BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In The Matter Of The Construction Audit and Prudence Review Of Environmental Upgrades To Iatan 1 Generating Plant, and Iatan Common Plant, and the Iatan 2 Generating Plant, Including All Additions Necessary For These Facilities To Operate	)))))	File No. EO-2010-0259

INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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I. Introduction

The Commission's March 15, 2010 Order Establishing Investigatory Docket and Setting On-The-Record Proceeding in File No. EO-2010-0259 stated, in part, in "ORDERED: 5" on page 3 "[a]n on-the-record proceeding is scheduled for Tuesday, April 6, 2010, beginning at 2:00 p.m." On March 22, 2010, KCPL/GMO filed Kansas City Power & Light Company's And GMO's Motion To Reschedule The On-The-Record Proceeding "for a full two-day hearing." KCPL/GMO identified in its March 22, 2010 Kansas City Power & Light Company's and GMO's (1) Response To Order Establishing Investigatory Docket And Setting On-The-Record Proceeding; And (2) Response To Staff Motion To Open Construction Audit And Prudence Review Investigation Case that it wanted to call 5 KCPL/GMO witnesses, 4 KCPL personnel and 1 consultant, and cross-examine the 3 Staff members responsible for the December 31, 2009 Staff Reports filed in Case Nos. ER-2009-0089 and ER-2009-0090. The Staff had no objection to KCPL's/GMO's request. The Staff has no objection to appropriate access to the Commission. The Staff's objections go to the inappropriate substantive and procedural result that KCPL/GMO seek from that access.

Counsel for KCPL/GMO said, among other things, in his opening statement: "The companies do not seek to limit the Commission's jurisdictional authority or statutory responsibility in any way." (Tr. Vol. 1, p. 44, ls. 19-20). But that is exactly what KCPL/GMO are unlawfully seeking that the Commission do to itself. KCPL/GMO has stated at different times, in different pleadings, and in otherwise different forms, different representations of the relief that it is seeking. KCPL/GMO state the "relief" they are seeking at page 4 in their March 25, 2010 filing in File No. EO-2010-0259 as follows:

> **WHEREFORE**, the Companies respectfully request that the Commission accept this filing as clarification of their request for relief in this matter, and respectfully request that the Commission convene a two-day hearing to investigate this matter with the opportunity for the parties to present witnesses and engage in cross-examination of opposing witnesses. At the conclusion of the hearing, the Companies request that the Commission issue an Order precluding Staff from proposing additional prudence disallowances in addition to those prudence disallowances that are already contained in its *Staff's Report Regarding Construction Audit And Prudence Review Of Environmental Upgrades To Iatan 1 and Iatan Common Plant* filed in Case Nos. ER-2009-0089 and ER-2009-0090 on December 31, 2009 in this or any future rate proceeding.

KCPL/GMO are requesting the Commission to limit the Commission's jurisdictional authority and statutory responsibility and also the contract rights of the non-utility signatory parties to the April 24, 2009 Case No. ER-2009-0089 Non-Unanimous Stipulation And Agreement and the May 22, 2009 Non-Unanimous Stipulation And Agreement by action in this non-contested, investigatory file to which only KCPL/GMO, the Office of the Public Counsel ("Public Counsel") and the Staff are parties.

After the Staff filed its December 31, 2009 Staff Report, KCPL/GMO filed on February 16, 2010 KCP&L's And GMO's Initial Response To Staff Report Of The Construction Audit/Prudence Review Of Environmental Upgrades To Iatan 1 And Iatan Common Plant (KCPL's/GMO's First Response). KCPL's/GMO's First Response filed February 16, 2010 shows that KCPL/GMO knew full well the terms of the revenue requirement/global agreement Stipulation And Agreements in Case Nos. ER-2009-0089 and ER-2009-0090 and that they have chosen not to honor those terms which they entered into with the Staff and other non-utility parties. KCPL's/GMO's First Response filed February 16, 2010 clearly makes this admission at pages 2-3:

> On April 24, 2009 and May 22, 2009, Staff and other parties entered into a settlement with KCP&L and GMO in Case Nos. ER-2009-0089 and ER-2009-0090, respectively ("Unit 1 Settlements"). In the Unit 1 Settlements, the Companies agreed to allow Staff to continue the construction and prudence audit

> for Iatan 1 and Iatan common plant costs, but capped any potential disallowances at $30 million for KCP&L and $15 million for GMO. The Companies were willing to allow the Staff to complete its audit as late as the filing of direct testimony in the next rate cases and filed a joint motion with the Staff to extend time for completion of the audit. [Footnotes omitted].

Furthermore, KCPL's/GMO's First Response filed February 16, 2010:

(a) did not request a hearing for KCPL/GMO to respond to the Staff's December 31, 2009 Report;

(b) said that KCPL/GMO would address the December 31, 2009 Staff Report through rebuttal testimony in KCPL's/GMO's next general rate cases if the Staff files the December 31, 2009 Construction Audit Report as part of its testimony in those cases (pp. 1-2, 10-11); and

(c) stated that KCPL/GMO were responding to: "object to the Construction Audit Report to the extent it attempts to alter the Commission's June 10 order. The construction audit and prudence review concerning Iatan l and common plant has been completed and should not be permitted to continue." (p. 11).

KCPL/GMO in their March 22, 2010 filing with the Commission greatly expanded what KCPL/GMO are seeking from the Commission:

(1) "Staff's prudence review of Iatan 1 and Common Plant is complete and Staff may not present proposed prudence adjustments on prudence in the upcoming rate case concerning Iatan 1 and Common Plant other than what is contained in the audit report filed on December 31, 2009." paragraph 6(a), page 7. **"[T]he Companies are not opposed to Staff's review of invoices** related to Iatan 1 and Common Plant that were **not available at the end of 2009**, but this review should be in the nature of a 'true-up' of the numbers rather than an inquiry into additional prudence issues." (Emphasis added; paragraph 3, page 2; paragraph 10, page 9);

(2) **"The Companies have not engaged in any dilatory or unreasonable practices in responding to discovery** during the prudence review, thus leaving in tact the prudence disallowance caps established in the April 24, 2009 and May 22, 2009 settlement agreements." (Emphasis added; paragraph 6(b), page 7);

(3) **"The Companies' cost control system is not in violation of any Commission order and is sufficient to identify and track costs of the Iatan construction projects."** (Emphasis added; paragraph 6(c), page 7).

KCPL/GMO is seeking no less than to impair the Staff's review and demean the Staff's audit in advance of KCPL's/GMO's impending Iatan 2 rate case filings. KCPL/GMO are seeking that the Commission make unprecedented rulings outside of the context of full contested case rate proceedings to restrict the evidence to be presented to the Commission in the next KCPL/GMO rate cases, and KCPL/GMO are pursuing this action contrary to their contractual obligations under (1) the revenue requirement/global agreement Stipulation And Agreements approved by the Commission in the settlement of KCPL's/GMO's recent rate cases in Case Nos. ER-2009-0089 and ER-2009-0090 and (2) the KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement approved by the Commission in Case No. EO-2005-0329.

KCPL/GMO witness Chris B. Giles was asked by Commissioner Jarrett to expound upon the nature of the Staff's audit activity:

> [COMMISSIONER JARRETT] Q. Was there anything different in the way that Staff handled this Iatan 1 environmental upgrades audit versus the other construction and prudence audits on other projects that you observed?
>
> [Mr. GILES] A. Yes.
>
> Q. And can you tell me what those are?
>
> A. In short -- and by the way, I expressed this same concern to Staff, particularly Mr. Schallenberg. This audit has proceeded in a manner that I have never experienced in my 34 years with the company, and I expressed that on several occasions, and as an example, the focus on minutia of this audit. Rather than first focussing on prudence and large contracts and a half a billion dollar investment, Staff has spent an unusual amount of time tracking mileage, tracking expense reports.
>
> (Tr. Vol. 1, pp. 301-02).

Counsel for KCPL/GMO inquired of KCPL's/GMO's consultant, Dr. Kris R. Nielsen about the audit work performed by the Kansas Corporation Commission Staff's consultant, Vantage Consulting, Inc. ("Vantage"), regarding Iatan 1 AQCS:

[MR. FISCHER] Q. You mentioned that you were also engaged by Kansas City Power & Light to conduct a prudence audit for use in the Kansas proceeding?

[DR. NIELSEN] A. Yes.

Q. Are you familiar with the Kansas staff and their outside consultants and what they've been doing in that proceeding?

A. Yes.

Q. Did the approach taken by -- was it Vantage Consulting?

A. Yes.

Q. Did the approach taken by Vantage Consulting in Kansas differ from the approach you took at all?

A. No.

(Tr. Vol. 1, p. 224).

[MR. FISCHER] Q. Staff counsel also asked you about the Vantage report. Is it --- is it true -- or did you testify that Vantage had reduced the disallowances that they were recommending?

[DR. NIELSEN] A. The first filing that Vantage made, which I think was in January of 2009, included testimony, and they attached to that testimony their report. I think the page that I was referring to was in their report. Subsequently, in rebuttal to the company's rebuttal, which included my testimony, they adjusted their recommended disallowances.

Q. By adjusted you mean lowered?

A. Lowered, yes.

(Tr. Vol. 1, p. 224).

In *in camera* cross-examination by Staff counsel, Dr. Nielsen was asked about the dollar value of the Vantage recommended disallowance in Kansas before the Kansas Corporation Commission ("KCC"). He indicated that Vantage lowered its original recommended disallowance and the matter was settled. (Tr. Vol. 2HC, pp. 245-47). Based on the numbers in

the December 31, 2009 Staff Reports and the numbers testified to by Dr. Nielsen concerning the Vantage recommended disallowance in Kansas before the KCC, the record at hearing in this proceeding indicates that the December 31, 2009 Staff Reports contain nearly twice the dollar amount of proposed adjustments than does the work performed on behalf of the KCC Staff by Vantage. This fact is at odds with the KCPL/GMO assertion that the Staff spent a majority of its time auditing expense accounts and other items of minimal value or significance.

II. File No. EO-2010-0259 Is A Non-Contested Proceeding

First, the Staff does not believe that the Commission can lawfully do in a non-contested proceeding what KCPL/GMO has requested that this Commission do even though the Commission has held an evidentiary hearing. The necessary entities for the result that KCPL/GMO seek were not parties and the rulings that KCPL/GMO seek cannot be made outside of the context of a ratemaking proceeding. Section 536.010(4) RSMo. Cum. Supp. 2009 defines a "contested case" as follows:

> "Contested case" means a proceeding before an agency in which **legal rights, duties or privileges of specific parties** are required by law to be determined after hearing [Emphasis added].

From the start the Commission has declared this proceeding to be a non-contested proceeding as most recently indicated by various statements in the Commission's April 14, 2010 Order Of Clarification. The Commission calls this proceeding a "file," File No. EO-2010-0259, not a "case," not "Case No. EO-2010-0259":[1]

> The Commission is clarifying its investigatory authority. Outside of a contested case, the formal discovery devices available in circuit court ("discovery") are not available to any person, including the Commission's Staff.

[1] The Staff notes that the Commission has been using the "file" rather than the "case" designation for its Orders and the transcripts in EO-2010-0259.

. . .The [December 9, 2009 Order Regarding Staff's Motion To Compel in File No. ER-2009-0089] contrasted the differences between enforcement of the data requests served pursuant to the Commission's investigatory authority with the enforcement of formal discovery tools in a contested case.

On March 12, 2010, Staff filed a motion requesting the Commission order Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company to follow Commission Rule 4 CSR 240-2.090 as it relates to data requests. The Commission subsequently denied that request believing Staff was asking the Commission to authorize discovery enforcement in this investigation by use of contested case procedures. . . .

Clarification

A. Investigation

As described in the order dated December 9, 2009, statute, rule, and case law limit discovery's availability before the Commission to contested cases. Unlike discovery, informal data requests are available outside the context of a contested case. . . .

* * * *

C. Limitation

Of course, these powers are solely for gathering information. Information gathered, and conclusions reached, in the course of an investigation may support further action, like rulemaking, or adjudication by non-contested case or contested case. Investigations, like in this matter, may produce an audit that will come into play during the companies' next general rate case. The audit report, or any other information obtained during the audit, if offered into evidence in another matter will be subject to the appropriate evidentiary competency tests that apply in those formats, because such investigation does not, alone, determine the legal rights or duties of any person.[11]

[11] Indeed, a contested case operates under the fundamental laws of evidence. See *Director of Ins., Fin. Inst., and Prof. Regis'n v. Rothermich*, Case No. 06-1608 DI (Mo. Admin. Hearing Com'n, Nov. 29, 2007), 2007 WL 4618606, 4.

Even if the Commission had declared this proceeding to be a contested case, there is a serious question as to what action the Commission could take if this were a contested case without voiding the April 24, 2009 Case No. ER-2009-0089 Non-Unanimous Stipulation And Agreement and the May 22, 2009 Case No. ER-2009-0090 Non-Unanimous Stipulation And Agreement.

The case law is that those documents are contracts among the signatories, of which KCPL/GMO and the Staff are less than all signatories, and the Commission at KCPL's/GMO's behest and/or its own motion is considering changing that contract contrary to its express terms.

III. Can The Commission Grant KCPL/GMO Any Substantive Or Procedural Relief, And If So What Would Be The Effect?

The Staff does not believe that the Commission can lawfully grant to KCPL/GMO any substantive or procedural relief in this proceeding respecting their impending Iatan 2 rate cases.

