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 Service to Implement Its Regulatory Plan	))))	Case No. ER-2007-0291

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

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), and for its Response 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 for Specific Customers, respectfully states as follows:

1. On December 14, 2007, Kansas City Power & Light Company ("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 (KCPL's "Application") regarding the Commission's Report and Order issued herein on December 6, 2007 (the "Report and Order"). The Commission should deny KCPL's Application in its entirety.

2. KCPL's request for rehearing of Issues 13a, 13b and 13c of the Report and Order should be denied because, contrary to KCPL's claim, there is competent and substantial evidence to support the Commission's decision on these issues. As set forth in detail in Trigen's Initial Post-Hearing Brief in this case, KCPL's general service all-electric tariff rates and separately metered space heating rates suffer from several

substantial flaws[1], evidence of which was on the record and before the Commission in the form of testimony from Trigen's witness Mr. Herz and which constitutes competent and substantial record evidence to support the Commission's decision. Despite KCPL's claim to the contrary, regarding Issues 13a and 13b, as testified by Mr. Herz, KCPL needs to do a comprehensive cost of service study in order to prove that the discounted rates are *not* discriminatory, rather than the other way around as KCPL would suggest. Regarding Issue 13c, given the numerous, substantial flaws[2] in KCPL's discounted rates, as testified by Mr. Herz, "The Company's [KCPL's] position is backwards. It would only be logical that the availability of these discounts should be restricted unless and until the Company presents the Commission with the appropriate studies and analyses that, pending Commission review and approval of such studies and analyses, provides an underlying basis of support for general service space-heating discounted rates in the first place; not the other way around as suggested by KCPL." (Ex. 703, Herz Surrebuttal, pp. 7-8). For its request for rehearing, KCPL's Application merely re-argues the arguments that KCPL has already made in its briefs and which were rejected by the Commission. For example, but not limited to, the arguments concerning the 1996 Rate Design case to which KCPL's Application refers were addressed and refuted in Trigen's Initial Post-Hearing Brief in detail. The Commission also properly considered and rejected KCPL's "mantra" referring to the Stipulation from the Regulatory Plan case. KCPL's rehearing request is merely a rehash of arguments KCPL has already made, and those arguments should be rejected (once again) by the Commission. The Commission's decision regarding Issues 13a, 13b and 13c was not arbitrary and capricious and was based on

[1] Rather than repeat arguments it has already made – as KCPL does in its Application – Trigen would refer the Commission to its Initial Post-Hearing Brief, beginning on page 9.
[2] See footnote 1 above.

competent and substantial evidence, and the Commission should deny KCPL's request for rehearing.

3. KCPL's request for a stay, waiver or variance of the decision related to Issue 13c to 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[3]" should also be denied.

It should be recognized that KCPL is improperly attempting to provide new "evidence" in the record to buttress its request for a stay, waiver or variance[4] beginning at least with paragraph 13 and continuing to the end of its Application and by including its Highly Confidential Attachment 1, by purporting to provide actual numbers and names of affected customers, as well as actions taken or being considered by those customers. **The Commission should not allow KCPL to supplement the record through the guise of an application for rehearing, and should strike all of this new material, including but not limited to Attachment 1**. Allowing KCPL to so supplement the record at this late date would violate the due process rights of Trigen and other parties. Even if not stricken, KCPL's claims regarding the actions taken or being considered by these customers is nothing more than hearsay and cannot be relied upon by the Commission.

It is obvious that KCPL's request for a stay, waiver or variance would yield an outcome which would exacerbate the Commission's stated concern of "allowing even

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[3] KCPL's request to grandfather customers actually uses this language, and would grandfather customers who have *committed to make decisions* in reliance upon the discount rates; how does one prove or disprove a commitment of someone else to make a decision in reliance upon anything? Such a proposal is ludicrous on its face.

[4] As used herein, references to KCPL's request for a stay, waiver or variance includes KCPL's request to "grandfather" certain customers.

more KCPL customers to migrate to those discounts." As stated by the Commission on page 82 of the Report and Order, "Allowing even more customers to use those discounts flies in the face of a possible move, supported by Staff, towards eliminating them completely." KCPL's request for a stay, waiver or variance flies in the face of the Commission's Report and Order.

