

**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**

**INITIAL POST-HEARING BRIEF OF BRIARCLIFF DEVELOPMENT COMPANY**

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 Initial Post-Hearing Brief on the issues set forth below:

**I. INTRODUCTION**

The 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. Other facts were not disputed by the parties in their testimony and at the hearing. This is a Complaint case brought by Complainant Briarcliff Development Company ("Briarcliff Development") against Respondent Kansas City Power & Light Company ("KCPL"). 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").

It has owned the Briarcliff I building since it was developed in 1999. KCPL has continuously supplied Briarcliff I with electricity since 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.

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. 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.]

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, and not in the name of the Owner, Briarcliff Development.

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 and from January 25, 2001 through August 5, 2009, Briarcliff I was served under the Large General Service - All Electric rate schedule 1LGAE. Interestingly, 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.

Not only did KCPL not list Briarcliff Development, the Owner of the building, as the customer on its billings, but by listing the customer as "Winbury Realty", it did not even list the owner's Property Manager 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.

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.

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."

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.

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." Both the Briarcliff II and Briarcliff III buildings were being served on January 1, 2008 on the 1LGAE rate schedule and have continued to be served by KCPL on the 1LGAE rate schedule after August 5, 2009. While the customer name on KCPL's records for the Briarcliff II and Briarcliff III buildings continue as "Briarcliff Two" and "Briarcliff Development" respectively, the address to which the KCPL bills are sent has been changed from "4520 Main Street, Ste 1000" the address of The Winbury Group to "4151 N. Mulberry, Suite 205," the address of Briarcliff Development.

That 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 damaged in that the 1LGSE rate results

in higher rates being charged to Briarcliff I for electric service since August 5, 2009, commencing with KCPL's August 24, 2009 initial billing, than had it been continuously billed at the 1LGAE rate for which it qualified.

Shortly after discovery of the change in billing classification for Briarcliff I, Briarcliff Development attempted to get KCPL to reconsider its actions, however after substantial dialogue between Briarcliff Development and KCPL, KCPL stood by its determination that under its Large General Service - All Electric (Frozen) schedule commencing January 1, 2008, if the customer name changes on an account being served under the all electric rate, i.e., from Winbury Realty to Briarcliff Development, Briarcliff Development cannot continue to receive the all electric rate even though Briarcliff Development was the actual customer continuously receiving the electricity from KCPL at the physical location of the Briarcliff I building, both before and after the change in billing rates at the physical location.

Briarcliff Development then filed this Complaint with the Commission on May 26, 2011 seeking a ruling from the Commission that KCPL's actions in charging Complainant for service provided the Briarcliff I building at the 1LGSE rate since August 5, 2009 instead of the 1LGAE rate is arbitrary, capricious, unreasonable and unlawful and unduly discriminatory in violation of Sections 393.130 and 393.140(11) in that:

- a. KCPL arbitrarily and capriciously in 1999 named Winbury Realty as the Briarcliff I customer, when Winbury Realty was a company that was not involved with Briarcliff I nor with Briarcliff Development, the owner of the building;
- b. That even had KCPL named The Winbury Group as the Customer, that too would have been arbitrary and capricious, and in violation of the Management Agreement, since The Winbury Group was Briarcliff Development's managing agent of the Briarcliff I building and pursuant to the Management Agreement between The Winbury Group and Briarcliff Development, The Winbury Group was not authorized to enter into a contract for electricity in its own name or any name other than the name of the owner, Briarcliff

