

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

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

File No. EC-2011-0383

**STAFF REPORT AND RECOMMENDATION AND  
RESPONSE TO REQUEST FOR WAIVER OR VARIANCE**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully submits as follows:

**BRIARCLIFF DEVELOPMENT'S COMPLAINT**

SUMMARY

1. On May 26, 2011, Briarcliff Development Company (Briarcliff Development) filed its *Complaint* against Kansas City Power & Light Company (KCPL).

2. The issues in the complaint turn on \*\* \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ . \*\*

3. Briarcliff Development's *Complaint* alleges, in short, the following:

1. \* \_\_\_\_\_  
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  3. \_\_\_\_\_  
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  7. \_\_\_\_\_  
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- \*\*

4. Briarcliff Development's *Complaint* requests an order from the Commission:

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6. \_\_\_\_\_  
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STAFF RECOMMENDATION

5. Staff's *Report* is attached, hereto, as Appendix A.

6. Based on its investigation and the analysis of information provided by Briarcliff Development and KCPL, Staff recommends the Commission find KCPL properly applied its tariff \*\* \_\_\_\_\_  
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\_\_\_\_\_ \*\*

7. Based on its investigation and the analysis of information provided by Briarcliff Development and KCPL, Staff did not find any facts to indicate \*\* \_\_\_\_\_  
\_\_\_\_\_ . \*\*

8. Based on its analysis of the legal issues of this matter, Staff finds that the Commission \_\_\_\_\_  
\_\_\_\_\_ . \*\*

9. Staff recommends the Commission \*\* \_\_\_\_\_  
\_\_\_\_\_ . \*\*

BRIARCLIFF DEVELOPMENT'S FACTUAL ALLEGATIONS

10. Briarcliff Development alleges \*\* \_\_\_\_\_

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\_\_\_\_\_ \*\*

11. Staff's investigation indicates \*\* \_\_\_\_\_

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12. Briarcliff Development alleges \*\* \_\_\_\_\_

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\_\_\_\_\_ \*\*

13. Staff's legal analysis indicates \*\* \_\_\_\_\_

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14. Briarcliff Development alleges \*\* \_\_\_\_\_

\_\_\_\_\_ \*\*

15. Staff's investigation indicates \_\_\_\_\_

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\_\_\_\_\_ \*\*

16. Briarcliff Development alleges \*\* \_\_\_\_\_

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17. Staff's investigation indicates \*\* \_\_\_\_\_

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18. Briarcliff Development alleges \*\* \_\_\_\_\_

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19. Staff's investigation indicates \*\* \_\_\_\_\_

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20. Briarcliff Development alleges \*\* \_\_\_\_\_

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21. Staff's investigation indicates \*\* \_\_\_\_\_

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22. Staff's legal analysis indicates that a customer does not have a property interest in a utility rate.

RELIEF SOUGHT BY BRIARCLIFF DEVELOPMENT

23. Staff's investigation and analysis \*\* \_\_\_\_\_

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24. Staff's investigation and analysis \*\* \_\_\_\_\_

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25. Staff's investigation and analysis \*\* \_\_\_\_\_

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26. Staff's investigation and analysis \*\* \_\_\_\_\_

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27. For the reasons described below concerning KCPL's request for a variance or waiver, Staff states that a Commission order that KCPL waive or vary its tariff is unlawful.

28. Staff's investigation and analysis \*\* \_\_\_\_\_

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29. The Commission is not a court of general jurisdiction and cannot award money damages.

#### KCPL'S APPLICATION FOR WAIVER OR VARIANCE

30. In paragraph 44 of its pleading, KCPL states:

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 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.

31. KCPL's support of Briarcliff Development's request for all electric rates going forward raises the following issues:

- a. Is the request, as framed, lawful?
- b. Is there a way to lawfully accomplish Briarcliff Development's request to receive the all-electric rates on a going forward basis?
- c. Is it a good idea to allow Briarcliff Development to receive the all-electric rate for service at Briarcliff I on a going forward basis?

For the reasons described more fully, here-in, Staff suggests that the answer to these questions are, in brief, "no," "yes," and "no."

#### THE KCPL/BRIARCLIFF DEVELOPMENT REQUEST AS FRAMED, IS NOT LAWFUL

32. As described more fully, below, (1) KCPL's request does not comply with applicable Commission rule regarding the form and contents of applications, (2) KCPL's request

does not adequately state good cause for a variance or waiver, and (3) a variance or waiver of the sort requested is not lawful.

