BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company	))	Case No. EO-2005-0329

STAFF PREHEARING BRIEF

Comes now Staff of the Missouri Public Service Commission (Staff) in response to the Commission's June 6, 2005 Order Requiring Prehearing Briefs (Order) directing that no later than June 15, 2005 the parties shall file their Prehearing Briefs. The Commission's June 6, 2005 Order stated as follows:

> . . . To try to simplify the hearing, the Commission will order parties to submit prehearing briefs no later than June 15. In those briefs, each party shall state what it believes each of its witnesses will prove at hearing, and what it believes it will ultimately prove at the end of its case.

The Staff has not planned to file testimony, but if there are questions for the Staff regarding the Stipulation And Agreement filed on March 28, 2005, the following Staff members will be offered for the following areas:

Robert E. Schallenberg:

Process and policy
Amortizations (including $17 million amortization and additional amortizations)
Interim Energy Charge (IEC)
Financing Plan
Aquila and Empire as KCPL Partners in Iatan 2 (also Participation of Missouri Joint Municipal Electric Utility Commission in Iatan 2)

Warren Wood:

Questions from Local Public Hearings
Need for Coal-fired Baseload Generation
Wind Energy Provisions

Lena Mantle:

Demand Response, Efficiency and Affordability Programs
Resource Plan Monitoring

David Elliott:

Environmental retrofitting
SO_2 emission allowances

Henry Warren:

Load Forecasting

Undersigned counsel, of course, will endeavor to answer any questions regarding the various outstanding legal issues that have been raised by the parties or that the Commissioners and/or Regulatory Law Judge may raise. Counsel for United States Department of Energy (USDOE) has recently informed undersigned counsel that USDOE may call/subpoena one or more members of the Staff as a witness(es) during the evidentiary hearing scheduled for June 23-24, 2005.

At the May 24, 2005, public hearing held in Downtown Kansas City, Missouri, Mr. Byron Combs, among other individuals testified. Mr. Combs stated that KCPL sold 528 MWhs to other utilities between 3:00 p.m. and 4:00 p.m. on August 21, 2003 and on that date KCPL set a new peak demand of 3,610 MWs. Mr. Combs went on to state that KCPL thus has a 33% capacity above its peak usage since it only needed 3,082 MWs (3,610 MWs less 528 MWs) in order to meet the needs of its own customers. Commissioner Steve Gaw indicated at the Kansas City local public hearing that he expected a response at the evidentiary hearing to the information provided by Mr. Combs. The Staff has reviewed the data provided by Mr. Combs at the Kansas City local public hearing which was marked as Exhibit No. 3. Mr. Warren Wood at the evidentiary hearing scheduled for June 23-24 will testify that Mr. Combs did not have all of the necessary information to perform the analysis that Mr. Combs sought to perform. Mr. Wood will testify he does not agree with the sales amount provided by Mr. Combs and Mr. Wood

further will note that in fact, in order to serve its native load KCPL, was a net purchaser of power during the peak period identified by Mr. Combs. Mr. Wood will relate that as a general practice KCPL will purchase energy from other utilities and will sell KCPL generated energy to other utilities if KCPL can purchase energy at a cost less than the cost at which KCPL can generate the electricity itself and if there is a buyer available for KCPL energy at the price set by KCPL. Mr. Wood will further state that when the Staff determines KCPL's revenue requirement in the context of determining whether KCPL's rates should be increased, decreased or remain as is, revenues received by KCPL in sales of KCPL energy to other utilities are included in the Staff's determination. Thus, economic sales and purchases by KCPL lower KCPL's revenue requirement collected from its retail customers.

The Staff believes that based on competent and substantial evidence presented in prefiled testimony and adduced at the June 23-24, 2005 evidentiary hearing, the Stipulation And Agreement filed on March 28, 2005 containing the KCPL Regulatory Plan is lawful and in the public interest. The Stipulation And agreement provides a prudent plan for KCPL to economically meet its near term capacity needs and environmental requirements with a proven baseload generating station technology and at the same time provide an aggressive but reasonable plan for implementing affordability, efficiency, demand response and wind power programs.

