

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

City of Kansas City, Missouri,	)	
	)	
The Planned Industrial Expansion Authority	)	
of Kansas City, Missouri,	)	
	)	
Boulevard Brewing Associates Limited	)	
Partnership, a Missouri limited partnership,	)	
d/b/a/ Boulevard Brewing Company,	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. EC-2006-0332
	)	
Kansas City Power & Light Company,	)	
	)	
Respondent.	)	

**ANSWER OF KANSAS CITY POWER & LIGHT COMPANY**

Pursuant to 4 CSR 240-2.070(8), Respondent Kansas City Power & Light Company ("KCPL"), by and through its legal counsel, submits its answer in response to the above-captioned complaint (the "Complaint") submitted by the City of Kansas City, Missouri ("Kansas City"), The Planned Industrial Expansion Authority of Kansas City, Missouri ("PIEA"), and Boulevard Brewing Company ("Boulevard") (Kansas City, PIEA and Boulevard, collectively, the "Complainants").<sup>1</sup>

Complainants are not entitled to the relief they seek. As more fully discussed herein, with respect to Count I of the Complaint, in which Complainants assert that KCPL should bear the cost of relocating its facilities to accommodate Boulevard's expansion project, the documents upon which Complainants rely expressly state that Boulevard as the developer of the project

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<sup>1</sup> All three Complainants support Count I of the Complaint. Only Boulevard supports Count II.

should bear those costs. Moreover, the single case upon which Complainants exclusively rely is inapplicable, or alternatively, does not support the relief requested by Complainants.

With respect to Count II of the Complaint, which is supported only by Boulevard, Boulevard, as the Complainant, bears the burden of demonstrating that KCPL's tariffs or actions are not just and reasonable, are discriminatory, or are otherwise inconsistent with Missouri law. Boulevard's list of generally vague and unsubstantiated allegations does not, nor cannot, satisfy its burden.

In support hereof, KCPL offers as follows.

### **I. BACKGROUND**

1. For more than a year, Boulevard and KCPL have been discussing how best to satisfy Boulevard's desire for KCPL to relocate certain of its delivery facilities to accommodate Boulevard's expansion of its brewery facilities located in Kansas City, Missouri. KCPL has already undertaken substantial work at Boulevard, *i.e.*, approximately \$90,000, related to Boulevard's expansion, at no cost to Boulevard, based upon the revenue justification from the anticipated additional load of Boulevard's expanded facilities.

2. Boulevard's request for KCPL to relocate its facilities is comprised of two distinct segments. The first segment involves KCPL's overhead delivery facilities on Belleview. Several months ago, Boulevard requested that KCPL provide a "ball park" estimate of the cost to Boulevard for KCPL to relocate its overhead distribution facilities on Belleview underground. Pursuant to Boulevard's request, KCPL provided its estimate of those costs. KCPL initially estimated that it would cost approximately \$180,000 to relocate its Belleview facilities underground. As a result of subsequent discussions with Boulevard, KCPL agreed to reduce its estimate of Boulevard's allocation of those costs to \$134,315.28.

3. Recognizing that it is expensive to relocate facilities underground, KCPL also provided an estimate to Boulevard for cleaning up KCPL's overhead facilities on Bellevue, *i.e.*, replacing existing poles with fewer new poles and cleaning up the existing conductors. KCPL initially estimated that cleaning up its facilities on Bellevue would cost approximately \$30,000. As a result of subsequent discussions with Boulevard, KCPL agreed to reduce its estimate of Boulevard's allocation of those costs to \$24,045.98.<sup>2</sup>

4. After reviewing the estimates, Boulevard informed KCPL that Boulevard wanted to pursue the clean-up option instead of moving KCPL's facilities on Bellevue underground, as evidenced by the July 5, 2005 e-mail from Michael Utz, Plant Engineer for Boulevard, to Lori Locker, Customer Representative for KCPL, which is included in the string of e-mails attached hereto as Attachment 1.<sup>3</sup> From that point on, KCPL designed the project and calculated the detailed project costs based upon Boulevard's stated desire to pursue the clean-up option.

5. Boulevard requested, and KCPL provided, detailed cost information concerning the clean-up option on Bellevue. It was not until relatively recently—November of 2005—that Boulevard's consultant, Greg Elam of American Energy Solutions, Inc. ("AES"), informed KCPL that not only did Boulevard want KCPL to remove its Bellevue facilities entirely or relocate them underground, but also that Boulevard expected KCPL to pay the costs of such removal or burial. Up to this point, it was KCPL's understanding that Boulevard recognized that it was responsible for the costs of cleaning up or relocating KCPL's facilities on Bellevue.

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<sup>2</sup> In hindsight, KCPL recognizes that \$17,469.13 of the reduction of its cost estimate for "Minus Expired Life" was in error and should not have been deducted from Boulevard's cost of the project. Nonetheless, KCPL will stand by the most recent cost estimate it provided to Boulevard.

