BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan	)	**Case No. ER-2009-0089**
In the Matter of the Application of Aquila, Inc. dba KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service.	)	**Case No. ER-2009-0090**
In the Matter of the Application of Aquila, Inc. dba KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Steam Heating Service.	)	**Case No. HR-2009-0092**

RESPONSE OF PUBLIC COUNSEL AND INDUSTRIAL INTERVENORS TO ORDER AND NOTICE AND MOTION FOR LEAVE TO FILE OUT OF TIME

COME NOW the Office of the Public Counsel and Industrial Intervenors[1] in response to the Commission's Order and Notice state as follows:

1. On September 5[2] Kansas City Power & Light Company, and Aquila, Inc. (the Companies) filed general rate increase cases.

2. On September 12, the Commission issued its Order and Notice, which directed parties (and those hoping to become parties) to respond to the Companies' proposed test year and true-up by October 14, before the first prehearing conference. It also, as modified by the Commission's October 23 order, directed parties to file a proposed procedural schedule or schedules by October 29. Beginning at the prehearing conference on October 15, a number of

[1] In the three 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.

[2] All dates herein are in calendar year 2008 unless otherwise noted.

the parties spent a great deal of time discussing a number of scheduling issues (the true-up date, testimony filing dates, etc.) that required resolution if an agreed-upon procedural schedule was to have been filed. Those discussions continued until approximately noon on October 28 when it appeared an impasse had been hit and no agreement would be reached. Public Counsel,[3] Industrial Intervenors, and the Staff were able to agree on the two proposed schedules that the Staff filed on October 29. There was some confusion, at least on the part of undersigned counsel, as to whether Staff would file proposed schedules only on Staff's behalf or on behalf of other parties as well.

3. As the Commission is aware, scheduling all the events that must be accomplished in one rate case is challenging. Scheduling for three cases simultaneously is extremely challenging. These challenges are increased by KCPL's requested effective date of August 5, 2009 and its requested true-up date of April 30, 2009. The parties attempted to develop a schedule that accommodates KCPL's requested true-up date and requested effective date, while still allowing the parties and the Commission adequate time. Ultimately, the parties to those discussions – with the notable exception of KCPL – concluded that an April 30, 2009 true-up date is simply incompatible with an August 5, 2009 effective date. Public Counsel and the Industrials do not object to the April 30, 2009 true-up date, so long as the Commission suspends (or KCPL voluntarily extends) the effective date of the tariffs until September 5, 2009.

4. The Commission has authority to suspend the tariffs. The tariffs that the Companies filed to initiate this case bear an effective date of August 5, 2009. Section 393.150.1 RSMO 2000 provides that:

[3] On a very minor point, Public Counsel would have preferred a somewhat earlier date for the circulation of a preliminary list of issues. Public Counsel would prefer that this list be circulated at the end of the settlement conference.

> Whenever there shall be filed with the commission … any schedule stating a new rate or charge, … the commission shall have, and it is hereby given, authority … to enter upon a hearing concerning the propriety of such rate … and pending such hearing and the decision thereon, the commission … may suspend the operation of such schedule and defer the use of such rate … but not for a longer period than one hundred and twenty days beyond the time when such rate … would otherwise go into effect….[4]

Although Section 393.150 does not expressly mention steam heating companies, it is made applicable to such companies by Section 393.290.

5. Because the true-up cut-off is necessarily tied to the effective date and all the other dates, and because the parties were engaged in discussions about all of those issues until well past the October 14 deadline for responses to the Companies' true-up request, good cause exists to allow Public Counsel and Industrial Intervenors to file its response late. Public Counsel and Industrial Intervenors do not object to the requested April 30, 2009 true-up date so long as a schedule is established consistent with Staff's proposed schedule with a September 5, 2009 effective date, and so long as the "true-up package" is consistent with that set forth in Staff's October 29 filing. Public Counsel and Industrial Intervenors do object to a true-up that trues-up certain items through one date and other items through another date. The only way that a true-up can (mostly) comply with the matching principle is if an appropriate list of items is trued-up to the same time. An unbalanced true-up violates the requirement that rates be set based upon an examination of all relevant factors.

