BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

The City of Kansas City, Missouri,	)	
	)	
The Planned Industrial Expansion Authority of Kansas City, Missouri,	)	
	)	
Boulevard Brewing Associates Limited Partnership, a Missouri Limited Partnership, d/b/a Boulevard Brewing Company,	)	
	)	
Complainants,	)	
	)	
v.	)	**Case No. EC-2006-0332**
	)	
Kansas City Power & Light Company,	)	
	)	
Respondent.	)	

REPORT AND ORDER

Issue Date: April 6 , 2006

Effective Date: April 16 , 2006

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	)	
Respondent.	)	

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Appearances

Heather A. Brown, Assistant City Attorney, Office of the City Attorney, 28th Floor, City Hall, 414 East 12th Street, Kansas City, Missouri 64106, for City of Kansas City, Missouri.

Jeremiah D. Finnegan, Finnegan, Conrad & Peterson, 3100 Broadway, 1209 Penntower Office Center, Kansas City, Missouri 64111, for Boulevard Brewing Company.

Curtis D. Blanc, Senior Attorney-Regulatory, 1209 Walnut, P.O. Box 418679, Kansas City, Missouri 64106, for Kansas City Power & Light Company.

REGULATORY LAW JUDGE: Colleen M. Dale, Chief Regulatory Law Judge

REPORT AND ORDER

This matter involves a dispute between Petitioners, Boulevard Brewing Associates, LP ("Boulevard"), the City of Kansas City, Missouri ("the City") and the Planned Industrial Expansion Authority ("PIEA"), and Respondent, Kansas City Power & Light Company (KCPL), over who should pay for certain improvements to KCPL's facilities pursuant to the approved General Development Plan ("Plan").

PROCEDURAL HISTORY

On February 21, 2006, the Petitioners filed their joint Complaint and Motion for Expedited Treatment. In the Complaint, two counts were asserted. In the first count, Petitioners sought an order directing KCPL to move certain facilities on 26th Street at KCPL's expense and to relocate underground certain KCPL facilities on Belleview Avenue at KCPL's expense. In the second count, Boulevard requests, if Petitioners fail to prevail on the first count regarding utility lines on either street, the Commission determine whether KCPL's asserted costs for such relocations of facilities are reasonable, lawful and non-discriminatory; that KCPL be required to account for its calculations of relocation costs; that KCPL be ordered to not collect tax on Contributions In Aid of Construction (CIAC) from

Boulevard; that KCPL provide access to cost records of previous line relocations; that KCPL be ordered to permit Boulevard to utilize independent contractors to complete the relocation work; that KCPL be prohibited from installing or requesting payment from Boulevard for any equipment or facilities included in the estimates that will benefit KCPL and other ratepayers; that KCPL be ordered to file a tariff outlining the costs and procedures for relocating an overhead line; that KCPL be ordered to submit an objective formula for calculating line extensions and relocation costs and revenue credits; and for such other and further relief authorized by law. Boulevard also filed its Motion for Expedited Treatment.

KCPL filed its Answer on March 2, 2006, with a general denial of the allegations made in Counts I and II relying on its tariffs and its franchise agreement. KCPL's reasoning supporting its denial of liability was based on the electric facility relocations being for a private entity, not ordered by the City and subject to various tariffs setting out certain cost recovery mechanisms.

The Commission granted the Complainants' Motion for Expedited Treatment and an evidentiary hearing was held on March 6-8, 2006. All parties except the City prefiled exhibits, and all testimony was given at the hearing. No pre- or post-hearing briefs were filed; opening and closing statements were made in lieu thereof.

The Complainants, and also KCPL, are responsible for bringing this dispute to the Commission at the last minute. Apparently, neither party sought to apprise the Staff of the dispute and see if the Staff might assist in resolution of this matter. The Commission has endeavored to afford the parties expedited treatment, but having done so, the Commission wants KCPL and the Complainants to understand that the Commission does not encourage

untimely filings of disputes and may not be able to expedite treatment in the future. The discovery requests raised by Boulevard in its Complaint are, among other things, untimely, and are denied.

