

**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         )        Case No. ER-2010-0355  
Service to Continue the Implementation of         )  
Its Regulatory Plan                                        )

**APPLICATION FOR REHEARING**

COMES NOW the Office of the Public Counsel and for its Application for Rehearing respectfully adopts and asserts the following points of error identified by the Midwest Energy Users Association:

1.        The Commission’s Order, as it applies to the issue of Fuel and Purchase Power Expense, represents an unlawful application of the Burden of Proof. Section 393.150(2) expressly provides that the burden of proof shall be on the party advocating for an increased rate. Therefore, as it applies to fuel and purchased power expense, the burden is on Staff to show that its level of fuel and purchased power expense is just and reasonable. To the extent that KCPL later seeks to adopt Staff’s level of fuel and purchased power expense, KCPL must accept that same burden of proof. That said, as demonstrated by its orders and deliberations in public session, the Commission abandoned application of this statutory burden of proof and instead simply “gave” KCPL the increased revenue requirement associated with Staff’s fuel and purchased power expense.

2.        The Order is unlawful, unjust and unreasonable in that the Commission has failed, as it applies to the issue of Fuel and Purchased

Power Expense, to provide adequate findings of fact. Labeling recitations of evidence and testimony as findings of fact when they are nothing more than descriptions of what one or the other parties contended do not substitute for findings of fact and has repeatedly been ruled as insufficient by Missouri courts.

3. The Order is unlawful, unjust and unreasonable in that the Commission fails to make any finding or decision on the issue denominated “How Should Natural Gas Costs be Determined?” In its Report and Order, the Commission held that it “adopts [KCPL’s] method of determining natural gas costs.”<sup>1</sup> Suddenly, in its Order of Clarification, the Commission deleted this sentence.<sup>2</sup> Therefore, this contested issue has not been decided by the Commission.

4. The Order is unlawful, unjust and unreasonable in that the Commission’s decision regarding fuel and purchased power expense (i.e., adoption of the Staff’s level of fuel and purchased power) is completely contrary to one of the few Commission findings on this matter. Specifically, in both the Report and Order and in its Order of Clarification, the Commission clearly found that “the MIDAS<sup>TM</sup> model, for which KCP&L argued, is a superior model for determining spot market prices.” That said, however, the Commission then inexplicably abandons this finding and adopts Staff’s level of fuel and purchased power expense which does not rely on the MIDAS model.

---

<sup>1</sup> *Report and Order*, at page 146.

<sup>2</sup> *Order of Clarification*, at page 3.

In fact, as the Commission subsequently recognizes, Staff's method of calculating spot market prices is diametrically opposed to the methodology reflected in the MIDAS model. The MIDAS model relies upon both historical and projected information for determining spot market electric prices. For this reason, the Commission found the MIDAS model to be "superior." On the other hand, Staff's methodology completely ignores projected spot market prices and relies entirely on historical data.

It is illogical (and unlawful and unreasonable) for the Commission to find the MIDAS model to be superior and recite the need to consider projected spot market prices, but then rely upon a Staff methodology that does not use the MIDAS model and only relies upon historical spot market prices. In this case, the Commission's decision (adoption of the Staff level of fuel and purchased power expense) has no logical nexus to the Commission's findings.

5. The Order is unlawful, unjust and unreasonable in that the Commission erroneously concludes that KCPL has "abandoned its true-up testimony position on fuel expense." Based solely upon this erroneous finding, the Commission concludes that Staff's methodology is "more reliable."

KCPL did not "abandon" its position on fuel expense. In fact, in the true-up direct testimony of KCPL witness Weisensee, KCPL notes that "stipulated issues" were trued up in a manner consistent with the

previously executed non-unanimous Stipulation and Agreement.<sup>3</sup> Not included in the “stipulated issues” portion of his testimony is the issue of “fuel and purchased power expense.”<sup>4</sup> As such, at the time that this testimony was prepared, KCPL did not believe that it had “abandoned” this issue. Furthermore, at the time it offered this testimony into evidence, KCPL did not make any correction to note that it had “abandoned” its position on fuel and purchased power expense. Finally, even at the time that it filed its Initial Brief, KCPL continues to list the four contested fuel and purchased power expense issues:

**F. Fuel & Purchased Power Expense**

1. How Should Natural Gas Costs be Determined?
2. How Should Wolf Creek Fuel Oil Expenses be Determined?
3. Should Missouri Joint Municipal Electric Utility Commission (MJMEUC) Margin be Included in Native Load as well as Off-System Sales Margin?
  4. How Should Spot Market Purchased Power Prices be Determined?