Development. Under the Management Agreement, The Winbury Group was required to enter into contracts for electricity "in the name of the owner" and all obligations or expenses incurred pursuant to the Management Agreement by the managing agent "shall be for the account of, on behalf of and at the expense of the owner";

c. At all times continuously since 1999, Briarcliff Development, as the owner of Briarcliff I, was a Customer of KCPL at its Briarcliff I building as the term "Customer" is defined in KCPL's tariffs under I. Definitions, Paragraph 1.04 in that Briarcliff Development has continuously been "receiving" and "using" electric service provided by KCPL at the Briarcliff I building physical location at 4100 N. Mulberry Drive since 1999;

d. That but for KCPL in 1999 naming Winbury Realty as the Customer instead of Briarcliff Development, the owner of Briarcliff I continuously since 1999, when Briarcliff Development removed The Winbury Group as its managing agent of the Briarcliff I building and replaced them with its in house management team in August 2009 and asked KCPL to correctly bill the building as Briarcliff Development, there would have been no question that the frozen all electric rate schedule would have continued to apply to the Briarcliff I building;

e. That in violation of Section 393.130.2, KCPL is unduly and unreasonably discriminating against Briarcliff Development and its Briarcliff I building in not providing it with the frozen all electric rate due to KCPL's failing to name Briarcliff Development, the owner of the building continuously since 1999, as the Customer on the billing for the Briarcliff I building and then in denying it the frozen all electric rate for which it would qualify but for the arbitrary and capricious naming of Winbury Realty as the Customer, when Winbury Realty was not the customer or even involved in any way whatsoever in the receipt of the electric service at the Briarcliff I building.

## II. ARGUMENT ON ISSUES

While Complainant brought this case as a Complaint seeking the relief stated above, KCPL broadened the issues in this case to seek relief from the Commission on the questions of: a) whether the Commission has the authority to waive or vary KCPL's frozen all-electric tariff on a prospective basis and if so, should it?; and b) should the Commission order KCPL to file a revised tariff sheet allowing KCPL to provide service to Briarcliff I on an all-electric schedule basis on a prospective basis.

Briarcliff Development's position is that KCPL's current tariff provisions, when properly construed, clearly and unequivocally permit the Briarcliff I building physical location to continue to have been served under the frozen all-electric rate when the only change was the name of the "customer of record" on KCPL's billing records when the actual customer receiving service at such location was and is and continues to be Briarcliff Development the owner and landlord of the building of which the Winbury Group was its agent/property manager and neither the landlord nor the owner. Consequently, Briarcliff Development believes that the Commission will rule in its favor on its Complaint and restore it to the status quo ante, including ordering KCPL to refund the difference between what it paid under the 1LGSE rate and what it would have paid had it been allowed by KCPL to continue under the 1LGAE rate. It is obvious that KCPL does not want to repay anything for its wrongful actions and that is why its two proposals are to be prospective only.

#### **A. ISSUE 1**

Inasmuch as the parties could not agree on the language of Issue 1, the issue setting forth the main issue in the Complaint, Complainant and KCPL filed separate language for the issue.

Briarcliff Development's Statement of Issue 1 is as follows:

**1. 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"?**

No. KCPL did not properly apply its tariff in August 2009 in refusing to provide the physical location of the Briarcliff I building with service on the 1LGAE rate schedule when the name on KCPL's records for the Briarcliff I account was changed to the name of the owner of the building in August 2009. Neither the language in the Commission's Order freezing the rate nor the language in KCPL's Frozen all-electric tariffs, approved by the Commission, prohibit the Briarcliff I physical location from continuing to be served under the 1LGAE tariff.

In its Report and Order in Case No. ER-2007-0291, issued December 6, 2007, the Commission at p. 82 froze the all-electric rate and by its Order Regarding Motions for Rehearing and Request for Clarification dated December 21, 2007 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. While the Commission's Report and Order as clarified applied to all-electric and separately metered space heating rates, in this case all we are concerned with is the all-electric rates and not the separately metered space heating rates. Thus, the language of the Order (as clarified) applicable to all-electric rates involved in this case, can be paraphrased as follows:

The availability of KCPL's general service all-electric tariffs should be **restricted to those qualifying customers' commercial and industrial physical locations being served under such all-electric tariffs as of January 1, 2008, and such rates should only be available to such customers for so long as they continuously remain on that rate schedule.** [Emphasis added].

Thus, as can be seen from the language, the Commission froze the all-electric rate "to those qualifying customers' commercial and industrial **physical locations** being served under such all-electric tariffs as of January 1, 2008 ... for so long as they continuously remain on that rate schedule."



