

**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)	Case No. ER-2010-0355
Service to Continue the Implementation of)	
Its Regulatory Plan)	

APPLICATION FOR REHEARING

COMES NOW the Midwest Energy Users' Association ("MEUA"), and for its Application for Rehearing, as it applies to the issue of Fuel and Purchased Power Expense, respectfully state as follows:

1. The Commission's Order, as it applies to the issue of Fuel and Purchase Power Expense, represents an unlawful application of the Burden of Proof. Section 393.150(2) expressly provides that the burden of proof shall be on the party advocating for an increased rate. Therefore, as it applies to fuel and purchased power expense, the burden is on Staff to show that its level of fuel and purchased power expense is just and reasonable. To the extent that KCPL later seeks to adopt Staff's level of fuel and purchased power expense, KCPL must accept that same burden of proof. That said, as demonstrated by its orders and deliberations in public session, the Commission abandoned application of this statutory burden of proof and instead simply "gave" KCPL the increased revenue requirement associated with Staff's fuel and purchased power expense without any logical decision-making.

2. The Order is unlawful, unjust and unreasonable in that the Commission has failed, as it applies to the issue of Fuel and Purchased Power Expense, to provide adequate findings of fact. Labeling recitations of evidence and testimony as findings of

fact when they are nothing more than descriptions of what one or the other parties contended do not substitute for findings of fact and has repeatedly been ruled as insufficient by Missouri courts.

3. The Order is unlawful, unjust and unreasonable in that the Commission fails to make any finding or decision on the issue denominated “How Should Natural Gas Costs be Determined?” In its Report and Order, the Commission held that it “adopts [KCPL’s] method of determining natural gas costs.”¹ Suddenly, in its Order of Clarification, the Commission deleted this sentence.² Therefore, this contested issue has not been decided by the Commission.

4. The Order is unlawful, unjust and unreasonable in that the Commission’s decision regarding fuel and purchased power expense (i.e., adoption of the Staff’s level of fuel and purchased power) is completely contrary to one of the few Commission findings on this matter. Specifically, in both the Report and Order and in its Order of Clarification, the Commission clearly found that “the MIDASTM model, for which KCP&L argued, is a superior model for determining spot market prices.” That said, however, the Commission then inexplicably abandons this finding and adopts Staff’s level of fuel and purchased power expense which does not rely on the MIDAS model.³

In fact, as the Commission subsequently recognizes, Staff’s method of calculating spot market prices is diametrically opposed to the methodology reflected in the MIDAS model. The MIDAS model relies upon both historical and projected information for determining spot market electric prices. For this reason, the Commission found the

¹ *Report and Order*, at page 146.

² *Order of Clarification*, at page 3.

³ Interestingly, in its deliberations on the companion GMO case, the Commission again appears to be adopting the MIDAS model as it applies to the calculation of off-system sales margins.

MIDAS model to be “superior.” On the other hand, Staff’s methodology completely ignores projected spot market prices and relies entirely on historical data.

It is illogical (and unlawful and unreasonable) for the Commission to find the MIDAS model to be superior and recite the need to consider projected spot market prices, but then rely upon a Staff methodology that does not use the MIDAS model and only relies upon historical spot market prices. In this case, the Commission’s decision (adoption of the Staff level of fuel and purchased power expense) has no logical nexus to the Commission’s findings.

5. The Order is unlawful, unjust and unreasonable in that the Commission erroneously concludes that KCPL has “abandoned its true-up testimony position on fuel expense.” Based solely upon this erroneous finding, the Commission concludes that Staff’s methodology is “more reliable.”

KCPL did not “abandon” its position on fuel expense. In fact, in the true-up direct testimony of KCPL witness Weisensee, KCPL notes that “stipulated issues” were tried up in a manner consistent with the previously executed non-unanimous Stipulation and Agreement.⁴ Not included in the “stipulated issues” portion of his testimony is the issue of “fuel and purchased power expense.”⁵ As such, at the time that this testimony was prepared, KCPL did not believe that it had “abandoned” this issue. Nor, had KCPL adopted Staff’s position. Furthermore, at the time it offered this testimony into evidence, KCPL did not make any correction to note that it had “abandoned” its position on fuel and purchased power expense. Finally, even at the time that it filed its Initial Brief, KCPL continues to list the four contested fuel and purchased power expense issues:

⁴ Ex. 117, Weisensee True-Up Direct, at page 5.