STATEMENT OF FACTS

The Complaint involves an area (the "Planning Area") located near downtown Kansas City made up of 12 property parcels amounting to 3.10 acres. The area is bounded by three public roadways and a part of a fourth, on the Northwest by Southwest Boulevard, which intersects with 26th Street on the South edge, by Belleview Avenue on the South and a small strip of 25th Street on the Northeast.

The entire parcel lies within the "Summit TIF," which was approved by the City Council as a Tax Increment Financing District on August 31, 1995. As part of that action, the City declared the area blighted, describing the area as unsanitary or unsafe, having deteriorating structures or fostering conditions that endanger life or property. Section 100.400.1(2), RSMo. The "blighted" area was found to be economically underutilized and a menace to public health safety, morals or welfare.

The PIEA is a public body corporate and politic exercising the powers, rights and duties of a Planned Industrial and Expansion Authority pursuant to Sections 100.300-100.620, RSMo. The PIEA engaged Development Initiatives, Inc., to study whether the Planning Area continued to be blighted (See Section 100.010, et seq. RSMo). On July 16, 2004, the report was returned to the PIEA, and the PIEA recommended that the City Council re-designate the area blighted, unsanitary or an underdeveloped industrial area. (PIEA Resolution No. 893) In September 2004, the City Council, by Ordinance No. 041081, declared the area blighted, which made the area eligible for special development

options available to prospective developers.

Following requisite public notice and consideration, the PIEA adopted Resolution No. 936, accepting Boulevard Brewery's proposal and sending notice to the City Council on December 16, 2004. (Exhibit 5).

The Plan called for Boulevard to expand its existing brewery, include a conference center, and upgrade packaging and distribution services to permit increased sales, visitors and traffic. From the City's perspective, "[t]he intent of this Plan [was] to remediate various blighting factors within the Planning Area, including . . . the remediation of certain environmental liabilities, the modernization and/or construction of new facilities and the replacement of curbs, gutters, and sidewalks, as well as removal of overhead utility lines." (Exhibit 15, p. 20). The City sought to remove blight, upgrade or clean-up the neighborhood and make the area function economically, enhance quality of life, increase property taxes, and encourage additional investment (Exhibit 14, p. 35).

Boulevard was required to follow the Land Use Plan of the Area, adhere to all city codes and ordinances, complete a traffic study of the area and upgrade or repair all of the public services The Plan stated:

> It may be required that as part of a specific project plan, and to remedy blighting conditions, certain utilities will be relocated or buried. Any changes will be coordinated with the City of Kansas City, Missouri and provided at the Developer's expense. (See Exhibit 14, pp. 34, 36)

In December 2004, Boulevard submitted a Traffic Impact Study performed by Olsson Associates. (Exhibit 13*)* The Study recommended left and right turn lanes for westbound 26th Street turning onto Southwest Boulevard "to reduce delay for the turning vehicle traffic on 26th Street." This required widening 26th Street and relocation of utility poles in the public right-of-way to the opposite side of the street. In addition, the Study recommended

additional signaling and striping and vacating a portion of Belleview Avenue as a city street. The Study was not limited to Boulevard's vehicles.

As noted above, the City was to vacate a portion of Belleview for use as off-street parking and other purposes. As utility lines on poles serving customers other than Boulevard run the length of Belleview Avenue, the City retained a utility easement through the entire strip of roadway.

DISCUSSION

Count I

26th Street Utility Relocations

In Count I, the City, the PIEA and Boulevard seek a declaratory ruling that KCPL must pay to relocate certain utility facilities within the Planning Area. The first dispute involves the proposed relocation of the utility lines on 26th Street, in light of the proposed widening discussed above. The Plan further suggests relocating all of the poles on 26th Street to the South side of the street to avoid multiple crossings of lines above the street, even though the street would not be widened at that section of 26th Street. The parties agree that the lines and poles are in the public right-of-way and will remain so if the Plan advances. Complainants argue that removal and relocation should be at the utility's expense; KCPL argues that the City has not directed it to move the lines and that the Plan specifically states that the developer will incur the costs.

