BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Kansas City Power & Light Company's Application for Approval of Demand-Side Programs and for Authority to Establish a Demand-Side Programs Investment Mechanism	)))))	**File No. EO-2012-0008**

MOTION FOR COMMISSION DETERMINATIONS ON VARIANCES

COMES NOW the Staff of the Missouri Public Service Commission, by and through the undersigned counsel, and files this *Motion For Commission Determination on Variances (Motion)* for the Commission's information and consideration. For its *Motion*, the Staff respectfully states the following:

Procedural Background

On August 28, 2009, The Missouri Energy Efficiency Investment Act of 2009[1] (MEEIA) became effective. MEEIA permits electric corporations to implement commission-approved demand-side programs "…with the goal of achieving all cost-effective demand-side savings." Based upon the legislature's mandate, the Commission found it necessary to promulgate a rule in order to implement the provisions of Section 393.1075.[2] Several stakeholders participated in the rulemaking docket, File No. EX-2010-0368, including Kansas City Power & Light Company ("KCPL" or "Company"). On February 9, 2011, after careful consideration of the comments filed in the rulemaking docket, the Commission authorized the Secretary of the Commission to file an *Order Of Rulemaking* with the Office of the Missouri Secretary of State for the following proposed rules: 4 CSR 240-3.163, 3.164, 20.093, and 20.094 (*Orders of Rulemaking*).[3] After the

[1] Section 393.1075, RSMo (Supp. 2010).
[2] File No. EX-2010-0368, Commission's *Notice Finding Necessity For Rulemaking,* June 17, 2010.
[3] File No. EX-2010-0368, *Memorandum,* February 9, 2011.

proper comment period in which KCPL participated and a public hearing, the rules became effective on May 30, 2011.

On December 22, 2011, KCPL filed its application, *Application Of Kansas City Power & Light Company* (*Application*), for approval of Demand-Side Programs and for authority to establish a Demand-Side Programs Investment Mechanism (DSIM) in File No. EO-2012-0008. As part of the *Application*, the Company specifically requested variances from two provisions of the MEEIA rules: 4 CSR 240-20.093(H) and 4 CSR 240-20.094(J).[4] However, the Company has not provided good cause pursuant to 4 CSR 240-20.093(13) and 4 CSR 240-0.094(9) for why the Commission should grant these variances. The Company's filing did not include a baseline DSIM that complies with 4 CSR 240-20.093 to support a finding that the Company's proposed shared benefit incentive component is necessary to avoid a manifest injustice. Also, the Company's request to exclude customers who opt-out of participation in the Company's demand-side programs under 4 CSR 240-20.094(6)(J) in interruptible or curtailable rate schedules or tariffs of the Company is in opposition with Section 393.1075.10[5]. Staff does not believe the Commission has the authority to grant a variance to 4 CSR 240-20.094(6)(J), since this subsection of its rules results from the statutory requirements in Section 393.1075.10. Additionally, the Company did not request all the variances necessary for its DSIM. This *Motion* will discuss each below.

Since the Company's filing in December 2011, the parties in File No. EO-2012-0008 agreed to a procedural schedule for this case. Staff, as well as some of the parties, made it clear to the Company that agreement with a procedural schedule did not preclude the right of the

[4] *Direct Testimony of Tim M. Rush*, pp. 26-27. Staff notes that the correct and complete subsection references for the Company's requested variances are 4 CSR 240-20.093(2)(H)3 and 4 CSR 240-20.094(6)(J).

[5] Section 393.1075.10, RSMo (Supp. 2010) states "Customers electing not to participate in an electric corporation's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation."

parties to request that the Commission decide the variance requests before it addresses approval of KCPL's demand-side programs and proposed DSIM. In addition, the schedule did not preclude the right to request more time from the Commission if necessary. On January 30, 2012, the parties filed a proposed procedural schedule that the Commission adopted by Order on January 31, 2012. The January 31, 2012 Order states that the Commission finds good cause to waive the 120-day requirement of 4 CSR 240-20.094(3). It is the Staff's position that the Commission's granting of the waiver does not signify that the 120-day time frame has started, as the Company has not provided good cause to support its variance requests. Alternatively, the 120-day decision time frame has not begun because it was established with the expectation that a company's MEEIA filing would comply with the rules, and that it would be impracticable for any request for a variance of a portion of those rules to be considered during the 120-day time frame.

