BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Kansas City Power & Light	)	
Company's Request for Authority to Implement	)	File No. ER-2014-0370
A General Rate Increase for Electric Service	)	

APPLICATION FOR REHEARING OF
KANSAS CITY POWER & LIGHT COMPANY

Kansas City Power & Light Company ("KCP&L" or "Company"), pursuant to Section 386.500[1] and 4 CSR 240-2.160, files its application for rehearing of the Report and Order ("Report and Order") issued on September 2, 2015. In support of its application for rehearing, the Company states as follows:

I. Legal Principles That Govern Applications for Rehearing.

1. All decisions of the Commission must be lawful, with statutory authority to support its actions, as well as reasonable. State ex rel. Ag Processing, Inc. v. PSC, 120 S.W.3d 732, 734-35 (Mo. en banc 2003). An order's reasonableness depends on whether it is supported by substantial and competent evidence on the record as a whole. State ex rel. Alma Tel. Co. v. PSC, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). An order must be neither arbitrary, capricious, nor unreasonable, and the Commission must not abuse its discretion. Id.

2. In a contested case, the Commission is required to make findings of fact and conclusions of law pursuant to Section 536.090. Deaconess Manor v. PSC, 994 S.W.2d 602, 612 (Mo. App. W.D. 1999). For judicial review to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the Commission, make sense to the reviewing court. State ex rel. Capital Cities Water Co. v. PSC, 850 S.W.2d 903, 914 (Mo. App. W.D. 1993). In order for a Commission decision to be lawful, the Commission must include appropriate findings of fact and conclusions of law that are

[1] All references to the Missouri Revised Statutes (2000), as amended.

sufficient to permit a reviewing court to determine if it is based upon competent and substantial evidence. State ex rel. Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 243, 246 (Mo. App. W.D. 2000); State ex rel. Monsanto Co. v. PSC, 716 S.W.2d 791, 795 (Mo. en banc 1986); State ex rel. A.P. Green Refractories v. PSC, 752 S.W.2d 835, 838 (Mo. App. W.D. 1988); State ex rel. Fischer v. PSC, 645 S.W.2d 39, 42-43 (Mo. App. W.D. 1982), cert. denied, 464 U.S. 819 (1983).

3. In State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 691-92 (Mo. App. W.D. 2003), the Court of Appeals described the requirements for adequate findings of fact when it stated:

> While the Commission does not need to address all of the evidence presented, the reviewing court must not be "left 'to speculate as to what part of the evidence the court found true or was rejected.'" … In particular, the findings of fact must be sufficiently specific to perform the following functions:
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> > [F]indings of fact must constitute a factual resolution of the matters in contest before the commission; must advise the parties and the circuit court of the factual basis upon which the commission reached its conclusion and order; must provide a basis for the circuit court to perform its limited function in reviewing administrative agency decisions; [and] must show how the controlling issues have been decided[.]
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> [St. Louis County v. State Tax Comm'n, 515 S.W.2d 446, 448 (Mo. 1974), citing Iron County v. State Tax Comm'n, 480 S.W.2d 65 (Mo. 1972)].

4. The Commission cannot simply recite facts on which it bases a "conclusory finding," and must rather "fulfill its duty of crafting findings of fact which set out the basic facts from which it reached its ultimate conclusion" in a contested case. Noranda, 24 S.W.3d at 246. "Findings of fact that are completely conclusory, providing no insights into how controlling issues were resolved are inadequate." Monsanto, 716 S.W.2d at 795.

5. A review of the evidentiary record in this case demonstrates that the Report and Order fails to comply with these principles in certain respects and that rehearing should be

granted as to the issues discussed below.

II. Issues on Which Rehearing Should be Granted.

A. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the Rate Allowance for Critical Infrastructure Protection ("CIP")/Cyber-security Operation & Maintenance ("O&M") Expenses is Based on Historical Amounts That Will be Inadequate Because CIP/Cyber-security O&M Expenses Will Increase During the Period When Rates Will be in Effect.

6. In its Report and Order, the Commission established KCP&L's revenue requirement using a rate allowance for CIP/Cyber-security O&M expenses based on the actual amount of CIP/Cyber-security O&M expense incurred by KCP&L for the twelve-month period ending May 31, 2015. Report and Order at 58. This fixed rate allowance will remain in KCP&L's rates until changed in a subsequent general rate proceeding. After new rates from this case take effect, if actual CIP/Cyber-security O&M expenses exceed the rate allowance, then the Company will absorb those increased expenses through a reduction in its earned return on equity ("ROE"), unless offsetting cost savings or revenue growth come into being. Conversely, if actual CIP/Cyber-security O&M expenses fall short of the rate allowance when new rates are in effect, then the Company will retain the resulting savings through an increase in its earned ROE, unless other costs increase or revenues fall which would erode the impact of the CIP/Cyber-security O&M expense savings.

7. Competent and substantial record evidence establishes that KCP&L's CIP/Cyber-security O&M expenses have been increasing in recent years and that they are expected to continue increasing significantly after new rates from this case take effect. Ex. 132, Phelps-Roper Rebuttal at 2-3. This evidence was not disputed; in fact, evidence offered by other parties confirms that CIP/Cyber-security O&M expenses will continue to increase after rates are set in this case. See Ex. 222, Lyons Rebuttal at 26-27; and Ex. 502, Brosch Direct-

Revenue Requirement at 32.[2]

8. Competent and substantial record evidence also establishes that KCP&L is not expected to experience any meaningful load or revenue growth after new rates take effect, and that cost increases in other areas in addition to CIP/Cyber-security O&M expenses are expected. See Ex. 107, Carlson Rebuttal at 6-8; Ex. 113, Hardesty Surrebuttal at 5-6; Ex. 132, Phelps-Roper at 2-3; Ex. 130, Overcast Surrebuttal at 5-6; and Ex. 121, Ives Surrebuttal at 23-24, and 35, fn. 1. Consequently, there is no reasonable likelihood that KCP&L's increased CIP/Cyber-security O&M expenses will be offset to any meaningful extent by increased revenues or cost savings in other areas. Because the fixed rate allowance is based exclusively on historical CIP/Cyber-security O&M expense levels, increased CIP/Cyber-security O&M expenses experienced when rates are in effect will reduce KCP&L's earned ROE below the level authorized in the Report and Order.

9. Two alternatives to exclusive reliance on historical information to establish the CIP/Cyber-security O&M expense rate allowance were presented to the Commission, either of which would have mitigated the ROE-reducing impact of this aspect of the Report and Order. As one alternative (assuming a rate allowance based on historical costs), KCP&L proposed in its direct testimony (Ex. 134, Rush Direct at 33) that actual CIP/Cyber-security O&M expenses would be tracked relative to the historically-based amount allowed in rates, with any differences deferred as regulatory assets or liabilities, as permitted by the Federal Energy Regulatory Commission's ("FERC") Uniform System of Accounts ("USOA"). See Ex. 160, 18 C.F.R. Part 201 (Accounts 182.3 & 253; Definition No. 31); 4 CSR 240-20.030 (adoption of USOA).

[2] It should be noted that both Staff witness Lyons and Midwest Energy Consumers' Group ("MECG") witness Brosch include capital expenditures in the CIP/Cyber-security cost tables presented, respectively, in their rebuttal and direct testimony. Because the Report and Order on this issue only addressed O&M costs, the capital expenditure lines of these tables should be disregarded for purposes of ascertaining O&M cost trends historically and in the future.

Ratemaking treatment for such expenses would occur in the Company's next general rate proceeding. As a second alternative, KCP&L proposed that the historically-based rate allowance be increased by $3.5 million to reflect the impact of forecasted CIP/Cyber-security O&M expenses during the period when rates are in effect. Ex. 136, Rush Surrebuttal at 15-17. If the actual CIP/Cyber-security O&M expenses fall short of the rate allowance, KCP&L proposed that customers be credited with the difference, including interest calculated using the Company's short-term rate, in the Company's next general rate proceeding. Id. If the actual CIP/Cyber-security O&M expenses exceed the rate allowance, KCP&L proposed that shareholders would absorb those excess costs. Id.

10. In rejecting both of these alternatives and instead basing the rate allowance exclusively on historical costs, the Commission has ignored evidence regarding CIP/Cyber-security O&M expense increases that will occur when rates will be in effect. These expense increases have a material bearing upon KCP&L's ability to achieve the ROE authorized by the Commission in its Report and Order and, consequently, are factors highly relevant to the determination of just and reasonable rates. In this regard, the Report and Order violates the Missouri Supreme Court's holding in State ex rel. Missouri Water Co. v. PSC, 308 S.W.2d 704, 719 (Mo. 1957) ("Missouri Water").[3] See State ex rel. Mo. Pub. Serv. Co. v. Fraas, 627 S.W.2d 882, 886 (Mo.App. W.D. 1981) ("Commission must make an intelligent forecast with respect to the future period for which it is setting the rate.") ("Fraas").

11. Additionally, in determining (on pp. 58-59 of the Report and Order) that KCP&L's alternative request to base the rate allowance for CIP/cyber-security O&M expense

[3] Specifically, the Missouri Supreme Court held that ". . . in determining the price to be charged for (in this instance) water (Sec. 393.270, Par.4) the fair 'value of the property' of the water company which the Commission is empowered to ascertain under Sec. 393.230, Par. 1, is a relevant factor for consideration in its proper relationship to all other facts that have a material bearing upon the establishment of 'fair and just' rates as contemplated by our statutes and decisions." Missouri Water at 719.

on forecasted expenses violated 4 CSR 240-2.130(7)(A), prevented other parties from having a sufficient opportunity to conduct discovery, and was not adequately explained by KCP&L in terms of either how the forecasted expense estimate was arrived at or how the Commission has legal authority to grant such relief, the Report and Order is unreasonable and unlawful because it ignores the Commission's own rules which specifically allow surrebuttal testimony that is responsive to rebuttal testimony, and ignores the fact that KCP&L provided substantial testimony explaining why CIP/Cyber-security O&M expenses were increasing and detailed CIP/cyber-security O&M expense forecasts throughout the case, beginning with direct testimony and continuing through rebuttal and surrebuttal testimony. Ex. 134, Rush Direct at 31-34; Ex. 132, Phelps-Roper Rebuttal at 3 & Sched. JFR-1 through JFR-7; and Ex. 133, Phelps-Roper Surrebuttal at 2-3.

B. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that (1) the Rate Allowance for Southwest Power Pool, Inc. ("SPP") Transmission Expenses is Based on Historical Amounts that Will be Inadequate Because SPP Transmission Expenses Will Increase During the Period When Rates Will be in Effect, and (2) the Inadequate Rate Allowance for SPP Transmission Expenses Results in Unrecoverable or "Trapped" FERC-approved Rates Paid by KCP&L in Violation of the Filed Rate Doctrine and Federal Preemption Principles.

(1) <u>The Rate Allowance for SPP Transmission Expenses is Based on Historical Amounts that Will be Inadequate Because SPP Transmission Expenses Will Increase During the Period When Rates Will be in Effect.</u>

12. In its Report and Order, the Commission established KCP&L's revenue requirement using a rate allowance for SPP transmission expenses based on annualizing the actual amount expended by KCP&L for SPP transmission expenses for period January 1, 2015 through May 31, 2015. Report and Order at 54. This rate allowance does not include transmission costs charged to KCP&L by reason of Independence Power & Light ("IP&L")

becoming a member of SPP. Id. This fixed rate allowance will remain in rates until changed in a subsequent general rate proceeding, but because the Commission approved KCP&L's use of a fuel adjustment clause ("FAC"), a portion of prospective changes in SPP transmission expense will be flowed through the FAC and recovered from or credited to customers. Report and Order at 33-35. Specifically, the Commission adopted the 95/5 convention pursuant to which 95% of prospective changes in FAC-related costs flow through the FAC. Report and Order at 31. Additionally, the Commission decided that only SPP transmission expenses related to "true" purchased power could flow through the FAC. Report and Order at 33-35. As a result, more than 93%[4] of prospective changes in SPP transmission expenses paid by KCP&L will not flow through the FAC. Thus, after new rates from this case take effect, if actual SPP transmission expenses exceed the rate allowance, then the Company will absorb 93.065% of those increased expenses through a reduction in its earned ROE, unless offsetting cost savings or revenue growth come into being. Conversely, if actual SPP transmission expenses fall short of the rate allowance when new rates are in effect, then the Company will retain 93.065% of the resulting savings through an increase in its earned ROE, unless other costs increase or revenues fall which would erode the impact of the SPP transmission expense savings.

13. Competent and substantial record evidence establishes that KCP&L's SPP transmission expenses have been increasing in recent years and that they are expected to continue increasing significantly after new rates from this case take effect. Ex. 107, Carlson Rebuttal at 6-8. The driver of approximately $2.4 million in increased annual SPP transmission expense (for KCP&L's Missouri jurisdictional operations) is FERC's acceptance of SPP tariff

[4] The actual figure is 93.065% which represents the sum of 92.7% (the portion of SPP transmission expenses excluded from the FAC by the Commission on the grounds that this transmission is not related to "true" purchased power) and 0.365% (5% of the 7.3% of SPP transmission expenses the Commission has authorized to flow through the FAC as related to "true purchased power").

revisions, effective June 1, 2015, reflecting IP&L's membership in SPP as a transmission owner. Ex. 165, Klote True-up Direct at 3-4; and Ex. 164, Ives True-up Rebuttal at 5.

14. Competent and substantial record evidence also establishes that KCP&L is not expected to experience any meaningful load or revenue growth after new rates take effect, and that cost increases in other areas in addition to SPP transmission expenses are expected. See Ex. 113, Hardesty Surrebuttal at 5-6; Ex. 132, Phelps-Roper at 2-3; Ex. 130, Overcast Surrebuttal at 5-6; and Ex. 121, Ives Surrebuttal at 23-24, and 35, fn. 1. Consequently, there is no reasonable likelihood that KCP&L's increased SPP transmission expenses (driven by general increases in SPP transmission expenses as well as IP&L's membership in SPP as a transmission owner effective June 1, 2015) will be offset to any meaningful extent by increased revenues or cost savings in other areas. Because the fixed rate allowance is based exclusively on historical SPP transmission expense levels, increased SPP transmission expenses experienced when rates are in effect will reduce KCP&L's earned ROE below the level authorized in the Report and Order.

15. Three alternatives to virtually exclusive reliance on historical information to establish the SPP transmission expense rate allowance were presented to the Commission, any of which would have mitigated the ROE-reducing impact of this aspect of the Report and Order. KCP&L's preferred alternative is to include 100% of transmission expenses in the FAC, enabling changes in SPP transmission expense levels to be credited to or recovered from customers through the operation of the FAC. Ex. 134, Rush Direct at 11, 17-22 & 26. As another alternative (assuming a rate allowance based on historical costs), KCP&L proposed in its rebuttal testimony (Ex. 135, Rush Rebuttal at 11) that actual SPP transmission expenses not flowed through the FAC would be tracked relative to the historically-based allowed in rates, with any differences deferred as regulatory assets or liabilities, as permitted by FERC's USOA.

See Ex. 160, 18 C.F.R. Part 201 (Accounts 182.3 & 253; Definition No. 31); 4 CSR 240-20.030 (adoption of USOA). Ratemaking treatment for such expenses would occur in the Company's next general rate proceeding. As a third alternative, KCP&L proposed that the historically-based rate allowance be increased by $5 million to reflect the impact of forecasted SPP transmission expenses during the period when rates are in effect (which includes the impact of IP&L's membership in SPP as a transmission owner effective June 1, 2015). Ex. 136, Rush Surrebuttal at 9. If the actual SPP transmission expenses fall short of the rate allowance, KCP&L proposed that customers be credited with the difference, including interest calculated using the Company's short-term rate, in the Company's next general rate proceeding. Id. If the actual SPP transmission expenses exceed the rate allowance, KCP&L proposed that shareholders would absorb those excess costs. Id.

16. In rejecting all of these alternatives and instead basing the rate allowance almost exclusively on historical costs, the Commission has ignored evidence regarding SPP transmission expense increases that will occur when rates will be in effect. These expense increases have a material bearing upon KCP&L's ability to achieve the ROE authorized by the Commission in its Report and Order and, consequently, are factors highly relevant to the determination of just and reasonable rates. In this regard, the Report and Order violates the Missouri Supreme Court's holding in Missouri Water, 308 S.W.2d at 719. See Fraas, 627 S.W.2d at 886.

17. Additionally, in determining (on p. 54 of the Report and Order) that KCP&L's alternative request to base the rate allowance for SPP transmission expense on forecasted expenses violated 4 CSR 240-2.130(7)(A), prevented other parties from having a sufficient opportunity to conduct discovery, and was not adequately explained by KCP&L in terms of

either how the forecasted expense estimate was arrived at or how the Commission has legal authority to grant such relief, the Report and Order is unreasonable and unlawful because it ignores the Commission's own rules which specifically allow surrebuttal testimony that is responsive to rebuttal testimony, and ignores the fact that KCP&L provided detailed SPP transmission expense forecasts throughout the case, beginning with direct testimony and continuing through rebuttal and surrebuttal testimony. Ex. 134, Rush Direct at 11 & Sched. TMR-5; Ex. 107, Carlson Rebuttal at 8; Ex. 108, Carlson Surrebuttal at 7; Ex. 165, Klote True-up Direct at 3-4; and Ex. 164, Ives True-up Rebuttal at 5.

(2) The Inadequate Rate Allowance for SPP Transmission Expenses Results in Unrecoverable or "Trapped" FERC-approved Rates Paid by KCP&L in Violation of the Filed Rate Doctrine and Federal Preemption Principles.

18. The Commission denied the vast majority of KCP&L's request to recover through the FAC the costs that it incurs with SPP. KCP&L is charged by SPP for services related to the transmission of electricity and the administration of SPP's energy markets and its transmission expansion planning duties. SPP invoices these charges pursuant to its FERC-approved Open Access Transmission Tariff ("OATT") and rate schedules. The failure of the Commission to allow such recovery through the FAC violates the Filed Rate Doctrine and is contrary to principles of federal preemption. Nantahala Power & Light Co. Thornburg, 476 U.S. 953, 964-72 (1986) ("Nantahala"); Associated Natural Gas Co. v. PSC, 954 S.W.2d 520, 530 (Mo. App. W.D. 1977) ("Associated Natural Gas").

19. In Section III(B)4 the Commission found that KCP&L sells all of the power that it generates into SPP's federally-regulated energy markets and, in turn, purchases all of the power that it sells to retail customers from those markets. See Report and Order, ¶ 61. KCP&L receives these revenues and pays these charges pursuant to invoices received from SPP under its

rate and fee schedules, which are elements of its FERC-approved OATT. See Ex. 134, Rush Direct at 17-22. All of these transactions are accounted for pursuant to FERC's USOA, which has been adopted by the Commission. Id. See 4 CSR 240-20.030(1). The Commission specifically referred to FERC Account 565, under which SPP bills KCP&L for "standard point-to-point transmission charges and base plan funding." See Report and Order, ¶ 62.

