

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

In the Matter of Kansas City)	
Power & Light Company's Request)	Case No. ER-2012-0174
for Authority to Implement a General)	
Rate Increase for Electric Service)	

**REPLY TO RESPONSES IN OPPOSITION TO MOTION TO STRIKE
TESTIMONY**

COMES NOW the Office of the Public Counsel and for its Reply to Responses in Opposition to Motion to Strike Testimony respectfully states as follows:

1. MEUA and MECG offer a number of arguments in opposing Public Counsel's motion to strike a reference in MEUA witness Johnstone's testimony. Their four arguments are generally: that KCPL has abandoned all the testimony supporting the Base, Intermediate and Peak allocation method (although it is unclear why such alleged repudiation is relevant to the motion to strike); that Mr. Johnstone's testimony is not hearsay; that privilege does not apply (or cannot be asserted by Public Counsel); and that a motion to strike is untimely. All of these arguments are unpersuasive, and most can readily be seen to be without merit simply by referencing the Commission's rule on prehearing conferences: 4 CSR 240-2.090(7). The Commission's rule states that "Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence." In effect, the rule creates a duty on all participants not to disclose information rather than granting a privilege to each participant.

2. MEUA and MECG both claim that KCPL repudiated the Base, Intermediate and Peak (BIP) method at the evidentiary hearing. MEUA cites¹ to a portion of the transcript in this case in which Mr. Bartels cross-examined KCPL witness Rush. MEUA asserts at page 1 that “Mr. Rush under questioning from Mr. Bartels was examined in regard to the subject matter at the technical conference.” Tortured grammar aside, this statement is misleading. At no point in that cross-examination does Mr. Rush state – or even imply – that the Base, Intermediate and Peak method is unreliable. He simply states that KCPL does not believe its **results** should be followed because of rate impacts. His point is that space heating rates should be deliberately set to provide a below-average return, not that the BIP is unable to accurately calculate returns.

3. MECG also asserts that KCPL has somehow repudiated all the testimony about the BIP. MECG cites to page 979 of the transcript as the point at which KCPL “disclaimed the use of its methodology for purposes of allocating any revenue increase” but there is no such statement on that page – nor **at any other point** in the transcript. In entering into the nonunanimous stipulation and agreement, KCPL did not abandon or repudiate its prefiled testimony any more than any other party did. KCPL neither repudiated the BIP nor agreed with Mr. Johnstone’s disputed statement. In fact, at no point at the evidentiary hearing was Mr. Rush or any other KCPL witness even asked about Mr. Johnstone’s statement.

4. Both MECG and MEUA cite to Rule 801(d)(2) of the Federal Rules of Evidence as support for their assertion that the disputed statement is not hearsay, but

¹ Both the MEUA and MECG responses had trouble accurately citing the transcript. MEUA refers to its cross-examination of Mr. Rush and incorrectly cites to page 1013; the cross-examination is actually at pages 1018-1021.

neither provide any authority for the proposition that the Federal Rules of Evidence apply to state administrative law proceedings of the Missouri Public Service Commission. Indeed, there appears to be no such authority. The Commission has adopted the state rules of civil procedure with respect to discovery in 4 CSR 240-2.090, but did not similarly adopt the federal rules of evidence in 4 CSR 240-2.130. Neither the Commission's rules nor the Missouri statutes contain any provision comparable to federal Rule 801(d)(2). In Missouri, no exception to the hearsay rule is automatically created simply because the declarant is also a witness, and so the statement is hearsay.

5. One of the most disturbing points that MECG and MEUA raise is the notion that the title of a meeting is more important than its substance. They both argue that the alleged statement of Mr. Rush cannot be privileged because it was allegedly made at a "technical" conference rather than at a "settlement" conference. This argument is elevating form over substance. The Commission's rules, recognizing that settlement discussions occur in all prehearing conferences, do not distinguish among types of prehearing conferences. 4 CSR 240-2.090(7) plainly states that "**Facts disclosed in the course of a prehearing conference and settlement offers are privileged** and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence." [Emphasis added.] It does not matter whether the scheduling order listed the conference as "technical" or "settlement." At both the prehearing conference listed as "technical" and the one listed as "settlement," issues were discussed and facts disclosed with the intent of furthering all parties' understanding of each others' positions and with the ultimate goal of reaching partial or global settlement.

