

3. Should the Commission approve the Stipulation and Agreement without KCPL and/or the other Signatory Parties curing any flaw in the filing of the Stipulation and Agreement?

DOE's i: *hat without the filing of a proper Application the Commission's jurisdiction has not been invoked and therefore it cannot approve the Stipulation and Agreement.*

Issue No. 3

Is Case No. EO-2005-0329 a "contested case," and if it is not, has KCPL or any of the other the(sic) Signatory Parties to the Stipulation And Agreement invoked the jurisdiction of the Commission by not proceeding in a contested case proceeding?

DOE's position: *hat EO-2005-0329 is not a contested case within the meaning of the Commission's Rule it is DOE's position that a contested case cannot be initiated nor the jurisdiction of the Commission invoked in a matter of this nature without the filing of an Application. Therefore, it is further DOE's position that the Signatory Parties have not invoked the Commission's jurisdiction.*

Issue No. 4

What would be the legal and precedential effect on the Commission of the Commission approving the Stipulation and Agreement in this case? Would the Commission's approval constitute a determination by the Commission that:

- (i) the Stipulation and Agreement is just and reasonable;

DOE's position: *(1)That the jurisdiction of the Commission has not been invoked and therefore the Commission does not have the legal authority to approve the Stipulation and Agreement (2) That the Signatory Parties have not requested that the Commission find that the Stipulation and Agreement is just and reasonable and therefore the Commission should not make such a finding and (3) That the Stipulation and Agreement cannot bind the Commission in any manner.*

- (ii) the Stipulation and Agreement is among the Signatory Parties and the Commission does not approve any of the contents of the Stipulation and Agreement;

DOE's position: *(1) That the jurisdiction of the Commission has not been invoked and therefore the Commission does not have the legal authority to approve the Stipulation and Agreement (2) That this is a private agreement between and among the Signatory Parties that the Commission may acknowledge has been made and (3) That the Signatory Parties appear to state that it is not their intention for the Stipulation and Agreement to bind the Commission in any manner.*

- (iii) the Commission acknowledges the Agreement is among Signatory Parties and the Commission does not approve any of the contents of the Stipulation and Agreement;

DOE's position: *(1)That the jurisdiction of the Commission has not been invoked and therefore the Commission does not have the legal authority to approve the Stipulation and Agreement (2) That this is a private agreement between and among the Signatory Parties that the Commission acknowledges has been made and (3) That the Signatory Parties appear to state that it is not the intent of the Signatory Parties to the Stipulation and Agreement to bind the Commission in any manner.*

(iv) the Stipulation and Agreement is in the public interest?

DOE's position: (1) That the Commission cannot on the basis of this filing make such a finding for the reason that the jurisdiction of the Commission has not been invoked and therefore the Commission does not have the legal authority to approve the Stipulation and Agreement (2) That the Signatory Parties have not requested that the Commission find that the Stipulation and Agreement is in the public interest and therefore the Commission should not make such a finding and (3) That the Signatory Parties appear to state that the Stipulation and Agreement does not bind the Commission in any manner.

Issue No. 5

1. Is the Stipulation and Agreement a contract among the Signatory Parties and what is its legal effect before and on the Commission; e.g., does the Commission have the authority to approve a contract among the Signatory Parties which binds the parties to specific regulatory action to which the Commission cannot be bound? See *State ex rel. Capital City Water Company v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. 1993); *Union Electric Company v. Public Serv. Comm'n*, 136 S.W.3d 146 (Mo.App. 2004); Paragraph III.B.10.g. at pages 53-54 of the Stipulation and Agreement.

DOE's position: It is DOE's position that the Stipulation and Agreement is an agreement between and among the Signatory Parties. DOE does not have a position on the legality of the contract. It is DOE's position that the Stipulation and Agreement has no binding effect on the Commission. It is DOE's position that the Commission does not have the authority to approve the Stipulation and Agreement in the current case.

