

**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. EE-2008-0238  
Case No. ER-2007-0291                                    )

**STAFF’S INFORMATIONAL FILING IN RESPONSE TO APPLICATION**

**COMES NOW** the Staff of the Missouri Public Service Commission, in response to the Application for a Waiver or Variance of Certain Provisions of the Report and Order in Case No. ER-2007-0291, and provides the following information in recognition of (1) the legal issues surrounding the Commission’s authority to grant the requested variances, and (2) the impacts on those entities who have actually committed financial resources before January 1, 2008 based on the availability of KCPL’s general service all-electric tariffs and separately-metered space heating rates after January 1, 2008 (“entities”) and (3) KCPL’s failure to bring the circumstances of those entities to light in Case No. ER-2007-0291. Staff is submitting this pleading at this time to allow other parties to this matter an opportunity to respond to Staff’s pleading before the Commission rules on any dispositive motions that may be filed. Staff states as follows:

**OVERVIEW**

1. Staff is sympathetic to the plights of customers and potential customers who have made, or are in the process of making, infrastructure investments in reliance on representations KCPL made as to the availability of these rates. Staff is particularly sympathetic to those entities who acted in response to solicitations by KCPL made *after* KCPL was on notice of the uncertainty future availability of its general service all-electric tariffs and separately-metered space heating rates. However, Staff is also concerned that the relief KCPL seeks has

implications beyond the facts of this case. KCPL failed to timely bring the impacts on its affected customers and potential customers to the attention of the Commission or the Commission's Staff in the context of Case No. ER-2007-0291, and KCPL failed to timely present evidence concerning those impacts into the record in Case No. ER-2007-0291, and now, KCPL has failed to address these customer and potential customer impacts through the proper statutory channels.

2. Staff is somewhat reluctant to reprise to the Commission here the concerns the Staff expressed in response to KCPL's *Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers* filed in Case No. ER-2007-0291 in light of the Commission's rejection of KCPL's request in that case by the Commission's December 21, 2007 Order. However, Staff is also 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. Also, in recognition that the net effect of this variance as regards certain of these customers, if granted, would be to decrease KCPL's revenues, in consideration of KCPL's failure to timely produce evidence relative to these customers into the record in Case No. ER-2007-0291, the Staff does not believe that the end result of the granting the requested variance would necessarily adversely impact the public interest.

3. Staff also feels obliged to note that there are, as regards many of the entities for whom the variance is sought, multiple utilities that provide utility services in competition with KCPL. Those utilities, Trigen and MGE, have demonstrated their capability of representing themselves and advocating on behalf of their own interests, and Staff will accordingly leave this task to them, respectively. Staff would also note that it suspects that those entities to whom it is

most sympathetic – those that have *already* committed significant resources to installing electric heating systems – are likely those entities that are least likely, at this point, to remove or modify equipment in order to utilize either Trigen’s steam service or MGE’s gas service. Further, Staff would note 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. Finally, as regards those entities solicited by KCPL to invest in electric heating equipment *after KCPL had been put on notice that the future of these rates were uncertain*, Staff is most vexed by KCPL’s actions, yet Staff recognizes that these entities are the least likely to have made significant investments to date.<sup>1</sup>

4. Although some discovery has occurred in this cause, and more is underway, as of the filing of this pleading, Staff cannot specifically identify those affected customers for which Staff believes a variance from the Commission’s ER-2007-0291 orders may be more or less suitable.

5. Staff find the posture of this case to be troubling in that while some entities have contacted Staff and expressed an interest in utilizing the all-electric and space heating provisions of KCPL’s tariff, no KCPL customers or potential customers are a party to this case, nor is there any indication that each of the entities for whom the variance is requested have been effectively apprised of the issues raised by KCPL’s request. Further, at this stage of the proceedings KCPL has not provided information specific to each entity that shows good cause why a variance from

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<sup>1</sup> Staff would note that it is disturbed by KCPL’s seeming preference to act first, and then ask for forgiveness, as opposed to first requesting permission. Staff would note that it is especially disturbed by KCPL’s course, here, of asking for permission, and when that permission was denied, proceeding regardless – and then requesting forgiveness, *post hoc*.

the Commission's order should be granted to allow that entity to take service under KCPL's all-electric rate schedules or separately metered space heating tariff provisions.

