

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

In the Matter of The Empire District Electric)
Company of Joplin, Missouri for Authority to)
File Tariffs Increasing Rates for Electric Ser-)
vice Provided to Customers in the Missouri)
Service Area of the Company.)

Case No. ER-2011-0004

**STAFF'S RESPONSE TO
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 the Staff of the Missouri Public Service Commission, by and through Counsel, and for its Response to *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*, filed herein on May 12, 2011, states:

1. Staff repeats, as it evidently must, that it not does not propose to re-litigate in this case those issues already litigated in Case No. ER-2010-0355. Staff agrees with KCPL to the extent that it suggests that re-litigation of these issues would be a waste of everybody's time.¹ Staff does, however, propose to litigate certain issues *not* already litigated in Case No. ER-2010-0355.

¹ *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*

2. Staff joins KCPL in urging the Commission to take administrative notice of its recent decisions in Case Nos. ER-2010-0355 and ER-2010-0356.

3. KCPL quotes extensively from the Commission's **Wolf Creek** Report & Order,² before it finally gets around to the object of its motion: "Staff should be estopped both from raising any "new" issues at this time pertaining to KCP&L's alleged imprudence and from relitigating [*sic*] the old issues."³ The quoted excerpt refers to the doctrines of *res judicata* and collateral estoppel. KCPL quotes it because the Commission, in that case, decided "relitigation of the Hawthorn 5 issue is not appropriate . . . [t]herefore, the commission will not address the merits and staff's adjustment is rejected." KCPL now urges the Commission to not only prohibit the litigation of the Iatan-related issues that actually were litigated in Case No. ER-2010-0355, but also the litigation of those that it contends *could* have been litigated there.

4. Collateral estoppel prevents parties from re-litigating issues that have already been adjudicated.⁴ *Res judicata* is a similar and related doctrine.⁵ Both doctrines implement the public policies of conserving judicial resources and finality.⁶ Missouri courts have held that an administrative order may have preclusive effect on a subsequent proceeding if the following conditions are met: (1) the administrative hearing resulted in a "judgment" on the merits; (2) the issue to be litigated is identical to the

Commission Take Administrative Notice of its Decision in Case No. Er-2010-0355 and Motion for Expedited Treatment, Case No. ER-2011-0004, filed May 12, 2011 ("**KCPL's Motion**"), at ¶ 4.

² 28 Mo.P.S.C. (N.S.) 228 (April 23, 1986).

³ **KCPL's Motion**, ¶ 8.

⁴ **Board of Education of City of St. Louis v. City of St. Louis**, 879 S.W.2d 530, 532 (Mo. banc 1994).

⁵ **Black's Law Dictionary**, q.v. (7th ed., 1999).

⁶ *Id.*

issue addressed by the administrative order; (3) the party to be estopped from litigating the issue was a party to (or was in privity with a party to) the administrative hearing; and the party to be estopped had a full and fair opportunity to litigate the issue decided in the prior proceeding.⁷

5. KCPL ignores an important prerequisite of issue and claim preclusion: application of either doctrine requires an existing *final* judgment on the merits.⁸ The recent decisions in Case Nos. ER-2010-0355 and ER-2010-0356 relied on by KCPL are hardly final – applications for rehearing have not yet even been ruled. Neither decision, consequently, gives rise to any issue or claim preclusion.

6. Additionally, our Supreme Court has held, “the use of nonmutual offensive collateral estoppel against government entities is not permitted.”⁹ Staff is a government entity. The Court held, “sound policy suggests that estoppel should rarely be applied to a governmental entity and then only to avoid a manifest injustice.”¹⁰ KCPL has not cited any “manifest injustice” in its motion and, consequently, the Commission may not apply collateral estoppel against the Staff.

7. Staff suggests that public policy does not support the result urged here by KCPL. The Commission has never heard nor considered the issues that KCPL now seeks to exclude, yet KCPL would impose these charges upon the rate-paying public without any examination whatsoever by the regulatory authority. This is not a case in which issue preclusion or claim preclusion is applied for purposes of judicial economy in

⁷ *Wilson v. Cramer*, 317 S.W.3d 206, 211 (Mo. App., W.D. 2010).

⁸ *Owens v. Government Employees Insurance Co.*, 643 S.W.2d 308, 309 -310 (Mo. App., E.D. 1982).

⁹ *Id.*; *Shell Oil Co. v. Director of Revenue*, 732 S.W.2d 178, 182 (Mo. banc 1987).

¹⁰ *City of St. Louis*, 879 S.W.2d at 532; *Shell Oil*, 732 S.W.2d at 182.

a purely private dispute – this is, instead, a matter of great public interest, directly affecting the lives of thousands of citizens, in challenging economic times. Does KCPL really believe that it is somehow appropriate to impose these charges on the public without any review because of a legal technicality? Is that what “just and reasonable rates” mean to KCPL? Staff suggests that the Commission has no discretion to refuse to consider these issues.

WHEREFORE, Staff prays that the Commission will (1) take administrative notice of its recent decisions issued in Case Nos. ER-2010-0355 and ER-2010-0356 and (2) deny KCPL’s motion to the extent that KCPL seeks to preclude Staff from litigating in this case issues relating to the prudent management of the Iatan 1 and 2 projects that were not litigated in the cases cited above; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **17th day of May, 2011**, on 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/ Kevin A. Thompson