If the Commission to the contrary believes that it can, the Staff is not clear what the Commissioners' understanding is of how the relief requested by KCPL would operate if granted by the Commission. Again, File No. EO-2010-0259 is a non-contested investigation and does not include as parties the nonutility signatories to the Case Nos. ER-2009-0089 and ER-2009-0090 revenue requirement/global agreement Stipulation And Agreements or the Case No. EO-2005-0329 KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement. Is it the Commissioners and KCPL's understanding that if the Commission would grant KCPL the relief requested that the relief would function similarly to the mechanics of a rate moratorium?

Rate moratoriums are the result of the settlement of contested cases. Do the Commission and KCPL/GMO have the same understanding of the mechanics of a rate moratorium as does the Staff? The Commission's approval of a rate moratorium to which the Staff is a signatory does not mean that the Staff will not be engaged by the Commission in an excess earnings investigation and complaint. The Commission's approval of a rate moratorium to which the Staff is a signatory means that the Staff will not on its own engage in an excess earnings investigation of the particular utility and the other signatories to the rate moratorium will not ask the Commission to direct the Staff to conduct an excess earnings investigation of the particular utility. Nonetheless, it is understood that the Commission remains free to direct the Staff to

conduct an excess earnings investigation of the particular utility if the Commission receives a request from a non-signatory to the moratorium that the Commission believes meets statutory, caselaw, or other requirements warranting some action on the part of Commission. A difference in this situation from a rate moratorium is that some or all of the other nonutility signatories may have entered into those revenue requirement/global agreement Stipulation And Agreements in Case Nos. ER-2009-0089 and ER-2009-0090 relying on the Staff being permitted to continue to perform its prudence reviews / construction audits of Iatan 1 and Iatan common plant into the Staff's audit of KCPL's and GMO's filing of their Iatan 2 rate cases.

The Staff notes that the Commission's April 15, 2009 Order Regarding Construction And Prudence Audits Of The Environmental Upgrades At Iatan I, Jeffrey Energy Center And The Sibley Generating Facility (April 15, 2009 Order) and the Commission's June 10, 2009 Order Regarding Joint Motion To Extend Filing Date (June 10, 2009 Order) apply only to the Staff's audits of Iatan 1 AQCS and Iatan 1 common plant and not to any other entity whether that entity be a signatory to the revenue requirement / global agreement Stipulation And Agreement in Case Nos. ER-2009-0089 and ER-2009-0090 or not.

What has been the purpose of the two-day hearing held on April 28-29? Will the Commission issue an Order in File No. EO-2010-0259 making substantive or procedural findings or rulings to be imposed in the soon to be filed KCPL and GMO Iatan 2 rate cases? Regardless of what the Commission may intend, will KCPL/GMO contend that a Commission Order in File No. EO-2010-0259 is res judicata in the yet to be filed KCPL/GMO Iatan 2 rate cases? Will the Commission incorporate by reference in the yet to be filed KCPL/GMO Iatan 2 rate cases the record of File No. EO-2010-0259, the Preliminary Staff Report filed on June 19, 2009, the separate Staff Reports filed on December 31, 2009 in Case No. ER-2009-0089 and

Case No. ER-2009-0090, the transcript and exhibits of the two-day hearing held on April 28-29? What else might the Commission rule that is to be incorporated by reference?

The "Public Service Commission Law" includes all of Chapter 386 and Sections 393.110 to 393.290. (Section 383.010 RSMo. 2000). Although there are numerous references to investigations in Chapters 386 and 393 that are related to investigations associated with complaints or some other enumerated power of the Commission, there is a dearth of reference to investigation as a stand alone activity of the Commission or a Commissioner(s). For example, although the focus of Section 386.420.1 RSMo. 2000 is a complaint, Section 386.420.2 refers to "investigation" made by the Commission without reference to what the investigation may be in regard to. The word "complaint" does not appear in Section 386.420.2. Section 386.420.2 RSMo. 2000 provides, in part:

> Whenever an investigation shall be made by the commission, it shall be its duty, to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises. . . .

IV. "Prudence Issues" Versus "Ratemaking Issues"/"Financial Issues"/"Construction Issues"

KCPL/GMO draws a distinction between (1) prudence or "decisional prudence" issues and (2) ratemaking issues. At page 2, footnote 2 of KCPL's/GMO's February 16, 2010 Response, KCPL/GMO first make this distinction and take their initial stance of not asking for any hearing prior to the next rate case hearings:

> Some of the issues addressed in the Construction Audit Report are not **prudence issues**. They are instead typical **ratemaking issues** that will be addressed in KCP&L's and GMO's next rate cases, e.g. allocations of expenses between Iatan 1 and Iatan 2; changes to KCP&L's cost of debt; and the equity rate used in the calculation of AFUDC. The Commission expressly authorized KCP&L to respond to the true prudence issues as part of the rate case and KCP&L does not waive its right to do so by filing this response.

(Emphasis added).

KCPL/GMO in their March 22, 2010 pleading characterize the distinction, which they assert the Staff has mistakenly not recognized in its audit, is the Staff has conjoined a "financial audit" with a "prudence audit," and the Commission should take action against the Staff's audit activity. At page 2, paragraph 4 of their March 22, 2010 pleading, KCPL/GMO state "the Companies suggest that at least the following issues should be the subject of the on-the-record proceeding:"

> 4.(b) What are Staff's reasons for failing to produce an audit during the last rate case and wishing to continue the audit that was due December 31, 2009? The Commission should inquire into the excuses raised by Staff for its failure to complete the audits which should have been done a year before the scheduled hearing. Staff's claims fall into two categories: Discovery and cost tracking. As to discovery, the Commission should take testimony concerning: . . . 4) whether the Staff's requests have been unduly burdensome, failed to take into account that requests might be objectionable and not properly focused on **prudence issues**, or whether those requests drifted far afield from **prudence review** and into minute details more appropriate for a **financial audit**; 5) whether discovery conducted by Staff has focused on **prudence issues** or digressed into **financial reviews** of items that may or may not be included in a future rate case [*See* Attachment 2] . . .

(Emphasis added).

Is the Commission deciding at either KCPL's/GMO's behest or on the Commission's own motion in this non-contested proceeding, to which only KCPL/GMO, the Staff and Public Counsel are parties, the substantive issue of what is a prudence issue and what is a ratemaking issue / financial issue / construction issue, which the Commission will then apply in KCPL's/GMO's soon to be filed Iatan 2 rate cases?

Mr. Schallenberg and KCPL/GMO counsel Ms. Barbara Van Gelder engaged in colloquies regarding the Staff's view that there are factors that cause the prudence determination to not be the discrete, immutable calculation that KCPL/GMO advocate that it should be:

[MS. VAN GELDER] Q. Now, with something like that, it's finite, it's done, you pay the vendor to pave or to enhance the soil and you move on. In your world of prudence, in Mr. Nielsen's world of prudence, he would say that item, that decision and the costs that are attendant to that decision are reasonable, correct?

[MR. SCHALLENBERG] A. Well, I would say there's more decisions in that tree than -- because the next thing you have to do is -- and I think, List & Clark was one of the vendors. After you make that decision you have to now, in essence, contract to get the work done. You have to schedule the work, and that's all part of whether the prudence continuation takes place or you could have a break and do imprudent things in that stage of the decision.

Q. But for you, where you're having difficulty is that one decision begets another decision that goes back and affects the first decision?

A. Well, you use -- and we've had this discussion before. You use like they're separate decisions. I look at when you're making a big decision or a decision that has consequences, a prudent decision looks at the consequences before it makes the decision. It doesn't take the steps and break those in and then say, this decision is prudent and then the corresponding consequence has to be looked at separately or is just a freebie that because the first step was prudent, the consequent steps are prudent.

(Tr. Vol. 3, pp. 551-52).

BY MS. VAN GELDER: Q. If you make that decision and it's prudent, if you -- you'll never be able to render a decision of prudence if you always think that down the road there's something going to impact that first decision. When do you stop?

[MR. SCHALLENBERG] A. Well, I believe it's imprudent to make a decision, especially in a dynamic environment that lacks the flexibility to allow you to change, you know, as conditions change. I mean, I think that's part of the decision and the prudence of it is how rigid is the decision relative to the conditions that I have to execute the decision in. And I think someone asked me earlier about the way -- the regulatory plan. We agreed not to challenge the prudence of putting in the AQCS system at Iatan, and we don't -- we're not challenging it today. But that didn't mean at the time we did it that the decision that was locked in and that they had to follow it. In fact, there were modifications to the decisions that were made at the time of the regulatory plan. The environmental upgrades, for example, at LaCygne, some of those were not completed because of a change in market conditions, and so we're not -- I'm not saying that not executing that was imprudent, but I would definitely have not said it was prudent to continue the follow the regulatory plan if facts and circumstances showed at the time of execution you should take a different course.

Q. Right. But if once you decided, let's say, to follow it, then all of the expenditures that follow are presumed to be reasonable?

A. Assuming that at the time you don't have other alternatives that could allow you to change that course. For example - -

Q. I understand. We'll go on. Let's go back to this. . . .

(Tr. Vol. 3, pp. 570-71).

KCPL/GMO Exhibit No. 1HC is the Kansas City Power & Light Company, Strategic Infrastructure Investment Status Report, Fourth Quarter 2009, February12, 2010, Case No. EO-2005-0329. It was established during the cross-examination of KCPL/GMO witness Curtis Blanc that page 41 of KCPL/GMO Exhibit No. 1HC shows for 2010 for the Iatan 1 Project expenditures for 2010 are in the millions of dollars and that KCPL/GMO contends that the Commission should rule that the Staff's prudence review of the Iatan 1 project ended as of the Staff's filing of its Staff Reports in Case Nos. ER-2009-0089 and ER-2009-0090 on December 31, 2009. (Tr. Vol. 2HC, pp. 155-58). Mr. Blanc testified that regarding the auxiliary boiler presently being installed, "the auxiliary boiler, it is a common facility, but because common facility isn't its own bucket, for lack of a better term, that money will come out of the Iatan I budget, is my understanding." (Tr. Vol. 1, p. 161).

State ex rel. GS Technologies Operating Co. v. Public Serv. Comm'n, 116 S.W.3d 680 (Mo.App. W.D. 2003) is a noteworthy decision involving KCPL, its Hawthorn 5 generating facility, the Commission, and the determination of prudence, if for no other reason than for its statements regarding burden of proof concerning prudence/imprudence issues. The underlying Commission case is Case No. EC-99-553. On February 17, 1999, the boiler to KCPL's Hawthorn 5 coal-fired baseload generating unit was destroyed by an explosion which caused the inoperability of Hawthorn 5. The Staff opened an investigation into the matter of the cause of

the explosion and what "action," if any, as a consequence was needed, and on June 1, 1999, the Staff filed a Motion To Open Docket for the purpose of opening an investigatory docket to receive a Staff report, Case No. ES-99-581. On May 11, 1999, GS Technologies Operating Co., d/b/a GST Steel Company (GST) filed a petition for an investigation as to the adequacy of service provided by KCPL and request for immediate relief. The Commission construed GST's petition as a complaint and the Commission issued its Notice Of Complaint on May 26, 1999 as Case No. EC-99-553.

KCPL had informed GST that as a special contract customer, rather than as a tariffed rate customer, the Hawthorn 5 outage would likely result in an increase in rates to GST. The May 11, 1999 GST petition for an investigation requested that the Commission continue its Hawthorn 5 investigation and also investigate the adequacy, reliability, and prudency of KCPL's service to GST before and after the Hawthorn 5 explosion and the justness and reasonableness of prices KCPL charged. 116 S.W.3d at 686. GST complained that KCPL's rate for electric service was not just and reasonable because of certain imprudently incurred expenses and that electric service provided by KCPL was inadequate and unreliable because of imprudent management. GST sought several remedies including a finding that it had been overcharged and recalculation of its bills for services already rendered. In November 1999, KCPL requested that the Commission hold the GST complaint Case No. EC-99-553 in abeyance pending the Commission's final resolution of its investigation of the Hawthorn incident in Case No. ES-99-581. The Commission denied KCPL's request. (*GS Technology Operating Co. v. Kansas City Power & Light Co.*, Case No. EC-99-553, Report And Order, 9 Mo.P.S.C.3d 186, 190 (2000).

The Commission held an evidentiary hearing on April 17 and 18, 2000. The Commission issued a Report And Order on July 13, 2000 in which it held, among other things, that: (1) GST

had failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999, i.e., the Commission was unable to determine on the existing record whether KCPL was responsible for the Hawthorn 5 explosion (the Hawthorn 5 explosion was an open question pending the conclusion of the Staff's ongoing investigation); and (2) KCPL's charges to GST under its special contract were just and reasonable. 116 S.W.3d at 686.

GST filed direct testimony. KCPL and the Staff filed rebuttal testimony. GST filed surrebuttal testimony and the Staff filed cross-surrebuttal testimony. (Case No. EC-99-553, Report And Order, 9 Mo.P.S.C.3d at 191). GST offered the testimony of an energy and deregulation consultant. The GST witness opined that the Hawthorn 5 explosion was the result of a series of unsafe, imprudent, and unreasonable actions and omissions of KCPL. 116 S.W.3d at 687-88. The Commission decided to accord GST's witness's opinion testimony little weight based on an erroneous interpretation of the law rather than on a proper exercise if its discretion. The Commission incorrectly found that KCPL objected to all of the statements and documents attached to GST's witness's testimony and that the Regulatory Law Judge had limited the purpose for which they were received. Except for an affidavit from a GST employee attached to GST's witness's testimony, KCPL did not object to any of the other statements and documents attached to GST's witness's testimony. 116 S.W.3d at 689. The Court found that these other statements and documents, which GST's witness relied upon in reaching his opinion, were received without objection, and, although hearsay, had probative value as they included plant records and statements from KCPL employees describing the events at the Hawthorn 5 plant that led up to the explosion. The Court stated that the facts contained in these other attachments were substantive evidence. The Court held that the Commission's decision to accord these other attachments and GST's witness's testimony relating to these other attachments to his testimony

little weight was based on an erroneous interpretation of the law, and, therefore, constituted an unlawful decision. The Court reversed the Commission's decision and remanded the cause to the Commission to reconsider, under the proper standard, the GST witness's testimony and these other attachments to his testimony which were admitted without objection. 116 S.W.3d at 691. The Court also held that the Commission on remand should make findings on the GST witness's testimony as to KCPL's alleged imprudence on this evidence that it did not properly consider. 116 S.W.3d at 692-93.

