

**OF THE STATE OF MISSOURI**

Briarcliff Development Company )  
Complainant, )  
 )  
v. )  
 )  
Kansas City Power & Light Company )  
Respondent. )

File No. EC-2011-0383

## APPLICATION FOR REHEARING

**COMES NOW** Kansas City Power & Light Company (“KCP&L” or “Company”), by and through the undersigned counsel, pursuant to §386.500, RSMo., 4 CSR 240-2.080 and 4 CSR 240-2.160, and hereby submits its Application for Rehearing of the Missouri Public Service Commission’s (“Commission”) Report and Order issued March 7, 2012 and effective April 6, 2012 (“Order”), in the above-captioned proceeding. In support thereof, KCP&L respectfully states as follows:

**I. The Commission’s determination that Briarcliff met, by a preponderance of the evidence, its burden of proving that KCP&L incorrectly applied a tariff provision by refusing to provide service to Briarcliff I on the all-electric rate schedule as of August 2009, is unlawful, unjust and unreasonable.**

1. The Staff of the Commission and KCP&L both advocated the position that KCP&L 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”. Whereas the customer changed from Winbury Realty to

Briarcliff Development after the all-electric rate was frozen, the all-electric rate was not available to the new customer, Briarcliff Development. As specifically found by the Commission, KCP&L was not aware prior to August 2009 that Winbury Group was acting as the agent on behalf of Briarcliff in managing the Briarcliff I property. The Commission further found that no evidence was offered or admitted that Briarcliff applied to KCP&L for electric service at Briarcliff I prior to August 2009.

2. In its Order, the Commission identifies the first issue as “whether 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 under a customer name differing from the customer name associated with that service prior to the general service all-electric rate schedule being frozen.”<sup>1</sup> The Commission’s decision in the 2007 rate case limited the availability of the all-electric rate after January 1, 2008; thereafter that lower rate would only be available to such customers for so long as they continuously remain on that rate schedule. Finding that it is the customer – and not the physical location – that is operative, the Commission states: “Applying this interpretation of the 2007 rate case decision and the tariff to the facts of this case requires determining whether Briarcliff was a ‘customer’ being served continuously after January 1, 2008.”<sup>2</sup>

3. The Commission then determines that there are three potential definitions of “customer” that could describe Briarcliff’s status with KCP&L prior to August 2009 – KCP&L’s customary practice and procedure for designating customers, the definition of “customer” in Commission Rule 4 CSR 240-13.015(1)(E) that was incorporated into KCP&L’s tariffs, and the definition in KCP&L’s tariffs found in subsection 1.04. After additional analysis, the

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<sup>1</sup> Order, page 12.

<sup>2</sup> *Id.*, page 13.

Commission concludes that “. . . the appropriate definition of ‘customer’ to apply is the definition found in subsection 1.04 of the tariffs.”<sup>3</sup>

Accordingly, the Commission declares:

If Briarcliff meets all the elements of the definition in subsection 1.04 after January 1, 2008, then it was a “customer” and entitled to continue to receive the all-electric rate. That definition requires that a “customer be:

1. any person,
2. applying for, receiving, using, or agreeing to take a class of electric service,
3. 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.<sup>4</sup>

4. Reviewing the record, the Commission finds that the “evidence shows that Briarcliff satisfies the first and third elements of the definition. The remaining element number 2 requires Briarcliff to demonstrate that it applied for, received, used or agreed to take a class of service from KCP&L.”<sup>5</sup> Among the Commission conclusions regarding Briarcliff’s failure to meet element number 2:

- “First, there is no credible evidence that Briarcliff applied for electric service at the Briarcliff I building.”
- “Second, Briarcliff did not physically occupy any part of the premises at Briarcliff I and, consequently, did not receive or use electric service from KCP&L at that location.”
- “Third, there is insufficient evidence that Briarcliff itself agreed with KCP&L to take electric service at Briarcliff I.”<sup>6</sup>

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<sup>3</sup> *Id.*, page 14.

<sup>4</sup> *Id.*, pages 14-15 (emphasis added).

<sup>5</sup> *Id.*, page 15.

<sup>6</sup> *Id.*

As a result, the Commission states: “Briarcliff has not met element number 2 of the definition of ‘customer.’ Therefore, it was not a customer of KCP&L prior to August 2009 unless it can acquire customer status in some other manner.”<sup>7</sup> (Emphasis added).

5. Having reached the conclusion that Briarcliff was not a customer of KCP&L prior to August 2009 – pursuant to the analysis the Commission itself deemed appropriate in this matter – the Commission should have concluded that KCP&L properly followed the Commission orders and its own tariffs in this case and dismissed the complaint, and its failure to do so was unlawful, unjust, unreasonable, arbitrary and capricious and constitutes an abuse of discretion.

6. While recognizing that the Commission is a body of limited jurisdiction that cannot declare or enforce principles of law or equity, the majority proceeds to do just that by expounding on agency law and erroneously concluding that “[t]hese agency principles and case law lead to the conclusion that Briarcliff, as the undisclosed principal, can claim the benefits of the service agreement contract for itself and acquire Winbury Group’s status as a ‘customer’ that agreed to take electric service at the Briarcliff I building.”<sup>8</sup> Such actions and conclusions are unlawful, unjust and unreasonable. Indeed, in addition to acting beyond its statutory authority, the Commission erroneously interprets and applies the agency law it cites. Acknowledging that Winbury Group failed to disclose to KCP&L that Briarcliff was its principal under the management agreement, the Commission references case law holding that substitution of the principal for the agent is not permitted if it causes injury to the third party. The majority’s conclusion that KCP&L will not be injured by Briarcliff receiving the all-electric rate is clearly erroneous, as KCP&L will now be exposed to the expense of litigation defending what the

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<sup>7</sup> *Id.*, page 16.

<sup>8</sup> *Id.*, page 17.

Commission itself describes as “Briarcliff’s requests for re-billing, refund and interest” – notwithstanding the Commission’s note “that KCP&L’s actions in refusing to provide service to Briarcliff I under the all-electric rate schedule beginning in August 2009 were made in good faith and reasonably based on information available to it at that time.”<sup>9</sup> The majority’s decision is unlawful, unjust and unreasonable, arbitrary and capricious, and constitutes an abuse of discretion.

**II. The Commission’s decision to require KCP&L to apply the all-electric rate to Briarcliff prospectively without a waiver or variance of KCP&L’s tariff provisions is unlawful, unjust and unreasonable.**

7. As fully set forth in KCP&L’s Briefs filed in this matter, the Commission should have reaffirmed in this proceeding that it has the authority to grant a variance or waiver from the specific tariff provisions related to the Company’s all-electric tariffs, to allow Briarcliff I to be grandfathered into the all-electric tariff, for good cause, on a prospective basis. The Commission’s decision that KCP&L incorrectly applied its tariff provision and should now provide electric service to Briarcliff I on the 1LGAE (general service all-electric) rate schedule beginning on the effective date of the Order is unlawful, unjust and unreasonable.

8. The Order’s findings and conclusions regarding the errors identified in paragraphs 4 through 7 of this Application are: 1) unlawful, 2) unjust, 3) unreasonable, 4) not based on competent and substantial evidence, 5) arbitrary and capricious, and 6) constitute an abuse of discretion.

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<sup>9</sup> *Id.*, page 18.

WHEREFORE, Kansas City Power & Light Company respectfully requests rehearing to address the errors identified above.

Respectfully submitted,

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**Attorneys for Kansas City Power & Light  
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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 5<sup>th</sup> day of April, 2012, to all counsel of record.

/s/ James M. Fischer  
James M. Fischer