The Commission in its June 6, 2005 Order did not ask for legal argument, so the Staff will not repeat the legal argument that is contained in the Staff's Suggestions In Support of the Stipulation And Agreement filed on May 10, 2005 or in the Staff's Statement Of Positions filed on June 2, 2005. For example, the Staff addressed in its Suggestions In Support the case law on Section 393.135 RSMo 2000 (Proposition 1) at pages 12-19 and case law relevant to the issue of

preapproval at pages 27-28. The Staff has continued to review these issues in an attempt to be as thorough as possible in its presentation of these matters to the Commission. Also, subsequent discussions with various parties in this case have caused the Staff to further consider the arguments that it has made to date. The Staff's additional review and consideration of the issues has not caused the Staff to believe that there is any need for the Staff to alter anything it has presented to the Commission. Nonetheless, the Commission might view the additional Staff research and analysis of interest or benefit, and thus the Staff will present it at this stage of the proceedings.

Expert Witness Testimony

In the recent Missouri Gas Energy rate increase case, Case No. GR-2005-0209, an issue arose respecting expert witness testimony. It has occurred to the Staff that this issue might be in part what the Commission was intending that the parties address in their prehearing briefs and the Staff does so herein. The Staff has assumed that the Commission will afford some opportunity for post-hearing briefs and thus, as previously noted, the Staff has not attempted to restate herein the legal discussion contained in its Suggestions In Support and Statement Of Positions.

The expert witness testimony issue that arose in the Missouri Gas Energy rate increase case, Case No. GR-2004-0209, may be of particular relevance in this case as it relates to the testimony of the Concerned Citizens of Platte County (Concerned Citizens)/Sierra Club witnesses. The Commission stated in its June 8, 2004 Order Regarding MGE's Motion To Exclude Certain Testimony And Opinions Of David Murray, in part as follows:

> All of the parties agree that the standard for determining whether expert testimony should be admitted into evidence is established by statute at Section 490.065, RSMo (2000). The first subsection of the controlling statute, Section 490.065.1, provides that:

> In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

. . . the statute does not require that a witness possess any specific education level or experience to be qualified to offer an expert opinion. There is no magic level of education or training at which a witness immediately qualifies as an expert. Indeed, Missouri's courts have taken the position that "the extent of an expert's experience or training in a particular field goes to the weight of the testimony and does not render the testimony incompetent." [2]

In addition to the general requirements of its first subsection, the controlling statute, at Section 490.065.3 provides that "[t]he facts or data in a particular case upon which an expert bases an opinion or inference … must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." This statutory provision creates what is sometimes known as the "gatekeeper requirement."

The existence of the "gatekeeper requirement" was recognized by the Missouri Supreme Court in the McDonagh case when it found that "section 490.065.3 also imposes an independent duty on the court to determine whether the facts and data relied on are otherwise reasonably reliable." [3] However, the gate that the Commission is charged to keep is not unreasonably difficult for an expert to open. Missouri's Supreme Court has stated that "[a]ny weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility. In general, the expert's opinion will be admissible, unless the expert's information is so slight as to render the opinion fundamentally unsupported." [4] Furthermore, Missouri's courts have generally held that "[i]f the witness has some qualifications, the testimony may be permitted. The extent of an expert's training or experience goes to the weight of his testimony and does not render the testimony incompetent." [5] In addition, the determination of whether a witness is qualified to give an expert opinion rests largely in the discretion of the trial court and its rulings on that question will not be disturbed on appeal absent a clear showing of abuse. [6]

. . . .

. . . the Missouri Supreme Court's decision in McDonagh does not require a different result. It certainly does not require the Commission to make a determination about a challenged witness' credibility before hearing all the evidence. A close reading of that case reveals that the Supreme Court indicates that the Administrative Hearing Commission appropriately heard all the evidence in the case before ruling on the admissibility of the expert's testimony. [8]

> Indeed, the Supreme Court never says that the testimony of McDonagh experts must be struck. Instead, the Court simply held that the Administrative Hearing Commission did not apply the correct standard when evaluating that testimony. . .
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> [2] Hord v. Morgan, 769 S.W.2d 443, 448 (Mo App. E.D. 1989) In this child custody case a counselor who was a student at the time she examined the child was allowed to testify as an expert regarding her conclusions.
> [3] State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 157 (Mo 2003).
> [4] Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226, 246 (Mo 2001).
> [5] Whitnell v. State, 129 S.W.3d 409, 413 (Mo. App. E.D. 2004).
> [6] Id.
> . . . .
> [8] McDonagh, at 151.