Finally, there was the issue of which party had the burden of proof and the burden of going forward with the evidence. The Court held that there is a distinction between complaint cases and rate cases:

> . . . In cases where "a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions," the Commission has determined that "the burden of proof at hearing rests with complainant." *Margulis v. Union Elec. Co.*, 30 Mo. P.S.C. (N.S.) 517, 523, 1991 WL 639117 (1991). This court has affirmed placing the burden of proof on the complainant in such cases, because the burden of proof properly rests on the party asserting the affirmative of an issue. *State ex rel. Tel-Central of Jefferson City, Inc. v. Pub. Serv. Comm'n*, 806 S.W.2d 432, 435 (Mo.App.1991). Applying this principle, because GST was asserting the affirmative on the issue of KCPL's imprudence, the burden of proof rested on GST.
>
> Nevertheless, GST argues that a case from this court, *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 954 S.W.2d 520 (Mo.App.1997), required the burden of proof to be on KCPL to prove it acted prudently. . . .
>
> *Associated Natural Gas* is sufficiently substantively and procedurally dissimilar, however, to make it inapplicable to this case. *Associated Natural Gas* was a ratemaking case initiated by the utility, seeking to pass on costs to its customers. *Id.* at 523. In such cases, the utility receives the benefit of the presumption of prudence with regard to its costs until a serious doubt is created with regard to the prudence of an expenditure. *Id.* at 528. When a serious doubt arises, the burden then shifts to the utility to prove prudence of the expenditure in order to succeed on its request to pass these costs on to its customers. *Id.*

116 S.W.3d at 693-94.

> GST cites no authority for its proposition that a complainant in a Public Service Commission case can rely on the doctrine of res ipsa loquitur to meet its burden of proving a utility was imprudent and this imprudence resulted in inadequate and unreliable service and unjust and unreasonable rates. Even if res ipsa loquitur were available in this case and GST met the requirements for its application, however, the doctrine would create only an inference, and not a rebuttable presumption, as GST contends. GST would still bear the burden of proof, and the Commission, as the trier of fact, would be free to reject any inference of negligence regardless of whether KCPL presented any evidence to the contrary.
>
> GST, as the complainant asserting the affirmative issue of KCPL's imprudence, bore the initial burden of proof in this case, and the burden of proof never shifted. GST could meet its burden of proving imprudence through direct evidence or reasonable inferences drawn from the evidence. Merely creating a reasonable inference of imprudence would not conclusively establish imprudence, as the Commission is free to reject any inferences. Nor would a reasonable inference of imprudence create a rebuttable presumption of imprudence, thereby shifting the burden of proof to KCPL to prove its prudence. The Commission did not err in placing the burden of proof on GST. . . .

116 S.W.3d at 695.

On remand to the Commission, the Commission on December 12, 2004 issued a Report And Order On Remand in which it specifically considered all of the attachments to the GST consultant's testimony and made specific findings with respect to the matter it had previously not done and reached the same conclusion: "For the purposes of this case, the Commission concludes that GST has failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999. This is not a conclusion that KCPL is not responsible for the Hawthorn 5 explosion. The Commission will not resolve that question in this case." *GS Technology Operating Co. v. Kansas City Power & Light Co.*, Case No. EC-99-553, Report And Order On Remand, 13 Mo.P.S.C.3d 151, 167 (2004).

Finally on prudence, there are two appellate cases that are also significant regarding the issues of the possible voiding of the revenue requirement Stipulation And Agreements in Case Nos. ER-2009-0089 and ER-2009-0090 and the KCPL Experimental Alternative Regulatory

Plan Stipulation and Agreement: *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976) and *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993). The first case involves a general rate increase case filed by Missouri Public Service Company (MPS), Case No. 18,180. The County of Jackson ("Jackson County") tried to invoke an announcement made by the Commission, on the Commission's own initiative, in the Commission's Report And Order in the immediately preceding rate increase case of MPS, Case No. 17,763, that there would be a moratorium on rate increases for MPS for a period of at least two years from the effective date of the Report And Order in Case No. 17,763. The Missouri Supreme Court in its review of the Commission's Report And Order in Case No. 18,180 noted that the parties to Case No. 17,763 did not address the moratorium issue during the proceedings in Case No. 17,763. The moratorium issue was apparently reached by the Commission on its own. In ordering a two-year period of repose on rate increases in its December 14, 1973 Report And Order in Case No. 17,763, the Commission stated that the two-year moratorium was based upon a thorough analysis of the updated and projected test year presented in Case No. 17,763. There was no judicial review of the Commission's Report And Order imposing the moratorium in Case No. 17763. *Id*. at 21-23.

On August 4, 1974, MPS filed revised tariffs, eventually docketed as Case No. 18,180, requesting increased rates for electric service. Various motions to dismiss the tariffs were filed premised on the two-year moratorium adopted by the Commission on its own in MPS's prior general rate case, Case No. 17,763. A hearing was held at which evidence was submitted indicating that circumstances had changed in MPS's operations since the Commission's Report And Order of December 14, 1993 in Case No. 17,763. The Commission issued Orders

overruling/denying motions to dismiss MPS's revised tariffs. The Commission found that MPS had adduced sufficient evidence to establish a prima facie showing of substantial and altered circumstances. On June 13, 1975, the Commission authorized an increase in rates. 532 S.W.2d at 21-23.

The City Of Kansas City and Jackson County sought judicial review of the Commission's rate decision. The Missouri Supreme Court stated that a moratorium was in conflict with the spirit of the Public Service Commission Law, that spirit being continuous regulation to meet changes in conditions as required to meet the public interest. The Court quoted from a Missouri Supreme Court decision in *State ex rel. Chicago, Rock Island, & Pacific Railroad Company*, 312 S.W.2d 791, 796 (Mo. banc 1958) as follows:

> "Its [Commission's] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest." To rule otherwise would make §393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers. [Citation omitted.]

532 S.W.2d at 29; *See also*, *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (MoApp.1976)("*General Telephone*")[2]; *State ex rel. Arkansas Power & Light Co.*

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[2] In the *General Telephone* case, the Court of Appeals held that the Commission's decision in a prior General Telephone Company case had no binding effect in a subsequent General Telephone Company case:

> Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, Administrative Treatise Section 18.09, 605, 610 (1958), as follows:
>
> > "* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)

v. Public Serv. Comm'n, 736 S.W.2d 457, 462 (Mo.App. 1987); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985); *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356, 371-72 (Mo.App. 1992); *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993); *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); *Marty v. Kansas City Light & Power Co.*, 259 S.W. 793, 796 (Mo. 1923).

The regulatory principle regarding the orders and directives of the Commission to a utility being subject to change to meet changing conditions, as the Commission, in its discretion, may deem to be in the public interest is still good law, but what is different between *Jackson County* and *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993)("*Capital City Water Co.*") on the one side and KCPL/GMO on the other is that among other things the center piece of the litigation in *Jackson County* and *Capital City Water Co.* was not a stipulation and agreement which provided that if the Commission did not approve and adopt the terms of the stipulation and agreement in total, the stipulation and agreement would be void and none of the signatories would be bound, prejudiced, or in any way affected by any of the agreements or provisions thereof, unless otherwise agreed to by the signatory.

At the center of the *Capital City Water Co.* case was a contract, but the contract was between Capital City Water Company and Public Water Supply District No. 2 of Cole County. The contract in question was not a stipulation and agreement among parties in resolution of a proceeding before the Commission. The contract at issue had been sent to the Commission

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Clearly the commission in this case was not bound by the action in the 1962 case.

537 S.W.2d at 661-62.

before it was executed and there had been five settled rate cases and an investigation of the utility's capacity since the contract had been executed. 850 S.W.2d at 909-10.

V. Staff's Non-Objection To December 31, 2009 Filing Date For Staff Reports

Mr. Schallenberg on June 8, 2009 in File Nos. ER-2009-0090 and HR-2009-0092 related to Commissioner Davis that even if the Commission ordered the Staff to perform an audit of Iatan 1 AQCS by December 31, 2009 that audit would not be complete even though Iatan I AQCS was fully operational and used for service. He provided an indication of his understanding of a complete audit:

> [Commissioner Davis] Okay. So would you have any objection if the Commission ordered you to produce these audits by, say, December 31st, 2009, as opposed to what was said the time for Staff to file its direct testimony in the next round of rate cases?
>
> [Mr. Schallenberg] Obviously I won't object. It does change the priority of how the work is done, but if that's the Commission's desire, those audits will be moved up to make sure they meet the date, and the audit - - other audits will be adjusted accordingly.
>
> [Commissioner Davis] I don't want to disrupt MGE's rate case or Empire's gas case or anything else.
>
> [Mr. Schallenberg] There are no resources that are being dedicated to the construction audits that are competing with Empire's rate case or with MGE's rate case. The thing is, is it's not likely that between now and the end of the year nothing else will come up. In Iatan 1's case, Iatan 1 is interrelated with Iatan 2, and as we finish or as we finish Iatan 1, there's going to be an overlap between that and Iatan 2. There's going to be costs that should be in one or the other. And then we still have that common plant deal.
>
> So when you're saying Iatan 1, Iatan 1 will still have some overhang until Iatan 2 is finished, and I -- we're still talking to the company. We get those updates as to when Iatan 2 will be finished because that dictates when the next rate case will take place.
>
> And I would also point out is, there is still the -- when you're doing a construction audit, you're actually doing it on the dollars. You're doing it on the dollars spent, and the dollars spent are not necessarily -- well, in fact, almost -- it's probably

> universal, they're never complete, completely known at the time a plant goes into operation.
>
> And I think we're looking at some schedules that go through the rest of this year of payments that are projected to be made that haven't been made. So the -- that is an issue as to what the construction audit at December 31st would address because it can only address what -- what has actually been paid because audits are done on what's paid, not what was projected.

(File No. EO-2010-0259, Tr. Vol. 1, pp. 59-61; Case Nos. ER-2009-0090 and HR-2009-0092, Tr. Vol. 12, pp. 180-82, June 8, 2009).

KCPL's/GMO's counsel Ms. Van Gelder drew out from Mr. Schallenberg an explanation of what he meant by his statement "Obviously I won't object." Mr. Schallenberg's explanation was not what KCPL/GMO had intended for Mr. Schallenberg's response to be read as saying in the transcript of the June 8, 2009 hearing. Mr. Schallenberg stated his understanding that the Staff is not in a position to object to a Commission directive:

> [MS. Van Gelder] Q. Do you remember the discussion which was, I believe, in -- was referred to by Mr. Dottheim and Mr. Fischer in the openings where you were asked by one of the Commissioners, would you object if we order you to complete this, and you said you have no objection?
>
> [Mr. Schallenberg] A. I think I said I wouldn't object. I don't think I said no objection. I think you've misquoted what I said.
>
> Q. I'm sorry. And is there a material distinction between I won't object and I have no objection?
>
> A. Yeah. The way I answered that is, I'm not in a position to object to a Commission directive.
>
> Q. Do you think the Commissioners understand when they're asking you if you can do something, that you are in a position to object?
>
> A. If that's their interpretation. I said, I didn't take that as being that answer to that question . . . .

(Tr. Vol. 3, pp. 602-03).

VI. Notice In Staff's December 31, 2010 Reports That Staff's December 31, 2010 Reports Are Subject To Change

The Staff Report Of The Construction Audit / Prudence Review Of Environmental Upgrades To Iatan 1 And Iatan Common Plant filed December 31, 2009 in KCPL Case No. ER-2009-0089 (December 31, 2009 Staff Report in ER-2009-0089) and the Staff Report Of The Construction Audit / Prudence Review Of Environmental Upgrades To Iatan 1 And Iatan Common Plant filed December 31, 2009 in GMO Case No. ER-2009-0090 (December 31, 2009 Staff Report in ER-2009-0090) relates that the Staff's construction audit / prudence review is subject to change. This was clear to KCPL/GMO and the subject of its February 16, 2010 filing with the Commission in File Nos. ER-2009-0089 and ER-2009-0090. KCPL/GMO noted at various pages in its February 16, 2010 First Response the following items it found in the Staff's Reports regarding Staff's intentions for Staff's Iatan 1 AQCS and Iatan common plant filing in KCPL's/GMO's next rate cases:

Staff 0089 Report	Staff 0090 Report	Item
Page 3	Page 3	Iatan 1 AQCS invoices received by Staff post May 31, 2009
Page 3	Page 3	Staff reserves the right to modify its findings in the Reports if it discovers that (a) KCPL has withheld information, except when allowed by the Commission, which should have been provided in response to a Staff Data Request, or (b) KCPL provided inaccurate information in response to a Staff Data Request.
Page 5	Page 5	Iatan 1 AQCS $60M in cost overruns will be examined in conjunction with Staff's audit of Iatan 2 overruns. While Staff is not proposing a disallowance of the Iatan 1 AQCS cost overruns not identified or explained by the change management system, Staff cannot recommend inclusion of these amounts without identification and corresponding examination. . . . Subsequent Staff audit work on Iatan 2 and the remaining Common Plant with additional interaction with KCPL representatives is expected to result in further refinement of

		this number leading to an opinion the costs item is justified or will be addressed by a proposed disallowance.
Page 7	Page 7	Staff has no intention to continue to audit in areas in which it has made adjustments, it will continue to inquire into those areas to increase its understanding of the areas to provide to the Commission in future proceedings the best recommendations.
Page 8	Page 7	Staff does not know whether KCPL/GMO will not seek recovery of any of the costs that Staff proposes to disallow by any of its adjustments
Page 8	Page 7	Staff does not know what its position will be in response to positions that KCPL/GMO have not yet taken regarding disallowances proposed by the Staff in its 12/31/09 Reports
Page 8	Page 7	Staff's 12/31/09 Reports not intended to indicate that Staff will not address an area of costs, not previously addressed by Staff, if KCPL/GMO seeks recovery of costs in rates that another party raises as an issue in a future rate case.

