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 Service to Begin the Implementation of Its Regulatory Plan.	**)))))**	**Case No. ER-2006-0314**

KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE TO APPLICATIONS FOR REHEARING AND MOTIONS FOR CLARIFICATION

Kansas City Power & Light Company ("KCPL" or "Company") states the following in response to the Order Directing Filing issued on January 3, 2007:

On January 3, 2007, the Commission issued its Order Directing Filing which directed KCPL to respond by January 10, 2007 to the various applications for rehearing and motions for clarification filed by parties in this proceeding. This response complies with the Commission's directive and addresses the salient points raised by certain parties in their respective applications and motions:

I. The Return on Equity of 11.25% is Just and Reasonable, and Supported by Competent and Substantial Evidence.

A. Dr. Hadaway's Analysis was Properly Adopted by the Commission.

On behalf of KCPL, Dr. Samuel Hadaway recommended a base return on equity of 11.0%, plus 50 basis points to account for construction risks. See Tr. 1297. The Commission adopted the base ROE recommendation of 11%, but added only 25 basis points for construction risks, given its view of the benefits provided by the Regulatory Plan Stipulation and Agreement ("Stipulation") approved in Case No. EO-2005-0329. This decision is fully supported by the record, and in certain respects is supported by experts who testified on behalf of those who have filed applications for rehearing.

Dr. Hadaway used a peer group of 24 companies, which included utilities in both the Midwest as well as other areas of the United States. His peer group was accepted without modification by the Department of Energy (DOE) witness Professor Woolridge. Office of Public Counsel's expert Mr. Baudino used a similar peer group of 21 companies. Because Dr. Hadaway's analysis included Midwestern companies, it fell within the directives of the Supreme Court of the United States in Bluefield and Hope[1] that the returns on investments and corresponding risks of utilities in the same general part of the country be considered as part of the ROE process. Several parties attacked the Commission's ruling because it accepted testimony by Dr. Hadaway which was based upon ROEs earned by other utilities during 2006, as well as allowed returns permitted by regulatory commissions in 2006. Such evidence was entirely proper for the Commission to consider and rely upon, given Bluefield's dictate that a "public utility is entitled to earn such rates ... equal to that generally being made at the same time ... in other business undertakings which are attended by corresponding risks and uncertainties ...." See Bluefield, 262 U.S. at 692.

Moreover, the Commission's decision to grant more credibility to Dr. Hadaway because he had better credentials and more experience than other witnesses, including DOE's Dr. Woolridge, is well within the discretion of the Commission. The Commission "may weigh the credibility of testimony received, and may choose to believe or disbelieve all or part of any witness' testimony ...." Vaughn v. Labor and Indus. Relations Comm'n., 603 S.W.2d 63, 66 (Mo. App. 1980). In its comment that "Dr. Woolridge has never worked for, or even testified

[1] Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944)("Hope"); Bluefield Waterworks & Improv. Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679, 692-93 (1923) ("Bluefield").

for, a public utility,"[2] the Commission was simply weighing his credentials, which it found "impressive" when it noted he was "a professor of finance at Penn State University." However, the fact that Dr. Hadaway has testified on many occasions on behalf of both utilities and state regulators was properly found to be an important factor, compared with Dr. Woolridge who had never testified on behalf of a utility. Such decisions concerning credibility are well within the authority of the Commission.

B. The Use of a "Zone of Reasonableness" is Proper.

Rates set by this Commission must be "just and reasonable" under Section 393.150.2, as well as other provisions of the Public Service Commission Law. The courts have recognized that ratemaking involves "pragmatic adjustments" and that public utility commissions are "not bound to the use of any single formula or combination of formulae in determining rates." See Hope, 320 U.S. at 602.

In evaluating the decisions of this Commission, Missouri courts have approved the use of a "zone of reasonableness" concept when financial and ROE issues are examined on appeal. See State ex rel. Missouri Gas Energy v. PSC, 186 S.W.3d 376, 385 n. 5, 389 (Mo. App. 2005). Indeed, the Court of Appeals has approved the Commission's consideration of national averages of rates of return as a proper, although not determinative, factor. Id. at 387-88. In determining that the return on equity recommended by DOE's Professor Woolridge fell outside the zone of reasonableness, the Commission was well within its authority to judge an expert's opinion and to discard it on the basis that it was not reasonable. Id. at 390-92.

