

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

Staff of the Missouri Public Service Commission,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	<b><u>File No. EC-2015-0309</u></b>
	)	
Kansas City Power & Light Company	)	
	)	
And	)	
	)	
KCP&L Greater Missouri Operations Company,	)	
	)	
Respondents.	)	

**PUBLIC COUNSEL’S POST-HEARING BRIEF**

COMES NOW the Office of the Public Counsel (“Public Counsel” or “OPC”) and presents its post-hearing brief as follows:

**Introduction**

At the core of this case, is the unauthorized transfer of telephone calls and customer-specific information by Kansas City Power & Light Company (“KCPL”) and KCP&L Greater Missouri Operations Company (“GMO”) to a non-regulated telemarketer. These customers *never* needed to be transferred to a telemarketer, were never *asked* if they wanted to be transferred to a telemarketer, and if they have an issue with this telemarketer – KCPL and GMO send the customer back to the telemarketer. It is *wrong* to treat customers this way.

Great Plains Energy Services Incorporated (“GPES”) entered into a contract with a telemarketing company – Allconnect. Through this contract, GPES committed its affiliated regulated utilities, KCPL and GMO to transfer customer phone calls and customer-specific

information to Allconnect. In exchange for access to these customer calls and their information, Allconnect pays a fee per call that is booked to the companies' non-regulated operations.

Here is what happens. A customer, or potential customer, calls the regulated utility to set up service at a location. Then, prior to giving the customer the service confirmation number, the KCPL representative says that they will transfer the caller to Allconnect who will provide the customer with the confirmation number. No consent is sought (Tr. Vol. 4, pp. 309-310; HC Tr. Vol. 3, p. 277).

Once the customer is transferred, the Allconnect telemarketer takes the customer's information down, and then begins to make a sales pitch. Sometimes, the customer receives the service confirmation number. Other times, the caller has to ask for the service confirmation number before receiving it (Ex. 2, p. 13). And, at times, even when the customer asks for the confirmation number, Allconnect does not provide it. In those cases, the customer must call KCPL, which then provides the service confirmation number to the caller.

KCPL and GMO are capable of providing the confirmation numbers to the callers (Tr. Vol. 4, p. 298). The companies did so in the past, and even today, continue to do so when Allconnect does not provide the confirmation number. This transfer to Allconnect is unnecessary. Furthermore, the transfer subjects customers to telemarketers that – according to Mr. Caisley – admittedly treat the caller in “a pushy and aggressive manner in an effort to sell Allconnect products.” (Ex. 100, p. 9).

### **Chairman Hall's Request**

At the conclusion of the evidentiary hearing, Chairman Hall requested that the parties address certain issues in their post-hearing briefs:

I want the parties to include their positions as to the factual and legal basis for determining that, one, the current Allconnect mover server's program violates public policy and must be discontinued whether or not such program violates a specific statute or PSC rule, and any Allconnect mover's server's [sic] program going forward must include, one, expressed, informed consent by the consumer before the consumer is transferred to Allconnect, and all revenues derived from the Allconnect program and associated costs are booked above the line as regulated accounts.

(Tr. Vol. 4, pp. 524-25).

**Chairman Issue 1: Does the current Allconnect mover's program violate public policy whether or not such program violates a specific statute or PSC rules?**

As an initial matter, the actions of KCPL and GMO related to the Allconnect relationship violate the statute and rules charged in the Staff's complaint. The legal violations are presented in the issues list and will be discussed in greater detail below.

Public policy "must be found in a constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 96 (Mo. 2010). The first Public Service Commission law was enacted in 1913. The Supreme Court has since recognized that the Commission's purpose is to protect the consumer against the natural monopoly of a public utility as provider of a public necessity. *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n.*, 585 S.W.2d 41, 47 (Mo. Banc 1979) ("UCCM").

