BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company Regarding the Sale of Assets and Property Rights Located Near Spearville, Kansas.	))))	Case No. EO-2010-0353

STAFF'S RESPONSE TO APPLICATION AND MOTION FOR EXPEDITED TREATMENT

Comes Now the Staff of the Public Service Commission of Missouri and for its response to Kansas City Power & Light Company's *Application and Motion for Expedited Treatment* recommends the Commission (1) expeditiously deny Kansas City Power & Light Company's ("KCPL") request the Commission decline to exercise jurisdiction over KCPL's planned sale of both thirty-two 1.5MW wind turbine generators which are stored near KCPL's existing Spearville Wind Energy Facility and KCPL's rights to develop and build a new wind generation facility near Spearville, Kansas and (2) order KCPL to seek authority from the Commission to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber any or all of the wind turbine generators and new wind generation facility rights *before* doing so. According to its application KCPL has stored the wind turbines at the planned site of the new wind generation facility near Spearville, Kansas. All Staff knows about this proposed sale is that it is based on a request for proposals KCPL issued in December 2009 and KPCL's disclosures it includes KPCL selling to a developer the wind turbines and KCPL's rights to develop a new wind generation facility near Spearville, Kansas.

KCPL's assertion in its second paragraph that counsel for Staff raised at the eleventh hour the issue of whether KCPL can lawfully dispose of the wind turbines and wind generation facility rights without Commission authorization after KCPL

"had been given the 'green light' from Staff in November 2009" is, even when viewed in the most favorable light, misleading and, in any event, irrelevant to whether KCPL must obtain Commission authorization to dispose of this property. Therefore, Staff first addresses Commission jurisdiction over the planned sale, then how KCPL's foregoing statements are misleading.

In support of its recommendation Staff states:

1. Section 393.190.1, RSMo. 2000, provides:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax

> revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

2. The issue then is whether the thirty-two wind turbines stored at the planned site of the new wind generation facility and the new wind generation facility rights KCPL owns are part of its "franchise, works or system, necessary or useful in the performance of its duties to the public." They are.

3. The words "works" or "system" appearing in the statute are applicable not only for electrical corporations, but also for gas corporations, water corporations and sewer corporations. Neither "works" nor "system" is defined in the Public Service Commission Act, as amended, for all these types of utilities, collectively or individually. However, electric plant is defined to include "all real estate, fixtures and personal property operated, controlled, owned, used ***or to be used*** (Emphasis added.) for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."[1] In light of the broad remedial purpose of the Public Service Commission Act,[2] "works" and

[1] § 386.020(14), RSMo. Supp. 2009.
[2] *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Company*, 254 Mo. 515, 163 S.W. 854, 857-858 (1913).

"system" as used in § 393.190.1, RSMo. 2000, are broad and include facilities and rights acquired to use in providing utility service, but which are not yet so used. Both in its application in this case and in its third and fourth status updates in Case No. EO-2008-0224 KCPL has represented it acquired and intends to use the thirty-two wind turbines and new wind generation facility rights to obtain wind-generated electricity.

4. To comply with the Renewable Energy Standard, KCPL will be required to generate or purchase electricity generated from renewable resources—among those resources is wind—that constitutes no less than two percent of its sales for calendar years 2011 through 2013, no less than five percent for calendar years 2014 through 2017, no less than ten percent for calendar years 2018 through 2020, and no less than fifteen percent in each calendar year beginning in 2021.[3]

5. The Missouri Western District Court of Appeals in 2008 held that before it begins construction of a generating plant a commission-regulated electric utility such as KCPL must obtain a certificate from this Commission to build that plant at a particular site based on a determination by the Commission the plant is "necessary or convenient for the public service"—a certificate of convenience and necessity.[4] For purposes of a certificate of convenience and necessity "[t]he term "necessity" does not mean "essential" or "absolutely indispensable," but that an additional service would be an improvement justifying its cost."[5] From these holdings it follows that a generation plant is "necessary" before it is built.

[3] Renewable Energy Standard, §§ 393.1025 and 393.1030 RSMo. Supp. 2009.
[4] *State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544 (Mo. App. 2008).
[5] *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597-98 (Mo. App. 1993) quoting *State ex rel. Beaufort Transfer Company v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

6. KCPL discusses the St. Louis Court of Appeals' opinion *State ex rel. Union Electric Company v. University City*, 449 S.W.2d 894 (Mo. App. 1970). The St. Louis Court of Appeals' construction of "necessary to the public convenience" as used in zoning ordinances with respect to special use permits in that case is consistent with the Western District Court of Appeals' construction of "necessary" in connection with Public Service Commission certificates of convenience and necessity. In *Union Electric Company* the St. Louis Court of Appeals held that as used in a zoning ordinance regarding the granting of conditional use permits "necessary to the public convenience" meant "suitable, proper and convenient to the ends sought," not "absolutely the only site available in the area."