---

2 Report and Order at 22, n. 21.

C. The Evidentiary Basis for the Commission's ROE Decision, as well as its Reasoning Supporting that Decision are Adequate.

Finally, certain parties attacked the Commission's order as lacking sufficient detail to support its overall 11.25% ROE decision. To the contrary, the Commission's detailed discussion of the evidence provided by Dr. Hadaway and other witnesses is sufficient to permit a reviewing court to determine the facts upon which the Commission's order was based. See State ex rel. Midwest Gas Users' Assoc. v. PSC, 976 S.W.2d 485, 496 (Mo. App. 1998)("MGUA"). The Order contained a thorough analysis of the pertinent issues, from the companies included in various peer groups to the Discounted Cash Flow method and the use of the Risk/Premium Model as a comparative check. It reviewed the role of both the equity and debt financial markets, as well as the construction risk facing KCPL. On these issues, the Commission's Order spanned over ten pages with 38 footnotes citing to various factual and legal references. See Report and Order at 20-30.

Similarly, there is no basis for an attack upon the Commission's decision in this case simply because it utilized an analysis or reasoning that may have differed from its decision in the Empire District Electric Co. rate case.[3] Regulatory Commissions are not bound by *Stare Decisis*. See State ex rel. Churchill Truck Lines, Inc. v. PSC, 734 S.W.2d 586, 593 (Mo. App. 1987). Inconsistencies between current and prior decisions of the Commission or other decisions are irrelevant "so long as the action taken is not otherwise arbitrary or unreasonable." See State ex rel. GTE North, Inc. v. PSC, 835 S.W.2d 356, 371 (Mo. App. 1992).

Finally, there was substantial evidence in the record to support an additional 25 basis points for construction risks by Dr. Hadaway. As Schedule 1 to his direct testimony demonstrated, KCPL's construction program will almost double its plant in service (by 95%),

---

[3] In re Empire District Electric Co., Case No. ER-2006-0315 (Mo. P.S.C. Dec. 21, 2006).

compared to the average utility's rate base increase of 56%. (Tr. 1305; Ex. 33, SCH-1). These facts were discussed and referred to in the record in detail by the Report and Order, and clearly provide substantial support for the Commission's decision.

II. Setting Rates for Off-Systems Sales Margins at the 25% Level, with Future Rates to be set on the Basis of Actual Margins, Conforms to Standard Missouri Regulatory Principles.

A. The Commission's Decision is not Retroactive Ratemaking.

Citing the risks that KCPL faces in the volatile off-system wholesale electricity sales market, the Commission set rates by establishing non-firm off-system sales margins at the 25% level of its expected range for 2007. This was based on the largely undisputed testimony of KCPL witness Michael Schnitzer of the NorthBridge Group, which presented a comprehensive evaluation of the off-system sales market and the probable ranges in which KCPL's off-system sales margins would fall.[4] The 25% level was adopted by the Commission, based upon the recommendation of KCPL's Chris Giles who, along with Mr. Schnitzer, noted the Company's historical dependence on the off-system sales market and the volatility associated with those markets and the price of natural gas.

It then became necessary for the Commission to determine how KCPL's actual off-system sales experience would ultimately be treated. Such treatment is governed in part by the 2005 Regulatory Plan Stipulation (Case No. EO-2005-0329) where KCPL agreed that "off-system energy and capacity sales revenues and related costs would continue to be treated above the line for ratemaking purposes." The Stipulation also prohibited KCPL from proposing "any adjustment that would remove any portion of [KCPL's] off-system sales from its revenue requirement determination in any rate case ...." See Stipulation, § III(B)(1)(j) at 22.

---

[4] The Commission's use of the numbers contained in the True-Up Direct Testimony of KCPL witness Tim Rush and its accompanying schedules, which were admitted without objection, was proper. See Report and Order at 36-37.

