have not represented to the Staff that the costs they will seek to recover in rates for Iatan 1 AQCS and Iatan common plant, in their yet to be filed rate increase cases, were definitively known at December 31, 2009. KCPL/GMO further must know that the Staff could not be examining material through December 31, 2009 and issue reports by June 19, 2009 and December 31, 2009. The Commission's April 15, 2009 Orders in Case Nos. ER-2009-0089 and ER-2009-0090 providing the specifics of the audit that the Staff was to perform by June 19, 2009 provided at least eleven (11) days for Staff to review invoices it received and prepare a report. The Staff expects that the Commissioners knew that the eleven (11) days specified by the Commission would only permit the most elementary review of invoices received by the Staff from KCPL by June 8, 2009, even if KCPL was able to provide the Staff with all such invoices.

7. In setting rates, other than for fuel and purchased power, environmental, renewable energy resources, and decommissioning costs, the Commission must look at all relevant factors. *State ex rel. Utility Consumers Council of Mo., Inc. v. Public Serv. Comm'n*, 581 S.W.2d 41, 49, 56 (Mo.banc 1979); Sections 393.266, 393.292, 393.1030.2(4) RSMo. If any of the items listed in paragraph 3. above arise, are any of them "relevant factors" pursuant to

Missouri statute and caselaw? The Staff would contend that they are. Maybe some parties that could appeal a Commission decision would so contend also.

8. KCPL/GMO asserts in their March 22, 2010 Response, separately, at pages 3 and 4, respectively, that the Commission should make the following inquiry/take testimony concerning:

> 4. (a) 7) whether Staff's current discovery and investigation has focused on prudence or instead on financial issues which may or may not be included in a future rate case [*See* Attachment 2, a listing of all data requests received from Staff in Case No. ER-2009-0089 since the Commission's June 10, 2009 order].
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> 4. (b) 5) whether discovery conducted by Staff has focused on prudence issues or digressed into financial reviews of items that may or may not be included in a future rate case [*See* Attachment 2].

Among other things, on the cover page to KCPL's/GMO's Attachment 2 to their March 22, 2010 Response, KCPL/GMO take the Staff to task for among other things:

> . . . Of those data requests, more than 100 pertain to expense reports of KCP&L employees. More than 50 data requests pertain to how KCP&L employees are reimbursed for mileage. By contrast, only about a dozen data requests pertain to the expenditures by Alstom, Kiewit, or Burns & McDonnell, the principal vendors responsible for the construction of Iatan 1, Iatan 2, and the common facilities necessary to operate those units.

At page 3 of their March 25, 2010 Response, KCPL/GMO assert that:

> 5.e) Staff appears to be conducting a financial audit of the Companies rather than a prudence review of the construction decisions made related to Iatan 1 and common plant. For example, Staff's recent audit activities have largely focused on expense reports of officers of the Companies, and mileage charges reimbursements for employees working at the Iatan construction project. In fact, of the most recent 400 data requests issued by Staff in this "construction audit," more than 100 (or in excess of 25%) have dealt with expense reports of KCP&L employees. More than 50 data requests pertain to how KCP&L employees are reimbursed for mileage. Only a dozen or so of those 400 data requests (or only 3%) pertain to expenditures by Alstom, Kiewit or Burns & McDonnell, the principal vendors responsible for the construction of Iatan 1, Iatan 2 and the common plant necessary to operate those units.

KCPL/GMO in part direct their criticisms of the Staff's audit as being a financial audit and not a construction audit/prudence review. It was the Commission that specified that the Staff was to perform a construction audit and prudence review based in particular on a review of invoices through June 8, 2009. A construction audit/prudence review of infrastructure investment the nature of that relating to the KCPL Experimental Regulatory Plan Stipulation And Agreement does not rely primarily on a review of invoices.

