

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

In the Matter of the Application of Kansas)	
City Power & Light Company Regarding)	
the Sale of Assets and Property Rights)	Case No. _____
Located Near Spearville, Kansas)	

APPLICATION AND MOTION FOR EXPEDITED TREATMENT

Kansas City Power & Light Company (“KCP&L” or “Applicant”), pursuant to 4 CSR 240-2.060 and 4 CSR 240-2.080(16), hereby respectfully submits to the Missouri Public Service Commission (“Commission”) its Application requesting that the Commission decline to exercise jurisdiction under Section 393.190.1¹ with regard to the sale of certain wind turbine generators and property rights, and that it grant the Motion for Expedited Treatment to decline such an assertion of jurisdiction on an expedited basis.

KCP&L is in final negotiations for a wind energy power purchase agreement that would result in a new wind generation facility being constructed near Spearville, Kansas this year. However, the issue of KCP&L’s legal authority to transfer 32 wind turbine generators and certain property rights -- now raised at the eleventh hour by counsel for Staff when KCP&L had been given the “green light” from Staff in November 2009 -- places the transaction that will enable the project in severe jeopardy and requires immediate resolution.

Because the issues in this matter raise purely a legal dispute, the essential facts being uncontested, the Commission can resolve the controversy on the pleadings or after oral argument.

In support of its requests, KCP&L states:

¹ All statutory references are to the Missouri Revised Statutes (2000) and its Cumulative Supplement (2009), as amended.

I. APPLICANT

1. Applicant is a Missouri corporation with its principal office and place of business at 1200 Main Street, Kansas City, Missouri 64105. KCP&L is engaged in the generation, transmission, distribution, and sale of electricity in western Missouri and eastern Kansas, operating primarily in the Kansas City metropolitan area. KCP&L is an “electrical corporation” and “public utility,” as those terms are defined in Section 386.020 and, as such, is subject to the jurisdiction of the Commission as provided by law. KCP&L’s Certificate of Good Standing was filed in Case No. EM-2000-753 and is incorporated by reference.

2. KCP&L sells electricity at retail to approximately 271,000 customers in Missouri and 233,000 customers in Kansas. It owns 1,755 miles of high-voltage power lines and 4,055 MW of base, intermediate, and peak load generating capacity, as well as 100.5 MW of wind generation, for a total of 4,155.5 MW.

3. Pleadings, notices, orders and other correspondence and communications concerning this Application should be addressed to the undersigned counsel and:

Curtis D. Blanc
Senior Director, Regulatory Affairs
Tim M. Rush
Director, Regulatory Affairs
Kansas City Power & Light Company
1200 Main Street – 19th Floor
Kansas City, Missouri 64105
Telephone: (816) 556-2483 and 556-2344
Fax: (816) 556-2110
E-mail: Curtis.Blanc@kcpl.com
Tim.Rush@kcpl.com

4. Applicant has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates,

which action, judgment, or decision has occurred within three years of the date of this Application.

5. Applicant has no overdue annual report or assessment fees.

II. REQUEST FOR COMMISSION TO DECLINE TO ASSERT JURISDICTION

6. KCP&L owns 32 General Electric 1.5 MW wind turbine generators along with certain property rights in Ford County, Kansas. Neither the wind turbine generators nor the property and associated development rights comprising the project site have provided any service to KCP&L's customers at any time. The wind turbine generators have never been used and remain in weather-protected crates lying on the ground at the project site in Ford County, Kansas. Similarly, the property and other development rights have never been employed in the performance of KCP&L's duties to the public or anyone else. Moreover, neither the turbines, the property rights, nor any of the financing costs associated with KCP&L's ownership of these assets have ever been reflected in the Applicant's rates.

7. On December 1, 2009 KCP&L issued a Request for Proposals ("RFP"), seeking proposals for 100.5 MW of wind generated electricity where the purchased power would feed into KCP&L's existing Spearville, Kansas substation. The essential element of the proposal is that KCP&L would sell, and a successful bidder would be obligated to buy, the 32 wind turbine generators and the associated property and development rights comprising the project's site. KCP&L would then purchase the output of these generators via a power purchase agreement ("PPA"). See KCP&L RFP, attached as Highly Confidential Exhibit A.

