

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 15th day
of April, 2009.

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan)))))	<u>Case No. ER-2009-0089</u> Tariff No. JE-2009-0192
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**ORDER RESCINDING CONDITIONS IMPOSED IN THE COMMISSION'S
ORDER MODIFYING PROCEDURAL SCHEDULES FOR
TRUE-UP PROCEEDINGS**

Issue Date: April 15, 2009

Effective Date: April 15, 2009

Background

On March 2, 2009,¹ Kansas City Power and Light Company ("KCPL") filed a status report and a motion to extend the True-Up period.² The Commission granted the request to extend the True-Up proceeding on March 18, but also imposed certain conditions recommended by its Staff. On March 19, KCPL filed a motion requesting the Commission reconsider the imposition of the conditions.³ The conditions imposed on the True-Up proceeding that are at issue are as follows:

- a.) Iatan 1 costs that exceed the base costs will be included in rates on an interim basis subject to refund based on a true-up of costs in the Movant's' next electric rate case;
- b.) depreciation reserve attributable to Iatan 1 accrued post March 31, 2009 shall be included in setting rates in this proceeding;

¹ All dates throughout this order refer to the year 2009 unless otherwise noted.

² KCP&L Greater Missouri Operations Company ("GMO") joined in this pleading to the extent that identical issues were being addressed for Case Nos. ER-2009-0090 and HR-2009-0092.

³ *Id.*

- c.) deferred income tax reserve attributable to latan 1 accrued post March 31, 2009 will be included in setting rates in this proceeding;
- d.) environmental credits for energy productions from latan 1 shall be applied as an offset to the latan 1 plant balance; and,
- e.) the value of power generated by latan 1 net of variable costs shall be credited to the costs to be placed in service.

KCPL offers extensive reasons for rescinding the conditions, the gravaman of which is that by imposing the conditions, the Commission will have exceeded its statutory authority by prejudging substantive and contested issues in these matters with no supporting evidence, findings of fact or conclusions of law. Additionally, such conditions, according to KCPL, would constitute a regulatory taking without due process of law in violation of statutory and constitutional principles.

The Commission set a deadline for responses to KCPL's motion, and on March 23, the Office of the Public Counsel and Industrial Intervenors⁴ filed responses supporting the conditions. On March 24, Staff late-filed its response in conjunction with a request for leave to file its response out of time.⁵

The Parties' Positions

KCPL argues that:

- (a) Imposing the first condition, requiring latan 1 costs that exceed the base costs will be included in rates on an interim basis subject to refund: (1) summarily predetermines the amount of the cost related to their investment in latan 1 that is appropriate to include in each rate case; (2) ignores the legal presumption that a utility's investments are prudent until evidence is adduced to the contrary; (3) delays the prudence review violating the legal requirement to consider all relevant factors in this case;

⁴ In the three pending rate cases, the Industrial Intervenors are as follows: ER-2009-0089: Praxair, Inc. and Midwest Energy Users' Association; ER-2009-0090: Ag Processing, Inc., Sedalia Industrial Energy Users' Association, and Wal-Mart Stores, Inc.; HR-2009-0092: Ag Processing, Inc.

⁵ The motion for leave to late-file was granted on April 6, 2009, during the motion hearing that was set to hear oral argument on these issues.

(4) is unlawful because making a portion of their rates subject to refund, when the Companies have not requested such relief, would constitute retroactive ratemaking; and (5) creates confusion as there is no definition as to what constitute latan 1 costs that exceed base costs.

- (b) Imposing conditions 2 and 3, concerning depreciation reserve and deferred income tax reserve attributable to latan 1, ignores accounting rules already in place that govern how depreciation reserve and deferred income tax reserve are treated.
- (c) Imposing condition 4, concerning environmental credits ignores the fact that Regulatory Plan⁶ governs treatment of the Companies' emission allowances.
- (d) Imposing condition 5 incorrectly treats latan I as though the generating unit had to satisfy in-service criteria to be included in rates, whereas latan 1 is being returned to service and should not be treated like a new generating unit producing "test power" arbitrarily reducing its rate base.

Public Counsel and the Industrials (collectively "Respondents"), without providing a detailed analysis, simply observe that the Commission does indeed have the authority to make rates subject to refund, and that the later four conditions merely balance KCPL's ability to get the plant upgrades included in rates as of April 30, 2009, with the recognition that the rates will not go into effect until later. Respondents state that it is within the Commission's discretion in setting just and reasonable rates to impose conditions between the in-service date of the latan I improvements and the effective date of rates.