KCPL/GMO did not note the following language found in the Staff's Reports regarding Staff's intentions for Staff's filing in KCPL's/GMO's next rate cases:

Staff 0089 Report	Staff 0090 Report	Item
Pages 2-3	Pages 2-3	The Iatan Project components are: Iatan 1 AQCS, Common Plant Used To Operate Iatan 1, Common Plant - Remainder, Iatan 2. "It should be noted that significant expenditures remain to be paid after a major construction project becomes fully operational and used for service. . . . These segments cannot be separated on an actual cost basis because the Iatan Project used a contracting strategy which included work covering Iatan 1, Iatan 2, and Common facilities for both units for large contracts. In addition, actual costs incurred were not invoiced or recorded in a manner that allowed for the recognition of the Iatan Project's actual expenditures related to each of these four segments. In many cases, actual costs were assigned totally to Iatan 2 that were related to Iatan 1, in part or in total. The Report covers Staff's audit of the actual costs of the Iatan 1 AQCS segment as of May 31, 2009. Staff was informed that cash payments were expected to be made relative to this segment through December 2009. As Staff discovered

		in this audit, certain costs were assigned to Iatan 1 AQCS that in Staff's opinion were related to Iatan 2. It is likely that Iatan 2 contains costs that should be assigned or allocated to the Iatan 1 AQCS segment or the Common Plant Used to Operate Iatan 1 segment."
Page 7	Page 7	The fact that the Staff does not address an area of costs in these Reports or did not propose an adjustment at this time does not indicate that the Staff auditors found the costs incurred and KCPL's activities to be appropriate, reasonable, and prudent. The Staff may not believe costs to be appropriate, reasonable, or prudent, but may not propose an adjustment because Staff does not believe it has sufficiently strong evidence/argument to prevail if a Staff adjustment were litigated.

VII. Staff's Present Activity Respecting Iatan 1 AQCS And Iatan Common Plant

The Staff is not presently engaged in a construction audit or prudence review of the time frame already addressed by the period covered in the Staff's Reports filed on December 31, 2009, which is the period through May 31, 2009, and it was not the Staff's intent to return to that time period to conduct further or new investigation and propose new, different or increased adjustments, barring the developments listed in the Staff's March 9, 2010 Reply, which the Staff repeated in its March 29, 2010 Reply as follows: (a) matters that a party other than the Staff may raise before this Commission, (b) matters that the public service commission staff in an adjoining State might raise in a contemporaneous proceeding in that adjoining State to a Missouri Commission proceeding or in a subsequent proceeding to a Missouri Commission proceeding involving the same construction project, (c) matters that an informant may bring to the attention of the Staff of which the Staff was not previously aware,[3] (d) matters that may be raised by the

[3] An example of a matter which an informant provided information to the Staff which resulted in a Staff adjustment adopted by the Commission involved securities fraud litigation against Union Electric Company (UE). Imprudence was found by the Commission respecting UE and the Harris litigation issue in *Re Union Electric Company*, Case Nos. EC-87-114 and EC-87-115, Report And Order, 29 Mo.P.S.C.(N.S.) 313, 327-28 (December 21, 1987). The Harris litigation itself involved a securities fraud action brought against UE by a class of bondholders resulting from UE attempting to call certain first mortgage bonds. It was alleged that UE had violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities and Exchange Commission (SEC). A jury verdict of $2.7 million was rendered in Federal District Court and was upheld on appeal to the Eighth Circuit Court of Appeals,

media of which the Staff was not previously aware, (e) information not timely disclosed by KCPL or information disclosed by KCPL that is later found to be fraudulent, inaccurate, misleading, or incomplete, (f) matters that may originate as an inquiry by a member of the Legislature of which the Staff was not previously aware, (g) matters that the Staff may become aware of on its own, but too late in an audit to be entirely developed by a deadline in a particular case, and (h) matters that become an issue only after the "completed" construction project operates for a period of time, such as a unit not meeting design specifications, having high maintenance costs, experiencing low availability, etc.

If KCPL/GMO prevail and the Commission orders the relief that KCPL/GMO are requesting, there is the question of whether the Staff is prohibited from filing testimony in response to an Iatan 1 AQCS and Iatan 1 common plant adjustment that another party is proposing? In Case No. ER-2009-0089, the Hospital Intervenors filed the testimony of James R. Dittmer which set forth the material amount the costs of KCPL on the Iatan 1 AQCS exceeded the "definitive estimate" and the Hospital Intervenors took the position that the Commission must make a legal determination whether under applicable law the Commission is required to include costs in rate base of KCPL that materially exceed the "definitive estimate." The U.S.

Harris v. Union Electric Co., 787 F.2d 355 (8th Cir. 1986). The Commission in its decision noted that the Eighth Circuit Court of Appeals, which affirmed the Federal District Court, held that:

> ... the evidence is sufficient for the jury to have found that UE's entire conduct from March, 1975 to April, 1978 concerning the Series 2005 Bonds constituted a course of business and scheme or artifice which operated as a fraud on the bondholders. *Harris v. Union Electric Co.*, 787 F.2d 355, 362 (8th Cir.1986)

The Staff proposed to reduce UE's expenses by $3.8 related to the judgment and plaintiffs' and UE's attorneys' fees. UE argued before the Commission that the litigation costs were a reasonable business expense and that its attempts to call the bonds was intended to reduce UE's cost of money which would benefit its ratepayers. A letter in opposition to the UE transaction was written to a UE executive by one of the members of the UE Board of Directors. The Commission stated that "[i]t is apparent that a serious doubt existed as to the legality of the redemption attempt." 29 Mo.P.S.C.(N.S.) at 328. The Commission held that UE had not shown that its action underlying the litigation was prudent, and, therefore, had not shown that inclusion of these litigation expenses in UE's cost of service was justified. The Commission adopted the Staff's adjustment.

Department of Energy and the U.S. National Nuclear Security Administration, on behalf of themselves and all other affected Federal Executive Agencies, filed the testimony of Jatinder Kumar and took the positions that (a) KCPL had not carried its burden of demonstrating what the costs of Iatan 1 AQCS have been, indeed some significant portion of the cost of Iatan 1 AQCS work had still not even been expended, and (b) the costs of Iatan AQCS rate base additions that exceed KCPL's "definitive estimate" should either be excluded from rate base or be included in rate base on an interim subject to refund basis. (Item Nos. 54 and 39 in EFIS File No. EO-2010-0259: March 9, 2010 Staff's Reply To KCPL's And GMO's February 16, 2010 Initial Response, p. 2 fn.1, File Nos. ER-2009-0089 and ER-2009-0090).

At the hearing on April 29, 2010, Mr. Schallenberg and counsel for KCPL/GMO, Ms. Van Gelder engaged in a colloquy about the Staff's December 31, 2009 Reports and the audit the Staff is presently engaged in regarding Iatan 1 AQCS, Iatan common plant and Iatan 2:

> [MS. VAN GELDER] Q. . . . But when you filed the December report, you did not believe that you had completed the construction -- you had not done a construction audit and prudence review?
>
> [MR. SCHALLENBERG] A. That's not true.
>
> Q Did you think that you had completed a construction audit and prudence review?
>
> A. Yes.
>
> Q. And did you think that what you filed on -- which is this, did you think that was -- that portion, construction audit, prudence review, would close the door on these questions, that you could move on to something else? You've done the construction audit and prudence review, you don't have to continue?
>
> A. What I would say is, I believe this closed the door on the order on the audit, construction audit and prudence review that I had been -- Staff had been ordered to do April 15th, as modified on June 10th.
>
> Q. And is it fair to say that your interpretation of the order meant that this is a partial report, it only covers part of the time, part of the –

A. I mean, I don't think it's partial in relation to what the parameters were that I was given to conduct this construction audit and prudence review. Now, that being said, there's always in almost all audit reports a disclaimer or a notice as to outstanding items that could affect the results of the report. So I don't consider that because you have outstanding items and you can actually -- and some of these are like preliminary reports. I don't consider the fact that those things are outstanding means that you haven't completed the audit you were asked to do.

Q. But you stated in this order -- and I don't want to go through 99 pages here, but you state, I can't do a complete audit until I see every expenditure?

A. I don't remember saying I can't do a complete audit until I -- I would have said that I can't tell you that the audit is -- I mean, that you're going to have final numbers, all the numbers are audited until all the numbers are incurred and closed. I can't do that.

(Tr. Vol. 3, pp. 603-05).

[MR. SCHALLENBERG] A. . . . In fact, I would not -- I would not use May 31st. In fact, we had questions about what would the Staff's next audit report look like? And as I said, I would, given -- given the latitude, I would combine Iatan 1, Iatan 2 and common into separate sections of the same report.

[MS. VAN GELDER] Q. Okay. Well, of course, that's not what you told the Commission on May 31st. Is that a new idea?

A. Well --

Q. I mean, on December 31st.

A. On December 31st I'm responding to their April 15th, '09 order specifying what I'm to do.

Q. But also on December 31st, you're saying, this is what I'm doing next. I'm just taking the post May 31st, 2009 expenditures?

A. Yes.

Q. So I'm going to do that, and then I'm also going to do -- and it's not in the Iatan inclusion of the Iatan 2 in the rate base, it's in the next rate case, you're going to do that separately?

A. As I said, I'm going to do all of that within one report, so that, you know, as you heard our prior discussion, I can, in essence, show you the plus and

minuses of where the dollars are, and you can identify allowances and you can identify transfers in the format I anticipate. But on the other hand, this May 31st date that's in this report, we will -- in fact, we're in the process of now of truing the entire Iatan project up to March 31st of 2010. And I don't know that will be the final update because I don't know what the procedural schedule's going to end up for 2010, but I know that the date for the next Staff report on this, assuming it's not stopped, will be at least March 31st, 2010.

Q. So again, my client, KCPL, has no certainty for when this is going to be over, even though you have a high level of confidence that what you've done in here is fine?

A. KCPL has not talked to me about this topic, so I don't know, I don't -- KCPL still has outstanding issues, if they want to discuss something, I have always been open to discussing, if they want to have this discussion, as I would say is, I believe a lot of this came from not having this discussion, I am more than willing to have this discussion and talk to them about it.

(Tr. Vol. 3, pp. 607-08).

VIII. Potential Voiding Of The Revenue Requirement/Global Agreement Stipulation And Agreements In Case Nos. ER-2009-0089 And ER-2009-0090

Should the Commission bar the Staff from conducting any further "prudence" audit activity regarding Iatan 1 AQCS and Iatan common plant costs and/or "construction" / "finance" / "ratemaking" audit activity regarding Iatan 1 AQCS and Iatan common plant costs which were available for review by the Staff at the end of 2009 the Commission will void the revenue requirement/global agreement Stipulation And Agreements In Case Nos. ER-2009-0089 And ER-2009-0090. KCPL has violated paragraph 26 of the April 24, 2009 revenue requirement/global agreement Stipulation And Agreement in Case No. ER-2009-0089, and GMO has violated paragraph 22 of the May 22, 2009 revenue requirement/global agreement Stipulation And Agreement in Case No. ER-2009-0090.

The Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0089 approves the April 24, 2009 Non-Unanimous Stipulation And Agreement ("revenue requirement Stipulation And

Agreement" or "global agreement Stipulation And Agreement") without modification or amendment. The Commission identifies as the signatory parties KCPL, Staff, Public Counsel, Praxair, Midwest Energy Users' Association, U.S. Department of Energy, National Nuclear Security Administration, Federal Executive Agencies, Ford Motor Company, Missouri Industrial Energy Consumers, and Missouri Department of Natural Resources. On page 19 of the Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0089, the April 24, 2009 revenue requirement/global agreement Stipulation And Agreement is identified both as Appendix A and as being attached.[4] The relevant paragraphs are paragraphs 5, 25, and 26. To the extent that KCPL or even the Commission asserts that the Commission modified the April 24, 2009 revenue requirement/global agreement Stipulation And Agreement in its June 10, 2009 Order, these paragraphs/provisions of the April 24, 2009 revenue requirement Stipulation And Agreement provide as follows:

> **5. Prudence and In-Service Timing of Iatan 1**
>
> **No Signatory Party to this 2009 Stipulation shall argue that anyone is prohibited from arguing or presenting evidence in the next KCP&L general rate case challenging the prudence of any Iatan 1 construction cost** or that KCP&L should have had this unit operating at full generation capacity sooner than the actual date that Iatan 1 is found to be fully operational and used for service, provided however, that any proposed disallowance of rate base for imprudence under this paragraph shall be limited to a maximum amount of Missouri jurisdictional rate base no greater than $30 million inclusive of Iatan common costs. KCP&L represents that Iatan 1 and Iatan common costs will not exceed $733 million on a total project basis. Should the Commission find that KCP&L, respecting any Non-Utility Signatory's construction audit of these costs, (a) failed to provide material and relevant information which was in KCP&L's control, custody, or possession, or which should have been available to KCP&L through reasonable investigation, (b) misrepresented facts relevant to charges to Iatan 1 or Iatan common costs, or (c) engaged in the obstruction of lawful discovery, said Non-Utility Signatory is not bound to proposing a disallowance to

[4] There was also a June 11, 2009 Notice Of Correction in Case No. ER-2009-0089 correcting the Order's signature line to show Commissioner Davis as absent rather than as concurring.