<sup>3</sup> In Mr. Utz's July 5, 2005 e-mail to Ms. Locker and others, Mr. Utz indicated that Boulevard wished to pursue "Option A," which refers to the options listed in Mr. Utz's June 15, 2005 e-mail to Ms. Locker and others, which is also included in the string of e-mails comprising Attachment 1. Option A represents KCPL's proposal to clean up its Bellevue facilities instead of relocating them underground. Mr. Lutz's e-mails also indicate that Boulevard understood that it would be required to pay approximately \$38,000 for the Bellevue clean-up option

6. KCPL explained to Boulevard that the KCPL delivery facilities on Belleview could not simply be removed, as Mr. Elam proposed, because those facilities are necessary for the reliability of KCPL's system. KCPL further explained that it had not designed or calculated the precise cost of relocating its Belleview facilities underground because Boulevard had previously indicated to KCPL that it did not want to pursue that option. KCPL also informed Boulevard that under the terms of KCPL's tariffs, Boulevard would have to pay for the relocation of KCPL's facilities on Belleview underground.

7. Boulevard has explained to KCPL that the reason Boulevard seeks to locate KCPL's facilities on Belleview underground is purely aesthetic and for Boulevard's benefit. As described to KCPL, Boulevard, as part of its expansion, will open a large conference center overlooking Belleview. KCPL's overhead facilities along Belleview would be in plain view of the conference center, which Boulevard seeks to avoid.

8. The second segment of Boulevard's requested relocation of KCPL's facilities to accommodate Boulevard's expansion project is the relocation of certain of KCPL's poles and lines on 26<sup>th</sup> Street. KCPL initially estimated that it would cost approximately \$75,000 to relocate its facilities on 26<sup>th</sup> Street. Boulevard requested, and KCPL provided, detailed cost information concerning the relocation of these facilities. As a result of subsequent discussions with Boulevard, KCPL agreed to reduce its estimate of Boulevard's allocation of those costs to \$60,435.15.<sup>4</sup> It was not until KCPL's relatively recent conversations with Mr. Elam of AES that KCPL learned that Boulevard no longer intended to pay for the relocation of KCPL's facilities on 26<sup>th</sup> Street either.

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((\$35,000 to KCPL and \$3,100 to Westhues) and approximately \$75,000 to KCPL to relocate its facilities on 26<sup>th</sup> Street.

9. Boulevard explained to KCPL that 26<sup>th</sup> Street needs to be widened to give Boulevard's delivery trucks sufficient turning clearance onto that road. Boulevard further explained that this widening of 26<sup>th</sup> Street necessitates relocating KCPL's distribution facilities on 26<sup>th</sup> Street.

10. Although KCPL has negotiated in good faith to seek a solution to the present dispute that satisfies Boulevard's needs, KCPL does not agree that it, and ultimately its ratepayers, should be required to bear the entire cost of relocating its facilities, as requested by Boulevard and AES to accommodate Boulevard's expansion project. KCPL has already reduced its estimates of Boulevard's costs for the projects in an attempt to address Boulevard's concerns. Boulevard now contends that KCPL should bear the full cost of these projects. The parties have reached an impasse on this point.

11. On February 21, 2006, the Complainants submitted the Complaint, including a Motion for Expedited Treatment, to the Missouri Public Service Commission ("Commission"). In essence, the Complaint requests that the Commission direct KCPL to relocate its delivery facilities on Belleview underground and relocate its delivery facilities on 26<sup>th</sup> Street, all at KCPL's expense.

12. By order issued February 22, 2006, the Commission granted the Complainants' Motion for Expedited Treatment. The Commission directed KCPL to respond to the Complaint "within eight days of being notified thereof." KCPL received notice of the Complaint *via* certified mail from the Secretary of the Commission, pursuant to 4 CSR 240-2.070(7), on

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<sup>4</sup> In hindsight, KCPL recognizes that \$6,268.24 of the reduction of its cost estimate for "Minus Expired Life" was in error and should not have been deducted from Boulevard's cost of the project. Nonetheless, KCPL will stand by the most recent cost estimate it provided to Boulevard.

February 23, 2006. Consequently, KCPL's answer to the Complaint is due Friday, March 3, 2006. The Commission also established expedited hearing dates of March 6-10, 2006.<sup>5</sup>

## **II. ANSWER TO COMPLAINT**

13. At issue here is whether Boulevard or KCPL, through its ratepayers, should pay for the relocation of KCPL's facilities to accommodate Boulevard's expansion of its facilities. "The burden of proof at hearing rests with the complainant in cases where, such as here, the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions."<sup>6</sup> The Commission has interpreted this to mean that complainants "must establish all facts necessary to support the relief [they] seek by a preponderance of the credible evidence."<sup>7</sup>

14. The Complainants have not met their burden. They have not demonstrated by a preponderance of the credible evidence that KCPL is obligated to pay for Boulevard's request for KCPL to relocate its facilities to accommodate Boulevard's expansion project. Nor have they adequately demonstrated that KCPL cannot require Boulevard to pay the costs attributable to the relocation projects. For the reasons set forth herein, the Commission should dismiss the Complaint outright or deny Complainants the relief they request therein.

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<sup>5</sup> Although KCPL questions Boulevard's stated urgency, KCPL was unable to respond to Complainants' motion for expedited treatment because the Commission granted it the day after Complainants submitted it. KCPL did not even receive official notice from the Commission of the Complaint and motion, as required by the Commission's regulations, until February 23, 2006—one day after the Commission granted Complainants' motion for expedited treatment. The Commission's order left KCPL with only eight days (instead of the typical thirty days provided in the Commission's regulations) to respond to a lengthy complaint that Complainants had as much time as they desired to prepare. KCPL respectfully requests leave to supplement this answer as it deems necessary up and until the beginning of the scheduled evidentiary hearing on March 6, 2006 to remedy the lack of due process afforded KCPL in this matter.