Staff's response is essentially if their recommended conditions are not adopted, then the Commission should deny KCPL's March 2, 2009 motion to extend the True-Up period to April 30, 2009. Staff, similar to the other Respondents, argues that the Commission does have the legal authority to impose interim rates subject to refund. However, Staff provides no legal or accounting reasons for imposition of the recommended conditions that

⁶ See Case Number EO-2005-0329, In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company, Report and Order issued July 28, 2005.

rebutts KCPL's arguments. Indeed, on March 24, 2009, KCPL responded to Staff and the other Respondents and noted that these parties largely ignored their legal arguments.

On March 24, 2009, the Industrial Intervenors filed a reply to KCPL's response. The Industrial Intervenors provide the Commission with a historical review of advent of the use of historical test years and true-up proceedings and their use as tools to balance the interests of the companies and ratepayers. The Industrial Intervenors further suggested the Commission entertain oral argument on the issues concerning the alternative proposal for the True-Up proceedings.

Motion Hearing

On March 25, 2009, the Commission set a motion hearing and ordered oral argument on the True-Up conditions. Oral argument was held on April 6, 2009, at the Commission's offices in Jefferson City, Missouri. During the argument, Staff conceded that the Commission lacked the legal authority to pre-condition the True-Up proceedings to require later 1 costs exceeding the base costs be included in rates on an interim basis subject to refund.⁷ Staff agreed the Commission could exercise its discretion to impose such a condition after the issue had been fully argued at the evidentiary hearing and briefed, or in the event that KCPL agreed to the condition.⁸ Staff further stated that if the True-Up date was extended until April 30, 2009, as has already been done by the Commission, that the remaining four conditions were not required.⁹

Public Counsel, on the other hand, stated the conditions ordered on March 18, 2009, were lawful and the Commission could proceed pursuant to the order imposing the

⁷ Case No. ER-2009-0089, Transcript, Volume 10, pp. 47-52.

⁸ *Id.*

⁹ Case No. ER-2009-0089, Transcript, Volume 10, pp. 47-52. See also Transcript, Volume 10 for Cases ER-2009-0090 and HR-2009-0092, pp. 80-81.

conditions.¹⁰ The Industrial Intervenors, listed options for the Commission's approach to True-Up and the construction and prudence audits, and while the Industrial Intervenors argued that these options only involved procedural issues and not substantive issues, they failed to provide clarity as to whether these options should be considered before or after the evidentiary hearing.¹¹

Decision

The Commission, having fully considered KCPL's motion for reconsideration, the responses to the motion and the oral arguments, shall rescind the conditions placed on the True-Up proceedings delineated in Ordered Paragraph 5 of its March 18, 2009 order modifying the procedural schedule. The Commission emphasizes that lifting the conditions at this preliminary stage of the proceeding does not, in any way, restrict its consideration of any conditions regarding the structure of any proposed rate increase.

The Commission will consider the condition requiring latan 1 costs exceeding the base costs being included in rates on an interim basis subject to refund at the appropriate time during this proceeding, but it will not jeopardize any litigants' due process rights by making predeterminations on contested issues encompassed within the pleadings and prefiled testimony.¹²

¹⁰ See Transcript, Volume 10 for Cases ER-2009-0090 and HR-2009-0092, p. 77, referring back to the oral arguments offered for Case ER-2009-0089.

¹¹ Case No. ER-2009-0089, Transcript, Volume 10, pp. 82-106.

¹² See also the companion order issued for Case Nos. ER-2009-0090 and HR-2009-0092 addressing the identical motions of GMO.

THE COMMISSION ORDERS THAT:

1. Kansas City Power and Light Company's "Motion for Reconsideration and/or Rehearing of Order Modifying Procedural Schedules For True-Up Proceedings and Motion for Expedited Treatment" are granted.

2. The conditions placed on the True-Up proceedings in Ordered Paragraph Number 5 of the Commission's March 18, 2009, "Order Modifying Procedural Schedules for True-Up Proceedings and Formally Adopting Test Year and Update Period," are hereby rescinded.

3. All other provisions of the Commission's March 18, 2009, "Order Modifying Procedural Schedules for True-Up Proceedings and Formally Adopting Test Year and Update Period," remain in full force and effect; including Ordered Paragraph Number 4 directing Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company to comply with their representation that they would voluntarily extend the effective date of the tariffs filed in these proceedings until September 5, 2009.

4. This order shall become effective immediately upon issuance.

BY THE COMMISSION

(S E A L)



Colleen M. Dale
Secretary

Murray, Jarrett, and Gunn, CC., concur;
Clayton, Chm., dissents.
Commissioner Davis absent.

Stearley, Senior Regulatory Law Judge