9. In a further effort to distort the nature of the Staff's construction audit/prudence review, KCPL/GMO uses the number of Staff Data Requests to attempt to indicate the amount of Staff time devoted to one area versus another. KCPL/GMO knows that each Staff Data Request does not seek or produce from KCPL an equal amount of information. For example, Staff Data Request No. 673 ("Please provide for review all David Price [KCPL Vice-President Construction] e-mails either received or sent while in the employ of KCPL.") produced over 40,000 pages of information regarding issues exclusive to the Iatan Project as well as Iatan Project matters relative to other KCPL Experimental Regulatory Plan Stipulation And Agreement infrastructure projects for the period May 2007 through early February 2008. KCPL/GMO is further aware that KCPL provided to the Staff significant information in response to subpoenas duces tecum in Great Plains Energy, Inc.'s (GPE) acquisition of Aquila, Inc. in Case No. EM-2007-0374. In fact in the rebuttal testimony of KCPL witness Chris B. Giles in Case No. ER-2009-0089, Mr. Giles states that KCPL provided thousands of documents to the Utility Services Division about the Iatan Project in response to the subpoenas duces tecum in Case No. EM-2007-0374. The Commission in its April 15, 2010 Orders in Case Nos. ER-2009-0089 and ER-2009-0090 at pages 5-6 directed the Staff to use the information that it had received from KCPL to date for a construction audit and prudence review. In addition, KCPL/GMO have failed to note in their recent filings, but provided information to members of

the Commission's Operations Division without the requirement of the issuance of formal Staff Data Requests which is being reviewed by the Utility Services Division Staff auditors engaged used in the construction audit/prudence review.

10. The Staff's inquiry into expense reports of KCPL officers and employees was driven by the charge to the Iatan Project treated by the Staff as "Highly Confidential" in the Staff's March 9, 2010 Reply and the facts related to KCPL's efforts to prevent disclosing the details of the matter and how this matter was addressed by KCPL. The Staff would be happy to discuss in granular detail this particular charge and how KCPL treated it after the matter was discovered by the Staff. The Staff is prepared to do so if that is KCPL's desire. The nature of an audit is influenced by the culture and operation of the internal controls of the entity being audited. Generally an entity which displays an effective practice of internal controls and cooperates by fully explaining charges and providing supporting information requires less scrutiny and audit work than an entity found to be operating outside its own internal control parameters and that refuses to or inadequately explains information it provides and delays the provision of information

11. After the Staff discovered the aforementioned charge, the specifics of which the Staff is still treating as "Highly Confidential," the Staff sought to determine whether this item was an isolated event. Further expense report audit work by the Staff respecting Iatan Project expenses, revealed what the Staff deemed to be other inappropriate charges, including duplicative and misreporting of charges to the Iatan Project. The Staff's audit work revealed and indicated that inappropriate mileage charges to and from the Iatan Project site were being made against the Iatan Project. In addition, a significant Iatan Project vendor has a contract provision allowing for mileage charges to and from the Iatan Project site. This is a vendor that KCPL asserts the Staff was devoting an inadequate amount of time concerning, in regards to the Staff's

construction audit/prudence review. In a meeting requested by KCPL of the Staff and KCPL representatives in Jefferson City, after a Quarterly Iatan Construction Audit meeting, and after KCPL had objected to making available employees'/workers' home addresses needed by the Staff to verify the legitimacy of mileage charges, KCPL again objecting on the basis that the Staff's request was burdensome, refused to make the necessary information available to the Staff. KCPL eventually provided the home addresses of those charging mileage on expense reports, other than home addresses for employees of the Iatan Project vendor.

Iatan Project employees/workers whose sole or principal location of work is the Iatan Project site should not be claiming mileage to the Iatan Project site on expense reports. Those Iatan Project/KCPL employees/workers, whose principal location of work is not the Iatan Project site, should only be claiming mileage for those miles in excess of the miles to their principal location of work for those occasions when they travel to the Iatan Project site. The Staff also has been attempting to verify that those individuals who have been claiming mileage to the Iatan Project site have actually logged in at the Iatan Project site for those trips for which they are claiming mileage. If the Commission does not want the Staff to conduct such an audit of charges to the Iatan Project, KCPL has now afforded the Commission the opportunity to so indicate that to the Staff.