<sup>6</sup> *GS Technology Operating Co., Inc., v. Kansas City Power & Light Co.*, Case No. EC-99-553 (2004 WL 2752782) (Dec. 2, 2004) (citing *Ahlstrom v. Empire District Elec. Co.*, 4 Mo.P.S.C.3d 187, 202 (1995) and *Margulis v. Union Elec. Co.*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991)).

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

**KCPL'S ANSWER TO COUNT I OF THE COMPLAINT:**

**A. The Documents Upon Which Complainants Rely Expressly Provide That Changes In Public Utilities Necessitated By Boulevard's Expansion Will Be Provided "At The Developer's Expense."**

15. As a preliminary matter, none of the Kansas City ordinances or PIEA resolutions relied upon by the Complainants either directs that any of KCPL's electric distribution facilities be relocated or requires KCPL to pay for such relocations.

16. Kansas City Ordinance No. 41081, which the Complainants attached to the Complaint, and which is attached hereto as Attachment 2, concludes that the area at issue is blighted and approves the "General Development Plan: and Blight Analysis: 25<sup>th</sup> & Southwest Boulevard Planned Industrial Expansion Authority (PIEA) Planning Area" (the "Development Plan"). Ordinance No. 41081 does not contain any statements concerning the relocation of public utility facilities, or who should pay for any such relocations necessitated by projects under the Development Plan. Instead, Ordinance No. 41081 simply approves the Development Plan. Similarly, PIEA's Resolution No. 936, which the Complainants attached to the Complaint, and which is attached hereto as Attachment 3, accepted Boulevard's development proposal, but is silent with respect to the potential relocation of public utility facilities.

17. Complainants rely exclusively on page 20 of the Development Plan to support their argument that "As a result of the legislative declaration of blight and approval of the redevelopment of PIEA's property, certain utility facilities, owned by KCPL in or adjacent to the blighted PIEA Area property, require removal, relocation and burial in order to implement the [Development Plan]."<sup>8</sup> Complainants accurately quote page 20 of the Development Plan, which reads in pertinent part, "The intent of this Plan is to remediate various blighting factors within

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<sup>8</sup> Complaint, at ¶ 8.

the Planning Area, including, but may not be limited to: . . . the removal of overhead utility lines.”

18. Significantly, however, Complainants do not include in the Complaint or mention or reference the clear and express provision on page 34 of the Development Plan, which reads in its entirety:

Proposed Changes in Public Utilities

It may be required that as part of a specific project plan, and to remedy blighting conditions, certain utilities will be relocated or buried. Any changes will be coordinated with the City of Kansas City, Missouri and **provided at the Developer’s expense.**<sup>9</sup>

To ensure that the Commission’s record in this matter is complete, KCPL attaches hereto as Attachment 4, a complete copy of the Development Plan.

19. Kansas City Ordinance No. 41081 approved the Development Plan, which with respect to the relocation or removal of public utility facilities expressly finds (i) that the removal of overhead utility lines is part of the remediation of “various blighting factors within the Planning Area” and (ii) that any relocation or burial of public utility facilities necessitated by a project undertaken pursuant to the Development Plan must be “provided at the Developer’s expense.” Setting aside the issue whether Kansas City or PIEA by approving the Development Plan has directed that overhead utility lines be buried, as alleged by Complainants, it is unambiguously clear that any such activities should be paid for by Boulevard as the “Developer” of the project, and not by KCPL. Complainants cannot pick and choose which provisions of the Development Plan constitute city mandates and which do not. For these reasons, the Commission should either dismiss Count I of the Complaint outright, or deny Complainants the relief they seek therein.

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<sup>9</sup> Development Plan, at p. 34 (emphasis added).



**B. *Union Electric Does Not Apply Here Because KCPL's Franchise With Kansas City Does Not Include the Condition In Union Electric's Franchise Upon Which the Court Relied.***

20. If the Commission concludes that the unambiguous language of the Development Plan, which indicates that the developer must bear the cost of any public utility changes necessitated thereunder, does not justify either dismissing Count I of the Complaint or denying Complainants the relief they seek therein, KCPL also asserts that the single case upon which Complainants' argument rests is not applicable here.

21. Complainants rely exclusively on *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis* ("Union Electric"),<sup>10</sup> to support their position that KCPL must pay to relocate its facilities to accommodate Boulevard's expansion project.<sup>11</sup> However, *Union Electric* is not controlling here.

22. The Supreme Court of Missouri based its decision in *Union Electric* on a specific provision of the utility's franchise with the City of St. Louis, Missouri ("St. Louis") that does not appear in KCPL's franchise with Kansas City. As quoted by the court in footnote 1 of its decision, Union Electric's St. Louis franchise, *i.e.*, St. Louis Ordinance No. 12723, expressly provides that "The 'right is \* \* \* reserved to the Board \* \* \* at any time to direct any alterations in the location of said \* \* \* [facilities].'"<sup>12</sup> The court reasoned that "In accepting this franchise [Union Electric] also accepted this condition as a part of the contract and is in no position to complain of its exercise."<sup>13</sup>

23. The court explained that "Union Electric has, as it claims, a right to locate its electric distribution facilities in the streets and alleys of [St. Louis]. The source of this right is,

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<sup>10</sup> 555 S.W.2d 29 (Mo. 1977). Complaints indicate that the Supreme Court of Missouri decided *Union Electric* in 1997. See Complaint, at ¶ 9. In fact, *Union Electric* was decided in 1977.