The Staff requests that the Commission decide, before it addresses approval of KCPL's demand-side programs and proposed DSIM, the variances KCPL requested for its DSIM and whether to grant those variances, and at this time: (1) find the Company has not provided good cause in support of the variances it has requested; (2) find which variances the Company should have requested for its DSIM, but has not; (3) order the Company to show good cause for each of the variances applicable to its DSIM, whether initially requested or not; (4) direct the Staff to file a recommendation on each variance within thirty (30) days after KCPL makes its good cause showing for that variance; and (5) find the 120-day decision time frame[6] does not apply until the Commission issues findings on each of the variances, or, if the Commission finds the time frame does apply, toll it until after the issuance of its findings on the variances.

[6] 4 CSR 240-20.094(3) provides in part that "The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans with-in one hundred twenty (120) days of the filing of an application …"

Position of Company in MEEIA Rulemaking

In reviewing the variances requested by the Company, it is also imperative to review the various filings of KCPL in the rulemaking docket. Essentially, the Company is requesting variances from the rules to obtain benefits it supported, but the Commission did not incorporate, in the rulemaking. As explained in the section below, the Company has requested a shared benefit incentive component as part of its DSIM. The shared benefit incentive component is not based on actual annual energy and demand savings levels as measured and verified through evaluation, measurement and verification (EM&V) of MEEIA programs. Instead, the Company is asking to collect an incentive on the expected results of its MEEIA programs as soon as the programs start based on the annual energy and demand savings levels measured and verified from past performance.

Similar to the approach taken in this filing, the Company argued unsuccessfully in the rulemaking that semi-annual adjustments should apply to all components of DSIM. The Company argued that the provisions of 4 CSR 240-20.093(4)

> …are unlawful, unjust, unreasonable, arbitrary and capricious, and contrary to the spirit and letter of the enabling legislation. This language, which sets forth the requirements for semi-annual adjustments of DSIM, should have been modified to apply not only to the cost recovery component of DSIM, but to all components of DSIM: cost recovery, lost margins or lost revenues, and incentive. In order to comply with the intent of the MEEIA…adjustments of DSIM rates between general rate proceedings should apply to all components of the DSIM. These three cost components must be addressed in concert to provide a sustainable business model for utilities to pursue DSM programs and both benefit customers and satisfy shareholders."[7]

The Staff provides this example to illustrate that the relief the Company seeks in its variances is the type of relief that the Commission and stakeholders contemplated in the rulemaking, but was ultimately not included in the Commission's MEEIA rules. The Company argues in this case

[7] File No. EX-2010-0368, *Application For Rehearing And Request For Stay*, p. 6 ¶ 7.

that the Commission should allow the collection upfront through a tracker of shared benefits from its demand-side management (DSM) programs. Because 4 CSR 240-20.093 contemplates collection of utility incentives on a retrospective basis, there is no consideration given in MEEIA or the MEEIA rules to a tracker or when such tracker may be appropriate for a utility incentive.

Variances Requested by the Company

The Company's *Application* requests variances from 4 CSR 240-20.093(2)(H)3 and 4 CSR 240-20.094(6)(J).

4 CSR 240-20.093(2)(H)3[8]

The Company's *Application* states it has requested a variance from 4 CSR 240-20.093(H), "which requires that any utility incentive component of a DSIM shall be implemented on a retrospective basis and all energy and demand savings used to determine a DSIM utility incentive revenue requirement must be measured and verified through EM&V." (emphasis added). As part of its *Application*, the Company has asked for an incentive in two parts: a "shared benefit"[9] component and a performance incentive component.

The Company's proposal varies from the MEEIA DSIM rule in several respects. First, the Company proposes recovery of its shared benefit component on a prospective basis. The Company bases recovery of the shared benefit on a "…percent of the overall energy and capacity benefits from the programs that are planned to be implemented based on the first three years in the initial filing and covering the savings to customers over a fifteen year period."[10] (emphasis added). The computation would be 12 percent times the net present value of the anticipated energy and capacity benefits if imputed to the level planned by the Company.

[8] The Company cites 4 CSR 240-20.093(H) within the *Direct Testimony of Tim M. Rush*, p.26. However, the Staff believes the variance is from 4 CSR 240-20.093(2)(H)3.
[9] The Staff will discuss the difference between "shared benefit" and "net-shared benefit" in the section concerning additional applicable variances.
[10] *Direct Testimony of Tim M. Rush*, p.20

KCPL's proposal includes the energy and capacity benefits discounted at a rate to represent the net present value of the benefits over the 15-year period.