Concerned Citizens/Sierra Club have identified as their witnesses Messrs. Troy Helming and Ned Ford for the hearing on June 23-24, 2005. Mr. Helming already testified at the local public hearing in Downtown Kansas City, Missouri on May 24, 2005 where he identified himself as a wind energy expert. Mr. Ford is Energy Chair of the Ohio Chapter of the Sierra Club. The Staff would note in advance Section 536.070(11) RSMo 2000 regarding any purported studies that Concerned Citizens/Sierra Club witnesses would rely upon or would seek that the Commission rely upon as competent and substantial evidence upon the whole record.[1] Section 536.070(11) provides that the results of studies, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such study, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence

[1] The Missouri Constitution, Article V, Section 18 requires as follows: **All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.** Unless otherwise provided by law, administrative decisions, findings, rules and orders subject to review under this section or which are otherwise subject to direct judicial review, shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review proceeding.

adduced that the witness making or under whose supervision such study, compilation of figures or survey was made was basically qualified to make it.

The Missouri Supreme Court in *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949) (hereinafter referred to as "*Rice*") clearly stated that the Commission determines the weight of evidence presented to it and may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it:

> Rice objects to the findings of the commission because they ignore his evidence. **He contends since there was no other evidence adduced which contradicted his figures and calculations, or even disputed them, that the commission is bound to accept them as true. Accordingly he contends his evidence is the only substantial evidence in the record. In asserting his contention he overlooks that on cross examination his evidence was discredited to such an extent that the commission held it not entitled to credence. And certainly if evidence is not credible, it does not meet the required test of being substantial. An appellate court as a matter of law passes upon the matter of substance and not of credibility.** In other words an appellate court may say that particular evidence is substantial if the triers of the facts believed it to be true. Keller v. Butcher's Supply Co., Mo.Sup., 229 S.W. 173.
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> Whenever an investigation is conducted by the commission it is required under the statute to make a report in writing which shall state its conclusions and its decision or order. Sec. 5688, R.S.1939, Mo.R.S.A. Thus it must find and determine the facts. And in doing so **the commission determines the weight of evidence presented to it.** (Cf. Ohio Utilities Co. v. Public Utilities Comm., 108 Ohio St. 143, 140 N.E. 497.) **It may disregard evidence which in its judgment is [359 Mo. 117] not credible, even though there is no countervailing evidence to dispute or contradict it. The rule is established in this State that the triers of fact under their duty to weigh the evidence may disbelieve evidence although it is uncontradicted and unimpeached.** Wiener v. Mutual Life Ins. Co., 352 Mo. 673, 179 S.W.2d 39; Woehler v. City of St. Louis, 342 Mo. 237, 114 S.W.2d 985.

(Emphasis added). In *Koplar v. State Tax Comm'n*, 321 S.W.2d 686, 694 (Mo. 1959), the Missouri Supreme Court, citing among other things *Rice*, stated that "[n]o one questions the rule that an administrative agency in determining a question of fact may pass upon the credibility of

witnesses and where a claimant has the burden of proof may decide a claim solely upon a finding of lack of credibility of uncontradicted and unimpeached testimony offered in support of the claim. [Citations omitted]."

In a more recent case respecting the Commission, *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985), the Western District Court of Appeals stated that in evaluating expert testimony the Commission may adopt or reject any or all of any witness' testimony:

> Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony. *In re Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 800, 88 S.Ct. at 1377. Evaluation of expert testimony was for the Commission. *Southwestern Bell Telephone Co.*, *supra*, 593 S.W.2d at 445-46. . . .

See State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n, 37 S.W.3d 287, 294 (Mo.App. 2000). The Court stated in the 1985 *Associated Natural Gas* decision that "[t]he Commission as the trier of fact was free to choose between conflicting testimony. *General Telephone and Telegraph Company*, *supra*, 390 A.2d at 36." 706 S.W.2d at 882.

Evidentiary determinations by the Commission are favored by a strong presumption of validity, which extends to determinations based on expert opinion. *State ex rel. Missouri Pub. Serv. Co. v. Pierce*, 604 S.W.2d 623, 625 (Mo.App. 1980). The opinion of a qualified expert may amount to competent and substantial evidence. 37 S.W.3d at 294; 537 S.W.2d at 663 (citing 2 Am.Jur.2d., Adm.Law s 395, p. 201 (1962)). It is up to the Commission to choose between the conflicting evidence of expert witnesses, if the testimony was properly presented to the Commission. The Court will not second guess that determination. *State ex rel. Midwest Gas Users' Ass'n v. Public Serv. Comm'n*, 976 S.W.2d 485, 495 (Mo.App. 1998). The courts are not authorized to weigh the evidence heard by the Commission, the findings of the Commission are

prima facie correct and the challenger carries the burden of making a convincing showing that those findings are not reasonable and lawful. *State ex rel. Inman Freight Sys., Inc. v. Public Service Comm'n*, 600 S.W.2d 650, 654 (Mo.App. 1980); *See State ex rel. St. Louis-San Francisco Ry. Co. v. Public Serv. Comm'n*, 439 S.W.2d 556, 559 (Mo.App. 1969).