<sup>11</sup> Complaint, at ¶¶ 9 – 14.

<sup>12</sup> *Id.*, at n. 1 (redactions and brackets in original as quoted by the court).

as [Union Electric] states, Ordinance No. 12723.”<sup>14</sup> The court further explains, however, that Union Electric’s right to serve under the franchise is not unconditional. “It is subject to the condition **clearly expressed in the ordinance** on which the rights claimed are based: a reservation [by the city] of the right to direct relocation of electric distribution facilities installed in a street.”<sup>15</sup>

24. KCPL’s Kansas City franchise, *i.e.*, Kansas City Ordinance No. 21706, upon which Complainants rely and attached to the Complaint, and which is attached hereto as Attachment 5, does not contain a similar condition to the one relied upon by the court in *Union Electric*. The only arguably similar provision of KCPL’s franchise appears in Section 5 of the franchise, and states as follows:

Whenever the Council shall, by General Ordinance, determine that all lines, pipes or conductors for illuminating and heating purposes and for furnishing motive power by Electric Works, shall be laid under ground, then and in such case all lines, pipes and conductors erected above ground under this ordinance shall be taken down and transferred under the ground as may be provided in such general ordinance and with as little delay as possible.

25. Because the Kansas City Council has not issued such a general ordinance, this section of KCPL’s franchise does not apply here. There is no other provision of KCPL’s franchise that is remotely similar to the “clearly expressed” condition in Union Electric’s franchise, upon which the court relied, that grants the Board of Public Improvements in St. Louis the authority to “direct any alterations in the location” of Union Electric’s distribution facilities.

26. The court’s reasoning in *Union Electric* is premised on the existence of a “clearly expressed” condition in the utility’s franchise, which the utility accepted as part of its franchise. Without a similar condition here, the court’s holding in *Union Electric* simply does not apply.

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<sup>13</sup> *Id.*

<sup>14</sup> *Union Electric*, at 32.

<sup>15</sup> *Id.* (emphasis added).

Consequently, Complainants cannot rely upon *Union Electric* to support their contention that KCPL should bear the cost of relocating its facilities to accommodate Boulevard's expansion project.

27. The present facts, particularly those pertaining to the relocation of KCPL's facilities on 26<sup>th</sup> Street to accommodate the widening of that street, are more analogous to the Missouri Court of Appeals's decision in *Home Builders Assn. Of Greater St. Louis, et al., v. St. Louis County Water Co.* ("*Home Builders*").<sup>16</sup> In that case, municipalities directed several developers to undertake certain road improvements as a condition of the municipalities' authorization of the developers' projects. Those road improvements necessitated the relocation of public utility assets. The developers alleged that the public utilities should have to pay for the relocation of their facilities because such relocations were ultimately the result of municipality mandates. The court rejected the developers' arguments, reasoning that

the actions of private developers constructing their projects, not the actions of the governmental entity, have caused the need for right-of-way improvements and have, in turn, necessitated [public utility] relocations. Absent these private actions, the road improvements and consequent facility relocations would not occur at this time or perhaps at any time. While the right-of-way improvements incidentally accomplish a public purpose, they primarily accomplish private sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of Developer's projects.

28. Based on *Home Builders*, any city mandate or incidental public benefits associated with widening 26<sup>th</sup> Street do not require KCPL to bear the cost of relocating its facilities to accommodate that road improvement. Like the road improvements in *Home Builders*, there is no indication that absent Boulevard's expansion activities there would be any need to widen 26<sup>th</sup> Street. Consequently, under *Home Builders*, KCPL is not responsible for the cost of relocating its facilities to accommodate widening 26<sup>th</sup> Street. Furthermore, any incidental

public benefits attributable to relocating KCPL's facilities on Belview underground to improve the view from Boulevard's new conference center are even further removed. Under *Home Builders*, Boulevard should bear those costs.

29. For the foregoing reasons, the Commission should either dismiss Count I of the Complaint outright, or deny Complainants the relief they seek therein.

**C. Even If *Union Electric* Applies, It Does Not Support The Relief Requested By Complainants Because PIEA Is Acting In A Proprietary Rather Than Governmental Capacity.**

30. Despite the foregoing, if the Commission determines that *Union Electric* is controlling, that decision does not support the relief Complainants seek.

31. As the court held in *Union Electric*, "The general rule that the utility must bear the relocation costs has been held inapplicable where the relocation of its facilities has been necessitated by the municipality's exercise of a proprietary rather than governmental function or purpose."<sup>17</sup> Here, because PIEA's actions do not accomplish "a purely governmental purpose," PIEA is exercising a proprietary, rather than governmental, function.<sup>18</sup>

32. As explained in the Complaint, PIEA owns "the property that is being redeveloped for lease to Boulevard."<sup>19</sup> Moreover, according to the Complaint, Boulevard was acting as "PIEA's agent" when it applied to KCPL to relocate its facilities. As an active lessor of the land on which Boulevard's expanded facilities are being constructed, PIEA is performing "a proprietary rather than governmental function or purpose." Under these facts, Boulevard's situation is more analogous to the *Baltimore Gas & Electric* decision<sup>20</sup> discussed in *Union*

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<sup>16</sup> 784 S.W.2d 287, 292-93 (Mo. Ct. App. 1989) (Motion for Rehearing and/or Transfer to the Supreme Court Denied Jan. 24, 1990).