KCPL and GMO are regulated utilities because they provide electric service. Missouri law provides that the provision of electric service constitutes a public service that is subject to

regulation of the Commission. Mo. Rev. Stat. § 386.250(1). For this service, KCPL and GMO have an obligation to provide its customers electric service at rates set by the Commission. They have no obligation or authority to use their monopolies, to sell, provide, or otherwise offer the unregulated services offered by Allconnect to its customers. KCPL and GMO's customer's and potential customers are a captive audience, so to speak, and whether or not those customers choose cable television, internet, or home security services does not impact the regulated utilities' obligations – or importantly – its ability to attract and keep its electric customers.

KCPL and GMO transfer customer calls and specific customer information that each would not have but for their positions as monopolies. The GPES/Allconnect relationship provides Allconnect, a non-regulated company, certain advantages of a monopoly, but without the regulation that the Public Service Commission provides. The Commission, in its role as regulator of monopoly utilities, should prohibit those regulated utilities from exercising monopoly power to gain advantages in competitive markets.

**Chairman Issue 2: If the program is allowed to continue, must 1) customers give expressed, informed consent prior to transfer, and 2) all revenues and associated costs be booked as regulated accounts?**

If the Commission permits the program to continue, it should require that the companies seek expressed, informed consent. As will be discussed later in this brief, “[s]pecific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rule or orders.” Commission Rule 4 CSR 240-20.015(2)(C). Furthermore, the regulated utilities have no authority or obligation to provide their customers with cable television, internet, or home security services. If such a program does provide a convenient service for customers, a fact that is not clear based on the testimony in the hearing, it should be the customer's choice whether or not to participate.

All revenues and associated costs should be booked as regulated accounts. The companies use employees and regulated assets paid for by ratepayers to generate these revenues. Counsel for the Companies represented to the Commission during the hearing that KCPL and GMO would be willing to record the revenues and costs “above the line” as regulated accounts (Tr. Vol. 2, p 60). It is appropriate for the Commission to require such treatment.

### **Staff’s Complaint**

The Staff’s complaint against KCPL and GMO related to the companies’ relationship with Allconnect, consists of three charges. First, violation of § 393.190.1 relating to the transfer of utility works or system without commission approval. Second, violation of Commission rule 4 CSR 240-20.015(2)(C) pertaining to the transfer of customer information without consent. Third, violation of the Commission rule 4 CSR 240-13.040(2)(A) requirement that qualified customer service personnel be made available.

**Issue A: Does the evidence establish that, through the relationship with Allconnect, the Company has violated section 393.190.1 RSMo?**

KCPL and GMO have violated § 393.190.1, RSMo. In pertinent part, the law provides that:

No ... electrical corporation ... shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Mo. Rev. Stat. § 393.190.1 (Cum. Supp. 2013).

To find that the companies violated that section of the law, the Commission should examine the evidence as it relates to the following points:

1. Is information concerning the customers and prospective customers of KCPL and GMO part of KCPL's and GMO's works or system?

Yes, the customer information is a part of the companies' works or system. The Commission has said "a utility's system is greater than the physical parts which would be its 'works.'" *In the Matter of the Application of Kansas City Power & Light Co.*, Order Establishing Jurisdiction and Clean Air Act Workshops, 1 Mo. P.S.C. 3d, 359, 362. "A utility's system is the whole of its operations which are used to meet its obligation to provide service to its customers." *Id.* The customer information provided to Allconnect is necessary for KCPL and GMO to provide service to their customers, thus, it is a part of a utility's works or system (Ex. 3, p. 32; Ex. 4, p. 20). Without the customer information, the utility would be unable to bill or provide electric service to its customers. Furthermore, customers have paid, in rates, for the necessary equipment and expenses incurred relating to customer information (Ex. 4, p. 16).

2. Did the transfer by KCPL or GMO of those telephone calls and provision of customer information constitute a sale, assignment, lease, or transfer of part of their works or system?

