

**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

REPORT AND ORDER

Issue Date: March 7, 2012

Effective Date: April 6, 2012

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

| | | |
|------------------------------------|---|-------------------------------------|
| Briarcliff Development Company, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | <u>File No. EC-2011-0383</u> |
| |) | |
| Kansas City Power & Light Company, |) | |
| |) | |
| Respondent. |) | |

APPEARANCES

Appearing for **BRIARCLIFF DEVELOPMENT COMPANY:**

Jeremiah D. Finnegan, Finnegan, Conrad & Peterson, L.C., 1209 Penntower Office Center, 3100 Broadway, Kansas City MO 64111.

Appearing for **KANSAS CITY POWER & LIGHT COMPANY:**

James M. Fischer, Fischer & Dority, PC, 101 Madison, Suite 400, Jefferson City MO 65101,

and

Roger W. Steiner, Kansas City Power & Light Company, 1200 Main St., 16th Floor, Kansas City MO 64105.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Sarah L. Kliethermes, Associate Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushmann, Regulatory Law Judge

REPORT AND ORDER

I. Procedural History

On May 26, 2011, Briarcliff Development Company (“Briarcliff” or “Briarcliff Development”) filed a formal complaint against Kansas City Power & Light Company (“KCP&L”). Briarcliff alleges that KCP&L failed to properly apply its tariff in August 2009 by refusing to provide electric service to Briarcliff on the large general all-electric rate schedule (“1LGAE”). Briarcliff asserts that it was entitled to continue receiving the all-electric rate as of August 2009 when it changed the name associated with that account on KCP&L records because it was a customer of KCP&L prior to the general service all-electric rate being frozen. Briarcliff contends that KCP&L’s actions in using a different name as the customer name in its records from 1999 to 2009 and in refusing to allow Briarcliff to receive the all-electric rate after August 2009 were arbitrary, capricious and unreasonable. Briarcliff requests that the Missouri Public Service Commission (“Commission”) require KCP&L to immediately allow Briarcliff to receive the large general all-electric service rate, to re-bill Briarcliff for electric service at the all-electric rate from August 2009 until KCP&L reinstitutes services at that all-electric rate, and refund any difference between the all-electric rate and the general service rate Briarcliff is currently paying, with interest.

KCP&L answered the complaint and sought its dismissal. The Commission’s Staff investigated and found no violations of any statute, regulation or Commission-approved

tariff. However, because there were material facts in dispute, the Commission held an evidentiary hearing on January 24, 2012 to address Briarcliff's allegations.¹

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence. On January 19, 2012, the parties filed a Joint Stipulation of Material Non-Disputed Facts, which the Commission incorporates and adopts in its entirety as its own Findings of Fact. The stipulated facts in the Joint Stipulation are as follows:

1. Complainant Briarcliff Development Company is a Missouri corporation located at 4151 N. Mulberry Street, Kansas City, Missouri 64116.

2. Respondent Kansas City Power & Light Company is an electrical corporation and public utility as defined in Section 386.020, RSMo, engaged in the business of manufacture, transmission and distribution of electricity subject to the regulatory authority of the Commission pursuant to Chapters 386 and 393, RSMo.

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

4. Briarcliff I is located at 4100 N. Mulberry Street, Kansas City, Missouri 64116.

¹ Transcript, Volume 2. In total, the Commission admitted the testimony of four witnesses and received eight exhibits into evidence. Post-hearing briefs were filed on February 17, 2012 and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

5. Briarcliff Development has owned Briarcliff I since it was developed in 1999.

6. KCP&L has provided electric service to the premises located at 4100 N. Mulberry Street, Kansas City, Missouri 64116 continuously since 1999.

7. In the development of Briarcliff I, Briarcliff relied upon the existence of KCP&L's all-electric rate and this all-electric rate was instrumental in Briarcliff's decision to develop it as an all-electric building to be served under KCP&L's all electric rate schedules.

