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 POST HEARING BRIEF

COMES NOW the Staff ("Staff)" of the Missouri Public Service Commission ("Commission"), and states as follows:

I. KCPL 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.

Briarcliff Development Company is the Complainant in this matter, and as such, Briarcliff Development bears both the burden of proof and persuasion.[1] Briarcliff Development failed to carry these burdens. Further, as discussed below, 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

[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."

its burden, that doubt should be resolved in favor of restricting the availability of the 1LGAE rate schedule.[2]

Briarcliff Development's case, as pled, prays an order from the Commission, *inter alia*:

> 1. Finding 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.
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> 2. Finding that under the circumstances, that KCPL's refusal to allow Briarcliff to continue to receive the frozen all electric rate was arbitrary, capricious, unreasonable, unlawful and unduly discriminatory.
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> 3. Finding that 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.[3]

Briarcliff Development's theories, though convoluted, 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
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> 2. For purposes of implementing the 1LGAE rate schedule freeze, KCPL's customer name of record doesn't matter.

KCPL Reasonably Named Winbury Realty the Customer for Briarcliff I in 1999

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," is premised on Briarcliff Development's theory that KCPL doing so breaches a contract between

[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.
[3] *Complaint*, pp 8 – 9.

The Winbury Group and Briarcliff Development. 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.[4] Staff will, for the sake of argument, 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.

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 the Commission.[5] 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.

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;

[4] *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); *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).

[5] 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.

> *(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][6]

The facts of this case clearly satisfy the *Dahn* elements. Electric service began at Briarcliff I on May 17, 1999, and continued through June 14, 1999, in the name of Briarcliff West Development.[7] 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.[8] KCPL witness Mr. Henrich, KCPL Manager, Customer Care Center, testified that 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.[9] The testimony of KCPL witness Henrich during the evidentiary hearing shows that as a practical matter, KCPL does not distinguish between "Winbury Group" and "Winbury Realty." Therefore, except where the distinction is clear in the record, Staff will refer to them, as the witness does, as "Winbury." Briarcliff Development witness Mr. Hagedorn, employee of Briarcliff Realty and former Chief Operating Officer of Briarcliff Development, testified he knew Ms. Painter is a clerical worker at the Winbury Group," but that he did not recall having a conversation with her about her call to KCPL to change the customer name on Briarcliff I, either in 1999 or recently.[10] Mr. Hagedorn further testified that he did not review the utility bills

[6] *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).
[7] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 9.
[8] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[9] Transcript, p 83; 86; 90; KCPL Exhibit 1, Heinrich Rebuttal, p 2.
[10] Transcript, pp 56 – 57.

for service at Briarcliff I,[11] although he acknowledged that the Management Agreement gave Briarcliff Development that right.[12]

Service at Briarcliff I was put in the name of Winbury Realty by KCPL on June 14, 1999.[13] Sometime shortly after June 14, 1999, Briarcliff West Development received a Final Bill.[14] 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.[15] After Briarcliff West Development received KCPL's final bill for Briarcliff I in 1999, the lights were still on at Briarcliff I, so Briarcliff West Development knew or should have known that KCPL was billing someone for service at Briarcliff I.[16] 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.[17]

KCPL does not normally request verification of the identity of someone seeking to set up a commercial account.[18] 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.[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.[20] KCPL witness

[11] Transcript, p 57.
[12] Transcript, p 58.
[13] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[14] Transcript, p 97.
[15] Transcript, p 97.
[16] *See* Transcript, pp 97 – 98.
[17] *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.
[18] Transcript, p 76.
[19] Transcript, p 80.
[20] Transcript, pp 83 – 84.