KCP&L's Missouri jurisdictional rate base no greater than $30 million inclusive of Iatan common costs in aggregate amount with regard to such construction audit. KCP&L shall maintain Caseworks for the use of the Non-Utility Signatories. **The Non-Utility Signatories may continue their construction audits of Iatan 1 and Iatan 2 prior to KCP&L filing its Iatan 2 rate case.** KCP&L will facilitate the resolution of all outstanding discovery disputes with the Non-Utility Signatories and cooperate with them in any construction audits of Iatan 1 and Iatan 2. KCP&L shall have the right to object, or to continue to object, to discovery of the Non-Utility Signatories under applicable law or Commission rule. KCP&L and the other Non-Utility Signatories will seek the timely resolution of discovery disputes. KCP&L will provide DOE/NNSA the Iatan portion of all reports provided to the Signatory Parties to the 2005 Stipulation.

* * * *

25. The provisions of this 2009 Stipulation have resulted from extensive negotiations between the Signatory Parties and are interdependent. **In the event that the Commission does not approve and adopt the terms of this 2009 Stipulation in total, it shall be void and none of the Signatory Parties shall be bound, prejudiced, or in any way affected by any of the agreements or provisions hereof, unless otherwise agreed to by the Signatory Parties**.

26. If approved and adopted by the Commission, this 2009 Stipulation shall constitute a **binding agreement among the Signatory Parties**. **The Signatory Parties shall cooperate in defending the validity and enforceability of this 2009 Stipulation and the operation of this 2009 Stipulation according to its terms.**

(Emphasis added).

The Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0089 approves the revenue requirement settlement in all respects at page 12, approves the rate design settlement in all respects at page 13, and approves without modification or amendment at page 13 the "adjunct provisions" / "miscellaneous provisions" that include the provision that "[t]he Non-Utility Signatories may continue their construction audits of Iatan I and Iatan 2 prior to KCP&L filing its Iatan 2 rate case:"

D. Remaining Provisions of the Global Agreement and the Pension and OPEB Agreement

After reviewing the remainder of the items encompassed in the Global Agreement and the Pension and OPEB Agreement, as outlined above, and the parties' positions on, or lack of position on, those items, the Commission finds the proposed items are reasonable as adjunctive provisions of the Agreements. These remaining items proposed in the Agreements, as previously outlined, are acceptable to all concerned parties as evidenced by these parties being either a Signatories to the Agreements or not having objected to these provisions.

The Commission concludes that none of these adjunct provisions to either Agreement are contrary to any statute or rule, or in any way violative of the public interest. The Commission shall approve all of the miscellaneous provisions encompassed in both Agreements.

* * * *

THE COMMISSION ORDERS THAT:

1. The Non-Unanimous Stipulation and Agreement filed on April 24, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number ER-2009-0089. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Appendix A.

2. The Signatories to the Non-Unanimous Stipulation and Agreement are ordered to comply with the terms of the Agreement.

The Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0090 approves the May 22, 2009 Non-Unanimous Stipulation And Agreement ("revenue requirement Stipulation And Agreement" or "global agreement Stipulation And Agreement") without modification or amendment. The Commission identifies as the signatory parties GMO, Staff, Public Counsel, Missouri Department of Natural Resources, and Dogwood Energy. On page 15 of the Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0090, the May 22, 2009 revenue requirement/global agreement Stipulation And Agreement is identified both as Appendix A and as being attached. The relevant paragraphs are paragraphs 5, 21, and 22. To the extent that

GMO or even the Commission asserts the Commission modified the May 22, 2009 revenue requirement/global agreement Stipulation And Agreement in its June 10, 2009 Order, these paragraphs/provisions of the May 22, 2009 revenue requirement Stipulation And Agreement provide as follows:

> **5. <u>Prudence and In-Service Timing of Iatan 1</u>**
>
> **No Signatory Party to this 2009 GMO Stipulation shall argue that anyone is prohibited from arguing or presenting evidence in the next GMO general rate case challenging the prudence of any Iatan 1 construction cost** or that Iatan 1 should have been operating at full generation capacity sooner than the actual date that Iatan 1 is found to be fully operational and used for service; provided, however, that any proposed disallowance of rate base for imprudence under this paragraph shall be limited to a maximum amount of Missouri jurisdictional rate base no greater than $15 million inclusive of Iatan common costs. GMO acknowledges Kansas City Power & Light Company has represented that Iatan 1 and Iatan common costs will not exceed $733 million on a total project basis. Should the Commission find that GMO, respecting any Signatory's construction audit of these costs, (a) failed to provide material and relevant information which was in GMO's control, custody, or possession, or which should have been available to GMO through reasonable investigation, (b) misrepresented facts relevant to charges to Iatan 1 or Iatan common costs, or (c) engaged in the obstruction of lawful discovery, said Non-Utility Signatory is not bound to proposing a disallowance to GMO's Missouri jurisdictional rate base no greater than $15 million inclusive of Iatan common costs in aggregate amount with regard to such construction audit. GMO shall maintain Caseworks for the use of the Non-Utility Signatories. **The Non-Utility Signatories may continue their construction audits of Iatan 1 and Iatan 2 prior to GMO filing its Iatan 2 rate case.** GMO will facilitate the resolution of all outstanding discovery disputes with the Non-Utility Signatories and cooperate with the Non-Utility Signatories in any construction audits of Iatan 1 and Iatan 2. GMO shall have the right to object, or to continue to object, to discovery of the Non-Utility Signatories under applicable law or Commission rule. GMO and the Non-Utility Signatories will seek timely resolution of discovery disputes.
>
> * * * *
>
> **21**. The provisions of this 2009 GMO Stipulation have resulted from extensive negotiations between the Signatories and are interdependent. **If the Commission does not approve and adopt the terms of this 2009 GMO Stipulation in total, it shall be void and none of the Signatories shall be bound, prejudiced, or in any way affected by any of the agreements or provisions hereof, unless otherwise agreed to by the Signatory**.

> **22.** If approved and adopted by the Commission, this 2009 GMO Stipulation shall constitute a **binding agreement among the Signatories**. **The Signatories shall cooperate in defending the validity and enforceability of this 2009 GMO Stipulation and the operation of this 2009 GMO Stipulation according to its terms.**

(Emphasis added).

The Commission's June 10, 2009 Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0090 approves the revenue requirement settlement in all respects at page 11, approves the rate design settlement in all respects at page 12, and approves without modification or amendment at page 13 the "adjunct provisions" / "miscellaneous provisions" that include the provision that "[t]he Non-Utility Signatories may continue their construction audits of Iatan I and Iatan 2 prior to GMO filing its Iatan 2 rate case:"

> **D. Miscellaneous Provisions to the Agreements**
>
> After reviewing the remainder of the items encompassed in the Global Agreement and the Pension Agreement, as outlined above, and the parties' positions on, or lack of position on, those items, the Commission finds the proposed items to be reasonable as adjunctive provisions of the Agreements. These remaining items proposed in the Agreements, as previously outlined, are acceptable to all concerned parties as evidenced by these parties being either a Signatory to the Agreements or not having objected to these provisions.
>
> The Commission concludes that none of these adjunct provisions to the Agreement are contrary to any statute or rule, or in any way violate the public interest. The Commission shall approve all of the miscellaneous provisions encompassed in both Agreements.
>
> * * * *
>
> **THE COMMISSION ORDERS THAT:**
>
> 1. The Non-Unanimous Stipulation and Agreement filed on May 22, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number ER-2009-0090. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Appendix A.

2. The Signatories to the Non-Unanimous Stipulation and Agreement are ordered to comply with the terms of the Agreement.

The Commission should find instructive *State ex rel. Missouri Cable Telecommunications Ass'n. v. Public Serv. Comm'n,* 929 S.W.2d 768 (1996), an appeal of a Circuit Court order declaring a settlement agreement among the Commission, Southwestern Bell Telephone Company ("SWBT"), and Public Counsel to be unlawful. The origin of the case was that at the conclusion of the Southwestern Bell Incentive Regulation Experiment ("SBIRE") from the settlement of litigation from Case No. TC-89-14, et al., the Staff and Public Counsel performed earnings investigations of SWBT and filed excess earnings complaint cases with alternative regulation proposals. The Commission ordered a rate reduction and offered SWBT a new alternative regulation plan, which SWBT rejected. Judicial review of the rate reduction was sought by SWBT, AT&T Communications of the Southwest, Inc. ("AT&T"), and the Missouri Cable Telecommunications Association ("MCTA"). While the consolidated cases were pending before the Cole County Circuit Court, the Commission, SWBT, and Public Counsel entered into a settlement agreement. MCTA, AT&T, and MCI Telecommunications Corporation ("MCI") filed applications for rehearing with the Commission which were denied. They then sought judicial review in Circuit Court and Midwest Independent Coin Payphone Association ("MICPA") intervened. The Circuit Court held the settlement agreement to be illegal and unenforceable. The Commission, SWBT, and Public Counsel appealed to the Western District Court of Appeals. 929 S.W.2d at 769-71.

The Commission, SWBT, and Public Counsel argued that the settlement agreement was not an order of the Commission as that term is used in Sections 386.500 and 386.510 and therefore was not reviewable. 929 S.W.2d at 772. The Commission asserted that the settlement agreement was a non-binding expression of the signatories' intent, only served to implement its

Report And Order, and did not to constitute a separate order. 929 S.W.2d at 773. MCTA, AT&T, MCI and MICPA contended that once review was initiated from the Commission's December 1993 Report And Order, exclusive jurisdiction was in the circuit court and the Commission was without jurisdiction to alter or modify its Report And Order and the settlement agreement accordingly was void and without effect. 929 S.W.2d at 772.

The Western District Court of Appeals held that the settlement agreement constituted an order or decision of the Commission and the Commission lacked jurisdiction to enter into the settlement agreement outside the court proceedings because exclusive jurisdiction was vested in the circuit court at that time. The Court further stated that the settlement agreement violated one of the purposes for vesting exclusive jurisdiction in the circuit court while review is pending "which is to ensure that those interested in the outcome of the case as intervenors have a forum to be heard." 929 S.W.2d at 774.

Even though the Western District Court of Appeals stated that it need not decide whether the Commission has the authority to enter into settlement agreements with public utility companies, but would proceed as if the Commission may do so, the Court noted that Missouri courts generally treat settlement agreements as contracts. Significantly for the instant proceeding, the Court held as follows:

> . . . Missouri courts generally treat settlement agreements as contracts and we find no reason to view this settlement agreement any differently. See *Daily v. Daily*, 912 S.W.2d 110, 114 (Mo.App.1995); *Ayotte v. Pillsbury Co.*, 871 S.W.2d 139, 142 (Mo.App.1994); *Park Lane Med. Ctr. V. Blue Cross/Blue Shield*, 809 S.W.2d 721, 724 (Mo.App.1991). If the settlement agreement is a contract, then it is binding. If it is binding, the provisions of this settlement agreement, some being regulatory in nature, have the effect of operating as a regulatory plan. If it has the effect of a regulatory plan, then there are no practical differences between the settlement agreement here and the usual order or decision entered by the PSC after a public hearing. If it is an order, then it is reviewable by this court.

929 S.W.2d at 774, 773.

There is an immediately preceding relevant case where the Commission attempted to resolve litigation, in doing so excluded interested entities, and as a result was involved in making caselaw. The case began as the Staff's 1988 excess earnings complaint case against SWBT, which was docketed as Case No. TC-89-14. Prior to the Staff filing its excess earnings complaint case, SWBT filed with the Commission a local network modernization plan, which was docketed as Case No. TO-89-10. The Commission consolidated these cases and two others denominating TC-89-14 as the lead case of the four. The Commission issued its Report And Order in Case Nos. TC-89-14, et al. on June 20, 1989 directing SWBT to file tariffs for telephone service reflecting a decrease in Missouri jurisdictional gross annual revenues of $101.3 million. *Re Southwestern Bell Telephone Co.*, 29 Mo.P.S.C.(N.S.) 607, 610, 683 (1989).

On June 30, 1989, the Commission issued in Case Nos. TC-89-14, et al. an Order Concerning Motion For Stay, Depreciation Rates And Establishing An Incentive Plan Docket, among other things, denying SWBT's motion to stay or postpone the $101.3 million rate reduction. The Commission created as an incentive plan docket, Case No. TO-90-1, and set a prehearing conference for July 12, 1989 for SWBT, the Staff, and Public Counsel to discuss proposals for an incentive plan for SWBT and directed that they file a report or a proposal for an incentive plan for SWBT on or before September 1, 1989. SWBT was directed to file a network modernization plan in conjunction with the incentive plan to be filed in Case No. TO-90-1. *Re Southwestern Bell Telephone Co.*, 29 Mo.P.S.C.(N.S.) 684, 685-86 (1989).

