

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

In the Matter of the Application of)	
Kansas City Power & Light Company's)	
Application for Approval of Demand-)	EO-2012-0008
Side Management Programs and for)	
Authority to Establish a Demand-)	
Side Programs Investment Mechanism)	

**RESPONSE TO KCPL REQUEST FOR VARIANCE AND JOINDER IN STAFF'S
MOTION FOR COMMISSION DETERMINATION ON VARIANCES**

COMES NOW General Mills, Inc., and for their Response to KCPL's Request for Variance,¹ respectfully state as follows:

I. INTRODUCTION

1. On December 22, 2011, KCPL filed its Application under the Missouri Energy Efficiency Investment Act ("MEEIA"). That Act, codified at Section 393.1075, provides a statutory mechanism for the Commission to approve an electric utility's demand-side management programs as well as the associated demand-side investment mechanism.

2. In its Application, KCPL seeks approval for numerous demand-side programs² including the Mpower rate schedule – an interruptible / curtailable rate schedule offered to commercial and industrial customers.

¹ On February 6, 2012, Staff filed its Motion for Commission Determination on Variances ("Motion"). In that Motion, Staff asserts that the Commission is powerless to "waive a statutory requirement of MEEIA." (Motion at page 7). As such, the Staff the Commission to deny KCPL's requested variance. Furthermore, Staff asks that the Commission rule on KCPL's requested variances in expedited fashion. Recognizing that Staff's Motion is consistent with this pleading, General Mills concurs in Staff's Motion and asks that the Commission deny KCPL's requested waiver. Furthermore, General Mills concurs with Staff's request that the Commission rule on the requested variances in expedited fashion.

² It is important to recognize that, while KCPL distinguishes between demand-side programs and energy efficiency programs, the statutory definition combines the two. Specifically, Section 393.1075.2(3) defines "demand-side program" as "any program conducted by the utility to modify the net consumption of electricity on the retail customer's side of the electric meter, **including but not limited to energy efficiency measures, load management, demand response, and interruptible or curtailable load.**" (emphasis added).

3. As this pleading indicates, KCPL seeks to preclude certain customers from participating in the Mpower tariff. Specifically, KCPL seeks to prevent those customers that have opted-out of the costs of the KCPL demand-side programs from participating in the Mpower curtailable rate schedule.

KCP&L's proposal in this case provides that a customer exercising the opt-out provision cannot participate in the DSM programs approved as part of the DSM portfolio. Such a customer can participate in other curtailment or interruptible programs but not those in the DSM portfolio. KCP&L believes that this is consistent with section J of 4 CSR 240-20.094 which states that a customer that opts-out shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs. Good cause exists for such a variance since KCP&L's proposal ensures that those customers that are paying for the DSM programs get to participate in the programs.³

4. As this pleading demonstrates, however, KCPL fails to recognize that the Mpower rate schedule is an interruptible / curtailable tariff and must be offered to all customers including those that have opted-out of KCPL's energy efficiency costs. Furthermore, given the lack of statutory authority to waive the provisions of Section 393.1075.10, the Commission is powerless to grant a waiver or variance from this statutory provision. As such, KCPL's request for a variance to limit the availability of the Mpower tariff must be denied.

II. MEEIA

5. In 2009, the General Assembly passed the Missouri Energy Efficiency Investment Act. As stated in Section 393.1075.3, the purpose of the Act is "to value demand-side investments equal to traditional investments in supply and delivery infrastructure." The Act continues on to provide for Commission approval of utility demand-side programs. Furthermore, Section 393.1075.5 provides for Commission approval of investment mechanisms to encourage the utility's investment in demand-side programs.

³ Rush Direct, page 27.

6. Prior to the passage of MEEIA, many large commercial and industrial customers had already invested in their own energy efficiency and demand-side programs. Recognizing the inequity of assessing the costs of the utility's energy efficiency costs on customers that have already made identical investments, Section 393.1075.7 expressly provides that certain large customers may "opt-out" of "the costs of demand-side measures" offered by the electric utility. Section 393.1075.8 then provides that once the customer has opted out of such costs, that customer is precluded from subsequently participating in any demand-side programs.

