BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MOTION TO DISMISS, STRIKE AND SANCTION

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), by and through the undersigned counsel, and pursuant to the procedural schedule previously established for this case, submits this Motion to Dismiss, Strike and Sanction, and in support thereof respectfully states as follows:

1. The Commission issued its Report and Order in Case No. ER-2007-0291 on December 6, 2007, with a stated effective date of December 16, 2007. In said Report and Order, at page 82, the Commission decision stated that:

> 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 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).

2. On December 12, 2007, in Case No. ER-2007-0291, Staff filed *Staff's Request for Clarification* in which, among other things, Staff requested clarification of whether the Commission "intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying

customers' commercial and industrial physical locations being served under such rates as of September 30, 2007, January 1, 2008, or some other date."

3. On December 14, 2007, in Case No. ER-2007-0291, KCPL filed *Kansas City Power & Light Company's Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers*, in which, among other things, KCPL requested the Commission grant a rehearing and stay as to that portion of the Commission's decision set forth in paragraph number 1 above, or in the alternative, grant KCPL a waiver or variance from that decision "and allow KCPL to grandfather any existing KCPL customer who has entered into a contract for, or purchased heating equipment or committed to make decisions, in reliance upon the existence of the availability of KCPL's all-electric and space-heating rates." On December 19, 2007, Trigen filed the *Response of Trigen-Kansas City Energy Corporation in Opposition to Kansas City Power & Light Company's Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision*.

4. Thereafter, on December 21, 2007, the Commission issued its *Order Regarding Motions For Rehearing And Request For Clarification* in Case No. ER-2007-0291. In said December 21 Order, the Commission granted Staff's request for clarification referenced above in paragraph number 2 and clarified that it intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying customers' commercial and industrial physical locations being served under such rates **as of January 1, 2008**. In that same December 21 Order, the Commission also denied in its entirety KCPL's request for rehearing and

stay, or in the alternative, application for waiver or variance from decision for specific customers referenced above in paragraph number 3.

5. After the Commission's December 21 Order in Case No. ER-2007-0291 denied *Kansas City Power & Light Company's Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers,* KCPL **did not** seek judicial review of the Commission's decision[1]. Furthermore, KCPL **did not** seek rehearing of that portion of the December 21 Order which clarified that the Commission intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying customers' commercial and industrial physical locations being served under such rates **as of January 1, 2008**.

6. Thereafter, on January 23, 2008, KCPL filed its *Application for Waiver or Variance Concerning Certain All-Electric and Electric Heating Customers of Kansas City Power & Light Company* (the "Application"), which instituted the instant case – Case No. EE-2008-0238. According to the introductory paragraph of KCPL's Application, it is an application "for waiver or variance of certain provisions of the Commission's Report and Order in Case No. ER-2007-0291 . . ., concerning the availability of KCPL's general service all-electric tariffs and separately-metered space heating rates . . . to certain customers who were not taking service under those rates as of January 1, 2008, but who committed financial resources prior to that date based on their expectation that those rates would be available." In other words, KCPL is, once again, seeking a waiver or variance from the Commission's decision set forth above in

[1] KCPL did not seek judicial review of either the Commission's Report and Order issued December 6, 2007 or the Commission's *Order Regarding Motions For Rehearing And Request For Clarification* issued on December 21, 2007.

paragraph 1 for some alleged customers – a waiver or variance which the Commission has once already denied as set forth in paragraphs 3 and 4 above.

Sanction of dismissal for violation of rule prohibiting *ex parte* communication

7. Before addressing why, under the applicable law, on its face, this Application case filed by KCPL should be dismissed, the undersigned is compelled to address a matter which first came to light when KCPL filed the supplemental direct testimony of David L. Wagner (the "Supplemental Direct") on April 15, 2008, in this case. Trigen will not address in this pleading its objections to the prefiled testimony filed in this case by KCPL, since such objections would not be directed to KCPL's Application and the relief requested therein and would not therefore, of themselves, be in the nature of a "dispositive" motion, and only "dispositive" motions were required to be filed by April 18 pursuant to the procedural schedule. Trigen will address its objections to KCPL's prefiled testimony at a later date, if it becomes necessary to do so. However, the following matter does not make the prefiled testimony objectionable; rather, Trigen believes that it demonstrates action on the part of KCPL which should result in the sanction of dismissal of this case.