On June 30, 1989, SWBT obtained a Temporary Restraining Order in Cole County Circuit Court staying the implementation of tariffs implementing the rate reduction ordered by the Commission in Case No. TC-89-14, et al. On July 21, 1989, SWBT and Public Counsel filed their respective Applications For Writ Of Review of the Commission's rate reduction ordered in

Case No. TC-89-14, et al. On September 5, 1989, the Cole County Circuit Court, in the consolidation of SWBT's and Public Counsel's Writ Of Review proceedings, issued a stay of the Commission's Report And Order in Case No. TC-89-14, et al. pending the outcome of judicial review.

On September 25, 1989, the Commission, SWBT and Public Counsel executed a Settlement Agreement to resolve the Petitions For Writs Of Review filed by SWBT and Public Counsel. As part of that Settlement Agreement, the Commission, SWBT and Public Counsel agreed to adopt a three-year incentive regulation experiment for SWBT beginning January 1, 1990 including terms of implementation and monitoring. On September 26, 1989 SWBT and Public Counsel voluntarily dismissed their Petitions For Writ Of Review and advised the Circuit Court of Cole County that its Stay could be dissolved. The Court entered an Order Of Dismissal And Dissolution Of Stay on that same date.

MCI and AT&T filed Applications For Rehearing with the Commission regarding the September 25, 1989 Settlement Agreement among the Commission, SWBT and Public Counsel. When those Applications For Rehearing were denied by the Commission, MCI and AT&T filed Petitions For Writs Of Review with the Cole County Circuit Court.

On or about October 5, 1989, MCI, AT&T, and CompTel of Missouri ("CompTel") filed various motions with the Cole County Circuit Court requesting that the Court vacate or modify the Court's September 26, 1989 Order Of Dismissal And Dissolution Of Stay. On October 24, 1989, twenty-nine days after the Circuit Court's Order Of Dismissal And Dissolution Of Stay, the Circuit Court granted those motions by ordering as follows:

(1) The Court's September 26, 1989 Order did not approve, ratify, or condone the September 25, 1989 settlement agreement of the Commission, SWBT and Public Counsel.

(2) To the extent the Court's September 26, 1989 Order suggests that the Court's Order Granting Stay is dismissed, it is set aside.

(3) The Court's September 26, 1989, Order did not dispose of the Order Granting Stay or the requirement that all monies collected by SWBT during the pendency of the stay (i.e., since July 1, 1989) in excess of the rate reduction authorized by the Commission's June 20, 1989, Report And Order be paid into the registry of the Court, pursuant to the Court's Order Granting Stay.

(4) The Court will thereafter determine who is entitled to receive such monies pursuant to the applicable statutes and the previous Orders of the Court.

In response to the October 24, 1989 Order of the Circuit Court, SWBT unsuccessfully sought a Writ Of Prohibition from the Western District Court of Appeals and the Missouri Supreme Court. *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385 (Mo.banc 1990).

On March 6, 1991, a Joint Recommendation To Approve Revised Incentive Regulation Experiment For Southwestern Bell Telephone Company was submitted to the Commission in Case No. TO-90-1 in an effort to resolve all litigation from Case No. TC-89-14, et al. The Joint Recommendation was filed with the Commission on March 7, 1991 and on March 15, 1991, the Commission issued an Order Granting Interventions And Approving Joint Recommendation. All parties to the litigation in the Cole County Circuit Court, including the Commission, entered into a comprehensive settlement agreement to resolve all matters, including the incentive regulation experiment. *Re Southwestern Bell Telephone Co.*, 30 Mo.P.S.C.(N.S.) 499 (1991); *See also State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385 (Mo.banc 1990); *State ex rel. Missouri Cable Telecommunications Ass'n. v. Public Serv. Comm'n*, 929 S.W.2d 768 (1996).

IX. Potential Voiding Of Case No. EO-2005-0329 KCPL Experimental Alternative Regulatory Plan Stipulation and Agreement

KCPL's/GMO's request in their March 22, 2010 filing with the Commission at page 7, paragraph 6(c) that the Commission should find "[t]he Companies' cost control system is not in

violation of any Commission order and is sufficient to identify and track costs of the Iatan construction projects" can be argued to violate the rights of the parties to the Case No. EO-2005-0329 KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement because that determination is to be made in a contested proceeding involving other signatory parties to the KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement as provided for therein. (*Re Kansas City Power & Light Co.*, Case No. EO-2005-0329, Report And Order, 13 Mo.P.S.C.3d 568 (2005)(Stipulation And Agreement not published); *Re Kansas City Power & Light Co.*, Case No. EO-2005-0329, Order Approving Amendments To Experimental Regulatory Plan, 13 Mo.P.S.C.3d 608 (2005)(Stipulation And Agreement not published)).

Should the Commission make the determination requested by KCPL/GMO, a signatory party to the KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement could assert that the Commission has voided that Stipulation And Agreement. As to the standard the cost tracking systems need to meet, there is a provision which was agreed to by the signatories for Cost Control Process For Construction Expenditures at page 28 in the KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement in Case No. EO-2005-0329. There is also language at pages 38-40, 42-43, and 53 that is relevant to the issue whether the action that KCPL/GMO is requesting will void the Case No. EO-2005-0329 KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement:

> **III.B.1.q. Cost Control Process For Construction Expenditures**
>
> **KCPL must develop and have a cost control system in place that identifies and explains any cost overruns above the definitive estimate during the construction period of the Iatan 2 project, the wind generation projects and the environmental investments.**
>
> * * * *
>
> **III.B.3. Expected Rate Cases During Regulatory Plan**
>
> * * * *
>
> **If one or more of the investments specified in Paragraphs III.B.3.b-e is not included in a rate case filing, as specified herein, KCPL may include the**

investments in a later rate case filing. In such an instance, the Signatory Parties' commitment not to take the position that the investments should be excluded from KCPL's rate base will extend to the filing that includes such investments consistent with the "Infrastructure" subparagraph of each "Rate Filing" section immediately below. KCPL further commits to work to develop mutually agreeable procedures in these rates cases to streamline the rate case process.

Because of the magnitude of these investments and the length of time in the Regulatory Plan, KCPL may need to adjust the timing of the rate filings to reflect additional information regarding the construction and timing of investments and other factors. KCPL and the Signatory Parties agree to work together to adjust the rate filing schedules to reflect these needs.

* * * *

III.B.3.c. Rate Filing #3 (2008 Rate Case)

*** * * ***

(ii) Interventions. **Each of the Signatory Parties shall be considered as having sought intervenor status in the 2008 Rate Filing without the necessity of filing an application to intervene and KCPL consents in advance to such interventions**. . . .

* * * *

(v) Infrastructure. The 2008 Rate Case will include prudent expenditures for the installation of an SCR facility, a Flue Gas Desulphurization ("FGD") unit and a Baghouse at Iatan 1; 100 MWs of wind generation; and the additions to transmission and distribution infrastructure identified in Appendix D that are in service prior to the agreed upon true-up date. The Signatory Parties agree that they will not take the position that these investments should be excluded from KCPL's rate base on the ground that the projects were not necessary or timely, or that alternative technologies should have been used by KCPL, so long as KCPL proceeds to implement the Resource Plan described herein (or a modified version of the Resource Plan where the modified plan has been approved by the Commission) and KCPL is in compliance with Paragraph III.B.1(o) "Resource Plan Monitoring." **Nothing in this Agreement shall be construed to limit any of the Signatory Parties' ability to inquire regarding the prudence of KCPL's expenditures**, or to assert that the appropriate amount to include in KCPL's rate base or its cost of service for these investments is a different amount (e.g., due to imprudent project management) than that proposed by KCPL.

* * * *

III.B.3.d. Rate Filing #4 (2009 Rate Case)

*** * * ***

(ii) Interventions. **Each of the Signatory Parties shall be considered as having sought intervenor status in the 2009 Rate Filing without the necessity of filing an application to intervene and KCPL consents in advance**

to such interventions. . . .

* * * *

(iv) Infrastructure. The 2009 Rate Case will include prudent expenditures for Iatan 2; the FGD unit and the Baghouse at La Cygne 1; and the additions to transmission and distribution infrastructure identified in Appendix D that are in service prior to the agreed upon true-up date. The Signatory Parties agree that they will not take the position that these investments should be excluded from KCPL's rate base on the ground that the projects were not necessary or timely, or that alternative technologies should have been used by KCPL, so long as KCPL proceeds to implement the Resource Plan described herein (or a modified version of the Resource Plan where the modified plan has been approved by the Commission) and KCPL is in compliance with Paragraph III.B.1(o) "Resource Plan Monitoring." **Nothing in this Agreement shall be construed to limit any of the Signatory Parties' ability to inquire regarding the prudence of KCPL's expenditures**, or to assert that the appropriate amount to include in KCPL's rate base or its cost of service for these investments is a different amount (e.g., due to imprudent project management) than that proposed by KCPL.

* * * *

III.B.10. EFFECT OF THIS NEGOTIATED SETTLEMENT

* * * *

e. The provisions of this Agreement have resulted from negotiations among the Signatory Parties and are interdependent. **In the event that the Commission does not approve and adopt the terms of this Agreement in total, it shall be void and no party hereto shall be bound, prejudiced, or in any way affected by any of the agreements or provisions hereof.**

f. **When approved and adopted by the Commission, this Agreement shall constitute a binding agreement among the Signatory Parties hereto. The Signatory Parties shall cooperate in defending the validity and enforceability of this Agreement and the operation of this Agreement according to its terms.**

The following direct examination of KCPL/GMO witness Chris B. Giles by counsel for KCPL/GMO provides an example of the semantic parsing of great dollar significance which the Staff finds itself drawn into with KCPL (and not just KCPL among the electric utilities regulated by the Commission). In this instance the issues are cost overruns, cost tracking/cost control system, and discovery. KCPL/GMO requested in their March 22, 2010 filing that the Commission make a substantive finding regarding, in a non-contested case, that goes to a

material provision of the Case No. EO-2005-0329 KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement.

> [MR. HATFIELD] Q. And so where we were was on the -- the Staff asked, if the reforecast effort then underway, so this new budget, would result in an increase in the budget to levels such that KCPL would assert after the reforecast that it did not have cost overruns, and since it did not have cost overruns it was not required to identify and explain changes in project costs.
>
> Is that your understanding? I mean, was that the conversation you were having at the time?
>
> [MR. GILES] A. That was the conversation, and my response was, we will -- you will always be able to track costs to the definitive estimate, the control budget estimate.
>
> Subsequent to that, Staff alleges in its reply that we, in fact, did say we did not have cost overruns because we were now below the new budget.
>
> * * * *
>
> Q. . . . this is Staff speaking through their reply. The attachment to quarterly status reports when compared to the Iatan AQCS expenditure summary for the fourth quarter contained in the instant Staff reply -- I'm sorry -- contained in the instant Staff reply above indicates that the anticipated issue did materialize. Is that correct?
>
> A. No.
>
> Q. It goes on to say, as one sees, the tracking by KCPL of actual costs to the current estimate adopted -- or amounts after KCPL adopted the higher -- higher current budget estimate with the control budget estimate for analysis purposes.
>
> I think they're just saying you're tracking to a different budget now, not CBE. Is that how you understand it?
>
> A. Yes.
>
> Q. Then it says, in actuality, what is occurring is KCPL increases its current budget and uses it for tracking purposes to prevent the very recognition of and the requirement to explain cost overruns.
>
> Is that what you did? Did you refigure the budget just so you can say we don't have any cost overruns?
>
> A. Absolutely not.

Q. Are there -- if we use the control budget estimate as the estimate, are there cost overruns on Iatan 1?

A. Yes.

Q. And has KCPL ever tried to deny, have you ever tried to deny that there are cost overruns?

A. No.

Q. And so how -- how can you -- how do you know when there are cost overruns?

A. My understanding is anything above the control budget estimate, or definitive estimate as it's described in the rate [plan], is considered a cost overrun. I don't -- I don't like that term obviously because it implies there's something wrong when it could just be a budget issue.

But given that any dollar above the CBE is considered cost overruns, then Iatan 1 has cost overruns. We're not hiding it. We're not saying we can't explain it. We can do both. We can explain it.

Q. And when was the reforecast done?

A. May of '08.

Q. So is it reasonable to say that the reforecast was an attempt to predict what those overruns, for want of a better word, might be?

A. Yes.

Q. Now, let me just read you a couple more allegations here from Staff's reply. And they're continuing on.

MR. HATFIELD: And again, Judge, this entire pleading is in your record if anybody needs to go back and get better context.

BY MR. HATFIELD: Q. So we're still talking about this budget comparison, and the Staff has said in its reply, instead, noting its reliance on its tracking of actual costs against the new higher current budget estimate amount, KCPL denies the existence of cost overruns for Iatan 1 AQCS.

I think you've already covered it, but there it is very specifically. Is that true?

A. It's not true. I think if -- to clarify that, I believe Staff in one of the documents referred to a data request that indicated compared to the reforecast number, KCPL did not have cost overruns. That's a correct statement as well.

> But as I've stated before, we never claimed we didn't have cost overruns when compared to the control budget estimate. We certainly do.

(Tr. Vol. 1, pp. 283-86).

On cross-examination of Mr. Giles, counsel for the Staff read KCPL's February 3, 2009 response to Staff Data Request No. 445 in Case No. ER-2009-0089 into the record and asked Mr. Giles whether his testimony that evening, April 28, 2010, was consistent with KCPL's response to Staff Data Request No. 445, which begins with the sentence "The Iatan 1 environmental upgrade project has not incurred cost overruns," and Mr. Giles' response was that his testimony that evening was not consistent with KCPL's response to Staff Data Request No. 445:

> Q. . . . Is that consistent with your prior statements this after -- this evening I should say?
>
> A. No. This is -- this is the data request I was referring to. The comparison being made here is to the reforecast, or I think this refers to it as the current control budget estimate. As I indicated, the documentation Staff has that supports the cost overruns for the control budget estimate. Now, I must say, this one got by me. This is not a good response. And I do review most all of these.
>
> Q. Mr. Giles, are you aware whether this is the only Data Request response that got by you?
>
> A. No. I'm sure there were others.