8. Counsel for KCP&L had earlier provided drafts of the RFP to Staff for its review on November 17, 2009 in an email to the signatories to the Regulatory Plan Stipulation and Agreement that the Commission approved in Case No. EO-2005-0329 in July and August, 2005.

See Email of J. Fischer to the Commission's General Counsel, et al. (Nov. 17, 2009), attached as Exhibit B. Among the numerous recipients were Staff members Steve Reed, Bob Schallenberg, Lena Mantle, Steve Dottheim, and Nathan Williams. Mr. Fischer noted that the RFP was to be issued "early next week" and requested recipients who had questions to "please let me or Tim Rush know."

9. On November 25, 2009 KPC&L's John Grimwade, Senior Director for Strategic Planning and Development, received an email from Michael Taylor, a member of the Energy Department of the Commission's Utility Operations Division, advising that Lena Mantle, the head of the Department, had "no comments" and that she "did not receive any comments from other Staff members who reviewed the RFPs." See Email from M. Taylor to J. Grimwade (Nov. 25, 2009), attached as Exhibit C. No further comments were provided and the RFP was issued on December 1.

10. In response to the RFP, KCP&L has received several expressions of interest that have developed into serious negotiations, expected to be finalized in mid-June 2010.

11. Concurrently with the RFP process, representatives of the Applicant described these plans in the course of a confidential presentation on KCP&L's Comprehensive Energy Plan that was presented on Wednesday, May 19, 2010 to Staff and other parties to the Regulatory Plan Stipulation and Agreement at a meeting in Jefferson City. At that time counsel for Staff inquired whether KCP&L planned to seek authority from the Commission prior to selling the wind turbine generators. KCP&L responded that it did not, but would consider the views of Staff and others.

12. On Thursday, May 21 Staff counsel confirmed with representatives of KCP&L that the Applicant owned the wind turbine generators which had not been installed. Staff counsel

then informed the Applicant that the position of the Staff was that KCP&L is required to obtain authorization from the Commission to transfer the wind turbine generators and any associated property rights, based upon its interpretation of Section 393.190.1. See Staff Letter to KCP&L (May 24, 2010), attached as Exhibit D.

13. Since the draft RFP was provided to Staff in November 2009 and Staff's response raised no issues or concerns, KCP&L questions why this legal issue was not raised earlier in a timely fashion by Staff so that this Application and Motion for Expedited Treatment would have been unnecessary.

14. KCP&L maintains that transferring the wind turbine generators and associated property rights is not subject to the prior approval of the Commission under Section 393.190.1. Those assets have never been a part of KCP&L's "works or system" that are "necessary or useful in the performance of its duties to the public." Moreover, neither the assets nor the financing costs associated with KCP&L's ownership of the assets have ever been included in KCP&L's rates.

15. Raising legal issues at the eleventh hour concerning KCP&L's ability to transfer the assets substantially jeopardizes the transaction. While time is of the essence to assure the success of the transaction, there is no reason why Staff should attempt to block the sale now. The Commission will have a full opportunity to review all aspects of the PPA, including the transfer of the turbines, when KCP&L seeks to include the costs of the PPA in rates.

III. LEGAL ARGUMENT

16. The statute which governs this circumstance is the first half of the first sentence of Section 393.190.1, which states:

No gas corporation, electrical corporation, water corporation, or sewer 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, . . . without having first secured from the commission an order authorizing it so to do [emphasis added].

17. The second sentence of Section 393.190.1 states that any such sale, assignment, lease or other disposition made without the order of the Commission authorizing such transaction “shall be void.” Staff’s position that such a transfer would be void (as set forth in Exhibit D) now clouds the title that KCP&L proposes to pass to a qualified buyer. Moreover, it materially endangers KCP&L’s ability to deliver the project to a qualified buyer in a timely fashion.