20. The services affected by the Commission's decision in Section III(B)(4) are charged under SPP Schedule 1 and Schedule 11. See Ex. 106, Bresette Surrebuttal at 6; Ex. 106, Carlson Rebuttal at 9.

21. Under Schedule 1, SPP charges KCP&L for Scheduling, System Control and Dispatch Service which are "required to schedule the movement of power through, out of, within or into the SPP Balancing Authority Area." See Ex. 155, SPP OATT Schedule 1, Scheduling, System Control and Dispatch Service, FERC Docket No. ER12-1179, Effective 3/1/2014. Staff did not oppose KCP&L's recovering Schedule 1 costs in the FAC "because these charges are needed for KCP&L to buy and sell energy to meet the needs of its customers." See Tr. 1681 (Eaves: "I think that's fair to say").

22. Under Schedule 11, SPP assesses Base Plan Zonal Charges and Region-wide Charges to SPP members like KCP&L. See Ex. 157, SPP OATT Schedule 11, Base Plan Zonal Charge and Region-Wide Charge, FERC Docket No. ER14-1653-001, Effective 3/1/2014; Ex. 200, Staff Revenue Requirement Cost of Service Report at 195 & n.91. Because "KCP&L's ability to serve its customers depends on the regional transmission system," KCP&L pays SPP "for the right to use that transmission through upkeep of and upgrades to that same transmission system (through Schedule 11 charges)." See Ex. 107, Carlson Rebuttal at 9 (cited by the

Commission in the Report and Order at 32, n. 115). SPP's annual Base Plan charges to KCP&L are expected to reach close to $60 million by 2018. See Ex. 134, Rush Direct, Sched. TMR-5.

23. There is no lawful basis for the Commission to authorize FAC recovery of only 7.3% of such costs on a theory of "true purchased power" or a narrow definition of off system sales -- or any percentage other than 100% -- because these charges are being invoiced to KCP&L pursuant to SPP's federally-approved tariff. See Report and Order at 32-35.

24. Similarly, in Section III(B)5 the Commission erroneously denied KCP&L recovery through the FAC of administrative fees charged by both SPP and FERC, which are invoiced to KCP&L pursuant to SPP's Schedules 1-A and 12. See Report and Order at 35-36. SPP's Schedule 1-A fee reflects the regional scheduling, planning and market-monitoring services it provides to facilitate the transportation of energy on the transmission system, which it does under a FERC tariff. See Ex. 156, SPP OATT Schedule 1-A, Tariff Administration Service, FERC Docket No. ER14-278-000, Effective 1/1/2014; Report and Order at 35-36 & n.127, citing Ex. 107, Carlson Rebuttal at 10. SPP Schedule 12 fees are an assessment charged by FERC itself related to KCP&L's membership in SPP. See Ex. 158, SPP OATT Schedule 12, FERC Assessment Charge, FERC Docket No. ER10-1960, Effective 7/26/2010; Report and Order at 36, n.128, citing Ex. 106, Bresette Surrebuttal at 6. KCP&L's transmission system has been a part of SPP's regional operations pursuant to this Commission's approval. See In re Kansas City Power & Light Co., Amended Order Approving Stipulation and Agreement, No. EO-2006-0142 (July 13, 2006).

25. The Commission properly found that the Company should be allowed to utilize a FAC because it "would help KCPL to timely recover its increased cost for fuel, purchased power and transmission and to avoid the negative consequences of regulatory lag …." See Report and

Order at 28. The Commission further concluded that KCP&L "has met the criteria for the Commission to authorize an FAC" and "should be allowed to establish a fuel adjustment clause." Id. at 30. Given these findings, particularly concerning SPP transmission expenses where rapid increases experienced in recent years are expected to continue for the foreseeable future, and the appropriateness of granting KCP&L an FAC under Section 386.266, the Commission cannot lawfully prevent KCP&L from flowing through the FAC the dollars it pays to SPP under its federal tariffs. By mandating that 93% of KCP&L's SPP transmission expense increases can be eligible for recovery only by means of the general rate case process which sets rates for prospective effect, the Report and Order will cause KCP&L to experience earnings shortfalls resulting from the mismatch between the historically based rate allowance and increasing SPP transmission expense when the new rates are in effect. This amounts to disallowance by process because preventing KCP&L from flowing 100% of SPP transmission expense through the FAC (or authorizing a tracker for SPP transmission expense not flowed through the FAC, or basing the rate allowance on forecasted SPP transmission expense) results in "trapped" costs and prevents KCP&L "from recovering the full costs of acquiring power under the FERC-approved scheme." Nantahala, 476 U.S. at 971. As a result, the Commission's decision violates the Filed Rate Doctrine, pursuant to which interstate power rates fixed by FERC must be given binding effect by state utility commissions determining intrastate rates, and the Commission's allocation of only 7.3% of Schedule 11 costs to the FAC, and the exclusion from the FAC of all Schedule 1, 1-A and 12 costs are preempted by federal law. Nantahala, 476 U.S. at 965, 967; Associated Natural Gas, 954 S.W.2d at 530.

C. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the Rate Allowance for Property Taxes is Based on Historical Amounts that Will be Inadequate Because Property Taxes Will Increase During the Period When Rates Will be in Effect.

26. In its Report and Order, the Commission established KCP&L's revenue requirement using a rate allowance of $91.6 million (on a total company basis) for property taxes expenses based on property in-service on January 1, 2015 and multiplying that property amount by the property tax ratio Staff derived from historical property tax payments by KCP&L. Report and Order at 56 (citing Ex. 259, Revised True-Up Accounting Schedules, Income Statement Detail, p. 7); and Ex. 200, Staff Revenue Requirement Cost of Service Report at 128. This fixed rate allowance will remain in rates until changed in a subsequent general rate proceeding. After new rates from this case take effect, if actual property taxes exceed the rate allowance, then the Company will absorb those increased expenses through a reduction in its earned ROE, unless offsetting cost savings or revenue growth come into being. Conversely, if actual property taxes fall short of the rate allowance when new rates are in effect, then the Company will retain the resulting savings through an increase in its earned ROE, unless other costs increase or revenues fall which would erode the impact of the property tax savings.

27. Competent and substantial record evidence establishes that KCP&L's property taxes have been increasing in recent years and that they are expected to continue increasing significantly after new rates from this case take effect. Ex. 120, Ives Rebuttal at 10; and Ex. 113, Hardesty Rebuttal at 5-6.

28. Competent and substantial record evidence also establishes that KCP&L is not expected to experience any meaningful load or revenue growth after new rates take effect, and that cost increases in other areas in addition to property taxes are expected. See Ex. 107,

Carlson Rebuttal at 6-8; Ex. 132 Phelps-Roper Rebuttal at 2-3; Ex. 132, Overcast Surrebuttal at 5-6; and Ex. 121, Ives Surrebuttal at 23-24, and 35, fn. 1. Consequently, there is no reasonable likelihood that KCP&L's increased property taxes will be offset to any meaningful extent by increased revenues or cost savings in other areas. Because the fixed rate allowance is based exclusively on historical property tax levels, increased property taxes experienced when rates are in effect will reduce KCP&L's earned ROE below the level authorized in the Report and Order.

29. Two alternatives to exclusive reliance on historical information to establish the property tax rate allowance were presented to the Commission, either of which would have mitigated the ROE-reducing impact of this aspect of the Report and Order. As one alternative (assuming a rate allowance based on historical costs), KCP&L proposed in its direct testimony (Ex. 134, Rush Direct at 27-29) that actual property taxes would be tracked relative to the historically-based amount allowed in rates, with any differences deferred as regulatory assets or liabilities, as permitted by FERC's USOA. See Ex. 160, 18 C.F.R. Part 201 (Accounts 182.3 & 253; Definition No. 31); 4 CSR 240-20.030 (adoption of USOA). Ratemaking treatment for such expenses would occur in the Company's next general rate proceeding. As a second alternative, KCP&L proposed that the historically-based rate allowance be increased by $5.6 million to reflect the impact of forecasted property taxes during the period when rates are in effect. Ex. 136, Rush Surrebuttal at 16-17. If actual property taxes fall short of the rate allowance, KCP&L proposed that customers be credited with the difference, including interest calculated using the Company's short-term rate, in the Company's next general rate proceeding. Id. If actual property taxes exceed the rate allowance, KCP&L proposed that shareholders would absorb those excess costs. Id.

30. In rejecting both of these alternatives, the Commission has ignored evidence regarding property tax increases that will occur when rates will be in effect, which expense increases will have a material bearing upon KCP&L's ability to achieve the ROE authorized by the Commission in its Report and Order and, consequently, are factors highly relevant to the determination of just and reasonable rates. In this regard, the Report and Order violates the Missouri Supreme Court's holding in Missouri Water, 308 S.W.2d at 719. See Fraas, 627 S.W.2d at 886.

31. Additionally, in determining (on p. 56 of the Report and Order) that KCP&L's alternative request to base the rate allowance for property tax expense on forecasted expenses violated 4 CSR 240-2.130(7)(A), prevented other parties from having a sufficient opportunity to conduct discovery, and was not adequately explained by KCP&L in terms of either how the forecasted expense estimate was arrived at or how the Commission has legal authority to grant such relief, the Report and Order is unreasonable and unlawful because it ignores the Commission's own rules which specifically allow surrebuttal testimony that is responsive to rebuttal testimony, and ignores the fact that KCP&L provided detailed property tax expense forecasts throughout the case, beginning with direct testimony and continuing through rebuttal and surrebuttal testimony. Ex. 124, Klote Direct a 74-76; Ex. 112, Hardesty Rebuttal at 23-24; and Ex. 113, Hardesty Surrebuttal at 5-6.

D. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the Commission's Rejection of Trackers in this Case for SPP Transmission Expenses, CIP/Cyber-security Expenses and Property Taxes is Based Upon an Erroneous Interpretation of the USOA.

32. The Report and Order is unlawful and unreasonable because it misinterpreted the USOA by finding that KCP&L's requests for an accounting deferral mechanism known as a

tracker are subject to a requirement that they be "extraordinary." See Report and Order at 50-54, 56, 58. The Commission correctly noted that the tracker deferral requests would create Regulatory Assets under FERC Account 182.3 and Regulatory Liabilities under FERC Account 254. Id. at 52. See 18 C.F.R. Part 101, USOA, Account 182.3 (Other regulatory assets) & Account 254 (Other regulatory liabilities). However, the Commission erroneously found that it can allow the establishment of such regulatory assets and liabilities only if they are "extraordinary items," a standard that is contained in an unrelated requirement of the USOA found in General Instruction No. 7. See Report and Order at 52.

33. The Commission properly found that KCP&L's tracker requests pertained to particular cost of service items that would be tracked and compared to the amount of those items in base rates. "Any over-recovery or under-recovery of the item in rates compared to the actual expenditures … is then booked to a regulatory asset or liability account and would be eligible to be included in the utility's rates in its next general rate proceeding through an amortization to expense." See Report & Order, ¶ 115. The accounts into which such regulatory assets or liabilities would be placed are defined in the USOA, as shown in Exhibit 160. There is nothing in the definitions of regulatory assets or regulatory liabilities found in Account 182.3 or Account 254 that requires or even suggests that only "extraordinary items" are eligible for such treatment.

34. To the contrary, Definition No. 31 sets forth the USOA's standards regarding such accounts. It states: "*Regulatory Assets and Liabilities* are assets and liabilities that result from rate actions of regulatory agencies." See Ex. 160 at 3; FERC Code of Federal Regulation USOA pp. 653, 663, 609USOA, Definition No. 31.

Definition No. 31 goes on to provide:

> Regulatory assets and liabilities arise from specific revenues, expenses, gains or losses that would have been included in net income

> determinations in one period under the general requirements of the Uniform System of Accounts, but for it being probable:
>
> 1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or
>
> 2) in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required. [Id.]

Because the USOA definition that governs regulatory assets and liabilities contains no requirement that an item placed in these accounts be extraordinary, abnormal, unusual, rare or infrequent, the Commission has improperly and unlawfully redefined how the federal regulations adopted by the Commission in its regulations treat such regulatory assets and liabilities. See Report and Order at 52-54.

35. The error in the Commission's re-definition of regulatory assets and liabilities can be seen by looking at how "extraordinary items" are defined in the USOA's General Instruction No. 7. Even a cursory reading of this instruction leads to the obvious conclusion that it contains no requirement or even a reference to establishing regulatory assets or liabilities. Neither the first sentence, which the Commission failed to quote, nor the second and third sentences which it did quote on page 52 of the Report and Order, relate to regulatory assets or liabilities, or to deferrals related to future costs that are incurred and considered in a subsequent rate case.

36. The final sentence of General Instruction No. 7 regarding "extraordinary items" states: "Commission approval must be obtained to treat an item of less than 5 percent [of income], as extraordinary (See accounts 434 and 435.)." Accounts 434 (extraordinary income) and 435 (extraordinary deductions) are the accounts to which gains or losses of extraordinary income or deductions are to be registered. There is nothing in these accounts and nothing in the General Instruction No. 7 relevant to the regulatory assets or liabilities that would be created by

KCP&L's tracker requests. Given that the Commission has directed all electric utilities to comply with the USOA pursuant to Section 393.140(4) and 4 CSR 240-20.030(1), the Commission itself must do the same.

37. None of the appellate cases on which the Commission relied discuss regulatory assets and liabilities or Definition No. 31 under the USOA. Instead, the cited cases relate to accounting authority orders established for extraordinary items that occurred in the past. See Report and Order at 53, n. 179. By contrast, KCP&L sought to establish trackers to defer ***future*** costs, with recovery to be determined in a subsequent general rate case. Because the Commission denied KCP&L's requests for trackers related to transmission fees, property taxes, and CIP/cyber-security expenses pursuant to an erroneous interpretation of the USOA relating to regulatory assets and liabilities, rehearing must be granted.

38. The Commission additionally erred by finding that KCP&L's request for deferral accounting in the form of trackers "violates the 'matching principle' required by Generally Accepted Accounting Principles (GAAP) and the Uniform System of Accounts approved by the Commission." See Report & Order at 50-51. To the contrary, USOA Definition No. 31 specifically states that "rate actions of regulatory agencies" can result in the creation of regulatory assets and liabilities under Accounts 182.3 and 254. They "arise from specific revenues, expenses, gains or losses that would have been included in net income determinations in one period under the general requirements of the" USOA "but for it being probable" that they will be included by the regulatory agency in different periods when it sets "rates the utility is authorized to charge" or "refunds to customers." See Ex. 160, FERC Code of Federal Regulation Uniform System of Accounts pp. 653, 663, 609.

39. There is nothing in the USOA which labels deferral accounting as a "violation" of

any principle of accounting. Rather, Account 182.3 is listed in the USOA's Balance Sheet Chart of Accounts under "Deferred Debts" and Account 254 is listed under "Deferred Credits." See USOA, Balance Sheet Chart of Accounts at 414 (2013). As there is no legal or factual basis for the Commission's finding that its approval of the trackers would violate the matching principle, rehearing must be granted.

E. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the Commission Disallowed Recovery of 25% of KCP&L's Prudently Incurred Rate Case Expenses and Imposed a Rule on the Company in Violation of Chapter 536.

40. Although the Commission has wide discretion in determining just and reasonable rates, its discretion is not without bounds. "The reasonableness of the PSC's order depends on whether it was supported by competent and substantial evidence upon the whole record; whether it was arbitrary, capricious, or unreasonable; or whether the PSC abused its discretion." State ex rel. Inter-City Beverage Co. v. PSC, 972 S.W.2d 397, 401 (Mo. App. W.D. 1998).

41. "Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling.' An agency must not act in a totally subjective manner without any guidelines or criteria." Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ., 34 S.W.3d 266, 281 (Mo. App. 2000) (citations omitted).

42. The arbitrariness and capriciousness of the Commission's decision is rooted in its implementation of a formula that denied recovery of 25% of the Company's rate case expenses. The ruling is particularly flawed because these expenses were not disallowed on the basis of

imprudence, unreasonableness or that they were not necessary for the provision of electric service, but on a novel methodology never before employed in over 100 years of utility ratemaking in Missouri which made no judgment as to any specific items of expense incurred by the Company.

43. In State ex rel. Laclede Gas Co. v. PSC, 600 S.W.2d 222, 228-29 (Mo. App. W.D. 1989) ("Laclede"), the Commission disallowed charitable contributions and certain goodwill advertising costs by the utility, excluding these "goodwill" costs from rates because they were not deemed necessary for the provision of electric service. The Court of Appeals found that there was competent and substantial evidence supporting the Commission's decision denying recovery of these costs. "The P.S.C. gave specific attention to the nature and extent of the advertising in question. The evidence is competent and substantial to support the finding of the P.S.C. …." Id. at 228. In Laclede the Commission did the work of examining and analyzing a certain type of costs and making specific disallowances based on that analysis.

44. In comparing Laclede to the handling of the rate case expense issues in this case, the difference is stark. Here the Commission instituted a cost-recovery formula which denies KCP&L recovery of rate cases expenses by the ratio of the revenue requested by the Company at the outset of the case to the final revenue requirement authorized by the Commission. Since the Company requested approximately 25% more revenue than it was ultimately authorized by the Commission, it was denied 25% of its rate case expense or approximately $250,000. This formula comes with a specific monetary impact which -- unlike Laclede -- is not supported by competent and substantial evidence of any kind. The Commission makes no attempt to link the monetary impact of the new formula with any specific item of rate case expense.

45. "[A] utility's costs 'are presumed to be prudently incurred'" absent a showing of

serious doubt as to the prudence of the expenditure. Office of Public Counsel v. Missouri Public Service Comm'n, 409 S.W.3d 371, 376 (Mo. en banc 2013) (internal citations omitted). The Commission conceded the lack of any serious doubt as to the reasonableness of KCP&L's rate case expenses, specifically determining that it "will not disallow these or any other rate case expense in this case." Report and Order at 69. Nevertheless, the Commission found "that in order to set just and reasonable rates under the facts in this case, the Commission will require KCPL shareholders ***to cover*** a portion of KCPL's rate case expense." Id. at 72 (emphasis added.). The use of the gentle phrase "to cover" does not alter the legal and financial reality of a $250,000 disallowance for prudently incurred expenses.

46. Recognizing the need for some factual justification for the formula, the Commission provides: "The evidence shows that the expenses in this case are driven primarily by issues raised by KCPL, which has complete control over the content and methodologies proposed when it files its rate cases." Id. at 71-72. It is odd for the Commission to cite the only means permitted a regulated public utility by law to recover its costs as "evidence" that the utility caused the rate case expense.

47. The formula implemented by the Commission is reminiscent of State ex rel. Missouri Water Co. v. PSC, 308 S.W.2d 704, 718-19 (Mo. 1957), in which the Commission abandoned the difficult task of basing its decision on "its own facts" and chose instead a generic methodology which it deemed more expedient and economical, sidestepping the difficulty of valuation of the utility's property with accuracy. The Missouri Supreme Court instructed the Commission: "But however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and

substantial evidence on the record.'" Id. at 720. The Commission simply does not have the authority to impose a policy regarding rate case expense recovery that is an abrupt change from the Commission's consistent historical practice without sufficient explanation that causes financial harm to KCP&L without any finding that KCP&L has incurred excessive, unreasonable or imprudent costs.

