BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service of the Company	)))))	Case No. ER-2011-0004

KANSAS CITY POWER & LIGHT COMPANY'S
MOTION TO PROHIBIT THE RE-LITIGATION OF ISSUES RELATED TO KCP&L'S MANAGEMENT OF THE CONSTRUCTION OF THE IATAN 1 & 2 PROJECTS AND REQUEST THAT THE COMMISSION TAKE ADMINISTRATIVE NOTICE OF ITS DECISION IN CASE NO. ER-2010-0355 AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Kansas City Power & Light Company (hereinafter "KCP&L"), pursuant to 4 CSR 240-2.080, and respectfully requests that the Commission issue an Order in this proceeding which prohibits the re-litigation of issues related to KCP&L's management of the Iatan 1 and Iatan 2 Projects and the prudence of costs associated with these projects, since such issues have been fully litigated in those proceedings, and it would not promote judicial economy or the use of the Commission's scarce resources to permit those issues to be re-litigated in this proceeding. In addition, KCP&L requests that the Commission take administrative notice of its *Report & Order* in Case No. ER-2010-0355 issued on April 12, 2011, and its *Report & Order* in Case No. ER-2010-0356 issued on May 4, 2011 which resolved the issues related to KCP&L's management of the construction of the Iatan 1 and Iatan 2 Projects, and the prudence of costs associated with these projects. In support of this motion, KCP&L states as follows:

1. On April 12, 2011, the Commission issued a 183-page *Report & Order* in Re Kansas City Power & Light Company, Case No. ER-2010-0355 which followed several weeks of hearings into issues related to KCP&L management of the Iatan 1 and Iatan 2 Projects. The *Report & Order* at pages 18-105, inclusive, addressed issues raised

by various parties[1] to the cases related to KCP&L's management of the Iatan Projects, and the prudence of the costs associated with these projects. On May 4, 2011, the Commission issued a 222-page *Report & Order* in the companion case, Re KCP&L Greater Missouri Operations Company, Case No. ER-2010-0356. The KCP&L *Report & Order* at pages 18-105, inclusive, addressed issues raised by various parties to the cases related to KCP&L's management of the Iatan Projects, and the prudence of the costs associated with these projects. Similar findings and conclusions related to KCP&L's management of the Iatan Projects were contained in the GMO *Report & Order* at pages 20-77.

[1] The parties to Case Nos. ER-2010-0355 and ER-2010-0356 included the following: Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company, the Staff of the Commission; the Office of the Public Counsel; The Empire District Electric Company; the Missouri Department of Natural Resources; Praxair, Inc.; Ag Processing, Inc., Midwest Energy Users Association (consisting of Alliant Techsystems, Inc., Wal-Mart Stores, Inc., United States Gypsum Company, LaFarge North America, Inc., and Cargill Incorporated, Archer Daniels Midland Company; Best Buy, Inc.; General Mills; Boulevard Brewing Co.; DST Realty, Inc.; and Broadway Square Partners, LLP), Sedalia Industrial Users (consisting of Pittsburgh Corning Corporation, Waterloo Industries, Hayes-Lemmerz International, EnerSys Inc., Alcan Cable Co., Gardner Denver Corporation), Missouri Industrial Energy Consumers (consisting of Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Doe Run, Enbridge, Explorer Pipeline, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, Monsanto, Precoat Metals, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum, Saint Gobain, Solutia and U.S. Silica Company); Ford Motor Co.; Missouri Joint Municipal Electric Utility Commission; the City of Kansas City, Missouri, the City of Lee's Summit, Missouri, Union Electric Company, d/b/a Ameren Missouri, Missouri Gas Energy, a Division of Southern Union Company; Hospital Intervenors (consisting of Carondelet Health, Crittenton Children's Center, HCA Midwest Health System, North Kansas City Hospital, Research Medical Center, Research Psychiatric Center, Saint Luke's Cancer Institute, Saint Luke's Health System, Saint Luke's Hospital of Kansas City, Saint Luke's Northland Hospital – Barry Road Campus, St. Joseph Medical Center, Truman Medical Center, Inc., Lee's Summit Medical Center, Liberty Hospital, Research Belton Hospital, St. Luke's Northland Hospital-Smithville Campus, Saint Luke's East-Lee's Summit, St. Mary's Hospital, and North Kansas City Hospital), the United States Department of Energy, Federal Executive Agencies, including Whiteman Air Force Base, AARP, Consumers Council of Missouri, the Missouri Retailers Association, Dogwood Energy, LLC, IBEW Local Unions 1464, 1613, and 412.