Has Jurisdiction Of The Commission Been Invoked?

The Staff would note that Concerned Citizens/Sierra Club announced their position at an early stage. In fact, counsel for Concerned Citizens/Sierra Club stated the unequivocal Concerned Citizens/Sierra Club position at a September 29, 2004, on the record conference in Case No. EW-2004-0596. Counsel for Concerned Citizens/Sierra Club, Elsa Steward, stated that Concerned Citizens/Sierra Club are "opposed to the construction and operation of this plant [Iatan 2], and we feel that way for several reasons, primarily, having to do with public health and environment issues." (Transcript, p. 32). She further stated that Concerned Citizens/Sierra Club believes that a coal-fired power plant is "imprudent at this time when pollution controls are not sufficient to be even considering a coal-fired plant, when we feel that if maximum efficiencies were promoted by the company and were achieved, that it would reduce or eliminate the need for further power in the area." (*Id.* at 33). She clearly stated on September 29, 2004 that Concerned Citizens/Sierra Club "would like to go on the record as being opposed to this plant" and stated that another reason for Concerned Citizens/Sierra Club's opposition was "[w]e've also heard that the company may be, at least in part, in a merchant capacity with this new plant . . ." (*Id.* at 33-34).

The Staff addressed in its Statement Of Positions, filed June 2, 2005, whether the jurisdiction of the Commission has been invoked in Case No. EO-2005-0329. The Staff would further note, as KCPL did in its Statement Of Positions, filed on June 2, 2005, that the

Stipulation And Agreement filed on March 28, 2005 requested in the "wherefore" clause on page 57 that the Commission approve the Stipulation And Agreement to be effective May 15, 2005, if possible. The Staff would further note that the very next day, March 29, 2005, KCPL filed in Case No. EO-2005-0329 a Motion For Protective Order, pursuant to 4 CSR 240-2.085. On April 5, 2005, the Commission issued an Order Adding Parties, Directing Notice, Setting Intervention Deadline And Establishing Protective Order (Order Adding Parties). In its April 5, 2005 Order Adding Parties, the Commission directed that the Information Office of the Commission provide notice of the March 28, 2005 filing of KCPL to, among other entities, the newspapers, as listed in the newspaper directory of the current *Official Manual of the State of Missouri*, that serve counties within the service area of KCPL.

Regarding the matter of the Commission's jurisdiction respecting the March 28, 2005 Stipulation And Agreement, the Staff would note that although Chapter 536 provides for the resolution of contested cases by stipulation:

> **Section 536.060 RSMo 2000**: **Contested cases** and other matters involving licensees and licensing agencies described in section 621.045, RSMo, may be informally resolved by consent agreement or agreed settlement or **may be resolved by stipulation**, consent order, or default, **or by agreed settlement where such settlement is permitted by law**. **Nothing contained in sections 536.060 to 536.095 shall be construed** (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) **to prevent stipulations or agreements among the parties (including, in a proper case, the agency)**.

the Commission has a rule on nonunanimous stipulation and agreements:

> 4 CSR 240-2.115(2)(D): A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

and there is the Western District Court of Appeals decision on nonunanimous stipulation and agreements: *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo.App. 1982).

"In The Public Interest" Standard And The Commission's Health And Safety Jurisdiction

In the Staff's Statement Of Positions filed on June 2, 2005, counsel for the Staff noted the language of Section 393.140(5) regarding the Commission's power relating to health and safety matters. Concerning the scope of the power of the Commission in respect to utility operations, Staff counsel also should have noted that Section 393.140(2) refers to the "public interest" and provides in part that "[t]he **commission shall . . . . have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . electricity . . . system** and those employed in the manufacture and distribution thereof, **and have power to order reasonable improvements and extensions of** the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of . . . **electrical corporations** . . ." (Emphasis added).

