STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 1st day of May, 1992.

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| City of North Kansas City, Missouri, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | Case No. GC-92-228 |
| | ) | |
| The Kansas Power and Light Company, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## ORDER DISMISSING COMPLAINT

On March 13, 1992, the City of North Kansas City, Missouri, Complainant, (City) filed a Complaint against The Kansas Power and Light Company, Respondent, (KPL) alleging: (1) that KPL violated its franchise agreement or license by entering into voluntary natural gas carriage contracts with numerous large commercial and industrial end users; (2) that KPL impermissibly enlarged its rights under the franchise or license and in violation of Missouri laws regarding certificates of convenience and necessity issued by the Missouri Public Service Commission by *de facto* leasing, transferring, and assigning a portion of the rights and privileges of use of the City's infrastructure and rights of way from its franchise agreement or license with the City; (3) that KPL violated Section 393.190(1), R.S.Mo. 1986, by failing to file with the Commission a projected tax impact statement; and (4) that KPL by engaging in systematic transportation activities that give undue and unreasonable preference for large customers violated Section 393.130(3), R.S.Mo. 1986, by imposing unreasonable prejudice and disadvantage upon the public at large. The City seeks an order of the Commission finding that the City has standing to complain in accordance with the statutes and rules governing complaints before the Commission and seeks an order for KPL

to cease its systematic natural gas transportation activities within the City until KPL complies with the condition precedent required for modification and amendment of its franchise or license by securing through negotiation the permission of the necessary municipal authorities. On April 13, 1992 KPL filed its Answer To Complaint And Motion To Dismiss stating that the City failed to allege any facts which would support any of its claims.

As to all allegations of City's Complaint, restated herein, the Commission finds in favor of KPL's Motion To Dismiss.

As to allegation (1) of City's Complaint, restated herein, the Commission finds that there is no franchise or license granted by the City, pursuant to which KPL operates its gas distribution system in the City, for the Commission to consider to make a determination whether any of KPL's utility activities in the City constitute a violation of the provisions or requirements thereof. The Commission has authority in a complaint case to determine if there is a violation by a regulated utility of a city's franchise. The rule is as set out in ***City of Cape Girardeau v. St. Louis-San Francisco Railway Co.***, 267 S.W. 601, 603 (Mo. banc 1924):

> Assuming without so deciding, that said ordinance also constitutes the franchise under which the railway company is now operating its said railroad in said city, it is quite clear that the Public Service Commission has been delegated full power to hear and determine all complaints, at the instance of the city or of any person or corporation, that said railway company is violating the provisions or requirements of said franchise. It is equally clear that the Commission is empowered to take whatever action or make whatever order on the hearing of such complaint the facts justify.

The City has heretofore granted to KPL a franchise, dated the 21st day of November, 1967, through passage of its Ordinance No. 3282, attached as Exhibit A to the City's Complaint, which authorized KPL to operate a gas distribution system in the City for a period of twenty (20) years terminating on the 21st day of November, 1987, and which provided for the payment to the City of a sum equal

to five percent (5%) of KPL's gross receipts derived from the measurement of gas sold within the City. The City has not granted a new franchise or extended the old franchise to KPL by ordinance or agreement since November 21, 1987 to the date of this Complaint. The City in its Complaint, herein, has ambiguously stated KPL's present authority to operate a gas distribution system in the City. At paragraph 3 of its Complaint, the City states:

> "The City of North Kansas City, Missouri, has not, since November 21, 1987, entered into a Franchise Agreement with KPL, and KPL is still operating in the City of North Kansas City under the terms and conditions of said Franchise Agreement, and is continuing to do so without an existing Franchise Agreement at the present time." (Emphasis added).

At paragraph 4 of its Complaint, the City states:

> "KPL is presently continuing as a licensee to operate its distribution system within the City of North Kansas City, Missouri...." (Emphasis added).