This issue hinges on whether the City is exercising a governmental or a proprietary function or purpose and whether the relocation is mandated by the City. The City controls the public rights-of-way, and can, to a certain degree, control their use.

In *Union Electric Company v. Land Clearance for Redevelopment Authority of the*

City of St. Louis, 555 S.W. 2d (Mo. 1997), St. Louis, by ordinance, vacated its right-of-way in one block of a public thoroughfare in favor of an urban renewal project that included "the Convention Plaza and a privately owned and operated hotel … under the authority of the Land Clearance of Redevelopment Authority Law." The Missouri Supreme Court stated that the primary purpose of the project was the redevelopment or renewal of what was implicitly a blighted area of St. Louis. *Id.* at 33. The Land Clearance for Redevelopment Authority (Authority) notified Union Electric to vacate a city block, without which vacation the project could not proceed. *Id.* at 31. By the express terms of its franchise with St. Louis, Union Electric had agreed to "'such restrictions, regulations and qualifications as may be prescribed by said Board'" of St. Louis. *Id.* at 32. Union Electric's right to use any public right-of-way was subject to a reservation of the right by St. Louis to direct relocation of facilities installed in the street. *Id.* The Court held that the utility served in accordance with its franchise and had no choice but to comply with St. Louis' order to vacate at its own expense.

The Court stated that the issue of who bears the cost of relocation depends on whether the relocation is necessitated by the municipality's exercise of either (1) a proprietary function or purpose, or (2) a governmental function or purpose:

> "The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity * * *, (or) public convenience (and) security require it, * * * at * * * (its) own expense. * * * (But) (t)he general rule that the utility must bear the relocation costs has been held inapplicable where the relocation of its facilities has been necessitated by the municipality's exercise of a proprietary rather than a governmental function or purpose."

Id. at 32.

The Eastern District Court of Appeals, on March 28, 2006, in *City of Bridgeton v.*

Missouri-American Water Co., Case No. ED86292 ("*Bridgeton v. Missouri-American Water*") stated that if the primary beneficiary of a governmental act is private rather than public, then the private beneficiary rather than the public utility should pay for the relocation of utility facilities. In the present case, KCPL's witness, Tim Rush, testified that if the City demanded removal or relocation of facilities located in a public right of way for the public good, KCPL would comply. (Transcript at p.282).

The City and the PIEA have enacted new Resolutions, 060288 on March 9, 2006 and 060339 on March 23, 2006, by the City Council, and 1083 on March 1, 2006, by the PIEA, modifying the paragraph on page 34 of the Development Plan to clarify that the city will not bear the cost of relocating or burying utility facilities to remedy blight (Exhibit 4).

None of the resolutions directly states that the costs of relocation or burying should be assigned to either the utility or the developer. Resolution 060339 refers to the authority of the Commission:

> Section 1: That the Council hereby states that the purpose of its adoption of Resolution No. 060288 was not to determine the responsibility for payment of costs for relocation or undergrounding of utilities in the Plan Area as between the developer and any affected utility (which is governed by the Public Service Commission pursuant to state law) but to stress that in no case shall the City or the Planned Industrial Expansion Authority of Kansas City, Missouri, be responsible for such costs.

The evidence before us suggests that the City has found the area to be blighted, used tax increment financing and condemnation powers, through its agent, the PIEA, issued a request for proposals for redevelopment. The City endorsed the Plan and developer to accommodate increased economic activity, productive use of the area and overall improvement in the quality of life and appearance of the Planning Area. In turn, this will increase tax base and rolls, more appropriately use the land in question, upgrade area

facilities, increase traffic and improve conditions for residents and businesses in the Area.

As noted above, the Plan-mandated traffic study requires new turning on 26th Street, which necessitates moving the utility poles. KCPL is required to move its facilities to allow the Development Plan to proceed. The lines are located in the public right-of-way and the City controls that space (Transcript at p. 282).

