BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric to Service Begin the Implementation of Its Regulatory Plan	)))))	**Case No. ER-2006-0314**

POST-HEARING REPLY BRIEF AND TRUE-UP BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

INTRODUCTION

On February 1, 2006[1], the Kansas City Power & Light Company (KCPL) filed with the Commission an application and tariff sheets designed to implement a general electric rate increase of approximately 11.5% for service it provides to its Missouri customers. In an order issued March 29, the Commission established November 15 as the deadline for initial post-hearing briefs, with reply and true-up briefs due November 22. In an order issued November 14, the Commission extended the deadline for initial post-hearing briefs to November 17, and the deadline for reply and true-up briefs to November 27.

This brief is organized into two parts. The first part will reply to points that KCPL attempted to make in its initial brief on the issues of Cost of Capital, Off-system Sales, Regulatory Plan Amortizations, SO2 Premiums, and Rate Case Expense (and will address the Staff's Initial Brief on the SO2 Premiums issue); this part will follow the order of issues in KCPL's initial brief. The second part will address the payroll issue that was litigated at the true-up hearing.

[1] All dates refer to calendar year 2006 unless otherwise noted.

As Public Counsel pointed out in its initial brief, much of this case is about KCPL's attempts to undermine and avoid the Regulatory Plan[2] that it entered into just over a year ago. In its initial brief, KCPL stays rigidly on point: the Regulatory Plan is only the starting point and the Commission must accept KCPL's novel and unique regulatory approaches to address KCPL's construction risks.

The Regulatory Plan amortizations are a trade-off. In the near term, ratepayers pay more to keep KCPL's credit rating stable and thus keep borrowing costs down during a construction phase. In the future, in recognition that ratepayers gave KCPL extra cash during construction, ratebase will be reduced. This was the bargain that KCPL agreed to. But now KCPL wants to change that bargain. It wants ratepayers to front the necessary cash, but it doesn't want them to get any credit for doing so.

When KCPL talks about "real cash" earnings and "non-cash" earnings, it is talking about whether shareholders get to keep that cash. From the ratepayers' perspective, both are cash out of their pockets. The question is really whether KCPL shareholders should continue to enjoy extraordinary and excessive returns while KCPL embarks on a construction program that ratepayers are funding up front. The Commission frequently says that its job is to balance the interests of utility shareholders and utility ratepayers. Accepting KCPL's novel regulatory proposals in this case – instead of the Regulatory Plan amortizations that KCPL agreed to and the Commission approved – will drastically shift the balance in favor of shareholders.

[2] The Regulatory Plan, as that term is used in this brief and as generally used in the lexicon of this case, refers to the Stipulation and Agreement as amended in Case No. EO-2005-0329. It has been made a part of the record in this case as Exhibit 143.

<u>REPLY BRIEF</u>

<u>Revenue Requirement</u>

Cost of Capital:
What is the appropriate return on common equity (ROE)?
Should ROE be adjusted either upwards or downwards to reflect increased or decreased risk or company performance? If so, what adjustment should be made?

At page 6 of its Initial Brief, KCPL argues that Public Counsel witness Baudino “conceded that GDP growth had been used by experts in other proceedings in their DCF analyses.” KCPL refers the Commission to page 1196 of the transcript where this so-called concession took place. At that point in KCPL’s cross-examination of Mr. Baudino, KCPL’s counsel had referred Mr. Baudino to page 4 of his surrebuttal testimony, which discussed – and emphatically rejected – the use of GDP growth in DCF analyses. After establishing that Mr. Baudino had never used GDP growth as part of a DCF analysis, counsel for KCPL asked Mr. Baudino whether he had encountered in any “other jurisdictions the use of GDP in DCF analysis.” Mr. Baudino did not testify that it had been “used by experts in other proceedings” as KCPL claims in its initial brief, but merely that he had encountered it. “Encounter” is such a vague term that nothing is really established by the fact that Mr. Baudino has “encountered” the use of GDP in other proceedings. It may very well be that it was mentioned by non-experts, which is a far cry from being “used by experts.” It may very well be that it was proposed by Dr. Hadaway himself, rather than other experts, in other proceedings in which he and Mr. Baudino both appeared. It may very well be that Mr. Baudino encountered it once in one other jurisdiction. The evidence simply does not reveal anything of significance that would establish that the use of GDP growth in a DCF analysis is anything other than a fringe theory used to inflate ROE in this case.

