THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Petition of Kansas City Power & Light Company ("KCP&L") for Determination of the Ratemaking Principles and Treatment that Will Apply to Recovery in Rates of the Cost to be Incurred by KCP&L for Certain Electric Generation Facilities Under K.S.A. 66-1239.	)))))))	Docket No. 11-KCPE-581-PRE

CURB'S RESPONSE TO KCPL'S AND WESTAR'S PETITIONS FOR RECONSIDERATION AND REQUESTS TO STAY OR SUSPEND IN PART

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files its Response to KCPL's Petition for Reconsideration and Motion to Stay or Suspend in Part. In support of its Response, CURB states as follows:

I. Background

1. KCPL and Westar both filed Petitions for Reconsideration of the Commission's August 19, 2011, Order Granting KCP&L's Petition for Predetermination of Rate-Making Principles and Treatment. In the Petitions, KCPL and Westar request that the Commission reconsider the portions of its decision denying KCPL's request to pass through costs of the La Cygne Project through an ECRR, denying Westar the ability to pass through costs of the La Cygne Project through its ECRR, and requiring contracts that significantly affect a utility's franchise or certificate of convenience and necessity to be presented to the Commission for approval. [1]

2. CURB opposes the Petitions for Reconsideration filed by KCPL, as will be discussed more fully below.

[1] CURB's decision not to address other issues for which KCPL and Westar have requested reconsideration should not be considered agreement with the arguments made by KCPL and Westar.

II. KCPL & Westar Failed to Timely Serve Their Petitions for Reconsideration Pursuant to the Commission's Procedural Order.

3. Pursuant to the paragraph 4 of the March 11, 2011, Prehearing Officer's Order Setting Prehearing Conference and Approving Use of Electronic Service, "Testimony, briefs, and other pleadings must be served electronically by 3:00 p.m. on the date due, without requiring service among the parties of a follow-up hard copy, but the original and at least seven paper copies of testimony, briefs and other pleadings must still be filed in the Commission's docket room by close of business on the date of the deadline."

4. KCPL and Westar served their Petitions for Reconsideration on September 7, 2011, at 4:53 p.m., and 4:56 p.m., respectively. [2] As a result, both Petitions were served out of time and should be dismissed and disregarded by the Commission.

III. The Commission's Decision Regarding K.S.A. 66-136 is Legally and Factually Correct.

5. In its Motion to Stay or Suspend in Part, KCPL erroneously concludes that, "Under the Commission's analysis, K.S.A. 66-136 would apply to contracts based solely upon whether they involve material amounts of money or whether there would be a financial impact on the Company." Understandably, KCPL fails to support this erroneous conclusion with any specific citation to the Commission's August 19th Order. What the Commission actually stated in the Order was, "Going forward, the Commission concludes contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here, are the type that should be presented to the Commission, not just its Staff." The entire paragraph of the Order addressing K.S.A. 66-136 is repeated below:

[2] Attachment 1: Email cover sheets from counsel for KCPL and Westar.

> The Commission was not presented with nor did it review and/or approve either agreement prior to their execution in 2007. K.S.A. 66-136 states that "No franchise or certificate of convenience and necessity granted a common carrier or public utility governed by the provision of the act shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right there under be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the Commission." Certainly, the Commission does not wish to review and approve all contracts and agreements, but this statute was enacted a century ago and is focused on contracts dealing with transfer of utility contracts that affect the utility's franchise, and thus has a purpose. Here there were two contracts – one with KDHE and the other with the Sierra Club- one subjecting KCP&L to government enforcement actions (the KDHE contract) and the other to civil penalties (the Sierra Club contract). A contract involving a $1.23 billion upgrade to a major base-load generating facility *where the utility asserts it would have to shut down the plant if it failed to meet the contractual deadline* seems to fall into the category of contracts that affect KCP&L franchise or certificate of convenience and necessity. Likewise, the extensive discussion of the environmental upgrades in financial analysts' assessment of KCP&L's financial matters also indicates that the contract is material and affects KCP&L's franchise or certificate of convenience and necessity. The Commission rejects arguments that KCP&L's petition for predetermination should be denied because these agreements were not previously presented to the Commission. Going forward, the Commission concludes contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here, are the type that should be presented to the Commission, not just its Staff. For this reason, the Commission directs Staff to develop a proposal regarding a procedure to be followed to enable review and approval of the type of material contracts entered into by public utilities we regulate. [3]