KCPL argues that in the present matter, the City acts in a "proprietary rather than governmental function or purpose." KCPL's arguments are misplaced. It is clearly a governmental role to declare an area blighted. While the City may own the real property to effect the financing arrangement, the City will not compete or act otherwise to pursue its own proprietary interest. The City embodies the public effort to remove blight and make its streets and public areas safe for residents and visitors.

KCPL also cites *Home Builders Assn. Of Greater St. Louis, et al. v. St. Louis County Water Co.784 S.W.2d 287 (Mo. App.1989)*, in support of its position. In that case, the Court held that private developers complying with municipal mandates to modify public facilities could not force utilities in the right-of-way to perform relocations or modifications to their facilities without paying the cost the projects were private projects and only incidentally public projects. In the present case, the entire project began as a public effort to remediate blight and to improve the conditions of the Plan area, distinguishing it from the *Home Builders* case. Although the *Bridgeton* case is too recent to have been cited by either party, it appears more similar in fact to the *Home Builders* case than the *Union Electric* case. In the *Bridgeton* matter, a private development necessitated subsequent improvements to public facilities. Again, the project in the instant case arose from the City's initiative to redevelop a blighted area. Although a portion of the project may confer a benefit to a

private entity, the public benefits clearly derive from a public project.

Finally, KCPL argues that language in the Plan relieves it from responsibility in relocating the utility facilities and cites the following to support its position:

> Proposed Changes in Public Utilities
>
> It may be required that as part of a specific project plan, and to remedy blighting conditions, certain utilities will be relocated or buried. Any changes will be coordinated with the City of Kansas City, Missouri and provided at the Developer's expense. P.34
>
> Public Improvements
>
> It is the objective of this Plan to require any developer or developers to make all necessary public improvements to streets, utilities, curbs, gutters and other infrastructure if the redevelopment project creates a need for improved public facilities. All improvements will be coordinated with the City of Kansas City, Missouri. Additionally, as part of this Planning Area, once a project is Proposed and a developer is selected, as part of the redevelopment project, it the City will require the property to be platted. P. 36

Boulevard and the City responded with Exhibit 4, as discussed more fully above. With respect to all other public improvements, the City has made clear that it is not responsible for payment for any of them, including not only replacements of curbs and sidewalks, but also the movement of fire hydrants. (Tr. At 92-94)

Based on the foregoing, the Commission finds that the City declared the area as blighted, approved the General Redevelopment Plan, required the Traffic Study, which has necessitated the widening of the road, and, in turn, required the relocation of the utility poles at the intersection of 26th Street and Southwest Boulevard without making that specific demand to KCPL. Therefore, the City must, through its usual procedures, notify KCPL that the street is to be widened and deliver to KCPL the traffic study and street plans. KCPL shall comply with the City's requirements according to its customary practices. If the City refuses or fails to issue its mandate, then KCPL is not required to relocate the facilities

absent an agreement by it to do so.

As to the relocation of utility poles on 26th Street between the alleyway and Belleview, the evidence indicates that possibly safety, convenience or engineering require the relocation of all of the facilities on 26th Street. KCPL has the right and the responsibility to ensure its facilities serve its customers and the general public in a safe and reliable manner. If KCPL determines that it is necessary to relocate its facilities the entire length of 26th Street in order to meet safety standards, then it will incur those costs.

Much of this dispute could have been resolved without resort to hearing if the City had taken more of a leadership role, clearly establishing goals and communicating unequivocally. KCPL has repeatedly stated its customary policy about movement of facilities when streets are widened. All of KCPL's criteria are met for a portion of 26th Street, yet the City never stepped up to the plate and told KCPL to move that facilities so the street could be widened. The vagueness of the Plan, including use of words such as "removal" when removal was not required, contributed significantly to the Parties' inability to negotiate a settlement.

Belleview Avenue Facility Relocations

The second request for relief in Count I involves utility modifications on Belleview Avenue. This road has been vacated by the City, except for a reservation of a utility easement, and has become the private property of Boulevard. The City, the PIEA and Boulevard demand the utility lines and poles that run along the road be buried underground. This request is troublesome for several reasons. The Plan clearly calls for the removal of overhead power lines, however, the Plan does not specify to which lines it refers. Although it appears to be a blanket statement, the City does not appear to apply it

to the lines on 26th Street or in the alleyway. The reference is too vague to be binding.