8. KCP&L's customer names and service dates of record for Briarcliff I are as follows:

| <u>Customer Name</u> | <u>Service From</u> | <u>Service To</u> |
|-----------------------------|---------------------|-------------------|
| Briarcliff West Development | 5/17/1999 | 6/14/1999 |
| Winbury Realty | 6/14/1999 | 8/5/2009 |
| Briarcliff Development | 8/5/2009 | Current |

9. Electric service began at Briarcliff I on May 17, 1999 and continued through June 14, 1999 in the name of Briarcliff West Development at the request of someone who identified himself as Lee Swartz. At this time, Briarcliff West Development was the legal entity responsible for payment.

10. On June 11, 1999, someone who identified herself as Ms. Dianne Painter called KCP&L to have service set up in the name of Winbury Realty as of June 14, 1999. Service at Briarcliff I was put in the name of Winbury Realty by KCP&L on June 14, 1999. The account remained in the name of Winbury Realty for over 10 years commencing on June 14, 1999 and terminating on August 5, 2009.

11. From May 17, 1999 through January 25, 2001, service to the premise was under the [Medium General Service All-Electric] 1MGAE rate schedule, and service from January 25, 2001 through August 5, 2009 was under the [Large General Service All-Electric] 1LGAE rate schedule.

12. The Report and Order in Case No. ER-2006-0314 addresses the discounted rates of KCP&L all-electric and separately metered space heating rate schedules as outlined below:

[Issue] Should the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general service tariffs be eliminated or restricted to existing customers only until there is a comprehensive class cost of service study and/or cost-effectiveness study which analyzes and supports such tariffs and provisions as well as KCPL's Affordability, Energy Efficiency and Demand Response programs? (Report and Order, Case No. ER-2006-0314, page 82)

... The Commission is concerned that during KCPL's winter season, commercial and industrial customers under the all-electric general service tariffs pay about 23% less for the entire electricity usage than they would otherwise pay under the standard general service tariff, and that the commercial and industrial customers under the separately metered space heating provision would pay about 54% less for such usage than they would pay under the standard general service tariff.

However, the Commission recognizes that KCPL participated in an extensive class cost of service study in 1996, and that KCPL has reached an agreement for class cost of service and rate design in the present case. The Commission will adopt Staff's suggestion, and Trigen's alternative suggestion, that the Commission restrict the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general tariffs to existing customers until there is a comprehensive class cost of service study. This appears to be a reasonable solution, since no one has performed a cost study of the impacts of eliminating the current rates.

(Report and Order, Case No. ER-2006-0314, page 83) [emphasis added]

13. In Re Kansas City Power & Light Company, Case No. ER-2007-0291 ("2007 Rate Case"), The Commission 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).

14. Since the effective date of rates in the 2007 Rate Case, the relevant KCP&L rate schedules are denoted as “FROZEN” (Large General Service – All Electric (Frozen) in Sheet 19A and Separately Metered Space Heat (Frozen) in Sheet 11A.

15. In an email dated February 8, 2008, from David Sutphin (KCP&L employee) to Richie Benninghoven (contact person for Briarcliff Development), KCP&L 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, KCP&L was contacted by someone identifying himself as Jim Unruh, Senior Vice President of the Winbury Group and directed to put the account in the name of Briarcliff Development.

17. Effective August 5, 2009, the customer name on KCP&L’s records for the Briarcliff I building was changed by KCP&L from “Winbury Realty” to “Briarcliff Development.”

18. On August 10, 2009, KCP&L was again contacted by someone identifying himself as Mr. Jim Unruh. He stated that Briarcliff I was no longer going to be managed by their company and instead they would be managing Briarcliff I in house. He also stated that bills should be sent to Skip Rosenstock, who was the Senior Property Manager for Briarcliff

Realty from July 2009 to May 2011, at 4151 N. Mulberry, Ste. 205, Kansas City, Missouri 64116.

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

20. The pertinent language of the Large General Service - All Electric (Frozen) schedule commencing January 1, 2008, reads as follows: "This Schedule is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."

