

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Jay Scott Emler, Chairman
Shari Feist Albrecht
Pat Apple

In the Matter of the Complaint of Southern)
Pioneer Electric Company Against the Kansas)
Power Pool Regarding Bypass and Duplication) Docket No. 17-KPPE-092-COM
of Service for 34.5kV Delivery to the City of)
Kingman.)

ORDER GRANTING PETITION FOR RECONSIDERATION OF DISCOVERY ORDER

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings:

I. Factual Background

1. On September 8, 2016, Southern Pioneer Electric Company (Southern Pioneer) filed a Complaint with the Commission against the Kansas Power Pool (KPP), alleging that KPP is attempting to bypass Southern Pioneer's 34.5 kV facilities contrary to the public interest, ostensibly creating a duplication of such facilities.¹

2. On September 8, 2016, Southern Pioneer also filed a Motion for Protective and Discovery Orders (Motion), wherein it requested "that the Discovery Order clearly state that for purposes of calculating discovery-related deadlines that Saturdays, Sundays, and legal holidays be excluded."²

3. On September 27, 2016, the Commission issued its *Order Designating Prehearing Officer; and Protective and Discovery Order* (Discovery Order). Regarding data request responses, and citing to portions of K.A.R. 82-1-217's time computation language, the

¹ Docket No. 17-KPPE-092-COM, Complaint of Southern Pioneer Electric Company Against the Kansas Power Pool, p. 1 (Sept. 8, 2016).

² Docket No. 17-KPPE-092-COM, Motion for Protective and Discovery Orders, ¶ 3 (Sept. 8, 2016).

Discovery Order stipulates that “[r]esponses to Staff data requests are due within seven days,”³ and “[r]esponses to all other data requests are due within 10 days, not counting Saturdays, Sundays, or legal holidays.”⁴

4. Regarding objections to data requests, the Discovery Order provides that: (1) where the parties have agreed to electronic service, the objecting party “shall object . . . within five days of the data request;” and (2) where the parties have not agreed to electronic service, the objecting party “shall object . . . within five working days after service, plus three days if service is by mail.”⁵ Regarding responses to motions to compel, such responses “are to be filed within three days after the motion is received, not counting intermediate Sundays, or legal holidays.”⁶

5. On October 12, 2016, Southern Pioneer timely filed a Petition for Reconsideration of Discovery Order (PFR), requesting that the Commission explicitly exclude Saturdays, Sundays and holidays in computing all discovery time deadlines.⁷ Southern Pioneer pointed to a recent Commission order in Docket No. 16-KCPE-593-ACQ (16-593 Docket),⁸ “wherein [the Commission] explicitly stated that ‘[i]n computing discovery deadlines, intermediate Saturdays and Sundays and holidays shall be excluded.’”⁹

6. Southern Pioneer’s PFR contended that the Commission’s Discovery Order in the current proceeding, by failing to exclude Saturdays, Sundays and holidays from discovery-related time computations, results in “different deadline calculations for the various discovery-

³ Discovery Order, ¶ 18.

⁴ *Id.*, ¶ 18.

⁵ *Id.*, ¶ 19.

⁶ *Id.*, ¶ 19.

⁷ Docket No. 17-KPPE-092-COM, Petition for Reconsideration of Discovery Order, p. 4 (Oct. 12, 2016).

⁸ Docket No. 16-KCPE-593-ACQ, In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Westar Energy, Inc. for approval of the Acquisition of Westar Energy, Inc. by Great Plains Energy Incorporated, *Order Granting in Part, Denying in Part Joint Applicants’ Petition for Reconsideration of Discovery Order*, ¶ B (Aug. 25, 2016).

⁹ PFR, ¶ 2.

related activities contemplated in the docket.”¹⁰ The PFR also complained of the Discovery Order’s use of and failure to define the term “working days.”¹¹ Southern Pioneer concluded that “[t]hese ambiguities create confusion with regard to the appropriate computation for discovery-related deadlines.”¹²

II. Legal Standards

7. Kansas courts examine the validity of Commission orders pursuant to the Kansas Judicial Review Act (KJRA).¹³ On appeal to Kansas courts, Southern Pioneer would bear the burden of proving the Commission's action was invalid.¹⁴ The validity of the Commission's action is determined in accordance with the standards of judicial review provided in K.S.A. 2015 Supp. 77-621, as applied to the Commission's action at the time it issued its Final Order.¹⁵ Southern Pioneer must prove one of the eight grounds under K.S.A. 2015 Supp. 77-621(c) in order to obtain relief. Although Southern Pioneer does not expressly cite to any of the eight grounds, only one is implicated. Southern Pioneer’s argument can be construed to assert the Commission acted in a manner that is unreasonable, arbitrary or capricious.¹⁶

