

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

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

**KANSAS CITY POWER & LIGHT COMPANY’S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. PROCEDURAL HISTORY

1. On May 26, 2011, Briarcliff Development Company (“Briarcliff Development”) filed its Complaint against Kansas City Power & Light Company (“KCP&L” or the “Company”) alleging, among other things, that the Company had unlawfully refused to allow a building owned by Briarcliff Development (“Briarcliff I”) to be billed under the frozen all-electric rate, and requesting that the Company rebill Briarcliff Development for past electric service using the frozen all-electric rate schedule.

2. On July 1, 2011, the Company filed its Answer and Motion to Dismiss.

3. On July 11, 2011, Staff filed its Staff Report and Response to Request for Waiver or Variance. The Staff Report found that KCP&L had acted properly in refusing to provide Briarcliff Development service under the frozen all-electric rate.

4. On August 3, 2011, the Commission issued its *Order Establishing Procedural Schedule*.

5. Pursuant to the procedural schedule, testimony, list of issues, a Joint Stipulation of Non-Disputed Material Facts, and Position Statements were filed.

6. Evidentiary hearings were held on January 24, 2012. Initial Briefs were filed on February 6, Proposed Findings of Fact and Conclusions of Law were filed on February 8, and Reply Briefs were filed on February 17, 2012.

II. FINDINGS OF FACT

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

1. Complainant 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 Section 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. Briarcliff Development is the owner of several commercial office buildings, including the Briarcliff I building (“Briarcliff I”), the Briarcliff II building (“Briarcliff II”) and the Briarcliff III building (“Briarcliff III”).

4. Briarcliff I is located at 4100 N. Mulberry Street, Kansas City, Missouri 64116.

5. Briarcliff Development has owned Briarcliff I since it was developed in 1999.

6. KCP&L has provided electric service to the premises located at 4100 N. Mulberry Street, Kansas City, Missouri 64116 continuously since 1999.

7. In the development of Briarcliff I, Briarcliff I relied upon the existence of KCP&L's all electric rate and this all electric rate was instrumental in Complainant's decision to develop it as an all-electric building to be served under KCP&L's all electric rate schedules.

8. KCP&L's customer names and service dates of record for Briarcliff I are as follows:

<u>Customer Name</u>	<u>Service From</u>	<u>Service To</u>
Briarcliff West Development	5/17/1999	6/14/1999
Winbury Realty	6/14/1999	8/5/2009
Briarcliff Development	8/5/2009	Current

9. 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 someone who identified himself as Lee Swartz. At this time, Briarcliff West Development was the legal entity responsible for payment.

10. On June 11, 1999, someone who identified herself as 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.

11. From May 17, 1999 through January 25, 2001, service to the premise was under the 1 MGAE rate schedule, and service from January 25, 2001 through August 5, 2009 was under the 1 LGAE rate schedule.

12. The Report and Order in Case No. ER-2006-0314 addresses the discounted rates of KCP&L all-electric and separately metered space heating rate schedules 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).

13. In Re Kansas City Power & Light Company, Case No. ER-2007-0291 ("2007 Rate Case"), the Commission ordered 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).

14. Since the effective date of rates in the 2007 Rate Case, the relevant KCP&L rate schedules are denoted as “FROZEN” (Large General Service – All Electric (Frozen) in Sheet 19A and Separately Metered Space Heat (Frozen) in Sheet 11A.

15. 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.

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

17. Effective August 5, 2009, the customer name on KCP&L’s records for the Briarcliff I building was changed by KCP&L from “Winbury Realty” to “Briarcliff Development.”

18. On August 10, 2009, KCP&L was again contacted by someone identifying himself as Mr. Jim Unruh. He stated that Briarcliff I was no longer going to be managed by their company and instead they would be managing Briarcliff I in house. He also stated that bills should be sent 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.

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

20. That the pertinent language of the Large General Service - All Electric (Frozen) schedule commencing January 1, 2008, reads as follows:

"This Schedule is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."

21. That KCP&L's General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.05 under I. Definitions defines Customer as follows:

"1.04 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."

III. ISSUES TO BE RESOLVED

In their List of Issues filed in this proceeding, the parties identified the following issues to be resolved by the Commission:

Kansas City Power & Light Company's Statement of Issue 1:

1. Did KCP&L properly apply its tariff as of August 2009 in refusing to provide service to Briarcliff I on the 1LGAE (general service all-electric) 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?

