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.	)	

REPLY BRIEF OF KANSAS CITY POWER & LIGHT COMPANY

Kansas City Power & Light Company ("KCP&L" or "Company") submits this Reply Brief in accord with the Commission's *Order Setting Procedural Schedules* issued August 3, 2011, and in response to the Initial Briefs filed by Briarcliff Development Company ("Briarcliff Development") and the Commission Staff ("Staff").

I. Statement of Facts

The Initial Brief filed by Briarcliff Development has confirmed that the material facts in this case are largely agreed to, and not in dispute, except for some minor details. (Briarcliff Development Brief at 1; 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)

II. Argument

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

In its Initial Brief, Briarcliff Development argued that ". . . despite the Management Agreement's express provision that the Winbury Group was to enter into contracts in the name of the Owner for electricity and other services, on June 11, 1999, without the knowledge of Briarcliff Development, Briarcliff Development's agent, the Winbury Group, contacted KCPL by telephone and applied for electric service under the All-Electric Rate Schedule . . . " (Briarcliff Brief at 2) Therefore, it is clear that Briarcliff Development does not dispute that Winbury Group, a separate entity from Briarcliff Development, applied for and received all-electric service from KCP&L beginning in June 11, 1999.

Effective January 1, 2008, the Commission restricted or froze the availability of the all-electric service rate to "those qualifying customers' commercial and industrial physical locations being served under such all-electric tariffs . . . as of the date used for the billing determinants [in Case No ER-2007-0291], and <u>such rates should only be available to such customers for so long as they continuously remain on that rate schedule</u>. . . ". (Joint Stipulation Of Non-Disputed Facts, pp. 4-5, para. 13-14)(Emphasis added)

Briarcliff Development also does not dispute that "On August 5, 2009, KCPL was contacted by telephone by someone identifying himself as Jim Unruh, Senior Vice President of the Winbury Group and directed to put the account for the Briarcliff I building in the name of Briarcliff Development." (Briarcliff Brief at 3) The Complainant also conceded that "Commencing with the first billing after KCPL was notified of the change of customer name on

KCPL's records, KCPL ceased billing Winbury Realty and began billing Briarcliff Development for electric service to the Briarcliff I building." (Briarcliff Brief at 4)

As pointed out by Staff, "KCPL was not unreasonable in relying on Winbury's request for financial responsibility for Service at Briarcliff I, and KCPL did so in good faith, having reason to believe and actually believing that such reliance was appropriate." (Staff Brief at 7) In fact, as Staff correctly pointed out, it really does not matter, for purposes of this case, what Briarcliff Development's Management Agreement with Winbury Group states since KCP&L was not a party to their Management Agreement, and therefore KCP&L had no obligations under their Management Agreement. If Briarcliff Development has any complaint or other cause of action based upon its Management Agreement, it would be against Winbury Group, and not KCP&L. As noted by Staff, Briarcliff Development's allegation that Winbury Group acted in excess of its express authority is not an allegation which the Commission can properly address or remedy in this proceeding. (Staff Brief at 3)

Staff correctly analyzes the proper interpretation of KCP&L's tariff restricting the all-electric rate schedules to existing all-electric customers, emphasizing that "customers" are separate from "locations". (Staff Brief at 10-11) By contrast, Briarcliff confuses the tariff by arguing: "Neither the language in the Commission's Order freezing the rate nor the language in KCPL's Frozen all-electric tariffs, approved by the Commission, prohibit the Briarcliff I physical location from continuing to be served under the 1LGAE tariff." (Briarcliff Brief at 8)

If the all-electric restriction were based upon "physical locations" as argued by Briarcliff Development rather than the "customers" as argued by Staff and KCP&L, then there would be no reason why KCP&L couldn't continue to provide "physical locations" that were served by all-electric rates prior to January 1, 2008, with all-electric rates, even though the property itself

changed hands and there were new "customers" at that physical location. This interpretation would appear to defeat the Commission's reason for freezing the all-electric rates.

In summary, the "customer" being served by the all-electric rate prior to January 1, 2008, is the critical restriction under the Commission's Orders and the Company's tariffs. When the customer changed after January 1, 2008, then the all-electric rate was no longer available to the "physical location." This is the way that KCP&L has interpreted the Commission's Orders and has memorialized this interpretation in the language of KCP&L's Commission-approved tariffs.

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 ILGAE (general service all-electric) 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 above and in KCP&L's Initial Brief, 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. (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.

In summary, KCP&L followed the Commission's order and its tariffs in this case. KCP&L's actions have been confirmed 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.

Finally, Briarcliff also argued that any refund should include an award "with interest at the legal rate of interest." The Commission should decline to add interest, even if it determined that some amount of refund was necessary. The Company's tariffs do not authorize the addition of interest (Rush Rebuttal, KCP&L Ex No. 2, p. 3), and the Commission has no statutory authority to award interest, damages or other equitable relief. The Public Service Commission 'is purely a creature of statute' and its 'powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted. *See GST Technology v. Kansas City Power & Light Company*, 13 Mo.P.S.C. 3d 151, 164 (December 2, 2004); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). The Commission cannot direct KCPL to recalculate its charges to Briarcliff Development for electrical service already rendered, as if it the service should have been on the all-electric rate schedule. That would constitute a species of equitable relief and the Commission cannot do equity. *See Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940).

With respect to charges already paid for service already rendered, the Commission is authorized to determine that a customer has been overcharged, but the customer must seek a remedy in the courts. *State ex rel. Kansas City Power & Light Company v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044 (1943); *State ex rel. Inter-City Beverage Co., Inc. v. Missouri Public Service Commission*, 972 S.W.2d 397, 972 (Mo. App., W.D. 1998).

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 all-electric schedule ILGAE on a prospective basis.

Contrary to the arguments of the Staff (Staff Br. at 12-14), the Commission has the authority to waive or vary KCP&L's Large General Service—All Electric (Frozen) 1LGAE tariff provisions contained in Tariff Sheet No. 19A[1] which restricts the availability of the all-electric tariff for Winbury Development on a prospective basis.

KCP&L has provided the specific indication of the tariff provisions which the variance would apply, and the reasons for the proposed variance setting out the good cause for granting the variance. KCP&L does not believe that any public utility other than KCP&L would be affected by the variance. (See 4 CSR 240-2.060(4)).

As KCP&L explained in its Initial Brief, 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).

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. *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*

[1] Tariff No. 19A states in part: "[t]his Schedule is available only to customers' physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter."

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).

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. The Commission should also conclude that Briarcliff Development has failed to carry its burden of proof, and therefore, the Complaint must be dismissed.

Respectfully submitted,

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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 17th day of February, 2012, to all counsel of record.

/s/ James M. Fischer
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