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.	)	

STAFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Staff ("Staff)" of the Missouri Public Service Commission ("Commission"), and for its proposed findings of fact and conclusions of law suggests as follows:

1. Briarcliff Development Company is the Complainant in this matter, and as such, Briarcliff Development bears both the burden of proof and persuasion.[1]

2. The language implementing the freeze of the all-electric rate schedule was remedial, and should be interpreted broadly to effectuate the freeze, thus to the extent there is any doubt concerning Briarcliff Development's failure to carry its burden, that doubt should be resolved in favor of restricting the availability of the 1LGAE rate schedule.[2]

I. KCPL & Staff Issue I: Did KCP&L properly apply its tariff as of August 2009 in refusing to provide service to Briarcliff I on the 1LGAE (general service all-electric) rate

[1] "In cases where 'a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions,' the Commission has determined that 'the burden of proof at hearing rests with complainant.' *Margulis v. Union Elec. Co.*, 30 Mo. P.S.C. (N.S.) 517, 523, 1991 WL 639117 (1991). This court has affirmed placing the burden of proof on the complainant in such cases, because the burden of proof properly rests on the party asserting the affirmative of an issue." *State ex rel. Tel–Central of Jefferson City, Inc. v. Pub. Serv. Comm'n*, 806 S.W.2d 432, 435 (Mo.App.1991); *see also* §386.764, "Nothing in sections 386.754 to 386.764 shall be construed as modifying existing legal standards regarding which party has the burden of proof in commission proceedings."

[2] The large general service all-electric and separately-metered space heating rate schedules are part of KCPL's large general service class, not a separate class. For purposes of class cost of service studies in several recent KCPL rate cases, however, these schedules have been studied as independent subclasses within the large general service class.

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?

Briarcliff Issue I: Did KCPL properly apply its tariff as of August 2009 in refusing to continue to provide service to the Briarcliff I building on the 1LGAE (general service all-electric) rate schedule under the name of the owner of the building, who had been receiving and using all-electric service at the building since 1999, but was a customer name differing from the customer name associated with that service on KCPL's records, prior to that rate schedule being frozen on January 1, 2008 and which schedule thereafter was "available only to Customers' physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter"?

3. Briarcliff Development's theories appear to boil down to the following contentions:

> 1. KCPL shouldn't have changed its customer name of record from "Briarcliff West Development" to "Winbury Realty" in 1999, and
>
> 2. For purposes of implementing the 1LGAE rate schedule freeze, KCPL's customer name of record doesn't matter.

Proposed Findings of Fact Regarding
Briarcliff Development's Customer Status at Briarcliff I from 1999 – 2009

4. Electric service began at Briarcliff I on May 17, 1999, and continued through June 14, 1999, in the name of Briarcliff West Development.[3]

5. On June 11, 1999, someone who identified herself as Ms. Dianne Painter called KCPL to have service set up in the name "Winbury Realty," as of June 14, 1999.[4]

6. KCPL knew at the time The Winbury Group and Winbury Realty were affiliated, thus KCPL accepted this request while they would not have accepted such a request from an unrelated third party.[5]

7. As a practical matter, KCPL does not distinguish between "Winbury Group" and "Winbury Realty."

[3] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 9.
[4] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[5] Transcript, p 83; 86; 90; KCPL Exhibit 1, Heinrich Rebuttal, p 2.

8. Briarcliff's witness Mr. Hagedorn did not review the utility bills for service at Briarcliff I,[6] although he acknowledged that the Management Agreement gave Briarcliff Development that right.[7]

9. Service at Briarcliff I was put in the name of Winbury Realty by KCPL on June 14, 1999.[8]

10. Sometime shortly after June 14, 1999, Briarcliff West Development received a Final Bill.[9]

11. A Final Bill states that it is a "Final Bill," which means the account with KCPL has been closed, and that payment of the final bill represents closure of responsibility for the customer named on that KCPL account.[10]

12. After Briarcliff West Development received KCPL's final bill for Briarcliff I in 1999, the lights were still on at Briarcliff I, and have remained on.

