

**BEFORE THE PUBLIC SERVICE COMMISSION  
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         )        Case No. ER-2010-0355  
Service to Continue the Implementation of Its        )  
Regulatory Plan    )

**KANSAS CITY POWER & LIGHT COMPANY’S  
OPPOSITION TO STAFF’S MOTION IN LIMINE  
REGARDING INTERIM ENERGY CHARGE**

Kansas City Power & Light Company (“KCP&L” or “Company”) states the following in opposition to Staff’s Motion in Limine Regarding Interim Energy Charge:

**I.     A Motion in Limine is Not an Appropriate Remedy.**

A motion in limine “is normally used to exclude evidence in a jury trial that would be unfairly prejudicial or inflammatory.” Roth v. Roth, 176 S.W.3d 735, 738–39 (Mo. App. W.D. 2005). It is a procedural device used to suppress evidence, typically with the salutary purpose of pointing out evidence which may not be only objectionable, but sufficiently prejudicial that if presented to a jury would warrant the declaration of a mistrial. See Cass Bank & Trust Co. v. Mestman, 888 S.W.2d 400, 404 (Mo. App. E.D. 1994); Robbins v. Jewish Hospital, 663 S.W.2d 341, 348 (Mo. App. E.D. 1983).

Accordingly, the Commission has characterized a motion in limine as a procedural device “which is properly used to exclude tainted or prejudicial evidence.” See In re Lake Region Water & Sewer Co., Case No. SR-2010-0110, Order Regarding Staff’s Motion in Limine at 4 (Mar. 24, 2010).

There is nothing inherently prejudicial, inflammatory, or tainted about the Interim Energy Charge (“IEC”) testimony in this case. Indeed, Staff makes no allegations that testimony

regarding an IEC is unfair or unduly prejudicial. The only basis for Staff's argument is that because Company witness Tim Rush stated in his direct testimony that KCP&L did not include a specific request for an IEC in its initial filing, it was precluded from even discussing the concept, even though it has met the filing requirements to establish an IEC. See T. Rush Direct Testimony at 16–17.

In this regard, Staff also seeks to suppress portions of the direct testimony of Company witness Burton L. Crawford, which relate to KCP&L's compliance with portions of 4 CSR 240-3.161 on fuel cost recovery mechanisms. See B. Crawford Direct Testimony at 16–18. Staff also has moved to exclude portions of the direct testimony of Company witness Samuel C. Hadaway, which explains the effect of an IEC rate adjustment mechanism ("IEC RAM") on the Company's business risk profile and its required ROE, were the Company to request an IEC RAM. See S. Hadaway Direct Testimony at 5–6. Finally, Staff has moved to exclude portions of the direct testimony of Company witness Wm. Edward Blunk which explains how KCP&L forecast prices for fuel and fuel-related commodities as part of its planning for a possible IEC. See W.E. Blunk Direct Testimony at 23–26. Exclusion of this testimony would prevent the Commission from reviewing Mr. Blunk's opinions on "what direction fuel and fuel related commodities are expected to move." Id. at 23, line 14–15.

The Commission's rules require fair and full disclosure of the testimony and exhibits each party expects to offer at the hearing so as to avoid any prejudice to other parties. See 4 CSR 240-2.130(8) (no supplementation of prefiled prepared testimony absent order of presiding officer or Commission or unless a previously undisclosed matter arises). KCP&L has avoided any potential prejudice at the hearing by explicitly presenting the issue of an IEC in prefiled direct testimony because an IEC "may become a preferred method" "given the expected

increases in fuel and purchased power costs beyond the time rates take [e]ffect in this case.” See T. Rush Direct Testimony at 16, lines 7–9. Because KCP&L’s testimony regarding an IEC has been fully and fairly disclosed, and is neither inflammatory nor tainted, a Motion in Limine is inappropriate at this stage of the proceedings and should be denied.

