

**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)	
of Certain Provisions of the Report and Order)	Case No. EE-2008-0238
in Case No. ER-2007-0291)	

OBJECTION TO THE ESTABLISHMENT OF PROCEDURAL SCHEDULE

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), by and through the undersigned counsel, and in accordance with 4 CSR 240-2.080, submits this Objection to the Establishment of Procedural Schedule, and in support thereof respectfully states as follows:

1. Pursuant to the Commission's Order Scheduling a Prehearing Conference issued on February 26, 2008, most parties to this case met on March 24, 2008. At said prehearing conference, the regulatory law judge directed the parties to file a proposed procedural schedule by March 31, 2008. However, for the reasons set forth below which were unknown to the regulatory law judge when he directed the parties to file a proposed procedural schedule, Trigen submits that it would be premature to set a procedural schedule for this case at this time and that setting a schedule would likely result in wasted resources and unnecessary expense. Accordingly, Trigen objects to the establishment of a procedural schedule for this case at this time. Despite Trigen's objection, KCPL, on behalf of certain parties, filed a proposed procedural schedule on March 31, 2008.

Establishment of any schedule is premature

2. As recognized in the proposed schedule submitted by KCPL, dispositive motions / motions to dismiss this case in its entirety are to be filed no later than April 18, 2008. Trigen does **not** object to the establishment of April 18 as the date for dispositive motions / motions to dismiss, with the caveat given in the footnote below¹. Trigen believes this case should be dismissed, for reasons which will be discussed in detail in a motion to dismiss which Trigen will file no later than April 18. Other parties may also file motions to dismiss this case by such date. Until these motions to dismiss are ruled upon, establishment of a procedural schedule for the remainder of the case is premature. In fact, establishment of a procedural schedule will become completely unnecessary if this case is dismissed, as Trigen believes should occur.

3. Furthermore, establishment of a procedural schedule prior to ruling on the motions to dismiss would likely result in wasted resources and unnecessary expense. This is because it would be necessary for the witnesses for Trigen (and other parties) to begin submitting data requests and preparing their testimony prior to the motions to dismiss being ruled upon, if a procedural schedule is established. For example, in the procedural schedule proposal filed by KCPL on behalf of certain parties to this case, KCPL would file its direct testimony April 4. Motions to dismiss would not be due until April 18, and then KCPL would have ten days (until April 28) to respond per Commission rule. The Commission would then need some time to consider the motions and KCPL's response, in all likelihood delaying a Commission ruling until mid-May, at

¹ Trigen does not object to the establishment of April 18 as the date for dispositive motions / motions to dismiss this case based on grounds which are demonstrable at this time. However, if the case is not dismissed at this early stage of the proceeding (which Trigen believes it should be), additional bases for motions to dismiss, strike, limit, etc. may arise after discovery is conducted or testimony is filed or hearings are held and Trigen reserves its rights to file any such motions at the appropriate time.

which time the case should be dismissed. However, in the proposed procedural schedule, Trigen and all non-KCPL parties would have only until May 30 to file their rebuttal testimony to KCPL's April 4 direct. Therefore, despite the statement in the schedule proposal filed by other parties that they "have proposed a schedule that allows the Commission the opportunity to consider and decide [the dispositive motions] before the filing of rebuttal testimony", rather than wait on such decision, to be safe Trigen's witnesses (and those of other parties) would need to begin submitting data requests and preparing their testimony prior to the motions to dismiss being ruled upon – all of which would be unnecessary and result in a waste of resources if the case is ultimately dismissed as it should be. Also, since KCPL has designated substantial portions of its Application herein as Highly Confidential, and will presumably do the same with its testimony and responses to data requests, it is necessary for Trigen to retain an outside consultant to prepare its case. Therefore, all of the potentially unnecessary work which will be necessitated by the establishment of a procedural schedule prior to ruling on the motions to dismiss will result in additional expense for Trigen.