33. KCPL's application doesn't comply with general provisions of 4 CSR 240-2.060(1), which sets out information concerning the applicant to be filed with any application made to the Commission.

34. Also, KCPL's application doesn't comply with the provision of 4 CSR 240-2.060(4) which provides: In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived, shall contain information as follows:

- (A) Specific indication of the statute, rule or tariff from which the variance or waiver is sought;
- (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and
- (C) The name of any public utility affected by the variance or waiver.<sup>1</sup>

35. KCPL makes the allegation that "[g]ood cause exists for a variance from the Commission's ruling since Briareliff relied on the all-electric tariff when it constructed the Property." However, this is not adequate because the Commission made the decision to restrict the availability of the rate schedule in the manner described in the tariff. If the Commission had desired to provide an exception to the limitation to properties constructed after 1996, it could have done so.

36. Further, because there is no property interest in the availability of a rate schedule, KCPL's reliance argument is inapplicable.

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<sup>1</sup> In addition to these filing requirements, 4 CSR 240-2.060(6) provides that "[i]n addition to the general requirements set forth above, the requirements found in Chapter 3 of the commission's rules pertaining to the filing of various types of applications must also be met." 4 CSR 240-3.015(1) provides that "[t]he requirements for filing applications for waivers or variances from commission rules and tariff provisions, as well as those statutory provisions that may be waived, are contained in Chapter 2 of the commission's rules in rule 4 CSR 240-2.060."



37. Based on intervention in prior KCPL cases concerning this matter, Staff suggests that Southern Union Company d/b/a MGE and Veolia are affected by this request.

38. KCPL requests a variance from “the Commission’s ruling,” presumably referring to either the Report and Order in Case No. ER-2007-0291, or the order approving the tariffs issued in Case No. ER-2007-0291.

39. For the reasons described in the Commission’s May 29, 2008 *Order Granting Motions to Dismiss* in Case No. EE-2008-0238, a request to waive or vary the Commission’s orders in Case No. ER-2007-0291 is a collateral attack on those orders, and should be denied.

40. Further, these rulings do not provide the only barrier to offering Briarcliff service under the frozen all-electric rate schedule, the tariff sheet itself states that the schedule is “Frozen.”

41. The Commission cannot vary or waive a rate schedule. A utility can file a rate schedule with terms that supersede an existing rate schedule, but the Commission cannot lawfully simply vary or waive an extant rate schedule no more than can the utility or a customer.

42. As set forth in *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 315 Mo. 312, 318, 286 S.W. 84, 86 (Mo.1926):

The rules and regulations of the St. Louis Gas Company as to extensions are integral parts of its schedule of rates and charges. If they are unjust and unreasonable, the commission, after a hearing, as just referred to, may order the schedule modified in respect to them. But it cannot set them aside as to certain individuals and maintain them in force as to the public generally. The gas company cannot extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances.”

Neither can the Public Service Commission.

MEANS FOR BRIARCLIFF DEVELOPMENT'S  
LAWFUL RECEIPT OF THE ALL-ELECTRIC RATES ON A GOING FORWARD BASIS.

43. If the Commission desires to allow Briarcliff I to take service under the frozen all-electric rate schedule, the proper course would be for KCPL to file a tariff sheet offering terms of service to Briarcliff I in a manner that is not unjustly discriminatory to other similarly-situated customers and is otherwise lawful in all respects.

44. Staff has not yet determined whether promulgation of such a tariff sheet would be permissible outside of a general rate case.

45. For the reasons Staff recommended freezing the rate schedule in Case No. ER-2007-0291 and the Commission adopted that recommendation, Staff does not recommend the Commission allow Briarcliff Development to take service at Briarcliff I under the frozen all-electric rate schedule.

WHEREFORE, Staff (1) requests that the Commission accept Staff's *Report*, (2) recommends the Commission deny Briarcliff's *Complaint* and (3) recommends the Commission deny KCPL's request for waiver or variance.

Respectfully submitted,

/s/ Sarah Kliethermes  
Sarah L. Kliethermes  
Associate Counsel  
Missouri Bar No. 60024

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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 25<sup>th</sup> day of July, 2011.

/s/ Sarah Kliethermes