

**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 ) Case No. ER-2010-0355  
Electric Service to Continue the )  
Implementation of its Regulatory Plan )

In the Matter of the Application of KCP&L )  
Greater Missouri Operations Company for ) Case No. ER-2010-0356  
Approval to Make Certain Changes in its )  
Charges for Electric Service )

**REPLY BRIEF OF THE MISSOURI RETAILERS ASSOCIATION**

**INTRODUCTION**

Let us begin with some definitions. Webster's New World Dictionary of the American Language, 2<sup>nd</sup> College Edition, 1980, page 664, defines "hindsight" as "ability to see, after the event, what should have been done: opposed to FORESIGHT." The same tome, page 1348, defines "snippet" as "a small, snipped piece; small scrap or fragment, specif. of information, a writing, etc." KCP&L's use of these terms in its brief stands the definitions on their head.

The Commission is required to find facts from the evidence presented to it at the hearing. Section 536.090; Section 393.150, RSMo. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Section 490.065.1, RSMo. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003). Mr. Drabinski has a B.S. in Electrical Engineering, an M.B.A. from the Wharton School at the University

of Pennsylvania, and 38 years experience in the management and evaluation of utility matters, and particularly electrical generation.

The evidence in the case is extensive—comparative data, budgets, audits, consultants’ reports, KCP&L staff reports, budgets, contracts, change orders, thousands of pages of pre-filed testimony and evidentiary transcripts. KCP&L did not object to Mr. Drabinski’s qualification as an expert, nor did it object to the sufficiency or reasonableness of the evidentiary basis for his opinions. In short, in light of KCP&L’s failure to object to Mr. Drabinski’s testimony that testimony constitutes competent and substantial evidence, the kind of evidence upon which the Commission is entitled to base its decision in this case. Mr. Drabinski’s testimony is not only sufficient to explode the presumption of KCP&L’s prudent management of the Iatan project, but is a firm basis for the Commission to adopt the disallowances that he proposes.

KCP&L’s brief continues its pattern of misdirection on this issue. It touts the KCC decision that is based on different legal standards; suggests (KCP&L Brief, p. 19-21) that by coming in 16% over budget (by its calculations) that no prudence adjustment is warranted; and continues its reliance on post hoc self-serving explanations, rather than contemporary evidence. In contrast, Mr. Drabinski’s adjustments were based on the contemporary evidence of KCP&L staff, Ernst and Young audits, STS management reviews, Schiff Hardin reports, and the regular records of the problems recorded at the time by the personnel managing the project.

## **ARGUMENT**

### **A. Budget Matters**

We are in Missouri now, not Kansas. As one of Missouri’s native’s sons observed, “There are lies, damned lies and statistics,” and much of the discussion of budgets falls in the latter category.

Pursuant to its pledge in the regulatory plan, KCP&L provided in December, 2006 (four months late) to the parties and the Commission a “definitive estimate” of the Iatan 2 project costs, which at the time denominated a Control Budget Estimate (CBE). The CBE at that time estimated the cost of the construction to be \$1.465 billion, with a contingency of \$220 million, for a total of \$1.685 billion. These estimates included the additional costs KCP&L discovered after sending the turbine building bust. Subsequently, KCP&L chose to lease railroad cars rather than purchase them, which dropped approximately \$50 million from the budget. Effectively, KCP&L reduced the expected cost of the project to \$1.415 billion, and increased the contingency to \$270 million. (Archibald Tr. 2134:17 to 2135:22)

In its filing in December, 2006, KCP&L did not alert the Commission or the parties that its definitive estimate, the CBE, was substantially unreliable because the project was only 20 to 30 percent engineered. KCP&L did boast at the time that more than \$1 billion of the expected \$1.465 billion cost of the plant was already under contract.

KCP&L claims that the startling run-up in costs are due to “design maturation.” If this were the true reason for the cost increase, one would have expected KCP&L, as Staff clearly did and as KCP&L claims the ability to do, to lay out in an easily comprehensible table the increase in quantities and prices for the project sub-components between the December, 2006, CBE and the ultimate cost of the project. KCP&L did not do so in its testimony, and did not do so in its brief.

Finally, KCP&L intimates (KCP&L Brief, pp. 20-21), without citation to any authority, that because the unanticipated costs on the Iatan 2 project were not as horrendous as those on the Callaway and Wolf Creek nuclear projects, the Commission should not otherwise require KCP&L

to substantiate the prudence of its actions. KCP&L never suggests why this position is consistent with application of the prudence standards.

## **B. RED HERRINGS**

Beginning at page 106 of its brief, KCP&L suggests that Mr. Drabinski has planted red herrings to mislead the Commission. The characterizations are inappropriate and inaccurate.

