

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Briarcliff Development Company)	
)	
Complainant,)	
)	
v.)	File No. EC-2011-0383
)	
Kansas City Power & Light Company)	
)	
Respondent.)	

INITIAL BRIEF OF KANSAS CITY POWER & LIGHT COMPANY

Kansas City Power & Light Company (“KCP&L” or “Company”) submits this Initial Brief in accord with the Commission’s *Order Setting Procedural Schedules* issued August 3, 2011.

I. STATEMENT OF FACTS¹

1. Complainant Briarcliff Development Company (“Briarcliff Development”) is a Missouri corporation located at 4151 N. Mulberry Street, Kansas City, Missouri 64116.

2. Respondent KCP&L is an electrical corporation and public utility as defined in §386.020, RSMo. engaged in the business of manufacture, transmission and distribution of electricity subject to the regulatory authority of the Commission pursuant to Chapters 386 and 393, RSMo.

3. KCP&L has provided electric service to the premises located at 4100 N. Mulberry Street, Kansas City, Missouri 64116 continuously since 1999 (“Briarcliff I”).

¹ The material facts in this case are largely agreed to, and not in dispute. See Joint Stipulation Of Material Non-Disputed Facts (filed on Jan. 19, 2012). These stipulations of fact were accepted as part of the record at the evidentiary hearing. (Tr. 21).

4. Electric service began at Briarcliff I on May 17, 1999 and continued through June 14, 1999 in the name of Briarcliff West Development at the request of Lee Swartz. At this time, Briarcliff West Development was the legal entity responsible for payment.

5. On June 11, 1999, Ms. Dianne Painter called KCP&L to have service set up in the name of Winbury Realty as of June 14, 1999. Service at Briarcliff I was put in the name of Winbury Realty by KCP&L on June 14, 1999. The account remained in the name of Winbury Realty for over 10 years commencing on June 14, 1999 and terminating on August 5, 2009.

6. From May 17, 1999 through January 25, 2001, service to the premises was under the Medium General Service All Electric (1MGAE) rate schedule, and service from January 25, 2001 through August 5, 2009 was under the Large General All Electric (1LGAE) rate schedule.

7. There have been several KCP&L cases before the Missouri Public Service Commission (“MPSC” or “Commission”) regarding the Company’s all-electric and separate-meter space heating rates for commercial and industrial customers. In Re Kansas City Power & Light Company, Case No. ER-2006-0314 (“2006 Rate Case”), Trigen-Kansas City Energy Corp. (“Trigen”), now operating as Veolia Energy Kansas City, Inc., over the objection of KCP&L, recommended that the all-electric and separately-metered space heating rates for commercial and industrial customers should be eliminated. The Commission adopted KCP&L’s position, and rejected Trigen’s recommendation. As a result, the Commission decided not to modify the general service all-electric rates that had been in effect since 1996. (2006 Rate Case, *Report and Order*, pp. 82-83). However, the *Report and Order* in Case No. ER-2006-0314 restricted the availability of the KCP&L’s all-electric and separately metered space heating rate schedules to existing customers as outlined below (Tr. 104):

[Issue] 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? (Report and Order, Case No. ER-2006-0314, p. 82).

... The Commission 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 the commercial and industrial customers under the separately metered space heating provision would pay about 54% less for such usage than they would pay under the standard general service tariff.

However, the Commission recognizes that KCPL participated in an extensive class cost of service study in 1996, and that KCPL has reached an agreement for class cost of service and rate design in the present case. The Commission 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 tariffs to existing customers until there is a comprehensive class cost of service study. This appears to be a reasonable solution, since no one has performed a cost study of the impacts of eliminating the current rates. (Report and Order, Case No. ER-2006-0314, p. 83).

8. In Re Kansas City Power & Light Company, Case No. ER-2007-0291 ("2007 Rate Case"), Trigen again sought to have the Commission restrict the availability of these all-electric and separately-metered space heating rates for commercial and industrial customers. The Commission reversed its prior decision on the issue in this 2007 Rate Case. The Commission decided this issue at p. 82 of the *Report and Order* in the 2007 Rate Case as follows:

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).

9. In its application for rehearing in the 2007 Rate Case, KCP&L requested that the Commission grant a rehearing and stay of the effect of the Commission's decision to restrict the availability of the all-electric rate schedules, or in the alternative, grant KCP&L a waiver or variance from this decision, and allow KCP&L to grandfather any existing KCP&L customer who had entered into contracts or purchased heating equipment, in reliance upon the existence of the availability of KCP&L's all-electric and space heating rates. The Commission denied KCP&L's request. (*Order Regarding Motions For Rehearing and Request For Clarification* in the 2007 Rate Case (issued December 21, 2007)).