4. Until the motions to dismiss which are to be filed no later than April 18 are decided by the Commission, it would be premature to set a procedural schedule for this case. For the reasons discussed above, setting a schedule prior to deciding the motions to dismiss would also likely result in wasted resources and unnecessary expense. Therefore, Trigen respectfully objects to the establishment of a procedural schedule for this case at this time.

Problems with schedule proposed by KCPL and certain other parties

5. As set forth above, Trigen objects to any procedural schedule being established for this case at this time. However, beyond objecting to the establishment of any schedule, Trigen submits there are substantial problems with the schedule proposal filed by KCPL on behalf of certain other parties to this case as set forth below and objects thereto.

6. As stated in the Conclusions section of KCPL's Application herein, KCPL is requesting "a waiver or variance of the Report and Order [in KCPL's last rate case] to the extent necessary to make KCPL's All-Electric/Space-Heating Rates available" to numerous customers listed in the Application and Schedules thereto, allegedly on the basis that "these customers made investment decisions based on the availability of the All-Electric/Space-Heating Rates." According to paragraph 12 of KCPL's Application, "KCPL has identified four categories of customers that are in various stages of commitment to constructing facilities or modifying existing facilities to qualify" for these discounted rates. Assuming without conceding that such allegations, if proven, would constitute a sufficient basis for granting KCPL's requested waiver or variance, at a minimum the allegations contained in KCPL's Application require evidence *from each allegedly impacted customer* of what "investment decision" has been made and when it was made, the stage of each customers' "commitment", what representations were made to the customer by KCPL and when such representations were made, and what steps have been taken by each allegedly impacted customer to mitigate the impact on them of the Report and Order from which KCPL seeks a waiver or variance. In order to provide the evidence necessary to support such a case, direct

testimony from each allegedly impacted customer² should be filed when direct testimony is due. As stated in 4 CSR 240-2.130(7)(A), “Direct testimony shall include **all testimony** and exhibits asserting and explaining [a] party’s entire case-in-chief.” (emphasis added) Furthermore, as provided in the Commission’s typical Order Setting Procedural Schedule, “The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing.” *Order Setting Procedural Schedule*, issued April 5, 2007 in Case No. ER-2007-0291 (KCPL’s last rate case).

However, rather than prefiling the direct testimony of the allegedly impacted customers as required by the Commission’s rules and procedures, KCPL has proposed in the procedural schedule submitted to the Commission to have a “local hearing” at which these customers could testify – without filing any testimony as required by rule. Such procedure would clearly violate the Commission’s rule on prefiled testimony.

Furthermore, if a local hearing is held to receive this evidence, Trigen will have no idea who is going to appear in furtherance of KCPL’s Application or what they plan to say, and will be deprived of the opportunity to conduct meaningful cross-examination or discovery concerning “evidence” which would presumably be the linchpin of KCPL’s case – thereby denying Trigen of its rights to due process. Under such procedure, the prefiled direct testimony will not include all testimony asserting and explaining KCPL’s entire case-in-chief in violation of the rule set forth above, and such procedure will not give parties (such as Trigen) notice of the claims, contentions and evidence in issue but

² Arguably, each of these customers should have intervened as parties in this case. Why they did not choose to do so prior to the intervention deadline is somewhat intriguing.

can reasonably be expected to lead to objections and delays caused by allegations of unfair surprise at the hearing which prefiled testimony is designed to prevent.

These customers should be required – and are required by Commission rule and procedure – to prefile written direct testimony rather than simply appear at a “local hearing”. The Commission must remember that the customers at issue in this case are **not** residential customers, but are commercial and industrial customers – businesses that could, if they chose to do so, comply with the Commission’s rules³ and present prefiled testimony subject to discovery and cross-examination at the evidentiary hearing before the Commission in Jefferson City. Trigen objects to a “local hearing” being used to circumvent the Commission rule on prefiled testimony, and certainly objects to such an infringement of its ability to conduct meaningful discovery or cross-examination, and accordingly must object to the “local hearing” contained in the proposed procedural schedule.