8. In the Supplemental Direct, as part of his discussion of "the process and measures the Company [KCPL] took to notify customers listed in the Application to this case about the Commission's April 8th Order" (Supplemental Direct, page 2, lines 2-4), Mr. Wagner states on page 4, lines 1-9, that KCPL personnel sent an email to customers which "*informed the customers of all communication options available to them, **including writing letters to the Commission** . . . **We felt it was important to provide other avenues to those who were reluctant to enter evidence in the case but wanted to***

still make their opinions known." (emphasis added) Attached to the Supplemental Direct as Schedule DLW-1 is a copy of the email he testifies was sent to customers, which clearly includes what is called "Instructions for letting the Missouri Public Service Commission know about your concerns" which includes, as **Option 2: Letter to the Commissioners** "Write a letter to one or all of the Commissioners explaining your concerns and how your company will be impacted. The Commissioners are: Jeff Davis, Connie Murray, Robert Clayton, Terry Jerrett [sic], and Kevin Gunn." This email concludes with the instructions that "If you have any questions about this process, please feel free to contact Curtis Blanc in the KCP&L Law Department at (816) 556-2483."

9. Although not so described by Mr. Wagner, the foregoing testimony indicates that KCPL instructed and encouraged its customers to engage in conduct prohibited by the Commission's rule on *ex parte* communications, 4 CSR 240-4.020. Indeed, Chairman Davis was compelled to file a "Notice of *Ex Parte* Contact" in this case on April 11 as a result. KCPL's intentional and egregious action of not only instructing its customers how to, but also encouraging them to, engage in what amounts to prohibited *ex parte* communication with the Commissioners should result in the sanction of dismissal of this case in its entirety.

The Commission cannot grant waiver of or variance from the tariff provision

10. In *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 315 Mo. 312, 286 S.W. 84 (1926), the Missouri Supreme Court stated that:

> 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**. Such is the construction which has been universally put

> upon analogous provisions of the Interstate Commerce Act (*Louisville Ry. Co. v. Maxwell, 237 U.S. 94*; *Gulf Ry. Co. v. Hefley, 158 U.S. 98*); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. [State ex rel. v. Public Service Commission, 264 S. W. l. c. 671-2.] **If such a schedule is to be accorded the force and effect of law, it is binding not only upon the utility and the public, but upon the Public Service Commission as well**. (emphasis added)

315 Mo. 312, at 317; 286 S.W. 84, at 86. Accordingly, KCPL's tariff, having become effective, has the force and effect of law and the Commission **cannot** grant waiver or variance therefrom. The case should be dismissed.

11. Furthermore, KCPL's request for a waiver or variance for specific customers so that those customers could receive KCPL's discounted rates would, on its face, be preferential, discriminatory and hence unlawful. In the case of *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 315 Mo. 312, 286 S.W. 84 (1926) referenced above, the Missouri Supreme Court further stated that:

> The general purpose of the statutory provision above referred to is to compel the utility to furnish service to all the inhabitants of the district which it professes to serve at reasonable rates and without discrimination. The methods by which these results are to be obtained are clearly and definitely prescribed. "Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such . . . corporation . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished." The rules and regulations of the St. Louis Gas Company as to extensions are integral parts of its schedule of rates and charges. If they are unjust and unreasonable the Commission, after a hearing, as just referred to, may order the schedule modified in respect to them. But it cannot set them aside as to certain individuals and maintain them in force as to the public generally. The Gas Company cannot "extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances." **Neither can the Public Service Commission.** (emphasis added)

315 Mo. 312, at 317-318; 286 S.W. 84, at 86. The statutory language cited in the opinion is presently found at Section 393.140(5) and 393.140(11) RSMo and applies equally to electric corporations such as KCPL. In addition, Section 393.130.2 and .3 RSMo also provide that:

> 2. No . . . electrical corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for . . . electricity . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation **for doing a like and contemporaneous service** with respect thereto **under the same or substantially similar circumstances or conditions**. (emphasis added)
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> 3. No . . . electrical corporation . . . shall make or grant **any undue or unreasonable preference or advantage** to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (emphasis added)

Accordingly, it would be unlawful for the Commission to grant KCPL's requested waiver or variance. The case should be dismissed.

