

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Kansas City)
Power & Light Company for Waiver or Variance) Case No. EE-2008-0238
of the Certain Provisions of the Report and Order)
in Case No. ER-2007-0291)

**RESPONSE OF KANSAS CITY POWER & LIGHT COMPANY
TO DISPOSITIVE MOTIONS AND INFORMATIONAL FILING**

Pursuant to the Order Establishing Procedural Schedule, as amended by the Order Extending Time to Response to Motions, both of which were issued by the Missouri Public Service Commission (“Commission”) in the above-captioned proceeding, Kansas City Power & Light Company (“KCPL”) hereby responds to the motions of Trigen-Kansas City Energy Corporation (“Trigen”) and Missouri Gas Energy (“MGE”), as well as the Informational Filing submitted by Staff. For the reasons set forth below, the motions to dismiss of Trigen and MGE should be dismissed and the Commission should be permitted to develop a record concerning KCPL’s application and the impact denying that application would have on certain of KCPL’s customers.

BACKGROUND

1. On December 21, 2006, the Commission issued an order in KCPL’s 2006 general rate case, Case No. ER-2006-0314 (“2006 Rate Case Order”). In that order, the Commission determined that “the competent and substantial evidence supports KCPL’s position” concerning the continued availability of KCPL’s general service all-electric tariffs and separately-metered space heating rates (“All-Electric/Space-Heating Rates”). Specifically, the Commission recognized

that KCPL participated in an extensive class cost of service study in 1996, and that KCPL has reached an agreement for class cost of service and rate design in the present case. The Commission will

adopt Staff's suggestion, and Trigen's alternative suggestion, that the Commission restrict the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general service tariffs to existing customers until there is a comprehensive class cost of service study. This appears to be a reasonable solution, since no one has performed a cost study of the impacts of eliminating the current rates. (footnotes omitted)¹

2. Trigen sought rehearing or clarification (i) to limit the meaning of "existing customers" to those receiving service under KCPL's All-Electric/Space-Heating Rates as of December 31, 2006 and (ii) to direct KCPL to file a class cost of service study analyzing its All-Electric/Space-Heating Rates by a date certain. KCPL responded by arguing (i) that KCPL should be permitted to make its All-Electric/Space-Heating Rates available to all of its existing customers—not just those already receiving service under those rates and (ii) that KCPL intended to file a class cost of service study in a subsequent rate case, as contemplated in the Regulatory Plan Stipulation and Agreement in Case No. EO-2005-0329. The Commission denied Trigen's request for rehearing or clarification. The Commission's 2006 Rate Case Order was subsequently appealed by Trigen and others. On December 31, 2007, the Cole County Circuit Court upheld the Commission's decision in all respects.²

3. On December 6, 2007, the Commission issued an order in KCPL's 2007 general rate case, Case No. ER-2007-0291 ("2007 Rate Case Order"). In that order, the Commission concluded

The availability of KCPL's general service all-electric tariffs and separately-metered space heating rates should be restricted to those qualifying customers' commercial and industrial physical locations being served under such all-electric tariffs or separately metered

¹ 2006 Rate Case Order, at p. 83.

² See Findings Of Fact, Conclusions of Law and Judgment, *State of Missouri ex rel. Trigen-Kansas City Energy Corporation v. Public Service Commission*, Case No. 07AC—CC00133 (December 31, 2007)(appeal docketed, No. WD69363 (Mo.Ct.App. 2008)).

space heating rates as of the date used for the billing determinants used in this case, and such rates should only be available to such customers for so long as they continuously remain on that rate schedule (*i.e.*, the all-electric or separately metered space heating rate schedule they are on as of such date).³

4. On December 21, 2007, the Commission issued an order clarifying that the above-quoted restriction applies “to customers being served under such rates as of January 1, 2008.”⁴

5. On January 21, 2008, KCPL initiated this proceeding by submitting an application for waiver or variance, seeking authority to make its All-Electric/Space-Heating Rates available to certain, specified customers that made commitments to all-electric or electric space heating infrastructure prior to the Commission’s January 1, 2008 cut-off date. As Staff correctly points out, “the net effect of this variance as regards certain of these customers, if granted, would be to decrease KCPL’s revenues.”⁵ That is, KCPL will not benefit financially if the Commission grants the waiver or variance. Instead, certain of its customers will avoid financial harm.

RESPONSE TO MOTIONS

6. Trigen and MGE request that KCPL’s application be dismissed as a collateral attack on the 2007 Rate Case Order. As Trigen and MGE both acknowledge in their pleadings, this issue is one of semantics. Each and every tariff or rate schedule of an electric utility in Missouri is approved by order of this Commission. To the extent KCPL’s application needs to be amended to request a waiver or variance from its tariffs as opposed to the order concerning those tariffs, KCPL hereby so amends its application.