(Tr. Vol. 1, p. 293).

X. Detrimental Reliance

KCPL/GMO complain of detrimental reliance in their February 16, 2010 filing at pages 5-6[5] and in their March 22, 2010 filing at page 6[6]. If there has been any detrimental reliance, it has been by the nonutility signatories to the Case Nos. ER-2009-0089 and ER-2009-0090

[5] "Staff's Position Is Prejudicial To KCP&L And Unfair To This Commission. . . . The Companies relied on this Commission's order and Staff's presumed compliance with that order to plan for its upcoming KCP&L and GMO rate cases."

[6] "Are the Companies being treated fairly in the auditing process? . . . whether the [Staff] . . . has deprived the Companies of the fair treatment to which they are entitled from the Commission and its Staff. . . ."

revenue requirement/global agreement Stipulation And Agreements. Some or all of the other nonutility signatories may have entered into those revenue requirement/global agreement Stipulation And Agreements relying on the Staff being permitted to continue to perform its prudence reviews / construction audits of Iatan 1 and Iatan common plant into KCPL's and GMO's filing of their Iatan 2 rate cases. Equitable estoppel would apply regarding the non-utility signatories, not regarding KCPL/GMO.[7]

XI. Financial Consequences

KCPL/GMO witness Michael Cline testified that "if we do not resolve the prudency issues around Iatan 1 and common, that it will have a detrimental effect on the companies' cost of capital." (Tr. Vol. 3, p. 444). He then went on to testify that Standard & Poor's ("S&P's") raised its Outlook respecting GPE, KCPL and GMO from negative to stable and raised KCPL's short-term debt rating to A2 from A3 on April 9, 2010. He further stated as follows regarding the lack of focus of S&P's, Moodys, and Fitch respecting the Staff's December 31, 2009 Staff Reports in Case Nos. ER-2009-0089 and ER-2009-0090:

> [MR. DOTTHEIM] Q. Has Standard & Poor's, Moody's or Fitch referred in any report to Staff's December 31, 2009 filing?

[7] *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 910 (Mo.App. W.D. 1993):

> Equitable estoppel is normally not applicable against a governmental entity. *Farmers' & Laborers' v. Dir. of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987). The application of equitable estoppel against governmental entities or public officers is limited to exceptional circumstances where right or justice or the prevention of manifest injustice requires its application. *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo.1966); *State ex rel. Letz v. Riley*, 559 S.W.2d 631, 634 (Mo.App.1977). Honesty and fair dealing must require that equitable estoppel be applied in order to prevent manifest injustice. *Murrell*, 408 S.W.2d at 851. The doctrine is not favored by law and is not to be casually invoked. *State, Etc. v. City of Woodson Terrace*, 599 S.W.2d 529, 531 (Mo.App.1980). Equitable estoppel cannot be applied if it will prejudicially affect the sovereignty of the state. P.H. Vartanian, Annotation, *Applicability of Doctrine of Estoppel Against Government and its Governmental Agencies*, 1 A.L.R.2d 338, 340-41 (1948). As a result, equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy. *Id.* at 341. The underlying principle behind its limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights. *Riley*, 559 S.W.2d at 634.

[MR. CLINE] A. No, sir.

Q. Has GPE, KCPL or GMO provided a copy of Staff's December 31, 2009 report to Standard & Poor's, Moody's or Fitch?

A. No, sir, we have not.

Q. Has anyone associated with GPE, KCPL, GMO discussed the Staff's December 31, 2009 filing with the Commission with Standard & Poor's, Moody's or Fitch?

A. Only with Moody's.

Q. Okay. And what was the nature of that discussion?

A. I was the party that had the discussion. I was talking with our company's analyst at Moody's, a gentleman named Jim O'Shannessey. We were talking, it was right after we issued the 8K in January related to the delays in Iatan 2, and so he reached out to me to talk a little bit more about that, and in that context asked if the Staff had filed its December 31st report as required by the Commission and what the outcome had been.

Q. So the concerns that you've expressed today haven't been communicated in any way to Standard & Poor's, Moody's or Fitch?

A. As I said earlier, I'm not sure that at this point there has been a significant amount of focus on this matter.

Q. And Standard & Poor's, Moody's and Fitch haven't contacted GPE, KCPL or GMO and specifically raised the concerns that you've addressed just a few minutes ago?

A. They are aware of the cap that was established in the stipulation, and as such, no, they have not contacted us about that.

Q. And when I was asking, you they haven't contacted KCPL about the specific concerns that you've raised this morning in your testimony to the Commission?

A. As far as treatments of Iatan 2 or -- no, they have not.

(Tr. Vol. 3, pp. 449-50)

What will Wall Street's and GPE's/KCPL's/GMO's investors' reaction be if the Commission takes action that voids or brings into question the continuing effect of the April 24, 2009 Case No. ER-2009-0089 revenue requirement/global agreement Stipulation And Agreement and the May 22, 2009 Case No. ER-2009-0090 revenue requirement/global agreement Stipulation And Agreement? What will Wall Street's and GPE's/KCPL's/GMO's investors' reaction be if the Commission takes action that voids or brings into question the continuing effect of the Case No. EO-2005-0329 KCPL Experimental Regulatory Plan Stipulation And Agreement?

XII. Discovery Issues

KCPL/GMO have sought to turn the discovery subject matter on the Staff. The Staff has addressed this matter in part in the Introduction section in respect to KCPL's/GMO's attack on the very nature of the Staff's prudence review / construction audit. The Staff will address this matter in further detail, but still in a limited manner.

Staff Data Request No. 415 dated January 14, 2009 in Case No. ER-2009-0089 requests an unedited copy of all invoices from Schiff Hardin for work charged to the costs of Iatan 1 or Iatan 2. On January 23, 2009, KCPL objected to this Staff Data Request to the extent it called for the production of information protected by the attorney-client privilege and/or attorney work product doctrine. A medium containing copies of invoices was provided that was almost entirely redacted. In the latter part of May and early June 2009, a medium of copies of invoices was provided with scant redaction after the Staff obtained the involvement of the Regulatory Law Judge in a review of the material. This matter can be seen by a comparison of Attachment 1 to Attachment 2 of the Staff's June 19, 2009 Preliminary Staff Report. (Item Nos. 29, 32, and 54 in EFIS File No. EO-2010-0259: June 19, 2010 Preliminary Staff Report in Case Nos. ER-2009-

0089 and ER-2009-0090, pp. 15-19, Redacted For Attorney-Client Privilege And Attorney Work Product Immunity Pre-Regulatory Law Judge Review: Attachment 1(a) General Business Advice, Attachment 1(b) Crane Accident – Legal Advice, Attachment 1(c) Crane Accident – Document Control; Redacted For Attorney-Client Privilege And Attorney Work Product Immunity Post-Regulatory Law Judge Review: Attachment 2(a) General Business Advice, Attachment 2(b) Crane Accident – Legal Advice, Attachment 2(c) Crane Accident – Document Control).

In general, the Staff does not assume that all communications to or from a law firm is protected by the attorney-client privilege or attorney work product immunity. In particular, although Schiff Hardin, LLP is a general practice law firm being utilized by KCPL, it has been assisting KCPL in KCPL's project management duties in the Iatan Project. KCPL filed in Case Nos. ER-2009-0089 the testimony of Kenneth M. Roberts, who is an equity partner, co-chair of the Construction Law Group and a member of the executive committee of the general practice law firm Schiff Hardin LLP. In addition to Mr. Roberts of Schiff Hardin, Daniel F. Meyer of Meyer Construction Consulting, who identified himself as having been retained by Schiff Hardin, filed testimony on behalf of KCPL in Case No. ER-2009-0089. (Item Nos. 29, 32, and 54 in EFIS File No. EO-2010-0259: June 19, 2010 Preliminary Staff Report in Case Nos. ER-2009-0089 and ER-2009-0090, pp. 15-19 and Staff's Reply to KCPL's And GMO's February 16, 2010 Initial Response (Public Version), paragraph 32 and fn.8 at pp. 26-27).

Mr. Roberts states in his Direct Testimony in Case No. ER-2009-0089 that KCPL engaged Schiff Hardin to help KCPL develop project control procedures to monitor the cost and schedule for the infrastructure projects contained in the KCPL's Comprehensive Energy Plan. Mr. Meyer in his Rebuttal Testimony in Case No. ER-2009-0089 identifies the work that he has

performed for Schiff Hardin since the early 1990s as primarily cost and cost analysis work, project oversight, some scheduling work, some litigation support, all in the construction industry and primarily in the power industry. (Item Nos. 29, 32, and 54 in EFIS File No. EO-2010-0259: June 19, 2010 Preliminary Staff Report in Case Nos. ER-2009-0089 and ER-2009-0090, pp. 15-19 and Staff's Reply to KCPL's And GMO's February 16, 2010 Initial Response (Public Version), paragraph 32 and fn.8 at pp. 26-27).

At the hearing on April 28, 2010, Mr. Giles testified that the Staff's audit was unusual from the perspective of the Staff's requests for materials protected by the attorney-client privilege:

> [COMMISSIONER JARRETT] Q. Do you have any other examples of what you call, what you would call differences between the way Staff previously audited projects versus how they audited this one, other than what you've said?
>
> [MR. GILES] A. I don't recall the number of data requests that would be classified as attorney/client privilege. Typically in an audit, most of the data that Staff would request is related to construction and prudence issues. It typically never got into the attorney/client privilege that we had to assert the privilege. I've seen more of that in this case. And I think, you know, in large part that's sort of been the philosophy of the Staff in this particular audit.

(Tr. Vol. 1, p. 303).

Mr. Giles' recollection is faulty. On May 17, 1985 the Commission issued an *Order Concerning In Camera Proceeding* in Case No. ER-85-128 and EO-85-185, in which the Commission denied the Staff's request for appointment of a special master and delegated authority to one of its Hearing Examiners to conduct in camera proceedings and make determinations concerning the discoverability of hundreds of documents withheld by KCPL from the Staff as purportedly protected by the attorney-client privilege or the attorney work product immunity/doctrine. *Re Kansas City Power & Light Co.*, Case Nos. ER-85-128 and EO-85-185,

Order Concerning In Camera Proceeding, 27 Mo.P.S.C.(N.S.) 520 (1985). The Commission's *Order* notes that the Staff's Motion To Compel Production Of Documents And Request For Appointment Of Special Master states that KCPL had refused to provide at least 700 documents during the course of the audit on the basis of either the attorney-client privilege or the attorney work product doctrine. On May 23, 1985, the Commission issued an *Order Denying Reconsideration* in which in Case Nos. ER-85-128 and EO-85-185 in which it denied KCPL's Application For Reconsideration Or Rehearing. *Re Kansas City Power & Light Co*., Case Nos. ER-85-128 and EO-85-185, *Order Denying Reconsideration*, 27 Mo.P.S.C.(N.S.) 524 (1985).

On June 11, 1985 the Commission issued its first *Order Concerning Discoverability Of Withheld Documents*. The Commission's *Order* notes that although originally the Staff estimated approximately 700 documents had been withheld at the beginning of the *in camera* proceeding, KCPL presented a list of 2,028 documents. *Re Kansas City Power & Light Co*., Case Nos. ER-85-128 and EO-85-185, *Order Concerning Discoverability Of Withheld Documents*, 27 Mo.P.S.C.(N.S.) 527 (1985). An *Order Concerning Second List Of Withheld Documents* was issued on July 2, 1985. *Re Kansas City Power & Light Co*., Case Nos. ER-85-128 and EO-85-185, *Order Concerning Second List Of Withheld Documents*, 27 Mo.P.S.C.(N.S.) 533 (1985).

During the Great Plains Energy, Inc. ("GPE") acquisition of Aquila, Inc., Case No. EM-2007-0374, GPE and KCPL moved the Commission to limit the scope of the proceedings. GPE/KCPL asserted that the Staff was engaged in an inquiry of certain issues that were either partially or totally irrelevant to the acquisition case including the reforecast of cost and schedule related to the Iatan 1 and Iatan 2 construction projects and that said inquiry involved the depositions of 11 GPE/KCPL witnesses and 5 Aquila witnesses. GPE/KCPL requested, among

other things, that the Commission should not require GPE/KCPL to produce for hearing 6 of the Staff's 11 GPE/KCPL deponents: (1) Michael J. Chesser, Great Plains Energy Chairman of the Board and Chief Executive Officer; (2) Stephen Easley, KCPL's Senior Vice President of Supply; (3) Brent Davis, KCPL's Iatan Unit 1 Project Director; (4) Terry Foster, KCPL's Director of Project Controls for CEP projects; (5) Steven Jones, KCPL's CEP Procurement Director; (6) John R. Grimwade, KCPL's Senior Director of Strategic Planning and Development. The Commission ruled as follows:

> (4) An extensive inquiry into to KCPL's CEP as set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects is overly broad and the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.
>
> (5) The witnesses that the Applicant's have requested to be released in this matter will not be released to the extent they can provide testimony on the Applicant's credit-worthiness.

Re Great Plains Energy, Inc., Kansas City Power & Light Co., and Aquila, Inc., Report And Order, pp. 14-16, 19, Case No. EM-2007-0374 (2008); (*See* Tr. Vol. 3, pp. 546-47, File No. EO-2010-0259).