2. Is it within the Commission's statutory authority to approve this Stipulation and Agreement for an "Experimental Regulatory Plan" for the construction of electric plant, such as Iatan 2?

DOE's position: It is DOE's position that it is not within the Commission's statutory authority to approve an "Experimental Regulatory Plan" for the construction of electric plant, such as Iatan 2.

Issue No. 6

1. Can facts and information that the Signatory Parties have agreed were presented to them in Case No. EW-2004-0596, a non-contested case outside of the record in this case, and not presented to the Commission, be considered by the Commission in Case No. EO-2005-0329 as competent and substantial evidence as to whether the Commission should approve the Stipulation and Agreement?

DOE position: It is DOE's position that facts and information that the Signatory Parties have agreed were presented to them in Case No. EW-2004-0596 (a workshop) and not presented to the Commission in this case cannot be considered by the Commission in this case as admissible, competent and substantial evidence upon which the Commission could approve the Stipulation and Agreement.

2. Are conclusions of the Signatory Parties in the Stipulation and Agreement regarding matters these parties considered in Case No. EW-2004-0596, a workshop which is a non-contested case

outside of the record in the present case competent and substantial evidence which the Commission may consider in support of the Stipulation and Agreement filed in this case?

DOE position: *It is DOE's position that conclusions of the Signatory Parties to the Stipulation and Agreement regarding matters these parties considered in Case No. EW-2004-0596 and which are outside of the record in the present case cannot be considered as admissible, competent and substantial evidence which the Commission may consider in support of the Stipulation and Agreement filed in this case.*

3. Must the evidence that the Commission consider (sic) in support of the Stipulation and Agreement be limited to competent and substantial evidence presented at the hearing, or otherwise, in the record in this case, Case No. EO-2005-0329?

DOE position: *It is DOE's position that the evidence that the Commission considers in support of the Stipulation and Agreement must be limited to competent and substantial evidence presented at the hearing in the record in a case properly before the Commission..*

4. Are the various components of the Stipulation and Agreement, such as the provision for additional amortizations, supported by competent and substantial evidence in Case No. EO-2005-0329?

DOE position: *It is DOE's position that the various components of the Stipulation and Agreement are not presently supported by competent and substantial evidence.*

5. KCPL has filed direct testimony and schedules in Case No. EO-2005-0329 and an evidentiary hearing has been scheduled for June 6-8, 2005 (or as may otherwise be held by the Commission). May this testimony and the evidentiary hearing scheduled for June 6-8, 2005 (or as may otherwise be held by the Commission) provide competent and substantial evidence for the Commission to approve the Stipulation and Agreement filed on March 28, 2005?

See Section 536.070 RSMo and 4 CSR 240-2.130; State ex rel. Fischer v. Missouri Public Service Commission, 645 S.W.2d 39 (Mo. App. 1982).

DOE position: *It is DOE's position that the jurisdiction of the Commission has not been invoked by the Signatory Parties and that neither prefiled direct testimony nor testimony and evidence adduced at the hearing in this case can cure this failure.*

Issue No. 7

1. Do the various provisions of the Stipulation and Agreement, such as those relating to the prudence of various KCPL decisions concerning the construction of Iatan 2, place on ratepayers some of the risk that KCPL has the obligation to assume due to its assumption of the obligation to provide electric service as a public utility; if the Stipulation and Agreement does shift such risk, what would be the effect of the Commission approving such Stipulation And Agreement; and does the Commission have the authority to approve such a Stipulation and Agreement? See *Capital City Water Company v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. 1993); Sections 393.130 and 393.170 and *State ex rel. Missouri Power & Light Co. v. Public Serv. Comm'n*, 669 S.W.2d 941, 947 (Mo.App. 1984).

