

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Inter-City Beverage Co., Inc.,
North Kansas City Beverage Company, Inc.
Meiners Thriftway, Inc.
d/b/a Meiners Sunfresh,
Fixtures Manufacturing Corporation,
d/b/a Fixtures Furniture,
Hamar, Inc., d/b/a Harry's Factory Outlet,
Edcor Safety Equipment Co., Inc.
Meiners Country Mart, Inc.
Wally's Thriftway, Inc.,

Complainants,

v.

Kansas City Power & Light Company,

Respondent.

CASE NO. EC-96-57

REPORT AND ORDER

Issue Date: May 1, 1996

Effective Date: May 14, 1996

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Inter-City Beverage Co., Inc.,	)	
North Kansas City Beverage Company, Inc.	)	
Meiners Thriftway, Inc.	)	
d/b/a Meiners Sunfresh,	)	
Fixtures Manufacturing Corporation,	)	
d/b/a Fixtures Furniture,	)	
Hamar, Inc., d/b/a Harry's Factory Outlet,	)	
Edcor Safety Equipment Co., Inc.	)	
Meiners Country Mart, Inc.	)	
Wally's Thriftway, Inc.,	)	
	)	
Complainants,	)	
	)	
v.	)	<u>CASE NO. EC-96-57</u>
	)	
Kansas City Power & Light Company,	)	
	)	
Respondent.	)	

APPEARANCES: **C. Edward Peterson**, Attorney at Law, and
 Jeremiah D. Finnegan, Attorney at Law,
 Finnegan, Conrad & Peterson, 3100 Broadway,
 Suite 1209, Kansas City, Missouri 64111,
 For: Inter-City Beverage Co., Inc., et al.

William G. Riggins, Senior Attorney and
 Susan B. Cunningham, Attorney at Law,
 1201 Walnut Street, Kansas City, MO 64106,
 For: Kansas City Power & Light Company.

Lewis R. Mills, Jr., Deputy Public Counsel,
 P. O. Box 7800, Jefferson City, MO 65102,
 For: Office of the Public Counsel and the Public.

David Woodsmall, Assistant General Counsel,
 P. O. Box 360, Jefferson City, Missouri 65102,
 For: Staff of the Missouri Public Service Commission.

Administrative
Law Judge: **Mark A. Grothoff**

REPORT AND ORDER

On August 23, 1995, Inter-City Beverage Co., Inc.; North Kansas City Beverage Company, Inc.; Meiners Thriftway, Inc. d/b/a Meiners Sunfresh; Fixtures Manufacturing Corporation d/b/a Fixtures Furniture; Hamar, Inc. d/b/a Harry's Factory Outlet; Eddcor Safety Equipment Co., Inc.; Meiners Country Mart, Inc.; and Wally's Thriftway, Inc. (Complainants) filed a complaint against Kansas City Power & Light Company (KCPL) alleging that KCPL has overcharged Complainants for its billing demand charges by misinterpreting and misapplying the determination of demand provision contained in KCPL's applicable rate schedules. On September 25, 1995, KCPL filed its answer to the complaint denying that it had misinterpreted the demand provision of its rate schedules.

On October 25, 1995, a prehearing conference was held as scheduled and on November 9, 1995, the Commission established a procedural schedule for this case. On January 29, 1996, a hearing was held as scheduled, and subsequently, briefs were filed by the parties.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Complainants are corporations receiving electric service from KCPL under one of the following rate schedules: General Service-Large (1-GL or 3-GL), General Service-All Electric (GA), and Primary Service-Large (PL). On August 23, 1995, Complainants filed a complaint against KCPL alleging that KCPL had misinterpreted and misapplied the determination of demand provision in these tariff schedules prior to their revision in 1992.

On September 25, 1995, KCPL filed its answer to the complaint. KCPL denied that it had misinterpreted or misapplied the demand provision. KCPL stated that it had consistently interpreted and uniformly applied its demand provision for over 40 years.

