

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

**BRIARCLIFF DEVELOPMENT COMPANY, )**  
**a Missouri Corporation )**

**COMPLAINANT )**

**v. )**

**KANSAS CITY POWER & LIGHT )**  
**COMPANY )**

**RESPONDENT )**

**CASE NO. EC-2011-0383**

**BRIARCLIFF DEVELOPMENT COMPANY'S PROPOSED FINDINGS OF FACT**  
**AND CONCLUSIONS OF LAW**

COMES NOW, Briarcliff Development Company ("Briarcliff Development" or "Complainant") by its attorneys, pursuant to the Commission's November 15, 2011 Order Setting Procedural Schedule and submits its Proposed Findings of Fact and Conclusions of Law as follows:

**I. PROPOSED FINDINGS OF FACT**

The material facts in this case are in the main undisputed except as to some minor details. Most of the material facts were set forth in the Joint Stipulation of Non-Disputed Material Facts filed on January 19, 2012 and accepted as part of the record at the evidentiary hearing (Tr.21). Other facts were not disputed by the parties in their testimony and at the hearing. Complainant's proposed findings of fact are as follows:

1. This is a Complaint case brought by Complainant Briarcliff Development Company ("Briarcliff Development") against Respondent Kansas City Power & Light Company ("KCPL").

2. Briarcliff Development is the owner of several commercial all-electric office buildings, including the Briarcliff I building ("Briarcliff I"), the Briarcliff II building ("Briarcliff II") and the Briarcliff III building ("Briarcliff III").

3. Briarcliff Development (or its predecessor, Briarcliff West Development) has owned the Briarcliff I building located at 4100 N. Mulberry Street, Kansas City, MO 64116 since it was developed in 1999.

4. KCPL has continuously supplied Briarcliff I with electricity since May 17, 1999. In the development of Briarcliff I, KCPL was instrumental in Complainant's decision to develop it as an all-electric building to be served under KCPL's all-electric rate schedules.

5. Briarcliff Development, as the Owner of the office buildings, had a Management Agreement from 1999 to August 2009 with The Winbury Group of K.C., Inc. ("Winbury Group") under which the Winbury Group was designated as exclusive managing agent for Briarcliff I. (Briarcliff Ex. 1, Sch. NH-5). It was expressly provided in Article I, Paragraph 1.1 of the Management Agreement that:

**"all obligations or expenses incurred hereunder by Manager shall be for the account of, on behalf of, and at the expense of Owner, except as otherwise specifically provided herein."** [Emphasis Added.]

Also pursuant to Paragraph 1.6 of Article I of the Management Agreement, it was specifically provided that:

**"Manager shall enter into or renew contracts in the name of the Owner for electricity ...,"** and other services in the ordinary course of business." [Emphasis Added.]

6. Nevertheless, despite the Management Agreement's express provision that the Winbury Group was to enter into contracts in the name of the Owner for electricity and other

services, on June 11, 1999, without the knowledge of Briarcliff Development, Briarcliff Development's agent, the Winbury Group, contacted KCPL by telephone and applied for electric service under the All-Electric Rate Schedule for the Briarcliff I all-electric building in the name of Winbury Realty ("Winbury Realty"), a separate corporation from the Winbury Group (Briarcliff Ex. 1, Sch. NH-3 & NH-4), and not in the name of the Owner, Briarcliff Development.

7. KCPL then set up Briarcliff Development's Briarcliff I building in the name of Winbury Realty initially on its Medium General Service - All Electric rate schedule 1MGAE from June 14, 1999 through January 25, 2001. From January 25, 2001 through August 5, 2009, Briarcliff I was served under the Large General Service - All Electric rate schedule 1LGAE.

8. While KCPL billed **Winbury Realty**, the bills were paid by Briarcliff Development's agent, the **Winbury Group**, out of the Owner's lease receipts from the Briarcliff I building managed by the Winbury Group.

9. KCPL did not list Briarcliff Development, the Owner of the building, as the customer on its billings, and by listing the customer as "Winbury Realty", it did not even list the owner's Property Manager, the Winbury Group, as the customer. KCPL instead listed Winbury Realty, an entirely different corporate entity with no association with the building, as the customer name on its billings.