An alternative explanation is an intention to establish a policy preference to relocate facilities underground. However, the City does not have unlimited power to order the utility to take certain actions. Sheet No. 38 of KCPL's PSC approved tariff reads:

> If any Municipality or other governmental subdivision (hereinafter referred to as the "Municipality"), by law, ordinance or regulation requires the Company to construct lines and appurtenances or other facilities designed for any Distribution or Transmission voltages (hereinafter referred to as "facilities") underground for any new or existing facilities in the Municipality when the Company, absent from such ordinance or regulation, would construct or continue to maintain the facilities overhead, and where the recovery of the additional const for such underground is not otherwise provided for in the Company's General Rules and Regulations Applying to Electric Service, the cost of the additional investment required by the Company to construct the facilities underground shall be assessed against the Municipality.
>
> Before the Company starts placing any facilities underground pursuant to this Rider, the Municipality shall provide adequate assurance to the Company that the Municipality's obligations to pay for such facilities are valid, lawful and enforceable against the Municipality.

Accordingly, if the City is requires utility lines to be placed underground as a matter of policy, then the City is required to pay. Moreover, the city has not adopted a specific ordinance requiring burial in reference to the utility's franchise.

Count II

Boulevard alone seeks additional relief in eight prayers in Count II, which relate to passing costs to customers. Since the Commission has disposed of the issues concerning relocations on 26th Street, the prayers in Count II only relate to lines on Belleview Avenue.

1. Boulevard challenges proposed costs submitted to it by KCPL for the various line relocations as unreasonable, unlawful and discriminatory. Boulevard asserts that the estimated cost for completion of the work is overstated. However, Boulevard's estimate appears to be incomplete. With a cursory review of Boulevard's numbers, KCPL's witness

was able to readily identify facilities necessary to the provision of service that had not been included in Boulevard's estimate. Boulevard has the burden of establishing that the proposed costs are unreasonable, but fails to meet that burden.

2. Boulevard demands an accounting for how costs are calculated in the expenses to be levied against Boulevard for line and pole relocations. The Commission finds that KCPL must provide, if it has not done so already, a detailed account for how it calculates the expenses to be paid, according to the formulae set forth in its tariff.

3. Boulevard objects to the application of a Contribution in Aid of Construction tax of 25%. Both parties produced letters from the IRS in support of their positions on the issue, although neither letter was directly on point. Boulevard may, at its own expense, seek a letter ruling from the IRS that no CIAC tax is owed for the facilities renovation on Belleview. If the IRS issues such a ruling, then KCPL will promptly refund the amount collected for CIAC tax.

However, as to the burial of power lines on Belleview, it appears to confer a public benefit of blight abatement. If Boulevard chooses to undertake the expense of burying the lines, then KCPL shall not collect and remit CIAC tax for that project. If the IRS later determines that the burial of the power lines does not confer a public benefit and that CIAC tax is owed, then Boulevard shall remit the tax and any associated interest and penalties to KCPL for payment to the IRS.

4. Boulevard demands past KCPL records illustrating line and pole relocation costs over the past five years. This is a discovery request and it is too late in the process for such records to be relevant to the conclusion of the case. Moreover, the discovery request is broad and overly burdensome. KCPL is not required to gather or release to

Boulevard the requested records.

5. Boulevard demands that it be permitted to use its own contractors in the construction of the new facilities. According to various tariff provisions, a customer may complete parts of work in the installation of new or replacement facilities upon approval by the utility. (Section 10, Tariff PSC Mo. #2) KCPL is responsible for its facilities throughout its system in terms of reliability and liability in the event of interruption of service or an accident and its tariffs clearly give KCPL the authority to approve (and implicitly, to not approve) installation work by a customer. In this instance, KCPL does not approve. This Commission will not seek to step into the utility's shoes to prescribe construction methods, choose engineering designs or select the firms with whom it contracts. The Commission will not order the utility to accommodate Boulevard's request.

