

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 26th day
of June, 2013.

In the Matter of Kansas City Power & Light Company's)
Practices Regarding Customer Opt-Out of)
Demand-Side Management Programs and Related Issues) File No. EO-2013-0359

CONSENT ORDER AND DISMISSAL

Issue Date: June 26, 2013

Effective Date: July 2, 2013

The Missouri Public Service Commission is:

- Approving the disposition of this action by settlement because disposition by settlement is in the public interest;
- Incorporating the *Non-Unanimous Stipulation and Agreement's* terms into this order; and
- Dismissing the action because the parties have resolved all disputes.

The disputes involved provisions for customer opt out of demand-side programs under the Missouri Energy Efficiency Investment Act ("MEEIA")¹ and related law. This order does not determine the merits of any claim or defense, including without limitation whether any violation of statute or Commission tariff, regulation, or order ("violation") occurred, and whether any tariff not yet filed supports safe and adequate service at just and reasonable rates.

¹ Section 393.1075, RSMo Supp. 2012.

Background

On January 18, 2013, Kansas City Power & Light Company (“KCPL”) and the Commission’s staff (“Staff”) initiated this action by filing the *Joint Application to Establish a Proceeding to Review [KCPL]’s Practices Regarding Customer Opt-Out of Demand-Side Management Programs and Associated Programs’ Costs and Revenue Impacts* (“application”).² The application asked the Commission to open a contested case. The Commission granted applications to intervene from:

- Missouri Department of Natural Resources.³
- Midwest Energy Users’ Association.⁴
- Midwest Energy Consumer’s Group (“MECG”);⁵

and granted an application to intervene out of time from Midwest Industrial Energy Consumers (“MIEC”).⁶

In response to a Commission order to state the relief sought, cite the authority for granting it, and allege facts under which that authority applies, KCPL and Staff filed further pleadings.⁷ Among the relief sought in those responses was an order authorizing deferred recording for certain accounting entries (“AAO”)⁸ and a finding that KCPL had

² Electronic Filing and Information System (“EFIS”) No. 1.

³ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁴ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁵ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁶ EFIS No. 20, *Order Granting Late Intervention*, March 20, 2013.

⁷ EFIS Nos. 27 and 28.

⁸ AAO is an acronym for “accounting authority order.”

violated a statute or Commission tariff, regulation, or order (“complaint”). The Commission then issued a notice of contested case.⁹

KCPL, Staff, MEEG, and MIEC (“signatories”) filed the settlement.¹⁰ No party objected to the settlement within seven days, so the Commission will treat the settlement as unanimous, as the Commission’s regulation provides.¹¹ The settlement includes a waiver of procedural formalities¹² including a hearing.¹³ Because no party seeks an evidentiary hearing, no hearing is required.¹⁴ The Commission must state its conclusions of law¹⁵ but need not separately state any findings of fact when a stipulation, agreed settlement, or a consent order disposes of a case.¹⁶

On those grounds, the Commission independently finds, concludes, and orders the following.

Findings, Conclusions, and Order

Because KCPL is an electrical company,¹⁷ the Commission has jurisdiction generally over KCPL’s operations.¹⁸ The Commission has specific authority to

⁹ EFIS No. 20, *Notice of Contested Case and Procedural Schedule*.

¹⁰ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*.

¹¹ 4 CSR 240-2.115(2)(C).

¹² Section 536.060(3), RSMo 2000.

¹³ Sections 536.060, RSMo 2000.

¹⁴ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

¹⁵ Section 386.420.2, RSMo 2000.

¹⁶ Section 536.090, RSMo 2000.

¹⁷ *[KCPL]’s Initial Pleading and Notice of Relief Requested*, EFIS No. 28, page 2-3, paragraph 5-6.

¹⁸ Section 393.140(1), RSMo 2000.

determine a complaint ¹⁹ and to issue a consent order. ²⁰ The Commission does not have authority to issue an advisory opinion. ²¹

The settlement sets forth the agreement of the signatories, including:

- MECG will dismiss its action in Case No. WD76164 at the Court of Appeals. ²²
- KCPL's filing of tariff sheets, ²³ specimens of which are attached. ²⁴
- The Commission's issuance of an AAO. ²⁵

The signatories also seek the Commission's approval of the settlement. ²⁶

A. Terms

But the Commission's approval of the settlement cannot mean a decision on the merits for several reasons.

- Actions before the Court of Appeals are outside the Commission's subject matter jurisdiction, ²⁷ so the Commission cannot order dismissal of such an action.
- No tariff sheet as described in the settlement has yet been filed, so a decision on its merits would constitute an advisory opinion. ²⁸

¹⁹ Section 386.390.1, RSMo 2000.

²⁰ Section 536.060, RSMo 2000.

²¹ *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n of State of Mo*, 392 S.W.3d 24, 38 (Mo. App., W.D. 2012).

²² EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 4-5, paragraph 5.D.