⁵ *Id.* at page 3.

F. Fuel & Purchased Power Expense

1. How Should Natural Gas Costs be Determined?
2. How Should Wolf Creek Fuel Oil Expenses be Determined?
3. Should Missouri Joint Municipal Electric Utility Commission (MJMEUC) Margin be Included in Native Load as well as Off-System Sales Margin?
4. How Should Spot Market Purchased Power Prices be Determined?

Clearly, contrary to the Commission’s current finding, at no time did KCPL “abandon” its level of fuel and purchased power expense. Ultimately, given that there are numerous other parties to this proceeding, whether KCPL actually abandoned its level of fuel and purchased power expense is inconsequential to the Commission’s obligation to make adequate findings of fact in regards to this issue. As the following section indicates, the obligation to make these findings of fact is based upon statutory directive.

6. The Order is unlawful, unjust and unreasonable in that the Commission seeks to treat the issue of fuel and purchased power expense as a settled issue between KCPL and Staff. Specifically, the Commission notes that KCPL “adopted Staff’s fuel expense amount.” Furthermore, repeatedly throughout the April 19 agenda session, individual Commissioners referred to this issue as “settled” between Staff and KCPL.

At best, given that this “settlement” only involved KCPL and Staff, it is a *de facto* non-unanimous Stipulation and Agreement. The Commission has noted, in its rules of practice and procedure, that a non-unanimous Stipulation represents nothing more than “a position of the signatory parties.”⁶

In 1982, the Court of Appeals addressed the Commission’s responsibility as it pertains to the consideration of a non-unanimous Stipulation. In the case of *State ex rel.*

⁶ 4 CSR 240-2.115(2)(D).

Fischer v. Public Service Commission,⁷ the Court held that the Commission may not simply adopt the position contained in the non-unanimous Stipulation. Rather, when confronted with a non-unanimous Stipulation, the Commission must implement the full hearing procedure. Included in this procedure are requirements related to the contents of the Commission's order.

This section also states that whenever the Commission makes an investigation, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises. In State ex rel. Rice v. Public Service Commission, the court stated that this statute required the Commission to include findings of fact in all of its written reports.⁸

Thus, the Commission cannot simply allow KCPL to adopt Staff's position over the objection of other parties. Rather, the Commission is required to make findings of fact as to all disputed issues including the allegedly settled issue.

Indeed, at least one Commissioner, relying in part on the holding of the *Fischer* court, has stated his opinion that the responsibility to make adequate findings of fact does not only extend to cases in which the Commission considers a non-unanimous Stipulation and Agreement, such as that pertaining to fuel and purchased power expense, but also extends to situations in which the Commission considers a Unanimous Stipulation and Agreement.

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without separately stating findings of fact and conclusions of law. Nevertheless, **this does not relieve the Commission of its statutory duty to evaluate the facts** and make a conclusion that the agreement provides for just and reasonable rates, provides for safe and adequate service, and is in the public interest. The signatories to the agreement may believe that it does, but **the Commission must decide** if this is so based upon the factual record. Missouri Courts, interpreting Section 386.420, have held that in contested

⁷ 645 S.W.2d 39 (Mo.App. 1982).

⁸ *Id.* at 42.

cases (proceedings in which legal rights, duties or privileges of specific parties are required to be determined after hearing) **the Commission must include findings of fact** in its written report. **Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard** embodied in the Missouri Constitution, Article V, Section 18. Consequently, the law requires the Commission to include separately stated findings of fact and conclusions of law supporting its decision in this matter.⁹

Despite the statutory requirements and the direction of the *Fischer* court, the Commission has neglected its duty to make adequate findings of fact in this case based simply on the belief that, because it had adopted Staff's position, KCPL had "abandoned" its true-up position. As Commissioner Jarrett has correctly noted, however, "**this does not relieve the Commission of its statutory duty to evaluate the facts.**" As pertains to the issue of fuel and purchased power expense, the Commission has not met its statutory duty.

WHEREFORE, MEUA respectfully requests that the Commission grant rehearing of its April 12, 2011 Report and Order and its April 19, 2011 Order of Clarification for the purpose of addressing the points raised herein.

⁹ *Concurring Opinion of Commissioner Terry M. Jarrett*, Case No. ER-2010-0130, issued May 19, 2010, at pages 1-2. (emphasis added, citations omitted).

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON



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ATTORNEYS FOR THE
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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: April 21, 2011