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.[21]

KCPL does not normally review agency contracts when setting up commercial accounts.[22] KCPL witness Mr. Henrich testified that it is not common in the utility industry to request verification of identity when setting up a commercial account.[23] Mr. Henrich testified that it is not common in the utility industry to review agency contracts when setting up commercial accounts.[24] Mr. Henrich testified that it would not have any way of knowing whether a particular agency agreement had been superseded.[25] Mr. Henrich testified that review of agency agreements would take some amount of time,[26] and that customers do not react well to delays in service.[27] 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.[28]

KCPL witness Mr. Henrich testified that Winbury was an established KCPL customer as a property manager in other places within the KCPL system,[29] so, from KCPL's perspective, Winbury was an established customer taking responsibility and ownership of the Briarcliff I account.[30] KCPL testified that it is common for a property manager, in general, to put service in

[21] Transcript, p 96; 97 – 98; 101 – 102.
[22] Transcript, p 76.
[23] Transcript, p 76.
[24] Transcript, p 76.
[25] Transcript, pp 76 – 77.
[26] Transcript, p 96.
[27] Transcript, p 96.
[28] Transcript, pp 60 – 62.
[29] Transcript, pp 77 - 78.
[30] Transcript, pp 77 - 78.

its name,[31] and that it was common for Winbury, in particular to put service for various properties in its name.[32]

Staff will only summarily address the third element of *Dahn*, that "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," because while appropriate in a civil suit for damages, it does not appear to have any bearing on this case, which is not a suit for damages by KCPL against Briarcliff. To the extent this element is implicated in this proceeding, Staff offers that 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.[33]

In short, KCPL was not unreasonable in relying on Winbury's request for financial responsibility for Service at Briarcliff I, and KCPL did so in good faith, having reason to believe and actually believing that such reliance was appropriate. 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, and by inaction manifested its consent to the exercise of apparent authority. Further, Briarcliff benefited from an apparent reprieve in financial responsibility for service to Briarcliff I during this time, and only now alleges wrongdoing by KCPL.[34]

KCPL Properly Relied on a Change in Customer Name to
Trigger the Freeze, Consistent with the Freeze's Remedial Nature

[31] Transcript, p 78.
[32] Transcript, pp 78 - 79.
[33] Transcript, PP 127 – 129.
[34] *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).

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.[35]

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.").[36]

In Case No. ER-2006-0314, the Commission closed the 1LGAE subclass, and ordered its elimination by attrition. The Commission devoted **fifteen pages** of its Report and Order in ER-2007-0291 to the all-electric and separately-metered space heating issues.[37] 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

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

dramatically. In its 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.[38] 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.[39]

Therefore, 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,[40] and explicitly adopted Staff's recommended phase-out of the discounted 1LGAE rate.[41] 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."[42] 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,[43] 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

[38] Report and Order in Case No. ER-2006-0314, pp 82 – 83; Transcript p 104; Transcript p 116.
[39] Transcript p 104 – 114.
[40] Report and Order in Case No. ER-2007-0291, pp 79 – 80.
[41] Report and Order in Case No. ER-2007-0291, pp 79 – 80.
[42] Report and Order in Case No. ER-2007-0291, p 82.
[43] 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.

heating rate schedule they are on as of such date)."[44] As a consequence, the 1LGAE tariff sheet ultimately effectuating rates was denominated "Frozen."[45]

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.[46]

"Customers" is separate from "locations." 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,"[47] which evidences the Commission's intent its language be restrictive. 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 back to "customers' commercial and industrial physical locations," would properly be the word "its."

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.[48] 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

[44] Report and Order in Case No. ER-2007-0291, p 82.
[45] Sheet No. 19A.
[46] Report and Order in Case No. ER-2007-0291, p 82.
[47] Report and Order in Case No. ER-2007-0291, p 82.
[48] Report and Order in Case No. ER-2007-0291, pp 75 – 90.

Case No. ER-2007-0291, the parties there, as well as the Commission, sought to address this disregard for the Commission's intent.[49]

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. 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."[50] While Staff asserts that 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 interpreted to effectuate the remedy reinforces the significance of the "customers" distinction, and the propriety of KCPL's action. 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. [51]

II. KCPL's ILGAE tariff provision was lawfully-promulgated and approved by the Commission, and as such the provisions that restrict KCPL from providing service to Briarcliff I on the all-electric schedule have the force and effect of law and may not be waived or varied prospectively, let alone retroactively. Further, even if the Commission had such authority, it should not exercise it.

There Is No Properly-Pled Application Before the Commission

As described more fully, below, (1) KCPL's request for variance or waiver with respect to Briarcliff does not comply with applicable Commission rules regarding the form and contents

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

of applications, (2) KCPL's request does not adequately state good cause for a variance or waiver, and (3) a variance or waiver of the sort requested is not lawful.