2. On March 21, 2011, Empire filed its *Empire's Motion to Establish Admissibility of Testimony and Exhibits and Motion for Expedited Treatment, Or, In the Alternative, Motion to Extend Filing Deadline* ("Empire Motion") in which Empire indicated that it wished to "avoid the re-litigation of KCPL's prudence at this time in the context of Empire's case." (Empire Motion, p. 3) Empire also stated: "Empire is not seeking any order of the Commission at this time with regard to evidence concerning Staff's alleged imprudence on the part of Empire." (Id. at 4)

3. On March 24, 2011, the Staff filed its *Staff's Response to Empire's Motion to Establish Admissibility of Testimony and Exhibits and Motion for Expedited Treatment, Or, In the Alternative, Motion to Extend Filing Deadline* in which Staff stated that it does not propose to relitigate issues already litigated in Case No. ER-2010-0355. In the Staff's Response, Staff stated: "Like Empire, Staff does not propose to relitigate issues already litigated in Case No. ER-201 0-0355 and set out by Empire in Paragraph 2 of its Motion." (Staff Response, p. 1) However, Staff indicated that: "However, Staff's *Iatan Construction Audit and Prudence Review Report* ("*Empire Audit Report"*) filed on February 23, 2011, in this case includes some issues relating to Empire's participation in the Iatan Project that Staff intends to litigate in this case, as Empire recognizes at Paragraphs 5 and 7 (last sentence) of its Motion." (Staff's Response, p. 1) (*emphasis added*)

4. KCP&L has made available to Empire a large portion of its testimony filed in Case Nos. ER-2010-0355 and ER-2010-0356 related to the Iatan Project issues. This testimony was filed as rebuttal testimony by Empire on April 18, 2011. However, like Staff and Empire, KCP&L wants to avoid re-litigation of the issues already litigated in Case Nos. ER-2010-0355 and ER-2010-0356. Since these issues have already been fully

litigated and resolved by the Commission's *Report & Order* in Case No. ER-2010-0355, it would be a waste of the Commission's and the parties' time and resources to commence this expensive and time-consuming litigation process again.

5. The Commission has previously found in the context of the KCP&L *Wolf Creek* rate case, Case Nos. EO-85-185 and EO-85-224, 28 Mo.P.S.C. (N.S.) 228, 282 (April 23, 1986), that it is inappropriate to re-litigate rate base disallowances related to a new power plant in future rate cases. In the *Report & Order* in the *Wolf Creek* case, the Commission stated at 228:

> The commission has carefully considered the voluminous record in this case and all arguments of counsel pertaining thereto. The commission has applied the standard set forth above in arriving at the reasonable amount of investment to be included in rate base. A discussion of the various issues regarding Wolf Creek rate base is set forth below.
>
> Finally, the commission determines that consistent with the reasoning set forth in Section IV-G - Hawthorn 5, Wolf Creek cost overruns herein disallowed will not be relitigated in a future KCPL rate case.

6. The Commission more fully explained the need and desirability of avoiding re-litigation of issues that have been fully litigated in its *Wolf Creek* decision as it related to a Hawthorn 5 issue:

> [42] In the company's last rate case, *Re* *Kansas City Power & Light Co.*, 26 Mo PSC NS 104, 55 PUR4th 468 (1983), the commission accepted staff's and company's proposal to amortize the cost of repair and replacement power associated with a forced outage at the company's Hawthorn 5 generating unit. In adopting company and staff's amortization, the commission rejected public counsel's assertion that the Hawthorn 5 outage resulted from negligence and management failure.
>
> In the instant case staff has attempted to relitigate the Hawthorn 5 outage issue and now proposes that no costs attributable to the Hawthorn 5 outage be recovered.

Although the commission is not bound by the doctrines of res judicata and collateral estoppel, the commission has the discretion to apply the doctrines to avoid needless relitigation of issues.

Kenneth Culp Davis explains the application of the doctrine of res judicata and its distinction from collateral estoppel in his hornbook, "*Administrative Law*," West Publishing Co. 1978, p. 432:

"The traditional doctrine of res judicata as applied in the judicial system is inexorable in making a judgment binding so as to shut off further inquiry no matter how clear the mistake of fact or how obvious the misunderstanding of law or how unfortunate the choice of policy or how unjust the practical consequences or how inadequate the evidence in the record or how poorly prepared the briefs and arguments. The interest of parties and of the public in ending litigation normally bars a party who has had his day in court from further pressing the same claims or the same defenses. Under the principles of bar and merger a judgment for the defendant bars the plaintiff from again asserting the same claim and a judgment for the plaintiff prevents the plaintiff from trying to get more, the theory being that the cause of action has merged in the judgment. When a cause of action is merged in or barred by a judgment, the judgment is binding no matter what issues were or were not actually litigated; it is binding even as to matters which might have been but were not actually litigated. The doctrine of collateral estoppel is different from merger and bar in that instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of the same issues between the same parties even in connection with a different claim or cause of action."