6. MEUA and MECG's last argument with respect to privilege is the baseless assertion that only KCPL can assert privilege with respect to the alleged statement. Once again, neither MECG nor MEUA have cited any authority for the proposition that a single party can unilaterally decide to waive the privilege attached to settlement negotiations. The whole of a settlement discussion is privileged, and the privilege belongs to all participants. If that were not the case, the Party A could say to Party B: "I reject your settlement offer of \$1 million." Then Party A could later disclose the fact that Party B made such an offer simply by Party A waiving privilege with respect to his own statement. Or, as here, Party C could disclose Party A's statement and hope that Party A did not object. The situation becomes even more fraught with risk of unfair disclosures if there are Parties D, E and F in the action, all with some degree of convergence and divergence in their positions on the issues and with respect to the validity of particular statements made in prehearing conferences. Note that the Commission's rule states that facts disclosed at prehearing conferences "shall not be used against **participating parties**," not simply the party making a disclosure. The Commission's rules are clear, are clearly applicable, and clearly provide that Mr. Rush's alleged statement cannot be used.

7. Given that Mr. Rush's alleged statement was privileged because it was made in the course of a prehearing conference, the next question is whether KCPL waived the privilege.² Neither MECG nor MEUA assert an explicit waiver, but rather suggest that a waiver is implied from KCPL's lack of objection to Mr. Johnstone's

² Based on the provision of the Commission's rules that states that disclosures shall not be used against participating parties except by agreement, Public Counsel submits that waiver of just one party is insufficient. Nonetheless, Public Counsel will address MECG's and MEUA's claims of waiver.

testimony. "To make out a case of implied waiver there must be a clear unequivocal and decisive act showing such purpose...." Fitzgerald v. Metropolitan Life Insurance Co., 237 Mo. App. 469, 149 S.W.2d 389, 391 (1941). Here there has been no such act; in fact, there has been no act at all. Again, the Commission's rules are controlling, and do not allow one party to unilaterally waive their application. 4 CSR 240-2.090(7) provides that "except by agreement, [a statement] shall not be used against participating parties...." Even if KCPL's silence can be construed as an implied waiver as to KCPL only (which it really cannot), it is far short of an agreement among the participating parties as required by the rules.

8. Both MECG and MEUA assert that once a piece of testimony is admitted into the record without objection, it cannot later be stricken. Once again, the Commission's rule is controlling and it simply provides that facts disclosed at a prehearing conference may not be disclosed. It does not set a time limit on when this prohibition ends, nor does it create a duty to object. Unlike a common law privilege, which confers on a party the ability to keep certain matters confidential, the rule creates an obligation on all parties not to reveal information disclosed at a prehearing. Privilege typically is a right that must be exercised or it is waived. The Commission's rule takes a different approach: instead of conferring a right to be able to protect certain information, it creates an obligation not to disclose certain information. This obligation does not disappear through inaction of other parties. The only two ways it can be avoided are explicitly set forth in the rule itself: 1) by agreement of the participating parties; and 2) when matters disclosed are fully substantiated by other evidence. Neither of those have

occurred here, and so MEUA is still under the obligation not to reveal the statements of Mr. Rush made at a prehearing conference.

WHEREFORE, Public Counsel respectfully submits this reply and renews its motion to strike the sentence beginning on line 15 and continuing through line 17 on page 4 of Exhibit 675.

Respectfully submitted,

/s/ Lewis R. Mills, Jr.

By: _____
Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-4857
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

ATTORNEY FOR THE OFFICE OF THE
PUBLIC COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 21st day of December 2012.

Office of the Public Counsel

Lewis Mills
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Missouri Public Service Commission

Office General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Missouri Public Service Commission

Nathan Williams
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

**National Nuclear Security
Administration (NNSA) - K.C. Plant**

Arthur P Bruder
1000 Independence Ave. SW
Washington, DC 20585
arthur.bruder@hq.doe.gov

Natural Resources Defense Council

Shannon Fisk
1617 John F. Kennedy Blvd, Suite 1675
Philadelphia, PA 19103
sfisk@earthjustice.org

Natural Resources Defense Council

Henry B Robertson
705 Olive Street, Suite 614
St. Louis, MO 63101
hrobertson@greatriverslaw.org

Praxair, Inc.