10. On January 22, 2008, KCP&L filed an Application For Waiver or Variance Concerning Certain All-Electric And Electric Heating Customers Of Kansas City Power & Light Company (Case No. EE-2008-0238) in which the Company sought a waiver of the provision in the *Report and Order* from KCP&L's 2007 Rate Case decision that limited all-electric and space heating rates to certain customers. By a 3-2 vote the Commission granted motions to dismiss filed by Trigen and Missouri Gas Energy on the grounds that KCP&L's application for variance represented an improper collateral attack on the Commission's previous decision in the 2007 Rate Case.

11. As of January 1, 2008, KCP&L froze the rate to customers of record as of that date.

12. In an email dated February 8, 2008, from David Sutphin (KCP&L employee) to Richie Benninghoven (contact person for Briarcliff Development) (Tr. 133-34), KCP&L notified Briarcliff that if the name changes, then the account must be changed to a standard electric tariff. The email states:

Effective January 1, 2008, the Commission restricted KCP&L's general service all-electric and separately-metered space heating tariffs to those commercial and industrial customers who have been taking service under these rates as of December 31, 2007. This action "Freezes" these rates to existing customers for so long as they remain on the all-electric or space heating rate schedules. This also means that if the customer name changes on an account served by these tariffs or if an existing heat rate customer requests the rate to be changed, due to changes in building usage or load, the account must be changed to a standard electric tariff.

13. On August 5, 2009 KCP&L was contacted by Jim Unruh, Senior Vice President of the Winbury Group (Tr. 65) to put the account in the name of Briarcliff Development.

14. Effective August 5, 2009, the customer name for the Briarcliff I building was changed by KCP&L from "Winbury Realty" to "Briarcliff Development."

15. On August 10, 2009, KCP&L was again contacted by Mr. Jim Unruh. He stated that Briarcliff I was no longer going to be managed by their company and instead they would be managing the Briarcliff I in-house. Mr. Unruh stated that bills should go to Skip Rosenstock, who was the Senior Property Manager for Briarcliff Realty from July 2009 to May 2011, at 4151 N. Mulberry, Ste. 205, Kansas City, Missouri 64116.

16. On August 28, 2009, KCP&L was contacted by Rebecca Hill, Chief Financial Officer for Briarcliff Development (Tr. 65) to have the mailing addressed changed. Ms. Hill contacted the Company again on September 17, 2009 to verify the mailing address had been changed.

17. Commencing with the first billing after KCP&L was notified of the change of customer name, KCP&L ceased billing "Winbury Realty" and began billing "Briarcliff Development" for electric service to the Briarcliff I building at the Large General Service (ILGSE) rate instead of continuing on under the Large General All Electric (1LGAE) rate.

II. ARGUMENT

- A. KCP&L properly applied its tariff as of August 2009 in refusing to provide service to Briarcliff I on the Large General All Electric (1LGAE) rate schedule because the customer associated with that service changed after the Large General All Electric (1LGAE) rate schedule was frozen.**

18. For the reasons stated herein, the Commission should find and conclude that KCP&L has properly applied its tariff as of August 2009 in refusing to provide service to Briarcliff I on the Large General All Electric (1LGAE) rate schedule since the customer associated with this property changed from Winbury Realty to Briarcliff Development after the general service all-electric rate schedule was “frozen”. As explained below, the customer changed from Winbury Realty to Briarcliff Development after the all-electric rate was frozen. As a result, the all-electric rate was not available to the new customer, Briarcliff Development Company. (Tr. 143-44). Because the customer changed (not just a name change of an existing customer), it was required that the Company refuse to allow the new customer-Briarcliff Development—to receive service on the frozen all-electric rate.

19. As explained by the Staff Report, Staff witness Michael Scheperle, and KCP&L witnesses, Jason Henrich and Tim Rush, KCP&L followed its tariff and the orders of the Commission. (Staff Ex. No. 1; Staff Report, Appendix 1, KCP&L Ex. Nos. 1-3) Under KCPL’s tariffs, a Customer is defined as follows:

CUSTOMER: Any person applying for, receiving, using, or agreeing to take a class of electric service supplied by the Company under one rate schedule at a single point of delivery at and for use within the premises either (a) occupied by such persons, or (b) as may, with the consent of the Company, be designated in the service application or by other means acceptable to the Company. (P.S.C. MO. No. 2, section 1.04, Sheet 1.05).

