BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

R & S HOME BUILDERS, INC., AND CAROL AND ARVEL ALLMAN,	)	
Complainants,	)	
v.	)	File No. EC-2014-0343
KCP&L GREATER MISSOURI OPERATIONS COMPANY,	)	
Respondent.	)	

KCP&L GREATER MISSOURI OPERATIONS COMPANY'S
MOTION TO DISMISS

COMES NOW Respondent, KCP&L Greater Missouri Operations Company ("GMO" or "Respondent"), pursuant to 4 CSR 240-2.116(4), and hereby moves for dismissal of the Complaint filed in this case. In support of this motion, Respondent states as follows:

INTRODUCTION

1. On May 14, 2014, R & S Home Builders, Inc. ("Home Builders") and Carol and Arvel Allman ("Allman") (collectively "Complainants") filed a formal Complaint against GMO alleging that the Commission approved the Non-Unanimous Stipulation And Agreement in File No. ET-2014-0059 on October 30, 2013, and "refrained from determining whether Respondent KCP&L-GMO had reached or would reach the one percent retail rate impact." (Complaint, p. 4) The Complainants allege that GMO's "denial of Complainants' applications for solar rebates was unlawful in that the Commission did not make the required determination that the one percent retail rate impact would be reached, and that Respondent is required by law to continue paying rebates until the Commission makes such a determination." (Complaint, p. 5) In Count II, the Complainants have alleged that GMO's "denial of Complainants' applications for solar rebates

was unlawful, in that such denials exceeded Respondent's authority to cease payment payments (sic) because: the denials were not necessary to avoid exceeding the law's one percent retail impact limit, and any authority to cease payments extends only for the calendar year in which such authority is granted." (Complaint, ¶20, p. 8)

2. For the reasons outlined herein, the Complaint should be dismissed because it fails to state a claim upon which relief can be granted in that (a) it constitutes an impermissible collateral attack on previous Commission Orders in File Nos. ET-2014-0059/ET-2014-0071 and EO-2014-0277, and the Company's Commission-approved tariffs; (b) granting the relief that would violate GMO's approved tariffs, and is therefore relief that the Commission may not lawfully grant, (c) sustaining the Complaint would require the Commission to exercise authority it does not have–sanctioning an undue or unreasonable preference or advantage to Complainants in violation of Section 393.130(3) RSMo[1]; (d) sustaining the Complaint would constitute unlawful, undue or unjust discrimination which the Commission lacks authority to do; and (e) the Complaint fails to allege a "violation of any provision of law, or of any rule or order or decision of the commission" by GMO, in violation of Sections 386.390. For the reasons stated herein, the Complaint should be dismissed with prejudice.

BACKGROUND

3. On September 4, 2013, GMO filed an application and tariff in File No. ET-2014-0059 (Tariff No. JE-2014-0112) seeking authority from the Commission to cease paying solar rebate payments. On September 10, 2013, Kansas City Power & Light Company ("KCP&L") filed a similar application and tariff in File No. ET-2014-0071 (Tariff No. JE-2014-0120) seeking authority for KCP&L to cease paying solar rebate payments. The Commission granted numerous interventions in both proceedings.

[1] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

4. On October 3, 2013, KCP&L, GMO, the Staff of the Commission, the Office of the Public Counsel, The Missouri Division of Energy, Earth Island Institute d/b/a Renew Missouri, Missouri Solar Energy Industry Association, Brightergy, LLC, and Missouri Industrial Energy Consumers ("Signatories") filed a Non-Unanimous Stipulation and Agreement ("Stipulation"). The Stipulation provided that GMO will not suspend payment of solar rebates in 2013 and beyond unless the solar rebate payments reach an aggregate level of $50 million incurred subsequent to August 31, 2012. The Stipulation further provided that when GMO's solar rebate payments are anticipated to reach the specified level, GMO will file with the Commission an application under the 60-day process as outlined in Section 393.1030.3 to cease payments beyond the $50 million level in 2013 and all future calendar years. The Signatories also agreed to cooperate in the development of all aspects of an orderly process to cease or conclude the solar rebate payments to solar customers, including updating KCP&L's website for applied for applications, the level of solar rebate payments, and approved applications for both KCP&L and GMO. The Commission held an on-the-record presentation on the Stipulation on October 23, 2013.