Yes. The customer information is a part of the utilities' works or system. It is undisputed that KCPL and GMO transfer customer telephone calls and send customer information to Allconnect for the telemarketing company to use. The Companies' witness Mr. Scruggs testified that the Allconnect agent receiving the call "uses the information to verify the start service information is correct and determine which service provider and product choices are available at the customer's new address." (Ex. 103, p. 7). Rather than providing a confirmation number to the caller, KCPL and GMO transfer the call and send the customer's information to the telemarketer.

In exchange for receiving these calls and the ability to use the customer information, Allconnect pays a fee for each call received.

Mr. Scruggs states that “customer data is purged from the system where our Allconnect agents are able to view it after 30 minutes of the data being retrieved by Allconnect.” (Ex. 103, p. 7). However, the data is not removed from Allconnect’s system entirely. Mr. Scruggs’ rebuttal testimony explains that “sensitive and confidential data is purged from Allconnect’s systems in accordance with internal data retention policies and when there is no further business need.” (Ex. 103, p. 8). Mr. Scruggs refused to explain the details of Allconnect’s data retention policies. While Allconnect agents are using the customer information, KCPL and GMO do not use the customer information to provide a confirmation number.

3. Do sales, assignments, leases, or transfers require prior authorization from the Commission pursuant to § 393.190.1?

Yes. No utility may sell, assign, lease, or transfer any part of its franchise, works or system, necessary or useful in the performance of its duties to the public “without having first secured from the commission an order authorizing it so to do.” Mo. Rev. Stat. § 393.190.1.

4. Did KCPL and GMO violate § 393.190.1 by making unauthorized sales, assignments, leases, or transfers of part of their works or system?

Yes they did. There is no Commission order that permits KCPL and GMO to sell, assign, lease, or transfer any part of their works or system related to the Allconnect relationship. Even though the Companies have no permission to do so, KCPL and GMO transfer telephone calls and send customer information to Allconnect. While Allconnect is on the call with the customer and using the customer information, KCPL and GMO do not provide a confirmation number. The customer information provided to Allconnect is necessary for KCPL and GMO to provide service to customers, and is, thus, a part of the utility “works or system.” Because the Companies

have transferred the calls and sold, assigned, leased, or transferred customer information without prior Commission approval, KCPL and GMO have violated § 393.190.1.

**Issue B: Does the evidence establish that, through the relationship with Allconnect, the Company has violated 4 CSR 240-20.015(2)(C)?**

In pertinent part, that rule provides that “[s]pecific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rule or orders.” Commission Rule 4 CSR 240-20.015(2)(C).

To assist the Commission’s decision on this point, Public Counsel suggests that the Commission should examine the evidence as it relates to the following points:

1. Did Great Plains Energy Services (“GPES”), an affiliate of KCPL and GMO, enter into the Allconnect Direct Transfer Service Agreement on behalf of itself, KCPL and GMO?

Yes, it is the contract between GPES and Allconnect that governs KCPL and GMO’s interactions with Allconnect and commits the regulated utilities to provide the services to Allconnect (Ex. 6, p. 7).

2. Does the Commission’s Affiliate Transaction Rule 4 CSR 240-20.015(2)(C) apply to the transactions in this case?

Yes, the affiliate transaction rule applies to the transactions in this case. An “affiliate transaction” is defined as:

any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of an product or service, between a regulated electrical corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated electrical corporation and the regulated business operations of a electrical corporation.

Commission Rule 4 CSR 240-20.015(1)(B).



In the first instance, GPES commits KCPL and GMO to provide services and information to Allconnect. These entities are affiliates falling within the rule. Second, an affiliate transaction includes transactions carried out between any “unregulated” business operations of a utility and the “regulated” business operations of a utility. Through the GPES/Allconnect contract, KCPL and GMO provide information and services using regulated assets and employees. The profits of that transaction are then applied to the unregulated operations of the utility (Ex. 6, p. 8). Because the Allconnect agreement results in a transaction between the regulated and unregulated utility operations, for this reason too, the affiliate transaction rule applies.