Since KCPL did not seek review of the Commission's decision, KCPL cannot now collaterally attack the decision

12. As set forth in paragraph number 5 above, after the Commission's December 21 Order in Case No. ER-2007-0291 denied *Kansas City Power & Light Company's Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers*, KCPL **did not** seek judicial

review of the Commission's decision[2]. Furthermore, KCPL **did not** seek rehearing of that portion of the December 21 Order which clarified that the Commission intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying customers' commercial and industrial physical locations being served under such rates as of January 1, 2008. The Commission's orders and decisions in Case No. ER-2007-0291 have now become final. Since KCPL did not follow the exclusive procedure provided for review of Commission orders and decisions, it **cannot** now collaterally attack those orders and decisions by filing this case "for waiver or variance of certain provisions of the Commission's Report and Order[3] in Case No. ER-2007-0291." (KCPL Application, introductory paragraph)

13. As the Commission is aware, Section 386.500 RSMo provides that:

> 1. After an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted the same shall be determined by the commission within thirty days after the same shall be finally submitted.
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> 2. No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. The applicant shall not in

[2] KCPL did not seek judicial review of either the Commission's Report and Order issued December 6, 2007 or the Commission's *Order Regarding Motions For Rehearing And Request For Clarification* issued on December 21, 2007.

[3] Although KCPL's Application is limited to the Commission's Report and Order issued December 6, 2007, it appears that KCPL's complaint may be with the Commission's December 21 Order which clarified that the Commission intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying customers' commercial and industrial physical locations being served under such rates as of January 1, 2008. However, in either event, KCPL failed to follow the procedure for obtaining judicial review of both orders and cannot now collaterally attack either order, or the Commission's decision in Case No. ER-2007-0291.

any court urge or rely on any ground not so set forth in its application for rehearing.

3. An application for a rehearing shall not excuse any corporation or person or public utility from complying with or obeying any order or decision or any requirement of an order or decision of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct.

4. If, after a rehearing and a consideration of the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order made after any such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision.

Section 386.510 RSMo states that:

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (herein referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined. The writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day the cause shall be heard by the circuit court, unless for a good cause shown the same be continued. No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review. In case the order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. No court in

> this state, except the circuit courts to the extent herein specified and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity.

Furthermore, Section 386.515 RSMo provides that:

> Prior to August 28, 2001, in proceedings before the Missouri public service commission, consistent with the decision of the supreme court of Missouri in State ex rel. Anderson Motor Service Co., Inc. v. Public Service Commission, 97 S.W.2d 116 (Mo. banc 1936) the review procedure provided for in section 386.510 is exclusive to any other procedure. An application for rehearing is required to be served on all parties and is a prerequisite to the filing of an application for writ of review. The application for rehearing puts the parties to the proceeding before the commission on notice that a writ of review can follow and any such review may proceed without formal notification or summons to said parties. **On and after August 28, 2001, the review procedure provided for in section 386.510 continues to be exclusive** except that a copy of any such writ of review shall be provided to each party to the proceeding before the commission, or his or her attorney of record, by hand delivery or by registered mail, and proof of such delivery or mailing shall be filed in the case as provided by subsection 2 of section 536.110, RSMo. (emphasis added)

Finally, Section 386.550 RSMo states:

> **In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive**. (emphasis added)

14. The foregoing statutes have consistently been interpreted to mean what they plainly say – that the review procedure provided in Sections 386.500 and 386.510 is the exclusive manner of obtaining review of Commission decisions, and once those decisions become final, they are not subject to collateral attack such as KCPL is attempting in this case.