Under KCP&L's tariffs, a Person is defined as follows:

PERSON: Any individual, partnership, co-partnership, firm, company, public or private corporation, association, joint stock company, trust, estate, political subdivision, governmental agency or other legal entity recognized by law. (P. S.C. MO. No. 2, section 1.03, Sheet 1.05)

Under KCPL's tariffs, a Responsible Party is defined as follows:

RESPONSIBLE PARTY: Any adult, landlord, property management company, or owner applying for agreeing to take, and or receiving substantial use and benefit of electric service at a given premise. (emphasis added)

20. As noted above, KCP&L's tariffs (Rules 1.04 and 1.21) provide that a Customer or Responsible Party may include a property management company. Winbury Realty, a property management company (Tr. 59-60), was the Customer and Responsible Party on the Briarcliff I account for almost ten years. During that time, the Commission froze the Company's all-electric rate to existing customers. KCP&L's tariffs noted that the all-electric rate had been frozen. KCPL Large General Service – All Electric (Frozen) (1LGAE) rate schedule states "[t]his Schedule is available only to customers' physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter." The effective date of this tariff freezing the all-electric service was December 31, 2007, as directed and approved by the Commission.

21. From June, 14, 1999 to August 5, 2009, the Responsible Party for the premise was Winbury Realty. Winbury Realty meets the definition of a "customer" and a "responsible party". (Rush Rebuttal, KCP&L Ex. No. 2, p. 6; Rush Surrebuttal, KCP&L Ex. No. 3, p. 2-3). Winbury requested that the account be placed in its name, received the bills and paid for the electric service. (Rush Surrebuttal, KCP&L Ex. No. 3, p. 2). It is very common for property management companies such as Winbury Realty to be the customer of record, and as such, the Responsible Party on an account for electric service. (Rush Surrebuttal, Ex. No. 3, p. 2).

22. Rules 1.04 and 1.21 of the KCP&L's tariffs allow property management companies to be Customers. This practice is further supported by the Missouri Code of State Regulations. As originally stated on page 6 of the Direct Testimony of Tim Rush, Chapter 13—Service and Billing Practices for Residential Customers of Electric, Gas and Water Utilities, 4 CSR 240-13.010(E) provides the following customer definition:

Customer means a person or legal entity responsible for payment for service except one denoted as a guarantor.

23. Jim Unruh, Senior Vice President of the Winbury Group, advised KCP&L in 2009 that Winbury Realty was no longer the property management company and that the account should be put in the name of Briarcliff Development. This change in the customer meant that the all-electric rate was not available to Briarcliff Development, a different customer from Winbury Realty. The Company informed Briarcliff Development of this fact before the change was requested. (Scheperle Direct Testimony (Staff Ex. No. 1, Staff Report, Appendix 1-3 through 1-4).

24. Staff witness Michael S. Scheperle agreed that this change of customer made the general all-electric tariff to be unavailable to the new customer, Briarcliff Development. He testified that the Company is in compliance with its tariffs and the Commission's orders. Staff also recommended that the Commission find that KCP&L properly applied its tariff when it refused to provide service to Briarcliff I on the all-electric rate schedule after August 4, 2009, because the customer associated with that service changed, and the Commission has restricted the availability of the commercial all-electric rate schedule to those qualifying customers' commercial and industrial physical locations being served under that all-electric rate schedule as of December 31, 2007, for so long as they continuously remained on that rate schedule. (Scheperle Direct Testimony, pp. 2-6; Staff Report, Appendix 1).

Based on its investigation and the analysis of information provided by Briarcliff and KCPL, Staff recommends the Commission finds that KCPL properly applied its tariff as of August 2009 in refusing to provide service to Briarcliff I on the 1LGAE rate schedule under a customer name differing from the customer name associated with that service prior to the general service all-electric rate schedule being frozen. Staff did not find any facts to indicate that KCPL's actions constituted a violation of applicable statutes, the Commission's rules or KCPL's tariff. Therefore, Staff recommends that the Commission not make the findings or enter the orders requested by Briarcliff.

(Scheperle Direct Testimony, Staff Ex. No. 1, p. 6).

25. KCP&L opposes the refund requested by Briarcliff since it has properly followed the orders of the MPSC and its tariffs throughout the period of the complaint. Consistent with the Commission orders regarding this issue (Tr. 20), once the customer of record changed, the rate was no longer available for this property. Winbury Realty was the customer of record for the property. The Company billed Winbury Realty, the Responsible Party. Property management companies are common in the Company's service territory. These companies agree to take electric service so that they can manage the property (manage utilities, collect rent from tenants, repair and maintain property, etc.) for a fee paid by the property owner. Winbury provided this service for Briarcliff I, and therefore was the responsible party on the account, and received substantial use and benefit of electric service at the property.