The Commission considered how to allocate the risks of the off-system sales market, based on the alternatives that KCPL proposed, all of which were consistent with the Stipulation. In order to account for these risks, the Commission ordered that rates would be set in KCPL's next case so that any amounts earned by KCPL over the 25th percentile be reflected as a credit to ratepayers.[5] Similarly, any amounts not earned by KCPL up to the 25th percentile would be covered in future rates in the next rate case. To account for and track these off-system sales margins, the Commission ordered KCPL to book such amounts as regulatory liabilities or assets for purposes of the next rate case.

This decision eliminated the risk of the off-system sales market to KCPL, in lieu of the risk-sharing alternatives that had been suggested. In so doing, the Commission adopted a mechanism that is consistent with the Stipulation and insures on a forward-looking basis that customers will receive the actual benefit of all off-system sales margins. It is also consistent with the "alternative mechanism" discussed by the Office of the Public Counsel's Ralph C. Smith in his Direct Testimony (Ex. 201). He expressed OPC's willingness to consider such a mechanism "by which KCPL would establish a regulatory liability (or asset) account, and would record its actual achieved off-system sales margin during the rate effective period in excess of (or below) the [designated point] in such account." See Ex. 201 at 11. He described the "benefits" of "such an accounting treatment," noting how fuel-related costs and revenues are similarly managed. Id. at 12-14.

Such a procedure is not retroactive ratemaking, which only occurs when a utility is permitted to collect or ordered to refund "additional amounts simply because they had additional

[5] Such treatment is consistent with how the Additional Amortizations will serve "as an offset to rate base and future rate proceedings of KCPL." See Stipulation at § III(B)(3)(a)(iv), (b)(vi), (c)(vi) at 32, 37, 40.

past expenses not covered by" existing rate schedules. See State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 59 (Mo. 1979) ("UCCM (1979)"). In that case the Missouri Supreme Court struck down the fuel adjustment clause and a later surcharge that permitted utilities to change a rate after it had been established and paid. In UCCM (1979), the fuel adjustment clause and its subsequent surcharge employed a formula that permitted utilities to look back and change established rates.

In KCPL's case, the Commission has simply established a mechanism to assure that off-system sales margins are appropriately treated above-the-line, but in a manner that shields KCPL from the risks of the wholesale electricity markets. If the Commission had not mitigated KCPL's off-system sales risk, some form of risk-sharing between the Company and ratepayers would be warranted. The Commission's decision to mitigate KCPL's energy market risk is similar to the Purchased Gas Adjustment (PGA) Clause and the related Actual Cost Adjustment (ACA) process that the Missouri Court of Appeals approved in MGUA, 976 S.W.2d 470, 481 (Mo. App. 1998). Addressing the retroactive ratemaking argument, the Court stated that it did not believe that the PGA/ACA process constituted "the kind of improper retroactive ratemaking disapproved in" UCCM 1979. The Court stated:

> The adjustments permitted under both the PGA and the ACA are applied only to future customers on future bills. The companies are not allowed to adjust the amount to past customers either up or down.
>
> Moreover, the PSC conducts its prudence review of the PGA, and again conducts a prudence review of the ACA before the adjusted amount becomes a part of the rate.

976 S.W.2d at 481. See State ex rel. Assoc. Natural Gas Co. v. PSC, 954 S.W.2d 520, 531 (Mo. App. 1997). This is similar to the way that the Commission has ordered KCPL to manage off-system sales margins, except that it will review those margins in the Company's next general rate case, not merely a "prudence review."

Indeed, the manner in which the Commission ordered such margins to be treated in rates in this case and in the future is less controversial than the incentive PGA/ACA clauses approved in the MGUA case, where adjustments in rates occurred prospectively after such periodic prudence reviews by the Commission. See 976 S.W.2d at 475-76. The Court of Appeals noted that neither the ACA nor the incentive PGA/ACA process "purport to retroactively change the amounts charged under those clauses. As Respondents note, while they may consider past costs, they thus apply only in the future and thus do not constitute retroactive ratemaking." Id. at 481. Because the Commission's decision is forward-looking, it also does not violate Section 393.270.

