

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

In the Matter of the Application of)
Kansas City Power & Light Company for)
the Issuance of an Accounting Authority) Case No. EU-2012-0130
Order relating to its Electrical Operations and)
for a Contingent Waiver of the Notice Requirement)
of 4 CSR 240-4.020(2))

**RESPONSE IN OPPOSITION TO MOTION TO DISMISS
AND IN SUPPORT OF MOTION TO CONSOLIDATE**

Kansas City Power & Light Company (“KCP&L” or “Company”) states the following as its Response in Opposition to the Motion to Dismiss and in Support of the Motion to Consolidate filed by the Staff of the Missouri Public Service Commission (“Staff”) on March 21, 2012:

A. Staff’s Motion to Dismiss Should Be Denied.

1. In its Motion to Dismiss, Staff asserts that KCP&L improperly applied for an Accounting Authority Order (“AAO”) because the costs that it seeks to defer were incurred during the test-year of its current rate case, No. ER-2012-0174. Staff also argues that since some of the costs KCP&L incurred resulted from reduced Off-System Sales (“OSS”) revenue and increased fuel costs assigned to OSS, they are, therefore, not recoverable because they are “ungenerated revenues.” Staff urges the Commission to dismiss KCP&L’s December 19, 2011 Application for an Accounting Authority Order (“Application”).

2. Nowhere does Staff assert that the costs KCP&L seeks to defer are not extraordinary and nonrecurring, the only elements that must be proven to obtain an AAO. See State ex rel. Office of the Public Counsel v. PSC, 858 S.W.2d 806, 810-11 (Mo. App. W.D. 1993), affirming In re Missouri Public Service, No. EO-91-358, 129 P.U.R.4th 381, 385 (Mo. P.S.C. 1991) (finding that AAO decisions “are best performed on a case [by case] basis”). Consequently, good cause does not exist for this case to be dismissed. See 4 CSR 240-2.116(4).

3. Staff fails to assert any proper grounds for dismissal of KCP&L's Application. The Commission's rule prescribing the conditions under which the Commission may dismiss a case is set forth in 4 CSR 240-2.116. Pursuant to that provision, an applicant may voluntarily dismiss an application, cases may be dismissed for lack of prosecution, a party may be dismissed from a case for failure to comply with any order issued by the Commission, and a case may be dismissed for good cause found by the Commission. Staff simply asserts that dismissal should be granted because the facts stated in KCP&L's Application purportedly (1) "fail to establish the necessity of an AAO" and (2) attempt to recover OSS revenues in what Staff describes as an "improper use of an AAO." However, these are not grounds for dismissal of an application brought before the Commission.

4. In fact, Staff cites no law whatsoever governing its Motion to Dismiss. KCP&L can only infer from Staff's allegations that it is seeking dismissal of KCP&L's Application for failure to state a claim on which relief may be granted pursuant to Missouri Rule of Civil Procedure 55.27(a)(6). See also 4 CSR 240-2.070(7) (which governs complaints but not applications). However, as the Supreme Court reiterated just last month: "When considering whether a petition fails to state a claim upon which relief can be granted, this Court must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader. The Court does not weigh the factual allegations to determine whether they are credible or persuasive. Instead, this Court reviews the petition to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." Bromwell v. Nixon, ___ S.W.3d ___, 2012 WL 556278 *2 (Mo. en banc Feb. 14, 2012).

5. In other words, a motion to dismiss for failure to state a cause of action is “solely a test of the adequacy of the petition.” Id. No attempt should be made to weigh the credibility or persuasiveness of the facts alleged. Instead, courts are to review petitions subject to a motion to dismiss in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. en banc 1993). This is because the law generally favors a trial on the merits. Jennings v. SSM Health Care St. Louis, 355 S.W.3d 526, 530 (Mo. App. E.D. 2011).

6. Applying this standard here, the Commission should deny the Motion to Dismiss. KCP&L has adequately pleaded facts showing that the costs that it seeks to defer are extraordinary and nonrecurring, the only elements that must be proven to obtain an AAO. See State ex rel. Office of the Public Counsel v. PSC, 858 S.W.2d 806, 810-11 (Mo. App. W.D. 1993). Nowhere in Staff’s Motion to Dismiss does it dispute KCP&L’s factual allegations. To the contrary, Staff admits that “the expenses in the case caused by the Missouri River flood may be extraordinary, unique and not recurring.” See Motion to Dismiss at ¶ 11.

7. Rather than offer the Commission any legal grounds for its motion, Staff simply recites its own past findings and conclusions in other cases of little relevance to this proceeding in an attempt to restrict the Commission’s exercise of discretion here. However, Commission is not bound by precedent, and, even if it were, the cases Staff cites to support its Motion to Dismiss are easily distinguishable from this case.