15. In *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 103 S.W.3d 753 (Mo. 2003), the Missouri Supreme Court stated:

> The circuit court's jurisdiction derives from *sections 386.500 and 386.510*, which provide that an applicant may seek review in the circuit court of a PSC "order or decision" if the applicant has timely filed an application for rehearing and that application has been denied. In that regard, this Court has held "that the Legislature has provided a special statutory procedure for review of an 'original order or decision' of the Commission...and that procedure [is] provided for in *[section] 386.510 [and]* is **exclusive and jurisdictional**." *Union Electric Company v. Clark, 511 S.W.2d 822, 825 (Mo. 1974).* (bold emphasis added)

103 S.W.3d at 758. The Commission should recall that, by failing to seek judicial review of the Commission's Report and Order in Case No. ER-2007-0291, KCPL did not follow the exclusive and jurisdictional procedure for attacking the Report and Order.

16. In a court proceeding involving numerous Commission cases and a rather lengthy statement of background facts[4], in which the circuit court had determined that it would not consider the merits of some of the consolidated cases because the relators had not filed timely applications for rehearing pursuant to Section 386.500 and that it did not have jurisdiction to review all of the Commission decisions because the petitioners had not timely filed their petitions for review pursuant to Section 386.510, in *State re rel. Mid-Missouri Telephone Company v. Public Service Commission*, 867 S.W.2d 561 (Mo. App. 1993), the Western District Court of Appeals stated as follows:

> We do not consider the merits of appellants' points because of the mandate of *§ 386.550*.
>
> *Section 386.550* says, "In all collateral actions or proceedings the orders and decisions [of] the commission which have become final shall be conclusive." If a statutory review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding. *State of*

[4] Rather than attempt to summarize the background of this appeal due to the length and number of Commission cases involved, the undersigned would refer the Regulatory Law Judge and Commission to the Court of Appeals opinion for background.

Missouri ex rel. Licata, Inc. v. Public Service Commission of the State of Missouri, 829 S.W.2d 515 (Mo. App. 1992).

> The circuit court concluded that the appellants waived any objection by not following the correct procedures for challenging a PSC decision. PSC created COS in its report and order of December 12, 1989. It adopted the revenue sharing plan in its report and order of April 18, 1990. None of the appellants filed a motion for rehearing under § 386.500.1. Section 386.500.2 says:
>
> > No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation . . . unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. . . . The applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.
>
> We agree with the circuit court. Appellants were parties to the cases. They had the right to ask for a rehearing, and because they did not do so, they lost the right to attack the decisions collaterally.

867 S.W.2d at 565. The Commission should recall that KCPL did not seek rehearing of the December 21 Order clarifying the Commission's intent to restrict the discount rates to those qualifying customers' commercial and industrial physical locations being served under such rates as of January 1, 2008. Accordingly, KCPL has lost the right to attack that decision collaterally. Furthermore, by not seeking judicial review of the December 6 Report and Order, KCPL has likewise lost the right to attack that decision.

17. In the *Licata* case referred to in *State re rel. Mid-Missouri Telephone Company v. Public Service Commission*, which involved a customer's attempt to avoid being subject to and bound by a utility tariff which the Commission had approved in a prior case, the Western District Court of Appeals stated:

> *Section 386.550, RSMo 1986*, provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In *State ex rel. State Highway Com'n v. Conrad, 310 S.W.2d 871, 876*[4] (Mo. 1958), the court stated that it had so frequently been held that orders of the PSC are not subject to collateral attack that the court was not required to elaborate on the effect and

> meaning of *§ 386.550*. In that case the court refused to entertain a collateral attack on an order of the Commission which had apportioned the costs of constructing a railroad crossing. **The court held that § 386.510 provides the sole method of obtaining review of any final order of the commission.**
>
> If a statutory review of an order of the Commission is not successful, the order becomes final and cannot be attacked in a collateral proceeding. Here, there is no question that the order of the Commission by which Article 10 [of the utility tariff] was approved became final; nor is there any question that Licata had notice of the proceeding in which Article 10 was considered and approved, and failed to participate in that hearing. Thus, Article 10 was approved with full notice to Licata and opportunity to be heard. (emphasis added)

