

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 12th day of January, 2011.

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of Its Regulatory Plan )

**File No. ER-2010-0355**

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service )

**File No. ER-2010-0356**

**ORDER DENYING MOTIONS IN LIMINE, GRANTING, IN PART, MOTION TO COMPEL, AND GRANTING MOTION TO LATE-FILE EXHIBIT**

Issue Date: January 12, 2011

Effective Date: January 12, 2011

This order denies the motions in limine filed by the Staff of the Missouri Public Service Commission regarding testimony on the topics of demand-side management programs (DSM) and interim energy charges (IECs). The order also grants the portion of the Staff's motion to compel requiring production of documents to the special master for further determination of the attorney-client privilege claim. In addition, this order grants the motion of Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company's (GMO) to late-file an inadvertently omitted schedule to the Rebuttal Testimony of Chris B. Giles.

On November 24, 2010, in both File Nos. ER-2010-0355 and ER-2010-0356, Staff filed essentially the same motion in limine requesting that the Commission order that portions of the Direct Testimony of Tim M. Rush filed by KCPL and GMO and

pertaining to the topic of DSM Programs Cost Recovery will not be received as evidence herein. Staff made this argument because those portions of the testimony specifically stated that the company is not presenting any revisions to the current cost recovery mechanisms, yet it hopes that the Commission will change the mechanism in its ongoing rulemaking case<sup>1</sup> and that the change “will become a part of the outcome in this proceeding.”

As both sides argue, the Commission rules require that a company set out its entire case in chief in its direct testimony.<sup>2</sup> KCPL and GMO claim that they intended to put the other parties to this case on notice about this issue which may develop further as the case progresses. The Commission must have substantial and competent evidence before it in order to support it taking some action (which KCPL and GMO have not requested, but merely “hoped” would happen anyway) with regard to DSM programs cost recovery. The Commission sees no harm in including the statements in the prefiled testimony and will not forbid the offering of such at the hearing. The motions in limine are denied.

Staff also filed a motion in limine in File No. ER-2010-0355 on November 22, 2010, regarding prefiled direct testimony and schedules of Tim M. Rush on the topic of the IEC. Staff argues that those portions of Mr. Rush’s testimony are irrelevant and requests that the Commission preclude the company from offering testimony related to the IEC because Mr. Rush states in his testimony that the company is not requesting an IEC in this case (ER-2010-0355). Mr. Rush goes on to state in that same testimony that although the company is not requesting an IEC in this case, the IEC may “become the

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<sup>1</sup> File No. EX-2010-0368, *In the Matter of the Consideration and Implementation of Section 393.1075, the Missouri Energy Efficiency Investment Act.*

<sup>2</sup> 4 CSR 240-2.130(7).

preferred method” given the “expected increases in fuel and purchased power costs beyond the time rates take [e]ffect in this case.”<sup>3</sup>

As with the previous motion in limine, the rules require that the company make its entire case-in-chief in its direct testimony. The Commission cannot determine in advance of the offering of this testimony at hearing that it is irrelevant. Within the testimony itself, KCPL states that it may yet seek an IEC before this case is final; thus, it appears that the IEC is relevant and that testimony regarding it should not be excluded prior to the hearing. The motion in limine is denied.

Next, the Staff filed a motion to compel the production of documents by KCPL and GMO in both cases related to Staff’s Data Request 580, part 6, which requests, “[a] copy of any correspondence, including emails, between Mr. Giles and any Schiff Hardin employee from January 1, 2006 through the current date[.]” KCPL and GMO responded to the motion and objected to that portion of the Data Request because the information is attorney-client privileged and because it believes the Staff’s request is so late that it should be barred. KCPL and GMO state in their unsupported response that because of the nature of Mr. Giles’ work for the companies, any e-mails between him and the Schiff Hardin law firm consultant are necessarily attorney-client privileged material. Also, KCPL and GMO estimate that there are approximately 3,800 e-mails and that to require production at such a late date in the case process would “prejudice and disrupt the efforts of KCP&L and GMO to prepare for hearing.”

The Commission determines that the request was not made so late (December 20, 2010 originally) as to hinder the companies’ preparation for hearing. Therefore, the Commission will overrule the objection to the Data Request on that

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<sup>3</sup> Direct Testimony of Tim Rush, p. 16, Ins. 7-9.

ground. Answering the Data Request, however, may very well require the submission of attorney-client privileged documents. The Commission has previously appointed Senior Regulatory Law Judge Harold Stearley as a Special Master to review attorney-client privilege claims and thus the Commission will grant the motion to compel, in part, by requiring that the companies provide the documents to the Special Master for his determination of privilege as set out below.

Finally, on December 23, 2010, KCPL and GMO filed a motion to late-file Schedule CBG2010-5 of the Rebuttal Testimony of Chris B. Giles filed December 8, 2010 in File No. ER-2010-0355 and filed December 15, 2010 in File No. ER-2010-0356. KCPL and GMO state that the schedule was inadvertently omitted from those filings. No party responded to the motion and the time to do so has passed. Therefore, the Commission will grant the motion and the schedules shall be considered attached to the rebuttal testimony.

**THE COMMISSION ORDERS THAT:**

1. Staff's Motion in Limine Regarding Interim Energy Charge filed on November 22, 2010, in File No. ER-2010-0355 is denied.

2. Staff's Motions in Limine Regarding DSM Programs Cost Recovery filed on November 24, 2010, in File Nos. ER-2010-0355 and ER-2010-0356 are denied.

3. Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company's Motion to Late-File Exhibit, filed on December 23, 2010, is granted.

4. Staff's January 4, 2011 Motion to Compel Production of Documents is granted to the extent that the companies shall produce to the Special Master the e-mails responsive to Data Request 508 part 6, no later than January 20, 2011, for a

determination by Judge Stearley of whether the documents are, in fact, attorney-client privileged material.

5. The documents set out in ordered paragraph 4 shall be provided to the Special Master in an electronic format and the Special Master may conduct a sampling of the material to determine if it is, in fact, attorney-client privileged in its entirety as claimed.

6. This order shall become effective upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Clayton, Chm., Jarrett, Gunn, and  
Kenney, CC., concur;  
Davis, C., concurs, with separate  
concurring opinion to follow.

Dippell, Deputy Chief Regulatory Law Judge