48. Not only is the formula one of expedience, but it is a proverbial "pig in a poke" for KCP&L because the Company has no idea what costs will be disallowed until the Commission renders its decision. The Commission jettisoned its duty to determine the appropriateness of certain operating costs and instead implemented an equation under the implicit theory that the Company should be able to predict the outcome of a rate case in order to recover all of its prudently incurred operating costs. It is one thing to determine that certain costs are not appropriate to be recovered as operating costs, but it is entirely different to ask a utility to divine the outcome of an adversarial proceeding in order to recover all of its prudently incurred costs.

49. The implementation of the rate case expense formula in this rate case has all the indicia of a rule, despite the Commission's assurance to the contrary.[5] "Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a 'rule.'" NME Hospitals, Inc. v. Dept. of Social Services, 850 S.W.2d 71, 74 (Mo. en banc. 1993) ("NME").

50. The Commission's implementation of this rate-case expense methodology is explicitly designed for its "future effects" and act "on unnamed and unspecified facts". Here is

[5] The Commission says it is "not announcing a general change in policy regarding rate case expense for all utilities in this Report and Order. Rather, the Commission is setting just and reasonable rates under the particular facts of this case, so the Commission is not engaging in improper rulemaking." Report and Order at 71.

an illustrative sample of some of the "facts" relied upon by the Commission which clearly demonstrates the intended function of this equation as a rule:

- Rate case expense can benefit both utility shareholders and customers, though often in different ways. A utility and its shareholders directly benefit from this expense because generally these costs are incurred in order to increase a utility's revenues and, ultimately, its profitability. Costumers benefit generally from being served by financially healthy utilities, which is bolstered in part by the ability of a utility to periodically seek increased rates to recover increasing expenses and earn a return on investments in their systems. See Report and Order at 64.
- Prudency reviews, by their nature, are not a strong incentive to control costs. The utility holds all the information a challenging party needs to prove imprudence, even when engaged in a conscientious prudence review. Id. at 67.
- Awarding a utility all of its incurred rate case expenses could provide that utility with a significant financial advantage over other participants in the rate case process, who may be constrained by budgetary and other financial restrictions. Such a practice does not encourage reasonable levels of cost containment in the utility's rate case expense. Id.
- An incentive for a utility to limit its rate case expense is to tie a utility's percent recovery of rate case expense to the percentage of its rate increase request that the Commission finds just and reasonable. Use of this approach would directly tie a utility's recovery of rate case expense to both the reasonableness of its issue positions and the dollar value sought from customers in a rate case. Id.

The Commission's findings regarding future economic incentives, the supposed inadequacy of

prudence reviews, the alleged financial advantage of the utilities over other parties in rate cases, and the direct benefit to shareholders set forth the basis for a rate case expense methodology that the Commission clearly intends to apply in the future and to other parties and other facts.

51. In Dept. of Social Services v. Little Hills Healthcare, L.L.C., 236 S.W.3d 637 (Mo. en banc 2007), the Supreme Court dealt with a similar circumstance when the Department of Social Services argued that its "estimated Medicaid days" methodology was not a rule because it did not apply to all hospitals and did not have a future effect. The Supreme Court found this rationale wanting, writing: "Application of the proposed standard to all hospitals in Missouri is not required to raise the standard to one of 'general applicability.'" Id. at 642, citing NME, 850 S.W.2d at 74. Likewise the Court declared that the agency's "choice to annually update or change its calculation methods does not change the fact that its methods *could* apply indefinitely in the future." Id. at 643 (emphasis added). Similarly, the assurance by the Commission in this proceeding that its decision is based on the facts of the case are belied by the Commission's own analysis.

52. Even more telling, the broad policy positions discussed at length by the Commission in its "Finding of Facts" to support its rate case expense formula are identical to the policy positions identified in concurring opinions filed in the recent Ameren Missouri and Empire District rate cases. See Concurring Opinion of Commissioner Daniel I. Hall in the Order Approving Amended Stipulation and Agreement Regarding Certain Issues, In re Union Electric Company, d/b/a Ameren Missouri, No. ER-2014-0258 (June 11, 2015) (attached as Exhibit A); and Concurring Opinion of Commissioner Daniel Y. Hall, In re Empire Dist. Electric Co., No. ER-2014-0351 (July 17, 2015) (attached as Exhibit B). As a result, the Commission has violated Section 536.021 by failing to promulgate a rule according to law. "A rule adopted in violation of

Section 536.021 is void." See NME, 850 S.W.2d at 74.

F. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the ROE is Insufficient Because it is the Lowest ROE Authorized Recently by Any Utility Regulatory Body for Electric Utilities Comparable in Risk to KCP&L.

53. The Commission established KCP&L's revenue requirement and rates based on a ROE of 9.5%. See Report and Order at 22. The ROE authorized for KCP&L in the Report and Order is:

a. Lower than the 9.53% ROE recently authorized by this Commission for Ameren Missouri[6];

b. Lower than any authorized ROE in effect for the electric utilities included in the proxy groups used by the various ROE experts, except for one company which is not comparable to KCP&L[7]; and

c. Lower than 21 ROEs authorized by other utility regulatory authorities in the country to set rates for vertically- integrated electric utilities like KCP&L for the period of May 1, 2014 through April 30, 2015.[8] In this regard, the 9.50% ROE authorized for the Company is equal to the other two lowest ROEs – set for PacifiCorp by the Washington and Wyoming Commissions.[9]

54. Although this 9.5% ROE is lower than virtually all ROEs recently authorized for vertically-integrated electric utilities across the country in the past 18 months, the Report and Order could be sustained on this point if the competent and substantial evidence established that KCP&L is less risky than those other utilities. The United States Supreme Court has stated: "A

[6] Report and Order at 68, In re Union Elec. Co., No. ER-2014-0258 (Apr. 12, 2015).
[7] See Ex. 117, Hevert Surrebuttal at Sched. RBH-32. The lowest ROE of 9.17% was awarded in December 2014 to Connecticut Light & Power Co., a distribution utility in a de-regulated state that owns no generation. See Ex. 134, Rush Direct at Sched. TMR-1 at 13.
[8] See Ex. 116, Hevert Rebuttal at Sched. RHB-20.
[9] Id.

public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n of West Virginia, 262 U.S. 675, 679 (1923) ("Bluefield"). But KCP&L is not less risky than those other electric utilities.

55. A fair reading of the evidence leads to the inescapable conclusion that KCP&L is more risky than those other electric utilities. All of the cost of capital experts presented a Capital Asset Pricing Model ("CAPM") analysis which contained Beta coefficients that were used to assess the risk and volatility of companies in the proxy groups. See Ex. 116, Hevert Rebuttal at Sched. RBH-15; Ex. 200, Staff Revenue Requirement Cost of Service Report at App. 2, Sched. 17; Ex. 550, Gorman Direct at 33-35 & Sched. MPG-15; Ex. 700, Reno Direct at 28-29 & Sched. MLR-8c. The Value Line assessment of the 19 companies in the Combined Proxy Group show KCP&L and its holding company Great Plains Energy Incorporated ("GPE") with a Beta of 0.85. See Ex. 116, Hevert Rebuttal at Sched. RBH-15; Reno Direct at 28-29 & Sched. MLR-8c.[10] Two other companies had Value Line Betas of 0.85, with only two companies at a riskier 0.90. Id.

56. Staff similarly stated that in its CAPM analysis of 14 companies, GPE was at 0.87 and OGE Energy Corp. at a Beta of 0.94. All other companies had Betas of 0.75 or below (including Ameren at 0.75), indicating lower risk than KCP&L. See Ex. 200, Staff Revenue Requirement Cost of Service Report at App. 2, Sched. 17. KCP&L's higher Beta coefficient shows that it is riskier and less insulated from market volatility and other economic trends, and

[10] Notably, the Beta included KCP&L's sister company, KCP&L Greater Missouri Operations Company ("GMO"), which operates with a fuel adjustment clause.

should be awarded a higher ROE than the 9.53% that Ameren was authorized to earn.

57. In addition to the requirement that the authorized ROE be equal to that of investments in other enterprises of corresponding risks and uncertainties, "[t]he return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." Bluefield, 262 U.S. at 693. As explained by the Supreme Court in Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944):

> … [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. … By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

The Bluefield Court stressed this point, declaring:

> Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. **Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors.**

Bluefield, 262 U.S. at 679 (emphasis added).

58. In this regard, the Commission failed to consider the clear evidence that the U.S. economy is improving, utility stock values have fallen, interest rates are rising, and that the Federal Reserve Board is almost universally predicted to raise the rate of federal funds later this year. See Tr. 214-16 (Staff); Tr. 237-40 (Reno); Tr. 268-70 (Gorman). And as interest rates move up, the cost of equity goes up. See Tr. 179 (Hevert); Ex. 117, Hevert Surrebuttal at 46-47.

59. Despite the challenges of predicting economic trends, the Court of Appeals has

declared that "the Commission must make an intelligent forecast with respect to the future period for which it is setting the rate; ratemaking is by necessity a predictive science." Fraas, 627 S.W.2d 882, 886 (Mo. App. W.D. 1981). See State ex rel. Ark. Power & Light Co. v. PSC, 736 S.W.2d 457, 461 (Mo. App. W.D. 1987) (approving use of forecasted load factors). The Commission failed to consider these critical economic factors in setting the ROE in this case which is neither lawful nor reasonable.

60. As a consequence, the Report and Order is unlawful, unreasonable, arbitrary, and capricious, and violates the requirements of Hope and Bluefield, as implemented by Missouri appellate courts.