Briarcliff's Statement of Issue 1:

1. Did KCP&L properly apply its tariff as of August 2009 in refusing to continue to provide service to the Briarcliff I building on the ILGAE (general service all-electric) rate schedule under the name of the owner of the building, who had been receiving and using all-electric service at the building since 1999, but was a customer name differing from the customer name associated with that service on KCP&L's records, prior to that rate schedule being frozen on January 1, 2008 and which schedule thereafter was "available only to Customers' physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter"?

Joint Statement of Parties on Issues 2 and 3:

2. Does the Commission have the authority to waive or vary KCP&L's tariff provisions that restrict KCP&L from providing service to Briarcliff I on the all-electric schedule ILGAE on a prospective basis? If so, should it?

3. Should the Commission order KCP&L to file a revised tariff sheet allowing KCP&L to provide service to Briarcliff I on an all-electric schedule on a prospective basis?

IV. CONCLUSIONS OF LAW**A. Request For Refund**

1. For the reasons stated herein, the Commission concludes 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 (ILGAE) 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". Therefore, the Commission has decided that Briarcliff's request for a refund of past billings should be denied.

2. Based upon the competent and substantial evidence contained in the record, including the Staff Report, and the testimonies of Staff witness Michael Scheperle, and KCP&L witnesses, Jason Henrich and Tim Rush, the Commission concludes that 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).

3. The Commission concludes that a Customer is defined in KCP&L's tariffs, 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 KCP&L'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)

4. 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. The Commission concludes that 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. KCP&L 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.

5. From June, 14, 1999 to August 5, 2009, the Commission concludes that the Responsible Party for the premise was Winbury Realty.

6. Rules 1.04 and 1.21 of the KCP&L’s tariffs allow property management companies to be Customers. The Commission concludes that 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.

7. Based upon the stipulated facts, the Commission finds that Jim Unruh, Senior Vice President of the Winbury Group, advised KCP&L in 2009 that Winbury Realty was no longer the property management company who was responsible for paying the electric bill, 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.

8. 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, pp. 2-6).

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. (Staff Report, Appendix 1).

9. In this proceeding, KCP&L opposes the refund requested by Briarcliff since it has properly followed the orders of the Public Service Commission and its tariffs throughout the period of the complaint. Consistent with the Commission orders regarding this issue, the Commission concludes that 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.

10. In summary, the Commission concludes that KCP&L properly followed the Commission's orders and its tariffs in this case. KCP&L's actions have been supported by Staff

in this case. The Commission concludes that the Company has complied with the Commission orders and its tariffs, and therefore, the Commission concludes that 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. The Commission concludes that the Complaint filed by Briarcliff Development Company should be dismissed.

B. Request For Waiver or Variance Issue

11. With regard to the second issue in the List of Issues, the Commission finds and concludes that it has the authority to grant appropriate variances from the provisions of KCP&L's tariffs. 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).

12. 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).

13. The Commission hereby reaffirms its previous conclusions that it has the authority to grant a variance or waiver from specific tariff provisions related to the Company's all-electric tariffs. The Commission concludes that it should allow KCP&L to grandfather Briarcliff I into the all-electric tariff on a prospective basis from the effective date of this Report And Order. The Commission concludes that good cause exists for a variance since Briarcliff I relied upon the existence of KCP&L'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. (Joint Stipulation Of Non-Disputed Material Facts, para. 7).

14. As a result of the Commission's decision on the second issue related to granting a variance from the Company's tariffs, it is unnecessary for the Commission to address the third issue listed by the parties in their Joint List of Issues.

V. ORDERED SECTIONS

IT IS THEREFORE ORDERED:

1. That Case No. EC-2011-0383 be, and hereby is, dismissed.
2. That any objections or motions not specifically ruled on in Case No. EC-2011-0383 are hereby overruled or denied.

3. That Kansas City Power & Light Company is hereby granted a variance from its tariffs to allow KCP&L to grandfather Briarcliff I into the all-electric tariff on a prospective basis from the effective date of this Report And Order.

4. That this order shall become effective on __, 2012.

5. That this case shall be closed on __, 2012.

Respectfully submitted,

/s/ James M. Fischer

James M. Fischer, MBN 27543
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383
Email: jfischerpc@aol.com

Roger W. Steiner MBE 39586
Corporate Counsel
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
Telephone: (816) 556-2314
Facsimile: (816) 556-2787
Email: roger.steiner@kcpl.com

**Attorneys for Kansas City Power & Light
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 8th day of February, 2012, to all counsel of record.

/s/ James M. Fischer
James M. Fischer