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**

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On December 21, 2006 the Commission issued its Report and Order in this case. That order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons. The Report and Order is unlawful, unjust, unreasonable and unconstitutional in that it completely fails to separately and adequately identify conclusions of law and findings of fact. The Report and Order is unlawful, unjust, and unreasonable in that it is not based upon competent and substantial evidence of record.

2. Return on Equity

The Commission's use of a "zone of reasonableness" to establish the appropriate return on equity is arbitrary and capricious, and unjust, unreasonable and unlawful. The Commission established the mid-point of its range by averaging returns awarded by regulatory bodies in the first three quarters of calendar year 2006. No expert testified that the national average should be used as the basis for a "zone of reasonableness." No expert testified that it should be the first three quarters of calendar year 2006, or calendar year 2005, or just the most recent report (the third quarter of 2006). No expert testified

that using the first three quarters of 2006 is more accurate than using an entire calendar year, or three years including 2006, or any other variation of recent national figures. The Commission's decision to rely on a combination of national figures is arbitrary and capricious and not based on competent and substantial evidence.

Furthermore, in an order issued in Case No. ER-2006-0315 the very same day, the Commission appears to have established a "zone of reasonableness" of 9.55% to 11.55%. This demonstrates that the zone of reasonableness established in this case was arbitrary and capricious.

In addition, the Commission fails to explain why relying on reported allowed returns is better than relying on actual returns earned by other electric utility companies.

Even aside from the unlawfulness and unreasonableness of the "zone of reasonableness" concept, the Commission's application of it is arbitrary and capricious and unreasonable and unlawful. The Commission relied in large part on the testimony of KCPL witness Hadaway even though Dr. Hadaway's recommendation was above the "zone of reasonableness." Only by ignoring the overall recommendation of the KCPL witness can the Commission shoehorn his testimony into the Commission's "zone of reasonableness." Taking Hadaway's testimony as a whole, he fell at the very edge of or outside of the "zone of reasonableness" on the downside with his initial ROE calculation, and on the upside with his final recommendation.

Furthermore, the "zone of reasonableness" that the Commission used to exclude without discussion the testimony of Department of Energy/National Nuclear Security Administration (DOE/NNSA) witness Dr. Woolridge is explicitly based on national

averages. Yet the Commission largely rejected Staff witness Barnes' testimony because it was not specifically based on utilities in this region.

The Commission's exclusion of Dr. Woolridge's testimony without serious consideration is unjust and unreasonable. In essence, the Commission found his testimony to be unreasonable without examining Dr. Woolridge's **analysis** because his **result** did not fall within an arbitrary range.

On December 29, 2006, DOE/NNSA filed an Application for Rehearing. Public Counsel concurs with the arguments raised at pages 3-7 in the section of that application headed: "II. MAJORITY ERRED IN ITS DECISION ON COST OF CAPITAL" and incorporates them as though fully set out herein.

3. Off-system Sales

The Commission's decision on off-system sales is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

A. The Commission's use of the 25th percentile

The Commission's use of the 25th percentile to calculate a level of revenues for off-system sales awards KCPL with a 3:1 chance of achieving a higher level of off-system sales revenues than the amount included in the rate-setting calculation. This is unjust and unreasonable in that it deliberately allows KCPL a strong chance to earn a return higher than that authorized. It is also unlawful and unreasonable in that it violates both the letter and the spirit of the Regulatory Plan that the Commission approved in EO-2005-0329.

B. The Commission's reliance on the excluded updated analysis

The Commission erred in its use of the 25th percentile level included in KCPL witness Schnitzer's updated probability analysis. The Commission specifically excluded Mr. Schnitzer's updated study from the record, and Mr. Shnitzer was not available for cross-examination on his updates. Although the updated 25th percentile number is found buried in an attachment to KCPL witness Tim Rush's True-up Direct Testimony (Exhibit 54), Mr. Rush's True-up Direct Testimony does not discuss this number. Mr. Rush's True-up Rebuttal Testimony (Exhibit 55) does not contain the number, nor does it discuss it beyond making clear that Mr. Rush did not conduct the analysis that resulted in the number. As Mr. Rush testified, Mr. Schnitzer performed the analysis and provided it to the company. Mr. Rush simply took a number calculated by Mr. Schnitzer and included it among the thousands and thousands of numbers in Schedule TMR-1.

Similarly, Staff mentions the number in its True-up testimony, specifically Staff witness Steve Traxler's True-up Rebuttal Testimony (Exhibit 164, page 13). But Mr. Traxler's testimony cannot serve as the basis for the Commission's use of the number in its decision, because Mr. Traxler did not perform or support the analysis that resulted in the number, and in fact completely rejects KCPL's analysis. None of Mr. Traxler's testimony in the case delves into the analysis, and his True-up Rebuttal Testimony focuses on how the number resulting from the updated analysis is out of whack.

Neither can KCPL witness Rush's testimony serve as the basis for the Commission's use of the number in its decision. Mr. Rush did not perform the analysis that resulted in the number, he simply reflected it in one of his schedules. The analysis

itself was specifically excluded from the record, and the witness who conducted the analysis was not made available for cross-examination at the true-up hearing.

The Commission does not have: the updated analysis itself; any explanation of how the analysis was updated; any confirmation that it was fairly and completely updated; or any opportunity for parties or the Commission to question the witness who updated the analysis on how the update was done. All it has in evidence is a number that purports to represent the results of an updated analysis that was excluded from the record. This is not competent and substantial evidence.

C. The Commisison established an unlawful retroactive ratemaking mechanism

The Commission approved a mechanism pursuant to which KCPL would "book any amount below the 25th percentile to be recovered in the next rate case." This is clearly unlawful retroactive ratemaking (as is the corresponding part of the mechanism which would require KCPL to refund any amounts over the 25th percentile). The seminal UCCM decision[1] defines retroactive ratemaking as redetermining rates already established and paid:

> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n, 537 S.W.2d 655 (Mo. App. 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too

[1] State ex rel. Utility Consumers Council, Inc. v. Public Service Com., 585 S.W.2d 41, 58 (Mo. 1979)

low) of his property without due process. See Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co., 284 U.S. 370, 389-90, 76 L. Ed. 348, 52 S. Ct. 183 (1932); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 70 L. Ed. 808, 46 S. Ct. 363 (1926); Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).

On December 29, 2006, Praxair, Inc. filed an Application for Rehearing. Public Counsel concurs with the arguments raised in Paragraphs 5-9 and Paragraph 12 of that application and incorporates them as though fully set out herein.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its December 21, 2006, Report and Order.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Lewis R. Mills, Jr.

By:_____

Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 29th day of December 2006:

/s/ Lewis R. Mills, Jr.