The Court of Appeals recently upheld the Commission's Emergency Cold Weather Rule against an attack that it constituted retroactive ratemaking because it allowed utilities to book incremental changes in revenues and expenses as an Accounting Authority Order (AAO) to be considered in a future rate case. In State ex rel. Missouri Gas Energy v. PSC, 2006 WL 3068673 (Mo. App., Oct. 31, 2006), the Court, citing the MGUA case, noted that it was permissible to defer the final decision on such costs until a rate case is heard. At that future rate case, gains or losses would be considered with other factors in determining new rates. Id. at *3. The Court concluded: "This is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future." Id. at *4.

Because the Commission's off-system sales decision is not "just a formula stuck into the utilities' rate schedules," as the Court of Appeals characterized the Supreme Court's findings in the UCCM 1979 case,[6] and establishes a procedure for the consideration of such earnings in a

[6] MGUA, 976 S.W.2d at 480 (Mo. App. 1998).

future rate case, the ratemaking treatment granted to off-system sales margins is proper under Missouri law.

B. <u>The Commission's Order is Consistent with the Stipulation</u>.

Several parties argue once again that setting the off-system sales margins at the 25^{th} percentile is a violation of the Stipulation. However, KCPL has committed that all such margins will be counted "above the line" (Tr. 788 [Giles]).

Moreover, there is nothing in the Stipulation that requires off-system sales margins to be included in rates on a normalized or historical basis, or that prohibits the use of a risk-based analysis that would set projected sales at a 25:75 point. The proposal set forth by Mr. Giles in his Direct Testimony at page 28, as well as in his oral testimony before the Commission (Tr. 792) is consistent with the OPC proposal submitted by Mr. Smith (Ex. 210 at 11), and provides a substantial basis for the Report and Order's decision.

C. <u>The Commission did not violate § 393.140(5) and its Ban on Undue Discrimination.</u>

Missouri law does not prohibit discrimination or preferences in ratemaking. What it prohibits is "unjustly discriminatory or unduly preferential" rates or charges under § 393.140(5). Section 393.130.3 similarly prohibits a utility from granting "any undue or unreasonable preference or advantage" to a customer.

The Commission's decision on off-system sales margins is forward-looking, and is neither unduly nor unjustly discriminatory. In this regard, it is similar to the Court of Appeals' approval of the Commission's orders involving accelerated depreciation and related tax issues in <u>State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC</u>, 606 S.W.2d 222, 224-27 (Mo. App. 1980) ("<u>UCCM (1980)</u>"). The Court noted that in order to permit the utility to take advantage of "substantial tax benefits," a system that accounted for the interests of both present and future ratepayers "was within the zone of an allowable discretion, which is not to be disturbed upon judicial review." Id. at 227.

III. The Additional Amortizations Approved by the Commission are Consistent with the Regulatory Plan and are Lawful.

Jackson County erroneously argues that the Report and Order is unlawful because "it grants an increase of millions of dollars in rates based on the costs of construction in progress of an electric plant before it is fully operational and used for service in direct contravention of Section 393.135 …." See Jackson County Application for Rehearing at 1-2. This argument is clearly incorrect.

The Commission Staff thoroughly discussed and rebutted this legal argument in its "Staff Suggestions In Support of Nonunanimous Stipulation and Agreement Regarding KCPL's Regulatory Plan Additional Amortizations" at pages 6-14, filed on December 11, 2006. Staff also addressed this argument in the Spring of 2005 in its "Suggestions In Support of Stipulation and Agreement" that it filed in the Regulatory Plan docket. Staff concluded then that the use of the Additional Amortizations mechanism, implemented in this case, violated neither the prohibition of Section 393.135 against placing in rate base funds for construction of plant before the plant is "fully operational and used for service" nor the holding of UCCM (1979). See Staff Suggestions in Support of Stipulation and Agreement at 12, Case No. EO-2005-0329 (May 10, 2005). KCPL concurs with this view.