<sup>17</sup> *Union Electric*, at 32.

<sup>18</sup> *Home Builders*, at 291.

<sup>19</sup> Complaint, at ¶ 3.

<sup>20</sup> *City of Baltimore v. Baltimore Gas & Elec. Co.*, 192 A.2d 87 (Md. 1963) ("*Baltimore Gas & Electric*").

*Electric* than to the facts actually underlying *Union Electric*. As summarized by the Supreme Court of Missouri in *Union Electric*, the *Baltimore Gas & Electric* case

involved an order by the city directing the Gas and Electric Co. to remove and relocate its facilities from streets vacated to permit their use for the purposes, among others, of constructing (1) a housing project by the Housing Authority and (2) a market by the city. The court held that the city was liable for the cost of removing the facilities from the area where the city market was to be located, because the operation and maintenance of a market puts the city in competition on an equal basis with the utility and therefore its order to relocate was the exercise of a 'proprietary' power.<sup>21</sup>

33. Given PIEA's financial interest in Boulevard's expansion project, the facts in *Baltimore Gas & Electric* are more analogous to the present situation than the facts underlying *Union Electric*. PIEA owns the real property on which Boulevard's expansion facilities are being constructed. Moreover, Boulevard and PIEA state in the Complaint that Boulevard was acting as PIEA's agent in its dealings with KCPL. For these reasons, the Commission should either dismiss Count I of the Complaint outright, or deny Complainants the relief they seek therein.

**KCPL'S ANSWER TO COUNT II OF THE COMPLAINT:**

34. Count II of the Complaint, which is supported only by Boulevard, involves four generally vague and unsupported allegations. Boulevard alleges that (i) "KCPL has no tariff, rule, or regulation, or schedule authorizing the recovery of costs associated with relocation or removal of facilities;" (ii) "KCPL has no schedule or tariff identifying with reasonable certainty the charges to be paid by a customer for relocations, removals or extensions of facilities;" (iii) "the proposed prices are unreasonable and unjust, arbitrary and capricious and without basis in fact;" and (iv) "KCPL's requirement that its equipment and personnel be utilized to the

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<sup>21</sup> *Union Electric*, at 33.

exclusion of other contractors discriminates against customers and results in unreasonable prices.”<sup>22</sup> KCPL will address each of these allegations in turn.

**A. KCPL’s Tariffs Authorize It To Recover From Boulevard Costs Associated With The Relocation Or Burial Of KCPL’s Facilities At Boulevard’s Request.**

35. Boulevard alleges that KCPL’s tariffs do not contain any provisions that permit KCPL to recover the cost of the facility relocations Boulevard has requested of KCPL. This is simply not true. KCPL’s tariffs authorize it to require Boulevard to pay the costs associated with both the Belleview and 26<sup>th</sup> Street relocation projects. Moreover, KCPL’s tariffs expressly state that its system standard is overhead construction.<sup>23</sup> It is also worth reiterating that the Development Plan upon which Boulevard relies in Count I of the Complaint clearly states that the “Developer,” *i.e.*, Boulevard—not KCPL, is responsible for any public utility changes necessitated by a project under the Development Plan.

36. With respect to Boulevard’s request for KCPL to move its Belleview facilities underground, Rule 10 of the General Rules and Regulations of KCPL’s Commission-approved tariffs expressly authorizes KCPL to charge a customer requesting to relocate facilities underground the full cost of relocating those facilities. Specifically, Section 10.02(b) provides as follows:

In any area where a Customer is being served from overhead primary and/or secondary facilities, and these facilities are to be converted to an underground installation, the Customer shall reimburse the Company for the total cost of the underground facilities plus the cost of removal, less salvage, of the Company’s existing overhead facilities.

37. KCPL serves Boulevard from overhead secondary lines. Consequently, Section 10.02(b) of the General Rules and Regulations of KCPL’s Commission-approved tariffs

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<sup>22</sup> Complaint, at ¶ 18.

authorize KCPL to require Boulevard to bear the cost of relocating KCPL's Bellevue distribution facilities underground.

38. With respect to Boulevard's request for KCPL to relocate its 26<sup>th</sup> Street facilities, Rule 9 of the General Rules and Regulations of KCPL's Commission-approved tariffs authorizes KCPL to charge a customer requesting to relocate facilities the full cost of relocating those facilities. Section 9.02 is equally applicable to line extensions and customer-requested relocation projects.