State ex rel. Licata, Inc. v. Public Service Commission, 829 S.W.2d 515 at 518 (Mo. App. 1992). The Commission had dismissed Licata's complaint against the utility company, and the Court of Appeals affirmed the Commission's dismissal of Licata's customer complaint. Interestingly, in an attempt to avoid Section 386.550 RSMo, Licata claimed that it was not attacking the Commission's order, but was instead attacking the utility tariff. The Court of Appeals stated that it was impossible to separate the utility tariff at issue from the order of the Commission approving the tariff, so when Licata attacked the tariff it must necessarily attack the order which adopted it and pursuant to Section 386.550 Licata could not collaterally attack the order of the Commission by which the tariff was adopted. *Id.* Therefore, in the instant case, even if KCPL claimed it was seeking waiver of or variance from the tariff rather than the Commission order as stated in KCPL's Application, KCPL would still be precluded from such an attack based on Section 386.550 RSMo since to attack the tariff would be to attack the order. The Commission should dismiss this case.

18. The case of *State ex rel. State Highway Commission v. Conrad*, 310 S.W.2d 871 (Mo. 1958) is also instructive. In that case, the Missouri Supreme Court stated that:

> *Section 386.550* provides that: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." *Section 386.510* provides the sole method of obtaining a review of any final order of the commission. So frequently have we held such orders not subject to collateral attack we need not elaborate upon the effect and meaning of these statutes, other than to refer to the case of *Wabash Railroad Company v. City of Wellston, supra, 276 S.W.2d 208*. There, the Wabash Railroad Company, appellant in the instant case, had applied to the Public Service Commission and obtained its order for authority to install, maintain and operate short-arm gates and flashing light signals at three street crossings in Wellston at a cost of $35,000, $12,000 of which Wellston was ordered to pay. The Wabash made the installations pursuant to that order and thereafter demanded from the city its share of the expense as ordered by the Commission. The city refused the demand. The Wabash sued the city and, in the circuit court, recovered judgment for $12,000, with interest. The city appealed. In this court, as in the trial court, the city attacked the validity of the order of the Commission. The Wabash there asserted and this court sustained its contention that Wellston **was "now precluded by law from attacking the public service commission order, either directly or collaterally."** In the instant case, therefore, must we hold, as we held at the instance of the Wabash in that case, that the order herein made by the Public Service Commission is not subject to collateral attack. (emphasis added)

310 S.W.2d at 876. Having failed to follow the exclusive procedure for obtaining review of the Commission's orders and decisions in Case No. ER-2007-0291, KCPL cannot now – by way of this application case – attack the Commission's orders and decisions in Case No. ER-2007-0291. KCPL's request "for waiver or variance of certain provisions of the Commission's Report and Order in Case No. ER-2007-0291 . . ., concerning the availability of KCPL's general service all-electric tariffs and separately-metered space heating rates . . . to certain customers who were not taking service under those rates as of January 1, 2008" is clearly – on its face – a prohibited collateral attack on the

Commission's orders and decisions in Case No. ER-2007-0291. Accordingly, the Commission must dismiss this case.

19. Finally as to this point, the Commission should also be aware that the only allegedly impacted customer to file direct testimony in a timely manner on April 15 as required by the Commission's April 8, 2008 *Order Establishing Procedural Schedule* was the General Services Administration ("GSA") which was represented by counsel in Case No. ER-2007-0291. (See the Application to Intervene of United States Department of Energy, National Nuclear Security Administration and Federal Executive Agencies filed in Case No. ER-2007-0291 on or about March 2, 2007, which states in part: "FEA represents all federal executive agencies located in KCPL's service territory which purchase electricity from KCPL" and "DOE/NNSA is authorized by a grant of Delegation of Authority from the General Services Administration pursuant to Section 201 (a)(4) of the Federal Property and Administrative Services Act of 1948, as amended (49 U.S.C. 481 (a)(4)) to represent the customer interests of affected executive agencies of the federal government in this proceeding.") However, GSA did not seek rehearing or judicial review of the Commission's decisions or orders in Case No. ER-2007-0291, although it was free to do so. Therefore, like KCPL, the GSA cannot now attack those decisions or orders. Furthermore, the Commission should be aware that the GSA – Bolling Building is currently a heating customer of Trigen, and KCPL's attempt to waive the implementation of the Commission's decision in Case No. ER-2007-0291 regarding restricting KCPL's discount rates is an attempt by KCPL to take heating load from Trigen which the Commission should not condone or allow.