Clearly, contrary to the Commission’s current finding, at no time did KCPL “abandon” its level of fuel and purchased power expense. Ultimately, given that there are numerous other parties to this proceeding, whether KCPL actually abandoned its level of fuel and purchased power expense is inconsequential to the Commission’s obligation to make adequate findings of fact in regards to this issue. As the following section

---

<sup>3</sup> Ex. 117, Weisensee True-Up Direct, at page 5.

<sup>4</sup> *Id.* at page 3.

indicates, the obligation to make these findings of fact is based upon statutory directive.

6. The Order is unlawful, unjust and unreasonable in that the Commission seeks to treat the issue of fuel and purchased power expense as a settled issued between KCPL and Staff. Specifically, the Commission notes that KCPL “adopted Staff’s fuel expense amount.” Furthermore, repeatedly throughout the April 19 agenda session, individual Commissioners referred to this issue as “settled” between Staff and KCPL.

At best, given that this “settlement” only involved KCPL and Staff, it is a *de facto* non-unanimous Stipulation and Agreement. The Commission has noted, in its rules of practice and procedure, that a non-unanimous Stipulation represents nothing more than “a position of the signatory parties.”<sup>5</sup>

In 1982, the Court of Appeals addressed the Commission’s responsibility as it pertains to the consideration of a non-unanimous Stipulation. In the case of *State ex rel. Fischer v. Public Service Commission*,<sup>6</sup> the Court held that the Commission may not simply adopt the position contained in the non-unanimous Stipulation. Rather, when confronted with a non-unanimous Stipulation, the Commission must implement the full hearing procedure. Included in this procedure are requirements related to the contents of the Commission’s order.

This section also states that whenever the Commission makes an investigation, it shall be its duty to make a report in writing in respect

---

<sup>5</sup> 4 CSR 240-2.115(2)(D).

<sup>6</sup> 645 S.W.2d 39 (Mo.App. 1982).

thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises. In State ex rel. Rice v. Public Service Commission, the court stated that this statute required the Commission to include findings of fact in all of its written reports.<sup>7</sup>

Thus, the Commission cannot simply allow KCPL to adopt Staff's position over the objection of other parties. Rather, the Commission is required to make findings of fact as to all disputed issues.

Indeed, at least one Commissioner, relying in part on the holding of the *Fischer* court, has stated his opinion that the responsibility to make adequate findings of fact does not only extend to cases in which the Commission considers a non-unanimous Stipulation and Agreement, but also extends to situations in which the Commission considers a Unanimous Stipulation and Agreement.

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without separately stating findings of fact and conclusions of law. Nevertheless, **this does not relieve the Commission of its statutory duty to evaluate the facts** and make a conclusion that the agreement provides for just and reasonable rates, provides for safe and adequate service, and is in the public interest. The signatories to the agreement may believe that it does, but **the Commission must decide** if this is so based upon the factual record. Missouri Courts, interpreting Section 386.420, have held that in contested cases (proceedings in which legal rights, duties or privileges of specific parties are required to be determined after hearing) **the Commission must include findings of fact** in its written report. **Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard** embodied in the Missouri Constitution, Article V, Section 18. Consequently, the law requires the Commission to include separately stated findings of fact and conclusions of law supporting its decision in this matter.<sup>8</sup>

---

<sup>7</sup> *Id.* at 42.

<sup>8</sup> *Concurring Opinion of Commissioner Terry M. Jarrett*, Case No. ER-2010-0130, issued May 19, 2010, at pages 1-2. (emphasis added, citations omitted).