13. Because the lights were still on at Briarcliff I after Briarcliff West Development received KCPL's final bill for Briarcliff I, Briarcliff West Development knew or should have known that KCPL was billing someone for service at Briarcliff I.[11]

14. The Briarcliff I account remained in the name of Winbury Realty for over 10 years commencing on June 14, 1999 and ending on August 5, 2009. [12]

15. KCPL does not normally request verification of the identity of someone seeking to set up a commercial account.[13]

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[6] Transcript, p 57.
[7] Transcript, p 58.
[8] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[9] Transcript, p 97.
[10] Transcript, p 97.
[11] *See* Transcript, pp 97 – 98.
[12] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[13] Transcript, p 76.

16. KCPL witness Mr. Henrich testified that it takes the identity of applicants accepting financial responsibility at their word in the case of a commercial property – particularly an established property manager like Winbury.[14]

17. Winbury was an established KCPL customer as a property manager in other places within the KCPL system,[15] so, from KCPL's perspective, Winbury was an established customer taking responsibility and ownership of the Briarcliff I account.[16]

18. KCPL testified that it is common for a property manager, in general, to put service in its name,[17] and that it was common for Winbury, in particular to put service for various properties in its name.[18]

19. In the case of an entity with which KCPL is less familiar than it is with Winbury, KCPL witness Mr. Henrich explained that it uses tax identification numbers and other verifying questions.[19]

20. KCPL witness Mr. Henrich explained that it relies on the reluctance of entities to pay bills they do not owe as a safeguard against customer name shenanigans.[20]

21. KCPL does not normally review agency contracts when setting up commercial accounts.[21]

22. It is not common in the utility industry to request verification of identity when setting up a commercial account.[22]

[14] Transcript, p 80.
[15] Transcript, pp 77 - 78.
[16] Transcript, pp 77 - 78.
[17] Transcript, p 78.
[18] Transcript, pp 78 - 79.
[19] Transcript, pp 83 – 84.
[20] Transcript, p 96; 97 – 98; 101 – 102.
[21] Transcript, p 76.
[22] Transcript, p 76.

23. It is not common in the utility industry to review agency contracts when setting up commercial accounts.[23]

24. A utility would not have any way of knowing whether a particular agency agreement had been superseded.[24]

25. Mr. Henrich testified that review of agency agreements would take some amount of time,[25] and that customers do not react well to delays in service.[26]

26. Briarcliff Development witness Mr. Hagedorn testified that in his position as a property manager for properties other than Briarcliff I, he had never had a vendor request contractual documentation of the authority of Briarcliff Realty Company to establish an account for services to a managed property.[27]

Proposed Conclusions of Law Regarding
Briarcliff Development's Customer Status at Briarcliff I from 1999 – 2009

27. Briarcliff Development's request for a "[f]inding that KCPL's actions in naming Winbury Realty as the Customer Name under which Briarcliff I was billed by KCPL instead of Briarcliff Development, the owner of the building, was arbitrary, capricious and unreasonable," appears to be premised on Briarcliff Development's theory that KCPL failed to abide by the terms of a contract between The Winbury Group and Briarcliff Development.

28. What Briarcliff Development omits is the basic legal premise that a contract binds no one but the parties to it, and cannot impose any contractual obligation or liability on one not a party to it.[28]

[23] Transcript, p 76.
[24] Transcript, pp 76 – 77.
[25] Transcript, p 96.
[26] Transcript, p 96.
[27] Transcript, pp 60 – 62.
[28] *See Continental Cas. Co. v. Campbell Design Group, Inc.* 914 S.W.2d 43, 44 (Mo.App. E.D. 1996) "What is not discussed by Continental is the basic legal premise that a contract generally binds no one but the parties thereto, and it cannot impose any contractual obligation or liability on one not a party to it. 17A C.J.S. *Contracts* § 520 (1963);

29. For purposes of this discussion, the Commission will assume that Briarcliff Development means to argue (1) that The Winbury Group acted in excess of its express authority when it requested KCPL to place service for Briarcliff I under the customer name Winbury Realty, and (2) that KCPL did not have a right to rely on the apparent authority of The Winbury Group to do so.

