BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

BRIARCLIFF DEVELOPMENT COMPANY, a Missouri Corporation	)	
	)	
	)	**CASE NO. EC-2011-0383**
COMPLAINANT	)	
	)	
v.	)	
	)	
KANSAS CITY POWER & LIGHT COMPANY	)	
	)	
RESPONDENT	)	

REPLY 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 Reply Brief to the Initial Post Hearing Briefs of Respondent KCPL and the PSC Staff on the issues set forth below:

I. INTRODUCTION

Complainant brought this case as a Complaint seeking to be restored to the *status quo ante* of being continuously served under the 1LGAE rate schedule for its Briarcliff I office building from August 5, 2009 and thereafter.

Briarcliff Development's position is that KCPL's current tariff provisions, when properly construed under the rules of construction, clearly and unequivocally permit the Briarcliff I building physical location to continue to have been served under the frozen all-electric rate after August 5, 2009, 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, 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 prays that the Commission rule in its favor on its Complaint and restore it to the *status quo ante* of being served on the 1LGAE rate, including ordering KCPL to refund the difference between: a) what Briarcliff Development has paid and will continue to pay under the 1LGSE rate until the 1LGAE rate is restored; and b) 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 in the case as to a variance and a tariff revision are to be prospective only.

II. ISSUE 1 ARGUMENT

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

> **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 the availability provision of its own frozen all-electric tariff in August 2009 when it unlawfully refused to continue to provide the physical location of

[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.

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, the actual Customer at that physical location who had been receiving and using service at such physical location continuously since 1999.

The facts are not in dispute. The only thing in dispute is whether KCPL unlawfully violated its own tariffs and rules in removing the Briarcliff I building from the frozen all-electric rate.

It is undisputed that Briarcliff Development was the owner and landlord of the Briarcliff I building continuously since 1999. It is also undisputed that Briarcliff I was developed by Briarcliff Development as an all-electric building in reliance upon the existence of KCPL's all-electric rate and such rate was instrumental in Complainant's decision to develop Briarcliff I, as well as the other buildings in the Briarcliff commercial development, as all-electric buildings to be served under KCPL's all electric rate schedules. The Briarcliff I physical location was served under KCPL's all-electric rate schedules from 1999 through August 5, 2009, when the name on the account on KCPL's records was changed from Winbury Realty to Briarcliff Development, when Briarcliff Development stopped using the Winbury Group as its property manager and took property management in house. As the direct result of such name change on KCPL's billing records, KCPL stopped billing the Briarcliff I physical location under the 1LGAE all-electric rate and began billing it under KCPL's 1LGSE standard rate schedule. This change resulted in higher rates being paid for electric service than would have been paid under the 1LGAE rate schedule.

The Briarcliff II and Briarcliff III buildings, as well as all the other Briarcliff Development owned buildings that were on the all-electric rate on January 1, 2008, were not

affected by the change in property manager because none of them were on KCPL's records in the name of the property manager. Only the Briarcliff I building was changed to the 1LGSE standard rate schedule on August 5, 2009.

KCPL was aware all along that neither the Winbury Group nor Winbury Realty were the owner of the building since KCPL knew all along that they were property managers (KCPL Ex. 1, p.2, lines 19-21) and property managers are agents of an owner and are not the owner. KCPL knew or should have known that the property manager, as an agent for the owner, was subject to a Management Agreement and should have inquired as to its authority to list the account in a name other than that of the owner, which failure to exercise reasonable inquiry was exacerbated by the fact that it was the Winbury Group that asked that the account be placed in the name of Winbury Realty, a separate corporation, and not even in its own name.

Contrary to the positions of Staff and KCPL, by KCPL changing the rate for the Briarcliff I physical location on August 5, 2009 for the sole reason that who KCPL calls the "customer of record" at the Briarcliff I physical location on KCPL's records changed, such rate change violated the language of KCPL's Commission approved Frozen all-electric tariff to implement the freeze, when the frozen tariff clearly does not prohibit the Briarcliff I physical location from continuing to be served under the 1LGAE tariff.

A. Commission's Report and Order in Case No. ER-2007-0291 Does Not Support KCPL's Denial of the 1LGAE Rate for Briarcliff I.

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 Commission's clear and unambiguous 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."