26. During the hearings, Company witness Tim Rush discussed with Commissioner Jarrett the importance of maintaining the tariff definition of a "customer" and "responsible party" as the entity responsible for paying for the account. He also explained the effect of the underlying tariff language upon the present case. (Tr. 137-42).

27. As Mr. Rush explained to Commissioner Jarrett, the Company will accept payment from any person or entity that paid an electric bill for a particular account, but the Company would only have legal recourse against the customer of record who was responsible

for payment on the account in the event of non-payment. (Tr. 140-44). In this case, the Company accepted payment from Winbury Realty's affiliate Winbury Group, but the customer and responsible party always remained as Winbury Realty. When the actual Customer on the account was requested to be changed from Winbury Realty to Briarcliff Development Company, KCP&L complied with the request. The new Customer (Briarcliff Development) was a different entity (and not just a different name for an existing customer) from the previous customer (Winbury Realty). This change of customer occurred after the all-electric rate schedule was frozen by the Commission. As a result, the new customer, Briarcliff Development, was not eligible to receive service under the frozen all-electric rate.

28. In summary, KCP&L followed the Commission's order and its tariffs in this case. KCP&L's actions have been supported by Staff in this case. The Company has complied with the Commission orders and its tariffs, and therefore, it would be unjust and unreasonable for the Commission to order KCP&L to refund any of the payments made by Briarcliff Development, pursuant to lawfully approved tariffs.

B. The Commission has the authority to waive or vary KCP&L's tariff provisions that restrict KCP&L from providing service to Briarcliff I on the Large General All Electric (1LGAE) rate schedule on a prospective basis.

29. The Commission has routinely reviewed and granted appropriate requests for variances from the provisions of public utility tariffs in the past. In fact, the Commission's own rules authorize the filing of such applications. See 4 CSR 240-3.015 and 4 CSR 240-2.060(4).

30. The Commission has also previously held that it has the authority to waive or vary public utilities' tariff provisions. See *Report & Order, Re Application of WST, Inc. a Missouri Corporation, For A Variance from Kansas City Power & Light Company's General*

Rules and Regulations Requiring Individual Metering, Case No. EE-2006-0123 (October 19, 2005), pp. 12-13 wherein the Commission held that it has the statutory authority to grant variances to KCP&L's tariffs:

WST and KCPL agree that the Commission has the authority needed to grant the variance requested by WST. WST indicates that the Commission's authority is derived from Section 393.140(11), RSMo 2000, which gives the Commission the authority to require electric corporations to file tariffs. That statute specifically gives the Commission the power to "prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise."

It is also clear that the Commission has granted variances from the questioned provision of KCPL's tariff in the past. In two recent cases, EE-2003-0199³¹ and EE-2003-0282,³² the Commission granted variances from Section 5.03 of KCPL's tariff to allow for the master metering of service to apartment buildings in Kansas City. Since the Commission has granted such variances in the past, and since KCPL agrees that the Commission has the authority to grant such a variance from its tariff, the Commission finds that it has the authority to grant the variance requested by WST, if it is in the public interest to do so. (footnotes omitted)

See also *Order Granting Variance, Re Kansas City Power & Light Company*, Case No. EE-2003-0199 (March 27, 2003); and Case No. EE-2003-0282 (May 13, 2003); *Order Granting Variance, Re Missouri Gas Energy*, Case No. GE-2009-0194 (December 30, 2008); *Order Approving Agreement and Granting Variance, Re Laclede Gas Company*, Case No. GE-2005-0405 (April 11, 2006); *Order Granting Waiver Regarding Refunds, Re Missouri Gas Energy*, Case No. GO-2004-0524 (May 6, 2004).

31. The Commission should again reaffirm in this proceeding that it has the authority to grant a variance or waiver from specific tariff provisions related to the Company's all-electric tariffs to allow Briarcliff I to be grandfathered into the all-electric tariff. Good cause exists for a variance since Briarcliff I relied upon the existence of KCPL's all electric rate and this all- electric rate was instrumental in Complainant's decision to develop the property as an all-

electric building to be served under KCP&L's all electric rate schedules. (See Joint Stipulation Of Non-Disputed Material Facts, para. 7).

WHEREFORE, KCP&L respectfully requests that the Commission find that it has properly followed the Commission orders and its own tariffs in this case, and conclude that the Complaint should be dismissed.

Respectfully submitted,

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Company**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 6th day of February, 2012, to all counsel of record.

/s/ James M. Fischer
James M. Fischer