30. The Commission is not a court of law, and The Winbury Group is not a party to this matter, thus Briarcliff's inherent allegation that The Winbury Group acted in excess of its express authority is not properly before this Commission.[29]

31. Even if The Winbury Group acted in excess of its authority when it requested KCPL to change the name of the customer of record, KCPL properly relied on The Winbury Group's apparent authority to change the customer of record for Briarcliff I to "Winbury Realty" on June 11, 1999.

32. As recently reiterated by the Missouri Western District Court of Appeals in *Dahn v. Dahn*, to establish the apparent authority of a purported agent, a claimant must show that:

> (1) the principal manifested his consent to the exercise of such authority or knowingly permitted the agent to assume the exercise of such authority; *(2) the person relying on this exercise of authority knew of the facts and, acting in good faith, had reason to believe, and actually believed, the agent possessed such authority;* and (3) the person relying on the appearance of authority changed his position and will be injured or suffer loss if the transaction executed by the agent does not bind the principal. [emphasis present in original][30]

Kansas City Downtown Minority Dev. Corp. v. Corrigan Assoc. Ltd. Partnership, 868 S.W.2d 210 (Mo.App.1994)[16]; *Reichert v. Jerry Reece, Inc.,* 504 S.W.2d 182 (Mo.App.1973)[1–3]; *Kahn v. Prahl,* 414 S.W.2d 269 (Mo.1967)[2,3]; *Zweifel v. Lee–Schermen Realty Co.,* 173 S.W.2d 690 (Mo.App.1943)[4–6]; *Mueninghaus v. James,* 324 Mo. 767, 24 S.W.2d 1017 (1930)[4,5]. The record does not establish that either of the individual defendants was a party to the contract. Language in a contract to which they were not parties cannot bind them." Citing *Kansas City Downtown Minority Development Corp. v. Corrigan Associates Ltd. Partnership* 868 S.W.2d 210, 223 -224 (Mo.App. W.D. 1994), "As a general rule, only parties to a contract are bound by the terms of that contract." Citing *Kahn v. Prahl,* 414 S.W.2d 269, 278 (Mo.1967).

[29] A civil court would be the proper forum for a cause of action regarding any breach of the Briarcliff/Winbury agreement. Briarcliff has not provided fact or argument to support a theory that KCPL is responsible for Winbury's assumption of financial responsibility for the Briarcliff I account.

[30] *Dahn v. Dahn* 346 S.W.3d 325, 339 (Mo.App. W.D.,2011), citing *Motorsport Mktg., Inc. v. Wiedmaier, Inc.*, 195 S.W.3d 492, 498 (Mo. App. W.D., 2006).

33. The facts of this case clearly satisfy the *Dahn* elements.

34. KCPL was not unreasonable in relying on Winbury's request for financial responsibility for service at Briarcliff I.

35. KCPL relied on Winbury's request for financial responsibility for service at Briarcliff I in good faith, having reason to believe and actually believing that such reliance was appropriate.

36. Even if one assumes it was unreasonable for KCPL to transfer the account out of the name of Briarcliff West Development, Briarcliff had every opportunity to address the situation over a ten year period.

37. Briarcliff, through its inaction during this period, manifested its consent to the exercise of apparent authority.

38. During the term of time of reliance by KCPL on Winbury's apparent authority (1999 – 2009), KCPL has testified that it does not believe it would have been capable of pursuing Briarcliff Development for financial responsibility on the Briarcliff I account.[31]

39. Further, Briarcliff benefited from an apparent reprieve in financial responsibility for service to Briarcliff I during this time, and only now alleges wrong doing by KCPL.[32]

Findings of Fact Regarding
The Remedial Nature of the Elimination of the 1LGAE Rate Schedule by Attrition

40. In Case No. ER-2006-0314, the Commission closed the 1LGAE subclass, and ordered its elimination by attrition.

[31] Transcript, PP 127 – 129.
[32] *See Dahn v. Dahn* 346 S.W.3d 325, 339 (Mo.App. W.D.,2011), citing *Motorsport Mktg., Inc. v. Wiedmaier, Inc.*, 195 S.W.3d 492, 498 (Mo. App. W.D., 2006).