G. The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious, Otherwise Unreasonable and Confiscatory Because, in Denying Regulatory Treatment of Future Cost Increases for Southwest Power Pool Transmission Expenses, Property Taxes and CIP/Cyber-security O&M Expenses, it Deprives KCP&L of Any Realistic Opportunity to Earn Even the Very Low Commission-Authorized ROE of 9.5%.

61. Courts – both in Missouri and at the federal level – have long ruled that in determining the reasonableness and lawfulness of rate orders, it is not methodology or theory that matters, but impact. Hope at 602; State ex rel. Associated National Gas Co. v. PSC, 706 S.W.2d 870, 878 (Mo. App. 1985); and State ex rel. OPC v. PSC, 293 S.W.3d 63, 81 (Mo.App. 2009). In determining that 9.50% is a fair and reasonable return on equity for KCP&L, the Commission specifically found that "[T]his rate of return will allow KCPL to compete in the capital market for the funds needed to maintain its financial health." Report and Order at 22. But in addition to being insufficient as detailed in paragraphs 53-60 above, the 9.5% ROE authorized by the Commission for KCP&L is also illusory because KCP&L has no realistic opportunity to earn it. The record evidence demonstrates that certain KCP&L costs necessary to

provide electric service (i.e., SPP transmission expenses, property taxes and CIP/Cyber-security O&M expenses) have increased substantially in the recent past, and are expected to continue increasing substantially in the future when rates set in this case will be in effect. And KCP&L's load growth, which prior to the 2008 economic downturn averaged 2-3% annually, is virtually non-existent now (forecast by KCP&L at 0.9%, 0.2% and 0.2% for 2016-2018, respectively) and provides no meaningful revenue offset to these significant cost increases. Ex. 118, Ives Direct at 6; and Ex. 121, Ives Surrebuttal at 35, fn. 1. Largely as a result of these past cost increases and meager load and revenue growth, KCP&L's actual earned ROE has fallen substantially short of the authorized ROE used by the Commission set rates in KCP&L's prior rate case (Case No. ER-2012-0174, which took effect in early 2013) and is also well below the ROEs achieved by other utilities in the region. Specifically, although the Commission-authorized ROE in that case was 9.7%, KCP&L actually earned an ROE of 6.5% in 2013 and 5.69% in 2014. Ex. 118, Ives Direct at 7-8; Ex. 120, Ives Rebuttal at 13; Tr. at 969.[11] During this same time frame, KCP&L's Kansas utility operations earned an actual ROE within 50 basis points of its ROE authorized in the State of Kansas (2013), GMO earned an actual return of 9.76% (2013) and Ameren Missouri earned an actual ROE of 10.34% (2013) and 9.71% (2014). Ex. 118, Ives Direct at 8-9; and Report and Order at 26-27, In re Union Electric Co., No. ER-2014-0258 (2015). Because rates are set on a going forward basis in Missouri, KCP&L's Missouri jurisdictional earnings shortfalls of 320 basis points (approximately $33 million) and 401 basis points (more than $34 million) can never be recovered by KCP&L. Additionally, due to minimal load and revenue growth and continuing increases in SPP transmission expenses, property taxes and CIP/Cyber-security O&M expenses when rates will be in effect, coupled

[11] Although Staff disputed the 5.69% ROE calculated by KCP&L for 2014, Staff conceded that KCP&L's actual ROE for 2014 was approximately 6.1%. Tr. at 1389.

with the Commission's refusal to afford regulatory treatment to these future cost increases in its Report and Order (whether through the FAC, tracker mechanisms or rate allowances based on forecasted expenses), the ROE KCP&L actually earns under these new rates will fall approximately 130 basis points (or more than $16 million) short of the Commission-authorized ROE in the first year after new rates take effect – due solely to the inadequacy of the rate allowance for these specific items (SPP transmission expenses, CIP/Cyber-security O&M expenses and property taxes). In the second year, this earnings shortfall will grow to approximately 170 basis points (or more than $21 million). Ex. 120, Ives Rebuttal at 9-12.

62. In addition to the requirement that the authorized ROE be equal to that of investments in other enterprises of corresponding risks and uncertainties as discussed in paragraphs 53-60, supra, "[T]he return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." Bluefield, 262 U.S. at 693. As explained by the Hope court:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view **it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.** These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Hope, 320 U.S. at 603. (emphasis supplied) The Bluefield court also stressed this point, declaring:

> Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an

> undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors.

Bluefield, 262 U.S. at 694.

63. In its Report and Order, however, the Commission rejected all of KCP&L's alternative proposals for regulatory treatment (through the FAC, tracker mechanisms and rate allowances based on forecasted expenses) to recognize future cost increases during the period when rates will be in effect. In so doing, the Commission ignored evidence demonstrating that failure to afford regulatory recognition for these increasing expenses in the recent past had resulted in significant earnings shortfalls for KCP&L that will recur if the rate order does not afford regulatory treatment (whether through the FAC, tracker mechanisms, rate allowances based on forecasted expenses or some other treatment) for future increases in SPP transmission expenses, property taxes and CIP/Cyber-security O&M expenses when the rates set in this case will be in effect. In this regard, the Report and Order violates Hope, Bluefield and the Missouri Supreme Court's holding in Missouri Water that

> . . . in determining the price to be charged for (in this instance) water (Sec. 393.270, Par. 4). the fair 'value of the property' of the water company which the Commission is empowered to ascertain under Sec. 393.230, Par. 1, is a relevant factor for consideration in the establishment of just and reasonable rate schedules **and must be considered in its proper relationship to all other facts that have a material bearing upon the establishment of "fair and just" rates as contemplated by our statutes and decisions**.

Missouri Water, 308 S.W.2d at 719 (citations omitted; emphasis added). See Fraas at 886.

64. In refusing to make any provision for future increases in CIP/Cyber-security O&M expense, 93% of SPP transmission expense and property taxes, the Report and Order will result in earnings for KCP&L that fall short of the authorized ROE of 9.50% by about $16 million and $21 million, respectively, in the first and second years after new rates take effect. These earnings shortfalls clearly demonstrate that the impact of the Report and Order is

unreasonable and unlawful. These earnings levels are well outside the zone of reasonableness that has been recognized by Missouri courts. State ex rel. OPC v. PSC, 367 S.W.3d 91, 100 (Mo.App. 2012). Such low earnings levels (about 8.2% ROE in year 1 of new rates and about 7.8% ROE in year 2, due solely to the impact of increases in CIP/Cyber-security O&M expense, 93% of SPP transmission expense and property taxes) fall so far short of the 9.50% return determined necessary by the Commission for KCP&L "to compete in the capital market for the funds it needs to maintain its financial health" and to compensate equity shareholders for the risks associated with their investment in KCP&L. The impact of the Report and Order is therefore confiscatory in violation of the Fifth and Fourteenth amendments to the United States Constitution under a standard articulated by the United States Supreme Court's holding in Duquesne Light Company v. Barasch, 488 U.S. 299, 312 (U.S. 1989) ("Duquesne Light").

65. Consequently, in failing to consider all relevant factors and denying KCP&L any realistic opportunity to actually earn the ROE authorized by the Commission, the Report and Order deprives KCP&L of adequate and reasonable compensation for the property it devotes to serving the public without due process and is confiscatory in impact and effect in violation of the fifth and fourteenth amendments to the United States Constitution.

III. Conclusion.

66. In its Report and Order, the Commission established KCP&L's revenue requirement and rates on the basis of an authorized ROE of 9.50% that is (a) lower than the 9.53% this Commission recently authorized for Ameren Missouri; (b) lower than any authorized ROE in effect for the electric utilities included in the proxy groups used by the various ROE experts, except for one company which is not comparable to KCP&L; and (c) lower than 21 of the 23 ROEs authorized for electric utilities like KCP&L for the period of May 1, 2014 through April 30, 2015. Because the competent and substantial record evidence demonstrates that

KCP&L is no less risky – and indeed is actually more risky – than these other electric utilities, the ROE authorized in the Report and Order violates Hope and Bluefield.

67. Additionally, there is no realistic opportunity for KCP&L to earn even the low 9.5% ROE authorized in the Report and Order. This is because in establishing KCP&L's revenue requirement and rates to be charged in the future (i.e., beginning September 29, 2015 and thereafter), the Commission relied exclusively on historical information for CIP/Cyber-security O&M expenses and property taxes and relied almost exclusively on historical information for SPP transmission expenses even though competent and substantial record evidence demonstrates that these costs have been increasing significantly in recent years and will continue to increase significantly when the rates set in this case will be in effect. The record evidence also establishes that load and revenue growth is expected to be minimal for KCP&L in the future and that future cost savings opportunities for KCP&L will be minimal. Because the Commission established rate allowances relying on historical costs, increases in CIP/Cyber-security O&M expenses, SPP transmission expenses and property taxes experienced by KCP&L when the rates set in this case will be in effect will translate to reductions to KCP&L's earned ROE of approximately $16 million in year 1 of new rates and approximately $21 million in year two of new rates relative to the ROE authorized by the Commission in this case. The impact of the Report and Order, will result in earnings for KCP&L at least $16 million below the Commission-authorized ROE. Under these circumstances, KCP&L has no realistic opportunity to achieve the ROE authorized by the Commission in this case and, as such, the Report and Order violates Hope, Bluefield, Duquesne Light, Missouri Water, Fraas and the Fifth and Fourteenth amendments to the United States Constitution.

68. This patently unreasonable and confiscatory impact is exacerbated by another

unreasonable and unlawful Commission decision in the Report and Order. Specifically, the Commission arbitrarily disallowed 25% of KCP&L's prudently incurred rate case expenses without any finding of imprudent or unreasonable conduct by KCP&L.

