

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

In the Matter of Heritage Farms, Inc.'s)
Application for Variance and/or Waiver of)
Commission Rule to Require Kansas City)
Power and Light, or Any Other Utility, to)
Provide Service to Real Property Located at)
8360 N.W. Fox Road in Platte County,)
Missouri.)

Case No. EE-2008-0151

STAFF REPORT AND RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Report and Recommendation* states the following:

1. On November 26, 2007, Heritage Farms, Inc. ("Heritage Farms") filed its *Application for a Waiver of the Requirements of Kansas City Power and Light ("KCP&L") to Install Electrical Service* ("Application") seeking a waiver¹ of Commission Rule 4 CSR 240-13.035(3) which Heritage Farms asserts requires KCP&L to provide electrical service to property located at 8360 NW Fox Road, Parkville, MO 64152, owned by Roger Cowan (herein the "Cowan property"). *See* November 30, 2007 filing by Heritage Farms, Inc. attorney ("Third Party Identification").

2. Subsequently, on November 26, 2007, the Commission issued its *Order Directing Filing from Heritage Farms, Inc., adding [KCP&L] as a Party, and Directing Responses from [KCP&L]... and the Staff of the Missouri Public Service Commission* ("Order") ordering Staff to file a report and recommendation. Staff's report was ordered to state "whether Heritage Farms has standing to seek the requested waiver, and if the issue presented to the Commission is solely an issue of law that can [be] decided upon the pleadings of the parties or if a hearing is required to determine disputed material factual issues." *Id.* at page 2.

¹ Black's Law Dictionary defines waiver as "the intentional or voluntary relinquishment of a known right" while variance is defined as "departure from the literal requirements." *Sixth Edition*, St. Paul, Minn. West Publ. Co. 1990. Applicant's request is technically a variance request. However, Staff's pleading will use the term waiver for the sake of consistency.

3. On December 13, 2007, a response was filed by Roger Cowan (“Cowan Response”).
4. On December 18, 2007, KCP&L filed its response to Heritage Farms waiver request (“KCP&L Response”).
5. On December 20, 2007, Staff issued data requests for additional information, due by January 9, 2008, from KCP&L, Heritage Farms, Inc. and Mr. Roger Cowan.

UNDISPUTED FACTS

6. It is undisputed by all parties that the real property, located at 8360 NW Fox Road, Parkville, MO 64152, is owned by Roger Cowan. *See* Third Party Identification, Cowan Response, and KCP&L Response at 2.
7. Mr. Cowan’s property is completely surrounded and encapsulated by Heritage Farms property. *See* Application at 1, Cowan Response, and KCP&L Response at 1.
8. Electrical service has been requested from KCP&L, as a public utility, for said property by Mr. Cowan. *See* Application at 1-2, KCP&L Response at 2, and Cowan Response.
9. Provision of any electrical service to Cowan’s property would have to traverse Heritage Farms’ property. *See* KCP&L Response, Cowan Response, and Heritage Farms Response at 2.

STANDING

10. The general rule for standing is:

Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote. *Ste. Genevieve School District R II v. Board of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002).

F.W. Disposal South, LLC v. St. Louis County 168 S.W.3d 607, *611 (Mo.App. E.D.,2005)

In order to have standing, a party must show only a legally protectable interest in the relief sought. *Neighbors Against Large Swine Operations v. Continental Grain Co.*, 901 S.W.2d 127, 132 (Mo.App.1995). For a party to have a legally protectable interest, that interest must be one that contemplates an interest, either personal or pecuniary, that is subject to some consequential relief, either immediately or

prospectively. *Phillips v. Missouri Dep't of Social Servs.*, 723 S.W.2d 2, 4 (Mo. banc 1987).

Associated Industries of Missouri v. Angoff 937 S.W.2d 277, *280 (Mo.App. W.D. 1996).

11. A review of Commission statutes and rules does not define or limit who may file an application for waiver of a rule. *See* §§ 393.140 and 393.170 RSMo.; and 4 CSR 240-2.060, 2.080, and 13.035(5).

12. The Commission's jurisdiction and supervision, pursuant to Chapters 386 and 393 RSMo., extends to the regulation of electric public utilities, i.e. KCP&L, and determination of applications requesting relief under Commission rules. *See* 4 CSR 240-2.060 and referenced authorities.

13. The Commission also has authority to waive Commission rule 4 CSR 240-13.035(3) upon a finding of "good cause." *See* 13.035(5). Good cause is not defined in pertinent statutes or rules. It is a vague term that falls within the discretion of the Commission to determine upon the circumstances and evidence of a case that good cause exists to grant a waiver of this rule.

14. Heritage Farms has a personal and tangible interest in KCP&L providing electrical service to the Cowan property because Heritage Farms property must be traversed to provide such service. Furthermore, Heritage Farms claims that its farm "land and business will be severely impacted by the loss of land" at issue. *See* Application at 2.

15. Staff asserts it has not found a basis to recommend dismissal of Heritage Farms Application on standing.

DETERMINATION ON THE PLEADINGS IS NOT YET APPROPRIATE

16. The Commission Order asked "if the issue presented... is solely an issue of law that can [be] decided upon the pleadings of the parties or if a hearing is required to determine disputed material factual issues." *Id.* at 2.

