

**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

**RESPONSE TO STAFF'S "INFORMATIONAL FILING"**

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), by and through the undersigned counsel, and pursuant to the Commission's Order Extending Time to Respond to Motions issued herein on April 25, 2008, submits this Response to Staff's "Informational Filing" filed herein on April 18, 2008, and in support hereof respectfully states as follows:

1. On April 18, 2008, Staff filed in this case what it titled "Staff's Informational Filing in Response to Application." On that same date, Trigen filed its "Motion to Dismiss, Strike and Sanction" in this case. Trigen continues to stand by each of the arguments made in its Motion to Dismiss, Strike and Sanction and submits that the Commission must dismiss this case, filed by Kansas City Power & Light Company ("KCPL"), in its entirety for the reasons set forth in said Motion.

2. Trigen would note that the vast majority of Staff's April 18 Filing appears to support, and in fact buttress, the arguments for dismissal made in Trigen's April 18 Motion. However, Trigen feels compelled to address a few of the matters contained in Staff's April 18 Filing as set forth below.

3. In paragraph 1 of Staff's April 18 Filing, Staff states it is "sympathetic" to certain customers who made (or are in the process of making) investments "*in reliance on representations KCPL made* as to the availability of those rates" and in paragraph 2 Staff states it is "aware of the Commission's general aversion to unintended or unanticipated customer impacts, particularly in situations where customers, or potential customers, *have been willfully misled by a regulated utility [i.e., KCPL].*" (emphasis added) Trigen respectfully submits that such action on the part of KCPL (if true) should not be grounds for KCPL to avoid dismissal of its Application herein, nor grounds for the grant of KCPL's requested discriminatory waiver or variance at the expense of other KCPL customers and competing regulated utilities who are not providing such discriminatory rates; failure to dismiss this case because of such action on the part of KCPL would, in fact, be rewarding KCPL for improper conduct, if KCPL in fact willfully misled its customers as alleged by Staff. If KCPL willfully misled its customers or potential customers, and the Staff and/or Commission feels sympathy for those customers, the Commission should dismiss this case (as set forth in Trigen's Motion filed herein on April 18) and allow the customers who were misled to bring their own actions against KCPL in court, if such action is warranted and appropriate.

4. In paragraph 3 of its April 18 Filing, Staff states "that it suspects that those entities to whom it is least sympathetic – those that have not yet installed or obtained heating equipment – are most likely to be those entities most coveted by Trigen and MGE as "poached" or potential customers." Given the Highly Confidential nature of customer specific information in this case, as well as the volume of customer specific information,

Trigen will not go into detail concerning this statement of Staff other than to say that Staff's "suspicion" is not necessarily correct in all circumstances.

5. As stated above, most of the remainder of Staff's April 18 Filing appears to support Trigen's April 18 Motion for dismissal. However, in its Conclusion, Staff concludes that the Commission could allow this case to proceed under certain circumstances **or** could dismiss this case as a prohibited collateral attack under other circumstances. Trigen must respectfully disagree; as stated above, Trigen continues to stand by each of the arguments made in its Motion to Dismiss, Strike and Sanction and submits that the Commission must dismiss this case in its entirety for the reasons set forth in said Motion.

6. As set forth in Trigen's April 18 Motion, 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<sup>1</sup>. 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

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<sup>1</sup> 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.

or variance of certain provisions of the Commission's Report and Order in Case No. ER-2007-0291." (KCPL Application, introductory paragraph) *See, e.g., Union Electric Co. v. Clark*, 511 S.W.2d 822 (Mo. 1974)(collateral attack by way of independent action is prohibited when administrative procedures have not been exhausted; utility could not challenge order issued by PSC in a proceeding for a declaratory judgment when review procedure was set forth by statute and was exclusive to any other procedure).

7. Furthermore, in *Christ, d/b/a ANJ Communications v. Southwestern Bell Telephone Company*, 12 Mo.P.S.C. 3d 70 (2003), in which the Commission dismissed a complaint against several telecommunications companies, the Commission stated that:

Missouri Courts have read *Section 386.390.1* together with *Section 386.550*, which provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In *State ex rel. Licata v. Public Service Commission of the State of Missouri*, the Western District held that *Section 386.550* barred a complaint challenging as unlawful a utility company rule that had been approved by the Commission. In its transfer application, the Relator complained that the Court had deprived it of the right of complaint granted in *Section 386.390.1*. The *Licata* Court explained that this contention was erroneous: *Section 386.390.1* authorizes complaints alleging violations of Commission orders, while *Section 386.550* bars complaints attacking Commission orders. The Court explained, "*Section 386.390* and *Section 386.550* are not in conflict but address separate problems." In a second case, *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri*, the Western District held that a complaint brought under *Section 394.312.6*, which authorizes complaints attacking territorial agreements previously approved by the Commission, must include an allegation of a substantial change in circumstances in order to avoid the bar imposed by *Section 386.550*, despite the fact that *Section 394.312* does not expressly require such an allegation. Reading *Licata* and *Ozark Border* together, it is clear that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, *Section 386.550* bars the complaint.

