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-2010-0355

REPLY TO KCPL'S RESPONSE TO
MEUA'S MOTION TO COMPEL

COMES NOW the Midwest Energy Users' Association ("MEUA"), pursuant to 4 CSR 240-2.090, and for its Reply to KCPL's January 17, 2011 Response to MEUA's Motion to Compel responses to data requests respectfully states as follows:

TIMELINESS AND LACHES

1. In its Response, KCPL suggests that MEUA's Motion should be denied simply because of the period of time which elapsed between the issuance of the data request and the filing of the Motion to Compel. In support of this notion, KCPL suggests, based upon certain dicta in a Union Electric decision as well as a 2001 telecommunications pricing docket that the doctrine of laches applies to Commission proceedings. As an initial matter, it is questionable whether the doctrine of laches is applicable to Commission proceedings. Laches is an equitable doctrine that is utilized in court proceedings. A review of the Commission's authorizing statutes (Chapter 386, 392 and 393) provides no indication that the doctrine is applicable to Commission proceedings. That said, however, it is clear from the following analysis that the doctrine of laches, as previously discussed by the Commission, not is applicable to the facts of this case.

UE DECISION

2. In its Response, KCPL directs the Commission to a 1996 UE order. Noticeably, KCPL conveniently grasps a single sentence from that decision while remaining silent regarding the circumstances of the Union Electric decision. As the following discussion indicates, however, the circumstances of that decision are entirely inapplicable to the current case.

In that case, in an order dated March 8, 2001, the Commission ruled that UE's experimental regulation mechanism would be allowed to expire by its own terms on June 30, 2001. In addition, the Commission ruled that Staff would be permitted to file a complaint related to a proposed rate reduction. As the Commission explicitly indicated, that Order became effective on March 18, 2001. On June 25, 2001, two months after the order became final; UE filed a Motion to Stay the expiration of UE's incentive regulation program. In its decision denying UE's Motion to Stay, the Commission expressly found that UE's Motion was untimely. Specifically, the Commission noted that, under Section 386.550, the previous order had become final and was immune to the collateral attack sought by UE in its Motion. As an aside, the Commission suggested that the doctrine of laches may apply to prevent the Motion. "Therefore, AmerenUE's emergency motion may be barred by laches if it were not barred by Section 386.550, RSMo 2000."

Assuming arguendo that laches may be applied to Commission proceedings, it is apparent, as demonstrated in the referenced UE decision, that it is only applied where the delay may work to injure another party. "***Laches is not mere delay***; but rather delay that works to the disadvantage or injury of another " Kizior v. City of St. Joseph, 329 S.W.2d

605 (Mo. 1959) (emphasis added). In the UE proceeding, the Commission specifically noted that UE had been on notice for at least 2 ½ months that the alternative regulatory mechanism would expire on June 30, 2001. By waiting until 5 days before that expiration to file its Motion, UE was attempting to "disadvantage" or "injure" the parties who had come to rely upon the now-final Commission decision. By waiting so long, UE was attempting to deny these parties an opportunity to adequately respond to the proposed motion. As such, given the absolute time deadline referenced by the Commission, there was a "disadvantage" or "injury" associated with considering UE's motion after such intentional delay. Therefore, laches ***may*** have been applicable to prevent consideration of the UE motion.

In contrast to the UE decision, as well as KCPL's contentions in this case, the delay in filing MEUA's Motion to Compel was "mere delay." As such, laches does not apply. Furthermore, as will be discussed later, the delay in filing the Motion to Compel does not work to "disadvantage" or "injure" the other parties.

TELECOMMUNICATIONS PRICING DOCKET

3. In its response, KCPL also directs the Commission's to an order issued in Case No. TO-2001-439. Again, KCPL chooses to pick and choose aspects of that decision without enlightening the Commission regarding the facts and details underlying that decision. As that order notes, IP Communications filed a Motion to Compel on July 31, 2001. In addition, IP Communications also filed a Motion for Continuance of the evidentiary hearing scheduled to begin in seven days.

Contrary to KCPL's suggestion, the Commission's decision never discussed the doctrine of laches. Rather, in denying the Motion to Compel, the Commission noted that

"if IP's Motion to Compel is granted, it will require the Commission to delay or hold open the record in this case, take late testimony, and conduct an additional hearing cross-examination on late-filed testimony." Given the burden imposed by IP's Motion to Compel and its attendant Motion for Continuance, the Commission denied IP's Motion to Compel.