- KCP&L states that Mr. Drabinski “abandoned” the plant comparisons as a basis for making an adjustment, and that this constitutes a red herring. KCP&L is wrong. First, Mr. Drabinski never adopted the plant comparison approach, so it could not be abandoned. Second, the plant comparison, like the other methodologies described in Mr. Drabinski’s direct testimony, was presented as a corroboration of what Mr. Drabinski recommends based on specific adjustments to specific costs. This is no different than cost of capital witnesses providing the Commission with a Capital Asset Pricing Model (CAPM) approach, even though both the Commission and the expert witnesses invariably rely on a discounted cash flow approach to price the cost of capital.
- KCP&L faults Mr. Drabinski for discussing budget estimates prior to the CBE. KCP&L correctly observes that Mr. Drabinski notes that it has “some significance.” It is certainly reasonable to reference earlier budget estimates to reflect both the changing scope of the project as well as the changing estimates of costs.
- KCP&L suggests that it is a red herring for Mr. Drabinski to point out that KCP&L mismanaged the project “early on,” while acknowledging that KCP&L achieved items on the critical path of the project. KCP&L’s allegation that this opinion is

unsupported ignores the contemporary reports and documentation that Mr. Drabinski lays out on pages 6-21 of his surrebuttal testimony (Drabinski Surrebuttal, Ex. 2602).

The fact Mr. Drabinski acknowledges successes that KCP&L achieved only bolsters the reliability of his observations of KCP&L's management failings on the project.

- It was not Mr. Drabinski who suggested problems with Burns and McDonnell's performance on the project. Those problems are reflected, again, in the contemporary reports and audits of KCP&L's own personnel and those of its consultants. (Ex. 2602, pp. 6-21).
- KCP&L suggests that Mr. Drabinski has proposed an adjustment based on KCP&L's decision to pursue the Iatan 2 project as a multi-prime versus an engineer, procure, construct (EPC) approach. Such is not the case. Mr. Drabinski does not fault the multi-prime approach nor the decision to fast track the project. Rather, he discusses those elements in the context of the advice that KCP&L received in 2005 and 2006 from its outside consultants which emphasized the need for KCP&L to provide strong project management from persons with substantial experience in management of large construction projects as well as the need to structure, manage, and coordinate the activities of the various contractors to ensure that the foreseeable problems of labor productivity were properly controlled. Mr. Drabinski objected not to the approach KCP&L selected, but rather to the weaknesses in the contracts it executed and its management of the execution and coordination of those contracts. (Tr. 1675:12 to 1701:18).

- Mr. Drabinski forthrightly acknowledged that his use of the word “specious” was ill-considered. Mr. Drabinski alleges and supports his opinion that the decision to retain key witnesses was both late and pricey. Mr. Meyer disagrees. The disagreement does not make either Mr. Drabinski’s or Mr. Meyer’s position a red herring.
- As noted above, the “turbine building bust” and its cost were identified prior to publication of the CBE. The costs of the turbine building were reflected in the CBE. Certainly KCP&L has not quantified any costs for the turbine building in excess of those in the CBE, other than the vague suggestions of “design maturation.” The turbine building bust, as noted in MRA’s initial brief, is particularly significant as evidence that KCP&L’s project management skills at the time were sadly lacking.
- The boiler island (Alstom) and turbine generator (Toshiba) came in at costs close to those in the CBE. Balance of plant encompasses everything other than those two EPC contracts, and that portion of the project cost went from \$350 million to \$1 billion.
- KCP&L suggests that Mr. Drabinski’s allegation that KCP&L could not manage a multi-prime project is a red herring because KCP&L contests that assertion. This proposition is simply nonsensical.
- The contracts with Kewit and Alstom required the contractors to gather, maintain and provide to KCP&L labor productivity statistics. Those contracts did not provide any means for KCP&L to manage labor productivity that was substandard and below contract expectations. (Ex. 2601, Sch. WPD-31; Sch. WPD 35). Further, Mr. Drabinski notes the one page dispute resolution in the Alstom contract, which did not

even require Alstom to continue work during any arbitration proceedings. KCP&L witness Roberts makes clear that KCP&L knew that Alstom was particularly litigious, and that the contract for the boiler island was considered below cost. Thus, KCP&L was reasonably on notice that disputes with Alstom were likely during the term of the contract. To address this, the Alstom contract has a dispute resolution provision of less than one page that does not even require continued prosecution of work during any arbitration. (Ex. 2601, Sch. WPD-31, p. 40). This is the crux of the problems that KCP&L resolved during the construction process by throwing money at Alstom and Kewit through change orders and new incentives.