As Staff noted, the Court of Appeals has interpreted Section 393.135 as prohibiting "the company from earning any return upon facilities before they are actually placed in service." UCCM (1980), 606 S.W.2d at 226. In this case, the Company's rates do not include any construction work in progress (CWIP), and the KCPL will not be earning a return upon facilities before they are actually placed in service. In fact, as a part of the Stipulation in the Regulatory Plan proceeding, the Signatory Parties agreed upon detailed In-Service Criteria that would be utilized to ensure that no plant was included in rates until it was fully operational and used for service: "KCPL, Staff and Public Counsel have agreed to the in-service criteria in Appendix H for the below list of existing generating units, the future Iatan 2 coal unit, and the future wind units in accordance with the requirements specified under Section 393.135 RSMo 2000." See Stipulation at 23 and Appendix H. Applying the in-service criteria to rate base additions in this proceeding, Staff witness Michael E. Taylor concluded that the Spearville Wind Energy Facility (which was a major rate addition in this case) "has satisfactorily met the in-service criteria established in Case No. EO-2005-0329 and should be considered 'fully operational and used for service.' " (Ex. 160 at 1). It is totally incorrect to conclude that any plant has been included in KCPL's rate base in this proceeding before it was fully operational and used for service, as mandated by Section 393.135.[7]

The Commission also explained the purpose of the Additional Amortizations in its Report and Order at 54:

> The Regulatory Plan amortization is intended to provide KCPL the necessary cash flow to meet the two particular debt coverage rations identified in the Regulatory Plan based upon KCPL's Missouri jurisdictional cost of service. The entire amount of the Regulatory Plan amortization will be treated as additional book depreciation, and the entire amount will be reflected in KCPL's tax calculation as additional tax straight-line depreciation deduction.

As explained above, these Additional Amortizations do not result in plant being included in rate base before it is fully operational and used for service, and therefore do not violate Section 393.135.

[7] In a related argument, the Jackson County suggests that the Order violates Section 393.130, based upon the erroneous proposition that the Commission has authorized rates in excess of what is allowed by law. See Jackson County Application at 2. Since this argument is also based upon the incorrect premise that the rates include CWIP, it should be rejected.

In its Application for Rehearing, DOE restates an argument related to the Additional Amortizations which it unsuccessfully raised in its Initial Brief. See DOE Application for Rehearing at 8-10. DOE argues that there is no competent and substantial evidence to support the adoption of the Additional Amortizations, and that KCPL has not demonstrated that it needs the Additional Amortization to prevent a downgrade by the rating agencies. KCPL fully addressed DOE's arguments in its Final Post-Hearing Brief at 16-19, and it is unnecessary to reiterate those points here.

IV. The Commission has set forth the Company's Revenue Requirement.

Praxair and the DOE assert that the Report and Order is unlawful because the Commission did not expressly state the revenue requirement it approved in the Order as a dollar figure.

While the Order itself does not include a dollar figure for the revenue requirement, the absence of such a figure does not warrant rehearing. First, the Commission's findings of fact and conclusions of law in the Report and Order dictate the amount of KCPL's revenue requirement. It is those findings and conclusions that an appellate court would review. The findings of fact and conclusions of law in the Order are "sufficiently definite and certain" to enable a court to review the Commission's decision. Glasnapp v. State Banking Board, 545 S.W.2d 382, 387 (Mo. App. 1976).

Second, the Commission remedied any potential error by including specific information in its December 29, 2006 Order approving KCPL's tariff sheets implementing its revised rates. That Order stated that its "December 21, 2006 Report and Order allows [KCPL] $28,937,577 in traditional revenue requirement, with $21,679,061 in Experimental Regulatory Plan additional amortizations, for a total of $50,616,638 additional revenue requirement." In this Order the

Commission also approved the rates proposed by KCPL to implement the newly approved revenue requirement. There is no need for rehearing on this issue

V. <u>The Commission's Decision concerning the Ice Storm Accounting Authority Order was Lawful.</u>

In its application for rehearing, DOE contends that the Commission's decision on the ice storm AAO is unjust, unlawful and unreasonable. This contention is apparently based on the fact that the Commission did not adopt the arguments of DOE's witness and found that Staff has no position on the issue.