7. Trigen acknowledges the interrelationship of orders and tariffs by devoting several pages of its motion to a discussion of whether the Commission has authority to grant a

³ 2007 Rate Case Order, at p. 82.

⁴ Order Denying Motions for Rehearing and Request for Clarification, at p. 1.

⁵ Staff’s Informational Filing in Response to Application, at ¶ 2.

waiver or variance from a tariff provision.⁶ MGE similarly acknowledges the relationship by asserting “Whether KCPL’s application is characterized as a request for waiver/variance from a Commission order or as a request for waiver/variance from tariff provisions, the application should be dismissed.”⁷ Because Trigen’s and MGE’s briefs include arguments concerning the amendments of a tariff and because this proceeding is at such an early stage, no party will be prejudiced by KCPL amending its application at this time.

8. Trigen cites *State ex rel St. Louis County Gas Co. v. Public Service Commission*, 286 S.W. 84 (1926) for the proposition that the Commission cannot grant a waiver or variance from a tariff provision. The section of that decision quoted by Trigen also provides the cure to the alleged lack of authority. As Trigen quotes in paragraph 10 of its motion, the Missouri Supreme Court stated as follows:

A schedule of rates and charges filed and published in accordance with the foregoing provisions [of the PSC law] acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. ***It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission.*** (emphasis added)

9. KCPL disagrees with Trigen’s claim that the Commission is not authorized to grant a waiver or variance from a tariff once approved, but such a general finding is unnecessary in this case. If the Commission ultimately determines that it would serve the public interest to permit KCPL to continue to make its All-Electric/Space-Heating Rates available to the customers, or a portion of the customers, listed in the attachments to KCPL’s application, the Commission can order KCPL to submit new or supplementary schedules that clarify the availability of the rates as the Commission deems appropriate in this case.

⁶ See Trigen’s Motion, at pp. 5-7.

⁷ MGE’s Motion, at ¶ 2.

10. Trigen's argument is largely premised on the incorrect assumption that tariffs are tantamount to statutes in *all* circumstances. This is not the case. The Commission's regulations correctly make a distinction. Specifically, 4 CSR 240-3.015 provides:

The requirements for filing applications for waivers or variances from commission rules and tariff provisions, as well as those statutory provisions that may be waived, are contained in Chapter 2 of the commission's rules in rule 4 CSR 240-2.060.

11. The referenced rule 4 CSR 240-2.060(4), in turn, provides:

applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived, are contained in Chapter 2 of the commission's rules in rule 4 CSR 240-2.060.⁸

12. The Commission has previously granted requests for waivers or variances from a utility's tariffs, particularly when not granting the waiver or variance would result in inequitable financial harm to a customer or group of customers. In Case No. EE-2006-0123, for example, a customer applied for a waiver or variance from KCPL's tariffs to the extent the tariffs prohibited KCPL from serving multiple-occupancy buildings with a single master meter. In its Report and Order issued October 19, 2005, the Commission found that "Given the particular circumstances that exist in this case, the Commission finds that it would be in the public interest to grant a variance from KCPL's tariff to allow the master metering plan proposed by [the customer] to proceed."⁹ The Commission routinely grants such waivers.¹⁰

⁸ See also, *Laclede Gas Co.*, GR-2007-0179 (Dec. 13, 2006) ("Commission Rule 4 CSR 240-2.060(4) allows the Commission to grant an applicant a variance from its tariff provisions if the applicant shows good cause.")

⁹ *WST, Inc.*, Report and Order, EE-2006-0123, at p. 15 (Oct. 19, 2005).

¹⁰ See, e.g., *Missouri Gas Energy*, GR-2007-0256 (Nov. 16, 2007); *Union Electric Co.*, GR-2008-0107 (Nov. 1, 2007); *The Empire District Gas Co.*, GT-2007-0207 (Feb. 15, 2007); *The Empire District Electric Co.*, EE-2007-0030 (Jan. 30, 2007); *Laclede Gas Co.*, GR-2007-0179 (Dec. 13, 2006); *The Empire District Electric Co.*, EE-2007-0030 (Oct. 11, 2006); *Grand View Tower, LLC*, EE-2005-0486 (Feb. 21, 2006). In each case the Commission granted for good cause a request for a waiver of a utility's tariffs.

13. The Commission's ability to grant waivers of tariff provisions is both legal and logical. While generally applicable, tariffs cannot reasonably be expected to apply equitably to any and all customer-specific circumstances that might arise. Rightfully so, however, KCPL cannot waive a provision of its tariffs to accommodate such circumstances as it perceives them. Instead, the Commission has the discretion and authority to determine whether a waiver or variance is in the public interest.