But even more important is the next question that KCPL does not draw the Commission's attention to. Counsel for KCPL asked Mr. Baudino whether he knew of any regulatory commissions that adopted the use of GDP growth in a DCF calculation, and Mr. Baudino testified that he did not know of any that had adopted it. (Transcript, p. 1096).

Mr. Baudino, in his rebuttal testimony (Exhibit 202, p. 3), testified that:

> It is inappropriate to include long-term GDP growth of 6.60% in the expected long-term growth rate for electric utilities. Dr. Hadaway presented no evidence that investors base their current growth rate assumptions for electric utility companies on the historical growth in GDP (6.60%). Interestingly, this projection is substantially greater than any of the electric utility dividend and earnings growth projections used by both Dr. Hadaway and myself. This suggests that the GDP growth rate is an outlier and should be rejected, rather than included in a DCF analysis specific to a group of electric utilities.

Furthermore, KCPL's own witness did not identify a single commission that has adopted the use of GDP growth in a DCF analysis. In short, while the record reveals that Mr. Baudino has "encountered" this novel approach an unknown number of times, there is no evidence that any commission has ever adopted it or even given it serious consideration. This Commission should certainly not give it any serious consideration.

At page 7 of its Initial Brief, KCPL alleges that all the cost-of-capital experts in the case, except KCPL witness Hadaway, ignored KCPL's construction risk. All of the experts in the case were cognizant of the risk, and concluded that it was adequately accounted for in their analyses. Only KCPL witness Hadaway, distrustful of his own DCF analysis, saw fit to propose an ROE "adder" to try to get to higher overall ROE. Far from ignoring the risk, all the other experts recognized it and explicitly **rejected** Dr. Hadaway's adder. For example, Public Counsel witness Baudino testified that he specifically considered construction risk but did not believe a specific adjustment was necessary. (Transcript, p. 1122).

Also on page 7 of its Initial Brief, KCPL denigrates the significance of the Regulatory Plan because it is on appeal. KCPL fails to mention that it, along with the Commission, is vigorously defending the Regulatory Plan in that appeal. KCPL also fails to mention that the Commission's decision approving the Regulatory Plan was upheld on the first level of appeal, at the Cole County Circuit Court. KCPL also fails to mention that decisions of the Commission are still in full effect during the pendency of any appeal. (Section 386.520 RSMo 2000). The cold hard fact is that the Regulatory Plan is in effect now, as it has been since the Commission approved it, and it is pure speculation to think that it may be overturned at some point in the future.

At page 8 of its Initial Brief, KCPL suggests that it should get some sort of undefined boost in the Commission's determination of the cost of equity because it is such a good company, despite stating on the record – although in an exceedingly muddy and convoluted way – that it was not seeking such an adjustment. (Transcript, pp. 1412-1415). While there is little reason to award KCPL a higher ROE because of good performance, if the Commission does so, it should certainly also impose lower ROEs on those Missouri utilities that exhibit substandard performance.

Off-system Sales:

What level of off-system sales margin should be included in determining KCPL's cost of service?

What parameters does the Commission-approved Stipulation & Agreement in Case No. EO-2005-0329 impose on the treatment of off-system sales revenue in this case?

How should the off-system sales margin be allocated to the Missouri retail, Kansas retail and FERC wholesale jurisdictions?

Should KCPL's customers receive the benefit of all margins of off-system sales or should it be shared between customers and shareholders?

Should a mechanism be adopted to ensure that the benefit is received by the appropriate party or parties? If so, what mechanism?

