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**

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"

COMES NOW the Office of the Public Counsel and for its 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" states as follows:

1. On August 30, 2007,[1] Public Counsel filed the Rebuttal Testimony of Barbara Meisenenheimer.

2. On October 9, the Staff of the Commission filed a motion to limit that testimony. Staff asks the Commission to strike the following portion of Ms. Meisenheimer's testimony:

> For example, while the Staff definition or description of Rate Structure contained in the Report does not appear to recognize inter-class cost allocations as a component of rate structures, authoritative experts on utility regulation such as James Bonbright and Charles Phillips do recognize inter-class cost allocations as an element of rate structures.[2]

[1] All dates herein refer to calendar year 2007.

[2]Charles Phillips, The Regulation of Public Utilities, Second Edition, Public Utility Reports Inc., 1988, Pages 171-172 and pages 409-411.

3. Staff's request to strike Ms. Meisenheimer's testimony rests entirely on a misunderstanding on of the parol evidence rule. While agreeing that there is no ambiguity to the disputed term "rate structures," Staff attempts to introduce external evidence to show what Staff thinks that term means, but objects to citations to authoritative sources that define the term. This approach stands the parol evidence rule on its head.

4. There are many discourses in the law about the meaning and application of the parol evidence rule. Almost a century ago, the Missouri Supreme Court stated:

> When men sit down to put a contract in writing and do so, the presumption is they write all there is of it. **All prior or contemporaneous verbal conversations relating to the subject-matter are presumed merged in the writing.** The precept to go by is: The spoken word flies; the written word remains. (*Vox emissa volat, litera scripta manet.*) However, men labor under such infirmities of mind and memory that mutual mistakes are made, or fraud, imposition, surprise or accidents sometimes happen. In such case, when proper issues are made, relief goes in equity. But to get that relief the pleadings must raise such issue and the proof must respond to the pleadings. Here there is neither proof nor allegation of that kind; the contract was drawn, as said, by their trusted and gifted kinsman, and **to permit the parties to a contract to vary its terms by parol proof, or by their secret or mistaken understanding of its obvious meaning would be a doctrine unheard of --** one as anxious as new. Beheret v. Myers, 240 Mo. 58, 75 (Mo. 1912). [emphasis added]

More recent pronouncements, while not nearly as elegant, are entirely consistent.

5. The dispute in this case arises because the Stipulation and Agreement in Case No. EO-2005-0329 (the "Regulatory Plan Agreement") provides, *inter alia*, that the parties will not propose changes to rate structures in this case, and the parties do not agree on the definition of the term "rate structures." In the direct testimony of Staff

witness James Watkins, Staff proposed "increasing the revenue responsibility of the Residential Class by approximately 1.8% and reducing the revenue responsibility of the Medium General Service calls by approximately 5%...." In the rebuttal testimonies of witnesses Meisenheimer and Trippensee, Public Counsel asserts that Staff's proposed shifts are not consistent with the agreement not to propose changes in rate structures.

6. Thus the heart of the issue is the definition of "changes in rate structures." Although Staff and Public Counsel disagree on what it means, they do agree that it is not ambiguous. While such a situation may seem odd to a layman (to a layman, a disagreement over a term necessarily means that the term is ambiguous), it is a well-settled legal principle that mere disagreement over the definition of a term does not create ambiguity. "The 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).

7. It is also a well-settled legal principle that:

> Words with a well-known technical meaning should be construed according to their technical meaning unless a contrary meaning appears in the granting instrument. See Central Trust Bank, 579 S.W.2d at 827. Sterling v. Hawkins (In re Nelson), 926 S.W.2d 707, 709 (Mo. Ct. App. 1996).

There is no definition of "changes in rate structures" or "rate structures" in the Regulatory Plan Agreement, so those terms should be construed according to their technical meaning. In order to determine that meaning, the Staff would have the Commission look to two sources: 1) communications among the drafters of the Regulatory Plan Agreement that are extrinsic to the document itself and that took place

during the drafting process; and 2) one party's (Staff's) own definition of the term. Both of these sources violate the parol evidence rule.