Contrary to Staff's argument at p. 10 of its Brief, the Commission determined that the availability of such all-electric rate, as properly construed, is that the 1LGAE rate schedule is restricted to those: (1) qualifying customers' commercial and industrial locations; (2) being served under such all electric tariffs; (3) for so long as they continuously remain on that rate schedule. Staff argues wrongly that "Customers" is separate from "locations" but a review of the language clearly shows that the word used was "Customers'" and not "Customers." The word "Customers'" as a possessive noun is clearly part of a single phrase, to wit: "Customers' commercial and industrial physical locations." Furthermore, the "they" in the last phrase "for so long as they continuously remain on that rate schedule" clearly refers back to "customers' commercial and industrial locations." Thus, the language is clear and unambiguous. The Commission restricted

the 1LGAE rate to: (1) customers' commercial and industrial physical locations; (2) being served under such all electric tariffs as of January 1, 2008; and (3) for so long as they continuously remain on that rate schedule. There is nothing ambiguous or unclear in the Commission's language. The Commission wanted to limit the all-electric rate to: Customers' commercial and industrial physical locations being served on January 1, 2008 under such all electric tariffs for so long as they continuously remain on that rate schedule. There is nothing in such language to justify a construction that if the name of the "customer of record" changes on KCPL's records that the Customers' physical location loses the 1LGAE rate. Nor does this expand the discounts to even more customers since Briarcliff Development was already a Customer, as such is defined in KCPL's approved Rules, at the Briarcliff I physical location where it used the service itself, provided same to its tenants and paid for the service from the proceeds on the building.

B. KCPL's Frozen 1LGAE Rate Schedule Does Not Support KCPL's Denial of the 1LGAE Rate for Briarcliff I.

In response to such Report and Order, KCPL then filed 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 filed by KCPL and 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 language of the tariff, which is virtually identical to the clarified language of the Report an Order, the **physical location** of the Briarcliff I building is not prohibited from continuing to be served under the frozen all-electric rate, since such physical location was currently taking service under the all-electric Schedule 1LGAE on January 1, 2008 and would have been "served hereunder continuously thereafter" but for KCPL's unlawful violation of its own tariff and rules in removing it from the 1LGAE rate. The tariff language could not be any clearer or unambiguous. It leaves no room for any other construction of the tariff.

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). Thus, the rule is binding upon KCPL and violation of its terms by KCPL is unlawful.

Even though a public utility's tariff approved by the Commission may only be modified by the filing of a new tariff, also approved by the Commission, KCPL, nevertheless, declared its own construction of the rule, which, in effect, resulted in KCPL unlawfully modifying the effect of the tariff without KCPL filing a new tariff as required pursuant to Section 393.140(11), RSMo., which prohibits such action. See also Section 393.130, RSMo., which prohibits any charges made by KCPL in excess of that allowed by law or by order or decision.

In an email dated February 8, 2008 (only one month and 8 days after the Frozen all-electric tariff became effective and too late for anyone to do anything about changing names), David Sutphin, a spokesman for KCPL notified Richie Benninghoven of Briarcliff Development by email informing him of the Commission's rate case order affecting certain of Briarcliff Development's electrically heated project(s). 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 in the first two sentences above, in which KCPL construes the language of its Commission approved frozen tariff, that nowhere is there any mention of it being available "only to Customers' physical locations" although both the Commission's Order says "customers' commercial and industrial physical locations" and KCPL's approved frozen rate specifically says the Schedule is available only to "Customers' physical locations." Instead, he only talks about the rate being restricted to "commercial and industrial customers." Nowhere does he mention "physical locations." While, it may be possible to read the first two sentences as not being in conflict with the frozen 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. Nevertheless, there is no specific mention of it being available to "**physical locations**" anywhere in KCPL's construction of its approved tariff and such terms were clearly in the rate schedule and the Commission's language and cannot be disregarded.

However, one cannot give the same benefit of the doubt for what is stated in 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 the approved tariff language was written by KCPL, less than two months after the rate was approved by the Commission, KCPL advised its customers that the tariff should be construed to read that it also included "customer name changes on an account." This was and is KCPL's position and is also Staff's position, 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. The impact of such unreasonable construction of its approved tariff by KCPL is to make the tariff more restrictive than the language of the Commission's Order and the language of the approved tariff.