10. The Winbury Group continued as the exclusive managing agent for Briarcliff Development from 1999 through July of 2009, when the Management Agreement was terminated by Briarcliff Development and in August of 2009, Briarcliff Development, the owner and landlord, took the property management of Briarcliff I in house.

11. In Re Kansas City Power & Light Company, Case No. ER-2007-0291 ("2007 Rate Case"), the Commission on December 6, 2007, ordered at p. 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).

12. On December 21, 2007, the Commission issued its Order Regarding Motions for Rehearing in Case No. ER-2007-0291 and at pp 1-2 clarified its Report and Order by stating that it intended to limit such rates to customers being served under such rates as of January 1, 2008.

13. In response to such Order, KCPL then adopted a Frozen all-electric tariff effective January 1, 2008 (P.S.C. MO. No. 7, Third Revised Sheet No. 19), Large General Service - All Electric (Frozen) Schedule LGA, which states as follows:

"This Schedule is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."

14. That KCPL's General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.05 under I. Definitions defines Customer as follows:

"1.04 CUSTOMER: Any person applying for, receiving, using, or agreeing to take a class of electric service supplied by the Company under one rate schedule at a single point of delivery at and for use within the premise 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."

15. In an email dated February 8, 2008, from David Sutphin (KCPL employee) to Richie Benninghoven (contact person for Briarcliff Development), KCPL notified Briarcliff that

if the name changes, then the account must be changed to a standard electric tariff. The email states:

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.

16. On August 5, 2009, KCPL was contacted by telephone by someone identifying himself as Jim Unruh, Senior Vice President of the Winbury Group and directed to put the account for the Briarcliff I building in the name of Briarcliff Development. Effective the same date, KCPL changed the customer name on KCPL's records from "Winbury Realty" to "Briarcliff Development."

17. Commencing with the first billing after KCPL was notified of the change of customer name on KCPL's records, KCPL ceased billing Winbury Realty and began billing Briarcliff Development for electric service to the Briarcliff I building. However, it billed Briarcliff Development at the Briarcliff I building under the Large General Service (1LGSE) rate instead of continuing on under the Large General Service All Electric (1LGAE) rate.

18. Two other office buildings owned by Briarcliff Development, Briarcliff II and Briarcliff III, which were also continuously on the 1LGAE all-electric rate schedule from their respective openings and continuously since, including on January 1, 2008, were not moved to the 1LGSE rate schedule when Briarcliff Development ended its relationship with the Winbury Group as its property manager of the three buildings and took the management of the three buildings in house on August 5, 2009. According to KCPL's billing records, the customer name for the

Briarcliff II building was "Briarcliff Two" and the customer name for the Briarcliff III building was "Briarcliff Development."

19. As a result of KCPL's actions in charging the Briarcliff I building at the standard Large General Service (1LGSE) rate instead of continuing on under the Large General All Electric (1LGAE) rate, Briarcliff Development has been paying higher rates under the 1LGSE rate for electric service at the Briarcliff I physical location since August 5, 2009, than it would have had it been continuously billed at the 1LGAE rate.

## **II. CONCLUSIONS OF LAW**

Complainant's Conclusions of Law are as follows:

1. That Complainant, Briarcliff Development Company has the burden of proof in this Commission proceeding.

2. That based on the evidence as a whole, Briarcliff Development Company has met its burden of proof that KCPL did not properly apply its Frozen all-electric tariff to the Briarcliff I office building after August 5, 2009, in that Briarcliff Development, as owner and landlord receiving and using electric service at the building, was a Customer of KCPL at the Briarcliff I building's physical location continuously since 1999 as the term "Customer" is used in its Frozen all-electric tariff and as it is defined in KCPL's own lawful Definitions, General Rules and Regulations, Rule 1.04, which Definitions specifically provides that "when used in ...Rate Schedules... shall...have the meanings" given in the definitions was entitled to continue to be served under the Frozen 1LGAE rate schedule.