The issue underlying the complaint concerns the imposition of demand ratchets contained in the demand provision of KCPL's canceled 1-GL, 3-GL, GA, and PL rate schedules. "Ratchet" is a term used to describe a method for establishing a billing demand that is different than the highest actual demand used by the customer during the billing period. The rationale for ratchets is that, although the customer will not use the maximum demand at all times, the utility must have that capacity available at any given time so it can serve the maximum demand whenever it does occur. Ratchets are intended to ensure that customers pay their fair share of the fixed cost of serving their peak demands regardless of monthly or seasonable variations in the customers' actual demands.

The demand provision in question reads as follows:

Demand will be determined by demand instruments or, at the Company's option, by demand tests. The billing demand for any month included in the Summer Season shall be the highest demand indicated in any 30-minute interval during that month or such higher minimum billing demand as may be established by contract. The billing demand for any month included in the Winter Season shall be 70% of the highest demand indicated during the month or such higher billing demand as may be established by contract.

The minimum billing demand established by contract shall be not less than ten kw for secondary electric service nor less than the higher of:

- (i) 80% of the highest billing demand occurring in that portion of the Summer Season included in the 12-month period ending with the current month; or
- (ii) 50% of the highest billing demand occurring in that portion of the Winter Season included in the 12-month period ending with the current month.

(Emphasis added).

Complainants' position is that KCPL must have a separate, written contract with each of its industrial and large commercial customers in order to utilize the ratchets in calculating billing demand. Complainants contend that because they did not have separate, written contracts with KCPL, the billing demand should not have been determined with the method containing the 80 percent of the summer billing demand, but should have been determined with the method utilizing its actual demand during a particular month. KCPL argues that the phrase "established by contract" does not mean an express contract, but means those contracts implied within the scope of its service agreements with its customers. KCPL states that its interpretation and application of the language was consistent when it was in effect and was approved repeatedly by the Missouri Public Service Commission (Commission). The Staff of the Commission (Staff) agrees with KCPL's interpretation of the demand provision language and believes KCPL has applied it consistently and uniformly over the years.

A contract may take many forms. Among these are express and implied contracts. It is not clear what is meant by "contract" in the context of the demand provision at issue. Thus, the Commission finds that evidence of intent, previous interpretation, or history may be utilized to interpret the demand provision.

The record indicates that demand ratchets similar to those contained in the demand provision at issue initially appeared in KCPL's tariffs in 1951. As with the provision in question, the demand ratchets included the language "established by contract".

The disputed language is not specifically discussed in the Report and Order considering KCPL's 1951 tariffs. *In re the rates of Kansas City Power & Light Company*, 3 Mo P.S.C. (N.S.) 362 (1951). However,

evidence in the 1951 case (Case No. 12,170) indicates that the demand ratchet provision was treated by the parties as applicable to all large commercial customers without the need for separate, written contracts. The evidence in Case No. 12,170 included testimony that the effect of adding the new ratchets would be to: (1) broaden the applicability of the new single demand ratchet to additional classes of customers; (2) allow the use of less expensive metering; and, (3) simplify the administration of the rate. Case No. 12,170, Transcript, pp. 52-54, 63-67. KCPL's proposal to broaden the applicability of demand ratchets does not appear to have been conditioned upon separate, written contracts and nothing in the record for the present case indicates that KCPL ever executed separate, written contracts pursuant to its 1951 tariffs. KCPL's proposal was ultimately approved by the Commission. ***In re the rates of Kansas City Power & Light Company, supra.*** KCPL's determination of demand provision continued in this form until it was revised in 1976. In the 1976 rate proceeding (Case Nos. 18,433; 18,463; 18,494; and 18,495), KCPL proposed a winter/summer differential and increases in ratchet demand provisions. The application of the higher summer ratchet is the basis of Complainants' claim in this case. KCPL's proposal was agreed to by Staff and was ultimately approved by the Commission as reasonable. ***In re Kansas City Power & Light Company increasing rates for electric service***, 20 Mo P.S.C. (N.S.) 592 (1976). The Commission specifically found "that the Company's proposed summer/winter differential and its change in billing demand ratchet change [sic] are reasonable at this time." *Id.* at p. 613.