At page 11 of its Initial Brief, KCPL argues that it faces greater risk from the variability in the off-system sales market than other utilities. KCPL cites to pages 755-756 and 823 of the transcript to support this contention. Public Counsel witness Baudino, a nationally recognized expert who has appeared as an expert all over the country (Exhibit 201, Baudino Direct, pp. 1-2; Schedule RAB-1), testified that KCPL's level of participation in the off-system sales market is not unique. (Transcript, p. 1123).

KCPL also argues that none of the other parties have taken this risk into account. Tellingly, KCPL cites only to the testimony of **its own witness** to support this argument. (KCPL Initial Brief at page 7, citing transcript pages 792-793 and 829-830). Despite his utter lack of qualification as an expert on rate of return,[3] KCPL witness Giles felt qualified to opine as to what was and was not considered in the analyses of qualified ROE experts. Mr. Giles' complete lack of understanding of the entire DCF analytical process is indicated by his testimony that a DCF analysis cannot address off-system sales risk because it was invented before the off-system sales market existed! Public Counsel witness Baudino – a certified rate of return expert with decades of experience – testified that an explicit adjustment for off-system sales risk "was not required in [his] analysis." (Transcript, p. 1116). Mr. Baudino further explained that:

> if the analyst, such as myself or Dr. Hadaway or Mr. Barnes, constructs a proper sample of companies that are recently good comparison companies for purposes of risk and estimating the ROE, there really is no need to make additional adjustments for specific risk items like wholesale sales or a construction program. (Transcript, pp. 117-118).

He not only considered these risks and determined that a specific adjustment would not be necessary, he also testified that such an adjustment would, in fact, be inappropriate. (Transcript, p. 1120).

[3] Indeed, as pointed out in Public Counsel' Initial Brief, Mr. Giles did not even realize that there was such a thing as a certified rate of return expert. (Transcript, pp. 812-813).

Not only are the risks KCPL faces in the off-system sales market not unique, neither are the other risks it faces. At page 13 of its Initial Brief, KCPL argues that by setting the off-system sales margin at the 25th percentile, "it is **only** asking that customers share to some degree the risk that KCPL would not reach the 50:50 point." (Emphasis added.) That is like saying that when President and Mrs. Lincoln attended the performance at Ford's Theater, there was **only** that one incident to mar the experience. KCPL is asking to "share" the risk on a 75:25 basis, with customers bearing three times the risk that KCPL bears. It is not proposing an even sharing at all.

There are many risks that utilities face, and most of them cannot be predicted with complete accuracy. For example, KCPL faces a risk that severe weather will damage its system, but the Commission does not adjust rates to make customers bear that risk. Neither should it set rates to make customers bear a greater share of off-system sales risk. The Commission should set rates based upon the best estimate of the off-system sales margins KCPL is likely to achieve. That best estimate is the 50th percentile of KCPL witness Schnitzer's off-system sales analysis.

At page 15 of its initial brief, KCPL argues that none of the parties "dispute the correctness of the rationale or intent behind the methodology" that KCPL used to allocate off-system sales revenues between jurisdictions. In fact, all parties that addressed this issue roundly condemned not only the rationale and intent, but the execution and the motivation as well! In Public Counsel's Initial Brief, KCPL's so-called "unused energy allocator" was pointed out as yet another attempt by KCPL to introduce a novel – even revolutionary – proposal to inflate its revenue requirement.

At page 16 of its Initial Brief, KCPL asserts that its off-system sales proposal is "consistent with" the requirements in the Regulatory Plan that it treat off-system sales revenues above the line and that it will not propose any adjustment that would remove any portion of off-system sales revenues from the revenue requirement determination. But, as the old saying goes, "Saying it doesn't make it so." There are **no citations** to anything in the evidentiary record in the two sections of KCPL's Initial Brief[4] that deal with these issues.