7. The language "necessary or useful in the performance of its duties to the public" in § 393.190.1 and the language "necessary or convenient for the public service" for certificates of convenience and necessity were part of the Public Service Commission Act as it was originally enacted in 1913, and both have remained essentially unchanged since then—the Legislature added tax impact disclosure requirements to § 393.190.1 in 1984. They should be viewed together within the scope and purposes of the entire Public Service Commission Act. When so viewed, it is illogical that after the Commission gives a utility a certificate of convenience and necessity to build a generation plant, the utility build that generation plant and sell it without first obtaining Commission authorization to do so. Former Commissioner Gaw and current Chairman Clayton recognized this illogic and raised it in their dissent to the Commission's Report and Order in Case No. EO-2005-0156 when they pointed out that under the Commission's construction of the statute KCPL, without first obtaining

Commission authorization, could sell its interest in Iatan 2 at any time before Iatan 2 became operational.

8. While the Commission does not have jurisdiction to manage the utilities it regulates, the Commission does have authority to supervise and regulate them to assure the public interest is served. That authority extends to management decisions that affect the utility's ability to provide safe and adequate service to the public.[6]

9. Based on the foregoing, KCPL requires Commission authorization before it sells, assigns, leases, transfers, mortgages, otherwise disposes of or encumbers the thirty-two 1.5MW wind turbine generators which are stored near KCPL's existing Spearville Wind Energy Facility or KCPL's rights to develop and build a new wind generation facility near Spearville, Kansas.

10. Although the Commission is not bound by precedent, KCPL relies on a number of Commission cases as persuasion for its position it does not need Commission authorization. In every one of those cases Staff initially took the position the utility had to obtain Commission authorization to sell or transfer the property in question—Case No. EO-2005-0156 (Aquila combustion turbines), Case No. EO-2010-0211 (former Aquila service center), Case No. HO-2007-0419 (Trigen long-term coal contract)—and only in Case No. HO-2007-0419 did Staff, after the utility represented it would not seek recovery of the contract investment through customer rates, change its position and recommend the Commission disclaim jurisdiction. Additionally, in a case KCPL does not reference, Case No. EO-2009-0148 (former Aquila service center), Staff asserted KCP&L Greater Missouri Operations

[6] *Public Service Commission v. Kansas City Power & Light Company*, 325 Mo. 1217, 31 S.W.2d 67 (1930); *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 256 (Mo. App. 2007).

Company required Commission authority before it sold its Platte City service center and the Commission, asserting jurisdiction over the proposed transaction, authorized the sale. In another case KCPL does not reference, Case No. EO-2010-0060, KCP&L Greater Missouri Operations Company sought Commission authority to sell a service center; KCP&L Greater Missouri Operations Company dismissed that case before Staff filed its recommendation.

11. In three of these cases, Case Nos. EO-2009-0148, EO-2010-0060 and EO-2010-0211, KCPL employees represented KCP&L Greater Missouri Operations Company. In Case No. EO-2009-0148 KCP&L Greater Missouri Operations Company requested the Commission to find no Commission authorization was needed or, alternatively, to grant the requested authority to sell its service centers. The Commission determined KCP&L Greater Missouri Operations Company required Commission authorization for the sales and authorized KCP&L Greater Missouri Operations Company to consummate the pending sale. In the other two cases KCP&L Greater Missouri Operations Company did not challenge that it required Commission authorization to consummate the sale and requested that authorization, which the Commission gave in Case No. EO-2010-0211. Based on Staff's positions in all of these foregoing cases, including the most recent three where KCPL employees represented the applicant, KCPL has no reason to be surprised when Staff advised KCPL that it needed to obtain Commission authority to sell its wind turbines and new wind generation facility rights before it sold them. Instead, KCPL should have been surprised if Staff had not.

12. With its application KCPL has only disclosed to the Commission one of the two requests for proposals for 100 MW of wind generation it issued. The e-mail and drafts of both draft requests for proposals sent to Staff in November 2009 are attached hereto as Appendix A. One of these requests for proposals includes options of purchased power agreements without buying from KCPL wind turbines or wind facility development rights as well as a build and transfer option similar to how KCPL built its existing Spearville wind generation facility.

