

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 27<sup>th</sup> day  
of March, 2013.

In the Matter of Kansas City Power & Light     )  
Company's Practices Regarding Customer     )  
Opt-Out of Demand-Side Management     )  
Programs and Related Issues     )

File No. EO-2013-0359

**NOTICE OF CONTESTED CASE AND PROCEDURAL SCHEDULE**

Issue Date: March 27, 2013

Effective Date: March 27, 2013

The Missouri Public Service Commission is giving notice that this action is a contested case. The Commission's provisions for discovery are at 4 CSR 240-2.090. Answering writings are provided as set forth in this notice and order. Notice of hearing and conferences shall issue separately. This order also addresses the procedural posture of this action.

**I. Background**

Kansas City Power & Light ("KCPL") and Staff filed the writing<sup>1</sup> that initiated this action ("application"). The Commission granted intervention to the Missouri Department of Natural Resources ("MDNR"), Midwest Energy Users' Association ("MEUA"), and Midwest Energy Consumers Group ("MECG");<sup>2</sup> the Commission also granted intervention to Missouri Industrial Energy Consumers ("MIEC").<sup>3</sup> The Commission

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<sup>1</sup> *Joint Application to Establish a Proceeding to Review Kansas City Power & Light Company's Practices Regarding Customer Opt-Out of Demand-Side Management Programs and Associated Programs' Costs and Revenue Impacts*, filed on January 18. All dates are in 2013.

<sup>2</sup> On March 15.

<sup>3</sup> On March 20.

convened a pre-hearing conference to discuss the relief at issue, appropriate procedure, and scheduling.<sup>4</sup> The parties filed a proposed procedural schedule.<sup>5</sup>

*a. MEEIA*

The application relates to Section 393.1075, RSMo Supp. 2012, which constitutes the Missouri Energy Efficiency Investment Act (“MEEIA”) and Commission regulations made under MEEIA. MEEIA and the related regulations (together, “MEEIA provisions”) address demand-side management (“DSM”) programs under MEEIA and other authority. DSM program participation and payment are optional for certain customers.<sup>6</sup> The MEEIA provisions state that, upon notice from a customer to KCPL, KCPL shall not charge the customer for any DSM program under MEEIA or by any other authority.<sup>7</sup> The MEEIA regulation states that the notice is effective for the following calendar year and each successive calendar year.<sup>8</sup> The opt-out is the subject of the application.

*b. The Application and Other Filings*

In the application, KCPL joins Staff in asking the Commission:

. . . to establish **a contested case** [<sup>9</sup>]

and:

. . . to open **a contested case** [<sup>10</sup>]

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<sup>4</sup> On March 20.

<sup>5</sup> On March 21.

<sup>6</sup> Sections 393.1075.7, RSMo Supp. 2012.

<sup>7</sup> Sections 393.1075.7, .8, .9, and .10, RSMo Supp. 2012, and 4 CSR 240-20.094(6)(F)

<sup>8</sup> 4 CSR 240-20.094(6)(F).

<sup>9</sup> Application, page 1, paragraph 1. Emphasis added.

<sup>10</sup> Application, page 1, paragraph 3. Emphasis added.

But KCPL refers to this action as an investigatory proceeding.<sup>11</sup> Investigation and discussion are certainly within the Commission's authority and the Commission has often conducted roundtables and workshops for those purposes. A contested case is not an investigatory proceeding.

A contested case is an adjudicatory proceeding.<sup>12</sup>

. . . a proceeding before an agency in which **legal rights, duties or privileges** of specific parties **are** required by law to be **determined** after hearing [. <sup>13</sup>]

The statutes provide the objective of a contested case as follows:

In any contested case:

(1) The contested case shall be commenced by the filing of a writing by which the party or agency instituting the proceeding **seeks** such **action** as by law can be taken by the agency only after opportunity for hearing, **or** seeks a hearing for the purpose of obtaining a **decision** reviewable upon the record [. <sup>14</sup>]

But the application seeks only:

. . . to **review KCPL's practices** regarding customer opt-out of demand-side management programs and associated programs' costs and revenue impacts. [<sup>15</sup>]

A review of practices does not require a contested case hearing. The application does not describe any action requiring a contested case hearing, any determination of legal rights, duties, or privileges, or any other decision. For example, the application does not

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<sup>11</sup> *Kansas City Power & Light Company's Response to Order Directing Filing*, filed on February 14, page 1, paragraph 2.