KCPL's request for a stay, waiver or variance is entirely based on KCPL's claim that some customers have made energy investments assuming the availability of the all-electric and space-heating rates. KCPL fails to recognize that, according to the Missouri Supreme Court, there is no protected property interest in a particular utility rate. *See, State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975). Therefore, any potential discount rate customers who constructed or made other investments in reliance on the tariffs continuing did so at their peril. KCPL has been on notice for some time that the continuation of these discounted rates was, at the very least, in question; yet KCPL continued to promote and market these discount rates to potential customers while knowing that the continuation of the rates was in some jeopardy. KCPL should not now be heard to argue that customers made decisions based on these rates when KCPL should have made those customers aware that the rates might not remain. KCPL avers in its application that the ("...adverse impact on such customers will be significant, and public outcry will be great..."). Trigen counters that KCPL should be more concerned not with these select customers to whom they are attempting to offer discriminatory, favored treatment, but rather should concern themselves with the rest of their customer base that they propose be left holding the bag to pay for their discounts. KCPL also very transparently seeks to selectively offer these discounted rates to gain an

entirely unwarranted and unfair competitive advantage. The Application should be denied in its entirety. Furthermore, KCPL already made this argument against restriction of the discount rates in its initial brief and the Commission should not be persuaded by KCPL's re-hash of the same old argument based on extra-record evidence.

Also, the Commission should recognize that while KCPL's request for a stay, waiver or variance is entirely based on KCPL's claim that some customers have made energy investments assuming the availability of the all-electric and space-heating rates – rather than on any alleged damage to itself as a result of the Commission's decision – one of the customers used as an "illustrative example" to support its Application in paragraphs 18 and 19 (the GSA – Richard Bolling Federal Building) was apparently represented by counsel in this case[5] and has not sought rehearing, stay, waiver or variance of or from the Commission's Report and Order. Why then did KCPL file its Application, and spend its own time and money, in an alleged attempt to "protect" these customers, when this actual customer did not choose to file an application for rehearing? This begs the question whether KCPL's claimed beneficent action was in reality motivated by something other than simply a concern for its customers. In that regard, the Commission should be aware that the GSA – Bolling Building is currently a heating customer of Trigen, rather than KCPL, and KCPL's attempt to prevent or at least delay the implementation of the Commission's latest decision regarding restricting the discount rates is an attempt by KCPL to take heating load from Trigen. How many of the other

[5] See the Application to Intervene of United States Department of Energy, National Nuclear Security Administration and Federal Executive Agencies filed herein 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."

claimed customers upon which KCPL relies for its Application, referenced in paragraph 22 of its Application ("a list of customers . . .at various stages of design and construction") and Attachment 1, are likewise currently Trigen heating customers is unknown for the reasons set forth in footnote 7. In any event, the Commission should not grant KCPL's request to discriminate in favor of certain customers, at the expense of other customers, while at the same time taking customers away from Trigen and possibly other heating utilities which are not utilizing discriminatory rates, since such a result would only serve to drive up the rates for the remaining Trigen (or other utilities) customers. The Commission should stand by its decision, and not grant a stay, waiver, variance or "grandfather" some amorphous group claimed by KCPL to be future discount rate customers.

It should also be recognized that KCPL's request for a waiver or variance for specific customers would, on its face, be discriminatory and hence unlawful. The extent of the discrimination this would permit KCPL to engage in is further magnified by the ridiculously vague and imprecise language KCPL has proposed to allegedly "define" the "specific customers" to which it would be allowed to offer the discounted rates – customers who have *committed to make decisions* in reliance upon the discount rates[6]; it is not even clear that they would even need to be existing KCPL customers as required by the Commission in KCPL's last rate case. The waiver or variance from the

[6] Even if it is KCPL's intent to limit its variance or "grandfather" rights to only those customers listed on Attachment 1, such variance would still fly in the face of the Commission's Report and Order by allowing even more customers to use the discount rates, and would be an exception which swallows the intent behind the Commission's decision. Applying the Commission's decision as the Commission has ordered would not constitute a "regulatory taking", as hinted by KCPL, for the reasons set forth in the paragraph discussing *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. banc 1975) above, and if the customers truly had no notice that the discounted rates might not be available until the end of time – which is seriously doubtful – KCPL has only itself to blame, since KCPL could have, and should have, informed the customers that the discount rates were in jeopardy.