6. Public Counsel and the Industrial Intervenors oppose the various options that the Companies suggest in their filings on October 29, and disagree with a number of misleading statements that the Companies make in those filings. First, the Companies state that the parties

[4] Section 393.150.2 allows the Commission to further suspend a tariff by six additional months after the initial 120-day suspension. Under the circumstances of this case, where the tariffs would go into effect (barring suspension) eleven months after their filing, it seems unlikely that suspension longer than 120 days would be necessary.

were unable to agree on procedural schedules "primarily due to the uncertainty created by the appeal of a rate case involving The Empire District Electric Company." The Companies are apparently referring to mandamus actions (not appeals of a rate case) in which the Missouri Supreme Court clarified that parties must be allowed sufficient time to seek rehearing of Commission orders. Far from creating uncertainty as the Companies assert, the Supreme Court confirmed the law as most practitioners had long understood it.[5] What KCPL probably means is that the Commission's timetable at the end of a rate case may be different now than it was before the Supreme Court ruled in the recent mandamus actions. The Companies were apparently unaware of the details of those mandamus actions when they filed these rate cases and requested their true-up dates and effective dates, but the Companies' lack of awareness does not create uncertainty.

7. Second, the Companies assert that the Staff "concurred with the April 30, 2009 true-up date." Public Counsel and the Industrial Intervenors certainly cannot speak for the Staff, but the Staff's October 14 pleading speaks for itself. Staff clearly stated that it would not object to the April 30, 2009 date **only if:**

> the parties in this case are able to agree upon the use of a 2007 test year, September 30, 2008 update date and April 30, 2009 true-up date, and the parties are able to agree to an appropriate procedural schedule in light of a 2007 test year, September 30, 2008 update date and April 30, 2009 true-up date....

Obviously, Staff understood and anticipated that there could be difficulties in agreeing on an appropriate procedural schedule in light of the Companies' requested dates.[6] Far from agreeing

[5] Almost by definition, a Supreme Court ruling on a practice issue clarifies practices rather than creating uncertainty. Regardless of whether a practitioner agrees with the Supreme Court, what it says goes, and there is no longer uncertainty about that aspect of practice.

[6] The difficulty that the Staff and the other parties had in these case in responding to a requested true-up before the initial prehearing conference indicates that it might be wise in future cases to set the deadline for such responses a bit later to coincide with the filing of the proposed procedural schedule.

with the Companies' proposal, Staff forewarned the Commission that there might be difficulty in "agree[ing] to an appropriate schedule" within the Companies' requested parameters, and expressly conditioned its acceptance of the Companies' request on the parties being able to work through those difficulties.

8. Public Counsel and the Industrial Intervenors oppose the Companies' first proposed schedule (Attachment 1 to the October 29 pleadings). This proposal gives parties other than the Companies too little time to prepare direct testimony and **way** too little time to prepare surrebuttal testimony. The Companies filed their cases when they were ready after many months of preparation, and on the exact date that maximized their chances of getting new rates in effect as soon as possible after new plant additions come on line. (This point is addressed in more detail in the next paragraph.) Staff has no choice but to complete its audit and file its direct case in a few months after a rate case is filed. As a practical matter, all the other parties representing ratepayers or groups of ratepayers rely on Staff for this work; no other entity in the state has the resources in rate cases to put together a direct case in an electric utility rate case. Typical rate case schedules in electric cases afford Staff (and the other parties) **at least** five months from the filing to complete the audit and file direct testimony. The Companies' first proposed schedule affords less than five months to do three or four audits and four separate revenue requirements (for the various KCPL and KCPL-GMOC entities). In a typical case, the utility has the most extensive rebuttal filing. In the Companies' first proposed schedule, they have allowed themselves four and a half weeks for this filing, while affording barely one week for other parties to file responsive surrebuttal testimony on rate design, and barely two weeks to file responsive surrebuttal testimony on revenue requirement. Moreover, they have proposed that local public hearings be conducted simultaneously with a settlement conference, all while parties are trying to

put together and file rebuttal testimony. It takes at least fifteen days for the Companies to close their books and provide accounting data to other parties, and more realistically it will take twenty days or more. But the Companies in their first proposed schedule would have parties filing true-up testimony only twenty-one days after the end of the true-up period.[7] This is beyond ambitious; it is likely to be totally impossible. Next, the Companies propose that true-up rebuttal testimony be filed on Memorial Day, with hearings beginning the day after. While not totally impossible, this is certainly ambitious. The Companies' proposed briefing schedule is likewise unworkable. The Companies propose that parties file their first brief (for KCPL) on May 1, while the evidentiary hearing (for KCPL-GMOC steam) is still going on. From beginning to end, this schedule is a disaster.