Despite the statutory requirements and the direction of the *Fischer* court, the Commission has neglected its duty to make adequate findings of fact in this case based simply on the belief that, because it had adopted Staff's position, KCPL had "abandoned" its true-up position. As Commissioner Jarrett has correctly noted, however, "**this does not relieve the Commission of its statutory duty to evaluate the facts.**" As pertains to the issue of fuel and purchased power expense, the Commission has not met its statutory duty.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission grant rehearing of its April 12, 2011 Report and Order and its April 19, 2011 Order of Clarification for the purpose of addressing the points raised herein.

Respectfully submitted,

OFFICE OF THE Public Counsel

**/s/ Lewis R. Mills, Jr.**

By: \_\_\_\_\_

Lewis R. Mills, Jr. (#35275)  
Public Counsel  
P O Box 2230  
Jefferson City, MO 65102  
(573) 751-1304  
(573) 751-5562 FAX  
lewis.mills@ded.mo.gov

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 21st day of April 2011:

General Counsel Office  
Missouri Public Service  
Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
GenCounsel@psc.mo.gov

Mills Lewis  
Office of the Public Counsel  
200 Madison Street, Suite  
650  
P.O. Box 2230  
Jefferson City, MO 65102  
opcservice@ded.mo.gov

Williams Nathan  
Missouri Public Service  
Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
Nathan.Williams@psc.mo.gov

Deutsch B James  
Missouri Retailers Association  
308 E High St., Ste. 301  
Jefferson City, MO 65101  
jdeutsch@blitzbardgett.com

Schwarz R Thomas  
Missouri Retailers  
Association  
308 E High Street, Ste. 301  
Jefferson City, MO 65101  
tschwarz@blitzbardgett.com

Bruder P Arthur  
National Nuclear Security  
Administration (NNSA) - K.C.  
Plant  
1000 Independence Ave. SW  
Washington, DC 20585  
arthur.bruder@hq.doe.gov

LeBlanc Therese  
National Nuclear Security  
Administration (NNSA) - K.C.  
Plant  
2000 E. 95th St.  
P.O. Box 419159  
Kansas City, MO 64141  
tleblanc@kcp.com

Porter A Steven  
National Nuclear Security  
Administration (NNSA) -  
K.C. Plant  
1000 Independence Ave,  
SW  
Washington, DC 20585  
steven.porter@hq.doe.gov

Sader S Neil  
North Kansas City Hospital  
4739 Belleview Avenue, Suite  
300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
North Kansas City Hospital  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Woodsmall David  
Praxair, Inc.  
428 E. Capitol Ave., Suite  
300  
Jefferson City, MO 65101  
dwoodsmall@fcplaw.com

Conrad Stuart  
Praxair, Inc.  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
stucon@fcplaw.com

Sader S Neil  
Research Medical Center  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Research Medical Center  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-  
2362  
jim@smizak-law.com

Sader S Neil  
Research Psychiatric Center  
4739 Belleview Avenue, Suite  
300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com



Sader S Neil  
Saint Luke's Cancer Institute  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Saint Luke's Cancer Institute  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Sader S Neil  
Saint Luke's Health System  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Saint Luke's Health System  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Sader S Neil  
Saint Luke's Hospital of  
Kansas City  
4739 Belleview Avenue,  
Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Saint Luke's Hospital of Kansas  
City  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Sader S Neil  
Saint Luke's Northland Hospital -  
Barry Road Campus  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Saint Luke's Northland  
Hospital - Barry Road  
Campus  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Zakoura P James  
Saint Luke's Northland Hospital  
- Smithville Campus  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Sader S Neil  
St. Joseph Medical Center  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
St. Joseph Medical Center  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Sader S Neil  
Truman Medical Center, Inc.  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Truman Medical Center, Inc.  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Lowery B James  
Union Electric Company  
111 South Ninth St., Suite  
200  
P.O. Box 918  
Columbia, MO 65205-0918  
lowery@smithlewis.com