DOE's position: *It is DOE's position that; (1) The Stipulation and Agreement improperly shifts some of the risk KCPL is obligated to assume to its ratepayers. (2) If the Commission were to*

approve the Stipulation and Agreement this would constitute an approval of KCPL shifting some of its obligation to serve to its ratepayers. (3) the Commission does not have the authority to approve the Stipulation and Agreement in this case in its present posture. DOE does not have a position on whether such a Stipulation and Agreement could be approved in a case in which the jurisdiction of the Commission was properly invoked.

Issue No. 8

1. Are additional amortizations to maintain financial ratios provided for in Section III B.1. I, page 18 of the Stipulation and Agreement, supported in the record before the Commission and whether it is lawful for the Commission to allow an amortization expense that is unsupported by any cost to be amortized in the case?

DOE position: *It is DOE's position that it is unlawful for the Commission to allow an increase in KCPL revenue requirements based on an amortization expense that is unsupported or unrelated to the amortization of any cost, asset or liability. It is further DOE's position that the amortization expense referred to in Section III B. 1.(i) is by definition unsupported or unrelated to the amortization of any cost, asset or liability and therefore cannot be supported in the record before the Commission.*

2. Does Section 393.135 RSMo prohibit the additional amortizations to maintain financial ratios provided for in Section III B. 1 I, page 18 of the Stipulation and Agreement, which permits additional amortizations in the event of revenue short falls that would cause KCPL's bond rating to fall below investment grade?

DOE's position: *It is DOE's position that since the amortization expense proposed in Section III B 1 (i) of the Stipulation and Agreement is not supported or related to the amortization of any cost, asset or liability such an amortization expense is prohibited by 393.135 RSMo.*

3. Do the additional amortizations provided for in the Stipulation and Agreement cause present ratepayers to pay higher rates and future ratepayers to pay lower rates, causing an intergenerational subsidy which may result in undue discrimination?

DOE's position: *It is DOE's position that the additional amortization expense provided for in the Stipulation and Agreement if allowed by the Commission would cause present ratepayers to pay higher rates and future ratepayers to pay lower rates, causing an intergenerational subsidy which may result in undue discrimination.*

4. Is it proper or sound regulatory policy for the Commission to approve such additional amortizations, and on what basis?

DOE's position: *It is DOE's position that the provision of additional amortization expense as provided in the Stipulation and Agreement if allowed would be both unlawful and unsound regulatory policy.*

Issue No. 9

Does Section IIIB.1.o of the Stipulation and Agreement, respecting the Resource Plan modification process, place the Commission, the Commission Staff or the other KCPL non-signatory parties in the position of managing or being requested to manage KCPL; and if it does so, does it do so contrary to statute or case law? *See State ex rel. Kansas City Transit, Inc. v. Public Serv. Comm'n*, 406 S.W.2d 5, 11 (Mo. banc 1966); *Re Union Electric Co.*, Case No. EA-79-119, 24 Mo.P.S.C.(N.S.) 72 (1980).

DOE's position: *It is DOE's position that the modification process of Section III B 1 (o) unlawfully places the non-KCPL Signatory Parties, which includes the Commission Staff, and the Commission, if it approves the Stipulation and Agreement, in the position of being involved*

in the management of KCPL. It is further DOE's position that management of a public utility by other than the public utility's management is contrary to law.

Issue No. 10

Is it proper and lawful for the Commission to approve the Stipulation and Agreement which itself involves terms and conditions regarding the construction of utility generation and environmental enhancements in the future? *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177 (Mo.App. 1960); *Re Union Electric Co.*, Case No. EA-79-119, 24 Mo.P.S.C.(N.S.) 72 (1980).

DOEs position: *It is DOE's position that it is improper and unlawful for the Commission to approve the Stipulation and Agreement since among other things it involves terms and conditions regarding the future construction of utility generation and environmental enhancements.*

Issue No. 11

1. What effect would Commission approval of the Stipulation and Agreement have on any of the future rate cases scheduled to be filed by KCPL beginning in 2006 as contained in the Stipulation and Agreement?

