

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

**DISSENTING OPINION OF COMMISSIONERS KEVIN D. GUNN
AND ROBERT M. CLAYTON III**

On May 29, 2008, the majority granted Missouri Gas Energy and Trigen's Motions to Dismiss Kansas City Power and Light's (KCPL) Application for a Waiver or Variance of Certain Provisions of the Report and Order in Case No. ER-2007-0291 (Application). KCPL's Application asked the Commission for a waiver of the provision in the Report and Order from KCPL's most recent rate cases (Report and Order) that limited all-electric and space heating rates to certain customers. In the Application, KCPL stated that several large customers had made significant investments in buildings based upon the availability of the discounted all-electric and space heating rates. Many of these customers are large public or semi-public institutions.¹

The majority indicated in its Order Granting Motions to Dismiss that the Application was a collateral attack on the original Report and Order and was therefore prohibited.

These Commissioners respectfully disagree with the majority. KCPL's Application does not wish to overturn or reverse the Report and Order but requests a waiver or variance of one small part of the overall order. Therefore, the Application may be viewed as an independent proceeding that does not collaterally attack the original order. This Commission has, in recent

¹ These customers included the United States Federal Government, the Kansas City Performing Arts Center and an unidentified church among others.

weeks, granted several waivers or variances to Commission orders or tariffs.² In these cases, the Commission either allowed a Company to engage in a previously prohibited action by the Order or waived a previous requirement and accepted non-compliance. It is well-established that the Commission has the ability to grant these waivers and variances if the waiver or variance is neither unduly discriminatory nor lacking in a rational basis,³ and is in the public interest.⁴

These Commissioners believe that it is entirely appropriate for a company to request a waiver or variance when it becomes apparent that a relatively small portion of the Report and Order's practical effect is to create an unduly burdensome impact on ratepayers and taxpayers. Here, KCPL does not request a broad-based waiver, nor does it challenge the general proposition that the number of customers using the all-electric/space-heating rates should be limited.⁵ They ask for a narrowly defined determination that certain specified customers be granted these rates.

These Commissioners make no determination as to whether a waiver or variance is appropriate in the case. In fact, after evidence was provided, it is certainly a possibility that these Commissioners would vote to deny the waiver or variance as being inappropriate or discriminatory and against the public interest. However, KCPL has presented a narrowly-drawn request for a waiver within the confines of the existing Report and Order and those ratepayers who are adversely affected should have the opportunity to be heard. Although the application was brought by KCPL, the ratepayers are the real voices that will be shut out due to the Order Granting Motions to Dismiss.

² See Case No. GE-2008-0352 (Order Granting Variance and Approving Tariff Sheets, May 20, 2008), Case No. WO-2008-0301 (Order Granting Variance from Tariff, May 20, 2008), Case No. GE-2008-0342, (Order Granting Waiver, May 29, 2008).

³ MO. Rev. Statute 393.130

⁴ *May Department Stores Company v. Union Electric Company*, 341 Mo. 299, 107 S.W.2d 41.

⁵ Application for Waiver or Variance Concerning Certain All-Electric and Electric Heating Customers of Kansas City Power and Light Company, Page 4, Section 8.

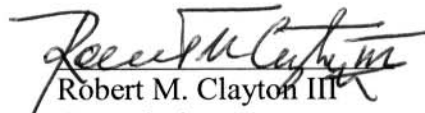
In conclusion, these Commissioners believe the Application was a narrowly-drawn, independent action acceptably brought within the confines of the Report and Order. These Commissioners also believe the ratepayers who will be adversely affected by the Report and Order should have the opportunity to be heard on the Application even if the evidence presented may ultimately prove to be unpersuasive.

For the foregoing reasons, these Commissioners respectfully dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. D. Gunn', written over a horizontal line.

Kevin D. Gunn
Commissioner

A handwritten signature in black ink, appearing to read 'Robert M. Clayton III', written over a horizontal line.

Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri
On this 12th day of June, 2008.