5. On October 30, 2013, the Commission issued its *Order Approving Non-Unanimous Stipulation And Agreement* ("*Stipulation Order*") which became effective on November 10, 2013. The *Stipulation Order* stated in part:

> The signatories agree on the specified level that both KCP&L and GMO must reach in payment of solar rebates before they are allowed to suspend such payments. Upon Commission approval of this agreement, KCP&L and GMO agree to withdraw their tariff sheets and further agree to file tariff sheets to implement the Stipulation. The signatories further agree to work to resolve how to calculate the one percent Retail Rate Impact ("RRI") in a rulemaking proceeding. Further, the signatories agree that solar rebate amounts paid and other RES compliance costs borne by KCP&L and GMO shall be included in regulatory assets to be considered for recovery in rates, either in a general rate

case or an approved Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM").

* * *

The Commission has the legal authority to accept a stipulation and agreement to resolve a case. The Commission notes that "[e]very decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement . . . shall include . . . findings of fact and conclusions of law." Consequently, the Commission need not make findings of fact or conclusions of law in this order.

* * *

The Commission has reviewed the application and the Stipulation. The Commission independently finds and concludes that the Stipulation is a reasonable resolution of these cases. Thus, the Commission will approve it. (*Emphasis added; footnotes omitted*)

6. No timely motion for rehearing was filed in File Nos. ET-2014-0059 and ET-2014-0071, and the *Stipulation Order* is now a final and non-appealable order.

7. Pursuant to Section 393.1030 and the terms of the Stipulation in File No. ET-2014-0059, GMO filed an Application for Authority to Suspend Payment of Solar Rebates in File No. ET-2014-0277 on April 9, 2014. The application included the 3rd Revised Sheet No. R-62.19 (Tariff No. JE-2014-0403) bearing an effective date of June 8, 2014. The tariff sheet stated in part:

> The Company will pay solar rebates for all valid applications received by the Company by November 15, 2013 at 10 AM CST, which are preapproved by the Company and which result in the installation and operation of a Solar Electric System pursuant to the Company's rules and tariffs. Applications received after November 15, 2013 at 10 AM CST may receive a solar rebate payment if the total amount of solar rebates paid by the Company for those applications received on or before November 15, 2013 at 10 AM CST are less than $50,000,000.

8. On May 28, 2014, the Commission issued its *Order Approving Tariff* in File No. ET-2014-0277 (effective on June 8, 2014) ("*Tariff Order*"). The *Tariff Order* stated:

> To sum up, Section 393.1030(3) allows an electric utility to determine when its maximum average retail rate increase will be reached. Upon the utility's finding that the maximum will be reached, it may give the Commission sixty

> days' notice that it will cease paying solar rebates. If the Commission finds that the maximum average retail rate increase will be reached, it shall approve the tariff suspension within those sixty days.
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> Upon review of the pleadings, the Commission finds that the maximum average retail rate increase will be reached. GMO has correctly calculated the maximum average retail rate increase because, as GMO explained, KCP&L Solar, KCP&L and GMO's solar projects do not fit within the definition of Section 393.1030(2). Hence, GMO meets the standard elicited in Section 393.1030(3). The Commission will approve the tariff.

9. No timely motion for rehearing was filed by any entity, and the *Tariff Order* is now a final and non-appealable order.[2] In addition, 3rd Revised Sheet No. 62.19 became effective on June 8, 2014, and is a lawful and effective tariff.

APPLICABLE LEGAL STANDARDS

10. "The Commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted." *Public Serv. Comm'n v. Bonacker,* 906 S.W.2d 896, 899 (Mo. App. S.D. 1995). The Commission lacks the power to declare or enforce any principle of law or equity. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 47 (Mo. *banc* 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W2d 925, 928 (Mo. Banc 1958). For an electrical corporation, complaints are governed by Section 386.390. Utility tariffs have the force and effect of law. *Midland Realty Co. v. Kansas City Power & Light Co*., 300 U.S. 109, 114 (1937), *aff'g* 93 S.W.2d 954 (Mo. 1936). Commission orders, decisions, and approved tariffs cannot be collaterally attacked absent proper allegations of a substantial change in circumstances. Section 386.550; *State ex rel. Licata v. Public Service Commission*, 829 S.W.2d 515 (Mo. App., W.D. 1992). The Commission lacks the statutory authority to approve an unduly or unreasonably discriminatory