WHEREFORE, Kansas City Power & Light Company respectfully requests that the Commission grant rehearing of its Report and Order, as more fully described herein.

Respectfully submitted,

/s/ Robert J. Hack

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-

delivered, emailed or mailed, postage prepaid, this 14th day of September, 2015, to all parties of record.

/s/ Robert J. Hack

Robert J. Hack

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Electric Service	)))	**File No. ER-2014-0258**

CONCURRING OPINION OF COMMISSIONER DANIEL I. HALL IN THE ORDER APPROVING AMENDED STIPULATION AND AGREEMENT REGARDING CERTAIN REVENUE REQUIREMENT ISSUES

On March 19, 2015, the Commission approved a nonunanimous stipulation and agreement, which the Commission treated as unanimous per Commission Rule 4 CSR 240-2.115(2). The approved stipulation resolved numerous previously contested issues, including the amount of rate case expense Ameren Missouri will recover in rates for pursuing and prosecuting its rate increase request. Specifically, it sets forth that "the revenue requirement in this case shall include the Company's prudently-incurred rate case expenses for this case . . . ."[1] Accordingly, under this stipulation, Ameren Missouri ratepayers, through the rates they pay for electric service, will be required to pay 100 percent of Ameren Missouri's prudently incurred rate case expenses. I believe the stipulation is a reasonable resolution of the vast majority of the issues addressed therein and, therefore, should be approved. However, I am not convinced it constitutes good public policy in general, or in this case in specific, to require customers to pay 100 percent of the utility's rate case expense.[2] For that reason, I write separately to express my disagreement with that portion of the stipulation.

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[1] *Amended Nonunanimous Stipulation and Agreement Regarding Certain Revenue Requirement Issues*, p. 2, para. 3.

[2] Staff identified the final amount of rate case expense included in rates as $2,391,209, which will be amortized over two years and recovered at $1,366,975 per year. *Rate Case Expense*, EFIS No. 737, p. 1.

I acknowledge that, in one sense, rate case expense is like other common operational expenses, such as employee salaries, information technology upgrades and fuel costs. These are all expenses the utility must incur in order to provide utility service to customers. In order to prosecute a rate case, the utility must incur expenses for lawyers and consultants, and a rate case is the established process under Missouri law by which new just and reasonable rates are set. Accordingly, and because it is indisputable that customers benefit from having just and reasonable rates, it is appropriate for customers to bear some portion of the utility's cost of prosecuting a rate case.

However, rate case expense is also different from most other types of utility operational expenses. First, the rate case process is adversarial in nature, with the utility on one side and its customers on the other. During the hearing in this case, counsel for Ameren Missouri took issue with that observation, contending that Ameren Missouri does not view its customers as its adversaries. I appreciate that sentiment; I want that to be true. But that is not how it appears from where I sit. In the hearing room during the evidentiary hearing, the Office of Public Counsel and other customer organizations opposed Ameren Missouri on virtually every issue presented – the former taking positions that would lower rates, and the latter taking the positions that would result in increased rates. In addition, at local public hearings, customer after customer articulated the harmful effect of rising utility rates on their financial affairs, and pleaded with the Commission to take whatever action necessary to mitigate any future rate increase.

Second, unlike other operating expenses, rate case expense produces some direct benefits to the utility, more specifically, to its shareholders, that are not shared with customers. In a typical rate case, as in this one, the utility seeks a higher rate of return than customers are willing to support. While I agree it is absolutely necessary, both legally and from a public policy perspective, to ensure that the utility has the opportunity to recover a reasonable return on its investment, any amount sought over a reasonable rate of return is solely sought for the benefit of shareholders. This stands in contrast to typical operating expenses where there is a direct benefit to ratepayers – safe, adequate and reliable service.

Third, requiring 100 percent of rate case expense to be paid by ratepayers provides the utility with what appears to be an inequitable financial advantage over other participants in the rate case process. Staff and the Office of Public Counsel both operate within tight annual budgets, and the intervener consumer groups must pay their own legal expenses. In contrast, under the current system, the utility prosecutes its rate case with an unconstrained budget, receiving reimbursement from ratepayers for all of its expenses related thereto. This allows the utility, in some circumstances, to "out-gun" its opponents, investing resources other parties cannot match to engage numerous counsel and consultants, and conduct multiple rounds of depositions and written discovery.

Finally, full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment. While Ameren Missouri insists it carefully scrutinizes and manages its costs, and that the prudency review these costs receive is designed to ensure that unnecessary and exorbitant rate case expenses are disallowed,

it is indisputable that the Commission has only rarely disallowed even a portion of a utility's rate case expense as imprudently incurred. This is because, in the context of rate case expense, a true prudency review would be cumbersome, time-consuming, resource intensive, and even impractical.[3] Simply put, it does not work as well as providing a direct financial incentive to the utility to minimize litigation costs.

Accordingly, I believe rate case expense should be shared by ratepayers and shareholders. Some parties have noted that there is no express authority in statute or rule to implement such a sharing mechanism, however, the Commission has the current legal authority to take such action. Under Missouri law, the Commission must set just and reasonable rates,[4] and rates that include 100 percent of the utility's rate case expense, for the reasons set forth above, may not be just or reasonable.[5] Moreover, this Commission has already found rate case expense sharing to be just and reasonable in at least one prior case. In a 1986 decision, *In the Matter of Arkansas Power and Light Company*,[6] the Commission "adopted Public Counsel's proposed

[3] Any after-the-fact review of rate case expense necessarily depends on the utility's ability to make available detailed, transparent records about costs related to experts and attorneys, which are often considered confidential to some degree. Furthermore, even if records are made available, by the nature of the subject matter, any review of those records is inherently so deferential it can sometimes become a perfunctory exercise. In this very case, Public Counsel alleged the information Ameren Missouri provided for rate case expense would be insufficient for a meaningful prudence review. Despite these challenges reviewing rate case expense for prudency, the Commission has disallowed, on rare occasions, portions of rate case expense when certain costs were deemed excessive. *See, In the Matter of Missouri Gas Energy*, Report and Order Case No. GR-2004-0209, 12 Mo. P.S.C. 3d 581, 623 (2004) and *In the Matter of Missouri-American Water Company*, Report and Order, Case No. WR-93-212, 2 Mo. P.S.C. 3d 446, 449 (1993).

[4] ". . . All charges made or demanded by any . . . electrical corporation . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge . . . is prohibited." Section 393.130.1, RSMo 2000 as currently supplemented.

[5] Of course, there are rate cases where the utility does not have the means to absorb a portion of rate case expense, and requiring it to do so would ultimately harm customers. In such circumstances, it would appear just and reasonable that rates include the entire amount of rate case expense.

[6] Report and Order, Case No. ER-85-265, 28 Mo. P.S.C. (N.S.) 435, 447 (1986).

disallowance of one-half of rate case expense." It is also important to note that there are a number of other cases where the Commission acknowledged it had this authority.[7]

Some parties to this hearing suggested a workshop would be in order to examine and develop this concept. However, the Commission has already opened a working case precisely on this issue, File No. AW-2011-0330. This case was opened April 7, 2011, over four years ago, and is currently still open. In that case, Staff issued a comprehensive Staff Report, which concludes,

> Staff recommends that the Commission consider employing structural incentive measures in rate cases to provide utilities with stronger incentives to reasonably limit their rate case expenses to appropriate and necessary levels. . . These measures may include . . . sharing of rate case expense."[8]

As noted above, I believe the stipulation is reasonable and should be approved. I appreciate the parties' efforts to reach this agreement that includes a number of other complex issues beyond the rate case expense issue. In those negotiations, the parties (in particular the Office of Public Counsel, which has long supported rate case expense sharing) were unaware that some Commissioners were open to this concept; and it is not my intent to thwart the work that went into reaching this agreement. Going forward, I am heartened by Public Council's statements at the hearing that it would renew its pursuit of rate case expense sharing in future proceedings, and I am also encouraged

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[7] *See, In the Matter of Kansas City Power & Light Company*, Report and Order, Case Nos. EO-85-185 and EO-85-224, 28 Mo. P.S.C. (N.S.) 229, 263 (1986), and *In the Matter of Missouri Gas Energy*, Report and Order, File No. GR-2009-0355, 19 Mo. P.S.C. 3d 245. 303, (2010).

[8] *Staff's Investigative Report on Rate Case Expense*, Sept. 4, 2013, p. 15. Counsel for Ameren Missouri complained at the hearing that the company had not yet been given a chance to fully respond to the idea of a rate sharing mechanism. However, any party interested in this issue had an opportunity to provide comments in AO-2011-0330, as the Commission order establishing the file provided, "[u]sing this file, any person with an interest in this matter may . . . submit any pertinent responsive comments or documents." *Order Directing Staff to Investigate and Opening a Repository File*, pp. 1-2. If Ameren Missouri was waiting for a more direct invitation to submit its input, this Concurrence constitutes such an invitation.

EXHIBIT A

by the support some of my fellow Commissioners have expressed for considering a rate case expense sharing mechanism in future cases.

For the forgoing reasons, I concur.

Respectfully submitted,

Daniel Y. Hall
Commissioner

Commissioner Rupp joins this concurring opinion in its entirety.