18. Because the wind turbine generators and the associated property rights are not now and have never been “necessary or useful” in KCP&L’s performance of its duties to the public, there is no reason for the Commission to assert jurisdiction and, instead, it should affirmatively decline to assert jurisdiction under these circumstances.

19. The Commission has previously determined that where combustion turbines and associated equipment were not providing electricity to Missourians on the date of their sale, those assets were not necessary or useful at that time, and therefore Section 393.190 does not apply to the sale. In re Application of Aquila, Inc. for Authority to Acquire, Sell and lease Back Three Natural Gas-Fired Combustion Turbine Power Generation Units and Related Improvements to be Installed and Operated in the City of Peculiar, Missouri (“South Harper Gas Turbine Case”), Report and Order at 8, Case No. EO-2005-0156 (Mo. P.S.C., Dec. 19, 2005).

20. As the Commission has stated in another case, it is unclear how unused property is “necessary or useful in the performance of its duties to the public.” See In re the Application of GMO for Authority to Sell its Liberty Service Center, Order Approving the Sale at 2, Case No. EO-2010-0211 (Mo. P.S.C., Mar. 3, 2010). There the Commission stated: “[I]t is unclear how a vacant and non-operational building is necessary and useful in the performance of GMO’s

duties to the public,” despite Staff’s assertion that “the Commission has jurisdiction over GMO’s request because GMO could choose to make the facility useful in the performance of its duties.”

Id.

21. While KCP&L believes that the Report and Order in the South Harper Gas Turbine Case is correct, the facts in this case are in contrast with and should alleviate the concerns raised by Commissioner Gaw and then-Commissioner, now Chairman Clayton. Unlike Aquila, KCP&L does not claim “that these turbines are needed in order for [the utility] to meet its obligation of delivering electricity to its current Missouri customers.” See South Harper Gas Turbine Case, Dissenting Opinion of Commissioners Gaw and Clayton at 4 (Mo. P.S.C., Dec. 21, 2005). Similarly, KCP&L has not here used the 32 wind turbine generators and any associated property in Ford County, Kansas to construct a power plant that will be sold prior to its being fully operational. Id. at 3.

22. The dissenters in the South Harper Gas Turbine Case assert that the term “necessary” does not require absolute necessity. They cite an appellate decision in which the court found that “necessary” means “suitable, proper and convenient to the ends sought.” Id. at 4, citing State ex rel. Union Elec. Co. v. University City (“University City”), 449 S.W.2d 894, 901 (Mo. App. St. L. 1970).

23. The term “necessary” as it is used in Section 393.190.1 has not been defined by the Commission or by any courts. Assuming that the University City definition is even applicable to the term “necessary” in Section 393.190.1,² it does not extend to the wind turbine generators at issue here.

² There is a strong argument that it is not applicable. The Court in University City was defining the term as it was used in a city ordinance under which a city council may grant conditional use

24. The University City Court determined that “[t]he location of the [Union Electric] substation on the Waldron site was necessary because no other site was both satisfactory and reasonably available.” University City, 449 S.W.2d at 901. In finding that the location was “suitable, proper and convenient to the ends sought,” the Court of Appeals found that Union Electric had established the need for the substation at that site. While the “suitable, proper and convenient to the ends sought” standard carries with it the concept of reasonableness, it is not so relaxed as to apply to any property of a utility. The University City Court noted that the Waldron site would not be necessary if “an alternative site is reasonably available.” Id.

25. Commission decisions lend further support for the position that an asset is not necessary if the utility has other available means to meet its obligation to serve its customers. For example, in its determination that a transaction involving a coal purchasing contract does not fall within the purview of Section 393.190.1, and thus no Commission approval is required, the Commission cited Trigen-Kansas City Energy Corporation’s argument that “the coal contract has never been considered necessary in the provision of steam to its customers.” In re Trigen-Kansas City Energy Corp.’s Application for a Finding of No Jurisdiction, Order Closing Case at 3, Case No. HO-2007-0419 (Mo. P.S.C., Aug. 9, 2007).