[2] On June 9, 2014 at 5:00 PM, after the June 8, 2014 effective date of the Tariff Order and the related tariff sheet (3rd Revised Sheet No. 62.19), Renew Missouri filed its Application For Rehearing. However, pursuant to Section 386.500 and 4 CSR 240-2.160, this application for rehearing was untimely

special rate, rebate, drawback or other device or method, or to grant any undue or unreasonable preference or advantage to any person, corporation, or locality. Section 393.130; *State ex rel. City of Joplin v. Pub. Serv. Comm'n et al.,* 186 S.W.3d 290, 296 (Mo. App. W.D. 2005).

11. A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought. *See, e.g.* Order Regarding Motions To Dismiss, *p. 14, Tari Christ v. Southwestern Bell Tele. Co. et al.,* Case No. TC-2003-0066, (issued Jan. 9, 2003), *citing Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. *banc* 1993). A complaint "seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstance; otherwise Section 386.550 bars the complaint." *Id.* at 21, citing *State ex rel. Licata v. Pub. Serv. Comm'n,* 829 S.W.2d 515 (Mo. App. W.D. 1992) and *State ex rel. Ozark Border Elect. Coop. v. Pub. Serv. Comm'n,* 924 S.W.2d 597 (Mo. App. W.D. 1996). The Complaint in this case fails to allege the required substantial change in circumstances. In reality, the Complaint is a collateral attack on the Commission's final orders in File Nos. ET-2014-0059/ET-2014-0071 and EO-2014-0277, without a showing of any change of circumstance.

ARGUMENT

A. The Complaint is an unlawful collateral attack upon the Commission's Order Approving Stipulation And Agreement in File Nos. ET-2014-0059 and ET-2014-0071, the Commission's Order Approving Tariff in File No. EO-2014-0277, and GMO's approved Tariff Sheet No. R-62.19--in violation of Section 386.550.

12. As discussed in *Tari Christ*, under the *Ozark Border* and *Licata* cases cited above, a claim is barred by Section 386.550 because to entertain such a claim is to unlawfully allow the Complainants to collaterally attack the Commission's prior orders which are final and effective.

In particular, the Complaint is an unlawful collateral attack upon the Commission's *Stipulation Order* issued on October 30, 2013 and effective on November 10, 2013 in File Nos. ET-2014-0059 and ET-2014-0071. Secondly, the Complaint is also a collateral attack upon the Commission's *Tariff Order* in File No. EO-2014-0277. Finally, it is also a collateral attack on the GMO's 3rd Revised Tariff Sheet No. R-62.19 which became effective on June 8, 2014.

For these reasons, the Complaint should be dismissed as a violation of Section 386.550.

13. The Commission independently found and concluded that the Stipulation in File Nos. ET-2014-0059 and ET-2014-0071 was "a reasonable resolution of these cases." (*Stipulation Order*, p. 2) The Commission also specifically approved the terms of the Stipulation. The Complaint is a collateral attack upon the Commission's *Stipulation Order* which is final and unappealable and, as a consequence, the Complaint violates Section 386.550.

14. In Count I, the Complainants allege that: "Respondent KCP&L-GMO's denial of Complainants' application for solar rebates was unlawful, in that the Commission did not make the required determination that the one percent retail rate impact would be reached, and Respondent is required by law to continue paying rebates until the Commission make such a determination." (Complaint, ¶12, p. 5) As an initial matter, Complainants' repeated allegation that their solar rebate applications had been denied by GMO makes it seem as if Complainants' rebates would not receive any further consideration for payment by GMO. In fact, GMO stated in writing to both Complainants that

> . . . KCP&L has committed rebate funds equal to the $50 million in your service area. As a result, we will not be able to provide you with a solar rebate offer following your administrative review. However, if any solar rebate application submitted in your service area is rejected or approved applications not completed within the defined construction period, those funds will be made available to the next qualifying customer in the queue.