The criteria for applying res judicata and collateral estoppel are set out generally by the U.S. Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966), and more specifically in *Athan v. Professional Air Traffic Controllers Organization*, 672 F.2d 706 (8th Cir.1982). The *Athan* court set out four criteria:

(1) issue must be identical to one in a prior adjudication;

(2) there was a final judgment on the merits;

(3) the estopped party was a party or is in privity with a party to the prior adjudication; and

(4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

> Because of the nature of administrative proceedings, courts were originally reluctant to apply the doctrines at all. This reluctance, though, has been moderated and the more accepted view now is that the doctrines are applicable if they serve the purposes for which the doctrines were established and do not create an unjust result. The reasons behind the application of the doctrines in the court system are applicable to some administrative decisions.
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> The U.S. Supreme Court has set out the same view of the doctrines' application to administrative decisions in the *Utah Construction and Mining* case. The court stated that (384 U.S. at pp. 421, 422, 16 L.Ed.2d at pp. 660, 661):
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> "...Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." (Cases cited not listed.) (Footnotes omitted.)
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> In the *Utah Construction and Mining* case, the court precluded further proceedings because of a prior administrative decision.
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> The Hawthorn 5 issue is identical to the issue tried in the company's last rate case. The staff had a full and fair opportunity to litigate the Hawthorn 5 issue in that rate case. Based on the evidence, the commission found for the company and the staff. In the instant matter the staff has shown no changed circumstances or new evidence not available to the Staff at the time of the company's last rate case.
>
> Accordingly, the commission determines that relitigation of the Hawthorn 5 issue is not appropriate. Therefore, the commission will not address the merits and staff's adjustment is rejected.
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> *Id*. at 376-77.

7. As explained by the Commission in the *Wolf Creek* decision, issues related to KCP&L's management of the Iatan 1 and Iatan 2 Projects and the prudence of costs associated with these projects should not be relitigated here. As Staff and Empire both noted in their previous pleadings, however, it would be appropriate for issues related to Empire's participation in the Iatan Projects to be raised and litigated in this proceeding.

8. In KCP&L's rate case, Case No. ER-2010-0355, Staff performed its audit and filed its construction and prudence review report pertaining to Iatan project costs reported as of June 30, 2010. In this Empire case, Staff's Empire Iatan Report involves the Iatan project costs reported as of October 31, 2010. The two "new" proposed disallowances, however, deal with matters that were within the timeframe of the Staff audit and report in the KCP&L case. For example, to support its recommended Enerfab adjustment, Staff points to the Ernst & Young audit from October of 2009, the deposition of KCP&L witness David McDonald taken in the KCP&L rate case, and various change orders from 2009. (Staff's Empire Iatan Report, pp. 103-108) To support its recommended Executive Bonus adjustment, Staff points to KCP&L's response to data request 406. Staff's testimony refers to the data request being issued and answered in this Empire rate case, but Staff DR 406 was actually issued in the KCP&L rate case on October 6, 2010. (Staff's Empire Iatan Report, p. 109) By order of the Commission, "the deadline for final completion for all audit activity, of any type, involved with the Iatan II generating facility, including any common plant shared between Iatan I and II" was January 30, 2011, and the issues of KCP&L's prudence pertaining to the Iatan projects were tried and decided in the KCP&L rate case. Staff should be estopped both from raising any "new" issues at this time pertaining to KCP&L's alleged imprudence and from relitigating the old issues.

MOTION FOR EXPEDITED TREATMENT

9. Since the evidentiary hearings are scheduled to commence on Monday, May 23, 2011, KCP&L respectfully seeks expedited treatment of this matter and requests that the Commission act by May 18, 2011, or as soon as possible thereafter. This

pleading is being filed as soon as it could have been. Further, there will be no negative effect on the customers or the general public if the Commission acts by May 18 or as soon as possible thereafter.

WHEREFORE, KCP&L respectfully requests that the Commission prohibit the re-litigation of issues related to KCP&L's management of the Iatan 1 and Iatan 2 Projects and the prudence of costs associated with these projects, since such issues have been fully litigated in those proceedings, and take administrative notice of its *Report & Order* in Case No. ER-2010-0355 issued on April 12, 2011, and its *Report & Order* in Case No. ER-2010-0356 issued on May 4, 2011, which resolved the issues related to KCP&L's management of the construction of the Iatan 1 and Iatan 2 Projects, and the prudence of costs associated with these projects, and decide this matter on an expedited basis.

Respectfully submitted,

/s/ Roger W. Steiner

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, to all parties of record this 12th day of May, 2011.

/s/ Roger W. Steiner _____

Roger W. Steiner