12. At page 4, paragraph 4.b.4) of their March 22, 2010 Response, KCPL/GMO assert that the Commission should take testimony concerning "whether the Staff's requests have been unduly burdensome, failed to take into account that the requests might be objectionable and not properly focused on prudence issues, or whether those requests drifted far afield from prudence review and into minute details more appropriate for a financial audit." At page 4, paragraph 4.b.2) of their March 22, 2010 Response, KCPL/GMO assert that the Commission should take testimony concerning "the reasons the Staff failed to bring issues to the Commission

concerning discovery compliance if Staff felt the Companies were being dilatory." Applying KCPL's/GMO's retort to the Staff on discovery matters to KCPL/GMO themselves, the Commission should take testimony concerning the reasons KCPL/GMO failed to bring issues to the Commission concerning the Staff's discovery, if KCPL/GMO believed Staff Data Requests were unduly burdensome, objectionable, not properly focused, digressions into minute details, etc.

13. At page 6 of their March 22, 2010 Response, KCPL/GMO assert that:

> 4.(e)The Commission should also inquire into the impact on the Companies' cost of capital as a result of Staff's failure to complete the audit and thus identify the specific issues to be considered in future proceedings.

At page 3 of their March 25, 2010 Response, KCPL/GMO assert that:

> 5.a) Continuing the uncertainty associated with the prudence review of the Companies' investment in Iatan 1 and common plant beyond the time frame ordered by the Commission in its June 10, 2009 Orders has the potential to increase the Companies' cost of capital, to the detriment of the Companies and their customers.

First, KCPL/GMO entered with the Staff into a Joint Motion Of Staff, KCP&L And GMO To Extend The Filing Date Of Staff's Construction Audit And Prudence Review Reports And The Filing Date Of Responses Or Rebuttal Testimony To KCP&L's And GMO's Next General Rate Cases, which was filed on May 28, 2009 in Case Nos. ER-2009-0089 and ER-2009-0090. KCPL/GMO and the Staff stated at page 5, paragraph 6 in said Joint Motion that extending the Staff's filing date to the date of the filing of the Staff's direct testimony in the next general rate cases of KCPL and GMO "will not prejudice any party to these cases . . ." The "electronic signature" of Curtis Blanc appears on the Joint Motion and William G. Riggins, James M. Fischer, Karl Zobrist, and Roger W. Steiner are also shown as counsel for KCPL. Presumably, KCPL/GMO knew the consequences of the Joint Motion Of Staff, KCP&L And GMO To Extend The Filing Date Of Staff's Construction Audit And Prudence Review Reports And The

Filing Date Of Responses Or Rebuttal Testimony To KCP&L's And GMO's Next General Rate Cases when they entered into it.

14. Second, KCPL/GMO and The Empire District Electric Company (Empire) could have tried the Iatan 1 ACQS and Iatan 1 common plant issues in the pending rate increase case of Empire, Case No. ER-2010-0130. But on January 25, 2010, when the procedural schedule in Empire's pending rate case, Case No. ER-2010-0130, was still in dispute and the Staff was proposing to try the Iatan 1 AQCS and Iatan common plant issues in the pending Empire rate case, KCPL filed the Response Of Kansas City Power & Light Company To Staff's And Empire's Proposed Procedural Schedules, And To Staff's Motion To Delay The Adoption Of Procedural Schedule. It was KCPL that argued for delay in the hearing of the Iatan 1 AQCS and common plant issues when they could have been heard in Empire's rate increase case. KCPL's pleading in Empire's rate increase case states, in part, as follows at paragraph 4, on page 2:

> . . . KCP&L has a different concern with the proposed schedules that pertains to the Iatan 1 AQCS and the Iatan common plant included in Empire's case. In particular, KCP&L is very concerned that the procedural schedule being proposed by Staff may result in any prudence issues related to the completion of the Iatan 1 AQCS and the Iatan common plant being litigated in the context of the pending Empire rate case rather than in the context of the next KCP&L rate case which is anticipated to be filed this Spring.[1] KCP&L strongly believes it would be preferable to wait to litigate such prudence issues until the next KCP&L rate case since KCP&L, rather than Empire, is the majority owner, constructor, and operator of the Iatan Generating Station. Litigating prudence first in the case of a minority owner will likely create both logistical and due process issues. KCP&L, however, also expects that the discussions among the parties may address and resolve this concern. . . .
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> [1] In Staff's Proposed Procedural Schedule And Other Proposed Procedures, Staff stated at page 3: "The Staff's direct case filing on February 26, 2010 will include the Staff's Iatan 1 AQCS and Iatan 1 common plant construction audit and prudence review filed by Staff on December 31, 2009, in Case No. ER-2009-0089 and Case No. ER-2009-0089, which is based on invoices booked and paid by KCPL through May 31, 2009." KCP&L, as opposed to Empire, is in a better position to substantively respond to the issues raised in those reports.