7. Related to the matters set forth in paragraph 6 above, assuming without conceding that the allegations of KCPL’s Application, if proven, would constitute a sufficient basis for granting KCPL’s requested waiver or variance, at a minimum the allegations contained in KCPL’s Application require evidence *from each allegedly impacted customer* of what “investment decision” has been made and when it was made, the stage of each customers’ “commitment”, what representations were made to the customer by KCPL and when such representations were made, and what steps have been taken by each allegedly impacted customer to mitigate the impact on them of the Report and Order from which KCPL seeks a waiver or variance. In addition to the requirement

³ Although these customers may not have intervened as parties in this case, presumably KCPL could file their testimony as witnesses for KCPL, which is what they would in actuality be.

of prefiled direct testimony as discussed in paragraph 6, *each* of these allegedly impacted customers *must appear* at the evidentiary hearing before the Commission in Jefferson City to support their prefiled testimony subject to cross-examination. Assuming each of the numerous customers listed in KCPL's Application and Schedules thereto actually files testimony as required by Commission rule *and* appears at the hearing in Jefferson City, the hearing could last several weeks. Therefore, the minimal time proposed for the hearing in the proposed procedural schedule filed with the Commission will be wholly insufficient, and Trigen objects thereto.

8. The proposed procedural schedule filed by KCPL on behalf of certain parties to this case only provides for one week between the filing of rebuttal testimony and the filing of surrebuttal/cross-surrebuttal testimony. Trigen submits that one week is an entirely insufficient amount of time to conduct discovery concerning the other parties' rebuttal testimony (the Commission should recognize that not even one round of data requests and responses could be effectuated in such a short period) and prepare and file surrebuttal/cross-surrebuttal testimony and objects to being allowed such an insufficient amount of time.

As set forth in the first section of this pleading, Trigen submits that it is premature to establish **any** procedural schedule for this case at this time, given that Trigen believes the case should be dismissed for the reasons which will be addressed in detail in the motions to dismiss which are to be filed herein no later than April 18, and that establishing a schedule at this time would result in wasted resources and unnecessary expense. However, if the case is not dismissed pursuant to the April 18 motions and a procedural schedule is ultimately established for this case, Trigen respectfully submits

that said schedule should provide for a minimum of two months between the filing of direct testimony and rebuttal testimony and a minimum of one month between the filing of rebuttal testimony and surrebuttal/cross-surrebuttal testimony in order to allow time for meaningful discovery to be conducted and testimony prepared.

Conflicts with dates proposed

9. The proposed procedural schedule filed by KCPL and certain other parties to this case provides for the filing of surrebuttal/cross-surrebuttal testimony on June 6 and the list of issues on June 13. However, the undersigned counsel is already scheduled to be out of state the week of June 2 – 6, and out of the office June 12 – 13, both due to previously scheduled commitments⁴. Therefore, notwithstanding the other problems with the proposed schedule as set forth above, the surrebuttal/cross-surrebuttal date and list of issues date proposed by the other parties are already otherwise conflicted for, and would be a hardship on, the undersigned.

WHEREFORE, for the reasons set forth above, Trigen-Kansas City Energy Corporation respectfully requests that no procedural schedule be established for this case until after the Commission has decided the dispositive motions / motions to dismiss which are to be filed no later than April 18. Hopefully, after that time the Commission will dismiss this case, thereby obviating the need to establish a procedural schedule. In any event, the Commission should not adopt the schedule proposed by KCPL and certain other parties to this case for the additional reasons set forth above.

Respectfully submitted,

/s/ Jeffrey A. Keevil

⁴ The undersigned indicated at the prehearing that the first two weeks of June would not work in his schedule.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was sent to counsel of record by depositing same in the U.S. Mail first class postage paid, by hand-delivery, or by electronic transmission, this 31st day of March, 2008.

/s/ Jeffrey A. Keevil