Secondly, this allegation is nothing more than an attempt to collaterally attack the adequacy of the Commission's final and unappealable *Stipulation Order*. In the *Stipulation Order*, the Commission specifically found:

> The signatories agree on the specified level that both KCP&L and GMO must reach in payment of solar rebates before they are allowed to suspend such payments. Upon Commission approval of this agreement, KCP&L and GMO agree to withdraw their tariff sheets and further agree to file tariff sheets to implement the Stipulation. The signatories further agree to work to resolve how to calculate the one percent Retail Rate Impact ("RRI") in a rulemaking proceeding. Further, the signatories agree that solar rebates amounts paid and other RES compliance costs borne by KCP&L and GMO shall be included in regulatory assets to be considered for recovery in rates, either in a general rate case or an approved Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM")
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> The Commission has reviewed the application and the Stipulation. The Commission independently finds and concludes that the Stipulation is a reasonable resolution of these cases. Thus, the Commission will approve it. (*Stipulation Order*, pp. 1-2)

15. Similarly, in Count II, the Complainants allege that: "Respondent KCP&L-GMO's denial of Complainants' applications for solar rebates was unlawful, in that such denials exceeded Respondents' authority to cease payments because: the denials were not necessary to avoid exceeding the law's one percent retail impact limit, and; any authority to cease payments extends only for the calendar year in which such authority is granted. (Complaint, ¶20, p. 8) This allegation is nothing more than an attempt to collaterally attack the Commission's *Tariff Order*. In its *Tariff Order*, the Commission specifically stated:

> Upon review of the pleadings, the Commission finds that the maximum average retail rate increase will be reached. GMO has correctly calculated the maximum average retail rate increase. . . Hence, GMO meets the standard elicited in Section 393.1030(3). The Commission will approve the tariff. (*Tariff Order*, p. 5).

16. The Complaint also challenges the adequacy of the Commission's findings of fact and conclusions of law related to the Commission's grant of authority to suspend payment of solar rebates. (Complaint, ¶¶15-17, pp. 6-7) In the *Tariff Order*, the Commission noted that File No. ET-2014-0277 was a "non-contested case" and as a result, there is no requirement for a hearing or for the Commission to issue findings of fact. (Tariff Order, pp. 3-4) Even if this was a contested case, however, this allegation by Complainants is wrong both substantively and procedurally. The courts have repeatedly held that factual findings by the Commission that leave no doubt about the basis of the Commission's findings and do not require the reviewing court to resort to the underlying evidence are adequate so long as record evidence exists to support those findings. *See e.g., State ex rel. GS Technologies Operating Co. v. PSC*, 116 S.W.3d 680, 691-92 (Mo. App. W.D. 2003). In the *Tariff Order*, the Commission clearly found that the maximum average retail rate increase would be reached. (*Tariff Order*, p. 5) This is an unambiguous finding that does not require resort to the underlying record. In addition, the Direct Testimony of Tim Rush explains why and how that retail rate impact will be exceeded. (Rush Direct, pp. 7-9) Consequently, record evidence exists that supports the clear finding by the Commission. And from a procedural perspective, again, this aspect of the Complaint is a collateral attack upon the Commission's *Stipulation Order* and its *Tariff Order* in violation of Section 386.550.

17. The Complaint is also a collateral attack upon GMO's approved 3rd Revised Sheet No. R-62.19 which specifies when solar rebates will be paid by GMO. This tariff was approved by the Commission and became effective on June 8, 2014, and provides the circumstances under which solar rebates will be paid by GMO:

> The Company will pay solar rebates for all valid applications received by the Company by November 15, 2013 at 10 AM CST, which are preapproved by the Company and which result in the installation and operation of a Solar Electric System pursuant to the Company's rules and tariffs. Applications received after

> November 15, 2013 at 10 AM CST may receive a solar rebate payment if the total amount of solar rebates paid by the Company for those applications received on or before November 15, 2013 at 10 AM CST are less than $50,000,000.

