

**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	)	Case No. ER-2010-0355
Service to Continue the Implementation of	)	
Its Regulatory Plan	)	

**RESPONSE TO STAFF’S MOTION FOR CLARIFICATION**

COMES NOW the Office of the Public Counsel (“OPC”) and the Midwest Energy Users’ Association (“MEUA”), and for their Response to Staff’s Motion for Clarification, respectfully state as follows:

1. On April 13, 2011, Staff filed its Motion for Clarification. In that Motion, Staff notes an apparent inconsistency in the Commission’s Report and Order pertaining to the calculation of fuel expense. As the following pleading outlines, OPC / MEUA agree that the Commission needs to clarify its order. Furthermore, OPC / MEUA will show that the Commission’s decision to allow KCPL to “adopt” the result of Staff’s fuel model is not only inconsistent with other decisions contained within the Report and Order, it is also contrary to the statutory burden of proof; it violates the consumer parties’ due process rights and would represent an abdication of the Commission’s responsibility to decide contested issues.

**I. INTRODUCTION**

2. At the outset, the Commission should take comfort in knowing that the conflict in the Report and Order was not the Commission’s fault. Rather, this problem was caused solely by KCPL. Specifically, KCPL claimed that the fuel expense issue was

resolved through KCPL's "adoption of Staff's fuel expense position."<sup>1</sup> Despite this claim, KCPL inexplicably decided to litigate certain numerous subissues of the fuel expense issue. For instance, KCPL litigated and briefed issues related to the determination of natural gas costs; Wolf Creek fuel oil expense; spot market purchased power prices and fuel model. If KCPL had truly adopted Staff's fuel expense position, then why did it continue to litigate these issues? The answer is that KCPL wanted to have its cake and eat it too. KCPL sought to advocate for the superiority of its methodology, but when Staff's fuel expense result ended up resulting in a higher rate increase, KCPL also wanted the benefit of Staff's end result. The Commission should recognize that KCPL's position is not based upon the appropriateness of ratemaking methodologies or arriving at the correct result. Rather, KCPL's position is driven entirely by their desire to inflate the ultimate revenue requirement.<sup>2</sup> This desire has resulted in a chaotic Commission result on the issue of fuel expense.

## **II. INCONSISTENCY IN REPORT AND ORDER**

3. In its Report and Order, the Commission expressly held that KCPL's methodology for determining natural gas costs is appropriate.<sup>3</sup> Furthermore, the Commission accepted KCPL's "MIDAS<sup>TM</sup> model as appropriate for determining spot market prices."<sup>4</sup> Interestingly, the Commission reached both of these conclusions by the verbatim adoption of aspects of KCPL's Initial Brief. While reaching these decisions, the

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<sup>1</sup> KCPL Reply Brief at page 103. See also, page 104 ("there is ample evidence for the Commission to adopt the position of Staff in this case as the new fuel expense number.").

<sup>2</sup> Interestingly, this desire to inflate its revenue requirement is done solely for the benefit of the shareholders. Nevertheless, KCPL has apparently been allowed to recover the rate case expense associated with these efforts.

<sup>3</sup> Report and Order, page 146.

<sup>4</sup> *Id.* at page 150.

Commission also found, through verbatim adoption of portions of KCPL's Reply Brief, that KCPL could simply adopt the result of Staff's fuel expense calculation.<sup>5</sup>

4. As Staff recognizes, however, it is impossible to reconcile these competing provisions of the Report and Order. If the Commission truly intended to allow KCPL to adopt the result of Staff's fuel expense model, then the Commission must also reject KCPL's position as it pertains to natural gas prices; Wolf Creek fuel oil costs; spot market electric prices; and the appropriate fuel model (i.e., MIDAS™ model). On the other hand, if the Commission intends to keep its decision on these subissues, then the Commission cannot allow KCPL to ignore those decisions and simultaneously allow it to adopt the higher result of Staff's model. For KCPL, this is an either / or proposition. Either maintain the superiority of your model and input calculations, or recognize the inferiority of that model and inputs and accept Staff's unexpectedly higher fuel costs. Again, KCPL cannot be allowed to have their cake and eat it too!

### **III. BURDEN OF PROOF**

5. In its Initial Brief, MEUA devoted an entire section to a discussion of burden of proof, its statutory derivation, the fact that it is a "substantial right" of the customers, the fact that it should be "rigidly enforced" by the Commission, its definition and the implications for KCPL of failing to meet this statutorily imposed burden of proof.