Second, because the Company proposes to collect the shared benefit component on a prospective basis, it also proposes a corresponding DSIM Tracker. "The DSIM Tracker will initially include these costs based on the filed plan, but will be trued-up to account for the actual experienced changes reflective of actual participants/measures achieved in the programs."[11] The Company does not propose to true-up the shared benefits based on actual energy and demand savings that are measured and verified through EM&V, as required by the rule. Instead, it requests a true-up based on the benefits it is estimating now. EM&V after the fact balances the risk of the demand-side programs on both the customer and the company. EM&V ensures that the Company is not just going through the motions of particular programs, but ensures that customers see a benefit from the programs.

During the rulemaking, Staff held the position that retrospective recovery is appropriate, because the MEEIA statute states that demand-side investments should be valued on an equivalent basis as supply-side investments. There is lag on the supply-side until a plant is deemed fully operational and used for service. In addition, the statute states that the Commission shall provide timely earnings opportunities associated with cost-effective measureable and verifiable efficiency savings. Staff maintains that savings are measured and verified through the EM&V process.

4 CSR 240-20.094(6)(J)[12]

4 CSR 240-20.094(6)(J) mirrors the statutory requirement of Section 393.1075.10, RSMo (Supp. 2010), and provides that "[a] customer electing not to participate in an electric utility's

[11] *Direct Testimony of Tim M. Rush*, p.20

[12]The Company cites 4 CSR 240-20.094(J) within the *Direct Testimony of Tim M. Rush*, p.27. However, the Staff believes the variance is from 4 CSR 240-20.094(6)(J).

demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric utility." The Company's *Application* states that "…should the Commission determine that this rule permits participation in the curtailment or interruptible programs in KCP&L's DSM portfolio, KCP&L requests a variance pursuant to 4 CSR 240-20.094(9). Good cause exists for such a variance since KCP&L's proposal ensures that those customers that are paying for the DSM programs get to participate in the programs."[13] However, granting such variance would violate the statutory requirement of Section 393.1075.10, by preventing customers from participating in the MPower Program, which is a demand response program with interruptible or curtailable rates.

Section 393.1075.10, provides: "[c]ustomers electing not to participate in an electric corporation's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation." Section 393.1075.2(5) defines interruptible or curtailable rate as "…a rate under which a customer receives a reduced charge in exchange for agreeing to allow the utility to withdraw the supply of electricity under certain specified conditions." The Staff considers the MPower program to have an interruptible or curtailable rate, because customers receive a credit on their bill for reducing usage during certain periods of time, which in turn reduces their overall charges for electricity. The Commission cannot waive a statutory requirement of MEEIA.

Applicable Variances Company Did Not Request

At this time, Staff has identified four additional variances it believes are applicable to KCPL's *Application* and that the Company should have requested prior to making its filing in this case: two (2) variances from 4 CSR 240-3.164(2)(A) and two (2) variances from

[13] *Direct Testimony of Tim M. Rush*, p.27

4 CSR 240-20.093(2)(H). The Staff cannot state a position on the variances until the Company provides good cause to support the need for the variances.

4 CSR 240-3.164(2)(A)

This rule subsection requires the Company to file a current market potential study. The rule requires in part:

> (2)(A)…The current market potential study shall use primary data and analysis for the utility's service territory….To the extent that primary data for each utility service territory is unavailable or insufficient, the market potential study may also rely on or be supplemented by data from secondary sources and relevant data from other geographic regions."

The rule subsection also requires the study include in part:

> 1. Complete documentation of all assumptions, definitions, methodologies, sampling techniques, and other aspects of the current market potential study;
> 2. Clear description of the process used to identify the broadest possible list of measures and groups of measures for consideration;
> 3. Clear description of the process used to determine technical potential, economic potential, maximum achievable potential, and realistic achievable potential for a twenty (20)-year planning horizon for major end-use groups (e.g., lighting, space heating, space cooling, refrigeration, motor drives, etc.) for each customer class; and
> 4. Identification and discussion of the twenty (20)-year baseline energy and demand forecasts. If the baseline energy and demand forecasts in the current market potential study differ from the baseline forecasts in the utility's most recent 4 CSR 240-22 triennial compliance filing, the current market potential study shall provide a comparison of the two (2) sets of forecasts and a discussion of the reasons for any differences between the two (2) sets of forecasts. The twenty (20)-year baseline energy and demand forecasts shall account for the following:
>
> A. Discussion of the treatment of all of the utility's customers who have opted out;
> B. Changes in building codes and/or appliance efficiency standards;
> C. Changes in customer combined heat and power applications; and
> D. Third party and other naturally occurring demand-side savings.