Byrne M Thomas  
Union Electric Company  
1901 Chouteau Avenue  
P.O. Box 66149 (MC 1310)  
St. Louis, MO 63166-6149  
AmerenMOService@ameren.com

Tatro Wendy  
Union Electric Company  
1901 Chouteau Avenue  
St. Louis, MO 63166-6149  
AmerenMOService@ameren.com

Bruder P Arthur  
United States Department of  
Energy  
1000 Independence Ave.  
SW  
Washington, DC 20585  
arthur.bruder@hq.doe.gov

LeBlanc Therese  
United States Department of  
Energy  
2000 E. 95th St.  
P.O. Box 419159  
Kansas City, MO 64141  
tleblanc@kcp.com

Porter A Steven  
United States Department of  
Energy  
1000 Independence Ave, SW  
Washington, DC 20585  
steven.porter@hq.doe.gov

Coffman B John  
AARP  
871 Tuxedo Blvd.  
St. Louis, MO 63119-2044  
john@johncoffman.net

Sader S Neil  
Carondelet Health  
4739 Belleview Avenue, Suite  
300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
Carondelet Health  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Comley W Mark  
City of Kansas City, Missouri  
601 Monroe Street., Suite  
301  
P.O. Box 537  
Jefferson City, MO 65102-  
0537  
comleym@ncrpc.com

Coffman B John  
Consumers Council of Missouri  
871 Tuxedo Blvd.  
St. Louis, MO 63119-2044  
john@johncoffman.net

Department Legal  
County of Jackson, Missouri  
415 E. 12th Street  
Kansas City, MO 64106

Sader S Neil  
Crittenton Children's Center  
4739 Belleview Avenue,  
Suite 300  
Kansas City, MO 64112-  
1364  
nsader@sadergarvin.com

Zakoura P James  
Crittenton Children's Center  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-2362  
jim@smizak-law.com

Lumley J Carl  
Dogwood Energy, LLC  
130 S. Bemiston, Ste 200  
St. Louis, MO 63105  
clumley@lawfirmemail.com

Cooper L Dean  
Empire District Electric  
Company, The  
312 East Capitol  
P.O. Box 456  
Jefferson City, MO 65102  
dcooper@brydonlaw.com

Carter C Diana  
Empire District Electric  
Company, The  
312 E. Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
DCarter@brydonlaw.com

Swearengen C James  
Empire District Electric Company,  
The  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
LRackers@brydonlaw.com

Mitten Russ  
Empire District Electric  
Company, The  
312 E. Capitol Ave  
P.O. Box 456  
Jefferson City, MO 65102  
rmitten@brydonlaw.com

Bruder P Arthur  
Federal Executive Agencies  
1000 Independence Ave. SW  
Washington, DC 20585  
arthur.bruder@hq.doe.gov

LeBlanc Therese  
Federal Executive Agencies  
2000 E. 95th St.  
P.O. Box 419159  
Kansas City, MO 64141  
tleblanc@kcp.com

Porter A Steven  
Federal Executive Agencies  
1000 Independence Ave,  
SW  
Washington, DC 20585  
steven.porter@hq.doe.gov

Vuylsteke M Diana  
Ford Motor Company  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102  
dmvuylsteke@bryancave.com

Sader S Neil  
HCA Midwest Health System  
4739 Belleview Avenue, Suite 300  
Kansas City, MO 64112-1364  
nsader@sadergarvin.com

Zakoura P James  
HCA Midwest Health  
System  
750 Commerce Plaza II  
7400 West 110th Street  
Overland Park, KS 66210-  
2362  
jim@smizak-law.com

Amash E Michael  
IBEW Local Union 1464  
753 State Ave, Suite 475  
Kansas City, KS 66101  
mea@blake-uhlig.com

Waers James Richard  
IBEW Local Union 1464  
753 State Avenue, Suite 475  
Kansas City, KS 66101  
jrw@blake-uhlig.com

Amash E Michael  
IBEW Local Union 1613  
753 State Ave, Suite 475  
Kansas City, KS 66101  
mea@blake-uhlig.com