<sup>12</sup> *Bruemmer v. Missouri Dept. of Labor Relations*, 997 S.W.2d 112, 116-17 (Mo. App., W.D. 1999).

<sup>13</sup> Section 536.010(4), RSMo Supp. 2012. Emphasis added.

<sup>14</sup> Section 536.063, RSMo Supp. 2012. Emphasis added.

<sup>15</sup> Application, page 1, paragraph 1. Emphasis added.

allege that KCPL has violated any statute, tariff, or Commission regulation or order—an allegation that the statutes require the Commission to determine by complaint.

And the Commission has no authority to issue a merely advisory or declaratory decision.

Like other administrative agencies, the Commission is not authorized to issue advisory opinions. The Commission, the circuit court, and this court should not render advisory opinions. "The function of each is to resolve disputes properly presented by **real parties in interest** with **existing adversary positions**."<sup>16</sup>

Therefore, the Commission ordered the parties to clarify the action or decision, or determination of legal rights, duties, or privileges, is at issue that requires a contested case hearing. All parties responding endorsed the application's request for a contested case and agreed that no mere advisory opinion was at issue. They discussed the relief sought as follows.<sup>17</sup>

*c. No Complaint*

Staff and MEUA allege that KCPL has denied opt-out notices. MEUA states that KCPL denied opt-out notices to certain of its members, which suggests that MEUA has real parties in interest with existing adversary positions. But MEUA is expressly trying to avoid that procedure:

We have had members and participants make timely filings of opt-out requests, but have had spotty response from the utility insofar as acknowledgment of either the opt-out or the process of dispute resolution. Some customers, whose internal billing records indicate qualification for the exemption, have been rejected by the utility without opportunity either for further discussion or challenge. They

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<sup>16</sup> *Laclede Gas v. Missouri Public Serv. Comm'n*, Case No. WD74852 (Mo. App., W.D., Dec 11, 2012), slip op. at 17, mandate issued Mar. 20. Citation omitted. Emphasis added.

<sup>17</sup> All responses were filed on February 14.

are then left with the more expensive and complicated process of mounting a "complaint." [18]

Staff expressly alleges that KCPL has violated MEEIA, and cites a complaint statute.

Section 393.270 requires the Commission to conduct a hearing to fix the lawful rate KCPL can charge customers, including opt-out customers.

\* \* \*

KCPL's denial of opt-out to the customers listed in Attachment A is in violation of both the MEEIA and the Commission's MEEIA rules, and Staff requests the Commission [to] issue an order directing KCPL to comply with such statute and rules, and if KCPL should fail to do so, authorize the General Counsel to seek injunctive relief and penalties against KCPL in circuit court. [19]

But Staff has not filed a complaint as set forth in the Commission's regulation 4 CSR 240-2.070. That regulation is not optional. Therefore, the Commission will not construe the filings of Staff and MEUA as a complaint.

#### *d. Other Relief*

By contrast, KCPL, MIEC, and MCEG have specified certain remedies. KCPL states:

[KCPL] is requesting in this proceeding approval of a mechanism (e.g. AAO, DSM tracker, or similar accounting mechanism) that would give the Company the opportunity to quantify and recover in a future rate proceeding the foregone revenues associated with customers that elect to opt-out of the DSM programs. [20]

MCEG and MIEC state:

MCEG and MIEC will be requesting that the Commission approve corporation-specific tariff provisions that ensure that

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<sup>18</sup> *Requested Comments*, filed on February 14, Page 2, paragraph 4.

<sup>19</sup> *Staff's Response to Order Directing Filing*, filed on February 14.

<sup>20</sup> *Kansas City Power & Light Company's Response to Order Directing Filing*, filed on February 14, page 7, paragraph 17.

KCPL can achieve the goals of this section – more specifically Section 393.1075.7. [<sup>21</sup>]

Those matters constitute a determination of legal rights, duties, or privileges, or other decision or action that the Commission can take only after a contested case hearing. Therefore, the Commission will conduct this action as a contested case.