39. KCPL's Commission-approved tariffs authorize KCPL to require Boulevard to bear the cost of the Bellevue and 26<sup>th</sup> Street relocation projects, which Boulevard requested to accommodate the expansion of its brewery facilities. This is not only the correct legal conclusion, but it is also the best policy outcome. There are no compelling public policy reasons why KCPL's ratepayers should subsidize the expansion of Boulevard's facilities. Or, to apply language from the Missouri Court of Appeals's decision in *Home Builders*,

[Boulevard], by [its] private development decisions, [has] triggered the need for . . . [public utility] facility relocations. [Boulevard is] in a position, when making those development decisions, to factor the cost of utility relocations into [its] project plans. [Boulevard] can accept those costs, if feasible, and proceed to complete [its] projects. Or, [Boulevard] can decline to undertake a project if the relocation costs are beyond [its] present resources. Developers thus have a better opportunity than [a public utility] to anticipate and to plan for the costs of relocation associated their proposed projects. [Public utilities], if forced to bear the costs whenever a developer's project requires facility relocations, [have] no similar opportunity to anticipate, much less to plan, the allocation of [their] resources to meet those costs.<sup>24</sup>

40. The court in *Home Builders* succinctly summarizes KCPL's position in this case. As the developer, Boulevard is in the best position to evaluate the entire cost of its expansion

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<sup>23</sup> Specifically, Section 3.03 of the General Rules and Regulations of KCPL's tariff states that "Normally, all transmission and distribution lines of the Company will be of overhead construction. Underground distribution lines in an area or on the Customer's premises will be made available pursuant to Rule 10 hereof."

<sup>24</sup> *Home Builders*, at pp. 292-93.

project, including the cost of relocating KCPL's facilities, and to decide whether to undertake the project. Incidentally, the Development Plan upon which Boulevard relies so heavily, appears to arrive at the same conclusion.

41. KCPL's Commission-approved tariffs authorize KCPL to require Boulevard to bear the cost of the relocation projects. Boulevard has not met its burden, as the Complainant, of demonstrating otherwise by a preponderance of the credible evidence. Consequently, the Commission should either dismiss this subpart of Count II of the Complaint outright, or deny Boulevard the relief it seeks related thereto.

**B. KCPL's Tariffs Contain The Necessary And Appropriate Flexibility Concerning Customer-Requested Relocations, Removals Or Extensions Of KCPL's Facilities.**

42. Boulevard argues that KCPL's Commission-approved tariffs afford KCPL too much discretion concerning its ability to require customers to pay to relocate KCPL's facilities.<sup>25</sup> Although it is undoubtedly true that the above-described provisions of KCPL's tariffs afford KCPL discretion when calculating a customer's cost of a requested relocation project, contrary to Boulevard's allegations, such discretion and flexibility is helpful and serves the public interest.

43. To prevail as the Complainant, Boulevard must demonstrate by a "preponderance of the credible evidence" that the discretion afforded KCPL in its tariffs is unjust or unreasonable. Like all the provisions of KCPL's tariff, the Commission approved the current language of Sections 10.02(b) and 9.02 of the General Rules and Regulations of KCPL's tariffs. As Missouri courts have held, once the Commission approves a tariff, that tariff becomes Missouri law and has "the same force and effect as a statute directly prescribed from the

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<sup>25</sup> Complaint, at ¶ 22.



legislature.”<sup>26</sup> Consequently, once a tariff is established, it carries a “strong presumption” that it is “reasonable.”<sup>27</sup>

44. KCPL’s tariffs give it the flexibility it needs to evaluate on a case-by-case basis the wide range of facility relocation and extension projects requested by its customers. Such flexibility benefits the public interest. The vast majority of KCPL’s customers do not object to the discretion the Commission has afforded to KCPL, as evidenced by the fact that of the thousands of customer-requested line extension and relocation projects KCPL has undertaken over the past several years, there have been virtually no complaints concerning the issues raised by Boulevard. According to KCPL’s records, there has been only one informal and one formal complaint over the past five years pertaining to the cost or cost allocation of a customer-requested facility relocation or line extension project.<sup>28</sup>

45. Boulevard also alleges that KCPL has withheld detailed cost information for the projects.<sup>29</sup> This allegation is not true. To the contrary, in its attempts to resolve this matter amicably, KCPL has provided far more detailed information to AES, Boulevard’s consultant, than KCPL is legally required to provide.

46. KCPL uses a software program called STORMS to estimate the cost of projects like those requested by Boulevard. KCPL engineers first determine what facilities will be necessary for a project. Then, KCPL enters those facilities into STORMS. STORMS then generates a detailed estimate of the cost of the project. KCPL provided the STORMS report to AES, Boulevard’s consultant, for the 26<sup>th</sup> Street relocation and Belleview clean-up projects. The

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<sup>26</sup> *Laclede Gas Co. v. Missouri Public Service Commission*, 156 S.W.3d 513, 521 (Mo. Ct. App. 2005) (citing *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, S.W.2d 314, 317 (Mo. Ct. App. 1996)).

<sup>27</sup> *Shepherd v. Wentzville*, 645 S.W.2d 130, 133 (Mo. Ct. App. 1982).

<sup>28</sup> The single formal complaint was brought before the Kansas Corporation Commission (“KCC”) by Boulevard’s consultant AES. That complaint and KCPL’s response thereto are presently pending before the KCC.

<sup>29</sup> Complaint, at ¶ 17.

STORMS report represents KCPL's most detailed cost data for the projects, and quite frankly, contains substantially more information than KCPL is legally required to disclose. In addition, KCPL has met, spoken with by telephone, and exchanged numerous e-mails with representatives from AES and Boulevard concerning KCPL's estimate of the costs of Boulevard's requested relocations. AES, who has a financial incentive to reduce Boulevard's cost of the relocation projects, simply wants Boulevard to pay less than KCPL's estimated cost for the projects.