6. An additional concern raised by this case is that the effect of granting a variance to certain of the indicated entities may encourage them to make expenditures in reliance on the availability of KCPL's all-electric or separately metered space heating rates. Staff's concern is based on the Commission's decision in ER-2008-0291 to potentially *phase out* these rates *unless* KCPL adduces in its next rate case evidence of a cost-based justification for the existence of the discounts. Thus, it is possible, and in the Staff's estimation even likely, that the availability of these rates to any KCPL customer will be short-lived. If the Commission grants the requested variance, that action could interfere in the economic analysis of the affected entities in a manner that may ultimately prove more costly to them over the long-term.

#### **PROCEDURAL HISTORY**

7. The issue raised by KCPL's instant and prior Applications is the impact of the Commission's December 6, 2007 *Report and Order* entered in Case No. ER-2007-0291 on those physical locations that were, as of January 1, 2008, in the process of, to a greater or lesser extent, equipping facilities in order to take advantage of the discounts afforded by KCPL's general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general service tariffs.

8. KCPL did not introduce the information regarding these customers and potential customers into evidence in Case No. ER-2007-0291, nor did KCPL succeed in its effort to reopen the record in that case to supplement it with that evidence – as established in the Commission's December 21, 2007 Order.

9. In its motion to reopen the record in Case No. ER-2007-0291, KCPL asked, in the alternative, for the very relief it is now seeking – a variance from the order to the benefit of specified customers and potential customers. That relief was also denied in the Commission’s December 21, 2007 Order.

10. KCPL has been aware for some time of the uncertainty surrounding the continued availability of the general service all-electric rates and the separately metered space heating provisions of KCPL’s standard general service tariffs.

11. The dispute over the continued availability of KCPL’s all-electric rates and the separately metered space heating provisions dates back to Case No. ER-2006-0314. As framed in that case the issue was:

Should the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL’s standard general service tariffs be eliminated or restricted to existing customers only until there is a comprehensive class cost of service study and/or cost-effectiveness study which analyzes and supports such tariffs and provisions as well as KCPL’s Affordability, Energy Efficiency and Demand Response programs?

12. In the Commission’s *Report and Order* entered in Case No. ER-2006-0314, regarding this issue, the Commission stated that it “will adopt Staff’s suggestion, and Trigen’s alternative suggestion, that the Commission restrict the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL’s standard general service tariffs to existing customers until there is a comprehensive class cost of service study.”

13. In Case No. ER-2006-0314, Trigen filed an *Application for Clarification or Rehearing*, seeking that the Commission clarify that the restriction to “existing customers” was a restriction to customers already taking service on the existing general service all-electric rate schedules and the separately metered space heating rates as of December 31, 2006, as distinguished from any existing KCPL general service customer.

14. The Commission ordered KCPL to respond to the applications for rehearing and motions for clarification in Case No. ER-2006-0314. In its response, KCPL stated, in pertinent part, that:

....KCPL has numerous existing customers that are eligible for the all-electric tariffs or separately metered space-heating tariff provisions who have indicated a desire to be served under these tariffs.

As the Commission is aware, several of KCPL's existing customers are in the process of completing major expansions and new construction projects in downtown Kansas City. These existing customers have relied upon KCPL's tariffs as they made their decisions regarding utility services. Trigen seeks to have the Commission restrict the availability of these tariffs to all-electric customers and to separately metered space-heating customers. This would deprive existing customers of the right to take service under these tariffs and alter the economics of the decisions they made regarding their choice of heating sources.

15. At no time during the pendency of Case No. ER-2006-0314, did KCPL provide a list of the "several" existing customers that were in the process of completing "major expansions" and "new construction projects" in downtown Kansas City that had relied upon KCPL's tariffs in making their decisions regarding utility services, nor provide any detail as to the number of said customers, but merely made the assertions above. Trigen replied to KCPL's response and in its January 18, 2007 *Order Regarding Motions for Rehearing*, the Commission denied the motions for rehearing, without expressly addressing Trigen's request for clarification of the Commission's *Report and Order*.

16. In KCPL's next general electric rate case, Case No. ER-2007-0291, an issue in the same vein was before the Commission, which appeared as Issue 13c, in the Commission's December 6, 2007 *Report and Order* as follows:

Should the availability of KCPL's general service all-electric tariffs and separately-metered space heating rates 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 (or as an alternative, the operation of law date of this case) and should such rates 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)?

17. In its “Decision” paragraph on Issue 13c, the Commission stated at page 82 of its

*Report and Order* 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 a date).

