

Briarcliff Development Company )  
Complainant, )  
 )  
v. )  
 )  
Kansas City Power & Light Company )  
Respondent. )

4. The Commission devoted fifteen pages of its Report and Order in Case No. ER-2007-0291 to the all-electric and separately-metered space heating issues.<sup>1</sup> That discussion and those findings and conclusions remain sufficient rationale for eliminating the 1LGAE rate schedule by attrition.

5. KCPL has not even attempted to provide a rationale for deviating from the Commission's ordered elimination of these rate schedules by attrition. In the absence of a sound basis for such a distinction, reopening the 1LGAE rate schedule for Briarcliff I would be manifestly unduly and unreasonably prejudicial and disadvantageous to other customers and locations impacted by the rate schedule "freeze."

6. KCPL ignores the uncontroverted case law that the Commission cannot vary or waive a tariff except by that tariff's own terms. 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.

7. As set forth nearly ninety years ago by the Missouri Supreme Court:<sup>2</sup>

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 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-

"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.<sup>3</sup>

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<sup>1</sup> See Report and Order in Case No. ER-2007-0291, pp 75 – 90.

<sup>2</sup> Interestingly, Briarcliff cites this case in its discussion of its contention that KCPL modified its tariff by sending the email describing KCPL's interpretation of the freeze language. Staff will not address that contention at length here, as it was discussed fully in Staff's initial brief. Succinctly, KCPL's interpretation that a change in customer name is triggers ineligibility under the freeze is entirely consistent with the Commission's language, the tariff language, and the demonstrated intent of both sets of language. Briarcliff ignores this case in its assent to KCPL's request for a Commission waiver of KCPL's 1LGAE rate schedule.

<sup>3</sup> *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).

8. Without addressing this binding precedent, and instead invoking *stare decisis* for Commission decisions, KCPL alleges that the Commission has varied or waived utility tariffs, and concludes that the Commission can do so here. This is not so.

9. The Commission has not routinely waived or varied tariffs as alleged by KCPL. Even if it were so, that the Commission has allegedly acted in excess of its authority in prior instances does not support a Commission action in excess of its authority in this instance.

10. The cases referred to by KCPL are distinguishable from KCPL's request here for a variance from its tariff to allow KCPL to provide Briarcliff I with the 1LGAE rate despite the failure of Briarcliff I to qualify for service on the 1LGAE rate as tariffed.

11. It appears that KCPL conflates use of the words "variance" and "waiver" in their common senses, with the specific legal meanings attributable to those words.

Black's 7<sup>th</sup> defines variance as "...2. A license or official authorization to depart from a zoning law....."

The American Heritage Dictionary of Modern English Usage 3<sup>rd</sup> defines variance as "1.a. The act of varying. b. The state or quality of being variant or variable; a variation. c. A difference between what is expected and what actually occurs. 2. At discord. 3. *Law* a. A discrepancy between two statements or documents in a proceeding. b. License to engage in an act contrary to a usual rule: *a zoning variance*...."

Black's 7<sup>th</sup> defines waiver as "1. The voluntary relinquishment or abandonment – express or implied – of a legal right or advantage <waiver of notice>...."

The American Heritage Dictionary of Modern English Usage 3<sup>rd</sup> defines waiver as "1.a. Intentional relinquishment of a right claim, or privilege. b. The document that evidences such relinquishment. 2. A dispensation, as from a rule or penalty. 3. A deferment."

12. KCPL refers to Case Nos. EE-2006-0123 , EE-2003-0199, and EE-2003-0282 as instances where the Commission has granted variances. Indeed, each of these cases nominally purport to vary KCPL's tariff in addition to Commission rule.

13. Each of these cases, and each of the structures that are the subject of these cases, are included on KCPL's P.S.C. MO. No. 2 Third Revised Sheet No. 1.71 Cancelling P.S.C. MO. No 2 Second Revised Sheet No. 1.71 "General Rules and Regulations Applying to Electric Service 21. Separate Metering Variances." That is to say, these "variances" are recorded in and made part of KCPL's tariff.

14. At the time these cases were decided and implemented, it was not Staff's intent that incorporating references to the cases and structures serve any purpose other than providing notice of the cases, and tracking the cases.

15. However, by virtue of the fact that these "variances" are recorded in and made part of KCPL's tariff, they appear to survive the requirements of *State ex rel. St. Louis County Gas Co.*. Thus, in these cases it can be reasonably viewed that the Commission did not vary KCPL's tariff in the legal sense, they simply modified the applicability of a particular tariff sheet by ordering KCPL to promulgate a new tariff sheet containing the modified standards of applicability.<sup>4</sup>

16. KCPL refers to Case Nos. GE-2009-0194 and GE-2005-0405. While each of these are nominally variances, they each consist of simply an agreement of the parties to not enforce, for a specified amount of time, particular provisions of a utility's tariff against the specified utility.

17. Most improperly, KCPL also refers to Case No. GO-2004-0524. In this case, MGE's application states "Sheet No. 21 of MGE's tariff provides that **unless the Commission otherwise orders**, refunds received by MGE in excess of \$75,000 from charges paid for natural gas resold to its residential, small general service, large general service and unmetered gaslight

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<sup>4</sup> In these cases the Commission did order a variance with respect to Commission rules. A Commission rule is not the source of the freeze of the ILGAE rate schedule.

customers, shall be refunded to such customers as a reduction in PGA rates....” [emphasis added.] Thus, though the word “waiver” is present in the docket, the Commission was not called to, and did not in fact, modify the applicability of the tariff sheet except by that sheet’s own terms. Since the tariff provided for the ability to modify MGE’s refunding procedures, the Commission’s actions were clearly within the bounds of the tariff.

18. KCPL’s 1LGAE tariff does not contain a provision for the Commission to vary its terms.

19. Again, even if the Commission has allegedly acted in excess of its authority in prior instances, such history does not support a Commission action in excess of its authority in this instance.

20. KCPL has not even attempted to provide a rationale for deviating from the Commission’s ordered elimination of these rate schedules by attrition. In the absence of a sound basis for such a distinction, reopening the 1LGAE rate schedule for Briarcliff I would be manifestly unduly and unreasonably prejudicial and disadvantageous to other customers and locations impacted by the rate schedule “freeze.”

**WHEREFORE**, the Staff submits this *Staff’s Reply Brief*.

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 17<sup>th</sup> day of February, 2012.

**/s/ Sarah Kliethermes**