21. KCP&L'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."

The Commission makes the following Findings of Fact in addition to the stipulated facts of the parties:

22. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."² Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."³ Although Public Counsel did not file a notice of

² Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

³ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

its intention not to participate in this matter, Public Counsel did not appear for the procedural conference or evidentiary hearing, nor did Public Counsel file any pleadings in this matter.⁴

23. The Staff of the Missouri Public Service Commission (“Staff”) is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁵

24. As of June 1, 1999, Briarcliff West Realty Company, as the owner of Briarcliff I, entered into a management agreement with Winbury Group of K.C., Inc. (“Winbury Group”), wherein Winbury Group agreed to perform property management services with regard to Briarcliff I. The agreement provided, in part, that Winbury Group, as the manager, is the “exclusive managing agent for the Project, and all obligations or expenses incurred hereunder by Manager shall be for the account of, on behalf of, and at the expense of the Owner ... Manager shall enter into or renew contracts in the name of the Owner for electricity...”.⁶ KCP&L was not a party to that management agreement.⁷

25. Effective June 28, 1999, Briarcliff West Realty Company merged into Briarcliff Development Company, with Briarcliff Development Company as the surviving corporation.⁸

26. 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.⁹

27. KCP&L entered into a service agreement with Winbury Group for providing electric service to the Briarcliff I property.¹⁰

⁴ Transcript, Volumes 1 and 2. See also the EFIS docket entries for File Number EC-2011-0383. Public Counsel is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.090 and 2.116.

⁵ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

⁶ Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-5.

⁷ *Id.*

⁸ Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-6.

⁹ KCP&L Ex. 1 NP and HC, Henrich Rebuttal, p. 4.

28. Winbury Group of K.C., Inc. and Winbury Realty of K.C., Inc. are separate business entities, although both companies listed the same officers and directors on their 1999 annual registration reports filed with the Missouri Secretary of State.¹¹ Neither corporation is a party to this case.

29. Neither Winbury Group nor Winbury Realty of K.C., Inc. have any common ownership with Briarcliff.¹²

30. Prior to August 2009, Winbury Group paid KCP&L for charges associated with providing electric service to Briarcliff I.¹³

31. Briarcliff alleges in the pre-filed testimony of Nathaniel Hagedorn that it had occupied Briarcliff I and continuously received and used electric service at that location since 1999.¹⁴ At the hearing, Mr. Hagedorn testified that Briarcliff did not physically occupy any part of the premises at Briarcliff I.¹⁵ The Commission finds Mr. Hagedorn's testimony at the hearing to be more credible than his assertions in the pre-filed testimony. The Commission specifically finds that 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.

32. No evidence was offered or admitted that Briarcliff applied to KCP&L for electric service at Briarcliff I prior to August 2009.

33. No evidence was offered or admitted that Briarcliff reached a mutual agreement with KCP&L prior to August 2009 to take electric service at Briarcliff I.

¹⁰ Transcript, Vol. 2, p. 82.

¹¹ Briarcliff Ex. 1, Hagedorn Direct, Schedules NH-3 and NH-4. Transcript, Vol. 2, p. 69.

¹² Transcript, Vol. 2, p.64.

¹³ Transcript, Vol. 2, p.58-59; Briarcliff Ex. 1, Hagedorn Direct, p. 11; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 9.

¹⁴ Briarcliff Ex. 1, Hagedorn Direct, p. 9, 14; Briarcliff Ex. 2, Hagedorn Rebuttal, p. 1, 5; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 2.

¹⁵ Transcript, Vol. 2, p. 68.

34. Following the 2007 rate case, KCP&L adopted a tariff effective January 1, 2008 titled “Large General Service-All Electric (Frozen)”, which states, in part, that “[t]his Schedule is available only to Customers’ physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter”.¹⁶

35. KCP&L’s tariffs, P.S.C. MO. No. 2, Sheet 1.05, Section 1.03, defines a “person” as “[a]ny individual, partnership, co-partnership, firm, company, public or private corporation, association, joint stock company, trust, estate, political subdivision, governmental agency or other legal entity recognized by law”.¹⁷

36. KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.07A, subsection 2.02, Provisions, incorporate by reference the provisions of Commission Rule 4 CSR 240, Chapter 13, Utility Billing Practices. In that Chapter 13, 4 CSR 240-13.015(1)(E) includes a definition of “customer” that is different than the definition in subsection 1.04 of the tariffs and described in Finding of Fact 21 above. Chapter 13 rules apply to residential utility service for domestic purposes.¹⁸ KCP&L has not provided residential utility service to Briarcliff I.¹⁹

37. KCP&L’s customary practice and procedure for designating the name of its customers was to use the name of the person listed on the “Acct/Premise” line of the computer form in KCP&L’s records titled “S.O. Maintenance: E-GS”, which form is also known as the service application.²⁰

¹⁶ Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-2.

¹⁷ Staff Ex. 1, Scheperle Direct, Appendix 1-3.

¹⁸ Commission Rule 4 CSR 240-13.010(1) and 4 CSR 240-13.015(1)(U). Transcript, Vol. 2, p. 144-5.

¹⁹ Transcript Vol. 2, p. 130; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 5.

²⁰ Transcript Vol. 2, p. 78, 81, 89, 93-5, 96; KCP&L Ex. 1 NP and HC, Henrich Rebuttal, Schedules JAH-1, JAH-2, and JAH-3.

38. As part of its customary practice and procedure, KCP&L refers to the person listed on the “Acct/Premise” line of the service application as the “customer of record”.²¹

39. The term “customer of record” is not defined in KCP&L's tariffs, the General Rules and Regulations Applying to Electric Service.²²

40. KCP&L's tariffs, the General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.07, subsection 1.14, defines a “service agreement”. Subsections 2.01 through 2.11 of those tariffs describe certain terms and conditions of all service agreements, including that service agreements are subject to modification by the Commission.

III. Conclusions of Law

Although Briarcliff is not a person or an entity regulated by the Commission, it submitted itself to the Commission's jurisdiction when Briarcliff filed its complaint pursuant to Section 386.390, RSMo 2000. KCP&L provides electric service to customers throughout the service area certificated to it by the Commission. KCP&L is an “electrical corporation” and “public utility” as those terms are defined by Section 386.020, RSMo Supp. 2010, and is subject to the Commission's jurisdiction, supervision, control and regulation as provided in Chapters 386 and 393, RSMo.

Since Briarcliff brought the complaint, it bears the burden of proof.²³ The burden of proof is the preponderance of the evidence standard.²⁴ In order to meet this standard,

²¹ Transcript, Vol. 2, p. 89.

²² Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 3.

²³ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo.*, 116 S.W.3d 680, 693 (Mo. Ct. App. 2003).

²⁴ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

Briarcliff must convince the Commission it is “more likely than not” that KCP&L violated an applicable statute, rule, or provision of a Commission-approved tariff.²⁵

The first issue is 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. Resolution of this issue requires interpretation of previous Commission decisions. The Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.²⁶ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.²⁷

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”.²⁸ The Commission interprets the word “they” in that decision to modify the word “customers”, and not the word “locations” that appears earlier in that text. To find otherwise would mean that locations receiving the all-electric rate could continue to receive that rate indefinitely regardless of how many owners or tenants occupied those premises, which would be contrary to the Commission’s intent in limiting that schedule in the 2007 rate case. This interpretation is supported by KCP&L’s subsequent amended tariff effective January 1, 2008 which states, in part, that “[t]his Schedule is available only to Customers’ physical

²⁵ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

²⁶ *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

²⁷ *Id.*

²⁸ File No. ER-2007-0291, *Report and Order*, p. 82.

locations currently taking service under this Schedule and who are served hereunder continuously thereafter”. If continuous service was based on the physical location (and not an individual customer), the word “who” in the tariff would have been replaced by words such as “that” or “which”. 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.

If Briarcliff was already a “customer” from January 1, 2008 until August 2009 when the name on the account was changed from that of the agent to Briarcliff, then it continuously remained on that rate schedule and KCP&L should have made the lower all-electric schedule available to Briarcliff. If Briarcliff was not a “customer” prior to August 2009, then there was a break in the continuity of customers for the Briarcliff I building when the name was changed and KCP&L properly refused service under the all-electric schedule.

