

**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.)

**ANSWER AND MOTION TO DISMISS OF
KANSAS CITY POWER & LIGHT COMPANY**

Pursuant to 4 CSR 240-2.070(6), Kansas City Power & Light Company (“Company” or “KCP&L”) hereby submits its Answer and its Motion to Dismiss to the Missouri Public Service Commission (“Commission”) in response to Briarcliff Development Company’s (“Briarcliff”) complaint in this proceeding.

In support, KCP&L states as follows:

BACKGROUND

1. On October 15, 1998 an entity named Briarcliff West Development applied to KCP&L for service to be setup in its name at a new property located at 4100 N. Mulberry Dr., Kansas City, MO (the “Property”). Service became effective on May 7, 1999 after city inspection was received.

2. On June 14, 1999, the account name was changed to Winbury Realty at the customer’s request. KCP&L understood Winbury Realty to be the entity managing the Property. Under the Company’s tariffs (Mo.P.S.C. Tariff No. 2, Section 1.21, Sheet 1.07) a property management company qualifies as a “responsible party” for the use and benefit of electric

service at a premises. In addition, the definition of “customer” in the Company’s tariffs (Mo.P.S.C. Tariff No. 2, Section 1.04, Sheet 1.05) provides that a customer includes a person applying for service.

3. Bills for service to the Property were sent by KCP&L to Winbury Realty from June 14, 1999 to August 5, 2009. Payments for electric service were made from an account with the name Winbury Group.

4. In Re Kansas City Power & Light Company, Case No. ER-2006-0314 (“2006 Rate Case”), Trigen-Kansas City Energy Corp. (“Trigen”), over the strenuous objection of KCP&L, recommended that the all-electric rates for commercial and industrial customers should be totally eliminated. However, 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 rate design that has been in effect since 1996. (2006 Rate Case, *Report And Order*, pp. 82-83).

5. 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 tariffs to all-electric customers and to separately-metered space-heating customers, and thereby retroactively alter the economics of the various decisions made by these existing customers and their choice of heating sources. Although the Commission properly resisted Trigen’s attempts to adversely impact these customers who were completing such construction projects during the 2006 Rate Case, the Commission (by a 3-1 vote, with Commissioner Appling not participating) reversed its decision on the issue in this 2007 Rate Case. The Commission’s decided this issue at page 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).

6. 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 has entered into contracts or purchased heating equipment, in reliance upon the existence of the availability of KCPL's all-electric and space-heating rates. The Commission denied KCP&L's request. See *Order Regarding Motions For Rehearing and Request For Clarification*, Case No. ER-2007-0291 (issued December 21, 2007).

7. 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. In its Application, KCP&L stated that several large customers had made significant investments in buildings based upon the availability of the discounted all-electric and space heating rates. Many of those customers were large public or semi-public institutions.

8. In Case No. EE-2008-0238, by a 3-2 vote (with Commissioners Gunn and Clayton dissenting), the Commission on May 29, 2008, granted motions to dismiss filed by Trigen and Missouri Gas Energy on the ground that the KCP&L's application for variance represented an improper collateral attack on the Commission's previous decision in Case No. ER-2007-0291.

9. On August 4, 2009, a representative of Winbury Realty notified KCP&L that the Winbury Realty account should be changed and put in the name of Briarcliff Development as of August 5, 2009. On August 5, 2009, KCP&L complied with this request. Bills for service to the Property have been sent to Briarcliff from August 5, 2009 to the present.

10. Due to the change in customer name requested by Briarcliff, the Property no longer qualified for the all-electric tariff as determined in the *Report And Order*, Case No. ER-2007-0291 (issued December 6, 2007). The Property has been billed using the Large General Service, Schedule LGS, tariff Sheet 11A since August 5, 2009.

11. Briarcliff filed a complaint on May 26, 2011 alleging, among other things, that the Property qualifies for an all-electric tariff.

ANSWER

12. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 1 of the complaint and therefore denies same.

13. KCP&L admits the allegation in paragraph 2 of the complaint.

14. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 3 of the complaint and therefore denies same.

15. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 4 of the complaint and therefore denies same.

16. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 5 of the complaint and therefore denies same.

17. In response to paragraph 6, KCP&L admits it has provided electric service to the premises at issue in this proceeding since 1999.

18. KCP&L denies the allegations in paragraph 7 of the complaint.

19. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 8 of the complaint and therefore denies same.

20. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 9 of the complaint and therefore denies same.

21. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 10 of the complaint and therefore denies same.

22. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 11 of the complaint and therefore denies same.

23. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 12 of the complaint and therefore denies same.

24. KCP&L denies the allegations in paragraph 13 of the complaint.

25. In response to paragraph 14, KCP&L admits that it has provided electric services to the premises that are subject to this proceeding under the Large General Service – All Electric Rate Schedule.

26. In response to paragraph 15, KCP&L admits it listed the “Customer Name” as “Winbury Realty” at the service address of 4100 N. Mulberry Dr., at the customer’s request and denies the remaining allegations in paragraph 15 of the complaint.

27. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 16 of the complaint and therefore denies same.

28. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 17 of the complaint and therefore denies same.

29. KCP&L is without sufficient knowledge to admit or deny the allegations in paragraph 18 of the complaint and therefore denies same.

