BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Eighth Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of KCP&L Greater Missouri Operations Company	))))))	Case No. EO-2019-0067
In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Kansas City Power and Light Company	))))))	Case No. EO-2019-0068
In the Matter of the Application of KCP&L Greater Missouri Operations Company Containing Its Semi-Annual Fuel Adjustment Clause True-Up	)))))	Case No. ER-2019-0199

MOTION FOR REHEARING OR RECONSIDERATION

COMES NOW the Office of the Public Counsel ("OPC") and for its *Motion for Rehearing or Reconsideration* of the Missouri Public Service Commission ("the Commission")'s November 6, 2019, *Report and Order* in the above styled cases, states as follows:

Pursuant to RSMo. Section 386.500.1 the OPC seeks rehearing and or reconsideration of the Commission's *Report and Order* because the *Report and Order* is unlawful, unjust, and/or unreasonable for the reasons laid out herein

The Commission's *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order*'s conclusion that Kansas City Power & Light Company ("KCPL") did not act imprudently when it decided not to sell or even attempt to sell its renewable energy credits

("RECs") is based on a fundamental misunderstanding of the nature of RECs

The Commission's entire decision with regard to the first issue raised in this case appears premised on the conclusion that, if KCPL had sold its RECs, its customers would no longer be receiving "clean" or "renewable" energy. Specifically, on page ten of the *Report and Order* the Commission makes a finding of fact that states as follows:

> Selling the 722,628 RECs would have unbundled the RECs from the actual power sold such that the energy which customers then received would lose its environmental attributes. Had the RECs been unbundled and sold, the percentage of power received by customers from renewable energy sources during the period January 1, 2017 through June 30, 2018, would have dropped from 25.15% to 19.39%.

Report and Order pg. 10. The Commission relies on this factual finding to determine that it was prudent for KCPL not to have sold or even attempted to sell its RECs because KCPL customers wanted "clean" or "renewable" energy and the sale of RECs would have deprived customers of what they desired. *Report and Order* pg. 25. However, the Commission's factual finding represents a fundamental misunderstanding of the true nature of RECs.

A careful review of the company testimony that the Commission's own factual finding is based off demonstrates that the sale of RECs will **not** change the amount of power that KCPL customers receive from renewable energy sources. Instead, the sale of RECs would change only the type of **representations** that KCPL could make to its customers. Martin, *Surrebuttal* pg. 4. KCPL customers would still receive the same amount of energy from renewable sources regardless of whether the RECs

generated from those renewable sources are sold after the fact because ownership of the REC only changes who can claim to possess the "environmental attributes" of the energy and does not change who actually received the energy itself. Marke, *Rebuttal*, pg. 3. This is why KCPL witness Jeff Martin carefully worded his surrebuttal to state that if KCPL sold its RECs, then the company "could only **represent** to customers that 19% of their power came from renewable energy sources[.]" Martin, *Surrebuttal* pg. 5. KCPL customers would still **receive** the energy produced by renewable energy sources, and KCPL could still claim renewable energy in its resource mix; KCPL would just lose the ability to **advertise** to its customers that their source energy included *more* than 19% renewable energy.[1]

The distinction between who **receives** renewable energy after RECs are sold and who can **advertise** they own the renewable attributes of that energy is an important one. This is especially true given that there is absolutely no evidence in the record to show that KCPL's customers desired (or really even care) about the company's ability to make certain **representations** regarding the energy that it is supplying to them personally. The OPC went to great lengths to prove that point by demonstrating that none of KCPL's evidence showed that customers valued or desired for the company to retain its RECs, which, as has been repeatedly established, is what would have been required for the company to make such

[1] Though, the OPC continues to point out, the company could still always advertise that more than 25% of the power it **generated** came from renewable energy sources.

representations. As support for that point, the OPC will briefly reiterate the points already raised in its briefs as to KCPL's evidence.

The Commission makes reference to the corporate energy buyer's principles as a basis for showing that KCPL corporate customers wanted to reduce their carbon footprint. *Report and Order* pg. 11. This does not equate to evidence that those customers wanted KCPL to retain its RECs, however, because the articulated goals of the corporate energy buyer's principles do **not** support the non-sale of RECs as a means of adherence. Marke, *Rebuttal*, pg. 8. In fact, several large companies such as Google and Walmart have even taken positions that expressly reject the non-sale of RECs as a means of meeting the companies' stated renewable energy goals. Marke, *Rebuttal*, pg. 8 – 10. The Commission also cites to the efforts of the City of Kansas City, Missouri to lower its greenhouse gases *Report and Order* pg. 11. But this too does not show that the City of Kansas City wanted KCPL to retain its RECs because the city was actively engaged in **alternative** methods of meeting its goal that in no way relied on the non-sale of KCPL's RECs. *Id.*; Marke, *Rebuttal*, pg. 10. Finally, the Commission discusses KCPL customer advisory panel surveys that showed an interest in a potential solar program. *Report and Order* pg. 11. Again, though, this offers no evidence that those same customers wanted KCPL to retain its RECs and the survey data the company presented literally states that KCPL has "conducted multiple surveys among our Customer Advisory Panel, **but none have specifically addressed interest in renewable energy**." Martin, *Direct*, Schedule JM-5 pg. 1 (emphasis added).