Waers James Richard  
IBEW Local Union 1613  
753 State Avenue, Suite 475  
Kansas City, KS 66101  
jrw@blake-uhlig.com

Amash E Michael  
IBEW Local Union 412  
753 State Ave, Suite 475  
Kansas City, KS 66101  
mea@blake-uhlig.com

Waers James Richard  
IBEW Local Union 412  
753 State Avenue, Suite 475  
Kansas City, KS 66101  
jrw@blake-uhlig.com

Cafer Glenda  
Kansas City Power & Light  
Company  
3321 SW 6th Ave  
Topeka, KS 66606  
gcafer@sbcglobal.net

Cunningham B Susan  
Kansas City Power & Light  
Company  
7028 SW 69th Street  
Auburn, KS 66402  
susan.cunningham@snrrenton.com

Gilbreath A Lisa  
Kansas City Power & Light  
Company  
4520 Main, Suite 1100  
Kansas City, MO 64111  
lisa.gilbreath@snrrenton.com

Fischer M James  
Kansas City Power & Light  
Company  
101 Madison Street, Suite 400  
Jefferson City, MO 65101  
jfischerpc@aol.com

Dority W Larry  
Kansas City Power & Light  
Company  
101 Madison, Suite 400  
Jefferson City, MO 65101  
lwdority@sprintmail.com

Gibb C Daniel  
Kansas City Power & Light  
Company  
4520 Main Street, Suite  
1100  
Kansas City, MO 64111  
dan.gibb@snrrenton.com

Humphrey A Heather  
Kansas City Power & Light  
Company  
1200 Main  
PO Box 418679  
Kansas City, MO 64141-9679  
Heather.Humphrey@kcpl.com

Zobrist Karl  
Kansas City Power & Light  
Company  
4520 Main Street, Suite 1100  
Kansas City, MO 64111  
karl.zobrist@snrdenton.com

Steiner W Roger  
Kansas City Power & Light  
Company  
1200 Main Street, 16th Floor  
P.O. Box 418679  
Kansas City, MO 64105-  
9679  
roger.steiner@kcpl.com

Hatfield W Charles  
Kansas City Power & Light  
Company  
230 W. McCarty Street  
Jefferson City, MO 65101-1553  
chatfield@stinson.com

Woodsmall David  
Midwest Energy Users'  
Association  
428 E. Capitol Ave., Suite 300  
Jefferson City, MO 65101  
dwoodsmall@fcplaw.com

Finnegan D Jeremiah  
Midwest Energy Users'  
Association  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
jfinnegan@fcplaw.com

Conrad Stuart  
Midwest Energy Users'  
Association  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
stucon@fcplaw.com

Mangelsdorf B Sarah  
Missouri Department of Natural  
Resources  
207 West High St.  
P.O. Box 899  
Jefferson City, MO 65102  
sarah.mangelsdorf@ago.mo.gov

Young Mary Ann  
Missouri Department of  
Natural Resources  
1101 Riverside Drive, 4th  
Floor East, Rm. 456  
Jefferson City, MO 65109-  
0176  
maryann.young@dnr.mo.gov

Cooper L Dean  
Missouri Gas Energy  
312 East Capitol  
P.O. Box 456  
Jefferson City, MO 65102  
dcooper@brydonlaw.com

Jacobs J Todd  
Missouri Gas Energy  
3420 Broadway  
Kansas City, MO 64111  
todd.jacobs@sug.com

Noack R Michael  
Missouri Gas Energy  
3420 Broadway  
Kansas City, MO 64111  
mike.noack@sug.com

Vuylsteke M Diana  
Missouri Industrial Energy  
Consumers  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102  
dmvuylsteke@bryancave.com

Healy Douglas  
Missouri Joint Municipal Electric  
Utility Commission  
939 Boonville Suite A  
Springfield, MO 65802  
doug@healylawoffices.com

Kincheloe E Duncan  
Missouri Joint Municipal  
Electric Utility Commission  
1808 I-70 Dr. SW  
Columbia, MO 65203  
dkincheloe@mpua.org

**/s/ Lewis R. Mills, Jr.**

---