The fact that the Commission did not adopt DOE's argument is not a basis for rehearing. KCPL presented evidence that the recovery of the ice storm costs through an AAO was appropriate, and the Commission determined that this evidence outweighed DOE's evidence.

The Commission's finding that Staff had no position on this issue is also not a basis for rehearing as the Commission correctly relied on Staff's briefs which indicated that Staff had no position on the ice storm AAO issue. Contrary to DOE's statement in its Application for Rehearing (p. 11) that Staff did not disagree with the position of DOE, Staff clearly stated in both its Post-Hearing Brief (p. 8) and its Reply Brief (p. 9) that "Staff has no position on the issue." The Commission's decision on the ice storm AAO was lawful and supported by the record.

VI. <u>The Allocation of A&G Expenses was Proper.</u>

Praxair asserts that the Report and Order is unlawful because it does not expressly state how A&G expenses should be allocated. KCPL believes that it is sufficiently clear from the Report and Order that the Commission resolved this issue in Staff's favor when it adopted Staff's position to adopt the 4-month average coincident-peak demand allocation ("4-CP") methodology for allocating KCPL's generation and transmission costs among its Missouri, Kansas and FERC jurisdictions.

The Commission did not inadvertently omit the issue from the Report and Order, which expressly lists the allocation of A&G Expenses among the issues it resolves at page 74. The issue was part of the larger jurisdictional allocations issue, which the Commission clearly resolved in favor of Staff's position. Id. Furthermore, the reconcilements used in the proceeding reflect Staff's position concerning the allocation of A&G expenses.

Because the Commission implicitly adopted Staff's position concerning A&G expenses as part of the Commission's decision on the broader jurisdictional allocation issue, rehearing is not warranted. There is no need to supplement the record in this proceeding with additional information. To the extent any further action is required, the Commission could clarify that it had adopted Staff's position on the allocation of A&G expenses.

VII. Trigen's Application relating to a Class Cost of Service Study and Other Rate Design Issues should be Denied.

Trigen-Kansas City Energy Corp. ("Trigen") requested that the Commission "clarify" the Report and Order by ordering KCPL to present a class cost of service study "in its next rate case filing, or as soon as possible, and to implement a phase out plan for the remaining customers served under the all-electric general service tariffs and the separately metered space heating tariff provisions .…" See Trigen Application at 2. The Commission should deny Trigen's request for "clarification."

At page 83 the Order stated:

> The Commission will adopt Staff's suggestions, and Trigen's alternative suggestion, that the Commission restrict the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general service tariffs to existing customers until there is a comprehensive class cost of service study. This appears to be a reasonable solution, since no one has performed a cost study of the impacts of eliminating the current rates [emphasis added].

Staff's position on this issue was included in the Rebuttal Testimony of Janice Payette (Ex. 129 at 17), where she stated:

> Q. What is Staff's position on continuing or eliminating general service all-electric rates in this case?
>
> A. Staff opposes the elimination of KCP&L's general service all-electric rates in this case as proposed by Trigen because no cost analysis or study of impacts on customers has been done. <u>Staff is willing to study the issue in the context</u> of a comprehensive CCOS and rate design investigation and/or <u>a cost-effectiveness study of the Affordability, Energy Efficiency and Demand Response programs</u> [emphasis added].

KCPL is also willing to study the all-electric general service tariffs and the separately metered space-heating tariff provisions as a part of a special study of the cost-effectiveness of the Affordability, Energy Efficiency and Demand Response Programs, as suggested by Staff. In addition, KCPL is willing to discuss the parameters and timing of the study with Staff, Public Counsel, and Trigen.

As the Commission knows, KCPL has already completed a comprehensive Class Cost of Service Study (Ex. 38) as a part of this proceeding. Recognizing that KCPL would complete such a study in the 2006 Rate case, the Signatory Parties to the Regulatory Plan Stipulation agreed that it would be unnecessary for KCPL to file another comprehensive Class Cost of Service Study in either the 2007 or 2008 rate case. <u>See</u> Stipulation at 35, 39.

