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**

PUBLIC COUNSEL'S APPLICATION FOR REHEARING OF ORDER APPROVING TARIFFS IN COMPLIANCE WITH COMMISSION REPORT AND ORDER

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On December 21, 2007 the Commission issued its Order Approving Tariffs in Compliance with Commission Report and Order (the Tariff Order) in this case. That order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons. The Tariff Order is unlawful, unjust, unreasonable and unconstitutional in that it completely fails to separately and adequately identify conclusions of law and findings of fact. The Tariff Order is unlawful, unjust, and unreasonable in that it is not based upon competent and substantial evidence of record.

2. The Commission erred in accepting KCPL's argument that Section 393.150 RSMo 2000 requires approval of the compliance tariffs within the 11-month window that opened with the filing of the original, now rejected, tariffs. According to this incorrect reading of that statute, any tariffs that a utility files after a Report and Order will be approved in a rush. If a party has legitimate objections, those objections will be ignored or hastily addressed in the Commission's unseemly rush to get higher rates in place. The Commission's belief that it is legally required to get new tariffs approved within the very short time between the issuance of

the Report and Order and the 11-month operation of law date for the original tariffs is simply mistaken. If a utility insists on requesting an increase of tens of millions dollars more than it is entitled to (or even hundreds of millions more as in the recent Union Electric Company case), why should the Commission consider itself bound to award a smaller increase within the same period of time it lawfully has to reject the inflated one? And if the Commission's Report and Order is unclear or not well-reasoned (as in the case of Trigen's issue) why should a challenging party have mere hours to address the problem after spending 11 months proving that the utility's request was inflated? Under the Commission's current practice, only the Staff – a party to the case, not a neutral advisor – can force a utility to file substitute sheets to make the filing comply with Staff's opinion of what the Report and Order requires; no other party has any real opportunity to be heard in the process. Public Counsel does not suggest and has never suggested that the Commission should take 11 months to evaluate compliance tariffs, but there may be situations where it takes a little more than a few hours or a few days. The Commission needs to acknowledge that parties that have legitimate concerns – not just attempts to delay for the sake of delay – should have a reasonable opportunity to get those concerns addressed. The Commission's current practice does not allow such an opportunity.

3. The Commission erred in determining that the "compliance tariff phase" of this case, which had heretofore clearly been a contested case, is not a contested case and thus no evidentiary record and no separately-stated conclusions of law and findings of fact are required. Even though the cases about the file and suspend method of ratemaking do opine that the Commission can allow tariffs to go into effect without a hearing,[1] nothing in those cases

[1] In the "modern era" of utility regulation in Missouri where utilities routinely ask for about double what they are awarded, allowing a general rate increase without a hearing would probably be an abuse of the Commission's discretion.

suggests that the Commission can suddenly treat a contested case in which a hearing has been held as an uncontested case.

4. The Commission erred in relying on Jackson County[2] for the proposition that: "Indeed, there is no property interest in a utility rate that requires procedural due process protections." (Tariff Order, page 3). The context of the Jackson County case was very different from the instant case. While Jackson County can be read for the proposition that customers do not have a protected property interest **in a particular rate**, it cannot be read for the proposition that customers have no procedural due process rights in the rate case process. The concurrence and dissent in Jackson County are much more in line with modern jurisprudence on procedural due process. The Jackson County concurrence noted:

> [I]n this case there was, in fact, knowledge on the part of the parties interested in contesting the proposed increased rates and there was a full hearing conducted with reference to those proposals. I do not agree that municipalities and consumers have no procedural due process rights with reference to utility rates. While a consumer may not have a property right to the continuation of a specific rate, he does have a right not to be charged unreasonable rates. Whether or not a proposed rate is reasonable is a matter for the Public Service Commission to decide, but, those who will have to pay the increase are, in my opinion, entitled to receive notice of the proposal and be afforded an opportunity to appear and be heard by the commission prior to the rates going into effect.[3]

And the Jackson County dissent seems to take a much more modern and reasonable approach than the majority opinion:

> If more is needed, we can properly look to the substantial investment which electric utility consumers have in their electrical appliances and systems.
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> …
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> The property rights of the customers in terms of their investment are many times greater than those of the utility. Who of us these days has any real choice in deciding whether or not to use electricity in his home or business? It is not realistic to say that electric consumers do not have a direct property interest in, and right to, just and reasonable electric rates. Both the Missouri statutes and their

[2] State ex. Rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. banc 1975).

[3] *Ibid*., at 38.

property investment give consumers sufficient entitlement to bring them under Fourteenth Amendment protection.[4]

5. Because the Commission failed to make adequate findings of fact and conclusions of law, and because it failed to separate any such findings from any such conclusions, a reviewing court will be at a loss to understand why the Commission concluded that the tariffs comply with the Report and Order. For example, how did the Commission determine the level of revenue to be collected from the residential customers pursuant to the Report and Order? How did the Commission confirm that the new tariffs are designed to actually collect this level? A reviewing court will not be able to understand the basis for the Commission's bare conclusion that the tariffs comply with the Report and Order. All the Tariff Order says is: "The Commission has reviewed the above-mentioned filings, and determines that the filings [*sic*] comply with the Commission's order." (Tariff Order, page 3). It should be noted that, of the "above mentioned filings," only one (the Staff recommendation) even suggests that the tariffs comply with the Report and Order, and even that one raises questions. Even as Staff suggested that the tariffs complied with the Report and Order, it concluded that the Report and Order was unclear or unreasonable with respect to the Trigen issue.[5] Moreover, the Staff recommendation itself is entirely conclusory and so qualified as to be almost meaningless. It simply states that: "The Staff has reviewed the filed tariff sheets and is of the opinion that, based on an authorized increase in revenues of $35,308,914 and the Staff's understanding of the Commission's decisions regarding Class Cost of Service and Rate Design, they are in compliance with the Commission's Order." (Staff recommendation, Appendix A, page 1). There is nothing more substantial than two qualifiers and a conclusion.

[4] *Ibid*., at 47-48.

[5] Staff's Request for Clarification, filed December 12, 2007.

6. The Commission erred in determining, as part of its justification for finding "good cause" to approve the tariffs on less than thirty days notice, that "KCPL does not have adequate revenue to meet its cost of service." (Tariff Order, page 2). There was no such finding in the Commission's Report and Order and the record does not support such a finding. Until such time as the additional revenues authorized by the Commission in its Report and Order are collected, KCPL is simply in the position of earning a profit somewhat less than the Commission believes is justified. KCPL – even before the increase takes effect – has ample revenue to meet all of its cost of service.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its December 21, 2007, Order Approving Tariffs in Compliance with Commission Report and Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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