The ratchets developed in the 1976 rate case remained unchanged until KCPL's 1985 Wolf Creek proceeding (Case Nos. EO-85-185 and EO-85-224) in which a minor change was proposed to the actual demand billing

determinant. In the Wolf Creek case, the parties had entered into a stipulation regarding rate design, so the Commission's Report and Order contains no discussion of relevant rate design issues, but rather simply adopts KCPL's proposal to reduce the actual demand billing determinant to 70 percent during the nonsummer months. *In re Kansas City Power & Light Company for authority to file tariffs increasing rates and the determination of in-service criteria for the Wolf Creek generating station*, 28 Mo. P.S.C. (N.S.) 228 (1986).

Nonetheless, the evidence in the Wolf Creek case included testimony discussing how the billing demands were applied and how the ratchets worked. Case Nos. EO-85-185 and EO-85-224, Sullivan Direct Testimony, p. 34 and Proctor Direct Testimony, pp. 39-40 (see Exhibit 6, Schedule WGI-11). In addition, the record for the present case includes work papers from the Wolf Creek case. Exhibit 4, Schedules 1-4; Exhibit 6, Schedule WGI-14. Both the testimony and the work papers indicate that the demand ratchets were to be applied to all commercial customers.

There was no mention in the testimony or work papers of the need for separate, written contracts with each customer in order to use the ratchet provisions. Also, the calculations contained in the work papers indicate that the ratchet provisions were applied uniformly to all commercial customers served under KCPL's tariffs.

The demand ratchets remained unchanged until 1992 when the issue under consideration in this case was first argued in Case No. EC-92-211. In that case, a complaint was filed by Shalom Geriatric Center (Shalom) against KCPL. The basis of the complaint mirrored the allegations contained in the present complaint, namely that the demand ratchets found in the determination of demand provision of the large commercial and

industrial rate schedules were not applicable to the individual customers absent a separate, written agreement.

Following the filing of an answer by KCPL, Staff filed its recommendation. Staff recommended that the complaint be dismissed because KCPL was consistently applying the tariff language as it was applied to Shalom and the application is in accordance with the intended rate application resulting from KCPL's previous rate case.

On August 21, 1992, the Commission issued an Order Of Dismissal in which it agreed with Staff's recommendations. The Commission found that KCPL had consistently applied its interpretation of the demand provision to all of its commercial customers. The Commission also noted KCPL's tariff was approved as part of KCPL's Wolf Creek rate case and the rates set in that case were developed using KCPL's interpretation of how the tariffs should be applied. ***Shalom Geriatric Center v. Kansas City Power & Light Company***, Case No. EC-92-211, Order Of Dismissal (August 21, 1992). In essence, the Commission agreed with the interpretation espoused by KCPL and rejected that of Shalom, and of the Complainants in this case. Subsequent to the Shalom case, KCPL revised its demand provision by removing the "established by contract" language.

The record in this case indicates that, while none of the Complainants have executed an express written contract with KCPL, the service agreement between the parties constitutes an implied contract. This contract was established by the actions of the parties. KCPL is statutorily required to file with the Commission tariffs showing all rates and charges and all rules related to such rates. KCPL also has the statutory duty to serve without discrimination as to rates. As such, when a customer requests and accepts service from KCPL at the rates and terms

dictated in KCPL's tariffs, an implied contract is effectively created. The formation of an implied contract is supported by KCPL's tariffs. Section 1.14 of KCPL's tariffs defines a service agreement as "the application, agreement or contract, express or implied, pursuant to which the Company supplies electric service to the customer." (emphasis added).

Furthermore, Staff estimates that Complainants' interpretation could expose KCPL to liabilities of \$100 million to \$350 million. Staff maintains that such a refund liability would impair KCPL's financial integrity and its ability to serve its customers.