Trigen also suggested that the Commission "clarify that 'existing customers' refers to customers currently being served under such all-electric tariffs or separately metered space heating tariff provisions as of December 31, 2006, and that KCPL is required to reflect this restriction in its tariffs." <u>See</u> Trigen Application at 3, n. 2. The Commission should decline to do so. KCPL has numerous existing customers that are eligible for the all-electric tariffs or separately metered space-heating tariff provisions who have indicated a desire to be served under these tariffs.

As the Commission is aware, several of KCPL's existing customers are in the process of completing major expansions and new construction projects in downtown Kansas City. These existing customers have relied upon KCPL's tariffs as they made their decisions regarding utility services. Trigen seeks to have the Commission restrict the availability of these tariffs to all-electric customers and to separately metered space-heating customers. This would deprive existing customers of the right to take service under these tariffs and alter the economics of the decisions they made regarding their choice of heating sources.

Instead, the Commission should adopt Staff's position and permit KCPL's existing customers to continue to utilize the provisions of its all-electric and separately metered space-heating tariffs until the special study of these provisions is completed. To clarify "existing customers" in the manner requested by Trigen would effectively eliminate the availability of all-electric and separately metered space-heating options before the cost study is completed. The Commission should decline to clarify the order, as requested by Trigen.

VIII. <u>There is no Basis to Rehear the Dias Weatherization Issues</u>.

Mr. Bill Dias presents two arguments in his application for rehearing: (1) The Commission improperly excluded issues that were not included in the October 6, 2006 List of Issues; and (2) The Commission improperly disregarded certain evidence in its determination of whether KCPL should be compelled to participate in his "Energy Conservation Program." Despite Mr. Dias's assertions to the contrary, the Commission resolved both of these issues properly.

On October 6, 2006, the parties filed a List of Issues that set forth the issues to be addressed at the evidentiary hearing and ultimately resolved by the Commission in this case. Mr. Dias was not only aware of the process of developing the List of Issues, but he was also an active participant in those efforts. Pursuant to the Commission's regulations, Mr. Dias had ten days until October 16, 2006 to object to the List of Issues. See 4 CSR 240-2.080(15). This he failed to do. The Commission correctly concluded that by failing to object, Mr. Dias is barred from raising issues outside the List of Issues.

Mr. Dias asserts that the Commission erred when it refused to require KCPL to participate in his "Energy Conservation Program." Specifically, Mr. Dias objects to the Commission's conclusion that "Mr. Dias does not cite, and the Commission cannot find, any legal authority to give him the various forms of relief that he requests." See Report and Order at 77. It is clear that the Commission is correct. At its core, Mr. Dias's request for relief is based upon his desire that the Commission order KCPL to enter into a contractual arrangement with his company, pursuant to which KCPL would pay his company $5 million per year. See Dias Application at 2, 4. Deciding with whom to contract is a fundamental management decision of the company, which is beyond the Commission's statutory authority. State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 899-900 (Mo. App. 1995). The Commission correctly concluded that no legal authority exists supporting the relief Mr. Dias seeks.

Mr. Dias also asserts that the Commission erred by not affording sufficient weight to the evidence he presented at the evidentiary hearing in this case. Specifically, he objects to the Commission's conclusion that "Mr. Dias' evidence, which included hearsay evidence such as newspaper articles from the Kansas City Call and USA Today, hardly rises to the level of competent and substantial evidence." See Report and Order at 77-78. The Commission is correct. The newspaper articles that Mr. Dias sought to introduce were "out of court" statements offered in testimony before the Commission not made by the declarant which were offered for the truth of the matters asserted therein — the very definition of hearsay. State v. Chambers, 891 S.W.2d 93, 102 (Mo. App. 1994); Fed. R. Evid. 801(c).

Moreover, the Commission, as the finder of fact in administrative proceedings before it, is afforded broad discretion when it comes to deciding how much weight to give the evidence presented at a hearing. Morton v. Missouri Air Conserv. Comm'n, 944 S.W.2d 231, 236-37 (Mo. App. 1997). The Commission correctly concluded to afford little weight to hearsay evidence presented by Mr. Dias. The Commission also correctly concluded that there is inadequate evidence in the record to support the adoption of Mr. Dias' "Energy Conservation Program" or any of his other proposals.