26. KCP&L has other available means to meet “the ends sought” -- which are its obligations to the public. Indeed, if it did not have those other available means, it would not be engaged in a sale of its wind turbine generators. Thus, the turbines are not “necessary or useful in the performance of its duties to the public.”

permits. Significantly, the Court noted that “necessary” is a word “susceptible of various meanings.” 449 S.W.2d at 901.

27. Additionally, there are no facts which currently show that the wind turbine generators or the associated property rights are “any part of [KCP&L’s] franchise, works or system” which is under Section 393.190.1 “necessary or useful in the performance of its duties to the public.”

28. Contrary to the opinion of the dissent in the South Harper Gas Turbine Case, Section 393.190 does not pertain to “assets” of an electrical corporation or a public utility. It relates only to the “franchise, works or system, necessary or useful in the performance of its duties to the public.” If the term “assets” were used, the concerns of the dissent might be well-taken. The term is not used, however.

29. The final sentence of Section 393.190.1 is equally as important as the first half of the first sentence. It states affirmatively: “Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any . . . public utility . . . which is not necessary or useful in the performance of its duties to the public” The remainder of this sentence states that any sale of its property by such public utility “shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.”

30. The General Assembly’s inclusion of this final sentence emphasizes that the sale of property “which is [*present tense*] not used or useful in the performance of a public utility’s duties to the public” cannot be prevented by the Commission or its Staff. This provision presents a strong justification for the Commission’s declining jurisdiction as found in the South Harper Gas Turbine Case because the turbines and associated equipment “were not providing electricity to Missourians” at the time of their sale. South Harper Gas Turbine Case at 8.

31. As noted above, Section 393.190 does not pertain to “assets” of an electrical corporation or a public utility. It relates only to the “franchise, works or system, necessary or useful in the performance of its duties to the public.” As the final sentence of Section 393.190.1 indicates, unless property specifically falls within the strict definition of the first sentence, nothing in Section 393.190.1 shall be construed to prevent any sale of a public utility’s property.

32. Furthermore, the final sentence goes on to emphasize that “any sale of its property by such ... public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public” Thus, any property which is sold by a public utility is presumptively not useful or necessary, and any sale of a public utility’s property is presumptively lawful.

33. The Commission additionally has no jurisdiction over the sale of the wind turbine generators and associated property development rights as this sale is a business and contracting decision. In State ex rel. City of St. Joseph v. PSC, S.W.2d 8, 14 (Mo. banc 1930), the Missouri Supreme Court clearly stated that the Commission’s authority to regulate certain aspects of a public utility’s operations does not include the right to dictate the manner in which the utility conducts its business:

[I]t must be kept in mind that the Commission’s authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. The company has the lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in doing so, it does not injuriously affect the public.

Indeed, the powers of the Commission “are purely regulatory. The dominating purpose in the creation of the Public Service Commission was to promote the public welfare. To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use.” State ex rel. Harline v. PSC, 343 S.W.2d 177, 181 (Mo. App. K.C.

1960). So long as a public utility performs its legal duty, complies with lawful regulation, and does no harm to the public welfare, it has the right to manage its own affairs and conduct its business as it may choose. Id. at 182. See State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5, 11 (Mo. banc 1966); State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 900 (Mo. App. S.D. 1995).

34. There are no facts which currently show that KCP&L is not meeting its obligation to its customers, or that the sale of the wind turbine generators would in any way harm or adversely affect the public welfare. Significantly, any assertion of jurisdiction by the Commission over this sale would be an unlawful overstepping of its bounds. State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. banc 1979) (the Commission “is purely a creature of statute”; its “powers are limited to those conferred” by statute “either expressly, or by clear implication as necessary to carry out the powers specifically granted”).