In *State ex rel. Utility Council of Missouri, Inc. v. Public Serv. Comm'n*, 562 S.W.2d 688, 698 (Mo.App. 1978)(*UCCM I* (Commission Case No. 18,117, Report And Order, March 14, 1975)), UCCM sought judicial review of the Commission's granting a certificate of convenience and necessity, pursuant to Section 393.170(3) RSMo, to construct and operate in Callaway County a nuclear-powered steam electric generating plant. The Missouri Court of Appeals, St. Louis District, stated that since the generating facility was to be constructed beyond the regular service territory of UE it was necessary for UE to apply to the Commission for a certificate of convenience and necessity, under Section 393.170. The Court held that in order for the Commission "[t]o arrive at its determination, [whether to grant a certificate of convenience and necessity] the Commission must find that the nuclear facility is adequate to meet the needs of the

public and is economical when compared with alternative sources of energy." 562 S.W.2d at 698 n.1. The Court further stated that the Commission was preempted by the federal government regarding safety issues and "[t]he Commission's considerations pertain to economic feasibility, need for increased power and financing." *Id.* at 698. Citing *Northern States Power Co. v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), the Court held that safety matters relating to nuclear power were preempted by the federal government:

> . . . It is obvious that the considerations of the State of Missouri do not affect the control of how the nuclear facility will be constructed and physically maintained. The considerations of the Commission do not attempt to protect the citizens of Missouri against radiation hazards. The issue of safety rests in the exclusive domain of the federal government. We find no error in the refusal of the circuit court to remand for further evidence regarding the economic impact of nuclear accidents on the overall cost of the nuclear power plant.

Id. at 698-99.

In *Re Union Electric Co.*, Case No. EO-2002-351, Report And Order (2003)(In the Matter of the Application of Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage, and Pulaski Counties, Missouri), AmerenUE offered as one of its witnesses Dr. Walter Gajda, an engineer and not a medical doctor. Respecting Dr. Gajda and the Concerned Citizens' witnesses, the Commission in its Report And Order stated that "though he is well-read on the subject of the health effects to living organisms of EMFs [electromagnetic fields], and has conducted research with biologists, the Commission did not consider him to be an expert with regard to the effects of EMFs on human or animal health." (Report And Order, p. 14). Nor did the Commission consider any of the Concerned Citizens experts in that field. The Commission held that "[t]here was . . . no substantial evidence from any party to lead the Commission to find that human or

animal health is affected by the EMFs produced by a 345-kv transmission line built to the standards as proposed in the application." (*Id.*).

The Commission further related that Dr. Gajda admitted that some transmission lines may produce an audible noise, general experience suggests that some audible noise may be disturbing to inhabitants near the source of the noise and the fears of the Concerned Citizens are genuine and cause a detriment to those specific individuals. Nonetheless, after carefully considering these matters, the Commission held that it "was presented with no reliable evidence as to any harmful effects to a person's physical health produced by such noise" and "without any evidence of the quantity or severity of the noise, the Commission cannot find that noise from the lines will be a detriment that carries much weight" in the Commission's decision. (Report And Order, pp. 14-15).

Effect Of The Commission Approving The Stipulation And Agreement

In *Re Office of Public Counsel v. Missouri Gas Energy*, Case No. GC-97-497, 6 Mo.PSC.3d 464 (1997), Public Counsel filed a complaint against Missouri Gas Energy, division of Southern Union Company. MGE had unlawfully billed certain customers for certain months of gas service in 1996-97. Public Counsel, the Staff and MGE entered into a stipulation and agreement purporting to settle all issues in Public Counsel's complaint case. The Commission took issue with that part of the stipulation and agreement that precluded the Commission's involvement in any complaints as well as the investigation of other service-related and rate-related matters against MGE from MGE's purchase of the Kansas City, Missouri gas utility operations of Western Resources Company in 1993 to August 1, 1997 and the donation of $450,000 to an unspecified charitable organization. The Commission rejected the stipulation and agreement as requiring that it abrogate its statutory responsibilities. The Commission noted in its

Order Rejecting Stipulation and Agreement that "[t]he standard for Commission approval of a stipulation and agreement is whether the agreement is just, reasonable, and in the public interest."