There was considerable evidence presented concerning whether Briarcliff and its agent were “responsible parties” as defined in the KCP&L tariffs and their legal obligation, if any, to provide payment to KCP&L for electric service. Persons who are customers of KCP&L as defined in the tariffs and persons who are responsible for payment are similar, but may not necessarily be the same. To the extent that the parties attempt to equate the two classifications, those efforts are misplaced. The critical question is whether Briarcliff was a “customer” of KCP&L prior to August 2009, not whether it was responsible for payment.

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. KCP&L's customary practice and procedure for designation of customers, including a "customer of record", is not defined in its tariffs. Since tariffs have the force and effect of a law²⁹ and KCP&L's practices are not accorded the status of a law, the definitions of "customer" found in the tariffs must be given more weight than those customary practices.

The two different definitions of "customer" in the tariffs are the definition in Commission Rule 4 CSR 240-13.015(1)(E) and the definition in subsection 1.04 of the tariffs. Commission Rule 4 CSR 240-13.015(1)(E) is a part of Chapter 13 of the Commission's rules, which only apply to residential utility services for domestic purposes. The record is clear that Briarcliff was a commercial enterprise, not residential, and KCP&L did not provide residential utility to service to Briarcliff I. While the Chapter 13 rules were incorporated by reference into KCP&L's tariffs, the definition of "customer" in Commission Rule 4 CSR 240-13.015(1)(E) is not applicable in this case because the electric service KCP&L provided to Briarcliff I was not residential service. Therefore, the appropriate definition of "customer" to apply is the definition found in subsection 1.04 of the tariffs.

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,

²⁹ *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 286 S.W. 84, 86 (Mo. 1926); *State ex rel. Jackson County v. Public Service Commission*, 532 S.W. 2d 20, 29 (Mo. 1975).

3. 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.

With regard to element number 1, Briarcliff was a “person” at all times pertinent hereto as defined in subsection 1.03 of KCP&L’s tariffs, as it was a Missouri corporation. With regard to element number 3, KCP&L supplied electric service under an all-electric rate schedule from 1999 until August 2009 for use within the Briarcliff I building. Although Briarcliff did not physically occupy that building, the address of the building was designated on the service application by KCP&L in 1999 and thereafter. 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 electric service from KCP&L. First, there is no credible evidence that Briarcliff applied for electric service at the Briarcliff I building. Briarcliff’s predecessor, Briarcliff West Realty Company, applied for service in May 1999, and Briarcliff’s agent, Winbury Group, applied for service in June 1999. Briarcliff itself did not apply for service prior to August 2009. 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. The word “agree” is defined as “to grant consent...to come to an understanding or to terms”.³⁰ There was no evidence that Briarcliff through its own actions reached a mutual agreement with KCP&L prior to August 2009 concerning electric service. Since neither Briarcliff nor KCP&L granted consent or came to an understanding with the other in regard to service, Briarcliff itself could not have agreed

³⁰ *The American Heritage Dictionary*, (Second College Edition 1982).

to take electric service for the Briarcliff I building. 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.

Although Briarcliff does not itself meet the definition of “customer” under the tariff, Briarcliff can acquire customer status through its agent, Winbury Group, under the general rules of agency law. Winbury Group does meet the definition of “customer” in the tariff because it applied for and agreed to take electric service under a service agreement with KCP&L. In 1999, Winbury Group executed a management agreement with Briarcliff’s predecessor, wherein Winbury Group was named as the managing agent for the Briarcliff I building and received express authority to contract for electric service in the name of Briarcliff. However, Winbury Group failed to disclose to KCP&L that Briarcliff was its principal under the management agreement.