6. Importantly, it was KCPL and Westar that asserted it would need to shut down 1,400 MW of capacity and electric energy associated with the La Cygne generating units if it failed to meet the contractual deadline. [4] It is difficult to understand how a utility can argue that losing 1,400 MW of capacity would not materially affect KCPL and Westar's franchise or certificate of convenience and necessity. Indeed, such an argument is contrary to the testimony of KCPL's own witnesses, Burton Crawford and Paul Ling, who both testified that the La Cygne generating units (1) are a

[3] Order Granting KCP&L Petition for Predetermination of Rate-Making Principles and Treatment, ¶ 27.
[4] *Id.*, at ¶¶ 25, 28, 50; Tr. Vol. 4, 1299-1300; Rohlfs Direct, p. 7.

significant part of the Company's generating fleet and (2) if the Company had to shut them down in 2015, it would affect the Company's ability to provide safe and reliable service and would negatively impact the Company's public service obligations. [5]

7. The Commission has applied K.S.A. 66-136 to other areas that affect the franchise or certificate of convenience and necessity of public utilities:

- Aquila's proposed collateralization of its Kansas utility assets reviewed under K.S.A. 66-136 to determine whether the proposal is reasonable, serves the public interest, and is not otherwise harmful to Kansas utility customers. [6]
- Required Kansas jurisdictional utilities agreeing to participate in the Southwest Power Pool Regional Transmission Organization to obtain the Commission's approval because transfer of control and operation of transmission facilities directly affects the ability of Kansas utilities to furnish reasonably efficient and sufficient electric service and facilities to retail customers. [7]
- Rejected Western Resources, Inc.'s argument that the K.S.A. 66-136 does not extend the Commission's approval authority to contracts that may affect the public utility. [8]

8. KCPL and Westar both contend the provisions of K.S.A. 66-136 only apply to the "right" to transact or conduct business, [9] but not to contracts that significantly affect the Companies' franchises or certificates of convenience and necessity - such as the agreements at issue here which Company witnesses have testified would affect the Company's ability to provide safe and reliable service and would negatively impact the Company's public service obligations. [10]

---

[5] Tr. Vol. 4, pp. 1158-1159 (Burton Crawford); Tr. Vol. 4, pp. 1279-1280 (Paul Ling).

[6] Order No. 21: Denying Request to Pledge Kansas Public Utility Assets, February 17, 2004, Docket No. 02-UTCG-701-GIG, ¶ 3. *See also,* Order Establishing Hearing Procedures, Directing Further Investigation and Extending Interim Standstill Protections, May 7, 2003, Docket No. 02-UTCG-701-GIG, ¶ 4.

[7] Order Opening General Investigation, Convening Roundtable, and Requesting Comments, April 16, 2004, Docket No. 04-GIME-922-GIE, ¶ 2 ("Under K.S.A. 66-136, "any contract or agreement . . . affecting . . . [a] certificate of convenience and necessity or right thereunder" must be approved by the KCC in order to be valid and of force and effect.").

[8] No. 51 Order Requiring Financial and Corporate Restructuring by Western Resources, Inc., November 8, 2002, Docket No. 01-WSRE-949-GIE, ¶ 58.

[9] KCPL PFR, ¶¶ 2, 7-18; Westar PFR, ¶¶ 4, 23-30.

[10] Tr. Vol. 4, pp. 1158-1159 (Burton Crawford); Tr. Vol. 4, pp. 1279-1280 (Paul Ling).

A. **The Commission is entitled to deference in interpreting its own statutes.**

9. The Commission was correct in determining contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here, are the type that should be presented to the Commission for approval under K.S.A. 66-136. An agency is entitled to maximum deference when it is interpreting its organic statutes[11] - which for the Commission, includes K.S.A. 66-136.