Turning to the Complaint, the Commission finds allegations of two violations of law: First, that Respondents' rates do not comply with the New Services Test and are therefore unlawful. Second, that Respondents

have not complied with the nonstructural safeguards purportedly imposed by the F.C.C. on all LECs. Nonetheless, the Commission must dismiss the Complaint insofar as it is brought under the general complaint authority contained in *Section 386.390.1*.

As the Complaint alleges, the Respondents filed tariffs with this Commission prior to April 15, 1997, which tariffs were intended to comply in all respects with the obligations and restrictions purportedly imposed on all LECs by the F.C.C. under authority of Section 276 of the Telecommunications Act. Each of the Respondents points to a prior Order in which this Commission approved that Respondent's present payphone service tariffs, specifically finding that they were in compliance with the federal statute and regulatory orders relied on by Complainants and refusing to suspend the tariffs on grounds similar in part to those raised in the present Complaint. In the Bell Order, the Commission stated:

The Commission has thoroughly reviewed the many filings in this case, including the motions to suspend filed by MCI and MICPA, and finds that SWBT's proposed tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary. Therefore, the applications to intervene and motions to suspend filed by MCI and MICPA should be denied. Since the tariff revisions will not be suspended, MCI's motion for protective order is unnecessary, and will be denied. In addition, MCI's discovery requests are denied as moot. The Commission further finds that no intrastate rate reductions are necessary in conjunction with SWBT's subsidy calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable.

Similar language appeared in the Verizon Order and the Sprint Order.

As the quoted language shows, the Commission's prior orders were determinations on the merits. In them, the Commission found that the Respondents' tariffs complied with the F.C.C. directives relied on herein by Complainants. **Those orders are long-since final and this is a collateral proceeding. The Complaint does not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of *Licata*, the Commission concludes that *Section 386.550* bars this proceeding and that the Complaint must be dismissed. Unlike such court-made doctrines as collateral estoppel and *res judicata*, *Section 386.550* applies to any petitioner, whether or not it was a party**

in the prior proceeding or has any relationship with any party in the prior proceeding.

Complainants attempt to avoid this result by characterizing the present proceeding as a *direct* attack rather than a collateral attack and asserting that such an action is expressly authorized by statute. But, as noted earlier, Missouri courts have held that *Section 386.550* bars actions brought before this Commission and, specifically, actions brought under *Section 386.390.1*.

Complainants also argue that *Section 386.550* operates only to bar collateral attacks on Commission decisions in court and not before the Commission itself. The *Licata* decision also disposes of this argument. In *Licata*, the court held that *Section 386.550* barred a proceeding before the Commission that challenged a Commission-approved tariff provision as unconstitutional. The situation in *Licata* was directly comparable to the present one, in which Commission-approved tariff provisions are challenged as contrary to statute. The Complainants cite *Bauer v. Southwestern Bell Telephone Company* in support of their position. However, *Bauer* is a case that deals not with *Section 386.550*, but with the Filed Rate Doctrine. *Bauer* has nothing at all to say about *Section 386.550* and whether it applies to actions before the Commission.

For these reasons, the Commission determines that the Complaint cannot go forward to the extent that it is brought under the Commission's general complaint authority in *Section 386.390.1*.

12 Mo.P.S.C. 3d at 82-85 (footnotes omitted)(emphasis added) In that case, the Commission went on to state that:

As discussed above, *Section 386.550* applies to actions brought under *Section 386.390.1*, whether they are brought under the general complaint authority or the special complaint authority as to rates. **The rates herein complained of are contained in tariffs that have been approved by this Commission. The Complaint, as noted above, contains no allegation of substantially changed circumstances. Therefore, the Commission concludes that *Section 386.550* bars this Complaint.**

For these reasons, the Commission determines that the Complaint cannot go forward to the extent that it is brought under the Commission's special complaint authority as to rates in *Section 386.390.1*.

12 Mo.P.S.C. 3d at 86 (emphasis added) *See also* Order Denying Rehearing and Denying Complainants' Alternative Motion For Leave To Amend, *Christ, d/b/a ANJ Communications v. Southwestern Bell Telephone Company*, 2003 Mo. PSC LEXIS 125, issued on February 4, 2003.

8. In the instant case, paragraph 27 of Staff's April 18 Filing recognizes that "KCPL alleges no change in circumstances vis-à-vis the Commission's December 6, 2007 *Report and Order* in Case No. ER-2007-0291, or the Commission's December 21, 2007 Order in Case No. ER-2007-0291, disposing of KCPL's *Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers*." Therefore, according to the Commission's analysis in the *Christ* case quoted above, this case ***must*** be dismissed. It is not an "either-or" proposition as Staff's April 18 Filing would suggest.

WHEREFORE, Trigen-Kansas City Energy Corporation respectfully moves for an order of the Commission dismissing this case in its entirety for the reasons and on the grounds set forth in its Motion to Dismiss, Strike and Sanction filed herein on April 18, 2008, and for such other relief as set forth in said Motion.

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 5th day of May, 2008.

**/s/ Jeffrey A. Keevil**

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