18. The Complaint seeks to modify the circumstance under which GMO will pay solar rebates when it alleges that "Respondent KCP&L-GMO's denial of Complainants' applications for solar rebates was unlawful, in that the Commission did not make the required determination that the one percent retail rate impact would be reached, and Respondent is required by law to continue paying rebates until the Commission makes such a determination." (Complaint, ¶13, p. 5) The Complaint further alleges that: "Respondent denied Complainants' applications for solar rebates without demonstrating that such denials were necessary to avoid exceeding the retail rate impact limit." (Complaint, ¶25, p. 9) As such, the Complaint represents a collateral attack upon an approved tariff without the necessary showing of changed circumstances.

B. The Complaint requests relief that would violate GMO's approved tariffs, and is therefore relief that the Commission may not lawfully grant.

19. The Complaint requests, *inter alia*, that the Commission "Order Respondent KCP&L-GMO to approve the solar rebate applications for Complainants and all other KCP&L-GMO customers who submitted rebate applications and were denied solar rebates in calendar year 2013 for the reason that Respondent did not have available funds." (Complaint, p. 10)

20. The relief requested by Complainants would be a direct violation of GMO's approved tariffs, including 3rd Revised Sheet No. 62.19 which states:

> The Company will pay solar rebates for all valid applications received by the Company by November 15, 2013 at 10 AM CST, which are preapproved by the Company and which result in the installation and operation of a Solar Electric System pursuant to the Company's rules and tariffs. Applications received after November 15, 2013 at 10 AM CST may receive a solar rebate payment if the total

amount of solar rebates paid by the Company for those applications received on or before November 15, 2013 at 10 AM CST are less than $50,000,000.

21. The Commission cannot grant relief that violates an approved tariff since utility tariffs have the force and effect of law. *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 114 (1937), aff'g 93 S.W.2d 954 (Mo. 1936). The Complaint requests the Commission order GMO to pay solar rebates under circumstances that violate the terms and conditions of the approved tariff. Therefore, the Complaint fails to state a claim upon which relief may be granted.

C. The Complaint requests relief that the Commission sanction the granting of an undue or unreasonable preference or advantage to Complainants in violation of Section 393.130(3).

22. The Complaint requests that the Commission grant an undue and unreasonable preference and advantage to the Complainants in violation of Section 393.130(3) when it requests that the Commission order GMO to approve solar rebate applications for Complainants under requirements different from the requirements utilized for other GMO customers. The Commission lacks the statutory authority to grant any undue or unreasonable preference or advantages to any person, corporation, or locality. Section 393.130; *State ex rel. City of Joplin v. Pub. Serv. Comm'n et al.*, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005). As such, the Complaint fails to state a claim upon which relief may be granted.

D. The Complaint requests relief that the Commission sanction undue discrimination against other similarly situated GMO customers in violation of Section 386.130(2).

23. The Complaint requests that the Commission sanction undue discrimination against other GMO customers in violation of Section 386.130(2) when it requests that the

Commission order GMO to approve solar rebate applications for Complainants under requirements different from the requirements utilized for other GMO customers. Such relief would unduly discriminate against similarly situated GMO customers whose solar rebate applications were not approved by GMO under terms of the existing tariffs. The Commission lacks the statutory authority to approve an unduly or unreasonably discriminatory special rate, rebate, drawback or other device or method, or to any person, corporation, or locality. Section 393.130; *State ex rel. City of Joplin v. Pub. Serv. Comm'n et al.*, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005). As such, the Complaint fails to state a claim upon which relief may be granted.

F. The Complaint should be dismissed since it fails to allege a "violation of any provision of law, or of any rule or order or decision of the commission" by GMO, in violation of Sections 386.390.

24. The Complaint should be dismissed against GMO since it does not allege a violation of any provision of law, or of any rule or order or decision of the Commission by GMO. Instead, the Complaint at its heart is a complaint against the Commission itself and the Commission's findings (or lack thereof) related to GMO's solar rebate payments. A careful review of the Complaint verifies that the Complainants' real issue is with how the Commission approved GMO's continuation and later cessation of solar rebate payments:

> 12. Respondent KCP&L-GMO's denial of Complainants' applications for solar rebates was unlawful, in that the Commission did not make the required determination that the one percent retail rate impact would be reached, and Respondent is required by law to continue paying rebates until the Commission makes such a determination. (Complaint, ¶12, p. 5)
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> 14. The Commission did not make a final determination of whether Respondent would meet or exceed the one percent cap within 60 days of KCP&L-GMO's August 28, 2013 application to suspend payment of rebates. Similarly, the Commission has not yet made a determination for whether Respondent will meet

