

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

In the Matter of Kansas City Power & Light)	
Company's Practices Regarding Customer)	
Opt-Out of Demand-Side Management)	<u>File No. EO-2013-0359</u>
Programs and Related Issues)	

STAFF'S RESPONSE TO ORDER DIRECTING FILING

COMES NOW Staff of the Missouri Public Service Commission ("Staff"), by and through the undersigned counsel, and for its Response states to the Missouri Public Service Commission ("Commission") the following:

1. Part of the Missouri Energy Efficiency Investment Act ("MEEIA"), Section 393.1075, paragraphs .7, .8, .9 and .10, RSMo (Supp. 2011) state:

7. Provided that the customer has notified the electric corporation that the customer elects not to participate in demand-side measures offered by an electrical corporation, none of the costs of demand-side measures of an electric corporation offered under this section or ***by any other authority***, and no other charges implemented in accordance with this section, shall be assigned to any account of any customer, including its affiliates and subsidiaries, meeting one or more of the following criteria:

(1) The customer has one or more accounts within the service territory of the electrical corporation that has a demand of five thousand kilowatts or more;

(2) The customer operates an interstate pipeline pumping station, regardless of size; or

(3) The customer has accounts within the service territory of the electrical corporation that have, in aggregate, a demand of two thousand five hundred kilowatts or more, and the customer has a comprehensive demand-side or energy efficiency program and can demonstrate an achievement of savings at least equal to those expected from utility-provided programs.

8. Customers that have notified the electrical corporation that they do not wish to participate in demand-side programs under this section shall not

subsequently be eligible to participate in demand-side programs except under guidelines established by the commission in rulemaking.¹

9. Customers who participate in demand-side programs initiated after August 1, 2009, shall be required to participate in program funding for a period of time to be established by the commission in rulemaking.²

10. Customers electing not to participate in an electric corporation's demand-side programs under this sections shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation.

(Emphasis added).

2. Rule 4 CSR 240-20.094 (6)(F) states:

Timing and Effect of Opt-Out Provisions. A customer notice shall be received by the utility no earlier than September 1 and not later than October 30 to be effective for the following calendar year. For that calendar year and each successive calendar year until the customer revokes the notice pursuant to subsection (6)(H), none of the costs of approved demand-side programs of an electric utility offered pursuant to 4 CSR 240-20.093, 4 CSR 240-20.094, 4 CSR 240-3.163, and 4 CSR 240-3.164 **or by other authority** and no other charges implemented in accordance with section 393.1075, RSMo, shall be assigned to any account of the customer, including its affiliates and subsidiaries listed on the customer's written notification of opt-out.

(Emphasis added).

3. Rule 4 CSR 240-20.094 (6)(B) states "...Written notification of opt-out from customers meeting the criteria under paragraph (6)(A)3. shall be sent to the utility serving the customer and the manager of the energy resource analysis section of the

¹ Guidelines are established in 4 CSR 240-20.094(6)(H): "Revocation. A customer may revoke an opt-out by providing written notice to the utility and commission two to four (2-4) months in advance of the calendar year for which it will become eligible for the utility's demand-side program's costs and benefits. Any customer revoking an opt-out to participate in a program will be required to remain in the program for the number of years over which the cost of that program is being recovered, or until the cost of their participation in that program has been recovered."

² Guidelines are established in 4 CSR 240-20.094(6)(I): "A customer who participates in demand-side programs initiated after August 1, 2009, shall be required to participate in program funding for a period of three (3) years following the last date when the customer received a demand-side incentive or a service."

commission or submitted through the commission's electronic filing and information system (EFIS) as a non-case-related filing."

4. Through opt-out requests submitted to the Commission's Staff pursuant to Rule 4 CSR 240-20.094 (6)(B) and follow-up inquiries, Staff has become aware KCPL and Staff interpret Section 393.1075.7 differently.

5. KCPL interprets Section 393.1075.7 to only allow customers to opt-out of DSM programs the Commission has approved under the MEEIA and the Commission's MEEIA rules.³ Staff interprets Section 393.1075.7 to not have that limitation.

6. On November 21, 2012, Staff sent KCPL an email with its analysis of pre-MEEIA rates (for illustrative purposes only). KCPL did not reply to this email.

7. On November 30, 2012, Staff began discussions with KCPL by email regarding their different interpretations of Section 393.1075.7

8. On December 10, 2012, KCPL replied to Staff's November 30 email. In its reply KCPL stated that

KCP&L does not believe that a [customer] company can elect not to participate in demand side programs that do not have a specific DSM charge that is implemented by the MEEIA statute (393.1075). The costs of the KCP&L programs have not been assigned to the account of any customer, rather they have been recorded in a regulatory asset account. Recovery of these amounts is effectuated through rates which cannot be adjusted to accommodate individual customers

9. Further, in its reply KCPL stated, "It is not our intention to include a DSM rate on each of the KCP&L exemplar rate schedules in Case No. ER-2012-0174. We will include a "DSM Charge" on the GMO exemplar rate schedules in Case No. ER-2012-0175 as described in the MEEIA Stipulation and Agreement."