8. With respect to prior and contemporaneous communications, the general rule is that, if a contract is unambiguous, prior and contemporaneous communications are not allowed as evidence to interpret terms of the contract. See, *e.g.*, Beheret, *supra*. In a case involving a shopping center lease, a tenant attempted to use prior drafts of a lease and other communications made during negotiating the lease to argue its interpretation of a term in the lease. The Missouri Court of Appeals (in what was then the St. Louis District) found that it was error for the circuit court to have considered such extrinsic evidence. The Court stated: "that the evidence regarding the negotiations which preceded the execution of plaintiff's lease, as well as the prior drafts of that document, were not admissible in evidence under the parol evidence rule." Friedman Textile Co. v. Northland Shopping Center, Inc., 321 S.W.2d 9, 16 (Mo. Ct. App. 1959). The situation in Friedman Textile is exactly what the Commission is faced with here: the Staff asks the Commission to consider extrinsic evidence (consisting of prior drafts and related communications) to bolster its interpretation of a term that the Staff concedes is unambiguous.

9. With respect to the Staff's other piece of parol evidence, its own definition of "rate structure," the parol evidence rule plainly prohibits its consideration as well. In Sterling v. Hawkins (In re Nelson), *supra*, the Missouri Court of Appeals, Southern District, was presented with a disagreement over the meaning of a trust document. A successor trustee had asked the trial court to consider parol evidence that the grantor intended to use the term "bank accounts" in the trust in a particular way. The parol

evidence (preserved in the record pursuant to an offer of proof) showed that the grantor meant to include certain annuity contracts within the definition of the term "bank account." The court found that parol evidence was not admissible to show that the term "bank account" meant – to the grantor – something other than what it means according to authoritative sources. *Ibid*, at 711. Because the document itself did not define the term "banks account," the court looked at authoritative sources to determine what the disputed term meant. It considered the Uniform Commercial Code, Black's Law Dictionary, and an authoritative treatise called "Appleman on Insurance Law And Practice." *Ibid*. The court's reliance on authoritative sources to define a term at the same time it rejected one party's parol evidence regarding that term is absolutely the opposite of what the Staff urges the Commission to do here.

10. Bonbright[2] and Phillips[3] are the leading authoritative sources on the regulation of public utilities. If one wants to learn how terms are construed in the field of utility regulation, one looks to Bonbright and Phillips. These are the sources that Ms. Meisenheimer cites in her testimony. The Staff, on the other hand, asks the Commission to strike these references and instead rely on a definition that Staff witness Pyatte wrote for purpose of this case. Ms. Pyatte participated in the negotiation of the Regulatory Plan Agreement, and filed testimony in this case primarily to defend her interpretation of the term "rate structures." Relying on the parol evidence that she provides, rather than the authoritative sources cited by Ms. Meisenheimer, would be an error.

[2] James C. Bonbright, Principles of Public Utility Rates, (New York: Columbia University Press, 1961.

[3] Charles Phillips, The Regulation of Public Utilities, Second Edition, Public Utility Reports Inc., 1988.

11. The parol evidence rule, despite its name, is not really an evidence rule; it is a rule of law. That means that even though the Commission has already admitted some of Staff's parol evidence into the record (and may admit more), it would be an error of law to rely upon it. "The parol evidence rule is a rule of law, and not evidence, and evidence in violation of it, even if received without objection, must be ignored and a decision made on the writing alone." State Bank of Fisk v. Omega Electronics, Inc., 634 S.W.2d 234, 237 (Mo.App. 1982). See also, Emerald Pointe, L.L.C. v. Jonak, 202 S.W.3d 652, 660 (Mo. Ct. App. 2006); Brewer v. Devore, 960 S.W.2d 519, 522 (Mo. Ct. App. 1998).

12. In conclusion, the Commission should not strike the references to authoritative sources in the testimony of Public Counsel witness Meisenheimer as these reveal the commonly accepted definition of the term "rate structures" as it is used in utility regulation. These references do not constitute parol evidence. Rather the Commission should disregard the parol evidence that the Staff has offered as to its interpretation of the term "rate structures:" Ms. Pyatte's definition of that term and the prior drafts of the Regulatory Plan Agreement and related communications.

WHEREFORE, Public Counsel respectfully requests that the Commission deny Staff's motion to strike a portion of Public Counsel witness Meisenheimer's testimony, and refuse to consider parol evidence offered by the Staff in support of its interpretation of the term "rate structures."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 19th day of October, 2007.

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