Scott T. Rupp
Commissioner

Dated this 11th day of June, 2015
at Jefferson City, Missouri

EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Empire District Electric Company for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Areas	)))))	**File No. ER-2014-0351**

CONCURRING OPINION OF COMMISSIONER DANIEL Y. HALL

On June 24, 2015, the Commission issued a Report and Order in this case approving a rate increase for Empire District Electric Company. The Report and Order included approval of a unanimous stipulation that resolved, among other things, the parties' dispute regarding the amount of rate case expense Empire will recover in rates for pursuing and prosecuting its rate increase request.[1] Specifically, the signatories to the stipulation agreed that Empire should be authorized to file tariffs designed to increase its revenues by $17,125,000 and also that rate case expense was no longer a contested issue.[2]

The parties do not specify in their agreement what amount of rate case expense will be recovered through the agreed upon revenue requirement.[3] However, Empire witness W. Scott Keith testified that the company supports including the entirety of rate

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[1] "The *Revised Stipulation and Agreement and List of Issues*, filed on April 8, 2015, is approved and incorporated into this order as if fully set forth herein." *Report and Order*, p. 30. All parties to this case either signed the stipulation or did not oppose it.

[2] *Revised Stipulation and Agreement and List of Issues*, EFIS No. 181, p. 2 sets the revenue requirement. The document also includes reference as to the remaining contested issues, which do not include rate case expense, and dismisses all witnesses related to rate case expense.

[3] Because the parties reached a "blackbox" settlement of the revenue requirement issue, it is not possible to determine the amount of rate case expense to be included in rates and, correspondingly, whether ratepayers are being asked to cover all or just a portion of Empire's rate case expense. As of February 28, 2015, Empire had incurred approximately $128,536.00 in rate case expense. Sarver Surrebuttal, Ex. 224, p. 3. In its *Statements of Position*, filed March 31, 2015, Staff indicated a two-year normalization of rate case expense, or an annual amount of $64,251, was an appropriate amount to include in rates, and Staff stated that this number was "consistent with the settled position." EFIS No. 164 p. 4.

case expense in the calculation of Empire's revenue requirement,[4] and estimated its total rate case expense at the time it filed this rate case to be $357,000.[5] It is Empire's position that the company's ratepayers, through the rates they pay for electric service, should be required to pay 100 percent of Empire's prudently incurred rate case expenses. I am not convinced it constitutes good public policy in general, or in this case in specific, to require customers to pay 100 percent of the utility's rate case expense. For that reason, I write separately to express my disagreement with the Commission's Report and Order approving the stipulation to the extent the stipulation is consistent with Empire's position on this issue and relegates all rate case expense to customers.

I acknowledge that, in one sense, rate case expense is like other common operational expenses, such as employee salaries, information technology upgrades, and fuel costs. These are all expenses the utility must incur in order to provide utility service to customers. In order to prosecute a rate case, the utility must incur expenses for lawyers and consultants, and a rate case is the established process under Missouri law by which new just and reasonable rates are set. Accordingly, and because it is indisputable that customers benefit from having just and reasonable rates, it is appropriate for customers to bear some portion of the utility's cost of prosecuting a rate case.

However, rate case expense is also different from most other types of utility operational expenses. First, the rate case process is adversarial in nature, with the utility on one side and its customers on the other. Some utilities have taken issue with that observation, contending that utilities do not view their customers as adversaries. I

[4] Keith Rebuttal, Ex. 108, pp. 2 – 9.
[5] Roth Rebuttal, Ex. 308, p. 19.

EXHIBIT B

appreciate that sentiment; I want that to be true. But that is not how it appears from where I sit. During evidentiary hearings, the Office of Public Counsel and other customer organizations often oppose the utilities on virtually every issue presented – the former taking positions that would lower rates, and the latter taking the positions that would result in increased rates. In this case, Public Counsel specifically advocated for rate case expense sharing while the company opposed the idea. In addition, at local public hearings, customers regularly articulate the harmful effect of rising utility rates on their financial affairs and plead with the Commission to take whatever action necessary to mitigate any future rate increase.

Second, unlike other operating expenses, rate case expense produces some direct benefits to the utility, more specifically, to its shareholders, that are not shared with customers. In a typical rate case, as in this one, the utility seeks a higher rate of return than customers are willing to support. While I agree it is absolutely necessary, both legally and from a public policy perspective, to ensure that the utility has the opportunity to recover a reasonable return on its investment, any amount sought over a reasonable rate of return is solely sought for the benefit of shareholders. This stands in contrast to typical operating expenses where there is a direct benefit to ratepayers – safe, adequate and reliable service.

Third, requiring 100 percent of rate case expense to be paid by ratepayers provides the utility with what appears to be an inequitable financial advantage over other participants in the rate case process. Staff and the Office of Public Counsel both operate within tight annual budgets, and the intervener consumer groups must pay their own legal expenses. In contrast, under the current system, the utility prosecutes its rate

case with an unconstrained budget, receiving reimbursement from ratepayers for all of its expenses related thereto. This allows the utility, in some circumstances, to "out-gun" its opponents, investing resources other parties cannot match to engage numerous counsel and consultants, and conduct multiple rounds of depositions and written discovery.

Finally, full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment. While utilities insist they carefully scrutinize and manage their costs, and that the prudency review these costs receive is designed to ensure that unnecessary and exorbitant rate case expenses are disallowed, it is indisputable that the Commission has only rarely disallowed even a portion of a utility's rate case expense as imprudently incurred. This is because, in the context of rate case expense, a true prudency review would be cumbersome, time-consuming, resource intensive, and even impractical.[6] Simply put, it does not work as well as providing a direct financial incentive to the utility to minimize litigation costs.

Accordingly, I believe rate case expense should be shared by ratepayers and shareholders. Some have noted in past cases that there is no express authority in statute or rule to implement such a sharing mechanism, however, the Commission has the current legal authority to take such action. Under Missouri law, the Commission

[6] Any after-the-fact review of rate case expense necessarily depends on the utility's ability to make available detailed, transparent records about costs related to experts and attorneys, which are often considered confidential to some degree. Furthermore, even if records are made available, by the nature of the subject matter, any review of those records is inherently so deferential it can sometimes become a perfunctory exercise. Despite these challenges reviewing rate case expense for prudency, the Commission has disallowed, on rare occasions, portions of rate case expense when certain costs were deemed excessive. *See, In the Matter of Missouri Gas Energy*, Report and Order Case No. GR-2004-0209, 12 Mo. P.S.C. 3d 581, 623 (2004) and *In the Matter of Missouri-American Water Company*, Report and Order, Case No. WR-93-212, 2 Mo. P.S.C. 3d 446, 449 (1993).

must set just and reasonable rates,[7] and rates that include 100 percent of the utility's rate case expense, for the reasons set forth above, may not be just or reasonable.[8] Moreover, this Commission has already found rate case expense sharing to be just and reasonable in at least one prior case. In a 1986 decision, *In the Matter of Arkansas Power and Light Company*,[9] the Commission "adopted Public Counsel's proposed disallowance of one-half of rate case expense." It is also important to note that there are a number of other cases where the Commission acknowledged it had this authority.[10]

Some parties in other cases have suggested a workshop would be in order to examine and develop this concept. However, the Commission has already opened a working case precisely on this issue, File No. AW-2011-0330. This case was opened April 7, 2011, over four years ago, and is currently still open. In that case, Staff issued a comprehensive Staff Report, which concludes,

> Staff recommends that the Commission consider employing structural incentive measures in rate cases to provide utilities with stronger incentives to reasonably limit their rate case expenses to appropriate and necessary levels. . . These measures may include . . . sharing of rate case expense."[11]

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[7] ". . . All charges made or demanded by any . . . electrical corporation . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge . . . is prohibited." Section 393.130.1, RSMo 2000 as currently supplemented.

[8] Of course, there are rate cases where the utility does not have the means to absorb a portion of rate case expense, and requiring it to do so would ultimately harm customers. In such circumstances, it would appear just and reasonable that rates include the entire amount of rate case expense.

[9] Report and Order, Case No. ER-85-265, 28 Mo. P.S.C. (N.S.) 435, 447 (1986).

[10] *See, In the Matter of Kansas City Power & Light Company*, Report and Order, Case Nos. EO-85-185 and EO-85-224, 28 Mo. P.S.C. (N.S.) 229, 263 (1986), and *In the Matter of Missouri Gas Energy*, Report and Order, File No. GR-2009-0355, 19 Mo. P.S.C. 3d 245. 303, (2010). Interestingly, and as Public Counsel points out, Missouri is not the only jurisdiction that has considered and even implemented rate case expense sharing. Roth Rebuttal, Ex. 308, pp. 17-18.

[11] *Staff's Investigative Report on Rate Case Expense*, Sept. 4, 2013, p. 15. Any party interested in this issue had an opportunity to provide comments in AO-2011-0330, as the Commission order establishing the file provided, "[u]sing this file, any person with an interest in this matter may . . . submit any pertinent responsive comments or documents." *Order Directing Staff to Investigate and Opening a Repository File*,

EXHIBIT B

As noted above, I believe the stipulation is reasonable and should be approved. I appreciate the parties' efforts to reach this agreement that includes a number of other complex issues beyond the rate case expense issue. Going forward, I am heartened by Public Council's pursuit of rate case expense sharing in this case and by both Public Counsel and Staff advocating for rate case expense sharing in the Kansas City Power & Light rate case that is currently pending before this Commission. I am also encouraged by the support some of my fellow Commissioners have expressed for considering a rate case expense sharing mechanism in future cases.

For the forgoing reasons, I concur.

Respectfully submitted,

Daniel Y. Hall
Commissioner

Commissioner Rupp joins this concurring opinion in its entirety.

Scott T. Rupp
Commissioner

Dated this 17th day of July, 2015
at Jefferson City, Missouri

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pp. 1-2. If Empire or other utilities were waiting for a more direct invitation to submit their input, this Concurrence constitutes such an invitation.