47. Because KCPL did not learn until recently that Boulevard had changed its mind and now seeks to have KPCL relocate its Bellevue facilities underground, KCPL has not yet generated a STORMS report for that project. It would take several weeks and significant manpower to generate such a report. Because it appears from past communications with Boulevard that it would no longer want to pursue the undergrounding option if it were required to bear the costs thereof, KCPL has not expended the resources necessary to fully design and calculate the cost of that option while the responsibility-for-payment issue is pending.

48. Boulevard bears the burden of demonstrating by a preponderance of the credible evidence that KCPL's Commission-approved tariffs are not just and reasonable. Boulevard's vague and unsubstantiated allegations do not, nor cannot, satisfy this burden. Consequently, the provisions of KCPL's Commission-approved tariffs must stand. Furthermore, contrary to Boulevard's unsubstantiated allegations, KCPL has provided extremely detailed information to Boulevard concerning the cost of the relocation projects. For these reasons, the Commission should either dismiss this subpart of Count II of the Complaint outright, or deny Boulevard the relief it seeks related thereto.

**C. The Amount KCPL Proposes To Charge Boulevard For The Relocation Of KCPL's Facilities To Accommodate Boulevard's Expansion Project Is Just And Reasonable.**

49. Boulevard alleges that KCPL's estimation of the cost of the Bellevue and 26<sup>th</sup> Street relocation projects may not be "fair, just, reasonable and nondiscriminatory."<sup>30</sup> Boulevard proffers several unsubstantiated allegations in support of its claim that KCPL's cost estimates may not be just and reasonable. Boulevard raises, for example, vague and unsupported allegations concerning KCPL's allocation of overhead costs to such projects,<sup>31</sup> KCPL's design of the relocation projects,<sup>32</sup> and KCPL's gross up for Contribution in Aid of Construction ("CIAC").<sup>33</sup> Given the vague and unsubstantiated nature of Boulevard's claims, it is difficult for KCPL to respond to Boulevard's allegations. It is clear, however, that such vague and unsubstantiated claims cannot and do not satisfy Boulevard's burden to demonstrate that KCPL actions are unjust, unreasonable, or discriminatory.

50. The cost data in STORMS is updated frequently. Moreover, KCPL has compared the cost estimates prepared by the STORMS software package to the actual costs of projects it has undertaken. Such comparisons have demonstrated that STORMS is a very accurate cost-estimating tool. If anything, STORMS has a slight tendency to underestimate the cost of projects due to the difficulty of quantifying the real-world complexities of construction that KCPL encounters in the field, *e.g.*, encountering significant amounts of rock while boring or digging or delays or difficulties resulting from inclement weather.

51. Boulevard also appears to assert that KCPL is adding more facilities than are necessary to the relocation projects, which according to Boulevard, would force Boulevard to

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<sup>30</sup> Complaint, at ¶ 24.

<sup>31</sup> Complaint, at ¶ 24.

<sup>32</sup> Complaint, at ¶¶ 25 and 29.

<sup>33</sup> Complaint, at ¶ 26.

pay for facilities that benefit KCPL's other customers.<sup>34</sup> Ironically, this is precisely the type of subsidization that Boulevard requests that the Commission mandate here. Boulevard wants KCPL's other ratepayers to bear the cost of relocating KCPL's facilities for the sole benefit of Boulevard—to accommodate Boulevard's expansion project and to improve the view from its new conference center. That observation aside, Boulevard's allegation of such subsidization is not true.

52. With respect to relocating KCPL's facilities underground, it is critical to realize that underground facilities are inherently different than overhead facilities. KCPL's proposed underground facilities replicate the pre-existing overhead facilities to the greatest extent possible. KCPL acknowledges, however, that the new relocated facilities will likely not be identical to the pre-existing overhead facilities—nor should they be. Underground facilities are inherently different than overhead facilities. KCPL based its design and cost estimates on approved KCPL standards, design requirements and equipment. The differences between the underground facilities and the pre-existing overhead facilities are entirely attributable to relocating the facilities underground. Similarly, KCPL's plan to relocate its facilities on 26<sup>th</sup> Street at Boulevard's request replicates KCPL's existing facilities on 26<sup>th</sup> Street to the greatest extent possible. Boulevard has not demonstrated by a preponderance of the credible evidence that KCPL is requesting that Boulevard pay for facilities that were not necessitated by Boulevard's request for KCPL to relocate its facilities on Bellevue and 26<sup>th</sup> Street.

53. Boulevard also makes the following unsubstantiated allegation concerning KCPL's cost estimate for relocating its Bellevue facilities underground: "An additional unjust and unreasonable expense being proposed by KCPL relates to taxes on [CIAC]."<sup>35</sup> This

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<sup>34</sup> Complaint, at ¶¶ 25 and 29.

<sup>35</sup> Complaint, at ¶ 26.

statement is not only wholly unsupported, but is also inaccurate. The portion of KCPL's cost estimate for relocating its facilities on Bellevue underground attributable to KCPL's tax liability for the CIAC is entirely appropriate here. The Internal Revenue Service ("IRS") has consistently ruled that a relocation payment is considered a taxable CIAC if the relocation directly benefits the customer of the utility, even though the relocation may at the same time satisfy community esthetics or public safety interests.<sup>36</sup> Undergrounding KCPL's facilities on Bellevue so that Boulevard's view from its new conference center will not be impeded is clearly for the direct benefit of Boulevard. Consequently, KCPL's tax allocations to Boulevard attributable to the CIAC are correct.