Since KCPL failed to properly plead its case it should be dismissed

20. Applications, such as that which KCPL filed to institute the instant case, must be based on facts – not on hearsay and speculation – and must plead those facts which support the Application. This can be seen from the requirement in the Commission's rule on applications, 4 CSR 240-2.060(1)(M), which requires all applications to "be subscribed and verified by affidavit under oath." By definition, hearsay and speculation cannot be verified under oath; only facts can be so verified. Even a cursory examination of paragraphs 7 through 21 of KCPL's Application reveals that those paragraphs are based on nothing but hearsay and speculation, as they purport to discuss what "certain, specified customers" did or did not do and why and the impact the Commission's decision in ER-2007-0291 will have on those customers (not what KCPL did or did not do and why or the impact of the decision on KCPL). If KCPL bases the statements in the Application on what it was told by the alleged customers, those statements are by definition hearsay; the only other possible basis for KCPL's statements is that KCPL is merely speculating. Either way, the **Commission should strike paragraphs 7 through 21 of the Application and the Schedules attached thereto as being based on hearsay and speculation**. Once those paragraphs and accompanying schedules are struck from the Application, KCPL has clearly failed to allege any "good cause" for its requested waiver or variance as required by Commission rule 4 CSR 240-2.060(4) and the case should be dismissed.

21. Furthermore, even if the Commission does not strike those paragraphs and schedules from the Application, the Application still fails to allege "good cause" as required by 4 CSR 240-2.060(4). Just last month, in another KCPL case, the Commission addressed the meaning of "good cause" and stated as follows:

> Although the term "good cause" is frequently used in the law, . . . the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning. . . . Good cause "generally means a **substantial reason amounting in law to a legal excuse** for failing to perform an act required by law." . . . Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties." . . . Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. . . . 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." . . . **And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney**[5]. . . .

[citations omitted](emphasis added) *In the Matter of the Application of Kansas City Power & Light Company for a Variance from Certain Regulations Pertaining to Net Metering*[6], Order Granting Request for a Variance and Approving Tariff, issued on March 4, 2007, footnote 3, Case No. EE-2008-0260. KCPL's Application in the instant case fails to allege anything resembling a **legal excuse** for its requested waiver or variance; KCPL does not claim it is unable to perform in accordance with the Commission's decision from which it seeks waiver or variance or unable to comply with its own tariff which the Commission ordered in Case No. ER-2007-0291. In fact, it admits that it can comply; it just does not want to do so.

22. In addition, as the Commission correctly found in its December 21, 2007, *Order Regarding Motions For Rehearing And Request For Clarification* in Case No. ER-2007-0291, "there is no protected property interest in any particular utility rate" [citing *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975)]. Therefore, there is no legal excuse – *i.e.*, no good cause – for the allegedly

[5] Therefore, as set forth above in paragraph 20, "good cause" cannot be based on mere hearsay and speculation, but must be based on fact.
[6] The case dealt with a requested variance from a Commission regulation, **not** from a tariff; in fact, as part of the case, KCPL filed a revised tariff to implement a new Missouri statute.

impacted customers to not comply with KCPL's tariff which resulted from the Commission's orders and decisions in Case No. ER-2007-0291. Since KCPL's Application has failed to properly plead or allege "good cause," it should be dismissed.

WHEREFORE, Trigen-Kansas City Energy Corporation requests that the Commission issue an Order imposing the sanction of dismissal on KCPL as discussed in paragraphs 7 through 9 above and/or striking those portions of KCPL's Application and Schedules as discussed in paragraph 20 above and dismissing the Application; however, even if the Commission does not sanction KCPL or strike those portions of KCPL's Application and Schedules referenced above, the Commission still must dismiss this case for the additional reasons set forth above and Trigen-Kansas City Energy Corporation requests that the Commission issue an Order dismissing this case in its entirety for any or all of the reasons set forth above.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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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 18th day of April, 2008.

/s/ Jeffrey A. Keevil