- KCP&L's failure to timely implement the advice of its outside consultants is reflected in the litany of contemporary documents provided in summary fashion by Mr. Drabinski's surrebuttal testimony. The evidence of KCP&L witnesses' post hoc explanations does not convert Mr. Drabinski's observations into a red herring.
- KCP&L, not MRA, engages in hindsight to make and support its case. Mr. Drabinski reviewed, summarized, relied upon and cited the advice and reports given to KCP&L at the time KCP&L was managing the project. KCP&L's case now purports to explain, belittle and minimize those contemporary reports.
- There can be no doubt that KCP&L understood the responsibilities it would shoulder under a multi-prime approach to the Iatan project. It knew the risks that it would be undertaking, and acknowledged those substantial risks to the Board of Directors in November, 2005. (Ex. 2601, Sch. 14, pp. 23-67). Its consultant, Schumacher, advised KCP&L that possible problems with the availability of skilled trades, and the

productivity problems that requiring additional hours would entail. (Ex. 2601, Sch. WPD-28). The contemporary reports (Ex. 2602, pp. 6-21) document the problems as experienced and reported by the participants at the time. Drabinski gives full faith and credit to these observations; KCP&L downplays and explains them after the fact.

### **C. Snippets**

KCP&L presents its case as a series of still photographs—examine one contract then move to a change order to the next change order to the next change order; move from one budget to a reforecast to the next reforecast. In so doing, KCP&L diverts the Commission from the very nature of its responsibilities in the Iatan projects, which is an unbroken continuation of management responsibility. KCP&L was responsible for the negotiation of each of the contracts required to complete the project; it was responsible for managing the execution of those contracts by the individual contractors; and it was responsible for the coordination of the activities of each and all contractors to maintain the schedule for the completion of the project.

The Iatan construction project was a real-time phenomenon, reflecting the overall responsibility of KCP&L to manage the project. An understanding of that project and its problems is best gathered from the composite of the reports and audits reflecting the observations of those directly involved in the real-time work. (Ex. 2602, pp. 6-21). Those documents, which are the support and basis for Mr. Drabinski's adjustments, are far more reliable than the after-the-fact memoirs of the higher echelon.

#### **D. Nexus**

KCP&L suggests (KCP&L Brief, pp. 108-111) MRA has failed to provide a nexus between KCP&L's imprudent management of certain aspects of the project with the adjustments that it proposes. Such is not the case.

Mr. Drabinski, relying on the reports provided by Ernst and Young, Strategic Talent Solutions, Schumacher, Schiff Hardin, KCP&L's project team, and KCP&L's audit staff, establishes that KCP&L knew the risks it willingly assumed in electing to proceed on a multi-prime approach (Ex. 2601, pp. 54-160). He succinctly summarizes these in a table in his surrebuttal testimony. (Ex. 2602, p. 37).

If KCP&L means to suggest that an adjustment must be based on specific, line-item entries, it provides no authority for that assertion. That is, there is no evidentiary requirement that MRA specify that welder, John Smith, on July 15, 2008, unnecessarily spent a quarter of an hour traveling from an overcrowded, remote parking lot to a crowded work site, where crowded conditions reduced his work efficiency by 18% and assign a cost to the incident. The failure to take such an approach does not diminish MRA's evidence in the least.

No party challenged Mr. Drabinski's credentials. No party challenged the documents on which Mr. Drabinski based his opinion. No party challenged the reasonableness of the contracts, reports, and audit reports upon which Mr. Drabinski relied in making his adjustments, nor did anyone challenge that experts rely on such data. If there were evidentiary objections to any of Mr. Drabinski's testimony, they should have been raised at the hearing, and were waived.

Section 490.065, RSMo, explicitly states that experts such as Mr. Drabinski are entitled to assist the trier of fact by providing the testimony in the form of an opinion. Mr. Drabinski has done

just that. He freely acknowledged that his opinion was based upon his knowledge, skill, education, and experience of more than 30 years in the industry, coupled with the evidence he reviewed and provided at hearing.

### CONCLUSION

The evidence in this case fully supports the adjustments proposed by Mr. Drabinski, KCP&L's post hoc justifications to the contrary notwithstanding.

In the separate section of its brief labeled, "Write Down Effect," KCP&L suggests that the Commission should make no prudence adjustment because of the impact on KCP&L and its shareholders. This suggestion is no more and no less that, despite the evidence supporting the adjustments, the Commission ignore statutory mandate to balance ratepayer and shareholder interests, Section 386.610, RSMo, and shift the consequences of KCP&L's management problems from its shareholders to ratepayers. The ratepayers have supported KCP&L's credit ratings by the additional cash of the regulatory amortizations during the execution of the project; the Commission should not force ratepayers to bear the shareholders' responsibilities of the shortcomings of the management that those shareholders selected.

For all of the foregoing reasons, Missouri Retailers Association asks the Commission to adjust the costs of the Iatan projects consistent with the testimony it has provided.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Reply Brief of the Missouri Retailers Association were sent by electronic transmission, this 18<sup>th</sup> day of March, 2011, to the following:

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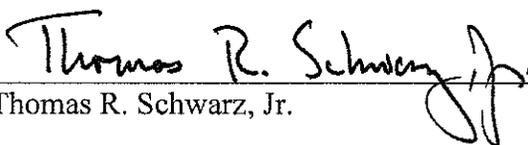
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