41. In that Report and Order, the Commission restricted the availability of the 1LGAE rate to "existing customers," and reduced the magnitude of the 1LGAE discount compared to that of the comparable general service rate.[33]

42. However, KCPL continued to place various structures and customers on the 1LGAE discount under two theories. The first relied on a very, very, broad interpretation of the term "existing customer" The second was that although the Commission's Report and Order ordered the restriction, because the 1LGAE tariff language remained unchanged, KCPL claimed could not implement the restriction.[34]

43. In KCPL's next rate case, Case No. ER-2007-0291, the Commission again reduced the magnitude of the discount of the 1LGAE rate compared to the comparable general service rate,[35] and explicitly adopted Staff's recommended phase-out of the discounted 1LGAE rate.[36]

44. The Commission found that "[a]llowing even more customers to use those discounts flies in the face of a possible move, supported by Staff, towards eliminating them completely."[37]

45. In so doing, the Commission ordered that 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,[38] and such rates should only be available to such customers for so

[33] Report and Order in Case No. ER-2006-0314, pp 82 – 83; Transcript p 104; Transcript p 116.
[34] Transcript p 104 – 114.
[35] Report and Order in Case No. ER-2007-0291, pp 79 – 80.
[36] Report and Order in Case No. ER-2007-0291, pp 79 – 80.
[37] Report and Order in Case No. ER-2007-0291, p 82.
[38] This date was later clarified to refer to January 1, 2008. See *Order Regarding Motions for Rehearing and Request for Clarification*, effective December 21, 2007, in ER-2007-0291.

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)."[39]

46. As a consequence, the 1LGAE tariff sheet ultimately effectuating rates was denominated "Frozen."[40]

47. The Commission devoted **fifteen pages** of its Report and Order in ER-2007-0291 to the all-electric and separately-metered space heating issues.[41] The Commission discussed the relative rates of return of the subclasses, the competitive nature of heating alternatives in Kansas City, Staff's filed position to eliminate the rate schedules by attrition over time, and Trigen's proposal to eliminate the discount and the class more dramatically.

48. The proper interpretation of this Commission language is that the 1LGAE rate schedule, along with others, is restricted to those (1) qualifying customers, (2) commercial and industrial physical locations, (3) being served under such all electric tariffs or separately-metered space heating rates, (4) for so long as they continuously remain on that rate schedule.[42]

49. "Customers" is separate from "locations."

50. This is entirely consistent with the Commission's explicit statement that "[a]llowing even more customers to use those discounts flies in the face of a possible move, supported by Staff, towards eliminating them completely,"[43] which evidences the Commission's intent its language be restrictive.

51. That "customers" is its own element is also evidenced by the grammar the Commission used in the parenthetical. "They" must refer back to "customers," as a reference

[39] Report and Order in Case No. ER-2007-0291, p 82.
[40] Sheet No. 19A.
[41] *See* Report and Order in Case No. ER-2007-0291, pp 75 – 90.
[42] Report and Order in Case No. ER-2007-0291, p 82.
[43] Report and Order in Case No. ER-2007-0291, p 82.

back to "customers' commercial and industrial physical locations," would properly be the word "its."

52. The Commission's language in its Report and Order in Case No. ER-2007-0291, as well as the "frozen" tariff, is remedial in two senses. First, closing the discounted sub-classes by attrition is a remedy for the failure of these subclasses to provide a comparable rate-of-return, as is discussed in the Commission's Report and Order in Case No. ER-2007-0291.[44] Second, the language is remedial in the sense that KCPL largely ignored the Commission's "existing customer" language in its Report and Order in KCPL's prior general rate case, Case No. ER-2006-0314, and as the Commission discussed in its Report and Order in Case No. ER-2007-0291, the parties there, as well as the Commission, sought to address this disregard for the Commission's intent.[45]

Conclusions of Law Regarding
The Remedial Nature of the Elimination of the 1LGAE Rate Schedule by Attrition