> or exceed the one percent cap within 60 days of KCP&L-GMO's April 9, 2014 application to suspend payment of rebates. (Complaint, ¶14, p. 6)
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> 17. In the present case, the Commission has made no finding that a Missouri utility has reached or will reach the one percent retail rate impact limit. In Case No. ET-2014-0059, the Commission's approval of the Non-Unanimous Stipulation and Agreement contained no statement as to whether Respondent would reach the retail rate impact limit within 60 days of its filing. Similarly, in the pending Case No. ET-2014-0277, the Commission has not yet granted authority to suspend rebates or made the required determination that Respondent has reached or will reach the one percent retail rate impact limit within 60 days. (Complaint, ¶17, p. 7) (*Emphasis added*)

That the Complaint at its heart is aimed at the Commission rather than making any credible allegation that GMO has failed to comply with any final, unappealable and controlling orders and tariffs demonstrates that the Complaint is a collateral attack on those final, unappealable and controlling orders and tariffs in violation of section 386.550 and, therefore, that the Complaint must be dismissed.

CONCLUSION

25. For the reasons discussed herein, the Complaint should be dismissed with prejudice because it fails to state a claim upon which relief can be granted. More specifically, the Complaint (a) constitutes an impermissible collateral attack on previous Commission Orders in File Nos. ET-2014-0059/ET-2014-0071 and EO-2014-0277, and GMO's Commission-approved tariffs; (b) seeks relief that would violate GMO's approved tariffs, and is therefore relief that the Commission may not lawfully grant, (c) seeks relief that would require the Commission to exercise authority it does not have–sanctioning an undue or unreasonable preference or advantage to Complainants in violation of Section 393.130(3); (d) seeks relief that would constitute unlawful, undue or unjust discrimination which the Commission lacks authority to do; and (e) fails to allege a "violation of any provision of law, or of any rule or order or decision of the

commission" by GMO in violation of Sections 386.390. While the Complaint is clearly barred as an impermissible collateral attack by Section 386.550, it is important to understand the broader rationale underlying that section. For the regulatory process to be effective, the public (including customers and companies alike) must be able to rely upon Commission orders – and the approved tariff sheets which implement those orders – until changes to such orders and/or tariff sheets take effect as prescribed by law. To do otherwise would undermine the reliability and effectiveness of the regulatory process to the detriment of all participants. Regarding the subject matter of this Complaint – solar rebates – vigilance is particularly important. Because – at least from GMO's perspective – if there is any indication whatsoever that additional solar rebate dollars will be made available upon the filing of a complaint, then that will simply spur the filing of additional complaints on the topic.

WHEREFORE, for the reasons stated herein, KCP&L Greater Missouri Operations Company prays the Commission dismiss with prejudice the Complaint filed on May 14, 2014.

Respectfully submitted,

/s/ Robert J. Hack

Robert J. Hack, MBN 36496
Lead Regulatory Counsel
Phone: (816) 556-2791
E-mail: rob.hack@kcpl.com
Roger W. Steiner, MBN 39586
Phone: (816) 556-2314
E-mail: roger.steiner@kcpl.com
Corporate Counsel
Kansas City Power & Light Company
1200 Main – 16th Floor
Kansas City, Missouri 64105
Fax: (816) 556-2787

James M. Fischer, MBN 27543
E-mail: jfischerpc@aol.com
Larry W. Dority, MBN 25617
E-mail: lwdority@sprintmail.com
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383

ATTORNEYS FOR
KCP&L GREATER MISSOURI OPERATIONS COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on this 16th day of June, 2014, to the following:

Kevin Thompson
Chief Staff Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
kevin.thompson@psc.mo.gov

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

Matthew J. Ghio
3115 S. Grand., Suite 300
St. Louis, Missouri 63118
matt@ghioemploymentlaw.com

Erich Vieth
1500 Washington Ave., Suite 100
St. Louis, Missouri 63103
erich@campbelllawllc.com

/s/ Robert J. Hack
Robert J. Hack