7. That said, the statute nevertheless provides that customers that have opted-out may still "participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation." (Section 393.1075.10). While the statute expressly preserves the availability of these interruptible / curtailable programs to these large customers, KCPL nevertheless seeks to limit the availability of the Mpower curtailable rate schedule to customers that have opted-out of KCPL's energy efficiency costs.

III. MPOWER IS A INTERRUPTIBLE / CURTAILABLE RATE SCHEDULE

8. As indicated, Section 393.1075.10 provides an absolute right for **all** customers, including those that have opted-out of the utility's energy efficiency programs, to participate in a utility's interruptible / curtailable programs. Therefore, any question regarding the availability of the Mpower tariff necessarily depends on whether the Mpower tariff is an interruptible / curtailable tariff. As the following analysis indicates, it is unquestioned that the Mpower rate schedule⁴ is an interruptible / curtailable rate schedule. As reflected in the availability section of the Mpower rate schedule:

This Rider is available to **any** Customer currently receiving or requesting electric service under any generally available non-residential rate schedule. The

⁴ The Mpower rate schedule is attached as Exhibit 1.

Customer must have a load curtailment capability of at least 25 kw during the Curtailment Season and within designated Curtailment Hours, and must agree to establish Firm Power Levels as set forth herein.⁵

Indeed, that same Availability Section notes that the Mpower tariff is a replacement for the Peak Load Curtailment Credit Rider.⁶

9. As defined in Section 393.1075.2(5), an interruptible or curtailable rate is “a rate under which a customer receives a reduced charge in exchange for agreeing to allow the utility to withdraw the supply of electricity under certain specified circumstances.” This definition appears to have 3 distinct elements: (1) receipt of a reduced charge; (2) agreement to curtail electric supply; and (3) defined circumstances for curtailment.

10. Receipt of Reduced Charge: The Mpower tariff provides specific explanation of the “reduced charge” that customers receive for their participation. As reflected in the Customer Compensation section, the reduced charge is dependent on the term of the contract, the maximum number of curtailable events agreed to by the customer, and the actual number of curtailable events. At a minimum, the customer receives \$2.50 per kW of curtailable load multiplied by the maximum number of curtailments agreed to by the customer.⁷

11. Agreement to Curtail: By executing the Mpower Contract, the customer expressly agrees to curtail its electric load. Specifically, that contract provides that the customer specifies that portion of its “Estimated Peak Demand that the Customer is willing and able to commit for curtailment.”⁸ Under no circumstances, however, may the level of curtailment be less than 25 kw.

⁵ Mpower Rider, Section Availability (emphasis added).

⁶ *Id.*

⁷ Mpower Rider, Section Customer Compensation

⁸ Mpower Ride, Section Curtailable Load

12. Defined Circumstances for Curtailment: The Mpower tariff provides “defined circumstances” under which KCPL may curtail the customer’s load. First, curtailment may only occur during the Curtailment Season (June 1 through September 30).⁹ Second, within that season, curtailment may only occur during Curtailment Hours (12:00 noon through 10:00 p.m., Monday through Friday).¹⁰ Third, curtailment may only occur after KCPL has provided a 4 hour notification.¹¹ Fourth, the curtailment event shall last between two and eight hours, may only occur once per day, and may occur in no more than three consecutive days.¹²

13. Clearly, the Mpower rate schedule meets all the elements specified in the definition of “interruptible or curtailable rate.” Indeed, by its own Availability section, the Mpower rate schedule admits that it is an “interruptible or curtailable rate.” Given this, KCPL is required, by the express terms of Section 393.1075.10, to make the Mpower rate schedule available to customers that opt-out of the KCPL energy efficiency costs.

IV. ABSENT A STATUTORY GRANT OF AUTHORITY, THE COMMISSION IS WITHOUT POWER TO GRANT A VARIANCE FROM A STATUTORY REQUIREMENT.

14. Despite the absolute nature of Section 393.1075.10, and the fact that the Mpower rate schedule constitutes an interruptible / curtailable rate, KCPL nevertheless claims that the Commission may unilaterally waive the requirements of this statute and deny the Mpower tariff to customers that opt-out of KCPL energy efficiency costs.