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 (i.e. those who make clean clothes) and not to laundries (i.e. those 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 unlawfully added more restrictive language to the tariff that is definitely not contained in it, either specifically or by reasonable inference therefrom, it also has unlawfully failed to liberally construe the tariff as written to apply to a consumer entitled to such rate since Briarcliff Development was a Customer of KCPL as defined in KCPL's approved Rules and Regulations which are applicable to all its tariffs. But for: (a) such unlawful and unreasonable construction by KCPL, and (b) the additional definition KCPL added about name changes without amending the Commission approved tariff it had only recently filed, the Briarcliff I physical location owned all along by Briarcliff Development would have continued to have qualified for and been continuously served under the 1LGAE rate schedule, since Briarcliff Development was, is, and always has been a Customer of KCPL at its Briarcliff I physical location as the term "Customer" is defined in KCPL's Commission approved rules and regulations, which definitions specifically are applicable to all its rate schedules.

C. Briarcliff Development is, was, and has Always been a Customer at its Briarcliff I Physical Location as KCPL's Approved Rules and the Frozen 1LGAE Rate Schedule Specifically Provide.

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 the Definitions in KCPL's General Rules and Regulations Applying to Electric Service, which have the same force and effect as a law enacted by the legislature binding on KCPL, the public and the Commission alike, and which terms when used in Rate Schedules are specifically required to have the meaning given the terms in the definitions themselves, it is readily seen that KCPL is violating the law by not applying such definitions to the Frozen all-electric rates.

With respect to the Frozen all-electric 1LGAE rate availability, which states:

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

the following pertinent definitions are found under 1. DEFINITIONS: starting at P.S.C. Mo. No.2, Third Revised Sheet No. 1.05 and are applicable to all rate schedules:

> "**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**:[Emphasis Added].
>
> 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.]

"Person" as used in Rule 1.04 means:

> 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.**

Thus, under this definition, Briarcliff Development is a "Person" as used in the definition of Customer and is a Customer.

Despite KCPL denying that Briarcliff Development, the "owner" and "landlord" of Briarcliff I is a responsible party that KCPL could sue in the event the property manager did not pay KCPL for service, a review of the Rule defining Responsible Party clearly states otherwise. The definition is as follows:

> 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.]

Thus, not only is a property management company applying for electric service at a given location a "responsible party" but so is any "landlord" or "owner" receiving substantial use and benefit of electric service at a given premise. This, of course, is Briarcliff Development. Obviously, the rule authorizes more than one Responsible Party at a time.

D. KCPL's Unreasonable Construction of its Frozen 1LGAE Rate Schedule is Unlawful.

When applying these Commission approved definitions as required by the Rule itself to the language of the Frozen all-electric tariff Schedule 1LGAE, 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 rules, and since tariffs and rules 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 name of its owner and landlord.

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

Secondly, and more importantly with respect to the Frozen Schedule 1LGAE, 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 coined 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 is unreasonable and unlawful. The Frozen tariff specifically 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." In fact, there is no mention of "customers of record" in the frozen tariff or the Commission's Order or in the KCPL's approved rules.

The Frozen all-electric tariff by its clear and unambiguous language 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,

when it put the Briarcliff I building on the 1LGSE rate for the sole reason that Briarcliff Development changed the name on the account from Winbury Realty to Briarcliff Development, who was 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 KCPL's 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. Thus, it is patently obvious that as a landlord and owner receiving substantial use and benefit of electric service at the Briarcliff I building, Briarcliff Development is and has been since 1999 not only a Customer at the Briarcliff I building but it is and was also a Responsible Party at the Briarcliff I building. Despite Mr. Rush's denials, if its "customer of record," Winbury Realty went bankrupt owing KCPL over $100,000 in electric bills at Briarcliff I, I cannot see KCPL's legal department agreeing with Mr. Rush that KCPL could not sue Briarcliff Development, who received the benefit of the service at Briarcliff, as a Responsible Party under Rule 1.21.

III. CONCLUSION

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 its Briarcliff I building as such term is defined

in KCPL's 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. 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. The Commission should so find and rule in Complainant's favor and return it to the *status quo ante* of being served on the 1LGAE from August 5, 2009 and thereafter and order KCPL to refund, with interest, the difference in the amount paid by Briarcliff Development under the 1LGSE rate and the 1LGAE rate.

WHEREFORE, for the reasons stated hereinabove, the Commission should find in favor of Complainant and grant it the relief requested in its Complaint and set forth in its Initial Post-Hearing Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been mailed, faxed or electronically mailed to all counsel of record this 17th day of February, 2012

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Jeremiah D. Finnegan