Upon review of the intent, previous interpretation, and history of the disputed language, the Commission finds that the demand ratchets contained in the disputed demand provision are applicable to all of KCPL's large commercial customers. While the demand ratchets would certainly be applicable to a customer with an express, written contract, Complainants' argument that the ratchets rely on such a contract fails to recognize the existence of the implied contract formed upon the customer's acceptance of service. The Commission also finds that KCPL's general application of its demand provision has been uniform and consistent with its application to Complainants. Furthermore, Complainants' interpretation is against the public interest. The demand provision was approved as part of KCPL's most recent rate case, and the rates set in that case were developed using KCPL's interpretation of how the demand provision should be applied. The interpretation urged by Complainants would be detrimental to KCPL and its customers, and would defeat the revenue requirement and rate design previously determined to be appropriate for KCPL. Thus, the Commission finds that the complaint in this case should be dismissed.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

KCPL is an electrical corporation and a public utility under the general jurisdiction of the Commission pursuant to Sections 386.020 and 386.250, RSMo 1994. Complainants are corporations receiving electric service from KCPL under KCPL's 1-GL, 3-GL, GA, or PL rate schedules. The Commission has the authority to make a determination in this case pursuant to Section 386.390, RSMo 1994.

Pursuant to Section 393.140(11), RSMo 1994, KCPL is required to file with the Commission tariffs showing all rates and charges made and all rules and regulations related to such rates. KCPL also has a duty under Section 393.130, RSMo 1994 to serve its customers without discrimination as to rates.

At issue in this proceeding is the imposition of demand ratchets contained in the demand provision of KCPL's canceled 1-GL, 3-GL, GA, and PL rate schedules. The demand provision in question reads as follows:

Demand will be determined by demand instruments or, at the Company's option, by demand tests. The billing demand for any month included in the Summer Season shall be the highest demand indicated in any 30-minute interval during that month or such higher minimum billing demand as may be established by contract. The billing demand for any month included in the Winter Season shall be 70% of the highest demand indicated during the month or such higher billing demand as may be established by contract.

The minimum billing demand established by contract shall be not less than ten kw for secondary electric service nor less than the higher of:

- (i) 80% of the highest billing demand occurring in that portion of the Summer Season included in the 12-month period ending with the current month; or

- (ii) 50% of the highest billing demand occurring in that portion of the Winter Season included in the 12-month period ending with the current month.

(Emphasis added).

In dispute is the meaning of the phrase "established by contract". It is well established that a contract may take several forms. For example, an express contract is one in which the terms are stated by words, whether oral or written, whereas an implied contract is arrived at by acts and conduct; the only difference being in the character of evidence necessary to establish the contract. **Westerhold v. Mullenix Corp.**, 777 S.W.2d 257, 263 (Mo.App. 1989); 17A Am. Jur.2D Contracts Section 12 (1991).

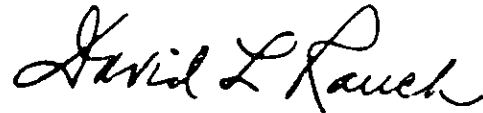
It is not clear within the context of the demand provision at issue what is meant by "contract". Thus, the Commission concludes that the interpretation of the tariff may be aided by extrinsic evidence as to intent, previous interpretation, or history. **Wilshire Construction Co. v. Union Electric Co.**, 463 S.W.2d 903 (Mo. 1971); **D.F.M. Investment Co. v. Union Electric Company**, 1 Mo. P.S.C. 3d 420 (1992). See also: **In re Columbia Gas Transmission Corp.**, 59 PUR4th 662 (F.E.R.C. 1984).

Upon review of the intent of the parties, the previous interpretation of the demand provision, and the historical context surrounding the formulation of the language, the Commission concludes that the demand ratchets contained in KCPL's demand provision are applicable to all commercial customers. Thus, the Commission concludes that the complaint in this case should be dismissed.

IT IS THEREFORE ORDERED:

1. That the complaint against Kansas City Power & Light Company in this case is hereby dismissed.
2. That this Report and Order shall become effective on May 14, 1996.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

Kincheloe, Crumpton, and
Drainer, CC., Concur and certify
compliance with the provisions of
Section 536.080, RSMo 1994.
Zobrist, Chm., Not Participating.
McClure, C., Absent.

Dated at Jefferson City, Missouri,
on this 1st day of May, 1996.