One hundred fifty Staff Data Requests relating to the Iatan 1 and Iatan 2 projects were drafted in late 2008/early 2009 by Mr. Schallenberg and submitted to KCPL in January 2009 in Case No. ER-2009-0089. (Tr. Vol. 3, pp. 530-31).

XIII. Certain Questions From Regulatory Law Judge Harold Stearley To Staff Witness Robert E. Schallenberg

Among other questions, the Regulatory Law Judge asked "[w]here does the Staff derive its authority to take any action, Mr. Schallenberg?" (Tr. Vol. 3, p.621). "Staff" is defined in the Commission's Rules, 4 CSR 240-2.010(11), as a party:

> Party includes any applicant, complainant, petitioner, respondent, intervenor or public utility in proceedings before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate within the period of time established for interventions by commission rule or order.

The Commission has not indicated that Staff counsel representing technical Staff are not to take certain legal positions because said Staff counsel and technical Staff are employees of the Commission. In fact, the Commission has taken certain actions over the last few years disaggregating the attorneys in its employ between (1) those representing the Staff before the Commission and (2) those representing the Commissioners as the Commission in matters at the Commission and outside the Commission. The Commission has recently retained a Chief Litigation Attorney for the Staff Counsel Office for purposes of litigation of Staff positions before the Commission. Pursuant to Section 386.135.1, the Commission shall have an independent technical advisory staff of up to six full-time employees, who shall have expertise in accounting, economics, finance, engineering/utility operations, law, or public policy. In addition pursuant to Section 386.135.2, each Commissioner shall also have the authority to retain one personal advisor, who shall be deemed a member of the technical advisory staff and shall possess expertise in one or more of the following fields: accounting, economics, finance, engineering/utility operations, law, or public policy.

Judge Stearley asked Staff witness Mr. Schallenberg whether he recalled if an 11-month tariff effective date was contemplated in the KCPL Experimental Alternative Regulatory Plan

and Mr. Schallenberg responded that he did not recall. He also asked Mr. Schallenberg whether he recalled if an 11-month operation-of-law date was built into the KCPL Experimental Alternative Regulatory Plan to allow flexibility for the Iatan 1 upgrades to go online and Mr. Schallenberg responded that he did not recall. Mr. Schallenberg did testify that it was his recollection, his understanding that the KCPL Experimental Alternative Regulatory Plan is predicated on an 11-month operation-of-law date. (Tr. Vol. 3, pp. 615-16).

It is true that the KCPL Experimental Alternative Regulatory Plan provides as follows at pages 30, 43, 37, and 41:

> III.B.3.a. Rate Filing # 1 (2006 Rate Case)
> (i) Schedule. Rate schedules with an effective date of January 1, 2007 will be filed with the Commission on February 1, 2006. . . .
>
> * * * *
>
> III.B.3.b. Rate Filing # 2 (2007 Rate Case)
> (i) Schedule. Rate schedules with an effective date of January 1, 2008 may be filed with the Commission on February 1, 2007. . . .
>
> * * * *
>
> III.B.3.c. Rate Filing #3 (2008 Rate Case)
> (i) Schedule. Rate schedules with an effective date of January 1, 2009 may be filed with the Commission on February 1, 2008. . . .
>
> * * * *
>
> III.B.3.d. Rate Filing # 4 (2009 Rate Case)
> (i) Schedule. Rate schedules with an effective date of September 1, 2010, will be filed with the Commission on October 1, 2009, or eight (8) months prior to the commercial in service operation date of Iatan 2. . . .

(Case No. EO-2005-0329, KCPL Experimental Alternative Regulatory Plan). Mr. Schallenberg's memory did not fail him, there is no language in the KCPL Experimental Alternative Regulatory Plan for suspending tariffs 11 months beyond: February 1, 2006, February 1, 2007, February 1, 2008, October 1, 2009, or an additional 11-months beyond the date the tariff sheets were/are actually filed for Rate Filing # 1, Rate Filing # 2, Rate Filing # 3,

or Rate Filing # 4. If the terms of the KCPL Experimental Alternative Regulatory Plan were as the RLJ had posited, there would have been no need for the Staff (a) to have sought to negotiate in Case No. ER-2009-0089 a resolution to the true-up controversy, or (b) to have initially proposed in Case No. ER-2009-0089 that, subject to KCPL's approval, KCPL's proposed rates for Iatan 1 AQCS and Iatan 1 common plant should be permitted to go into effect interim subject to refund pending the Staff's prudence review / construction audit to be filed in the next KCPL rate case.

XIV. Questions From The Bench Regarding The Wolf Creek Rate Cases

There were some questions from the bench during the April 28-29, 2010 hearing regarding the procedural schedule(s) of the Wolf Creek rate case(s). The Wolf Creek *Report And Order* was issued in Case Nos. EO-85-185[8] and EO-85-224[9], but the Wolf Creek rate case was originally filed in two other separate dockets, Case Nos. ER-85-43[10] and ER-85-128[11]. See *Re Kansas City Power & Light Co*., Case Nos. EO-85-185 and EO-85-224, *Report And Order*, 28 Mo.P.S.C.(N.S.) 228, 232-34 (1986)(Wolf Creek *Report And Order*). On August 17, 1984 KCPL filed Case No. ER-85-43 as the Wolf Creek rate case, and soon thereafter the Staff asserted that KCPL had prematurely filed its purported Wolf Creek rate case and the Staff contended that Case No. ER-85-43 was not the Wolf Creek rate case. The proposed tariff sheets filed by KCPL on August 17, 1984 could have been suspended by the Commission a maximum

[8] In the matter of the determination of the in-service criteria for the Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues.

[9] In the matter of the application of Kansas City Power & Light Company, a Missouri corporation, for determination of certain rates of depreciation.

[10] In the matter of Kansas City Power & Light Company of Kansas City, Missouri for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.

[11] In the matter of Kansas City Power & Light Company of Kansas City, Missouri for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.

period to July 15, 1985. On November 15, 1984, KCPL withdrew its first Wolf Creek rate case, Case No. ER-85-43.[12] KCPL filed its second Wolf Creek rate case on November 26, 1984 in Case No. ER-85-128. The Commission suspended the proposed tariff sheets in Case No. ER-85-128 a maximum period to October 25, 1985. The Wolf Creek nuclear generating unit became "fully operational and used for service"[13] on September 3, 1985, several months beyond what would have been the July 15, 1985 operation-of-law date of Case No. ER-85-43. Just as the Staff had told the Commission when KCPL filed Case No. ER-85-43 in 1984, KCPL had prematurely filed its first Wolf Creek rate case and eventually had to withdraw the case.

Even though Wolf Creek became "fully operational and used for service" within the maximum 11 month suspension period of Case No. ER-85-128, the Commission did not issue its Wolf Creek *Report And Order* in Case No. ER-85-128. The Procedural History section of the Commission's Wolf Creek *Report And Order* notes that when the Commission set a comprehensive procedural schedule it recognized that the comprehensive procedural schedule it was adopting would preclude it from issuing a Wolf Creek *Report And Order* prior to the October 25, 1985 operation-of-law date of Case No. ER-85-128. "The Commission, therefore, created an additional docket, EO-85-185, for the purpose of receiving the record of ER-85-128 and the refiling of the Company's proposed tariffs." 28 Mo.P.S.C.(N.S.) at 233. On October 15, 1985, 10 days prior to the October 25, 1985 operation-of-law date of the maximum 11 month suspension period in Case No. ER-85-128, KCPL voluntarily withdrew its proposed tariffs and

[12] In a footnote reflected at 28 Mo.P.S.C.(N.S.) at 232 by the Commission's Reporter of Opinions, but not appearing in the Westlaw online version of the Commission's Report And Order on Wolf Creek, the Commission noted that KCPL in a letter dated November 15, 1984 withdrew all tariffs which were the subject of Case No. ER-85-43, and the Commission in an Order issued December 13, 1984 dismissed the case. The Reporter of Opinions further notes that the Wolf Creek tariff sheets were later refiled and became Case No. ER-85-128, and the Wolf Creek case subsequently became Case No. EO-85-185.

[13] Proposition 1, Section 393.135 RSMo. 2000, prohibits an electrical corporation from basing a charge on the costs of construction in progress upon any existing or new facility or any other cost associated with owning, operating, maintaining, or financing any property "before it is fully operational and used for service."

refiled a new set of tariffs that very day, the only difference between the newly filed tariffs and those withdrawn was the proposed effective date of the tariffs. The Commission dismissed Case No. ER-85-128 and incorporated the entire record of Case No. ER-85-128 by reference in Case No. EO-85-185. The Commission did not initially suspend KCPL's third set of Wolf Creek tariffs the maximum 11-month suspension period to September 14, 1986. On March 11, 1986 the Commission "resuspended" KCPL's tariffs to September 14, 1986. 28 Mo.P.S.C.(N.S.) at 234. The Commission issued its Wolf Creek Report And Order in Case Nos. EO-85-185 and EO-85-224 on April 23, 1986, and ordered that the Report And Order was to become effective on May 5, 1986. *Id*. at 228, 425.

XV. Abbreviated Timeline Of Events, Orders, And Filings

(1) On July 28, 2005, the Commission issued its Report And Order approving the KCPL Experimental Alternative Regulatory Plan Stipulation And Agreement in Case No. EO-2005-0329, *Re Kansas City Power & Light Co.*, Case No. EO-2005-0329, 13 Mo.P.S.C.3d 568 (2005).

(2) On August 23, 2005, the Commission issued its Order Approving Amendments To Experimental Regulatory Plan in Case No. EO-2005-0329, *Re Kansas City Power & Light Co.*, Case No. EO-2005-0329, 13 Mo.P.S.C.3d 608 (2005).

(3) March/April, 2008 depositions and hearings in Case No. EM-2007-0374, Great Plains Energy, Inc. acquisition of Aquila, Inc. – depositions and part of hearings respecting Iatan 1 and Iatan 2 projects as they related to the GPE acquisition of Aquila.

(4) One hundred fifty Staff Data Requests relating to the Iatan 1 and Iatan 2 projects were drafted in late 2008/early 2009 by Mr. Schallenberg and submitted to KCPL in January 2009 in Case No. ER-2009-0089. (Tr. Vol. 3, pp. 530-31).

(5) On April 15, 2009, the Commission issued an Order Regarding Construction And Prudence Audits Of The Environmental Upgrades At Iatan I, Jeffrey Energy Center And The Sibley Generating Facility in Case No. ER-2009-0089 and Case No. ER-2009-0090.

(6) On April 21, 2009, a Term Sheet, Exhibit 58, was marked an exhibit and received in evidence in Case No. ER-2000-0089.

(7) On April 24, 2009, a revenue requirement Stipulation And Agreement was filed in Case No. ER-2009-0089.

(8) On May 22, 2009, a revenue requirement Stipulation And Agreement was filed in Case No. ER-2009-0090.

(9) On June 10, 2009, the Commission issued an Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0089.

(10) On June 10, 2009, the Commission issued an Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case No. ER-2009-0090.

(11) On June 10, 2009, the Commission issued an Order Regarding Joint Motion To Extend Filing Date in Case No. ER-2009-0089.

(12) On June 10, 2009, the Commission issued an Order Regarding Joint Motion To Extend Filing Date in Case No. ER-2009-0090.

(13) On June 19, 2009, the Staff filed the Preliminary Staff Reports in Case No. ER-2009-0089 and Case No. ER-2009-0090.

(14) On December 31, 2009, the Staff filed the Staff Report in Case No. ER-2009-0089 and Case No. ER-2009-0090.

(15) On February 16, 2010, KCPL/GMO filed KCP&L's And GMO's Initial Response To Staff Report Of The Construction Audit/Prudence Review Of Environmental Upgrades To Iatan 1 and Iatan Common Plant in Case No. ER-2009-0089 and Case No. ER-2009-0090.

(16) On March 9, 2010, the Staff filed Staff's Reply To KCPL's And GMO's February 16, 2010 Initial Response in Case No. ER-2009-0089 and Case No. ER-2009-0090.

(17) On March 15, 2010, the Commission issued an Order Establishing Investigatory Docket and Setting On-The-Record Proceeding in File No. EO-2010-0259.

(18) On March 22, 2010, KCPL/GMO filed Kansas City Power & Light Company’s and GMO’s (1) Response To Order Establishing Investigatory Docket And Setting On-The-Record Proceeding; And (2) Response To Staff Motion To Open Construction Audit And Prudence Review Investigation Case in File No. EO-2010-0259.

(19) On March 22, 2010, KCPL/GMO filed Kansas City Power & Light Company's And GMO's Motion To Reschedule The On-The-Record Proceeding in File No. EO-2010-0259.

(20) On March 25, 2020, KCPL/GMO filed Kansas City Power & Light Company's and GMO's Response To Clarify Relief Being Requested From The On-The-Record Proceeding in File No. EO-2010-0259.

(21) On March 29, the Staff filed Staff's Reply To Kansas City Power & Light Company's And KCP&L GMO's March 22, 2010 Response to Staff And Kansas City Power & Light Company's And KCP&L GMO's Response To Commission's March 24, 2010 Agenda Session in File No. EO-2010-0259.

XVI. Conclusion

For the above stated reasons, the Commission should deny KCPL's/GMO's request for any substantive or procedural relief or rulings relating to the prudence review / construction audit of Iatan 1 AQCS and Iatan common plant outside of the context of the full contested case hearings in the soon to be filed KCPL and GMO Iatan 2 rate cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 21st day of May, 2010.

/s/ Steven Dottheim