The Non-Unanimous Stipulation and Agreement filed on February 25, 2010 and approved by the Commission on March 3, 2010 in Case No. ER-2010-0130 provides for prudence issues related

to the completion of the Iatan 1 AQCS and the related Iatan common plant being litigated in the context of Empire's rate case next succeeding Case No. ER-2010-0130. Thus, both KCPL and Empire had no objection to the processing of Empire's pending rate case in which Empire is seeking recovery of its share of the costs of the Iatan 1 AQCS and Iatan 1 common plant investment, without trying any Iatan 1 construction audit/prudence review issues until the KCPL/GMO Iatan 2 rate cases.

15. The Staff did not comment on KCPL's/GMO's and Empire's strategy in the Staff's March 9, 2010 Reply filed in File Nos. ER-2009-0089 and ER-2009-0090, but the Staff will do so now. Although the Staff and the other non-KCPL signatories to the April 24, 2009 Non-Unanimous Stipulation And Agreement in Case No. ER-2009-0089 and the Staff and the other non-GMO signatories to the May 22, 2009 Non-Unanimous Stipulation And Agreement in Case No. ER-2009-0090 agreed to a cap on disallowances respecting KCPL's and GMO's ownership share of Iatan 1, there is no such cap respecting Empire's ownership share.

16. Not first trying Iatan 1 AQCS and Iatan common plant disallowances in the Empire rate increase case, potentially has permitted KCPL/GMO to avoid having to subsequently deal in their yet to be filed KCPL/GMO Iatan 2 rate cases with Commission disallowances in excess of the caps in the Case Nos. ER-2009-0089 and ER-2009-0090 Non-Unanimous Stipulation And Agreements.

17. Third, the Staff's December 31, 2009 Report was filed as Highly Confidential and was not available to the public in any form prior to February 16, 2010. The Staff is not aware of GPE/KCPL/GMO filing any report with the United States Securities and Exchange Commission (SEC) advising investors of the Staff's December 31, 2009 Report or the Staff's December 31, 2009 Report posing a significant change to their business risk. KCPL/GMO have filed

responsive pleadings before this Commission on February 16, 2010, March 22, 2010 and March 25, 2010 to the Staff's December 31, 2009 Report.

18. As the Commission is well aware, it is not bound by *stare decisis*. *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791 (Mo. 1958); *State ex rel. General Tel. Co. v. Public Serv. Comm'*n, 537 S.W.2d 655, 661-62 (Mo.App. 1976); *State ex rel. Associated Nat. Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985); *State ex rel Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W. 2d 457, 462 (Mo. App. 1987); *State ex rel. GTE North, Inc. v. Public Serv.Comm'n*, 835 S.W.2d 356, 371-72 (Mo.App. 1992); *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. 1993); *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); *Marty v. Kansas City Light & Power Co.*, 259 S.W. 793, 796 (Mo. 1923). [2]

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[2] In the *General Telephone* case, the Court of Appeals held that the Commission's decision in a prior General Telephone Company case had no binding effect in a subsequent General Telephone Company case:

> Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, Administrative Treatise Section 18.09, 605, 610, (1958), as follows:
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> > "* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)
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> Clearly the commission in this case was not bound by the action in the 1962 case.

537 S.W.2d at 661-62.

Another relevant case is *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). In this case regarding a general rate increase filed by Missouri Public Service Company (MPS), Jackson County and the City of Kansas City tried to invoke an announcement made by the Commission, on the Commission's own, in the Commission's Report And Order in the immediately preceding MPS rate increase case, that there would be a moratorium on rate increases for MPS for a period of at least two years from the effective date of the Report And Order. MPS subsequently filed for another general rate increase and the Commission granted MPS a rate increase within the two year moratorium period it had previously announced.