As can plainly be seen, there is no evidence that KCPL customers wanted the company to keep its RECs and hence no evidence that KCPL customers valued the ability of the company to advertise the renewable attributes of the energy it was providing. Instead, all this evidence shows is that KCPL customers valued renewable energy as a general matter, which is immaterial to the question of whether KCPL should have sold its RECs because KCPL customers would have received energy from renewable sources **regardless** of whether the RECs were sold. Marke, *Rebuttal*, pg. 3. And because none of KCPL's customer's cared about the utility's ability to advertise the renewable attributes of its energy, there was no prudent reason for KCPL to retain its RECs. KCPL's decision not to sell or even attempt to sell its RECs was thus clearly imprudent as it resulted in KCPL simply "leaving money on the table" without providing any attendant benefit to ratepayers.

The Commission's *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order* incorrectly found the OPC's argument to be a collateral attack, which it is not

The Commission's *Report and Order* concluded that the question of allocation of costs between steam and electric operations at KCP&L Greater Missouri Operations Company's ("GMO") Lake Road facility "was disposed of conclusively in GMO's last rate case, ER-2018-0146, by and through the language of the stipulation and agreement approved by the Commission . . . ." *Report and Order* pg. 25. This is false. The stipulation and agreement only resolved the allocation of costs that were actually addressed **in** the stipulation and agreement. Specifically, the stipulation and agreement resolved the allocation of plant accounts, non-fuel operations and

maintenance costs, and administrative and general costs. *Report and Order* pg. 13 n. 38. Nowhere in the stipulation and agreement is there **any** mention of the allocation of auxiliary power **fuel** costs. In fact, GMO's own witnesses have repeatedly admitted that the allocation factors that were included in that stipulation and agreement do not apply to fuel costs at all. Nunn*, Surrebuttal* pg. 4.

Because the allocation of auxiliary power fuel costs is not included **in** the stipulation in agreement, the issues raised by the OPC is not an attack **on** the stipulation and agreement. The OPC made this point quite clear in its reply brief:

> The seven allocation factors that GMO spends so much time discussing do not allocate the cost of fuel burned to produce auxiliary power at the Lake Road facility because auxiliary power costs were allocated using a different methodology during the same rate case where the seven allocation factors were developed. *Initial Brief*, OPC, pg. 28; Tr. pg. 205 lns. 19 – 22. Specifically, the auxiliary fuel used in the steam and electric operations was allocated through a modeling process performed by company witness Tim Nelson. *Initial Brief*, OPC, pgs. 28 – 29; Tr. pg. 217 lns. 1 – 16; pg. 205 lns. 19 – 22. The ability to allocate auxiliary fuel power between steam and electric operations was the direct result of the fact that a steam and electric rate case were brought **at the same time**. *Compare Order Approving Non-unanimous Stipulations and Agreements and Authorizing Tariff Filing,* ER-2009-0090, pg. 2, *and Order Approving Unanimous Stipulation and Agreement and Authorizing Tariff Filing,* HR-2009-0092, pg. 1. The allocation of steam auxiliary **fuel** costs via the modelling process dispensed with the need to develop a separate allocation factor to allocate auxiliary **fuel** costs, which is the whole reason for why auxiliary power **fuel** costs are not included in the seven allocation factors that were developed as part of those rate cases.

OPC, *Reply Brief*, pgs. 10 - 11. The Commission appears to have ignored all of this uncontroverted evidence in reaching the wholly unsupportable legal conclusion that

a stipulation and agreement somehow resolved an issue that was **never even addressed** in the stipulation and agreement, which is obviously wrong.

The issue of allocating auxiliary power fuel costs at GMO's Lake Road facility is entirely independent from the allocation of costs agreed to in the stipulation and agreement approved by the Commission in ER-2018-0146. A determination by the Commission that GMO was improperly allocating fuel costs would therefore in no way invalidate, contradict, or even effect the terms of that stipulation and agreement. Consequently, the issue raised by the OPC is clearly not a collateral attack on the Commission's decision in ER-2018-0146. The Commission's *Report and Order* is therefore unlawful, unjust, and/or unreasonable in as far as it fails to properly address this issue.

The Commission's *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order* effectively forecloses a prudence review for losses arising from purchase power agreements that are incurred during the pendency of the agreement

With regard to the issue concerning KCPL and GMO's losses resulting from the Rock Creek and Osborn wind PPAs, the Commissions' *Report and Order* states as follows:

> The Commission finds that the Rock Creek and Osborn wind power PPAs were long-term investments made in contemplation of the long-term (20-year) ebb and flow of market and political forces. OPC's argument, on the other hand, that the PPAs were not needed when acquired to meet Missouri RES requirements or customers' needs and that values declining before the PPA acquisition continued to decline afterwards, presupposes the PPAs were acquired as only short-term investments. The Commission will not replace the companies' primary supposition at the point of decision that the PPAs were being acquired

> in the context of a long term, twenty-year investment with a supposition that the investment was short term, and then apply a hindsight test and pronounce the investments imprudent, .