3. Do KCPL and GMO transfer telephone calls and send customer information to Allconnect?

It undisputed that KCPL and GMO transfer customer telephone calls and send customer information to Allconnect (Tr. Vol. 4, p. 299).

4. Do KCPL and GMO receive customer consent prior to transferring the telephone calls and sending customer information to Allconnect?

KCPL and GMO do not receive customer consent prior to transferring the telephone calls and sending customer information to Allconnect. Instead, the companies use the “no-customer consent” or “confirmation model” to transfer customer calls to Allconnect (Ex. 2, p. 4). Under the confirmation model, the utility customer service representatives do not provide the customer a confirmation number, as they did in the past, but instead they forward the customer call and send customer information to Allconnect representatives who verify the customer information and – only sometimes – provide the confirmation number, but always make a sales pitch. Notably, this “verification service” did not arise until 2013 when KCPL and GMO needed to create a “legitimate” reason to forward calls from its regulated customers to a nonregulated company without the customer’s consent (Ex. 6, p. 17).

5. Do KCPL and GMO receive a fee for each transferred telephone call?

Allconnect pays a fee for each transferred telephone call. However, all of the revenues and profits associated with the Allconnect transactions are transferred to non-regulated operations of KCPL and GMO (Ex. 6, p. 28) The Companies admit that the revenue is booked below the line (Tr. Vol. 2, p. 253).

6. Did KCPL and GMO violate Commission Rule 4 CSR 240-20.015(2)(C), by making unauthorized disclosure of specific customer information?

KCPL and GMO violated the customer information protections of the Commission Rule 4 CSR 240-20.015(2)(C). Section (2)(C) of the affiliate transaction rule also prohibits specific customer information from being made available to unaffiliated entities without the consent of the customer.

Allconnect is not an affiliate of KCPL or GMO, and so, in addition to any transactions between GPES and regulated KCPL and GMO operations, the rule prohibits KCPL or GMO from releasing customer specific information to Allconnect unless the customer gives consent or as otherwise provided by law or Commission order.

**Issue C: Does the evidence establish that, through the relationship with Allconnect, the Company has violated 4 CSR 240-13.040(2)(A)?**

In pertinent part, that rule provides that “[a]t all times during normal business hours, qualified personnel shall be available and prepared to receive and respond to all customer inquiries, service requests, safety concerns, and complaints.”

To assist the Commission’s decision on this point, Public Counsel suggests that the Commission should examine the evidence as it relates to the following points:

1. Do KCPL and GMO transfer phone calls and send customer information to Allconnect to allow Allconnect to attempt to sell additional services to the caller?

According to KCPL and GMO witness Dwight Scruggs, Allconnect provides a single source to permit customers to purchase bundled video, internet, home phone and home security. (Ex. 103, p. 2). Once a customer call is transferred to Allconnect, the Allconnect representative attempts to sell additional services to the caller. The sales pitch appears to be the primary reason for transferring the call. Although the company has claimed that transferring the call is necessary for an account verification function, the facts do not support the company's contention (Ex. 100, p. 4). As explained in Public Counsel's surrebuttal testimony, this "verification service" did not arise until 2013 when KCPL and GMO needed to create a "legitimate" reason to forward calls from its regulated customers to a nonregulated company without the customer's consent (Ex. 6, p. 17). Further, the Commission's Staff analyzed 86 phone calls provided in this case and found that 55% of the callers either did not receive a confirmation number or received it only after listening to the Allconnect sales pitch (Ex. 2, p. 13). Company witnesses were not able to explain why so many callers were not provided their confirmation numbers upfront before being solicited for additional services, rather they blame Allconnect, saying the process was out of the company's hands (Tr. Vol. 4, p. 316). Company witness Trueit conceded that of the 86 calls analyzed by Staff, this could be representative of the typical customer experience with Allconnect (Tr. Vol. 4, p. 317).