14. Trigen also argues that granting the waiver or variance would be preferential or discriminatory, again citing *State ex rel St. Louis County Gas Co. v. Public Service Commission*. Neither that case, nor any other, suggests that KCPL or the Commission must treat all customers identically. Instead, KCPL is prohibited from treating customers in an **unduly** discriminatory manner. This distinction is clear in the statutory provision cited by Trigen, *i.e.*, "No ... electrical corporation ... shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality...."¹¹

15. As explained in KCPL's application, the inequitable adverse financial impact on certain KCPL customers who made financial or other commitments prior to January 1, 2008 based on the continued availability of KCPL's All-Electric/Space-Heating Rates justifies not treating those customers identically to KCPL's other customers, that is, any discriminatory or preferential treatment they might receive is not undue. KCPL and its customers should be afforded the opportunity to demonstrate that good cause exists to permit KCPL to make its All-Electric/Space-Heating Rates available to those listed in the Company's application in this proceeding.

¹¹ See Trigen's Motion, at ¶ 11 (citing RSMo Section 393.130.3).

16. Lastly, Trigen argues that the options KCPL provided to its customers as to how to make their concerns known to the Commission somehow warrants dismissing the application. Trigen has sought every opportunity to make it more onerous for KCPL's customers to express their views to the Commission. KCPL proposed a public hearing in Kansas City, Missouri, similar to those used in rate cases, to give the public an opportunity to comment on this proceeding. Trigen objected to that proposal, suggesting that any hearing in Kansas City instead be for the purpose of subjecting any KCPL customer who prefiled testimony to cross examination.

17. Many of the customers who will be adversely impacted by limiting the availability of KCPL's All-Electric/Space-Heating Rates informed KCPL that they are wholly unaware of the Commission's regulations and practices. The Notice of *Ex Parte* Contact cited by Trigen illustrates this point. That contact simply represented one customer's confusion as to how to properly submit pre-filed testimony to the Commission. That is, the customer e-mailed his pre-filed testimony to Chairman Davis instead of submitting it via EFIS or the docket room.

18. Many customers have similarly expressed concern about the need to obtain legal counsel to comment or provide testimony in this case. Trigen's apparent intent to cross examine those customers has only exacerbated that concern.

19. KCPL was simply attempting to educate the affected customers on a generic basis how to make their concerns known to the Commission. To the extent the Commission deems one of those options to be inappropriate the proper remedy is to strike from the record any comments received via that channel. Dismissing the application outright is not warranted.

RESPONSE TO INFORMATIONAL FILING

20. KCPL appreciates Staff's preparation and submission of its Informational Filing. KCPL believes Staff's perspective is helpful both with respect to the factual background that lead KCPL to submit its application and with respect to the legal issues that are presented to the Commission in this case. KCPL responds primarily to clarify certain motives or understandings that are attributed to the Company.

21. KCPL seeks to clarify that it did not willfully mislead its customers concerning the continued availability of its All-Electric/Space-Heating Rates, as suggested by Staff.¹² Following the Commission's denial of Trigen's request for rehearing or clarification in the 2006 Rate Case Order, KCPL understood the status of its All-Electric/Space-Heating Rates to be (i) that KCPL could continue to make those rates available to all of its existing customers and (ii) that KCPL would be given an opportunity to cost justify those rates before their availability was further restricted.

22. KCPL did not attempt to provide a cost justification for its All-Electric/Space-Heating Rates in its 2007 rate case (Case No. ER-2007-0291) because it believed it was prohibited from doing so under its regulatory plan stipulation and agreement in Case No. EO-2005-0329. Concerning KCPL's 2007 rate case, that agreement provides that "The Signatory Parties agree not to file new or updated class cost of service studies or to propose changes to rate structures in [KCPL's 2007 rate case]." KCPL understood that provision to prohibit it from submitting the type of class cost of service study that would be necessary to cost justify its All-Electric/Space-Heating Rates. KCPL intends to cost justify its All-Electric/Space-Heating Rates at the first available opportunity. In fact, the Commission directed KCPL in its rate case to be

¹² Staff's Informational Report, at ¶ 2.

filed later this year to provide cost support for its All-Electric/Space-Heating Rates. KCPL will do so. Most importantly, KCPL did not willfully mislead its customers. Until the Commission issued the 2007 Rate Case Order, KCPL believed that its All-Electric/Space-Heating Rates would continue to be available until it had the opportunity to provide a cost justification for those rates.

CONCLUSIONS

23. KCPL respectfully requests that the Commission deny Trigen's and MGE's motions to dismiss KCPL's application. The Commission has the authority to grant a waiver or variance from KCPL's tariffs and the record will show that KCPL's application satisfies the criteria provided by Staff in its Informational Filing, *i.e.*, granting the waiver or variance is in the public interest and is not unduly discriminatory.

Respectfully submitted,

/s/ Curtis D. Blanc

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**COUNSEL FOR
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Dated: May 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served either by electronic mail or by first class mail, postage prepaid, on this 5th day of May 2008, upon counsel of record.

/s/ *Curtis D. Blanc*

Curtis D. Blanc