Jackson County and the City of Kansas City challenged the rate increase and the Missouri Supreme Court

19. And although the Staff addressed the doctrine of equitable estoppel in its March 9, 2010 Reply, a concept raised, but a term not used, by KCPL/GMO in their February 16, 2010 Initial Response, KCPL/GMO again raise the concept in their March 22, 2010 Response. The Staff would further note as follows:

> Equitable estoppel is normally not applicable against a governmental entity. *Farmers' & Laborers' v. Dir. of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987). The application of equitable estoppel against governmental entities or public officers is limited to exceptional circumstances where right or justice or the prevention of manifest injustice requires its application. *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo.1966); *State ex rel. Letz v. Riley*, 559 S.W.2d 631, 634 (Mo.App.1977). Honesty and fair dealing must require that equitable estoppel be applied in order to prevent manifest injustice. *Murrell*, 408 S.W.2d at 851. The doctrine is not favored by law and is not to be casually invoked. *State, Etc. v. City of Woodson Terrace*, 599 S.W.2d 529, 531 (Mo.App.1980). Equitable estoppel cannot be applied if it will prejudicially affect the sovereignty of the state. P.H. Vartanian, Annotation, *Applicability of Doctrine of Estoppel Against Government and its Governmental Agencies*, 1 A.L.R.2d 338, 340-41 (1948). As a result, equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy. *Id.* at 341. The underlying principle behind its limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights. *Riley*, 559 S.W.2d at 634.

850 S.W.2d at 910.

20. Based on the March 24, 2010 Agenda Session, KCPL/GMO in their March 25, 2010 Response state at page 1, paragraph 2 that "the Companies are concerned they may not have not [sic] succinctly articulated the specific relief they are seeking from the Commission at this juncture of the proceedings" and unfortunately add further obfuscation by using an important

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stated that a moratorium was in conflict with the spirit of the Public Service Commission Law, that spirit being continuous regulation to meet changes in conditions as required by these changes in conditions. The Court quoted from a Missouri Supreme Court decision in *State ex rel. Chicago, Rock Island, & Pacific R.R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo. banc 1958) as follows:

> "Its [Commission's] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest." To rule otherwise would make §393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers. [Citation omitted.]

532 S.W.2d at 29.

term incomprehensibly. That term is "decisional prudence." In fact, KCPL/GMO misleadingly imply that the Commission itself used the term in its June 10, 2009 Orders in Case Nos. ER-2009-0089 and ER-2009-0090. KCPL/GMO now ask that the Commission end "the decisional prudence aspect of the Staff's construction audit"/"the decisional prudence portion of Staff's review" [Emphasis KCPL's/GMO's] "as directed by the Commission in its June 10, 2009 Orders in Case Nos. ER-2009-0089 and ER-2009-0090." "Decisional prudence" is not a term used, let alone defined, in the Commission's June 10, 2009 or April 15, 2009 Orders.

21. Although the term "decisional prudence" is not found in KCPL's Experimental Regulatory Plan Stipulation And Agreement, which was approved by the Commission in Case No. EO-2005-0329, the signatory parties had agreed in the KCPL Experimental Regulatory Plan Stipulation And Agreement to not subsequently challenge the prudence of KCPL's initial decision to undertake specific infrastructure projects, such as the placement/replacement of AQCS equipment at Iatan 1, on the basis that such a decision was not necessary or timely, or that alternative technologies or fuels should have been used by KCPL, so long as KCPL proceeded to implement the Resource Plan described in the KCPL Experimental Regulatory Plan Stipulation And Agreement (or a modified version of the Resource Plan where the modified plan has been approved by the Commission) and KCPL is in compliance with Paragraph III.B.1(o) "Resource Plan Monitoring." KCPL Experimental Regulatory Plan Stipulation And Agreement, Case No. EO-2005-0329, pp. 31, 36, 39, 42-43. The KCPL Experimental Regulatory Plan Stipulation And Agreement also states at pages 31, 36, 39, 42-43 as follows:

> . . . Nothing in this Agreement shall be construed to limit any of the Signatory Parties' ability to inquire regarding the prudence of KCPL's expenditures, or to assert that the appropriate amount to include in KCPL's rate base or its cost of service for these investments is a different amount (e.g., due to imprudent project management) than that proposed by KCPL.