Commission Practice Regarding Approving The Construction Of Generating Units

It appears that the belief that the Commission historically has not authorized the construction of generating units in an electrical corporations certificated service territory is not necessarily accurate. In Case No. EA-79-119, Union Electric Company (UE) applied for Commission permission and authorization to construct, operate and maintain two 50 MW combustion turbine generators (CTGs), one each at UE's Meramec and Sioux plants. UE stated, in part, in an Answer filed on May 25, 1979 in response to the Staff's May 4, 1979 Motion To Dismiss UE's application, that UE had in the past received Commission approval to construct generating facilities in its certificated service territory:

> 3. The General Counsel's conclusion that the Company does not have to seek Commission approval prior to constructing a generating facility within its certificated area is a novel idea that directly contradicts the Commission's past actions concerning the Company.
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> The Company has always applied to the Commission for a certificate of convenience and necessity prior to commencing construction of generating units within its certificated area. These generating units, together with their case numbers and certificate years, are:

Plant	Case No.	Year of Certificate
Meramec	11,925	1950
Portage des Sioux	15,151	1963
Labadie	16,108	1966
Rush Island	17,139	1971
Howard Bend Combustion Turbine	17,509	1972

Meramec Combustion Turbine	17,805	1973

Furthermore, the Commission has always exercised its jurisdiction over the Company's applications for these certificates. The General Counsel's Motion to Dismiss in this proceeding is the first instance of the Commission questioning its jurisdiction over the Company's applications.

In *Re Union Electric Co.*, Case No. 17,139, Report And Order, 15 Mo.P.S.C.(N.S.) 505 (1971), UE filed an application for Commission permission and authority to construct, operate and maintain a multiunit steam electric generating plant within its certificated service area in Jefferson County, Missouri at Rush Island. The Commission held that the proposed construction, operation and maintenance of the multiunit steam electric generating plant was "in the public interest" and the authority requested was granted. *Id.* at 508. The Commission also stated that the granting of the authority requested "should in no way be construed to be a waiver of compliance, on the part of the Applicant, with any environmental control standards now existing or proposed by any environmental protection agency in the States of Illinois or Missouri or of the Federal Government." *Id.*

In *Re Kansas City Power & Light Co., St. Joseph Light & Power Co. and The Empire District Electric Co.*, Case No. EM-78-277, 22 Mo.P.S.C.(N.S.) 249 (1978) will be cited because (1) it granted to Empire a certificate of public convenience and necessity authorizing Empire to construct, own, operate and maintain a second 90 MW CTG at its Empire Energy Center near LaRussell, Missouri in Jasper County (the initial CTG was certificated in Case No. EA-77-38 even though Empire was certificated in Case No. 9,420 to provide electric service in all incorporated areas of Jasper County, including the instant site),[2] (2) it approved a further

[2] The Commission stated in its Report And Order as follows: "Inasmuch as Empire has submitted voluntarily to this Commission its application for authority to construct these facilities, notwithstanding its existing certificate of convenience and necessity under the Report and Order in Case No. 9,420, we choose to exercise our authority and

adjustment of the existing ownership interests of KCPL and SJLP in the Iatan site, common facilities and Iatan 1 generating unit and (3) approved the sale by KCPL to Empire of a portion of KCPL's readjusted ownership interests in the Iatan site, common facilities and Iatan 1 unit and granting to Empire a certificate of public convenience and necessity respecting same.

Scope Of Commission Jurisdiction

USDOE in its Statement Of Positions questions the lawfulness of the Stipulation And Agreement as, among other things, in violation of Section 393.135 and placing the Commission in the position of managing KCPL beyond the bounds of the Commission's jurisdiction. The Staff in its Suggestions In Support and Statement Of Positions has attempted to indicate to the Commission prior judicial recognition of how difficult it is to absolutely decouple ratemaking and significant construction activity, and that the courts have ostensibly recognized this difficulty. The Staff has previously related that the Missouri courts have found lawful the Commission's criteria for interim rate relief and flow-through versus normalization of tax timing differences. There is a 1976-1977 interim rate relief case respecting St. Joseph Power & Light Company that will further help illuminate this matter.

Sections 393.135 and 393.136, Proposition 1, were adopted by popular vote on November 2, 1976. (Section 393.136 provides that any charge by an electrical corporation for service based on the costs of construction in progress or on property before it is fully operational and used for service being made on November 2, 1976 shall not be deemed unjust or unreasonable by reason of Section 393.135, and shall not be prohibited thereby, for a period of 90 days after the effective date of the law.