DOE's position: *That it is concerned that if the Commission were to make a finding approving the Stipulation and Agreement that such an approval could be construed as a finding that the Stipulation and Agreement is in the Public Interest or a finding that it is just and reasonable and that such Finding may bind the Commission or may bind the Signatory Parties in the ratemaking treatment of issues necessary to arrive at the determination of just and reasonable rates and rates which are not unjustly discriminatory in future rate cases which finding would be unlawful.*

2. Can the Commission in this case make any findings which would bind it, customers of KCPL, the Staff, the Public Counsel or any other affected entity in ratemaking treatment of any issues necessary to arrive at the determination of just and reasonable rates in future rate cases?

See *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

DOE's position: *DOE's position is that it is concerned that if the Commission were to make a finding approving the Stipulation and Agreement finding also that it is in the public interest or finding that it is just and reasonable that it may bind itself or may bind the Signatory Parties in the ratemaking treatment of issues necessary to arrive at the determination of just and reasonable rates in future rate cases which would be unlawful.*

Issue No.12

In asking the Commission to approve the Stipulation and Agreement, are the Signatory Parties asking that:

- (i) the Commission agree that the construction of Iatan 2 and the environmental enhancements, i.e., these proposed additions to infrastructure, are prudent and in the public interest?

DOE's position: *It is DOE's position that if the Commission approves the Stipulation and Agreement that this approval may be construed as a finding that the future act of KCPL of building Iatan 2 using the coal fueling methodology planned and constructing*

the environmental enhancements is prudent. However, it is Doe's position that the Commission should not construe the request for approval of the Stipulation and Agreement as requesting a finding that the construction of Iatan2 and the environmental enhancements are prudent and in the public interest in the absence of an Application pursuant to the Commission's Rules and properly before the Commission clearly requesting such a finding

- (ii) the Commission find that the entire Stipulation and Agreement is just and reasonable?
DOE's position: *It is DOE's position that the Signatory Parties have not made the meaning of Commission "approval" of the Stipulation and Agreement clear .and that the Commission should not construe the request for approval of the Stipulation and Agreement as requesting a finding that the Stipulation and Agreement is just and reasonable in the absence of an Application properly before the Commission clearly requesting such a finding.*

- (iii) the Commission approve the Stipulation and Agreement among the Signatory Parties without approving any of the specific contents of the Stipulation and Agreement?
DOE's position: *It is DOE's position that the Signatory Parties have not made the meaning of Commission "approval" of the Stipulation and Agreement clear and that without a clarification of what an approval means the Commission should not approve the Stipulation and Agreement in any manner.*

Issue No. 13

The suspension period agreed to in Case No. EO-99-365 for the Commission's Chapter 22 resource planning rules (4 CSR 240-22.010 to 4 CSR 240.080) for each electrical corporation is scheduled to end. As a result, each electrical corporation will again be required by Chapter 22 to file consistent with the requirements of Chapter 22. KCPL is scheduled to file by July 5, 2006. KCPL may request that the Commission again suspend Chapter 22 as it applies to it or may request variances from specific provisions of Chapter 22. Should the Commission suspend hearings in this case and its consideration of the Stipulation and Agreement until after KCPL has complied with the required Commission Rule Chapter 22 filing to be made by KCPL on July 5, 2006?

DOE's position: *It is DOE's position that the Commission should both suspend the hearings in this case and its consideration of the Stipulation and Agreement until after KCPL has complied with the required Commission Rule Chapter 22 filing to be made by KCPL on July 5, 2006 and the Signatory Parties have filed a proper application in accordance with Commission Rules.*

Issue No. 14

If Senate Bill 179 (S.B. 179) becomes law, what is the effect, if any, of S.B. 179 on Case No. EO-2005-0369?