*e. Writings Required*

Nevertheless, those parties' filings are also incomplete because they do not support the requested relief as required by statute:

In any contested case:

\* \* \*

Any writing filed whereby affirmative relief is sought shall state what relief is sought or proposed and the reason for granting it, and shall not consist merely of statements or charges phrased in the language of a statute or rule [,<sup>22</sup>]

and by the Commission's regulations:

Pleading means any written document, including any exhibits or other attachments, filed with the commission that seeks a specific action or remedy, except that briefs and tariffs are not pleadings under this definition. [<sup>23</sup>]

\* \* \*

(4) Each pleading shall include a clear and concise statement of the relief requested, a specific reference to the statutory provision or other authority under which relief is requested, and a concise statement of the facts entitling the party to relief.

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<sup>21</sup> *Response to Order Directing Filing*, filed on February 14, Page 2, paragraph 4.

<sup>22</sup> Section 536.063(2), RSMo Supp. 2012 (emphasis added).

<sup>23</sup> 4 CSR 240-2.010(12).

(12) Pleadings and briefs which are not in substantial compliance with this rule, applicable statutes, or commission orders may not be accepted for filing. . . . The secretary of the commission may return these pleadings or briefs with a concise explanation of the deficiencies and the reasons for not accepting them for filing. Tendered filings which have been rejected may not be entered on the commission's docket. The mere fact of filing shall not constitute a waiver of any noncompliance with these rules, and the commission may require amendment of a pleading or entertain appropriate motions in connection with the pleading [. <sup>24</sup>]

Those requirements are currently unmet. The parties' proposal to file issues lists and position statements does not promise compliance with the statutes and regulations. The use of issues lists and position statements filed late in general rate actions is a matter of necessity, and tariffs are excluded from the definition of pleadings, but for the relief described in this action, issues lists and position statements are inefficient. <sup>25</sup>

If a party elects to file a complaint, an answer will be required, <sup>26</sup> and the Commission may require a responsive pleading as to other relief requested.

. . . Answering . . . and amendatory writings and motions may be filed in any case and shall be filed where required by rule of the agency, except that no answering instrument shall be required unless the notice of institution of the case states such requirement [. <sup>27</sup>]

The Commission will order the filing of those writings as part of the following procedural schedule.

### III. Procedural Schedule and Terms

The Commission will order the following.

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<sup>24</sup> 4 CSR 240-2.080.

<sup>25</sup> 4 CSR 240-2.010(12).

<sup>26</sup> 4 CSR 240-2.070(8) and (9).

<sup>27</sup> Section 536.063(1), RSMo Supp. 2012 (emphasis added).

Date	Event
March 21	Data request time shall be 10 calendar days to respond/5 calendar days to object
May 13	Conference call among the parties
May 15	Each party seeking relief shall file an initial pleading
	Joint stipulation of non-disputed material facts
May 23	All parties file direct testimony
May 24	Data request time changes to 5 calendar days to respond/3 calendar days to object
June 10	All parties file rebuttal testimony
June 13	Settlement conference
June 14	Responsive pleadings due
	Update to joint stipulation of non-disputed material facts to add any additional facts
June 20-21	Evidentiary Hearing
July 1	Initial Briefs
July 15	Optional Reply Briefs

The following terms apply.

*a. Pleadings*

An initial pleading shall state the relief sought, legal authority for that relief, and facts relevant under that authority. A responsive pleading shall admit or deny, or state that the filing party is without sufficient information to admit or deny, the allegations in the initial pleading. A responsive pleading shall also allege the facts supporting any affirmative defense. Any pleading may be filed jointly or separately.

*b. Other Matters*

Any motion challenging discovery or a response (including an objection) to discovery shall be filed within five calendar days of service of the challenged matter or shall be waived. The Commission will not rule on any motion that it deems filed unreasonably late. The conference call and settlement conference shall convene without the presiding officer.

**THE COMMISSION ORDERS THAT:**

1. The procedural schedule and terms set forth in the body of this order are adopted.



2. This order is effective immediately upon issuance.

**BY THE COMMISSION**

A handwritten signature in cursive script, reading "Shelley Brueggemann".

Shelley Brueggemann  
Acting Secretary

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

Jordan, Senior Regulatory Law Judge