54. As such, the resolution of this CIAC-related issue necessitates an interpretation of the Internal Revenue Code, and the regulations that the IRS has promulgated thereunder. KCPL maintains that such interpretations would be better left to the IRS. KCPL would be willing to seek a letter ruling from the IRS on Boulevard's behalf and at Boulevard's expense, confirming that the issue is being handled appropriately.

55. Boulevard bears the burden of demonstrating by a preponderance of the credible evidence that KCPL's cost estimates for the relocation projects are not just and reasonable. Boulevard's vague and unsubstantiated allegations do not, nor cannot, satisfy this burden. Consequently, the Commission should either dismiss this subpart of Count II of the Complaint outright, or deny Boulevard the relief it seeks related thereto, including its request for the Commission to open a formal investigation concerning the cost estimates KCPL provided Boulevard.

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<sup>36</sup> Cumulative Bulletin Notice 87-82, 1987-2 C.B. 389 states that "a relocation payment is not considered a CIAC where the relocation is undertaken for either reasons of community aesthetics or in the interests of public safety **and does not directly benefit particular customers of the utility.**" (emphasis added).

**D. The Commission Should Not Require KCPL To Permit Its Customers To Construct Substantial Distribution Facilities On KCPL's System.**

56. Boulevard requests that the Commission order KCPL to allow Boulevard to use its own contractors to relocate KCPL's facilities.<sup>37</sup> There are significant practical reasons why the Commission should not require KCPL to permit its customers to construct substantial delivery facilities that KCPL will own and operate. KCPL is held solely responsible for the operation, maintenance and continued reliability of its facilities. Unlike Boulevard or its consultant AES, KCPL is required under Missouri law to provide "safe and adequate" electric service.<sup>38</sup> As such, KCPL should decide the extent of its direct involvement in the design and construction of its facilities.

57. KCPL's policies are not overly broad or unreasonable. KCPL, for example, allows its customers at their discretion to construct the underground conduits for KCPL's facilities. In fact, KCPL's cost estimates for Boulevard assume that Boulevard will provide the necessary underground conduits.

58. As with its other allegations in the Complaint, Boulevard bears the burden of demonstrating by a preponderance of the credible evidence that KCPL's practices violate KCPL's tariffs or other Missouri law. Boulevard has not met this burden. Boulevard has done nothing more than to offer the blanket assertion that market forces could theoretically reduce the cost of relocating KCPL's facilities. In addition to being legally inadequate, Boulevard's assertions do not take into account KCPL's statutory obligations as a public utility to maintain its assets and safely and adequately serve its customers.

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<sup>37</sup> Complaint, at ¶ 27.

<sup>38</sup> Mo. Rev. Stat. § 393.130(1).

59. For these reasons, KCPL respectfully requests that the Commission reject Boulevard's request that the Commission compel KCPL to permit its customers at their discretion to construct substantial delivery facilities that KCPL will own and operate.

**E. The Commission Should Dismiss As Wholly Unsubstantiated Boulevard's Miscellaneous Prayers for Relief.**

60. In addition to the prayers for relief discussed above, Boulevard includes a litany of additional requests for relief that are similarly not adequately supported by the Complaint. For example, Boulevard requests that the Commission direct KCPL (i) "to provide access to the records pertaining to all of KCPL line relocations in the past 5 years;" (ii) "to submit to the Commission for approval, a tariff outlining the costs, including all incidentals, and procedure to relocate an overhead line;" and (iii) "to submit to the Commission for approval an objective formula for calculating line extension and relocation costs and revenue credits therefore."<sup>39</sup> Not only are these requests for relief not justified by Boulevard's allegations in the Complaint, but they also appear to be well beyond the scope of KCPL's present dispute with Boulevard.

61. Boulevard has indicated in the Complaint that it needs to relocate KCPL's facilities as soon as possible. Even if the Commission granted these overly broad and unsupported requests for relief, the relief could not be implemented in time to affect Boulevard's current project. Moreover, it is not clear how Boulevard would derive any benefits from KCPL's "records pertaining to all of KCPL line relocations in the past 5 years." Consequently, these requests are irrelevant to the current proceeding and unlikely to lead to discoverable material.

62. Boulevard bears the burden of demonstrating by a preponderance of the credible evidence that its miscellaneous prayers for relief are necessary. Because the Complaint does not

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<sup>39</sup> Complaint, at pp. 15-16.

support those prayers for relief, Boulevard has not satisfied its burden. Consequently, the Commission should deny these miscellaneous requests for relief.

### **III. CONCLUSION**

63. For the foregoing reasons, KCPL respectfully requests that the Commission either dismiss the Complaint outright, or deny Complainants the relief they seek therein. The Complainants have not met their burden on demonstrating by a preponderance of the credible evidence that KCPL's tariffs or actions are not just and reasonable or are otherwise contrary to Missouri law.

Respectfully submitted.



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing response was served via e-mail or first class mail, postage pre-paid, on this 2<sup>nd</sup> day of March 2006, upon:

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