²³ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 2, paragraph 5.A.

²⁴ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, Attachment A.

²⁵ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 5, paragraph 5.G.

²⁶ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 8.

²⁷ Missouri Constitution, Art. II, Section 1.

²⁸ *Akin v. Director of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996).

- Issuance of an AAO is unsupported by evidence or stipulated facts, relevant to the law that provides when such relief should issue.²⁹

As to the complaint, a conclusion that no violation exists would support no relief under the complaint, and the settlement includes no stipulation to a violation. Therefore the Commission concludes that the signatories have not shown that the Commission can and should approve their terms.

B. Disposition

Nevertheless, a Commission's determination on the settlement is apt because the Commission is not merely a tribunal. The Commission discussed a similar situation in an earlier decision.³⁰ Though not binding on the Commission, the analysis in that decision is persuasive.

The disposition of any complaint is subject to the Commission's determination of the public interest.³¹ That is because the elements of a complaint always include a violation of statute or Commission tariff, regulation, or order:

Complaint may be made by the commission of its own motion, or by [other entities] in writing, setting forth any [conduct of] any . . . public utility . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission [. ³²]

²⁹ 18 CFR Part 101, which includes the *Uniform System of Accounts Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act*, incorporated to Missouri law at 4 CSR 240-20.030(1).

³⁰ *Superior Bowen Asphalt Company, LLC, Complainant vs. Southern Union Company d/b/a Missouri Gas Energy, Respondent*, File No. GC-2011-0101, EFIS No. 54, *Consent Order and Dismissal with Prejudice* issued May 9, 2012.

³¹ The Commission's regulation on summary determination expressly provides that the Commission will not grant a motion for summary determination unless summary determination procedure is in the public interest. A ruling that summary determination procedure is in the public interest is implicit when the Commission grants a motion for summary determination. 4 CSR 240-2.117(1); *Public Serv. Comm'n of State of Missouri v. Missouri Gas Energy*, 388 S.W.3d 221, 228 (Mo. App., W.D. 2012). Here, the Commission is making no determination other than whether the procedure is in the public interest, so an implicit ruling is impossible, and an express ruling is necessary.

³² Section 386.390.1, RSMo 2000.

Generally, every statute, Commission tariff, regulation, or order implicates the public interest if it relates to “efficient facilities and substantial justice between patrons and public utilities.”³³ Partly for that reason, OPC is a party to this action³⁴ so that an advocate for the public interest³⁵ always remains whatever private parties like a utility and its industrial customers—and even Staff—may agree to.

The public interest is plainly more urgent in, for example, alleged pervasive safety violations than an isolated billing dispute with a sophisticated business entity. But this action relates to efficient facilities, and substantial justice between patrons and public utilities, because the application relates to MEEIA and other provisions of law. Those provisions state that:

- Demand-side management (“DSM”) program participation and payment are optional for certain customers,³⁶
- KCPL shall not charge the customer for any DSM program under MEEIA or by any other authority upon notice from a customer to KCPL,³⁷ and
- the notice is effective for the following calendar year and each successive calendar year.³⁸

And, unlike a private party or State agency, Staff has no authority of its own to settle an action, so Commission approval of Staff’s participation in the settlement in this action is necessary.

³³ *Public Serv. Comm’n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 228 (Mo. App., W.D. 2012).

³⁴ 4 CSR 240-2.010(10).

³⁵ Section 386.710.1(3), RSMo 2000.

³⁶ Sections 393.1075.7, RSMo Supp. 2012.

³⁷ Sections 393.1075.7, .8, .9, and .10, RSMo Supp. 2012, and 4 CSR 240-20.094(6)(F).

³⁸ 4 CSR 240-20.094(6)(F).

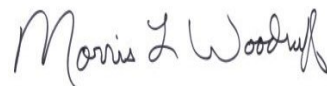
C. Ruling

The Commission concludes that disposition by settlement is in the public interest so the Commission will approve that disposition.³⁹ The Commission will also issue this consent order that, by analogy to a consent judgment, memorializes the signatories' terms without determining their merits.⁴⁰ There being no further relief for the Commission to grant, the Commission will also dismiss this action and cancel the hearing.

THE COMMISSION ORDERS THAT:

1. Disposition by settlement is approved.
2. The terms of the *Non-Unanimous Stipulation and Agreement* are memorialized, by incorporating them by reference into this order, as if fully set forth
3. This action is dismissed as of the effective date of this order.
4. This order shall be effective on July 2, 2013.
5. This file shall close on July 4, 2013.

BY THE COMMISSION



Morris L. Woodruff
Secretary

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

³⁹ Undisputed resolution of this action constitutes good cause for an effective date less than 30 days from issuance. Section 386.490.2, RSMo 2000.

⁴⁰ *Nations v. Hoff*, 78 S.W.3d 222, 223 (Mo. App., E.D. 2002).