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jurisdiction and do not treat the issue respecting the efficiency of that certificate as authority for the facilities involved in this proceeding."

On November 16, 1976, SJLP filed with the Commission an application for emergency/interim rate relief with revised tariff sheets designed to increase annual revenues by approximately $2.5 million on an annual basis.[3] SJLP contended that without emergency/interim rate relief, it would default on the Iatan project because no other alternatives for meeting its construction commitments were available. SJLP further contended that default on Iatan would jeopardize its ability to provide adequate service, which would compromise SJLP's status as an independent electric utility and possibly require SJLP to merge with a larger electric utility. The Commission stated that "the pivotal issue in this case is Company's need for the additional generating capacity which Iatan will provide and the secondary issue is how will Company finance its participation in Iatan with or without the emergency rate relief requested in this case." 21 Mo.P.S.C.(N.S) at 358.

The Commission found that (1) appropriate cost/benefit economic analysis indicated that SJLP should postpone completion of Iatan 1 for at least one year from its planned in service date of 1980, but (2) SJLP was the junior partner of KCPL, no great savings would result to KCPL from bringing Iatan 1 on line in 1981 over 1980, and (3) SJLP had no authority to postpone Iatan 1 one or more years. On March 4, 1977 in *Re St. Joseph Light & Power Co.*, Case No. ER-77-93, Report And Order, 21 Mo.P.S.C.(N.S.) 357, 368, 373 (1977), the Commission approved emergency/interim rate relief for SJLP contingent upon, among other things, SJLP entering into a binding agreement disposing of 57 to 67 megawatts (MWs) of its 157 MW entitlement to Iatan 1 capacity by the effective date of the final Report And Order issued in connection with SJLP's

[3] Subsequently on December 20, 1976, as a result of the enactment of section 393.135 (Proposition No. 1) by voters on November 6, 1976, SJLP filed revised tariff sheets effective as of February 1, 1977 reducing rates by $1.4 million by removing construction work in progress from rate base. As a consequence, SJLP's requested emergency electric rate increase was for $3.9 million over the rates on file and in effect as of February 1, 1977.

permanent rate case, *Re St. Joseph Light & Power Co.*, Case No. ER-77-107, Report And Order, 21 Mo.P.S.C.(N.S.) 466 (1977). [4]

The Commission authorized emergency/interim rate relief in the amount of an increase of annual gross electric revenues of $1.3 million, exclusive of gross receipts and franchise taxes, pending resolution of SJLP's pending permanent rate increase case on the basis that the "Company's financial integrity and credit worthiness will be impaired to the extent that the capital necessary for the provision of safe and adequate service cannot be raised." 21 Mo.P.S.C.(N.S) at 372, 373. The Commission went on to state that it could not ignore the extreme financial burden which full participation in the Iatan project placed on SJLP and its customers. Therefore, the Commission conditioned its authorization of emergency/interim rate relief on SJLP being required to refund the emergency/interim rate relief to its customers if:

> (1) its return on common equity exceeded 13.5% during the period that the emergency/interim rates were in effect;
>
> (2) it did not submit to the Commission documentary evidence that it had entered into a binding agreement disposing of 57 to 67 MWs of its Iatan 1 entitlement by the effective date of the final Report And Order issued in connection with SJLP's permanent rate case, ER-77-107; and
>
> (3) the interim rates authorized by the Commission were found by the Commission in the permanent rate case to be unreasonable.

Id.

On June 3, 1977 KCPL and SJLP executed an amending supplement to their Iatan Memorandum Of Understanding, which adjusted their ownership interests in Iatan upon authorization by the Commission. By a joint application filed July 26, 1977 in Case No. EO-78-

[4] The Case No. ER-77-93 Report And Order reported at 21 Mo.P.S.C.(N.S.) 356 does not reflect the correction made to the date by which the Commission was directed to dispose of 57 to 67 megawatts of Iatan 1 capacity. The correction is reflected in an unreported Correction Order issued by the Commission on April 26, 1977 in Case No. ER-77-93.

12, KCPL and SJLP sought Commission approval of the proposed adjustments to their ownership interests in Iatan as to the site, common facilities and Iatan 1 generating unit. On August 22, 1977 in Case No. EO-78-12, the Commission issued an Order Granting Application To Adjust Ownership Interests (unreported decision) authorizing KCPL and SJLP to adjust their ownership interests in Iatan as requested and as reflected in the First Supplement to their Iatan Memorandum Of Understanding. The Commission concluded that "the authority sought is in the public interest in that it permits SJLP, within the time dictated, to divest itself of a portion of its entitlement at Iatan in compliance with the Commission's order in Case No. ER-77-93."

