

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 29<sup>th</sup> day of  
May, 2008.

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

**ORDER GRANTING MOTIONS TO DISMISS**

Issue Date: May 29, 2008

Effective Date: June 8, 2008

On January 22, 2008, Kansas City Power & Light Company (KCPL) filed an application seeking a waiver or variance concerning certain customers that would like to receive electric service under KCPL's all-electric or separately-metered electric space heating rates. A hearing on that application is set for June 24, 25 and 26. On April 18, two intervenors in this case - Missouri Gas Energy (MGE) and Trigen-Kansas City Energy Corporation – filed separate motions urging the Commission to dismiss KCPL's application. In addition, the Commission's Staff filed what it called an Informational Filing regarding KCPL's application on that same date. KCPL responded to the motions to dismiss and Staff's Informational Filing on May 5.

The roots of this dispute go back to KCPL's last general rate case, Case No. ER-2007-0291. In that case, MGE, Trigen, and other parties, contended that the special all-electric rates and space heating rates offered by KCPL to its electric customers are inappropriate. MGE provides natural gas service in an area that overlaps the electric service area of KCPL. Similarly, Trigen offers steam heat service to an area of downtown

Kansas City that overlaps KCPL's electric service area. That means MGE and Trigen compete with KCPL to serve the heating needs of customers in the overlapping service areas.

In its Report and Order in ER-2007-0291, issued on December 6, 2007, the Commission held:

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).

The Commission gave its Report and Order a December 16 effective date.

KCPL timely challenged the Report and Order on December 14, in a pleading entitled *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 that pleading, KCPL argued that the Commission's decision to limit the future availability of its all-electric and space heating rates was not supported by competent and substantial evidence and would be unfair to future electric customers. In the alternative, if the Commission denied rehearing, KCPL asked for a waiver or variance to allow certain customers not then receiving service under the all-electric or space heating rates to do so if they had made substantial investments based on the presumed continued availability of those rates. As an example of the type of customer affected, KCPL cited the Performing Arts Center and the Richard Bolling Federal Building as customers that have made substantial investments in electric heating equipment and related all-electric infrastructure

in anticipation of receiving electric service under the reduced rates that will no longer be available to them.

The Commission denied KCPL's application for rehearing in an order issued on December 21. The Commission also denied KCPL's request for a variance to allow customers who have invested in all-electric equipment to receive the reduced rates, saying:

KCPL's motion is largely based upon the perspective of its customers in the midst of millions of dollars worth of infrastructure development, and how they will be deprived of these discounts if the Commission does not modify its decision. But there is no protected property interest in any particular utility rate. Indeed the Commission put KCPL on notice of a possible change to these discounted rates last year when it stated that "it is concerned that during KCPL's winter season, commercial and industrial customers under the all-electric general service tariffs pay about 23% less for the entire electric usage than they would otherwise pay under the standard general service tariff, and that commercial and industrial customers under the separately metered space-heating provisions ... pay about 54% less for such usage than they would pay under the standard general service tariff. KCPL's motion is denied. (citations omitted).

In the same order, the Commission granted a request by Staff and clarified that the future availability of the discounted all-electric and separately metered space-heating rate would be limited to those customers receiving service under those rates as of January 1, 2008.

KCPL did not seek judicial review of the Commission's decisions in ER-2007-0291, and its tariff revisions filed in compliance with the rate case Report and Order incorporated the restrictions required by the Commission. Instead of filing an appeal, on January 22, KCPL filed its new application for waiver or variance, resulting in the opening of this case.

MGE and Trigen argue in their motions to dismiss that the Commission's decisions in ER-2007-0291 became final and conclusive when KCPL did not seek judicial review of those decisions. As a result, those decisions may not be collaterally attacked in this new proceeding. In support of its argument, Trigen points to Section 386.550, RSMo 2000,

which states: “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive”

Missouri courts that have examined this question have confirmed that if a Commission order is not overturned by judicial review, that order becomes final and cannot be attacked in a collateral proceeding.<sup>1</sup> The same result is reached if the party raising the collateral attack simply failed to exercise their right to appeal the earlier order, allowing that order to become final.<sup>2</sup>

KCPL’s application in this case seeks the same relief it sought in ER-2007-0291 and even uses the same arguments it raised in that case. KCPL did not appeal the Commission’s adverse decision in ER-2007-0291 and it is now precluded from raising a collateral attack against that decision. On that basis, the Commission must dismiss KCPL’s application.

The courts have recognized an exception to the prohibition on collateral attacks on Commission decisions where a party can establish a change of circumstances that would justify a reexamination of the relevant issue.<sup>3</sup> KCPL has not, however, alleged any change of circumstance that would justify a reexamination of the Commission’s decision. Indeed, it is hard to envision any change of circumstance that could have occurred in the few weeks that elapsed between the December issuance of the decision in ER-2007-0291 and the January filing of KCPL’s application. Instead, KCPL suggests the Commission might reach

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<sup>1</sup> *State ex rel. Licata, Inc. v. Pub. Serv. Comm’n*, 829 S.W.2d 515 (Mo. App. W.D. 1992).

<sup>2</sup> *State ex rel Mid-Missouri Telephone Co. v. Pub. Serv. Comm’n*, 867 S.W.2d 561 (Mo. App. W.D. 1993).

<sup>3</sup> *State ex rel. Ozark Border Elec. Co-op v. Pub. Serv. Comm’n*, 924 S.W.2d 597 (Mo. App. W.D. 1996).

a different decision if it hears more testimony from customers that may be affected by the Commission's decision.

Essentially, KCPL's argument is that it should be allowed another opportunity to present evidence that it did not offer during its first opportunity to make its case in ER-2007-0291. The rule against collateral attacks on Commission decisions exists precisely to protect the Commission and other parties from having to relitigate established decisions when a party simply wants another opportunity to make its case. KCPL has not justified the application of any exception that would allow it to collaterally attack the Commission's decision.

Trigen's motion to dismiss offers several other arguments in support of the dismissal of KCPL's application. Since the Commission is dismissing that application as a forbidden collateral attack, there is no need to address those additional arguments and the Commission will not do so.

**IT IS ORDERED THAT:**

1. Kansas City Power & Light Company's Application for Waiver or Variance Concerning Certain All-Electric and Electric Heating Customers of Kansas City Power & Light Company is dismissed.
2. The procedural schedule established for this case, including the hearing beginning on June 24, 2008, is cancelled.

3. This order shall become effective on June 8, 2008.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

(S E A L)

Davis, Chm., Murray and Jarrett, CC., concur.  
Clayton and Gunn, CC., dissent, with separate dissenting opinions to follow.

Woodruff, Deputy Chief Regulatory Law Judge