22. The term “decisional prudence” was used in the Case No. EO-2005-0329 KCPL Experimental Regulatory Plan Stipulation And Agreement evidentiary hearings on June 27, 2005 by Public Counsel witness Russell Trippensee in response to a question from Commissioner Robert Clayton:

> Q.[Commissioner Robert Clayton] Are there any agreements as to positions of the parties in any of these rate cases that are set out rate case 1 through 4?
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> A.[Russell Trippensee] There are -- there are some agreements. As far as -- I don't think the term has been used, but in regard to the projects listed in the Stipulation and Agreement, the parties agree not to oppose those in the rate case in which they have -- are going to be included in rate-base as operational and in service used and useful. We will not oppose those based on the initial decision to commence with those projects. It does not address the stipulation and there is no -- does not address and there is no agreement that the implementation of that decision, the ongoing monitoring and determination of whether maybe a cancellation is appropriate, if -- if any of the -- the implementation and monitoring doesn't occur, cost overruns, there's no agreement as to the parties' position on that. There is the agreement –
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> Q.[Commissioner Clayton] So when you say there's no agreement, you had -- the Public Counsel -- Office of Public Counsel has not agreed to any particular type of treatment if there's a cost overrun?
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> A.[Russell Trippensee] Exactly. All --
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> Q.[Commissioner Clayton] One way or the other, whether it's included or not included in the cost of service?
>
> A.[Russell Trippensee] We would evaluate it in the context of the rate case and over the period of the entire time. I don't -- I expect this to be a five-year ongoing project, quite honestly.
>
> Q.[Commissioner Clayton] Is there an agreement as to prudency of any of the actions on the part of the company in this agreement?
>
> A.[Russell Trippennsee] Only to the date -- up until the date of the Stipulation and Agreement. Basically, what some people have referred to as the initial **decisional prudence**. After that point in time, if the date -- if there's something that has occurred since this document was signed that the parties aren't aware of, that's subject to review as far as the Public Counsel's concerned.

(Transcript Vol. 7, pp. 754-55)(Emphasis added). The Staff has complied with its commitments and not challenged any of the agreed upon projects as being the result of an imprudent decision. "Decisional prudence" as the Staff is aware of the definition of that term in the KCPL Experimental Regulatory Plan Stipulation And Agreement context has never been within the scope of any of the Staff's construction audit or prudence review and will continue to be outside the Staff's scope unless the Commission orders the Staff to act otherwise.

23. KCPL's/GPE's February 16, 2010, March 22, 2010, and March 25, 2010 Responses seem to indicate, and the Staff expects KCPL to interpret and argue, the relief which KCPL is seeking the Commission to grant them is to allow KCPL to refuse to provide data/information that KCPL deems was available to the Staff prior to December 31, 2009 but for Staff's failure to request it, or require the Commission to ignore because the Staff had the data/information but did not use it in its December 31, 2009 Report. KCPL is well aware that most Iatan Project documentation, including invoices, contain Iatan 1, Iatan common plant, and Iatan 2 data/information. KCPL does not need further excuses to deny access to or withhold data/information from the Staff. The Staff cannot support any restriction on the provision of data/information that would reduce the quality of the data/information necessary to be relied upon by the Staff in order to reach independent audit conclusions regarding the costs of Iatan 1 AQCS and Iatan 1 common plant or impair the Staff's ability to audit Iatan 2, which constitutes a much greater level of expenditures than the Iatan 1 AQCS costs.

24. The Staff recommends that the Commission be very careful how it addresses any of the matters specifically or implied raised by KCPL/GMO in their February 16, 2010, March 22, 2010, and March 25, 2010 pleadings, given how KCPL/GMO interpret Commission Orders and Agenda Sessions. The Commission can proceed by issuing an Order posing questions for written response, hold the previously scheduled April 6, 2010 hearing, schedule a

new hearing date or dates, or proceed by a combination of all of these options. The Staff would remind the Commission that Case No. EO-2010-0259 is an investigatory proceeding for which there are no parties other than KCPL/GMO, the Staff, and Public Counsel, and that KCPL, the Staff, and Public Counsel are not the only parties to the KCPL Experimental Regulatory Plan Stipulation And Agreement, the Case No. ER-2009-0089 Non-Unanimous Stipulation And Agreement, and the Case No. ER-2009-0090 Non-Unanimous Stipulation And Agreement.

WHEREFORE the Staff respectfully submits its Reply to the March 22, 2010 and March 25, 2010 filings of Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO).

Respectfully submitted,

/s/ Steven Dottheim
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 29th day of March, 2010.

/s/ Steven Dottheim