8. An agency’s action is arbitrary and capricious if it is unreasonable or without foundation in fact.¹⁷ “Whether an agency’s decision is arbitrary or capricious tests the reasonableness of the [agency’s] exercise of discretion in reaching the determination” at issue.¹⁸ Unreasonable action is action taken without regard to the benefit or harm to all interested parties.¹⁹

¹⁰ PFR ¶ 3.

¹¹ PFR, ¶ 5. *See* Discovery Order, ¶ 19.

¹² PFR ¶ 5.

¹³ K.S.A. 2015 Supp. 77-621 *et seq.*

¹⁴ K.S.A. 2015 Supp. 77-621(a)(1).

¹⁵ K.S.A. 2015 Supp. 77-621(a)(2).

¹⁶ *See* K.S.A. 2015 Supp. 77-621(c)(8).

¹⁷ *Sunflower Racing, Inc. v. Bd. of Cty. Comm'rs of Wyandotte Cty.*, 256 Kan. 426, 431, 885 P.2d 1233, 1237 (1994)

¹⁸ *Muir v. Kansas Health Policy Auth.*, 50 Kan. App. 2d 854, 862, 334 P.3d 876, 881 (2014).

¹⁹ *Sunflower Racing, Inc. v. Bd. of Cty. Comm'rs of Wyandotte Cty.*, at 431.

9. When the Commission conducts a proceeding pursuant to the Kansas Administrative Procedure Act (KAPA), the presiding officer may specify the times during which the parties may pursue discovery and respond to discovery requests and issue . . . discovery and protective orders in accordance with the rules of civil procedure.²⁰

III. Findings and Conclusions

10. The Commission's Discovery Order in this docket allowed seven days for responses to Staff data requests and 10 days, not counting Saturdays, Sundays, or legal holidays, for responses to all other data requests. It allowed five days for responses objecting to data requests served via electronic service and five working days after service, plus three more days, for data requests served by mail. The Discovery Order also required responses to motions to compel to be filed within three days after the motion is received, not counting intermediate Sundays, or legal holidays. The Commission finds that in providing these deadlines, the Discovery Order was consistent with K.S.A. 77-522, K.A.R. 82-1-217 and K.A.R. 82-1-234b, yet was inconsistent with the Commission's *Order Granting in Part, Denying in Part Joint Applicants' Petition for Reconsideration of Discovery Order* in the aforementioned 16-593 Docket.

11. Moreover, the Commission finds that due to the discretion granted to the presiding officer to specify the times during which the parties may pursue discovery and respond to discovery requests in K.S.A. 77-522, the above Order in the 16-593 Docket excluding intermediate Saturdays, Sundays and holidays from discovery deadline time computations was also consistent with Kansas law.²¹

²⁰ K.S.A. 2015 Supp. 77-522 (The general provisions governing discovery and protective orders are provided in K.S.A. 2015 Supp. 60-226 through 60-237).

²¹ The discovery deadline computations in the original July 14, 2016, Discovery Order in the 16-593 Docket, which KCP&L and Westar jointly asked the Commission to reconsider, properly followed the Commission's regulations. However, K.A.R. 82-1-202 authorizes the Commission to waive the requirements of its regulations for good cause

12. However, the Commission finds that fairness, clarity and efficiency in all Commission proceedings requiring discovery are best served by the issuance of consistent discovery orders. Parties should be able to rely on consistent standards for discovery-related deadlines from docket to docket. In addition, the Commission agrees with Southern Pioneer that the exclusion of intermediate Saturdays, Sundays and legal holidays for the purposes of calculating all discovery-related deadlines will allow parties to more thoroughly review and respond to discovery-related matters. Thus, the Commission finds it has good cause, and it will serve the public interest to waive the provision of K.A.R. 82-1-217(a) which states: “When the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in the computation.”

13. Therefore, consistent with its ruling in the 16-593 Docket, the Commission finds that, for the purposes of calculating all discovery-related deadlines, intermediate Saturdays, Sundays, and holidays shall be excluded. The Commission also determines that this method of calculating all discovery-related deadlines shall be Commission policy until such time as the Commission’s regulations can be made to reflect this policy.