4 CSR 240-3.164(2)(A). The Company's filing supplied potential studies for a number of specified programs or market segments using primary data from the utility's service territory in

Kansas and Missouri, and specified programs or market segments using secondary data. While not a preferred action, this is contemplated by the rules. Through various discussions with the Company prior to the *Application* filing, the Staff understands that the Company is currently conducting its own market potential study, but that the study would not be complete for another year. To prevent delay of a MEEIA filing until primary data is available, the Staff is not adverse to the Company's use of the secondary studies assuming the Company can provide an analysis as to why it believes the studies are comparable and appropriate for use in this instance.

However, the Company's *Application* is non-compliant with the rule as it fails to provide for its service territory a showing of energy and demand savings potentials, including technical, economic, realistic achievable and maximum achievable potentials for energy savings and for demand savings, or baseline forecasts for energy and demand. Without the showing of realistic achievable annual energy and annual demand saving potentials, neither Staff nor the Commission can begin to review whether the Company's proposed set of programs can be expected to make reasonable progress towards achieving MEEIA's goal of "…achieving all cost-effective demand-side savings."

The same rationale is applicable to the need for evaluation of a baseline energy forecast and a baseline demand forecast. A baseline energy forecast and baseline demand forecast are important for the comparison of energy and demand savings between a "business as usual approach," as if the Company implemented no new programs, and the technical, economic, realistic achievable and maximum achievable potentials for energy and demand saving within the Company's service territory. For these two non-compliance issues, the Staff requests that the Commission order the Company to request variances from the rules and provide good cause for the Commission's consideration in determining whether to grant the variance.

4 CSR 240-20.093(2)(H)

This subsection of the rule requires the Company's incentive component of a DSIM to define a methodology for determining the utility's portion of "annual net shared benefits." The rule requires in part that:

> (H) Any utility incentive component of a DSIM shall be based on the performance of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and shall include a methodology for determining the utility's portion of *annual net shared benefits* achieved and documented through EM&V reports for approved demand-side programs. Each utility incentive component of a DSIM shall define the relationship between the utility's portion of *annual net shared benefits* achieved and documented through EM&V reports, annual energy savings achieved and documented through EM&V reports *as a percentage* of annual energy savings targets, and annual demand savings achieved and documented through EM&V reports *as a percentage* of annual demand savings targets.

(emphasis added).

First, 4 CSR 240-20.093(1)(C) defines annual net shared benefits as "…the utility's avoided costs measured and documented through evaluation, measurement, and verification (EM&V) reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies, and technical resource manual on an annual basis." The Company's *Application* and supporting testimony in the *Application* uses the terms "annual shared benefits" and "shared benefits" when describing and discussing the Company's shared benefit incentive component. The Commission's rule requires the Company to include a methodology in its filing for determining the "annual net shared benefits" of demand-side programs.

The Company has asked for a variance from 4 CSR 240-20.093(2)(H) for other matters, but not from the required use of "annual net shared benefits." The Staff believes there are differences in calculations between "net" values and "non-netted values," and requests the

Commission to order the Company to request a variance from this portion of the rule and provide good cause for the Commission's consideration in determining whether to grant the variance.

Second, the Company's *Application* and supporting testimony of the *Application* uses four tiers of fixed incentive amounts and not a portion of annual net shared benefits when describing and discussing the Company's performance incentive.[14] The rule states that a company should express "a portion of annual net shared benefits" as a percentage amount. Staff believes there is a difference between recovery of the four tiers of fixed dollar incentive amounts and "a portion of annual net shared benefits" expressed as a percentage. The Staff requests that the Commission to order the Company to request a variance from this portion of the rule and provide good cause for the Commission's consideration in determining whether to grant the variance.

Requirement of Good Cause

Although the term "good cause" is frequently used in the law,[15] 4 CSR 240-3.163 (11), 4 CSR 240-3.164(6), 4 CSR 240-20.093(13) and 4 CSR 240-20.094(9) do not define it. The rules simply state, "Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule." Therefore, it is appropriate to resort to the dictionary to determine the terms ordinary meaning.[16] Good cause "…generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."[17] Similarly, "good cause" has also been judicially defined as a "…substantial reason or

[14] *Direct testimony of Tim M. Rush,* p. 23.
[15] *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).
[16] *See State ex rel. Hall v. Wolf,* 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5.
[17] *Black's Law Dictionary*, p. 692 (6th ed. 1990).

cause which would cause or justify the ordinary person to neglect one of his [legal] duties."[18] Similarly, it can refer "…to a remedial purpose and is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one."[19]