The Commission is without jurisdiction to make a determination as to the authority or privilege under which KPL operates its gas distribution system presently within the City. The case of ***State v. Missouri Utilities Co.***, 96 S.W.2d 607, 613 (Mo. banc 1936), is instructive as to this issue:

> The fallacy of this argument is that the issuance of a certificate is only one of the facts made by law prerequisite to the exercise by respondent of the privilege of keeping its lines on the streets of California. The law, as interpreted by this court in previous decisions, fixes as conditions precedent to creation of that privilege two things: (1) The granting of a certificate by the commission; and (2) the granting of a franchise by the city, which, like the commission, acts, in this regard, as agent of the state. Unless the permission of both agencies has been obtained, the privilege of using the streets for this purpose never comes into being; and when the city limits the life of the franchise granted to twenty years, as it must, and that period expires, the privilege of so using the city's public places comes to an end. The continued use is illegal. The corporation acts outside of its granted powers.

Even though KPL presently does not have a franchise or written agreement to operate a gas distribution system within the City, it does not automatically hold that KPL is operating within the City illegally.

The doctrines of equitable estoppel and laches have been applied in previous cases wherein a utility company was operating beyond the expiration of the period fixed by a franchise from a city to a utility company. In the case of ***State ex rel. City of Sikeston v. Missouri Utilities Co.***, 53 S.W.2d 394, 400 (Mo. banc 1932), the Court found:

> "that in the circumstances hereinabove stated the doctrines of laches and estoppel apply, and relator will not now be heard to say that respondent is without right or authority to engage in the electric business in the city of Sikeston and have reasonable use of its streets, avenues, and alleys in connection therewith."

The rule has been more recently confirmed in ***Kennedy v. City of St. Louis***, 749 S.W.2d 427 (Mo. App. 1988):

> "While the doctrine of 'equitable estoppel' ordinarily is not applicable against governmental entities, courts may apply the doctrine in 'exceptional cases' where required by 'right and justice." *Merrell v. Wolff, supra,* 408 S.W.2d at 851. In a long line of cases under Missouri law, the doctrine has been applied to municipalities, as well as to private persons. *State v. Missouri Utilities Co.*, 339 Mo. 385, 96 S.W.2d 607, 615-616 (1936)."

It would be for a court to determine whether KPL is operating illegally within the City or whether the doctrine of equitable estoppel or laches applies to KPL's operation of a gas distribution system within the City in that KPL is presently operating in the City without a franchise or written agreement. Since the City has not filed any court action to prohibit KPL from operating a gas distribution system within its boundaries, the Commission must conclude that KPL is operating legally within the City and has the privilege of using the City's streets, avenues, alleys, and infrastructure in connection with KPL's gas distribution system within the City.

The only consideration for the Commission is whether KPL is operating its gas distribution system within the City in accordance with its Certificate of Public Convenience and Necessity as granted by the Commission and in accordance with the tariffs approved by the Commission for KPL. The Commission

in Case No. GR-91-291, entitled *In the matter of The Kansas Power and Light Company's tariffs to increase natural gas rates for certain customers*, effective on February 5, 1992, in its Report And Order has approved KPL's rate design in saying at page 26 thereof:

> "The parties to this case have concluded a stipulation and agreement as to the appropriate rate design to be applied to this rate increase. The Commission finds that the rate design agreed to by the parties is reasonable and should be adopted in this case."

KPL had filed proposed tariffs with the Commission on March 8, 1991 in that case. By its order issued in the case on April 3, 1991 the Commission suspended the proposed tariffs to February 5, 1992, ordered notice, and set an intervention deadline of May 3, 1991. The City did not apply to intervene in the KPL rate case. As part of that rate case, the Commission approved KPL's tariff sheets No. 44 through No. 71.10, which concerned "transportation provisions" for large industrial service for all of KPL's Missouri service areas. Thus, the Commission has tacitly authorized and approved KPL providing "transportation services" as part of its gas distribution system within the City.