After extensively questioning Mr. Giles about his claim that KCPL's proposal does not violate the Regulatory Plan, Commissioner Murray concluded her questioning. But the Commissioner continued to struggle with KCPL's assertion that its proposal does not violate the provisions of the Regulatory Plan. After Chairman Davis concluded his questioning, Commissioner Murray returned to the topic of how KCPL's proposal could be reconciled with the Regulatory Plan, noting that nothing that KCPL had proposed was "in accord with what the company agreed to in the Regulatory Plan." Mr. Giles' further explanation did nothing to alleviate those concerns. The only proposal in this case that is in accord with the Regulatory Plan is that proposed by Public Counsel: set off system sales revenues at the 50th percentile.[5]

Regulatory Plan Additional Amortizations:
What risk factor should be used in calculating the Regulatory Plan additional amortizations for off-balance sheet purchased power agreements?

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[4] KCPL Initial Brief, pp. 16-17, addressing the issues of "*What parameters does the Commission-approved Stipulation & Agreement in Case No. EO-2005-0329 impose on the treatment of off-system sales revenue in this case"?* and *"Should KCPL's customers receive the benefit of all margins of off-system sales or should it be shared between customers and shareholders? Should a mechanism be adopted to ensure that the benefit is received by the appropriate party or parties? If so, what mechanism"*

[5] In some cases, use of a normalized or trended historical amount may be appropriate. Because the actual number for ratemaking purposes that Staff proposes in this case is nearly identical to the number that Public Counsel proposes, Public Counsel did not take a position on whether Staff's approach is appropriate in this case.

None of the parties cross-examined Public Counsel witness Trippensee on this issue. The only argument that KCPL's presents in favor of adopting the 50% risk factor is that Standard and Poor's does it that way. (KCPL Initial Brief, pp. 19-20). DOE/NNSA witness Woolridge pointed out that Standard and Poor's decisions on whether or not to downgrade a company are based on many factors, and that the metrics are not strict guidelines. There is no reason to slavishly follow Standard and Poor's calculations when Standard and Poor's does not do so.

As Public Counsel pointed out in its Initial Brief, the Commission should not abdicate its ratemaking role to Standard and Poor's. The Commission should only adopt a 50% risk factor if it believes that there is a 50% chance of default on these obligations; it should not adopt it simply because Standard and Poor's does.

SO2 Premiums:
How should SO2 premiums related to lower-sulfur coal be recorded for book and ratemaking purposes?
What parameters does the Commission-approved Stipulation & Agreement in Case No. EO-2005-0329 impose on the treatment of SO2 premiums in this case?

The Regulatory Plan addresses SO2 premiums at pages 9-10:

> KCPL currently purchases coal from vendors under contracts that indicate nominal sulfur content. To the extent that coal supplied has a lower sulfur content than specified in the contract, KCPL may pay a premium over the contract price. The opportunity to burn coal with lower sulfur content is both advantageous to the environment and reduces the number of SO2 emission allowances that must be used. To the extent that KCPL pays premiums for lower sulfur coal up until January 1, 2007, it will determine the portion of such premiums that apply to retail sales and will record the proportionate cost of such premiums in Account 254. **But in no event will the charges to the Missouri jurisdictional portion of Account 254 for these premiums exceed $400,000 annually.** The portion of premiums applicable to retail will be determined monthly based on the system-wide percentage of MWh's from coal generation used for retail sales versus wholesale sales as computed by the hourly energy costing model. This system-wide percentage will be applied to premiums invoiced during the same period. (emphasis added)

As noted in Public Counsel's Initial Brief, neither Staff witness Hyneman nor KCPL witness Blunk could provide a credible explanation that squared the phrase "but in no event" with their interpretation of what this section of the Regulatory Plan requires. Neither do the KCPL Initial Brief nor the Staff Initial Brief. KCPL simply states that: "By its own terms, this provision of the [Regulatory Plan] expires at midnight on January 1, 2007." It does not cite to any specific language, nor does it even attempt to explain what the phrase "but in no event" means. Staff has a lengthy discussion of the way courts construe contracts, but – except for pointing out that the Regulatory Plan is not the kind of contract that its discussion focuses on – does little to apply those principles of construction to the provisions at issue. In fact, Staff's main argument is that the Regulatory Plan might mean something different if it used different words. (Staff Initial Brief, p. 14).[6] While it is hard to argue with this logic, Public Counsel points out that it does not use different words, and the Commission must give meaning to the words it actually uses, not the ones Staff suggests it could have used.