IX. The Commission's Factual and Legal Findings were Adequate.

DOE and Praxair challenge the legality of the Commission's Order on the ground that the findings of fact and conclusions of law are inadequate. In particular, they argue that the Commission failed to make adequate findings of fact related to the Company's overall revenue requirement. See DOE Application at 11-12; Praxair Application at 1.

For a decision to be lawful, the Commission must include appropriate findings of fact and conclusions of law that are sufficient to permit a reviewing court to determine if it is based upon competent and substantial evidence. See State ex rel. Monsanto Co. v. PSC, 716 S.W.2d 761, 795 (Mo. 1986); State ex rel. A.P. Green Refractories v. PSC, 752 S.W.2d 835, 838 (Mo. App. 1988); State ex rel. Fischer v. PSC, 645 S.W.2d 39 (Mo. App. 1982), cert. denied, 464 U.S. 819 (1983).

The legal test for the sufficiency of findings of fact for administrative agencies was discussed by the Court of Appeals in Glasnapp v. State Banking Board, 545 S.W.2d 382, 387 (Mo. App. 1976):

> The overall principle generally subscribed to is summarized in 2 Am.Jur.2d Administrative Law § 455, p. 268, as follows: "The most reasonable and practical standard is to require that findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence."

The Commission's Order meets the requirements that will allow a reviewing court to determine if the decision is based upon competent and substantial evidence. With regard to the findings of the overall revenue requirement and level of Additional Amortization, the Commission's Order Approving Tariffs in Compliance with Commission Report and Order (December 29, 2006) has clarified the Order by stating the following at page 4:

> The Commission's December 21, 2006 Report and Order allows Kansas City Power & Light Company $28,937,577 in traditional revenue requirement, with $21,679,061 in Experimental Regulatory Plan additional amortizations, for a total of $50,616,638 additional revenue requirement.

Praxair also challenges the Commission's long-time use of the "scenarios" process where the Commission issues hypothetical assumptions and requests the Staff, with the assistance of the parties, to file a pleading outlining the quantification of the revenue requirement under those hypothetical assumptions. See Praxair Application at 4-5. The Commission should deny Praxair's argument on this point.

Like the "Reconciliation/Reconcilement as of Date of Conclusion of True-Up," filed by Staff on December 1, 2006, the "Staff Response to Order Directing Scenarios" (filed December 14) and subsequent "Staff Response to Second Order Directing Scenarios" (filed December 19) are practical tools for use by the Commission in calculating the overall revenue requirement in a complex rate case. "Scenarios" and reconciliations are useful and important devices to assist the Commission as it resolves a multitude of issues, based upon the evidence in the record, and determines the overall impact of the order.

The courts have held that "it is not the methodology or theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non-discriminating." State ex rel. Assoc. Natural Gas Co. v. PSC, 706 S.W.2d 870, 879 (Mo. App. 1985). See Hope, 320 U.S. 591, 602-03, (1944). The "scenarios" process is a valuable procedural tool in assessing and evaluating the overall impact of the order assuming specific outcomes on individual rate case issues. As a result, Praxair's challenge to the use of the "scenarios" process should be rejected.

Respectfully submitted,

/s/ Karl Zobrist

Karl Zobrist, MBN 28325
Roger W. Steiner, MBN 39586
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: (816) 460-2545
Facsimile: (816) 531-7545
email: kzobrist@sonnenschein.com
email: rsteiner@sonnenschein.com

James M. Fischer, MBN 27543
email: jfischerpc@aol.com
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383

William G. Riggins, MBN 42501
General Counsel
Curtis Blanc, MBN 58052
Kansas City Power & Light Company
1201 Walnut, 20th Floor
Kansas City, MO 64106-2124
Telephone: (816) 556-2785
Facsimile: (816) 556-2787
email: bill.riggins@kcpl.com
curtis.blanc@kcpl.com

Attorneys for Kansas City Power & Light Co.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 10th day of January, 2007, to all counsel of record.

/s/ Karl Zobrist
Karl Zobrist