4. As mentioned, the cases referenced by KCPL are inapplicable. First, while delay did occur in filing the subject Motion to Compel, this was simply "mere delay." As such, the doctrine of laches is not applicable. As pointed out in its Motion, MEUA does not require a resolution of this matter before the start of the hearing. In fact, the hearing in this matter commenced as scheduled on January 18. Given this, the facts of the Telecommunications Pricing Decision referenced by KCPL are clearly distinguishable. Furthermore, contrary to the UE decision, the consideration of this matter has not worked to deny KCPL the appropriate response period as provided by Commission rule. Finally, given that MEUA does not require the response to this data request prior to the evidentiary hearing in this matter, it will not prevent KCPL attorneys or witnesses from preparing for the evidentiary hearing. For these reasons, KCPL's assertions, that the Motion to Compel is untimely, are baseless.

RELEVANCE

5. Next, KCPL suggests that the data request is not designed to lead to the discovery of relevant information. KCPL's bases this assertion on the fact that "there is no suggestion, let alone any evidence of ex parte communications by KCP&L with commissioners." While MEUA acknowledges that no such evidence exists to date, that does not mean that such an inquiry will not lead to relevant information. Indeed, in at

least two previous cases, KCPL employees have engaged in such ex parte communications. In those cases, commissioners were asked to, and eventually did, recuse themselves as a result of those communications. It is unlikely that such communications would have been discovered absent the ability to engage in the inquiry sought through the subject Motion to Compel.

Ultimately, under KCPL's theory, parties would be required to present "evidence of an ex parte communication" before it would be allowed to conduct discovery of such matter. Clearly, such a theory places the "cart before the horse" given that discovery is designed to be the method by which parties are permitted to identify such evidence. Given KCPL's position then, no party would ever be able to conduct discovery on an ex parte communication unless it had independently garnered such evidence first. Such a notion undermines the very purpose of Missouri and federal discovery rules.

BURDENSOME

6. In addition, KCPL asserts, without providing any rationale, that the discovery request is burdensome. Contrary to MEUA's assertion that this would involve "a simple phone call" to the cell phone provider, KCPL asserts that it would involve "far more work." Nevertheless, KCPL fails to detail the nature of this "far more work."

As pointed out in its Motion, "MEUA has narrowly tailored" its request to four individuals: KCPL's two most senior executives and KCPL's current Director of Regulatory Affairs and his immediate predecessor. As such, the discovery request has been tailored to those individuals that MEUA believes were most likely to have engaged in such communications if they occurred. Contrary to KCPL's assertions, this is not a

"fishing expedition," but a carefully tailored request for information that may lead to the discovery of relevant information.

PRIVACY RIGHTS

7. Finally, KCPL makes the unsupported assertion that the disclosure of the requested information "would violate the right of privacy of the KCP&L employees named in the data request." Interestingly, despite raising this assertion, KCPL fails to provide any legal analysis to support the notion that this right of privacy would be applicable to a corporation, its records, and its employees.

In fact, it is very clear, under current law that "a corporation, partnership or unincorporated association has no personal right of privacy." Restatement (Second) of Torts, §652I (1965). In fact, this position has been clearly accepted in Missouri. "Corporations are not protected by a right of privacy." Bear Foot v. Chandler, 965 S.W.2d 386, 389 (Mo.App. 1998).

Given that MEUA seeks, in part, the production of corporate cell phone records for the four identified individuals, there is no right of privacy. These records are corporate documents; as such the right of privacy is not applicable. To this extent, they are comparable to corporate emails or internet usage where the employee is not entitled to a right of privacy. Calls made by these individuals on corporate cell phones, as recorded on cell phone records, are clearly subject to discovery.

In addition, to the extent that MEUA's Motion to Compel sought personal cell phone records, it is important to understand that Mr. Downey, Giles and Blanc are all witnesses in this proceeding. As such, their credibility and ability to follow Commission rules is in issue. Having been called as witnesses, these individuals should realize that

they may be subjected to discovery that may otherwise concern their credibility and veracity. For this reason, reasonable inquiries, including that sought by the immediate data request are permitted.

Finally, it bears repeating, that Commission procedures have been routinely applied to information that is otherwise sensitive to utility employees. For instance, just this week. the Commission received testimony related to the performance appraisal of a KCPL witness. As always, the confidentiality provisions contained in the Commission's rules have provided the necessary protection to such information.

CONCLUSION

WHEREFORE, MEUA respectfully requests that the Commission issue its order requiring KCPL to fully respond to the referenced MEUA data request.

Respectfully submitted,

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ATTORNEYS FOR THE MIDWEST ENERGY USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: January 25, 2011