DOE position: *DOE does not have a position at this time on the effect on this case, if any, of Senate Bill 179 becoming law.*

Issue No. 15

Does KCPL need additional generation capacity by 2010 to serve native system load or is KCPL seeking to build Iatan 2 in order to make off system sales?

DOE's position: *It is DOE's position that the prefiled testimony of KCPL does not contain sufficient competent and substantial evidence upon which the Commission is able to make a reasonable decision whether KCPL needs additional generation by 2010. DOE has no information allowing it to take a position that KCPL might construct Iatan 2 to make off-system sales.*

Issue No. 16

What is the applicable definition of the standard "in the public interest" respecting Commission consideration of whether to grant approval of the Stipulation and Agreement; e.g., who is the "public" that is to be considered and what is the scope of the "public interest" to be considered by the Commission?

DOE's position: *It is DOE's position that the standard "in the public interest" does not need any further definition.*

Issue No. 17

If KCPL needs additional generation capacity by 2010, does KCPL have an appropriate alternative to its generation needs for 2010, and a reasonable period of time thereafter which does not require the construction of additional generation capacity? If KCPL needs additional generation capacity by 2010, and a reasonable period of time thereafter, is there an alternative to the technology that will be used for Iatan 2, such as integrated gasification combined cycle (IGCC), that would be prudent and in the public interest for KCPL to use?

DOE's position: *DOE has no position on Issue 17.*

Issue No. 18

If KCPL needs additional generation capacity by 2010, does KCPL have an appropriate alternative to its generation needs for 2010, and a reasonable period of time thereafter, that is less costly in direct costs than Iatan 2, and is KCPL required by statute or case law to choose the alternative that is the least costly in direct costs, e.g., is any alternative chosen by KCPL, other than the alternative that has the least cost in direct costs, imprudent and/or not in the public interest? Should KCPL's analysis consider potential new environmental regulations, such as CO₂ tax, and has KCPL appropriately considered in its analysis potential new environmental regulations?

DOE's position: *DOE has no position on Issue 18.*

Issue No. 19

If KCPL needs additional generation capacity by 2010, does KCPL have an appropriate alternative to its generation needs for 2010, and a reasonable period of time thereafter, that has less of an environmental effect than Iatan 2, and is KCPL required by statute or case law to choose the alternative that has the least environmental effect, e.g., is any alternative chosen by KCPL, other than the alternative that has the least environmental effect, imprudent and/or not in the public interest?

DOE's position: *DOE has no position on Issue 19.*

Issue No. 20

If KCPL needs additional generation capacity by 2010, does KCPL have an appropriate alternative to its generation needs for 2010, and a reasonable period of time thereafter, that has less of a human health effect than Iatan 2, and is KCPL required by statute or case law to choose the alternative that has the least human health effect, e.g., is any alternative chosen by KCPL, other than the alternative that has the least human health effect, imprudent and/or not in the public interest?

DOE's position: *DOE has no position on Issue 20.*

Issue No. 21

If an electrical corporation has a certificate of convenience and necessity to construct electric plant or the electric plant is to be constructed in the certificated service area of the electric utility and the electrical corporation has received all necessary environmental and health related permits to construct and operate the electric plant, does the Commission have jurisdiction to consider the environmental and health related issues raised by any party opposed to the construction of the electric plant?

DOE's position: *DOE has no position on Issue 21.*

Issue 22

Is KCPL's proposed experimental regulatory plan reasonable and consistent with KCPL's current marketing practices?

DOE's position: *DOE does not know KCPL's current marketing practices and therefore has no position on Issue 22.*

WHEREFORE, Intervenor USDOE respectfully submits this its Statement of Position in this case in compliance with the Commission's May 6, 2005 Order Establishing Procedural Schedule

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, e-mailed or e-filed via EFIS to all counsel of record this 2nd day of June 2005.

/s/ Paul W. Phillips

Paul W. Phillips

Dated June 2nd, 2005

Washington, D.C. 20585