35. Given that it has been undisputed law in Missouri for many years that the “obvious purpose” of Section 393.190 “is to ensure the continuation of adequate service to the public serviced by the utility,” there is no need for the Commission to assert jurisdiction in this matter. See State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

IV. MOTION FOR EXPEDITED TREATMENT

36. Pursuant to 4 CSR 240-2.080(16), KCP&L requests expedited treatment of this Application.

37. Failure to complete the RFP and associated contracting by late June will impair the ability of KCP&L to assure that the project is completed in 2010. This must be done in order

for the project to take advantage of a grant in lieu of investment tax credit for costs spent on qualified construction projects that are placed in service before the end of 2010. This grant is offered under Sections 1104 and 1603 of the American Recovery and Reinvestment Act of 2009 (“ARRA”). Applications for such a grant must be submitted no later than October 1, 2011. Although provisions exist for requesting exceptions for assets where substantial physical construction has begun before the end of 2010, KCP&L would prefer not to rely upon the receipt of an exception to the ARRA requirements.

38. Any further delay in this process will also likely create uncertainty on the part of lenders willing to finance the project, as well as increase KCP&L’s carrying costs as winter weather may interfere with the construction schedule and postpone the completion of the project until spring 2011.

39. Applicant requests approval of this request by June 15, 2010, to be effective no later than June 25, 2010. There will be no negative effect on the Applicant’s customers or the general public if the Commission acts by the dates requested herein. This pleading was filed as soon as possible following the advice provided by the Staff of the Commission, and the assessment of the business risks being faced by the Applicant.

40. If expedited treatment is not granted, it is likely that a transaction which will enable the construction of a new wind generation facility will not occur.

41. KCP&L respectfully requests oral argument at the Commission’s agenda session currently scheduled for June 9, 2010 in Kansas City, Missouri.

WHEREFORE, Kansas City Power & Light Company respectfully requests that the Commission decline to exercise jurisdiction under Section 393.190.1 with regard to the sale of

the 32 wind turbine generators and the associated property rights in Ford County, Kansas, and grant other such relief as may be warranted.

Respectfully submitted,

/s/ Karl Zobrist

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Attorneys for Kansas City Power & Light Company

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 28th day of May, 2010, to all counsel of record.

/s/ Karl Zobrist _____
Karl Zobrist

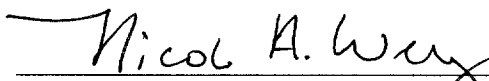
VERIFICATION

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Curtis D. Blanc, being duly sworn according to law, state that I am authorized to make this verification on behalf of Kansas City Power & Light Company as Senior Director, Regulatory Affairs, and that the facts set forth above are true and correct to the best of my knowledge, information and belief.

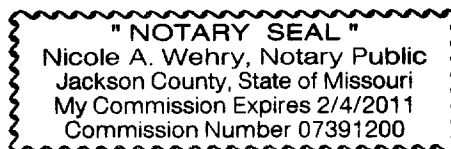

Curtis D. Blanc

Subscribed and sworn to before me this 28th day of May, 2010.


Notary Public

My commission expires:

Feb. 4, 2011



LIST OF EXHIBITS

- EXHIBIT A KCP&L Request for Proposals: 100.5 MW of Wind Generated Electricity, Sale of Wind Turbine Generators and Spearville 2 Development Rights (Dec. 1, 2009). ** Highly Confidential **
- EXHIBIT B Email from James Fischer to PSC General Counsel, et al. (Nov. 17, 2009).
- EXHIBIT C Email from Michael Taylor (PSC Staff) to John Grimwade (KCP&L) (Nov. 25, 2009).
- EXHIBIT D Letter of Commission Staff Deputy Counsel Nathan Williams to Curtis Blanc (KCP&L) (May 24, 2010).