Furthermore regarding questions concerning the scope of the Commission's power, the Staff would cite a Missouri Supreme Court decision issued soon after the Public Service Commission Act became law: *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co.*, 254 Mo. 515, 163 S.W. 854, 857-58 (Mo. 1913). The Court commented on the scope of the Public Service Commission Act as follows:

> That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and, to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. . . .

In *State ex rel. Electric Co. of Mo. v. Atkinson*, 275 Mo. 325, 204 S.W. 897, 899 (Mo. banc 1918), the Missouri Supreme Court noted that "protection of the public" is the "spirit" of the Public Service Commission Act.

"Intergenerational Subsidy"

Among the various issues raised by USDOE is Issue No. 8: 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? The Staff addressed this issue in its Statement Of Positions but would further respond by in part noting that there is "intergenerational" rate recovery throughout regulation. In the Staff's May 10, 2005 Suggestions In Support, the Staff noted that financial ratios are associated with the issue of flow through versus normalization of tax timing. There is also intergenerational rate recovery if normalization is adopted, as present ratepayers pay higher rates than the actual tax payments to the federal government whereas future ratepayers pay lower rates than the actual tax payments to the federal government.

The addition of baseload generation also involves intergenerational rate recovery as present ratepayers pay for capacity additions that the electrical corporation does not immediately need to serve native load. Electric utilities do not add capacity on a yearly basis, i.e., in one year increments, just to meet load growth for the year.

Depreciation is another area involving intergenerational rate recovery. Depreciation rates and life estimates are changed over time to address actual experience. The Western District Court of Appeals related in *State ex rel. Missouri Public Serv. Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. 1981) that "the Commission must make an intelligent forecast with respect to the future period for which it is setting the rate; rate making is by necessity a predictive science. [citation omitted]" In *State ex rel. Martigney Creek Sewer Co. v. Public Serv. Comm'n*, 537 S.W.2d 388, 396 (Mo. banc 1976), the Missouri Supreme Court stated that as a general rule where more accurate information is unavailable estimates should be considered.

Another intergenerational issue is "materials and supplies." In *Re Missouri Public Service Co.*, Case Nos. ER-78-29 and GR-78-30, Report And Order, 22 Mo.P.S.C.(N.S.) 193 (1978) the Staff proposed to attribute 96% of electric materials and supplies and 85% of gas materials and supplies to construction work in progress (CWIP). The Commission first found that Section 393.135 does not apply to gas corporations, it only applies to electrical corporations. The Commission next found that a significant portion includes materials and supplies used in the ordinary maintenance of Missouri Public Service Company (MPS) and not in connection with any significant new construction or expansion. Finally, the Commission rejected the Staff's proposed adjustments excluding materials and supplies from the MPS electric and gas rate bases. 22 Mo.P.S.C.(N.S.) at 199-200.

In a dissenting opinion, Commissioner Stephen B. Jones concurred with the majority on this issue. Noting the "used for service" portion of the phrase "fully operational and used for service" that appears in Section 393.135, Commissioner Jones commented that an item in a materials and supplies account is "fully operational," but it is not "used for service." He then explained that if the "used for service" language was strictly interpreted as being independent of the "fully operational language" then all materials and supplies would be excluded from rate base and "all fuel inventories would also qualify for exclusion from rate base as a lump of coal, even though it is 'fully operational,' has not been 'used for service.'" 22 Mo.P.S.C.(N.S.) at 215. Commissioner Jones stated that he believed that the language "used for service" was intended to reinforce the language "fully operational" and that Proposition One, Section 393.135, does not prohibit any charge based on inventory costs whether the items in inventory are eventually used for CWIP or not. Finally, he stated that it would be unconstitutional if all inventory were excluded from rate base. *Id.* Public Counsel proposed an identical adjustment in *Re Kansas*

City Power & Light Co., Case No. ER-78-252, Report And Order, 23Mo.P.S.C.(N.S.) 1, 6 (1979), and the Commission disallowed Public Counsel's proposed adjustment.

Wherefore the Staff submits the instant pleading as its Prehearing Brief in this case.

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 electronic mail to all counsel of record this 15th day of June 2005.

/s/ Steven Dottheim