3. That KCPL's interpretation of its approved Frozen all-electric tariff which clearly states:

"This Schedule is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."

to mean that "if the customer name changes on an account served by these tariffs... the account must be changed to a standard tariff" is unreasonable, arbitrary, capricious, unlawfully discriminatory and is violative of the law as set forth by the Supreme Court in *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37 (Mo. 1931), which requires that a rate filed by a public utility should be given a liberal, rather than a strict, construction as to the customers entitled to such rate.

4. That but for KCPL's unlawful and unreasonable construction of the availability of its approved Frozen all-electric rate schedule, Briarcliff Development would have continued to have been lawfully billed by KCPL at the 1LGAE rate schedule continuously from 1999 to date at its Briarcliff I building just as it was continuously provided service under the 1LGAE rate schedule at Briarcliff Development's Briarcliff II and Briarcliff III office buildings from the date of their openings and continuously to date.

5. That merely because the Briarcliff II building was carried on KCPL's billing records as "Briarcliff Two" and the Briarcliff III building was carried on KCPL's billing records as "Briarcliff Development" does not justify KCPL's unlawfully discriminatory treatment of the Briarcliff I building carried on KCPL's records as "Winbury Realty," since all three buildings were owned and leased by Briarcliff Development and Briarcliff Development was the actual Customer receiving and using service at all three such physical locations as the term "Customer" is used in the Frozen All-Electric Rate Schedule and is defined by Rule 1.04.

6. That the

proper construction of the language of the Availability of the Frozen 1LGAE rate schedule is that the schedule is available only to (a) Customers' physical locations, (b) currently taking service under the Schedule, and (c) who are served hereunder continuously thereafter.

7. That applying such construction of the Availability of the Frozen 1LGAE rate schedule, Complainant has sustained its burden of proof in that: (a) the Briarcliff I building is a "Customer's physical location" and as Customer is defined by Rule 1.04, Briarcliff Development is the Customer at such physical location, (b) that on January 1, 2008 when the Frozen rate schedule was adopted, the Briarcliff I building was currently taking service from KCPL under the 1LGAE rate schedule, and (c) but for KCPL's actions in wrongfully removing the Briarcliff I building from the 1LGAE rate schedule because the name of the customer on KCPL's records changed from "Winbury Realty", a company that was not associated with Briarcliff Development on the Briarcliff I building, to Briarcliff Development, the owner all along, Briarcliff Development's Briarcliff I physical location would have been served under the 1LGAE rate schedule continuously thereafter.

8. That in order to remedy the injustice of KCPL's actions in wrongfully removing Briarcliff Development's Briarcliff I building from the 1LGAE rate schedule effective August 5, 2009, the Commission should:

A. Find under the circumstances, that Briarcliff Development is and has been entitled to have been continuously served at its Briarcliff I building under the frozen all electric rate at all times and that KCPL acted arbitrarily, capriciously, unreasonably, unlawfully and discriminatorily in commencing to bill Briarcliff Development for service at the 1LGSE rate continuously since August 5, 2009.



- B. Order KCPL to commence immediately billing Briarcliff Development at the Briarcliff I building at the 1LGAE rate.
- C. Order KCPL to rebill Briarcliff Development for service to the Briarcliff I building at the 1LGAE rate for all service provided it at the 1LGSE rate since August 5, 2009 and for the period thereafter until KCPL reinstitutes service at the 1LGAE rate.
- D. Order KCPL to make an accounting of the difference collected from Briarcliff Development for the service it billed the Briarcliff I building at the 1LGSE rate and what the charges would have been for such period under the 1LGAE rate and refund such difference in amount to Briarcliff Development with interest at the legal rate of interest.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.,

By: 

JEREMIAH D. FINNEGAN MO#18416  
1209 Penntower Office Center  
3100 Broadway  
Kansas City, MO 64111  
(816) 753-1122  
(816) 756-0373 FAX

ATTORNEYS FOR BRIARCLIFF  
DEVELOPMENT COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Statement of Facts and Conclusions of Law has been mailed, faxed or electronically mailed to all counsel of record this 8th day of February, 2012

  
Jeremiah D. Finnegan