8. Missouri law has long held that state administrative agencies are specifically exempted from principles of stare decisis. State ex rel. GTE North, Inc. v. PSC, 835 S.W.2d 356, 371 (Mo. App. W.D. 1992); State ex rel. Churchill Truck Lines, Inc. v. PSC, 734 S.W.2d 586, 592-93 (Mo. App. W.D. 1987). Each case must be determined upon its own facts without

being rigidly constrained by prior agency decisions. Missouri Water Co. v. PSC, 308 S.W.2d 704, 718 (Mo. 1958). Any inconsistency or differences between current and prior decisions of the Commission are of no concern “so long as the action taken is not otherwise arbitrary or unreasonable.” GTE North, 835 S.W.2d at 371.

9. Despite this well-established principle of Missouri law, Staff relies heavily on two prior Commission decisions for its arguments that KCP&L’s Application is improper because the Company incurred the costs it seeks to defer during the test-year being utilized in its pending rate proceeding, Case No. ER-2012-0174, and because some of the costs it incurred resulted from reduced OSS revenue and increased fuel costs assigned to OSS. Since the Commission is not bound by its prior decisions, Staff’s effort to bind the Commission in this case is particularly misguided because the facts in this proceeding are distinguishable from the decisions Staff cites.

10. While Staff is correct that the Commission ultimately did deny St. Joseph Light & Power Company’s (“SJLP”) application for an AAO in a 2000 case, finding that SJLP could have filed an “immediate rate case” after the relevant incident, the Commission reached that conclusion only (a) after the parties filed direct, rebuttal, surrebuttal, and cross-surrebuttal testimony, (b) after the Commission held an evidentiary hearing, and (c) after the parties filed two rounds of post-hearing briefs. In re Application of St. Joseph Light & Power Co. for the Issuance of an Accounting Authority Order, Case No. EO-2000-845, Report and Order at 3-4 (Dec. 14, 2000). The ultimate decision reached in the SJLP case is not binding on the Commission in this case, and it certainly does not stand for the proposition that it is proper to dismiss an AAO application merely because the Company has filed a rate case in the interim. KCP&L deserves to be heard by the Commission, just as SJLP was heard.

11. Furthermore, the Commission's decision in In re Application of Southern Union Co. for the Issuance of an Accounting Authority Order, Case No. GU-2011-0392, Report and Order (Jan. 25, 2012) ("Southern Union") case does not support Staff's argument that KCP&L's losses related to its OSS margins somehow constitute "ungenerated revenue" that cannot be deferred through an AAO. In its application Southern Union sought to defer, among other costs, a drop in revenue resulting from the disconnection of approximately 0.62 percent of its customer base after the May 22, 2011 tornado in Joplin. Southern Union at 8-10. In support of such deferral, Southern Union argued that customers who were disconnected because of the tornado did not pay their gas bills, a portion of which was intended to cover the utility's fixed costs. As a result, Southern Union argued that it could not pay its fixed costs. Id. at 21-22. However, Southern Union's revenue actually increased \$409,119 in the months after the tornado, compared with the same time period in the previous year. Id. at 9, 22. The Commission criticized Southern Union for equating a customer's departure to a reduced opportunity for profit while ignoring the costs saved by providing no service, and concluded that Southern Union suffered no "real" loss. Id. at 22-23. The Commission noted that any drop in revenue resulting from the tornado did not threaten the utility's opportunity to earn a profit. Id. at 10.

12. The Commission further criticized Southern Union for attempting to defer revenue not generated from service that was not provided because of the tornado. The Commission characterized this as "ungenerated revenue," or revenue that "never has existed, never does exist, and never will exist." Id. at 25. It found that Southern Union "showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis." Id. The Commission determined that issuing "an AAO for such

ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company.”

Id.

13. The facts of KCP&L’s flooding case are unlike those in Southern Union’s Joplin tornado request. The 2011 Missouri River flood caused disruptions in coal deliveries that affected KCP&L’s entire service territory and forced the Company to implement coal conservation measures at five plants: Iatan 1 and 2, LaCygne 1 and 2, and Hawthorn 5. As a result, these plants decreased their output by over 130,000 MWh. In order to compensate for that loss of generation, KCP&L relied on a larger proportion of non-coal generation to meet retail load and purchased more expensive power on the wholesale market. Consequently, there was less energy available for Off-System Sales and, thus, lower OSS margins. Because of the unique way in which OSS margins are treated under the Commission’s recent rate case decisions, the loss of such margins are a proper item for deferral in an AAO.

14. Since the inception of KCP&L’s Regulatory Plan, the Commission has required the Company to track its OSS margins and to return to ratepayers any excess margins over a fixed level. See In re Application of KCP&L for Approval to Make Changes in Charges for Electric Service, No. ER-2006-0314, Report and Order at 31-37 (Dec. 21, 2006), Order regarding Motions for Rehearing at 2-3 (Jan. 18, 2007)¹; In re Application of KCP&L for Approval to Make Changes in Charges for Electric Service, No. ER-2007-0291, Report and Order at 33-39 (Dec. 6, 2007); In re Application of KCP&L for Approval to Make Changes in Charges for Electric Service, No. ER-2009-0089, Non-unanimous Stipulation and Agreement at 15, p. 9 (Apr. 24, 2009), approved in Order Approving Non-Unanimous Stipulation and Agreement and Authorizing Tariff Filing (June 10, 2009).