14. In view of this policy change, the Commission designates this Order as precedential. K.S.A. 2015 Supp. 77-415(b)(2) allows a Kansas administrative agency to “bind parties, establish policies, and interpret statutes or regulations by order in an adjudication under the Kansas administrative procedure act or other procedures required by law” where certain conditions are met. For a Commission order to be precedential, it must be: (1) designated by the Commission as precedent; (2) not overruled by a court or later adjudication; and (3) disseminated to the public in one of three ways.²² The precedential order must be disseminated by either:

and if it is in the public interest to do so. The Commission invoked K.A.R. 82-1-202 in its *Order Granting in Part, Denying in Part Joint Applicants’ Petition for Reconsideration of Discovery Order* in the 16-593 Docket.

²² K.S.A. 77-415(b)(2)(A)(i)-(iii).

- (a) Inclusion in a publicly available index, maintained by the agency and published on its website, of all orders designated as precedent;
- (b) publication by posting in full on an agency website in a format capable of being searched by key terms; or
- (c) being made available to the public in such other manner as may be prescribed by the secretary of state.²³

15. This Order shall be included in the Commission's publicly available index of precedential orders, maintained by the Commission and published on the Commission's website at <http://kcc.ks.gov/policy/index.htm>.

THEREFORE, THE COMMISSION ORDERS:

A. Southern Pioneer's Petition for Reconsideration requesting that the Commission explicitly exclude Saturdays, Sundays and holidays in computing all discovery time deadlines is hereby granted.

B. It shall be Commission policy going forward that, for the purposes of calculating all discovery-related deadlines, intermediate Saturdays, Sundays, and legal holidays shall be excluded.

C. This *Order Granting Petition for Reconsideration of Discovery Order* is hereby designated as a precedential order pursuant to K.S.A. 77-415(b) until such time as the Commission's regulations can be made to reflect the policy stated in Ordering Clause B of this Order. This Order shall be included in the Commission's publicly available index of precedential orders, maintained by the Commission and published on the Commission's website.

D. To the extent this Order constitutes final agency action as defined by K.S.A. 77-607(b)(1), Amy L. Green, Secretary to the Commission, is the agency officer designated to receive service of a petition for judicial review on behalf of the agency.²⁴

²³ K.S.A. 77-415(b)(2)(A)(iii)(a)-(c).

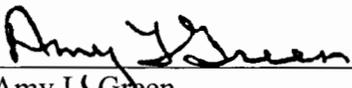
²⁴ K.S.A. 77-529(d).

E. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders, as necessary.

BY THE COMMISSION IT IS SO ORDERED.

Emler, Chairman; Albrecht, Commissioner; Apple, Commissioner

Dated: NOV 10 2016



Amy L. Green
Secretary to the Commission

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NOV 10 2016

CERTIFICATE OF SERVICE

17-KPPE-092-COM

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of Electronic Service on NOV 10 2016.

GLENDА CAFER, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
Fax: 785-233-3040
glenda@caferlaw.com

TERRI PEMBERTON, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
Fax: 785-233-3040
terri@caferlaw.com

SAMUEL FEATHER, DEPUTY GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
s.feather@kcc.ks.gov

ANDREW FRENCH, SENIOR LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3314
a.french@kcc.ks.gov

MARK CHESNEY, CEO & GENERAL MANAGER
KANSAS POWER POOL
100 N BROADWAY STE L110
WICHITA, KS 67202
Fax: 316-264-3434
mchesney@kansaspowerpool.org

LARRY HOLLOWAY, ASST GEN MGR OPERATIONS
KANSAS POWER POOL
100 N BROADWAY STE L110
WICHITA, KS 67202
Fax: 316-264-3434
lholloway@kansaspowerpool.org

CURTIS M. IRBY, GENERAL COUNSEL
KANSAS POWER POOL
LAW OFFICES OF CURTIS M. IRBY
200 EAST FIRST ST, STE. 415
WICHITA, KS 67202
Fax: 316-264-6860
cmirby@sbcglobal.net

LINDSAY SHEPARD, EXECUTIVE VP - GENERAL
COUNSEL
SOUTHERN PIONEER ELECTRIC COMPANY
1850 W OKLAHOMA
PO BOX 430
ULYSSES, KS 67880-0430
Fax: 620-356-4306
lshepard@pioneerelectric.coop

/S/ DeeAnn Shupe
DeeAnn Shupe

EMAILED

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