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

> (A) Specific indication of the statute, rule or tariff from which the variance or waiver is sought;
> (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and
> (C) The name of any public utility affected by the variance or waiver.[52]

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." However, this is not adequate because the Commission made the decision to restrict the availability of the rate schedule in the manner described in the tariff. If the Commission had desired to provide an exception to the limitation to properties constructed after 1996, it could have done so. Further, because there is no property interest in the availability of a rate schedule,[53] KCPL's reliance argument is inapplicable. The logical extension of KCPL's reliance argument would be that any entity has good cause for a waiver of any KCPL rate increase – this is certainly not so.

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[52] 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."

[53] *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).

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. 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. [54] 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.

The Commission Cannot Vary or Waive a Lawfully-Promulgated Tariff

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. A tariff has the same force and effect as a statute, and the Commission is as bound by its terms and the utility as the public.[55] If a statutory court review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding.[56]

The Commission cannot vary or waive a rate schedule. A utility can file a rate schedule with terms that supersede an existing rate schedule, but the Commission cannot lawfully simply vary or waive an extant rate schedule any more than can a utility or a customer.

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

[54] *See State ex rel. Licata, Inc. v. Public Service Com'n of State* 829 S.W.2d 515, 518 (Mo.App. W.D.,1992).
[55] *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).
[56] *State ex rel. Licata, Inc. v. Public Service Com'n of State* 829 S.W.2d 515, 518 (Mo.App. W.D.,1992).

> 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-
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> "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.[57]

Thus, even if the Commission determined that – for whatever reason – it would like service to Briarcliff I to be billed on the 1LGAE rate schedule, the Commission cannot simply waive or vary its decisions in Case No. ER-2007-0291. 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. If it were lawful for the Commission to allow KCPL not to comply with its tariff or the Commission's orders, the Commission should not do so. The Commission devoted fifteen pages of its Report and Order in ER-2007-0291 to the all-electric and separately-metered space heating issues.[58] That discussion and those findings and conclusions remain sufficient rationale for eliminating the 1LGAE rate schedule by attrition. Even was this the proper proceeding to reconsider these issues – it is not – the Commission should not reopen or extend the availability of the 1LGAE rate schedule to include service to Briarcliff I.

III. For the reasons the Commission initially froze KCPL's all-electric schedule, the Commission should decline to reopen it or extend it in any way. The Commission's decision to limit the use of the schedule through attrition was reasonable, and should not be abandoned.

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 should decline to

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

reopen or extend the availability of the 1LGAE rate schedule for service to Briarcliff I. Even if the Commission narrowly constrains any such language to seemingly apply only to service to Briarcliff I, KCPL has exhibited a pattern of broadly and loosely interpreting restrictions of its discounted subclasses.[59] KCPL has filed lists of customers or physical locations, 215 to 325, that it would like to serve on these types of rate schedules.[60] This is not a speculative slippery slope. KCPL has mapped the slope in filings before this Commission – twice.

KCPL witnesses have testified to KCPL's intent to close these all-electric heating rate schedules,[61] and the Commission has ordered their elimination by attrition.[62] In other proceedings KCPL urges the Commission to cause heating customers to bear their full cost of service, including a share of rate of return.[63] The Commission's prior findings and conclusions regarding closure of the all-electric and separately-metered subclasses to allow them to end by attrition were reasonable, and should remain intact. It would be counterproductive and counterintuitive to reopen the 1LGAE rate schedule for service to Briarcliff I or any other location at this time.

WHEREFORE, the Staff submits its *Post Hearing Brief*.

[59] Transcript pp 104 – 114.
[60] Transcript p 112; Application for Rehearing in Case No. ER-2009-0291; Application in Case No. EE-2008-0238.
[61] Transcript pp 120 – 121.
[62] *See* Report and Order in Case No. ER-2007-0291.
[63] Transcript pp 122 – 124.

Respectfully submitted,

THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

/s/_____

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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 6th day of February, 2012.

/s/ Sarah Kliethermes