Motions in limine are particularly inappropriate for administrative proceedings where there is no jury, as such motions are traditionally used to prohibit testimony that if presented would warrant a mistrial. See Roth, 176 S.W.3d at 738; Rhodes v. Blair, 919 S.W.2d 561, 564 (Mo. App. S.D. 1996). The concern that motions in limine address is that “the mere asking of an improper question in front of a jury may be so prejudicial that a party will be denied a right to a fair trial.” Cass Bank & Trust, 888 S.W.2d at 404.

The Company’s evidence, however, is presented to experienced, sophisticated, and knowledgeable Commission fact-finders. Thus, Staff’s Motion in Limine is misplaced and must be denied.

## **II. Testimony Regarding an IEC is Admissible.**

Testimony by KCP&L witnesses regarding an IEC is admissible. Missouri law provides: “Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted.” MO. REV. STAT. § 536.063(3) (emphasis added). KCP&L has reserved the right to seek an IEC as a possible method to recover the cost of fuel and fuel related commodities in this case, and has properly raised the IEC as an issue. Whether or not KCP&L has specifically requested an IEC is irrelevant to whether it might become an issue.

An order regarding a motion in limine is “merely a preliminary expression of the court’s opinion as to the admissibility of the evidence.” Sapp v. Morrison Bros. Co., 295 S.W.3d 470, 486 (Mo. App. W.D. 2009). The propriety of sustaining a motion in limine is thus judged by the admissibility or inadmissibility of evidence excluded thereby. Guthrie v. Missouri Methodist Hosp., 706 S.W.2d 938, 941 (Mo. App. W.D. 1986). Importantly, a motion in limine should not be employed indiscriminately. Cass Bank & Trust, 888 S.W.2d at 404. Because the testimony of KCP&L witnesses regarding an IEC is admissible, Staff’s Motion in Limine inappropriate and must be denied.

### **III. A Motion in Limine is Premature.**

Staff improperly attempts to use this procedural device “which is properly used to exclude tainted or prejudicial evidence” to block testimony on what might very well become an issue in this case. See Lake Region Water & Sewer at 4. A motion in limine should not be used to “choke off” a party’s claim. Roth, 176 S.W.3d at 738–39.

In this proceeding it would be contrary to Commission rules to strike KCP&L’s direct testimony regarding IEC issues and to prejudge the relevance of an IEC to KCP&L’s rate request. Direct testimony “shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 4 CSR 240-2.130(7)(A). Because KCP&L has reserved an IEC as a possible method to recover fuel and fuel related commodities in this case, it cannot be prevented from filing direct testimony regarding IECs.

Additionally, because KCP&L cannot know if another party will raise an IEC as a potential recovery option in its direct testimony, it would be unfair to limit KCP&L to discussing an IEC in rebuttal or surrebuttal testimony only if it is raised by another party. See 4 CSR 240-

2.130(7). Commission rules prohibiting the supplementation of prefiled direct, rebuttal, or surrebuttal testimony further limit KCP&L from addressing an IEC as a possible method to recover fuel and fuel related commodities in this case if the Commission were to strike this testimony. See 4 CSR 240-2.130(8).

It is also inappropriate to limit or strike testimony before all testimony has been filed. KCP&L cannot know at this time what issues or proposals will be raised by other parties to this case. Until the Company has had an opportunity to evaluate the issues and analyze the positions of the other parties, as well as to determine if it would be appropriate for KCP&L to recommend an IEC, it is premature for the Commission to grant a motion in limine so far in advance of the hearing.

WHEREFORE, KCP&L respectfully requests that the Commission deny Staff's Motion in Limine Regarding Interim Energy Charge.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the above and foregoing Kansas City Power & Light Company's Opposition to Staff's Motion in Limine was emailed to counsel of record on this 2nd day of December, 2010.

/s/ Lisa A. Gilbreath  
Attorney for Kansas City Power & Light Co.