13. Documented in KCPL's application, March 3, 2008 response, and four status updates in Case No. EO-2008-0224—opened by KCPL to keep the Commission informed of KCPL's efforts in evaluating the addition of more wind generated electricity supply—are the following events:

a. In March 2007 KCPL requested proposals for wind generation facilities to be built in 2008;[7]

b. In February 2009 KCPL entered into agreements to buy thirty-two 1.5 MW wind turbines, land development rights for a site upon which up to 67 wind turbines could be located as well as an engineering, procurement and construction contract for completed installation by May 31, 2010, of a 35 wind turbine project with an aggregate generation capacity of 52.5 MW upon KCPL's notice to the developer by September 30, 2009 to proceed; [8] and

c. On September 30, 2009, KCPL terminated the 35 wind turbine project contract.[9]

[7] KCPL's March 3, 2008 Response to Staff and other parties.
[8] KCPL's February 13, 2009 Third Status Update and October 15, 2009 Fourth Status Update.
[9] KCPL's October 15, 2009 Fourth Status Update.

Based on the limited review Staff was able to perform before making this filing, KCPL provided none of these requests for proposals or contracts to Staff for review before KCPL issued or executed them.

14. It was not until the meeting held on May 19, 2010, held after KCPL provided its Comprehensive Energy Plan update, that Staff learned KCPL was planning to enter into a contract based on the draft November 2009 requests for proposals that included KCPL selling to a developer the thirty-two wind turbines and new wind generation facility rights KCPL owns and, in response to Staff's inquiry then, that KCPL did not plan to seek Commission authority for the sale. Staff responded to KCPL's disclosure two days later by telephone advising KCPL of Staff's position that KCPL required Commission authorization to sell the turbines and new wind generation facility rights. Staff then memorialized that verbal message by a letter dated May 24, 2010 it e-mailed to KCPL that same date. A copy of that letter is attached to KCPL's application as Exhibit D. As of this date KCPL has not disclosed to Staff a draft of the contract itself, only the request for proposals upon which KCPL states the contract will be based is disclosed in KCPL's application.

15. KCPL cites to Case No. EO-2005-0156 where the Commission disclaimed jurisdiction over Aquila, Inc.'s sale to and leaseback from the City of Peculiar and encumbrance of a generating plant including three 105 MW combustion turbines. That case originated by Aquila, Inc. seeking valuations for recording on its regulated books the values of the three 105 MW combustion turbines, and authority to sell and lease back the generating plant upon which the combustion turbines were to be installed and to encumber the generating plant, all as part of a Chapter 100 economic

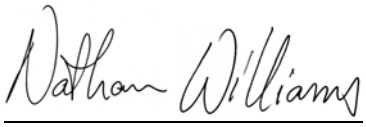
development arrangement to avoid property taxes. Notably, the Commission's Report and Order in Case No. EO-2005-0156 predates the Western District Court of Appeals opinion in *State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544 (Mo. App. 2008). *Cass County* involves the same generating plant. Thus, the Commission was without the benefit of the Court's holding that a commission-regulated electric utility must obtain a certificate of convenience and necessity to build a generating station before it builds it when the Commission concluded, "Because the turbines and associated equipment were not providing electricity to Missourians on December 30, 2004, those assets were not necessary or useful at that time. Therefore, Section 393.190 does not apply to this transaction."

16. As stated above, it is illogical that a utility could build and sell a generation plant without first obtaining Commission authorization to do so when it was required to obtain a certificate of convenience and necessity from the Commission to build that specific generation plant before it built the plant. Further, that case is distinguishable. The sale, leaseback and encumbrance in question were done to enable Aquila to qualify for an economic development tool created by the Missouri Legislature (Chapter 100 financing) that would allow Aquila to avoid property taxes and, instead, make a lower payment in lieu of taxes—a reduction in Aquila's costs and, therefore, a benefit to its retail customers. The Commission recognized this point in its December 19, 2005, Report and Order.

Wherefore, for its response to Kansas City Power & Light Company's *Application and Motion for Expedited Treatment*, Staff recommends the Commission (1) expeditiously deny Kansas City Power & Light Company's ("KCPL") request the

Commission decline to exercise jurisdiction over KCPL's planned sale of both thirty-two 1.5MW wind turbine generators which are stored near KCPL's existing Spearville Wind Energy Facility and KCPL's rights to develop and build a new wind generation facility near Spearville, Kansas and (2) order KCPL to seek authority from the Commission to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber any or all of the wind turbine generators and new wind generation facility rights *before* doing so.

Respectfully submitted,



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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronically mailed to all counsel of record this 4th day of June 2010.

/s/ Nathan Williams