15. It is well established that the Public Service Commission “is a creature of statute and can function only in accordance with the statutes.”¹³ The lack of express statutory authority

⁹ Mpower Ride, Section Curtailment Season

¹⁰ Mpower Ride, Section Curtailable Hours

¹¹ Mpower Ride, Section Curtailable Notification

¹² Mpower Ride, Section Curtailable Limits

¹³ *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 (Mo. banc 1986).

for specific Commission action has been repeatedly relied upon by reviewing courts in reversing Commission decisions.¹⁴

16. In the case at hand, a quick review of the Missouri Energy Efficiency Investment Act reveals that no power has been granted to the Commission to unilaterally waive or provide variances from Section 393.1075.10. This lack of a waiver provision stands in stark contrast to other statutes in which the Commission has been expressly granted such authority. For instance, in Section 392.420, the General Assembly has provided express authority for the Commission to waive the requirements of that statute.

The commission is authorized, in connection with the issuance or modification of a certificate of interexchange or local exchange service authority or the modification of a certificate of public convenience and necessity for interexchange or local exchange telecommunications service, **to entertain a petition to suspend or modify the application of its rules or the application of any statutory provision contained in sections 392.200 to 392.340 if such waiver or modification is otherwise consistent with the other provisions of sections 392.361 to 392.520 and the purposes of this chapter.** (emphasis added).

Still again, Section 392.460 provides authority for the Commission to waive the statutory requirements imposed on a carrier of last resort. “A local exchange carrier that is not relieved of its carrier of last resort obligation under subsections 2 and 3 of this section may seek a waiver of its carrier of last resort obligation from the commission for good cause shown based on the facts and circumstances of the provision of local voice service or internet access services or video services to a particular real property.” (emphasis added).

¹⁴ See, *Missouri Public Service Commission v. ONEOK, Inc.*, 319 S.W.2d 134 (Mo.App. 2009); *State ex rel. Missouri Cable Telecommunications Assoc. v. Public Service Commission*, 929 S.W.2d 768 (Mo.App. 1996); *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 (Mo. banc 1986); and *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979).

Other instances in which the Commission is expressly granted the authority to waive the requirements of a particular statute are contained in Section 392.245.4; Section 392.361.7; Section 386.310 and Section 386.420.4.

Noticeably there is no provision allowing the Commission to waive any of the provisions of the Missouri Energy Efficiency Investment Act. Given that the Commission is limited solely to the powers provided by statute, the Commission is powerless to grant KCPL's requested relief.

17. Given the lack of statutory authority to grant a waiver, KCPL must necessarily believe that the authority to grant a waiver is provided by some common law doctrine. If true, the ability to grant such a waiver would not be limited solely to the authority to waive the requirements of Section 393.1075.10 – requiring that any interruptible / curtailable rate schedule be available to customers who have opted out of energy efficiency costs. Rather, the authority to waive statutory requirements would necessarily be broader. In such a case, presumably the Commission could grant a waiver from all of the provisions of this statute. For instance, the Commission could waive the statutory requirement “to value demand-side investments equal to traditional investments in supply and delivery infrastructure.” (Section 393.1075.3).

V. CONCLUSION

18. In the final analysis, absent an express grant of authority allowing it to waive a statute, the Commission is required to follow and apply all statutes including Section 393.1075.10. For this reason, KCPL's request that the Commission grant a variance from the requirements of Section 393.1075.10 should be denied and the provisions of the Mpower rate schedule must be available to all KCPL customers including those that have opted-out of the KCPL energy efficiency costs.

Respectfully submitted,

WOODSMALL LAW OFFICE

/s/ David Woodsmall

David L. Woodsmall Mo. Bar #40747
807 Winston Court
Jefferson City, Missouri 65101
(573) 797-0005
Facsimile (573) 635-7523
Internet: david.woodsmall@woodsmallllaw.com

ATTORNEY FOR GENERAL MILLS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have that the foregoing pleading has been served by electronic means on all parties of record as reflected in the records maintained by the Secretary of the Commission through the EFIS system.

/s/ David Woodsmall

David Woodsmall

Dated: February 13, 2012