

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

In the Matter of Kansas City Power & Light)
Company's Request for Authority to Implement) Case No. ER-2012-0174
a General Rate Increase for Electric Service)

and

In the Matter of KCP&L Greater Missouri)
Operations Company's Request for Authority to) Case No. ER-2012-0175
Implement General Rate Increase for Electric)
Service.)

**MECG RESPONSE TO
OPC MOTION TO STRIKE**

COMES NOW, the Midwest Energy Consumers' Group ("MECG"), pursuant to the Commission's December 12, 2012 Order Setting Time for Filing, and for its Response to OPC's Motion to Strike respectfully states as follows:

1. On November 28, 2012, MECG filed its Initial Brief in this matter. One issue addressed in that brief is the method by which the Commission should allocate any KCPL revenue increase among the various customer classes. In its brief, MECG noted that all parties, except for OPC and AARP / CCM, had presented a non-unanimous stipulation by which a 1.0% revenue neutral increase would be allocated to the residential class with a corresponding decrease to the other non-lighting classes. Following such shift, the revenue increase would be allocated to all classes on an equal percent across the board basis.

2. While lacking a study of its own to oppose the stipulation, OPC requests that the Commission adopt the results of the KCPL class cost of service study. As demonstrated in the MECG brief, however, the KCPL class cost of service: (1) is based upon "an obscure and arcane method"; (2) has found widespread disfavor among state utility commissions; (3) is inconsistent

with several recent decisions issued by the Commission; and (4) provides results that are significantly different than any of the other 5 studies presented in this case.¹ Furthermore, MECG pointed out that KCPL, as the sponsor of the study now relied upon by OPC, not only agreed with the stipulation, but had itself disclaimed the use of its methodology for purposes of allocating any revenue increase.²

3. Given that its position relies entirely on the Commission's adoption of the KCPL study, and given that KCPL has itself expressly disclaimed the use of such study for revenue allocation purposes, OPC now seeks to strike any such criticism from the record. Specifically, well after such testimony was actually received into the record, OPC seeks to strike a portion of page 4 of MEUA witness Johnstone's Rebuttal Testimony. OPC's Motion to Strike is misplaced for at least three different reasons.

4. ***First***, OPC's motion to strike is not timely. The rebuttal testimony in question was filed on September 5, 2012. The issue in question was litigated on October 29, 2012 and the testimony in question was received into the record without any objection from OPC.³ Despite having almost 8 weeks from the date that it was filed, OPC was noticeably silent when it had the opportunity to object to this testimony at hearing. Given its silence and the fact that the testimony has already been received into the record, the Commission should find that OPC's motion is untimely and without merit.

5. ***Second***, OPC objects that Mr. Johnstone's testimony should be stricken because it "is hearsay, and appears to disclose privileged and confidential statements made at settlement

¹ As reflected at page 55 of the MECG Initial Brief, all of the class cost of service studies, except the KCPL study relied upon by OPC, reach the same conclusions: (1) that residential rates are significantly below its cost of service and (2) that LGS and LP rates are significantly above their cost of service.

² MECG Initial Brief at page 57 (citing to MEUA Exhibit 675, Johnstone Rebuttal, page 4).

³ Tr. 979.

conference.”⁴ Again, OPC’s objection is misplaced. Contrary to OPC’s allegation, the statement in question is not hearsay. As provided in Rule 801(d)(1) of the Federal Rules of Evidence, the statement is not hearsay because the declarant (Mr. Rush) subsequently testified and was subject to cross-examination regarding this statement.⁵ Despite having the opportunity to cross-examine Mr. Rush on the statement in question, OPC declined all cross-examination. As such, the statement in question is not hearsay. Furthermore, as provided in Rule 801(d)(2) of the Federal Rules of Evidence, the statement was offered by MEUA as an opposing party’s admission. Finally, the Commission is not bound by technical rules of evidence like the hearsay rule.⁶

In addition to not being objectionable as hearsay, the statement is not objectionable to OPC as a privileged communication. The statement in question was made by KCPL’s witness. As such, any privilege surrounding the statement may only be invoked by KCPL and its witness. Not only did KCPL not object to this communication when it was offered in the Missouri case,⁷ but the same statement was included in testimony in a recent Kansas case and was similarly not objected to by KCPL. In fact, when confronted with the use of this statement in the MECG Initial Brief, KCPL not only did not object to its use, but also did not even seek to rebut the statement in its reply brief.

6. **Third**, during the technical conference in question, KCPL was specifically asked whether the statement was confidential and declined any protection for the statement. As reflected in Mr. Johnstone’s testimony, the conference in question was not a settlement

⁴ OPC Reply Brief at page 7.

⁵ Tr. 1002-1039.

⁶ Section 386.410.

⁷ Tr. 979.

conference, but was a technical conference.⁸ Moreover, during cross-examination, the conference was also specifically characterized as a technical conference.⁹

Importantly, at the beginning of the August 30, 2012 technical conference, in preparation of his testimony in both Missouri and Kansas, Mr. Johnstone specifically asked KCPL whether this was a settlement conference or whether the statements should be treated as confidential. While represented by counsel at that conference, KCPL expressly acknowledged that it was not a settlement conference, that the statements were not made in furtherance of settlement, and that any statements were not confidential. Undoubtedly, this is the reason that KCPL has not objected to these statements either during the hearing in this case or during similar hearings in Kansas.

WHEREFORE, MECG respectfully asks that the Commission deny OPC's Motion to Strike and realizing that KCPL has expressly stated that its study should not be used for purposes of revenue allocation, find OPC's opposition to the Non-Unanimous Settlement to be without merit and make findings such that the results of that settlement may be effectuated.

⁸ MEUA Exhibit 675, Johnstone Rebuttal, page 4.

⁹ Tr. 1019.

Respectfully submitted,



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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: December 17, 2012