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." [Emphasis Added.]**

As can readily be seen, the language of the tariff, approved by the Commission, virtually tracks the clarified language of the Commission's Report and Order in that effective January 1, 2008 the frozen all-electric schedule **"is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."**

Thus, under the clarified language of the Order and the language of the tariff, the physical location of the Briarcliff I building is not prohibited from continuing to be served under the frozen all-electric rate.

Inasmuch as the tariff was approved by the Commission, it has the same force and effect as a statute enacted directly by the legislature, binding upon the public, the Commission and the utility itself and may only be modified by the filing of a new tariff approved by the Commission. *Midland Realty Co. v. Kansas City Power & Light Co.*, 57 S.Ct. 345, 300 U.S. 109, 81 L. Ed. 540 (1937); *St. Louis County Gas Co. v. Public Service Commission*, 286 S.W. 84 (Mo. 1926); *State ex rel. Jackson County v. Public Service Commission*, 532 S.W. 2d 20 (Mo. 1975).

Nevertheless, even though a public utility's tariff approved by the Commission may only be modified by the filing of a new tariff, KCPL decided to take the law into its own hands and added its own construction to the rule which modified the effect of the tariff without KCPL filing a new tariff. In an email dated February 8, 2008 (only one month and 8 days after the Frozen

all-electric tariff became effective), a spokesman for KCPL notified Richie Benninghoven of Briarcliff Development informing him of the Commission rate case order affecting certain of Briarcliff Development's electrically heated project(s).<sup>1</sup> On KCPL's behalf, he advised about how KCPL construed the Frozen tariff as follows:

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.

He then went on to add:

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. [Emphasis Added.]

It can clearly be noted that nowhere in the above construction of the restriction on the all-electric rate is there a mention of it being available "only to Customers' physical locations" although both the Commission's Order and KCPL's approved rate say so. However, it is possible to read the first two sentences as complying with the tariff even though he only advises in the first sentence that the rate is restricted "to those commercial and industrial customers who have been taking service under these rates as of December 31, 2007" and in the second sentence says that this action "'Freezes' these rates to existing customers for so long as they remain on the all-electric" rate. There is no specific mention of it being available only to "Customers' physical

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<sup>1</sup> Since he listed more than one project, it is obvious that this was a form email sent to all customers with electrically heated project(s), otherwise why put an "(s)" after project instead of just "projects" without the "(s)."

locations" anywhere in KCPL's construction of its approved tariff. However, this portion of the advisory could be construed as being explanatory of the rule as it is actually written.

The same is not true of the next sentence. In that sentence, as KCPL's spokesman, he also advises that KCPL construes the language of the approved tariff to say: "This also means that if the customer name changes on an account served by these tariffs... the account must be changed to a standard electric tariff."

Even though the approved tariff change was just a little over a month old and was written by KCPL, KCPL advised its customers that the tariff should be construed to read that it also included "customer name changes on an account" even though there is no mention of name changes in either the Commission's Order or KCPL's approved tariff and even though KCPL took no action at the Commission to attempt to modify the tariff by attempting to add such "name change" language to it.

This construction of the rate by KCPL is contrary to the case law in Missouri under which it is held that a rate filed by a public utility should be given liberal, rather than strict, construction as to consumers entitled to such rate. In *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W. 2d 37 (Mo. 1931), the Supreme Court held that the Commission's construction of a manufacturers' tariff to only apply to manufacturers (who make clean clothes) and not to laundries (who make clothes clean), when such laundry would otherwise qualify for such tariff by usage characteristics, was too narrow and reversed the Commission's construction; See also *De Paul Hosp. School of Nursing, Inc. v. Southwestern Bell Telephone Co.*, 539 S.W.2d 542 (Mo. App. 1976).

Quite obviously, by advising that KCPL construed the tariff to include "customer name changes on an account served by these tariffs," KCPL has not only added language to the tariff that is not contained in it, it also has failed to liberally construe the tariff as written to apply to Complainant, a consumer entitled to such rate but for such strict construction and additional definition KCPL added without amending the Commission approved tariff it had only recently filed.