6. Boulevard requests an order that protects Boulevard from having to pay any sum of money or convey any property that would in any way benefit KCPL or its ratepayers. No part of its resolution of the instant dispute benefits inappropriately KCPL, its ratepayers or the KCPL system as a whole. Boulevard's request is denied.

7. Boulevard demands that KCPL be ordered to submit a new tariff provision that directly relates to the issues associated with this case and to include within that provision reasonable allocations of costs payable by the customer or third-party. A tariff provision directly on point may assist in the resolution of this kind of matter. The Commission shall order its Staff to evaluate whether new tariff provisions for such circumstances should be ordered for all Commission jurisdictional electric utilities in the state. If the Staff finds that such a rule or tariff would be appropriate, Staff, at its own discretion, may file a complaint, a motion for such relief or a rulemaking. The Commission

will not order KCPL to make such a unilateral filing in this case.

8. Boulevard finally requests an order requiring KCPL to submit an "objective formula for calculating line extension and relocation costs and revenue credits." As in item seven above, the Commission will order its Staff to evaluate the merits of such a request and that, if the Staff, in its discretion, finds the need for such a formula or calculation method, it may file a complaint, a motion for such relief or a rulemaking. The Commission will not order KCPL in this case to make such a filing.

CONCLUSIONS OF LAW

1. Pursuant to §386.390, RSMo 2005, this Complaint is properly before this Commission for determination on the merits.

2. Combined with KCPL's tariffs and practices and the fact that the City declared the area including 26th Street to be blighted, approved the General Development Plan, required the widening of the road, and, in turn, required the relocation of the utility poles at the intersection of 26th Street and Southwest Boulevard, KCPL shall be required to pay for the relocation of those facilities if mandated by the City. This shall include all relocations between the alleyway and Southwest Boulevard, and may include the entirety of the 26th Street relocations, if KCPL determines that having the poles on the same side of the street is the safest and most reliable location to serve its customers and the general public.

3. In order for the City to exercise its ability to require KCPL to relocate facilities at KCPL's expense, the City shall direct KCPL in an unambiguous statement that it is requiring KCPL to relocate specific lines on 26th Street. In addition, the City shall provide KCPL the traffic studies and plans showing the planned street renovations.

4. The General Development Plan and later City Ordinances and Resolutions

are vague and make no specific demand to KCPL regarding KCPL's facilities on Belleview. Therefore, KCPL is not ordered to pay for any removal, relocation or burial of the lines on Belleview.

5. KCPL has followed its tariff provisions in application of its line extension policies and has no further obligation with respect to line extensions, except that the Parties agreed to "save" $20,000 credit for future work.

IT IS ORDERED THAT:

1. KCPL is not required to pay for the relocation or burial of power lines on Belleview Avenue.

2. When the City requires KCPL to relocate its facilities on 26th Street according to its usual practice, KCPL must, within a reasonable time comply with the City's request at KCPL's expense.

3. Boulevard may not perform any of the work on KCPL's facilities unless authorized and approved by KCPL, pursuant to its tariffs.

4. Boulevard may, at its own expense, seek a letter ruling from the IRS that no such tax is owed. If Boulevard receives such a ruling, Kansas City Power & Light Company will promptly refund the previously paid CIAC tax.

5. The Commission Staff shall evaluate whether new tariff provisions for circumstances such as those presented in this case should be ordered for all Commission jurisdictional electric utilities in the state and duly report its finings to the Commission.

6. The Commission Staff shall evaluate whether companies shall provide, in their tariffs, objective formula for calculating line extension and relocation costs and revenue credits and duly report its finings to the Commission.

7. All other requests for relief are denied.

8. This order shall become effective on April 16, 2006.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Clayton, C., concurs;
Gaw and Appling, CC., concur with
opinion(s) to follow;
Murray, C., dissents;
Davis, Chm., dissents with opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 6th day of April, 2006.