17. To address rule 13.035(3) requirements, the rule the Application requests be waived, the language must be reviewed. This provision of the rule states:

The utility shall commence service at an existing residential service location in accordance with this rule as close as reasonably possible to the day specified by the customer for service to commence, but no later than, three (3) business days following the day specified by the customer for service to commence provided that the applicant has complies with all requirements of this rule. When service to a new residential location is requested, the utility shall commence service in accordance with this rule as close as reasonably possible to the day specified by the applicant for service to commence, but normally no later that three (3) business days following the day that all required construction is complete and all inspections have been made.

18. Also helpful to reviewing rule 13.035 is the definition of Applicant which states “Applicant means an individual(s) who has applied to receive residential service from the utility.” See 4 CSR 240-13.015(1)(A).

19. The purpose of rule 13.035 states:

This rule prescribes conditions under which utilities may refuse to commence service to an applicant for residential service and establishes procedures to be followed by utilities to insure reasonable and uniform standards exist for the denial of services. This rule also protects an applicant(s) at the time of their application, from being required to pay for the bill incurred by other individuals for service from which the applicant(s) did not receive substantial benefit.

In light of this statement of purpose, Heritage Farms’ Application appears not to be using this rule for its intended purpose. Heritage Farms requests waiver of this rule so that KCP&L’s obligation to commence electrical service at the Cowan property, even with Mr. Cowan’s request for service as applicant, will be released. Therefore, a Commission determination granting the waiver would awkwardly allow KCP&L to decide when to commence service at the Cowan property, if no other tariff or certificate obligations apply.² However, Staff must note that the technical language of this

² Staff notes that in case 07AE-CV02402, KCP&L v. Heritage Farms Inc, Platte County Circuit Court, Missouri, in which Heritage Farms referred to a condemnation action of Applicant’s land for an easement for Mr. Cowan’s requested electrical service, docket entry 1-3-08 shows Notice of Payment Award. The Application, at 2, referenced this case as part of its basis for filing.

rule does not lawfully bar this type of Application.

20. Staff contends that this Application for waiver of rule 13.035(3) should not be dismissed because the relief requested of waiver for good cause is available. However, Staff must point out that any reliance on the theory that waiver of this rule will provide total relief from KCP&L's obligation to provide electrical service to a customer within KCP&L's certificated service area is flawed. Heritage Farms' Application requests the Commission waive the requirement that KCP&L provide electrical service to the Cowan property "as dictated by 4 CSR 240-13.035(3)." *Id.* at 2-3. However, under common law, a public utility or common carrier has to provide service to every one who asks, "when exercising its public function; that is, furnishing something, a necessity, that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions." See *State ex rel. M.O. Danciger & Co. v. Public Service Commission of Missouri*, 205 S.W. 36 (Mo. 1918). KCP&L holds a Certificate of Convenience and Necessity ("CCN") and associated tariffs, granted by the Commission, to serve customers in its service area, and therefore, as a public utility, is obligated to provide electric service unless a lawful exception or condition exists not to provide service. See *In Re Kansas City Power & Light Company*, 21 Mo. P.S.C. 1 (1934); KCP&L Tariff sheets 1.10, 1.11, 1.14, 1.15, and 1.31; and chapters 386, 393, and §393.130.3 RSMo. Staff's review of the CCN and tariffs has not revealed any lawful exceptions to this customer service obligation to Mr. Cowan's request in the Platte County service area.

MATERIAL FACTS ARE AT ISSUE

21. Staff's evaluation of the facts presented in the pleadings to determine whether a genuine issue of material fact still exists followed a simple guide:

We reiterate that a genuine issue exists, as to one of the material facts underlying the moving party's right to summary judgment, where the record contains competent evidence that demonstrates two plausible, but contradictory, accounts of the essential fact. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 382.

Birdsong v. Christians, 6 S.W.3d 218, *224 (Mo.App. S.D., 1999).

22. Heritage Farms alleges that if KCP&L provides service to the Cowan property by traversing Heritage Farms land, then harm will occur from the loss of land and ultimately business from this electrical service install. KCP&L disputes this claim and asserts no harm will befall Heritage Farms because the

distribution facilities serving the [Cowan property] have been in place on [Heritage Farms' property] for a number of years. Until recently, those facilities were used to provide electric service to the house [on the Cowan property]. That being the case, the provision of electric service to the [Cowan property] is not a change in circumstance, but rather a continuation of the *status quo*.

KCP&L Response at 3. Staff's review finds this as a genuine factual dispute still at issue because this is essential to the Commission's determination of whether good cause exists to waive this requirement under rule 13.035(5).

23. Also, another fact impacting a waiver request for the rule requiring commencement of service is whether or not service has already commenced. Not yet established in the pleadings in this case is whether or not service is currently being provided to the Cowan property by KCP&L.

24. Upon determination of these disputed facts the Commission can find that Heritage Farms waiver request of 4 CSR 240-13.035(3) as to KCP&L's obligation to commence electrical service as requested by Mr. Cowan is appropriate or inappropriate.

RECOMMENDATION

25. The Commission has been asked by Heritage Farms to waive rule 4 CSR 240-13.035(3) in the case of Mr. Cowan's request to KCP&L for electrical service. Based upon the above analysis, Staff states that genuine material issues of fact still exist for determination by the Commission that require an evidentiary hearing in this case.

WHEREFORE, Staff respectfully recommends that the Commission set this case for evidentiary hearing.

Respectfully Submitted,

/s/ Shelley Syler Brueggemann
Shelley Syler Brueggemann
Senior Counsel
Missouri Bar No. 52173

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-7393 (Telephone)
(573) 751-9285 (Fax)
shelley.brueggemann@psc.mo.gov (e-mail)

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 17th day of January 2008.

/s/ Shelley Syler Brueggemann