30. KCP&L admits that in August 2009 a Winbury Realty representative requested that KCP&L begin billing Briarcliff Development Company for service at 4100 N. Mulberry Dr. and denies all other allegations contained in paragraph 19 of the complaint.

31. KCP&L denies the allegations in paragraph 20 of the complaint.

32. KCP&L admits the allegations in paragraph 21 of the complaint.

33. KCP&L admits discussions occurred between itself and Complainant and denies all other allegations in paragraph 22 of the complaint.

34. The tariff language cited in paragraph 23 of the complaint speaks for itself and therefore KCP&L does not deem it necessary to admit or deny the allegations contained in paragraph 23.

35. The tariff language cited in paragraph 24 of the complaint speaks for itself and therefore KCP&L does not deem it necessary to admit or deny the allegations contained in paragraph 24.

36. KCP&L denies the allegations in paragraph 25 of the complaint.

37. Paragraph 26 does not contain any factual or legal allegations, and KCP&L therefore does not need deem it necessary to admit or deny this paragraph.

38. KCP&L denies the allegations in paragraph 27 of the complaint.

39. Except as expressly admitted in this Answer, KCP&L denies each and every other allegation contained in the Complaint. Additionally, KCP&L reserves the right to supplement this pleading to add additional defenses and claims in connection with this complaint.

AFFIRMATIVE DEFENSES

40. Briarcliff's complaint fails to state a claim upon which relief can be granted.

41. KCP&L followed the directives of the Commission by denying the Complainant service under the all-electric tariff.

42. Briarcliff's complaint is barred by the doctrines of laches and estoppel.

MOTION TO DISMISS

43. The Commission's rules provide that "The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted." 4 CSR 240-2.070(6). When evaluating such a motion "the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."¹ In other words, the Commission should ask, assuming the allegations are true, whether the complainant would have a right to the relief he seeks. Under this standard, the portion of Briarcliff's complaint requesting a refund of past bills from KCP&L must fail. Under the Company's tariffs, a property management company qualifies as a customer (Mo.P.S.C. Tariff No. 2, section 1.21, Sheet 1.07). The fact that the service was established in the property management company's name was appropriate as the property management company was responsible for payment of the bills. The Commission in Case No. ER-2007-0291, determined that the all-electric tariff could not be used by new customers after the 2007 rate case. When Briarcliff decided to manage its properties in-house, it requested of KCP&L that the name on the account be changed to reflect its self management status. The Company advised Briarcliff Development, in an email to Richie Benninghoven on February 8, 2008, that the change requested by Briarcliff would mean that the Property could no longer be served under the all-electric tariff. (Attachment No. 1) The Company has followed its tariffs and Commission orders and therefore cannot be responsible for a refund of any differences in the tariffed amounts as requested by Briarcliff.

44. KCP&L does support Briarcliff in its request for all electric rates on a going forward basis only. The Company believes that the Commission, may grant a variance or waiver

¹ *Richardson v. Richardson*, 218 S.W. 3d. 426, 428 (Mo. 2007).

from the tariff provisions that restrict the Company from providing all-electric service to this customer. Good cause exists for a variance from the Commission's ruling since Briarcliff relied on the all-electric tariff when it constructed the Property. However, the Commission should not and cannot lawfully grant Complainant's request for a refund of previously paid amounts properly billed under KCP&L's tariffs.

WHEREFORE, having fully answered and set forth its affirmative defenses, Respondent KCP&L prays the Commission dismiss the complaint with prejudice and grant such other relief as the Commission deems reasonable and just.

Respectfully submitted,

/s/ Roger W. Steiner

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Attorneys for KCP&L

Certificate of Service

I hereby certify that a true and correct copy of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all parties of record on this 1st day of July, 2011.

/s/ Roger W. Steiner

Attorney for KCP&L

From: Sutphin David
Sent: Friday, February 08, 2008 2:23 PM
To: Richie Benninghoven
Subject: Commission Rate Order

KCP&L Jobs

Application	Briarcliff Office Bldgs A,B,C & Daycare
3-204440	Briarcliff Pad 2 / Lot 5 (Nell Hills)
3-220559	Briarcliff (new office)

Dear Mr. Benninghoven,

The purpose of this email is to inform you of a recent rate case order by the Missouri Public Service Commission affecting your electrically heated project(s) listed above:

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.

It is our belief that the rate case order places building owners, who made application for service prior to January 1, 2008, in a predicament in that owners made economic decisions based on the continuing availability of the space heat rates.

On January 21, 2008, KCP&L submitted an Application for Waiver or Variance that would allow the company to "grandfather" those customers who have projects underway so as to preserve the rate's availability to these projects, as they are completed. Accompanying the waiver request was a list of projects still in our planning process or under construction. The project listed above was placed on the waiver list because the KCP&L Application for Electric Service indicated that the project is designed to have electric heat.

In consideration of KCP&L's waiver application, the Commission decided to establish this concern as regulatory case - Case No. EE-2008-0238. Under normal case proceedings, it appears this issue may be set for a future public hearing. If this occurs, KCP&L will request the public hearing be held in Kansas City to allow customers the opportunity to express their opinions to the Commission.

While the outcome of this case is unknown at this time, we believe the Commission will act prudently and fairly take into consideration the resources and investment decisions customers have made based on the availability of the space heating rates.

Please forward this to others in your organization that might have an interest in this information and please feel free to contact me or a member of my staff if you have any questions or need additional information.

Regards,
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