18. In its “Findings of Fact” paragraph on Issue 13c, the Commission stated at page 82 of its *Report and Order* that:

The Commission finds that the competent and substantial evidence supports the (restriction of the availability of KCPL’s general service all-electric tariffs and separately-metered space heating rates to those qualifying customers’ commercial and industrial physical locations being served under such all-electric tariffs or separately-metered space heating rates as of January 1, 2008) , and finds the issue in favor Staff and Trigen. The Commission is persuaded by Trigen’s argument that last year’s Report and Order that limited these discounts to existing customers could exacerbate, rather than ameliorate, the actual or potential problems the discounts cause by allowing even more KCPL customers to migrate to those discounts. In a future rate case, the Commission might be willing to consider eliminating the discounts altogether. Allowing even more customers to use those discounts flies in the face of a possible move, supported by Starr, towards eliminating them completely. (Footnotes omitted.)

19. In 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* filed in Case No. ER-2007-0291, KCPL presented, under affidavit, as Attachment 1, a list of 47 customers that KCPL characterized as then being presently undergoing construction or in the

process of installing the necessary equipment to qualify for the all-electric and space heating rates, and a list of 282 customers it purported were seriously evaluating the possibility of installing such equipment, styled as “Missouri Commercial Electric Heat Projects Under Construction for 2007,” and “Missouri Commercial Electric Heat Prospects,” respectively. In addition, in that Application, KCPL stated that during 2007 it had added nearly 200 customers to its all-electric and separately-metered space-heating tariffs.

20. With its December 21, 2007 Order in Case No. ER-2007-0291 the Commission denied KCPL’s *Application for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers*.

21. KCPL did not file in any circuit court a petition for a writ of review of the Commission’s Report and Order in Case No. ER-2007-0291, as described in Section 386.510,<sup>2</sup> which provides:

Within thirty days after the application for a rehearing is denied... ..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.

#### **LEGAL ISSUE OF COLLATERAL ATTACK**

22. It is arguable that KCPL’s *Application for a Waiver or Variance of Certain Provisions of the Report and Order in Case No. ER-2007-0291* is nothing more than a collateral attack of the Commission’s December 6, 2007 *Report and Order* in Case No. ER-2007-0291, and 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*.

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<sup>2</sup> Statutory references are to RSMo 2000, unless otherwise noted.



23. In its December 21, 2007 Order, the Commission referred to *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975) as the basis for its statement that “there is no protected property interest in any particular utility rate.” The Commission further stated that “[i]ndeed, 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 electricity 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 [for Rehearing and Stay, or in the Alternative, Application for Waiver or Variance from Decision for Specific Customers] is denied.”

24. Section 386.550 provides, “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” In a later proceeding where a party asks the Commission to determine that a previous order is no longer in the public interest, the party must assert a change in circumstances; otherwise, the party would be making a prohibited collateral attack on the previous final order. *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W. 2d 597, 601 (Mo. banc 1996).

25. *Ozark Border*, involved a complaint Ozark Border brought before the Commission regarding a Commission-approved territorial agreement. The Commission had issued an order dismissing Ozark Border’s complaint, and Ozark Border appealed. Ultimately, the Commission’s order was affirmed by the Western District Court of Appeals.

26. In its ruling in *Ozark Border*, the Court applied Section 394.312.4 which provides that review of Commission decisions is governed by Sections 386.500 to 386.550. The Court held that Section 386.550 makes a final decision of the Commission immune from collateral attack. *Ozark Border* at 601. The Court further reasoned that if a complaint fails to allege a change in circumstances, the complaint would be in conflict with Section 386.550's provision for finality and that Section 386.550 specifically applies to Section 394.312. "Although the statute [Section 394.312] does not specifically mandate that changed circumstances must be alleged, the requirement is implicit within the statutory scheme." *Id* at 600. Because the Court found that Ozark Border's complaint alleged no change in circumstances, Ozark Border was not permitted to attack the Commission's order approving the territorial agreement. *Id* at 601.

27. In the instant Application, KCPL alleges no change in circumstances vis-a-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*.

### **POTENTIAL CUSTOMER IMPACTS<sup>3</sup>**

28. Staff is aware of six Public Comments submitted into EFIS in this cause; three entities, on behalf of KCPL, submitting testimony regarding the impact of the Case No. ER-2008-0291 all-electric and separately metered space heating rate freeze into the variance request docket; and of one contact directly with Commissioners regarding the requested variance.

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<sup>3</sup> "Potential" refers not only to the speculative nature of the impacts, but more importantly, to the speculative nature of status of a given entity as a "customer" in light of the Commission's resolution of this issue in Case No. ER-2006-0314. In light of the customer information provided as schedules to KCPL's Application in this matter, Staff is considering the propriety of filing a complaint against KCPL for potential violation of the Commission's *Report and Order* entered in Case No. ER-2006-0314.

29. The public comments, testimony and ex parte contact above-referenced indicate the submitting entities' reliance on representations made by KCPL as to the availability of the all-electric or separately metered space heating rates.