53. It is a well-established canon of construction that remedial language should be interpreted to effectuate the remedy. As stated in *Utility Service Company, Inc. v. Department of Labor and Industrial Relations*:

> Because the Act is a remedial statute intended to prevent payment of substandard wages for work on public works projects, [*See* sec. 290.220; *Long v. Interstate Ready–Mix, L.L.C.*, 83 S.W.3d 571, 574 (Mo.App.2002)] it "should be construed so as to meet the cases which are clearly within [its] spirit or reason ... or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used." *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982) (internal quotations omitted). Doubts about the applicability of a remedial statute are resolved in favor of applying the statute. *See id.* Accordingly, exceptions or exclusions to a remedial law are narrowly construed. *Cf. id.; State v. Breckenridge*, 219 Mo.App. 587, 282 S.W. 149, 150 (1926) ("As a rule, exceptions in statutes are strictly construed.").[46]

[44] Report and Order in Case No. ER-2007-0291, pp 75 – 90.
[45] Report and Order in Case No. ER-2007-0291, pp 75 – 82.
[46] *Utility Service Co., Inc. v. Department of Labor and Indus. Relations* 331 S.W.3d 654, 658 (Mo.,2011).

54. The language implementing the freeze of the all-electric rate schedule was remedial, and should be interpreted broadly to effectuate the freeze, thus to the extent there is any doubt concerning Briarcliff Development's failure to carry its burden, that doubt should be resolved in favor of restricting the availability of the 1LGAE rate schedule.[47]

55. Briarcliff Development's case relies on a confused interpretation of who is a commercial customer. In KCPL's 2007 rate case, Case No. ER-2007-0291, the Commission ordered the 1LGAE rate schedule, along with others, to be restricted to those (1) qualifying customers, (2) commercial and industrial physical locations, (3) being served under such all electric tariffs or separately-metered space heating rates, (4) for so long as they continuously remain on that rate schedule.[48]

56. Because of the remedial nature of this language, both in a sense of correcting KCPL's interpretation of the prior restriction and the intent of the Commission to eliminate the class by attrition, KCPL properly interpreted the ordered language and the tariff freeze when it removed the Briarcliff I location from eligibility under the 1LGAE rate schedule after the customer of KCPL responsible for payment for service at that location changed.

57. KCPL construed the language "so as to meet the cases which are clearly within its spirit or reason," that is, by limiting the availability of the 1LGAE rate schedule, and that "interpretation is not inconsistent with the language used."[49]

58. The significance of "customers" is evident in the express language and no further interpretation is necessary, this canon of construction that remedial language should be

[47] The large general service all-electric and separately-metered space heating rate schedules are part of KCPL's large general service class, not a separate class. For purposes of class cost of service studies in several recent KCPL rate cases, however, these schedules have been studied as independent subclasses within the large general service class.
[48] Report and Order in Case No. ER-2007-0291, p 82.
[49] *See Utility Service Co., Inc. v. Department of Labor and Indus. Relations* 331 S.W.3d 654, 658 (Mo.,2011).

interpreted to effectuate the remedy reinforces the significance of the "customers" distinction, and the propriety of KCPL's action.

59. Finally, since "doubts about the applicability of a remedial statute are resolved in favor of applying the statute," any potential ambiguity should be resolved in favor of finding KCPL properly acted to limit the applicability of the 1LGAE discount. [50]

II. Does the Commission have 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? If so, should it?

Findings of Fact and Conclusions of Law
Regarding Lack of a Properly-Pled Application

60. 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.

61. 4 CSR 240-2.060(4) 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.[51]

62. KCPL has not complied with these requirements.

[50] *See Utility Service Co., Inc. v. Department of Labor and Indus. Relations* 331 S.W.3d 654, 658 (Mo.,2011).
[51] 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."

63. KCPL alleges that "[g]ood cause exists for a variance from the Commission's ruling since Briarcliff relied on the all-electric tariff when it constructed the Property."

64. KCPL's allegation of good cause 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. Further, because there is no property interest in the availability of a rate schedule,[52] KCPL's reliance argument is inapplicable.