Restatement (Third) of Agency, Section 6.03 (2006) states that “[w]hen an agent acting with actual authority makes a contract on behalf of an undisclosed principal...the principal ... and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally...” The Missouri Court of Appeals has stated in that in the situation of an agent contracting on behalf of an undisclosed principal, “the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party...”³¹ Substitution of the principal for the agent is not permitted if it causes injury to the third party³², but KCP&L is not injured by Briarcliff receiving the all-electric rate because it merely continues the status quo that had been in place for ten years. Moreover,

³¹ *Phillips v. Hoke Construction, Inc.*, 834 S.W.2d 785, 789 (Mo. App. S.D. 1992)

³² *Id.*

KCP&L has requested that the Commission permit it to charge Briarcliff the all-electric rate on a prospective basis, which further suggests that KCP&L will not be injured by Briarcliff receiving the all-electric rate. These 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.

The Commission is cognizant of the limits of its statutory authority. The Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.³³ The Commission cannot enforce, construe or annul contracts,³⁴ nor can it declare or enforce principles of law or equity.³⁵ However, the Commission does have the authority to interpret and apply tariffs,³⁶ including the exclusive jurisdiction to determine and classify which of two approved rates apply to a customer of a public utility.³⁷ The service agreement between KCP&L and Winbury Group is a contract, but that contract is defined by the KCP&L tariffs, and the terms and conditions of that agreement are described in the tariffs. The service agreement is so intertwined with the KCP&L tariffs that the Commission determines it has the statutory authority to interpret the relationship between Briarcliff, KCP&L and Winbury Group under that agreement in order to reach a decision concerning whether Briarcliff meets the definition of "customer" under the KCP&L tariffs.

The Commission concludes that Briarcliff acquired Winbury Group's status as a "customer" that agreed to take electric service from KCP&L and continuously maintained

³³ *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 766, 168 S.W.2d 1044, 1046 (1943).

³⁴ *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971).

³⁵ *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 547 (Mo. Ct. App. 2008).

³⁶ *State ex rel. Missouri Pipeline Co. v. Missouri Public Service Com'n*, 307 S.W.3d 162, 177 (Mo. Ct. App. 2009).

³⁷ *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d at 1047.

that status from 1999 through August 2009. Therefore, KCP&L improperly refused to provide service to Briarcliff under the all-electric rate schedule when the name on the account for the Briarcliff I building changed in August 2009. By so concluding, the Commission need not consider further the two additional issues presented by the parties regarding the grant of a waiver or variance of the KCP&L tariff or amendment of the tariff to provide Briarcliff the all-electric rate.

In its complaint, Briarcliff requests that the Commission require KCP&L to immediately allow Briarcliff to receive the large general all-electric service rate, to re-bill Briarcliff for electric service at the all-electric rate from August 2009 until KCP&L reinstitutes services at that all-electric rate, and refund any difference between the all-electric rate and the general service rate Briarcliff is currently paying, with interest. The Commission does have the authority to determine what approved rate should be applied to Briarcliff³⁸, and will require that KCP&L apply the all-electric rate to Briarcliff prospectively. However, the Commission does not have the authority to provide equitable relief, determine damages, or award pecuniary relief.³⁹ The Commission is not a court of law and, consequently, may not grant Briarcliff's requests for re-billing, refund, and interest.⁴⁰ The Commission notes 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.

³⁸ *Id.*

³⁹ *American Petroleum Exchange v. Public Service Com'n*, 172 S.W.2d 952, 955 (Mo. 1943).

⁴⁰ See, *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d at 1046; *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. Ct. App. 1978); *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 327 Mo. 93, 34 S.W.2d 37, 46 (1931).

IV. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that Briarcliff has 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.

THE COMMISSION ORDERS THAT:

1. Briarcliff Development Company's Complaint is sustained.
2. Kansas City Power & Light shall provide electric service to Briarcliff I on the 1LGAE (general service all-electric) rate schedule beginning on the effective date of this order and continuing for so long as Briarcliff Development Company continuously remains on that rate schedule.

3. This Report and Order shall become effective on April 6, 2012.
4. This file shall close on April 7, 2012.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. Reed', is positioned above the printed name.

Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., and Jarrett, C., concur;
Kenney, C., dissents, with separate
dissenting opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 7th day of March, 2012.