A review of KCPL's rules and regulations as to terms used in the Frozen all-electric tariff clearly demonstrates that KCPL's construction is arbitrary and capricious and in violation of its own rules and regulations. In reviewing KCPL's General Rules and Regulations Applying to Electric Service and having the force and effect as if enacted by the legislature binding on KCPL, the public and the Commission alike, the following pertinent definitions are found under 1. DEFINITIONS: starting at P.S.C. Mo. No.2, Third Revised Sheet No. 1.05:

**"The following terms, when used in these General Rules and Regulations, in Rate Schedules and in Service Agreements, shall, unless otherwise indicated therein, have the meaning given below:**

1.03 **PERSON:** Any 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.**

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.**" [Emphasis Added.]

1.21 **RESPONSIBLE PARTY:** Any adult, **landlord, property management company, or owner** applying for, agreeing to take, **and or receiving substantial use and benefit of electric service at a given premise.** [Emphasis Added.]

When applying these definitions to the language of the Frozen all-electric tariff Schedule LGA, approved by the Commission effective January 1, 2008, which reads:

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

it is clear that KCPL's construction of its rule is in violation of its own tariffs, and since tariffs approved by the PSC have the same force and effect as laws enacted by the legislature, it is also acting unlawfully in denying all-electric service to be continued at Briarcliff Development's physical location known as Briarcliff I.

In the first place, under Rule 1.03, Briarcliff Development as a firm, company, private corporation is a "PERSON" as such term is used in Rule 1.04.

Secondly, and more importantly with respect to the Frozen Schedule LGA, the Schedule clearly is available to Briarcliff Development because Briarcliff Development is a "CUSTOMER" as defined in Rule 1.04 since it is a "person" who is "receiving ~~or~~ using" "a class of electric service at a single point of delivery at and for use within the premises (Briarcliff I) occupied by such person, Briarcliff Development. To deny that Briarcliff Development is a customer at Briarcliff I because it is not a "customer of record," a term used by KCPL to determine that Briarcliff Development is not a Customer at Briarcliff I, and a term that is not defined by KCPL's Definitions and also a term that is not used in the Frozen tariff to limit its availability. The Frozen tariff says it is available "only to Customers' physical locations currently taking service under the Schedule." Nowhere in the Frozen tariff is the availability of the rate restricted only to "customers of record." It is only restricted to "Customers' physical locations" and Briarcliff Development is a Customer as defined in Rule 1.04 using or receiving electric service at the physical location of Briarcliff I continuously since 1999 and was being served as a 1LGAE

all-electric service on January 1, 2008 and continuously thereafter until KCPL stopped providing it electric service at the 1LGAE rate on August 5, 2009, the date KCPL stopped serving Briarcliff I on the 1LGAE rate and put it on the 1LGSE rate for the sole reason that Briarcliff Development changed the name on the account from Winbury Realty to Briarcliff Development, the owner and landlord of the Briarcliff 1 building continuously since its opening in 1999.

Thirdly, despite Mr. Rush's adamant denials that Briarcliff Development is a responsible party (Tr. 126-129), such denials clearly violate the approved rule defining responsible party. It is clear under the definition of "RESPONSIBLE PARTY," which says any adult, **landlord**, property management company or **owner** applying for agreeing to take and or **receiving substantial use and benefit of electric service at a given premise** is a responsible party, it is patently obvious that as a landlord and owner receiving substantial use and benefit of electric service at the Briarcliff I building, Briarcliff I is and has been since 1999 not only a Customer at the Briarcliff I building but it is also a Responsible Party at the Briarcliff I building.