Stuart Conrad
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Renew Missouri

Thomas Cmar
5042 N. Leavitt St., Ste. 1
Chicago, IL 60625
tcmar@earthjustice.org

Renew Missouri

Shannon Fisk
1617 John F. Kennedy Blvd, Suite 1675
Philadelphia, PA 19103
sfisk@earthjustice.org

Renew Missouri

Henry B Robertson
705 Olive Street, Suite 614
St. Louis, MO 63101
hrobertson@greatriverslaw.org

Sierra Club

Thomas Cmar
5042 N. Leavitt St., Ste. 1
Chicago, IL 60625
tcmar@earthjustice.org

Sierra Club

Shannon Fisk
1617 John F. Kennedy Blvd, Suite 1675
Philadelphia, PA 19103
sfisk@earthjustice.org

Sierra Club

Henry B Robertson
705 Olive Street, Suite 614
St. Louis, MO 63101
hrobertson@greatriverslaw.org

Union Electric Company

James B Lowery
111 South Ninth St., Suite 200
P.O. Box 918
Columbia, MO 65205-0918
lowery@smithlewis.com

Union Electric Company

Thomas M Byrne
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
AmerenMOService@ameren.com

United States Department of Energy

Arthur P Bruder
1000 Independence Ave. SW
Washington, DC 20585
arthur.bruder@hq.doe.gov

United States Department of Energy

Therese LeBlanc
2000 E. 95th St.
P.O. Box 419159
Kansas City, MO 64141
tleblanc@kcp.com

AARP

John B Coffman
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

City of Kansas City, Missouri

Mark W Comley
601 Monroe Street., Suite 301
Jefferson City, MO 65102-0537
comley@ncrpc.com

Consumers Council of Missouri

John B Coffman
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

Dogwood Energy, LLC

Carl J Lumley
130 S. Bemiston, Ste 200
St. Louis, MO 63105
clumley@lawfirmemail.com

**Empire District Electric Company,
The**

Diana C Carter
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
DCarter@brydonlaw.com

Federal Executive Agencies

Arthur P Bruder
1000 Independence Ave. SW
Washington, DC 20585
arthur.bruder@hq.doe.gov

Federal Executive Agencies

Steven E Jones
1104 SE Talonia Drive
Lees Summit, MO 64081
sejcaj@kc.rr.com

Kansas City Power & Light Company

Lisa A Gilbreath
4520 Main, Suite 1100
Kansas City, MO 64111
lisa.gilbreath@snrdenton.com

Kansas City Power & Light Company

James M Fischer
101 Madison Street, Suite 400
Jefferson City, MO 35101
jfischerpc@aol.com

Kansas City Power & Light Company

Heather A Humphrey
1200 Main
PO Box 418679
Kansas City, MO 64141-9679
Heather.Humphrey@kcpl.com

Kansas City Power & Light Company

Karl Zobrist
4520 Main Street, Suite 1100
Kansas City, MO 64111
karl.zobrist@snrdenton.com

Kansas City Power & Light Company

Roger W Steiner
1200 Main Street, 16th Floor
P.O. Box 418679
Kansas City, MO 64105-9679
roger.steiner@kcpl.com

Kansas City Power & Light Company

Charles W Hatfield
230 W. McCarty Street
Jefferson City, MO 65101-1553
chatfield@stinson.com

Midwest Energy Consumers Group

David Woodsmall
807 Winston Court
Jefferson City, MO 65101
david.woodsmall@woodsmalllaw.com

Midwest Energy Users' Association

Reed J Bartels
3100 Broadway
STE 1209
Kansas City, MO 64111
rbartels@bartelslaw.com

Midwest Energy Users' Association

Jeremiah D Finnegan
3100 Broadway, Suite 1209
Kansas City, MO 64111
jfinnegan@fcplaw.com

Missouri Department of Natural Resources

Jessica L Blome
221 W. High Street
P.O. Box 899
Jefferson City, MO 65102
Jessica.Blome@ago.mo.gov

Missouri Gas Energy

Dean L Cooper
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

Missouri Gas Energy

Todd J Jacobs
3420 Broadway
Kansas City, MO 64111
todd.jacobs@sug.com

**Missouri Industrial Energy Consumers
(MIEC)**

Diana M Vuylsteke
211 N. Broadway, Suite 3600
St. Louis, MO 63102
dmvuylsteke@bryancave.com

**Missouri Joint Municipal Electric
Utility Commission**

Douglas Healy
939 Boonville Suite A
Springfield, MO 65802
doug@healylawoffices.com

/s/ Lewis R. Mills