Of course, not just any cause or excuse will do. To constitute good cause, the reason or legal excuse given "…must be real not imaginary, substantial not trifling, and reasonable not whimsical…"[20] Moreover, some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[21]

Neither the Company's *Application*, nor its testimony, provide good cause for the Commission to consider in granting the variances. The *Application* at paragraph 23 states "[p]ursuant to 4 CSR 240-20.093 (13) and 4 CSR 240-20.094 (9), KCP&L requests that the Commission grant a variance from certain provisions of the MEEIA rules." One sentence in the testimony of Tim Rush states good cause exists, but that one sentence relates to the variance for MPower only, which as previously noted, the Staff believes violates the MEEIA statute.[22]

The Company was aware of the Staff's expectation for support of the variance requests. In discussion and correspondence between the Staff and KCPL on August 19, 2011, September 27, 2011, October 19, 2011, December 8, 2011, and December 14, 2011, the Staff strongly encouraged the Company to make any requests for variances from the Commission's rules regarding its MEEIA filing before submitting its *Application*, and to provide quantitative analysis supporting the need for the variance(s). As it is the Staff's position that the Company

[18] *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See Central. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("…[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

[19] *Bennett v. Bennett*, 938 S.W.2d 952 (Mo. App. S.D. 1997).

[20] *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

[21] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975)

[22] *Direct Testimony of Tim M. Rush*, pp. 26-27.

did not provide the Commission good cause to grant the variance requests, the Staff moves for the Commission to (1) order the Company to provide good cause to support its requests for variances (2) order the Company to provide good cause to support the variances the Staff believes are applicable and the Company should have also requested and (3) rule on the variance requests. Part of the Company's showing of good cause could include providing the Staff with a baseline DSIM model that complies with the rules and then explaining why an alternative DSIM model is necessary to avoid a manifest injustice.

Relief Requested by the Staff

4 CSR 240-20.094(3) provides that "[t]he commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one-hundred twenty (120) days of the filing of an application under this section only after providing an opportunity for a hearing." The Staff is concerned with its ability and that of the Commission to conduct a meaningful review of KCPL's *Application* and associated variance requests and that the Commission will not have an adequate amount of time to make a determination as to the variance requests, evaluate the application in light of its determination on those variance requests, and then approve, modify or reject the proposed demand-side programs and a DSIM within 120 days.

It would be impracticable to interpret the 120-day decision time frame stated in 4 CSR 240-20.094(3) as contemplating the Commission considering and ruling on the variance requests also within that time frame. Certainly, the time frame does not include the requirement of Staff to identify variances from the rule that the Company did not request, and then wait for the Company to supplement its *Application*. The Staff cannot efficiently and effectively review and evaluate the Company's filing until the Commission decides the scope of the allowed

variances. The multitude of permutations the Staff would have to consider if some, all or none of the variances were granted would result in an insurmountable barrier to a thorough review, evaluation and a comprehensive report concerning the *Application*. To review and evaluate the case without the variances decided upfront essentially results in the Company putting the case before the Commission as an "all or nothing" request. The Commission should not, nor did the rule intend to, box the Commission into such a decision corner. The rule allows the Commission to recommend modifications.

As the Company has not provided good cause to support its request, the Commission should find that the Company's filing is deficient as filed and that the 120-day time frame for decision has not begun to lapse. Alternatively, the Staff believes the 120-day decision time frame was established with the expectation that a company's MEEIA filing would comply with the rules, and that any request for a variance of a portion of those rules would necessarily need to be obtained prior to a company making its MEEIA filing. Should the Commission support the need for a decision on the variances, requested and not requested, prior to proceeding with the case, such finding would support good cause for a further variance from the 120-day decision time frame.

WHEREFORE, the Staff recommends that the Commission decide, before it addresses approval of KCPL's demand-side programs and proposed DSIM, the variances KCPL requested for its DSIM and whether to grant those variances, and at this time: (1) find the Company has not provided good cause in support of the variances it has requested; (2) find which variances the Company should have requested for its DSIM, but has not; (3) order the Company to show good cause for each of the variances applicable to its DSIM, whether initially requested or not; (4) direct the Staff to file a recommendation on each variance within thirty (30) days after KCPL

makes its good cause showing for that variance; and (5) find the 120-day decision time frame does not apply until the Commission issues its findings on each of the variances, or, if the Commission finds the time frame does apply, toll it until after the issuance of its findings on the variances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of February, 2012.

/s/ Jennifer Hernandez