³ The Commission's MEEIA rules include 4 CSR 240-3.163, 4 CSR 240-3.164, 4 CSR 240-20.093 and 4 CSR 240-20.094.

10. Staff interprets the “by any other authority” language within Section 393.1075 and Rule 4 CSR 240-20.094 (6)(F) (as emphasized above) to include the DSM programs the Commission addressed on pages 90-94 of its April 12, 2011 *Report and Order* in Case No. ER-2010-0355. Staff asserts that a DSM program does not have to be an approved program under the MEEIA or the Commission’s MEEIA rules for a customer to be eligible to opt out of the DSM programs and payment of charges for the associated programs’ costs until the customer revokes the notice under the Commission’s MEEIA rules.

11. Highly Confidential Attachment A is a copy of the letter Staff sent to KCPL on December 14, 2012, regarding this issue. Within it, Staff identifies customers who provided notice of their opt-out of DSM programs and payment of the costs associated with them, but that KCPL denied on the basis that it does not have DSM programs the Commission has approved under the MEEIA and the Commission’s MEEIA rules.

12. The Missouri Administrative Procedure and Review Act, Section 536.010 (2), RSMo 2000, defines contested case as “...a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.”

13. “The ‘law’ referred to in the contested case definition encompasses any statute or ordinance, or any provision of the state or federal constitutions that mandates a hearing.”⁴

14. KCPL is a public utility, and an electrical corporation, as those terms are defined in Section 386.020(43) and (15), RSMo (Supp. 2011). As such, KCPL is

⁴ *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo.,1995).

subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo 2000.

15. Section 393.130.1, RSMo (Supp. 2011) states:

All charges made or demanded by any...electrical corporation...shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for...electricity...or in excess of that allowed by law or by order or decision of the commission is prohibited.

16. Section 393.270, RSMo (2000) allows the Commission after hearing to fix the lawful rate an electric corporation may charge for service:

...[I]n order to carry out its statutory duties and effectuate the legislative policy objectives embodied therein, the commission must supervise, regulate and control the public utilities within its jurisdiction. It can do so, under the statutes, either by 'approval of rate schedules filed with it or by order after investigation or hearing.' The ultimate purpose of such action is to fix a rate which is just and reasonable both to the utility and to its customers."⁵

17. This is a contested case because Section 393.1075.7 and the MEEIA rules, both as cited and emphasized above, give qualifying customers a constitutionally protected interest in not being charged the costs of demand-side measures and/or because Section 393.270 requires the Commission to conduct a hearing to fix the lawful rate KCPL can charge customers, including opt-out customers. This case puts before the Commission the issues of which customers have the right under Section 393.1075.7 to elect to opt-out of participation in DSM programs KCPL offers and avoid the costs associated with those DSM programs, as well as the effective period of the opt-out notice.

⁵ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 48-49 (Mo. banc, 1979) (internal citations omitted).

18. The Commission can interpret the meaning of the MEEIA as “[t]he PSC has been given the statutory authority to interpret statutes pursuant to the administration of their charge.”⁶

19. Further, the Commission has the authority to interpret the meaning of its own MEEIA rules. “The rule-making power of the Commission is not questioned. The power to make rules includes the power to alter them, and to determine any reasonable policy of interpretation and application of said rules.”⁷

20. KCPL’s denial of opt-out to the customers listed in Attachment A is in violation of both the MEEIA and the Commission’s MEEIA rules, and Staff requests the Commission: (1) set an intervention deadline for this matter; (2) order a prehearing conference during which the parties can develop a proposed procedural schedule for resolution of this matter; and (3) at the resolution of this matter, issue an order directing KCPL to comply with such statute and rules, and if KCPL should fail to do so, authorize the General Counsel to seek injunctive relief and penalties against KCPL in circuit court.

21. Staff may raise other issues after any prehearing conference and opportunity to review further discovery in this matter.

WHEREFORE Staff files its Response for the Commission’s information and consideration and requests the Commission: (1) set an intervention deadline for this matter; (2) order a prehearing conference during which the parties can develop a proposed procedural schedule for resolution of this matter; and (3) at the resolution of this matter, issue an order directing KCPL to comply with such statute and rules, and if

⁶ *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D., 2011).

⁷ *State ex rel. Dail v. Public Service Com’n*, 203 S.W.2d 491, 497 (Mo. App., 1947).

KCPL should fail to do so, authorize the General Counsel to seek injunctive relief and penalties against KCPL in circuit court.

Respectfully submitted,

/s/Jennifer Hernandez

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served electronically on this **14th day of February 2013**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/Jennifer Hernandez