Report and Order pg. 26. The OPC admittedly experienced some difficulty discerning the meaning of the above statements, but the OPC presently understands the Commission's ruling to be that the Commission will not review the prudency of a PPA during the pendency of the PPA (which in this case is twenty years). In reaching this conclusion, however, the Commission has made it functionally impossible for the OPC (or any other party) to challenge, or for the Commission to review, the losses incurred **during this prudence review period**.

If the Commission takes the position that the prudency of a PPA cannot be determined during the pendency of the contract, then the only way to challenge the prudency of the PPA (and thus the inclusion of losses arising from the PPA in the FAC) would be **after** the time allocated under the terms of the PPA had expired. In this case, that would obviously be long after the present prudence review case has concluded. The Commission is thus forcing the OPC to either (1) forgo any review of the prudency of losses arising from the PPA in **this** review period, or (2) challenge the inclusion of losses incurred in this review period some nineteen **years** later, after the PPA has run its course. Moreover, this latter tactic is almost certainly going to be challenged by the utility as a collateral attack on the judgement rendered in the current prudence review case and thus impermissible.[2]

[2] This point is, of course, made all the more ironic given that the Commission has already incorrectly concluded that the OPC is attempting to make a collateral attack regarding one of the other issues raised in this case, as previously discussed.

The Commission has a statutory duty to review the prudency of costs incurred by a utility and included in the FAC. RSMo. § 386.266.4(4). Declining to review the prudency of KCPL and GMO's decision to enter into the Rock Creek and Osborne PPAs with regard to the losses incurred **in this review period** based solely on the fact that these are twenty year contracts thus amounts to a complete abandonment of the Commission's duty. As such, the Commission's *Report and Order* is unlawful, unjust, and/or unreasonable.

The Commission's *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order's* conclusion with regard to the prudency of the Rock Creek and Osborn PPAs misinterprets the issue presented to the Commission and ignores the arguments raised by the OPC.

The third issue presented to the Commission in this case was whether it was "prudent for [KCPL and] GMO to have entered into Purchase Power Agreements with the Rock Creek and Osborn Wind Projects **under the terms of the contracts as executed**." *List of Issues*, pg. 4 (emphasis added). The OPC argued that it was imprudent for KCPL and GMO to have entered into the Rock Creek and Osborn wind PPAs under the terms of the contracts as executed **because there were cheaper wind PPAs available**. OPC, *Initial Brief*, pg. *33* – 47. And yet, at no point in the *Report and Order* does the Commission ever even address this issue. Instead, the Commission only attempts to address whether it was prudent for KCPL and GMO to have entered into wind PPAs **as a general matter**, which was never an issue in the case.

The Commission's *Report and Order* lays out six things that it found KCPL and GMO "considered" when entering into the Rock Creek and Osborne PPAs: Missouri Renewable Energy Standard incentives; economic benefits; production tax credits; the proposed federal Clean Power Plan; projected revenue requirements; and low transmission risks. *Report and Order* pgs. 16 – 18. However, none of these factors address why it was prudent for KCPL and GMO to have paid a higher price for the Rock Creek and Osborne PPAs as opposed to the other, cheaper PPAs that the evidence shows were available at that time. *see, e.g.*, OPC, *Initial Brief*, pgs. 40 – 42; Mantle, *Rebuttal*, pg. 26. Stated differently, it was still imprudent for KCPL and GMO to have entered into these two PPAs despite these six considerations because all six of these considerations would also have been achieved if the companies had entered into PPAs at the lower prices that the evidence conclusively shows were available. *Id*.

The Commission's failure to address the OPC's central argument that cheaper wind PPAs were available is rendered still more problematic by the fact that the Commission at no point addresses the companies' complete failure to issue a request for proposal ("RFP") for either of the wind projects. This RFP issue was raised multiple times by the OPC and further demonstrates the imprudence of the companies' decision. OPC, *Initial Brief*, pgs. 42 – 47. The Commission's decision to not even address the RFP question only serves to further underline the extent to which the Commission has clearly misunderstood the issue before it.

KCPL and GMO may have begun this case with a presumption of prudence, but that presumption was overturned once the OPC established that cheaper wind was available for the companies to purchase. *State ex rel. Associated Nat. Gas Co. v. PSC*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997). Consequently, the burden shifted back to the companies to prove why it was prudent for them to have paid more for the Rock Creek and Osborn PPAs than they could have paid for other wind PPAs. *Id.* This, the companies failed to do. However, the Commission's *Report and Order* has fundamentally failed to even address this point. The *Report and Order* has thus failed to resolve all of the issues placed before it or, in the alternative, is not supported by sufficient evidence, and is therefore unlawful, unjust, and/or unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission either grant a rehearing or reconsideration of the November 6, 2019, *Report and Order* issued in the above styled cases pursuant to the authority of RSMo Section 386.500.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this fifth day of December, 2019.

/s/ John Clizer