30. Staff is somewhat troubled by KCPL encouraging interested parties to directly communicate with individual Commissioners during a pending case, particularly after the Commission has adopted a procedural schedule.<sup>4</sup>

#### **ADDITIONAL INFORMATION**

31. In *State ex rel. General Telephone Company of the Midwest v. Public Service Commission*, 573 S.W.2d 655, 661 (Mo. App. 1976) *Motion for Rehearing and/or Transfer Denied June 1, 1976*, the issue before the court, by review and appeal, was whether the Commission could lawfully disallow excessive and unreasonable payments by Midwest to affiliates "because in a 1962 rate case the commission ceased its examination into transactions between Midwest and [affiliate], upon concluding that the prices paid by Midwest to [affiliate] were as low or lower than those paid by a nonaffiliated purchaser, the commission in this case should have done likewise, and for it to go further and inquire into the profitability of such transaction amount to regulation of [affiliates] for which the commission has no authority."

32. In its opinion the *Midwest* court stated, in pertinent part, the following:

Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, *Administrative Law Treatise* § 18.09, 605, 610 (1958), as follows:

" \* \* \* For an equity court to hold a case so as to take such further action as evolving fact may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. \* \* \* Even when the conditions remain the same, the administrative understanding of those

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<sup>4</sup> See *Supplemental Direct Testimony and Schedules of David L. Wagner* filed 4/15/2008 in EE-2008-0238.

conditions may change, and the agency must be free to act \* \* \*.” (Footnotes omitted.)

*Id.* at 661-662.

33. In that case, the Midwest court concluded that the PSC was not bound by its action in the prior case. *Id.* at 662.

34. Assuming, *arguendo*, that a variance from an Order of the Commission under the circumstances of Case No. EE-2008-0238 is not unlawful as a collateral attack — a remaining impediment to the relief sought by KCPL is that *any variance* to be granted must be, at a minimum, neither unduly discriminatory nor lacking in a rational basis,<sup>5</sup> and also to be in the public interest.<sup>6</sup>

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<sup>5</sup> § 393.130 provides, in pertinent part, that:

1. ...[E]very electrical corporation... shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such... electrical corporation... for... electricity... or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for... electricity... or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

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.

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....

<sup>6</sup> Further, In the 1937 case *May Department Stores Company v. Union Electric Company*, 341 Mo. 299, 107 S.W.2d 41, the Missouri Supreme Court, in the context of rates, stated the following:

If all consumers similarly situated are to be treated alike, a contract dealing with one on a different basis from others cannot be recognized. If one consumer by reason of a contract pays less for or gets more service for his money than others, he pays less than it is worth (because the commission is directed to fix just and reasonable rates) and others would have to pay more than their service is worth in order to make up the difference it would cost the utility to give the one consumer special treatment. [See *State ex rel. Empire District Electric Co. v. Public Service Comm.*, 339 Mo. 1188, 100 S. W. (2d) 509; see, also, 1 Pond's Public Utilities, chap. 13, secs. 270-

### STAFF'S CONCLUSION

35. If the Commission were to conclude that its understanding of this situation is so changed from the time of its Orders entered in Case No. ER-2007-0291—or that it is presently without sufficient knowledge of the customer impacts, if any, of those Orders—then under the above-cited doctrine, the Commission could lawfully allow this cause to proceed to a hearing on the merits. Thus, at this interval, the determinative issue of whether KCPL's Application constitutes a collateral attack is the Commission's own understanding of the associated facts.

36. Staff would further caution that whether or not KCPL's requested variance constitutes a collateral attack is not the sole impediment to the relief here sought by KCPL — and, to a greater or lesser extent, entities filing testimony on behalf of KCPL — in that any relief granted must comport with the public interest, be not unduly discriminatory, and have a rational basis for any disparate treatment of similarly situated entities.

**WHEREFORE** the Staff respectfully submits its informational filing for consideration by the Commission in its evaluation of the Application of Kansas City Power & Light for a Waiver or Variance of Certain Provisions of the Report and Order in Case No. ER-2007-0291.

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295.] The purpose of providing public utility regulation was to secure equality in service and in rates for all who needed or desired these services and who were similarly situated. Of course, this required classification for rates and service on the basis of location, amount used, and other reasonable considerations, but this does not give public utilities and their customers the right to fix their own classifications by contract without regard to the rest of the public....

Respectfully submitted,

**/s/ Sarah Kliethermes**

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#### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 18<sup>th</sup> day of April, 2008.

**/s/ Sarah Kliethermes**