EXHIBIT A

**** Highly Confidential ****

EXHIBIT A

**THIS DOCUMENT CONTAINS
HIGHLY CONFIDENTIAL
INFORMATION NOT AVAILABLE
TO THE PUBLIC**

EXHIBIT B

From: JFischerPC@aol.com [mailto:JFischerPC@aol.com]

Sent: Tuesday, November 17, 2009 9:52 AM

To: gencounsel@psc.mo.gov; opcservice@ded.mo.gov; clumley@lawfirmemail.com;
steve.reed@psc.mo.gov; dwoodsmall@fcplaw.com; stucon@fcplaw.com; shelly.woods@ago.mo.gov;
dcooper@brydonlaw.com; ltrackers@brydonlaw.com; dmvyulsteke@bryancave.com; Riggins Bill;
kzobrist@sonnenschein.com; dkincheloe@mpua.org; JFischerPC@aol.com; Lutz Brad; Rush Tim;
brenda.wilbers@dnr.mo.gov; anita.randolph@dnr.mo.gov; bob.schallenberg@psc.mo.gov;
PaulB@brydonlaw.com; lena.mantle@psc.mo.gov; lewis.mills@ded.mo.gov; steve.dottheim@psc.mo.gov;
Blanc Curtis; Schatz Victoria; nathan.williams@psc.mo.gov

Cc: lwdority@sprintmail.com

Subject: Case No. EE-2008-0034/EO-2005-0329--KCP&L and GMO Wind RFPs
Counsel:

Attached are draft Requests For Proposal for additional wind generation that KCP&L and GMO are planning to issue early next week. If you have any questions, please let me or Tim Rush know. Jim Fischer

EXHIBIT C

From: Taylor, Michael [mailto:michael.taylor@psc.mo.gov]
Sent: Wednesday, November 25, 2009 10:59 AM
To: Grimwade John
Subject: Wind RFPs

John:

I checked with Lena and she has no comments. She did not receive any comments from other Staff members who reviewed the RFPs.

Mike

EXHIBIT D



Commissioners

ROBERT M. CLAYTON III
Chairman

JEFF DAVIS

TERRY M. JARRETT

KEVIN GUNN

ROBERT S. KENNEY

Missouri Public Service Commission

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ROBERT SCHALLENBERG
Director, Utility Services

NATELLE DIETRICH
Director, Utility Operations

STEVEN C. REED
Secretary/General Counsel

KEVIN A. THOMPSON
Chief Staff Counsel

Monday, May 24, 2010

Curtis Blanc
Kansas City Power and Light Company
Operations Company
1201 Walnut, 20th Floor
Kansas City, MO 64106

Re: Wind turbines (Highly Confidential)

Curtis:

After the Comprehensive Energy Plan update on Wednesday, May 19, 2010, in a confidential presentation you provided an update on Kansas City Power & Light Company's plans for wind-generated electricity. Part of that update was a plan to sell KCPL wind turbines and rights at the Spearville wind farm. During that presentation I inquired whether KCPL planned to seek authority from this Commission before selling wind turbines it owns. You responded it did not, but would welcome and consider the views of Staff, and others.

On Thursday, May 21, 2010, because you had made the presentation, I called you regarding transfer of KCPL's wind turbines. During that call you confirmed KCPL owns the wind turbines, which are not installed, and that it has rights in the Spearville wind farm. I first notified you then that it is the position of the Staff of the Public Service Commission of the State of Missouri that KCPL is required to obtain authorization from the Public Service Commission of the State of Missouri to transfer the wind turbines and KCPL's rights in Spearville, referencing § 393.190 RSMo 2000.

This letter is to confirm the foregoing regarding that communication and to add that under § 393.190 RSMo 2000, unless KCPL obtains the requisite authority before the transfer, the transfer is void.

If you believe anything I have related regarding our conversation or your presentation is inaccurate in any way, please advise me immediately. If KCPL wishes to discuss the Staff's position on the need for Commission authorization, let me know and I will make arrangements

for such a discussion. Staff appreciates your providing an update of Kansas City Power & Light Company's plans for wind-generated electricity.

Sincerely,

A handwritten signature in cursive script that reads "Nathan Williams".

Nathan Williams
Deputy Counsel
Public Service Commission
State of Missouri

573-751-8702 (Telephone)
573-751-9285 (Facsimile)
nathan.williams@psc.mo.gov

cc: James Fischer
Robert Schallenberg
Natelle Dietrich
Kevin Thompson