Commission's Report and Order for specific customers requested by KCPL would defeat the apparent intent behind the Report and Order's restriction – to not allow more customers to use the discounted rates – and would in essence be an exception which swallows the rule.

Also, KCPL's Application highlights a specific example of why the restriction imposed by Issue 13c is necessary and appropriate, and potentially describes an impending violation of KCPL's *current* tariffs regarding the availability of the discounted rates which can be avoided by the Commission's current decision under Issue 13c. Paragraph 19 of KCPL's Application refers to the Performing Arts Center ("PAC") as currently "being constructed" and clearly indicates that under its existing tariffs KCPL planned to serve the PAC pursuant to the all-electric or separately-metered space heating rates. The Commission will recall that in KCPL's last rate case (ER-2006-0314) the Commission restricted the discounted rates to *existing* customers, although it did not restrict the discounted rates to only those qualifying commercial and industrial customers who were then receiving service under the discounted rates (and, accordingly, the Commission's restriction in the last case was insufficient to address the problems presented by the discounted rates as the Commission correctly found on page 82 of the Report and Order in this case). However, since the discounted rates were restricted to *existing* customers by the last rate, and the PAC is *currently under construction*, it is difficult (perhaps impossible) to see how KCPL could place the PAC on the discounted rates; yet, KCPL obviously planned to do so without the further restriction imposed by the Commission in this case. How many of the additional claimed "customers" upon which KCPL relies for its Application, referenced in paragraph 22 of its Application ("a

list of customers . . .at various stages of design and construction") and Attachment 1, are likewise not current customers is unknown[7]. Furthermore, how far along their "design and construction" has progressed is likewise unknown, as is whether they have actually incurred any cost at all in reliance upon KCPL's discounted rate tariffs, as KCPL would have the Commission believe. KCPL's request would truly open a Pandora's box, which the Commission's decision has rightfully determined to close, on the basis of nothing more than speculation and hearsay, and allow KCPL almost unlimited discretion as to which "customers" qualified for the discount rates and which did not (i.e., which customers to favor or not). This would be an ideal ground for discrimination.

Even if the allegations of KCPL's Application are to be believed, KCPL has failed to allege any damage to itself as a result of the Commission's decision. Therefore, KCPL's allegations do not even meet the statutory requirements for issuance of a stay or suspension of a Commission decision by the circuit court. *See*, § 386.520 RSMo. (requires "a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result **to the petitioner** and specifying the nature of the damage." (Emphasis added))

Finally, KCPL's reference to the 2006 rate case being on appeal before the Cole County Circuit Court is irrelevant for purposes of this case, and once again, is merely a re-hash of an argument that KCPL has already made. The Commission should recognize it as being the red herring it is.

WHEREFORE, KCPL has failed to provide sufficient reason for the Commission to grant its request for rehearing or its request for a stay, waiver or variance or to allow

[7] Since KCPL designated Attachment 1 as Highly Confidential, the undersigned counsel has not been able to provide it to Trigen personnel in order to determine if these "customers" are truly KCPL customers or are actually customers of Trigen.

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." The Commission's decision regarding Issues 13a, 13b and 13c was not arbitrary and capricious and was based on competent and substantial evidence, and the Commission should issue its order (i) denying KCPL's Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decisions for Specific Customers **in its entirety**, and (ii) striking those portions of KCPL's Application which attempt to supplement the record of this case, beginning at least with paragraph 13 and continuing to the end of its Application and including its Highly Confidential Attachment 1.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent to counsel for parties of record by depositing same in the U.S. Mail, first class postage prepaid, by hand-delivery, or by electronic mail transmission, this 19th day of December, 2007.

/s/ Jeffrey A. Keevil