6. Specifically, Section 393.150(2) expressly provides that the burden of proof shall be on the party advocating for an increased rate. In this case, Staff filed a fuel model result that was significantly higher than that sought by KCPL. Subsequently, KCPL sought to adopt Staff's model, but never abandoned its model results. Instead, KCPL offered the entirety of its testimony on this issue. Given that this is a litigated

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<sup>5</sup> Report and Order, pages 147-149.

issue, the Commission is required to determine the appropriate measure of fuel expense. Therefore, as it applies to this issue, *the burden of proof is on KCPL and Staff to show the appropriateness of the higher result of Staff's fuel model.* On the other hand, the KCPL customers are entitled to rely upon KCPL's lower fuel result and KCPL / Staff must convince the Commission why the KCPL model and result is inappropriate.

7. Clearly, given the Commission's decision on natural gas prices, spot market power prices and the appropriate fuel model, the Commission necessarily believes that KCPL / Staff have failed to meet their burden to show that Staff's fuel expense level is "just and reasonable." On these issues, the Commission expressly held that KCPL's model, inputs and methodologies are clearly superior. As such, it is entirely inconsistent with the statutorily imposed burden of proof, to subsequently allow KCPL to adopt Staff's higher fuel result. The burden of proof requires the advocate of the higher rate to prove that it is "just and reasonable." Given the Commission's decision on multiple subissues, the Commission clearly believes that KCPL / Staff have failed to meet this burden of proof.

#### **IV. DUE PROCESS RIGHTS**

8. At its base, KCPL's argument, that it has adopted the results of Staff's fuel model, represents a non-unanimous Stipulation. KCPL apparently asserts that it has agreed with Staff as to the appropriate level of fuel expense. That said, however, none of the other parties to this case have agreed to the use of Staff's level of fuel expense. As such, the position advanced by Staff and now advocated by KCPL constitutes a *de facto* non-unanimous Stipulation. As Commission Rule 4 CSR 240-2.115(2)(D) provides, a

non-unanimous Stipulation represents nothing more than “a position of the signatory parties.”

9. In 1982, the Court of Appeals addressed the Commission’s responsibility as it pertains to the consideration of a non-unanimous Stipulation. In the case of *State ex rel. Fischer v. Public Service Commission*,<sup>6</sup> the Court held that the Commission may not simply adopt the position contained in the non-unanimous Stipulation. Rather, when confronted with a non-unanimous Stipulation, the Commission must implement the full hearing procedure. Included in this procedure are requirements related to the contents of the Commission’s order.

This section also states that whenever the Commission makes an investigation, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises. In *State ex rel. Rice v. Public Service Commission*, the court stated that **this statute required the Commission to include findings of fact** in all of its written reports.<sup>7</sup>

Thus, the Commission cannot simply allow KCPL to adopt Staff’s position over the objection of other parties. Rather, the Commission is required to make findings of fact as to all disputed issues.

10. As it applies to the immediate issue, the Commission has made the necessary findings of fact on each of the disputed issues. Based upon those findings of fact, it is apparent that the Commission has rejected the *de facto* KCPL / Staff non-unanimous Stipulation. Furthermore, given those findings, it is clear that the Commission finds that KCPL’s model, input, methodologies and fuel results are superior to Staff’s methodology. As such, despite the lower fuel expense, the Commission must accept KCPL’s level of fuel expense.

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<sup>6</sup> 645 S.W.2d 39 (Mo.App. 1982).

<sup>7</sup> *Id.* at 42.

## **V. CONCLUSION**

11. As this pleading recognizes, there is an inherent conflict between the Commission's findings on each of the fuel expense subissues with the subsequent finding that KCPL may simply adopt Staff's level of fuel expense. As indicated, this confusion is entirely the result of KCPL's misguided attempt to advocate the superiority of its models and methodologies while simultaneously seeking to grab the higher expense resulting from Staff's model. This pleading clearly indicates that the Burden of Proof dictates that the Commission must accept the lower level of fuel expense provided by the KCPL model. Furthermore, this pleading demonstrates that the Commission must issue findings of fact. Based upon the findings of fact already issued, the Commission must accept KCPL's model, inputs and methodologies as well as the resulting level of fuel expense.

WHEREFORE, OPC / MEUA respectfully request that the Commission clarify its Report and Order by finding that it is adopting KCPL's level of fuel expense consistent with its findings on the various fuel subissues.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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ATTORNEYS FOR THE  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: April 14, 2011