Consequently, since KCPL's General Rules and Regulations specify that the terms defined in the Definitions, when used in Rate Schedules, shall have the meanings given the terms as defined in the definitions, under KCPL's Frozen Rate Schedule in which the term "Customer" is used, Briarcliff Development is a Customer at the Briarcliff I building as such term is defined in 1. Definitions, Rule 1.04 since it is a Person (as defined in Rule 1.03) receiving or using a class of electric service supplied by the Company under one rate schedule for use within the premises. Furthermore, Briarcliff Development was receiving and using service under the 1LGAE rate schedule on January 1, 2008 and continuously thereafter until KCPL determined effective August 5, 2009 that Briarcliff Development (even though it was a Customer as defined

in KCPL's Rule 1.04) was not the "customer of record" (a term not defined in KCPL's Rules) at Briarcliff I and despite Briarcliff Development having been continuously provided electricity at the all-electric rate since 1999, at the Briarcliff I physical location, KCPL changed the rate to the 1LGSE rate schedule over Briarcliff Development's objections. But for KCPL's arbitrary and capricious and unlawful actions in violating its own tariffs and rules, Briarcliff Development's physical location of Briarcliff I would still be on the 1LGAE rate schedule today and the Commission should so find and rule in Complainant's favor and return it to the status quo ante.

WHEREFORE, for the reasons stated hereinabove, the Commission should grant Complainant the following relief:

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.
2. Finding that under the circumstances, that KCPL's refusal to allow Briarcliff Development to continue to receive the frozen all electric rate was arbitrary, capricious, unreasonable, unlawful and unduly discriminatory.
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.
4. Ordering KCPL to commence immediately billing Briarcliff Development at the Briarcliff I building at the 1LGAE rate.
5. Ordering 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.
6. Ordering KCPL to make an accounting of the difference collected from Briarcliff Development for the service it billed at the 1LGSE rate and what the charges would have been for such period under the 1LGAE rate and refunding such difference in amount to Briarcliff Development with interest at the legal rate of interest.

7. For such other relief as the Commission shall deem just and appropriate.

## **B. ISSUE 2**

**2. 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 1LGAE on a prospective basis? If so, should it?**

Yes, the Commission has the authority to waive or vary KCPL's tariff provision. However, unless the Commission rules against Briarcliff Development on its Complaint, there is no reason to waive or vary from the approved Frozen all-electric rate schedule. As stated hereinabove, the current Frozen all-electric tariff is clear and unambiguous. Under it, Briarcliff Development is clearly a "Customer" as such term is defined in KCPL's approved Definitions, Rule 1.04, which rule is specifically applicable to all of KCPL's Rate Schedules, including its Frozen all-electric rate schedule. Thus, since Briarcliff Development qualified as a Customer at the Briarcliff I physical location on January 1, 2008, was continuously on that schedule through August 4, 2009, and would have continuously been on that schedule up through now, but for KCPL violating its own approved tariffs and unlawfully and unreasonably changing the rate schedule for Briarcliff Development's Briarcliff I building to the 1LGSE rate schedule. Thus, if the Commission rules in Complainant's favor on its Complaint and returns it to the status quo ante, it is not necessary to seek a waiver or variance of the Availability language of the Frozen all-electric rate schedule.



### C. ISSUE 3

**3. 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?**

Despite KCP&L's assertions that the language of its frozen all-electric rate schedule includes a change in the customer of record name, the actual approved language of such frozen rate schedule clearly does neither imply nor specifically state that "if the customer name changes on an account served by these tariffs... the account must be changed to a standard electric tariff." Had KCP&L intended that its tariff be read that way it should have specifically included such language. Obviously, it did not do so. Consequently, KCPL acted unreasonably and unlawfully, construing the actual language of such frozen rate schedule and removing the Briarcliff I physical location from the frozen rate schedule when the case law in Missouri requires a liberal, rather than a strict construction as to customers entitle to such rate. See *Laundry, Inc., supra*.

However, in the event that the Commission should determine that Briarcliff Development's Briarcliff I building was properly refused continuance of the all-electric rate schedule under the current language of KCP&L's rule because the name on the account in KCP&L's records was changed from the name of the owner's agent to the name of the owner of the physical location itself, who is and has been defined as a "customer" in KCPL's Definitions under its General Rules and Regulations, then the Commission should order KCP&L to file a revised tariff sheet allowing KCP&L to provide service to Briarcliff I and others similarly situated on an all-electric schedule on a prospective basis.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief has been mailed, faxed or electronically mailed to all counsel of record this 6th day of February, 2012

  
Jeremiah D. Finnegan