9. The Companies' second proposed schedule (which is really two different schedules that the Companies can flip between at their sole discretion) is not much better. Because utilities are able to time their rate case filings, they have many advantages over the other parties. First, they need not file until they are ready, and they generally know many months (or even years) in advance of filing a rate case when the new plant they will seek recovery for will be in service, what accounting issues they will want to pursue, etc. Utilities can staff up or hire consultants if their desired timing necessitates these actions. All the other parties (especially the Staff, which has to conduct an audit and prepare a complete direct case) have to react to the utility's timing. There is no option for other parties to ask for a rate case to be filed a few months later than when the utility wants, there is little realistic opportunity for parties to hire additional

[7] The Companies have proposed three somewhat different schedules for: 1) KCPL; 2) KCPL-GMOC electric; and 3) KCPL-GMOC steam. While the discussion here focuses mostly on the KCPL schedule, they all suffer from the same general flaws discussed here; some are slightly worse and some are slightly better. As an example of a worse schedule, the KCPL-GMOC steam schedule would have the parties filing true-up direct testimony on May 18, before the data on which the testimony is to be based will even be available.

staff, and only limited ability to hire consultants. But perhaps the greatest advantage that the utility has is the ability of a utility to time the filing of a rate case. Generally speaking, and definitely in the cases here, utilities want to get new rates into effect as soon as possible. This desire is sometimes at odds with the need to be sure that a major plant addition is in service so the utility can begin earning a return on it. The utility, in its sole discretion, can time its filing to match the date on which it calculates that is late enough to offer the very best odds of getting the plant addition included in the true-up, but early enough that the rate increase goes into effect at the very earliest date possible. The utility has all the information that it can balance these two facets of rate case timing. Here, the Companies seek to greatly enhance this advantage. They want to preserve the option to get a rate increase at the beginning of August 2009 unless it becomes clear that their plant additions will not be able to meet a March 31, 2009 true-up date. Only after the scheduled Iatan 1 outage is finished and the Companies have done initial testing are they willing to commit to a true-up date; up until that point, they want the option to flip to an April 30, 2009 true-up date. Not only does this proposed procedure – which has never before been suggested by a utility in Missouri – give even more advantage to the utility which already has most of the advantages in rate case, but it makes the schedule as unworkable (albeit for different reasons) as the Companies' first proposed schedule. Among its many other flaws, if the Companies elect on January 20, 2009 to flip to an April 30, 2009 true-up date, local public hearings will have to be rescheduled on less than a month notice. All of the testimony filing dates, which the Commission always sets at the very beginning of the case to avoid surprises and disputes, will change two thirds of the way into the case. The Commission will have to reserve five weeks of hearing dates even though the parties anticipate needing four or less. Perhaps most significantly for the parties other than KCPL, we will not know how to allocate our time next

spring and early summer until the Companies decide which schedule they want. The other parties, and Public Counsel most of all, need to address a lot of cases. The Companies, while they may have some other minor matters before the Commission, really just have their rate cases. Other parties will have many other important cases to try to balance, a struggle even without the Companies holding everyone hostage schedule-wise until they see how the plant additions are coming along by the end of next January.

WHEREFORE, Public Counsel and the Industrial Intervenors respectfully request that the Commission: 1) reject the Companies' various proposed procedural schedules; 2) adopt the schedule proposed by the Staff that has a September 5, 2009 effective date; 3) suspend the tariffs until September 5, 2009; and 4) accept Public Counsel's and the Industrial Intervenors' position on the Companies' proposed true-up out of time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 30th day of October 2008.

/s/ Lewis R. Mills, Jr.