¹ The rehearing order determined that any Off-System Sales above the 25th percentile were to be booked as a regulatory liability to flow back to ratepayers in a future case, but that OSS to the 25th percentile, which were an element of KCP&L’s revenue requirement, would not be treated as a regulatory asset.

15. In the 2010 Rate Case Order, KCP&L's rates were set utilizing the 40th percentile of non-firm OSS margin as projected by the Company. In re Application of KCP&L for Approval to Make Changes in Charges for Electric Service, No. ER-2010-0355, Report and Order at 129-38, 141 (Apr. 12, 2011) ("2010 Rate Case Order"). Margins above the 40th percentile are treated as a regulatory liability and returned to ratepayers. Margins up to that threshold amount are treated as a minimum off-set to KCP&L's revenue requirement. Id.

16. Given that Off-System Sales margins at the 40th percentile are embedded in the Company's rates as an off-set to revenue, KCP&L is simply requesting that the Commission defer its OSS margin shortfall from the threshold amount at the end of the April 2012 OSS margin tracker accumulation period attributable to the flooding.

17. Unlike the disconnection of customers in the Southern Union case, which did not result in any lost revenue when compared with the same period from the previous year, the flood's impact on KCP&L's 2011 OSS margins in Missouri will likely result in a significant financial detriment to the Company. As a result of the flood's impact, it is likely that KCP&L will not reach the 40th percentile threshold level for the period May 2011 through April 2012.

18. KCP&L is different from other investor-owned electric utilities in Missouri in that it does not have a fuel adjustment clause that allows for the recovery of a majority of these increased costs or the impact of reduced OSS margins. Clearly, KCP&L will suffer a loss if it is unable to defer these costs or the impact of the shortfall from the 40th percentile threshold for OSS margin treated as an offset to KCP&L's revenue requirement.

19. Staff mischaracterizes KCP&L's 2011 OSS margins as "ungenerated revenue" in its Motion to Dismiss. The OSS margin is neither a "phantom loss" nor an "unearned windfall" for the Company. OSS revenue and energy costs during the third quarter of 2011 and for the

period of October 1-12, 2011 were significantly lower than would have been the case absent coal conservation. Because KCP&L's rates are set with an offset at a specific percentile of non-firm OSS margin, the effect that coal conservation had on KCP&L's OSS margins, and ultimately its net income, was very real.

20. Furthermore, KCP&L has requested that the Commission authorize it to defer the lesser of its OSS margins as it calculated them in its Coal Conservation Study or the actual shortfall for the accumulation period. See Application at ¶ 28, p. 9. In other words, the actual margins versus the amounts included in base rates. Id.

21. Staff has failed to meet the legal standards applicable to a motion to dismiss. Staff has also mischaracterized the facts of this case in an attempt to have the Commission reach the same result that it reached in Southern Union. For these reasons, the Motion to Dismiss should be denied.

B. GMO Supports Staff's Alternative Motion to Consolidate.

22. While granting a motion to dismiss is both inappropriate as a matter of law and on the facts noted above, KCP&L does not oppose Staff's suggestion that the Commission consolidate this action with the Company's pending rate proceeding in Case No. ER-2012-0174.

23. Should the Commission order that the Company's AAO application be consolidated with the rate case, it should also provide an opportunity for the Company to file supplemental direct testimony in case ER-2012-0174 so that the issues involved in the AAO application can be presented in the rate case. The Company proposes filing supplemental rate case direct testimony on the AAO issue on May 4 2012 (the date established in the procedural schedule adopted in this case). See Order Granting Joint Motion to Establish Procedural Schedule, No. EU-2012-0130 (Mar. 15, 2012). Other parties to the rate case could then respond

to this direct testimony when the rate case's rebuttal testimony is due. Without a provision for the filing of supplemental direct testimony on these AAO issues, KCP&L does not support the motion to consolidate.

/s/ Karl Zobrist
Karl Zobrist MBN 28325
Lisa A. Gilbreath MBN 62271
SNR Denton US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Phone: (816) 460-2400
Fax: (816) 531-7545
karl.zobrist@snrdenton.com
lisa.gilbreath@snrdenton.com

Roger W. Steiner MBN 39586
Corporate Counsel
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2314
Roger.Steiner@kcpl.com

Attorneys for Kansas City Power & Light Company

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Response has been emailed this 2nd day of April, 2012 to the parties listed on the service list in Case No. EU-2012-0130.

/s/ Roger W. Steiner
Roger W. Steiner