65. KCPL requests 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.

66. 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. [53]

67. 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," and a lawfully-promulgated tariff, having the force and effect of law, cannot be varied or waived.

Findings of Fact and Conclusions of Law Regarding
Commission Authority to Vary or Waive a Lawfully-Promulgated Tariff

68. KCPL and Briarcliff Development, though improperly, request not only variance or waiver of a requirement of the 1LGAE tariff, but also, tacitly, of the Commission's order spelling out the requirements for receiving the 1LGAE discount.

[52] *State ex rel. Coffman v. Public Service Com'n of State* 121 S.W.3d 534, 539 (Mo.App. W.D.,2003), referencing *State ex rel. Jackson County v. Pub. Serv. Comm'n,* 532 S.W.2d 20, 31 (Mo. banc 1975).
[53] *See State ex rel. Licata, Inc. v. Public Service Com'n of State* 829 S.W.2d 515, 518 (Mo.App. W.D.,1992).

69. A tariff has the same force and effect as a statute, and the Commission is as bound by its terms as the utility and the public.[54]

70. If a statutory court review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding.[55]

71. The Commission cannot vary or waive a rate schedule, unless pursuant to that schedule's own provisions. 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 any more than can a utility or a customer.

72. As set forth nearly ninety years ago by the Missouri Supreme Court:

> 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.[56]

73. Similarly, just as KCPL's request in Case No. EE-2008-0238 was a collateral attack on the Commission's orders in Case No. ER-2007-0291, which the Commission denied, its request here is a collateral attack and the Commission should deny it.

74. Even if it were lawful for the Commission to allow KCPL not to comply with its tariff or the Commission's orders, it is not necessary or appropriate do so here.

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[54] *State ex rel. Missouri Gas Energy v. Public Service Com'n* 210 S.W.3d 330, 337 (Mo.App. W.D.,2006), citing *Bauer v. Sw. Bell Tele. Co.,* 958 S.W.2d 568, 570 (Mo.App. E.D.1997).
[55] *State ex rel. Licata, Inc. v. Public Service Com'n of State* 829 S.W.2d 515, 518 (Mo.App. W.D.,1992).
[56] *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).

75. The Commission devoted fifteen pages of its Report and Order in ER-2007-0291 to the all-electric and separately-metered space heating issues.[57] That discussion and those findings and conclusions remain sufficient rationale for eliminating the 1LGAE rate schedule by attrition.

76. Even was this the proper proceeding to reconsider these issues – it is not – the Commission will not reopen or extend the availability of the 1LGAE rate schedule to include service to Briarcliff I.

III. Should the Commission order KCP&L to file a revised tariff sheet allowing KCP&L to provide service to Briarcliff I on an all-electric schedule on a prospective basis?

Findings of Fact and Conclusions of Law Regarding
The Continued Elimination of the 1LGAE Rate Schedule by Attrition

77. For the reasons discussed as basis for the Commission's findings and conclusions in Case No. ER-2007-0291, as well as Case No. ER-2006-0314, the Commission will decline to reopen or extend the availability of the 1LGAE rate schedule for service to Briarcliff I.

78. KCPL witnesses have testified to KCPL's intent to close these all-electric heating rate schedules.[58]

79. Although prior Commission orders are not binding on this Commission, the Commission has ordered the elimination of these rate schedules by attrition.[59]

80. It would be counterproductive and counterintuitive to reopen the 1LGAE rate schedule for service to Briarcliff I or any other location at this time.

IV. Additional Findings of Fact and Conclusions of Law

81. The Commission cannot and will not award money damages or any refund in this matter.

[57] *See* Report and Order in Case No. ER-2007-0291, pp 75 – 90.
[58] Transcript pp 120 – 121.
[59] *See* Report and Order in Case No. ER-2007-0291.

WHEREFORE, the Staff submits its *Proposed Findings of Fact and Conclusions of Law.*

Respectfully submitted,

THE STAFF OF THE
MISSOURI PUBLIC SERVICE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 8th day of February, 2012.

/s/ Sarah Kliethermes