2. Do KCPL and GMO defer their service quality obligations to Allconnect?

KCPL/GMO witness Ms. Trueit explains that "[w]hen a customer calls the Company about a poor experience related to Allconnect, Contact Center personnel collect pertinent information to review and determine the nature of the complaint." (Ex. 104, p. 6). Ms. Trueit then describes the companies' deferral to Allconnect, stating "[i]f it is determined that the concern is related to Allconnect actions, the Company notifies Allconnect within one business

day.” Thereafter, an Allconnect resolution specialist contacts the customer within two business days.

When the KCPL or GMO customer calls the utility, he or she is transferred – without consent – to a third-party marketing company, Allconnect. Then, if the caller has a complaint about Allconnect, KCPL and GMO do not solve the problem, but refer the caller back to Allconnect, potentially subjecting the caller to continued problems.

3. Are Allconnect’s service personnel “qualified personnel” as required by Commission Rule 4 CSR 240-13.040(2)(A)?

KCPL and GMO customer service representatives are evaluated on how well they provide utility services to customers (Hyneman Surrebuttal, p. 19). Allconnect agents, however, have an incentive to “optimize each call to get the best possible financial outcome,” which is a significantly different business type than a regulated utility[.]” (Ex. 2, p. 31). Rather than ensuring the best outcome for the customer, Allconnect representatives are evaluated by their opportunities to “increase conversions,” which the Commission’s Staff understands to be sales. *Id.*

KCPL and GMO themselves admit that, in certain instances, Allconnect agents handled calls with utility customers “in what could be fairly characterized as a pushy or aggressive manner in an effort to sell Allconnect products.” (Ex. 100, p. 9). Allconnect’s witness Dwight Scruggs also acknowledged that some Allconnect representatives could be pushy and rude, and subject to disciplinary action, including escalation back to the utility (Tr. Vol. 4, p. 423). Allconnect representatives are not an adequate substitute for utility customer service representatives. For the reasons explained above, KCPL and GMO violate Commission Rule 4 CSR 240-13.040(2)(A) by deferring their service quality obligations to Allconnect.

**Issue D: If the Commission finds in the affirmative on any of the preceding three issues, should the Commission direct its general counsel to seek monetary penalties against the Company?**

Monetary penalties may be assessed when a utility violates the law:

Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

Mo. Rev. Stat. § 386.570.1 (2000). All penalties are cumulative. Mo. Rev. Stat. § 393.590 (2000). The evidence in this case, applied to the law, supports a finding that a sufficient number of offenses have occurred to justify monetary penalties in excess of the revenues recorded by KCPL and GMO's non-regulated operations resulting from the GPES/Allconnect contract. (Ex. 104, p. 6; Ex. 2, p. 15; Tr. Vol. 3, p. 25). At the very least, the Commission should seek monetary penalties against KCPL and GMO for the amounts received by each company's non-regulated operations.

### **Conclusion**

KCPL and GMO are regulated monopolies. Every other business must attract and keep customers to stay in business. For regulated utilities – like KCPL and GMO – this is not an issue. This distinguishing factor cannot be overlooked. KCPL and GMO do not have to compete for their customers. The customers do not have a choice – they cannot simply choose to take their money elsewhere.

KCPL's and GMO's parent company, GPES, has committed its affiliated regulated utilities to transfer customer phone calls and customer specific information to Allconnect. These customers *never* needed to be transferred to a telemarketer, were never *asked* if they wanted to be transferred to a telemarketer, and if they have an issue with this telemarketer – KCPL and GMO send the customer back to the telemarketer. This Commission exists to protect customers. When, as here, a utility violates the law, and subjects customers to this treatment – the Commission should act.

WHEREFORE Public Counsel submits its post-hearing brief.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 11<sup>th</sup> day of February 2016:

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