As to allegation (2) of City's Complaint, restated herein, the Commission finds that it does not have the power to exercise or perform the judicial function requested. The City has requested the Commission to make a finding that the actions of KPL in providing "transportation services" to certain customers as opposed to "supplying and selling" natural gas to the customers, constitutes a ***de facto*** lease, transfer, and assignment of KPL's franchise rights and privileges. Such a finding would be declaring a principle of law or equity, which the Commission has no power to do. ***Gaines v. Gibbs***, 709 S.W.2d 541, 543; ***Board of Public Works of Rolla v. Sho-Me Power Corp.***, 244 S.W.2d 55, 59; ***Straube v. Bowling Green Gas Co.***, 227 S.W.2d 666, 668, ***American Petroleum Exchange v. Public Service Commission***, Mo. Supp., 172 S.W.2d 952, 955.

As to allegation (3) of City's Complaint, restated herein, the Commission finds that it is a moot question since the Commission is not empowered to make the determination as requested in allegation (2) of City's Complaint, restated herein, that there was a *de facto* lease, transfer, and assignment by KPL of a portion of the rights and privileges of use of the City's infrastructure and rights of way. Section 393.190(1), R.S.Mo. 1986, requires any gas corporation seeking approval of the Commission to lease, transfer, or assign any part of its franchise, works, or system to file with the Commission a statement as to what, if any, impact such lease, transfer, or assignment will have on the tax revenues of the political subdivisions in which any structures, facilities, or equipment of the corporations involved in such disposition are located.

As to allegation (4) of City's Complaint, restated herein, the Commission finds that it constitutes a collateral action against a final order of the Commission. The City has requested the Commission to make a finding that KPL's systematic transportation of natural gas activities result in an undue and unreasonable preference for large consumers and impose an unreasonable prejudice and disadvantage upon the public at large in violation of Section 393.130(3), R.S.Mo. 1986. Specifically, the City claims that the practice of KPL which allows industrial and commercial users a minimum of 3,000 Mcf of natural gas during any one month in the prior 12-month period to purchase natural gas from the wellhead as opposed to purchasing from KPL, creates an arbitrary threshold and imposes an adverse impact on the local public interest due to the added cost-burden borne by KPL's captive residential and small commercial and industrial consumers, who are forced to absorb the entire financial burden for the use of the City's infrastructure and rights of way because the large industrial and commercial consumers are effectively exempted through their purchase at the wellhead rather than from KPL. The City has, in effect, claimed a discriminatory rate design. Rate design is the process by which a change in

rates is distributed among the classes of customers taking a company's service, such as industrial, residential, and commercial customers.

Section 386.390, R.S.Mo. 1986, allows the City to file a complaint with the Commission "setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission." This statute in certain instances may conflict with Section 386.550, R.S.Mo. 1986, which provides that: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The Court in ***State ex rel. State Highway Commission of Missouri v. Conrad***, Mo. Supp., 310 S.W.2d 871 (Mo. 1958), states: "Section 386.570 provides the sole method of obtaining a review of any final order of the commission. So frequently have we held such orders not subject to collateral attack we need not elaborate upon the effect and meaning of these statutes."

As previously noted, the Commission in Case No. GR-91-291 has ruled that the rate design of KPL within the City is nondiscriminatory. While the City may attack the KPL rate design as discriminatory in a complaint by virtue of Section 386.390, R.S.Mo. 1986, it must allege facts that indicate that KPL is not following the Commission order or that there are changed circumstances that have taken place to make the previous order of the Commission a discriminatory order. The City has not done this. The City has only stated the legal conclusion that the rate design already approved and found to be reasonable by the Commission for KPL for service in the City is discriminatory. The City had the opportunity to intervene in Case No. GR-91-291 and chose not to do so. Therefore, Section 386.550, R.S.Mo. 1986, operates to not allow the City to attack the Report

And Order of the Commission in Case No. GR-91-291 as to KPL's rate design within the City in a collateral action as it is attempting to do here.

**IT IS THEREFORE ORDERED:**

1. That allegations (1), (2), (3) and (4) of the City of North Kansas City, Missouri's Complaint, restated herein, are dismissed.

2. That this order shall become effective on the 12th day of May, 1992.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

McClure, Chm., Mueller, Rauch,
Perkins and Kincheloe, CC., concur.