Rate Case Expense:
Should rate case expense be normalized or deferred and amortized? If the latter, then what is the appropriate amortization period for the deferred rate case expense?
Should the costs deferred for future amortization be included in rate base?

At page 46 of its Initial Brief, KCPL states that "The Staff used a three year amortization period…." KCPL is wrong again. Staff witness Harris made very clear at the hearing that Staff was **not** proposing to amortize rate case expense, but rather normalize it:

[6] At page 14, Staff suggests that "but" really means "and." Later in the very same paragraph, it suggests that it really means "in." Despite its lengthy discussion of contract construction, Staff never cites any authority for the proposition that contracts should be interpreted by substituting different words so that a particular interpretation is reinforced.

> In putting together my executive summary, which is the last thing I did, I inadvertently put in the word amortize instead of normalize, but it's always been the Staff's position, as it has been for as long as I'm aware of, as long as I've been with the Commission at least, that rate case expense has always been normalized. (Transcript, p. 310).
>
> So Staff and Public Counsel propose to treat rate case expense in the same way the Commission has always treated it: as a recurring expense that should be normalized and included in rates.

The Commission should adopt the position of Staff and Public Counsel and normalize rate case expense over three years, not amortize it.

TRUE-UP BRIEF

The primary issue addressed at the true-up hearing was whether to include some or all of the 113 positions that were vacant at the true-up cut-off date, but for which KCPL had made job offers. Public Counsel supports Staff's position that these positions should not be included in the determination of revenue requirement.

There are at least two good reasons why the Commission should adopt Staff's position. First, the true-up cut-off date was ordered by the Commission. There will always be situations in which a utility (or a party opposing a utility) can point to events that occur after the cut-off date and argue that those events should be considered in ratemaking. But if the Commission determines that the cut-off date is not really a hard and fast cut-off, where does it draw the line? Should the Commission consider events that occur a day after the cut-off? Or a month? Or two? Should it consider only significant changes? Or material changes, as defined by Generally Accepted Accounting Principles? Or some other threshold? In this case, the evidence is that those positions were vacant as of the cut-off date. There is some evidence that some of them were filled in the period between the cut-off date and the true-up hearing, but employee levels are always fluid, and no doubt have changed since the true-up hearing. And they will change more between the time the Commission deliberates this case and new rates go into effect. The Commission should establish a date certain and stick to it.

Another reason why the Commission should accept Staff's position is that the evidence indicates that some of the job offers are simply an attempt to inflate revenue requirement. The true-up cut-off date in this case is September 30, 2006, which falls on a Saturday. On the Wednesday and Thursday before the Saturday cut-off date – literally the eleventh hour – KCPL made 26 job offers for Plant Helpers. All of these job offers originated from the same KCPL employee, and all were recruited by the same KCPL employee. (Transcript, p. 1646). As of November 1,[7] over a month later, **not one** of those 26 potential employees was working for KCPL. (Transcript, p. 1647). It seems more than coincidence that so many offers were made through the same recruiter on only two days right before the cut-off date, especially since none of the people to whom the offers were made had begun work a month later.

CONCLUSION

This brief addresses only a few of the many issues in the main phase of this case and the true-up, but when taken with Public Counsel's Initial Brief, it highlights KCPL's concerted effort to convince the Commission to adopt KCPL's novel and unique regulatory proposals in order to inflate revenue requirement and avoid Regulatory Plan amortizations. The Commission should reject these efforts and establish KCPL's rates according to sound regulatory practices.

[7] Although KCPL witness Cheatum said "October 1st" (Transcript, p. 1647, line 17), the question referred to November 1st, and so did the document the witness was consulting (KCPL's response to Staff DR 556). In the overall context of the cross-examination, it is clear that Ms. Cheatum misspoke, and meant to say November 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 27th day of November 2006.

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