10. A two-prong test was established by the U.S. Supreme Court for determining when deference is due to an agency's interpretation of its own organic statutes. First, a reviewing court must determine whether the legislature has spoken directly to the precise question at issue.[12] If the legislature has not spoken directly to the precise question at issue, then the court must determine whether the agency's interpretation is reasonable.[13]

11. CURB believes the filing of agreements requiring a utility to retrofit a major base-load generating facility to reduce emissions, which the utility asserts it would have to shut down the plant if it failed to meet the contractual deadline, is required under K.S.A. 66-136. However, it could be argued that the Kansas Legislature has not passed specific legislation requiring the filing of such agreements. Nonetheless, when the second prong of the two-prong test is examined (Is the Commission's interpretation of K.S.A. 66-136 reasonable?) - the answer is clearly "yes." At issue are agreements that will certainly affect KCPL and Westar's franchises and certificates of convenience. The Commission must exercise its jurisdiction over contracts that would undoubtedly affect the abilities of both of these public utilities to perform their obligations under their franchises

[11] *Chevron, USA, Inc. v. NRDC, 467* U.S. 837 (1984).
[12] *Id., at 842.*
[13] *Id., at 843.*

and certificates to protect the public interest. KCPL witnesses Burton Crawford and Paul Ling testified that the La Cygne generating units are a significant part of the Company's generating fleet and if the Company had to shut them down in 2015, it would affect the Company's ability to provide safe and reliable service and would negatively impact the Company's public service obligations. [14]

12. The U.S. Supreme Court has further clarified that an agency is entitled to *Chevron* deference even when it is interpreting the jurisdictional scope of its organic statute. [15] Other reasons have been advanced by the courts to justify the substantial deference granted to an agency's interpretations of its own organic statutes. One reason is that an ambiguity in a statute reveals a legislative intent to delegate to the agency quasi-legislative authority or discretion. [16] Here, the Commission has been granted by the legislature full and exclusive authority and jurisdiction to supervise, control, and regulate public utilities of the state, and when acting in the exercise of its delegated powers, is not acting as a quasi-judicial body, but rather is performing a legislative function. [17]

13. Another rationale for agency deference in interpretation is that an agency's expertise often places it in a better position than a reviewing court - not only to determine the legislature's

[14] Tr. Vol. 4, pp. 1158-1159 (Burton Crawford); Tr. Vol. 4, pp. 1279-1280 (Paul Ling).

[15] *Commodity Futures Trading Commission* v. *Schor,* 478 U.S. 833 (1986) (Supreme Court deferred to the Commodity Futures Trading Commission's position that it had jurisdiction over certain issues, specifically rejecting the argument that the agency's expertise was irrelevant because of the "statutory jurisdictional interpretation" nature of the issues.); *See also, NLRB v. City Disposal Sys., 465* U.S. 822, 830, n. 7 (1984) (Court's longstanding deference of the National Labor Relations Board's construction of the National Labor Relations Act noted, regardless of whether the disputed provisions were "substantive," "legal" or "jurisdictional.").

[16] *Investment* Co. *Inst.* v. *Conover, 790* F.2d 925,935 (D.C. Cir.) *("*Under *Chevron* decision, Congress may delegate interpretive authority implicitly, by failing to legislate in sufficient detail as to resolve a particular question of interpretation."), *cert. denied,* 479 U.S. 939 (1986).

[17] *Kansas Gas and Electric Co. v. State Corporation Commission,* 720 P.2d 1063, 239 Kan. 483, probable jurisdiction noted 107 S.Ct. 1281, 479 U.S. 1082, 94 L.Ed.2d 140, vacated in part 107 S.Ct. 2171, 481 U.S. 1044, 95 L.Ed.2d 829, appeal dismissed *Kansas City Power & Light Co. v. State Corporation Commission,* 107 S.Ct. 3280,483 U.S. 1036, 97 L.Ed.2d 795 (1986).

intent, but also to determine which interpretation of an ambiguous statutory phrase best comports with the agency's overall mission and regulatory priorities. [18] Under Kansas law, the Commission has the inherent authority to interpret its laws so as to insure effectiveness and uniformity of its procedures. [19]

14. A third reason is that agency interpretations preserve the agency's flexibility to adapt its statutory mandate to changing needs. [20]

15. In the instant matter, the Commission is exercising jurisdiction over a matter which has not been expressly prohibited in order to protect the public interest. Therefore, the Commission's actions fit squarely into the three additional justifications for agency deference.

B. The Plain Language of K.S.A. 66-136 Grants the Commission Authority Over These Agreements.

16. K.S.A. 66-136, as stated above, grants the Commission authority over contracts or agreements affecting a public utility's franchise or certificate of convenience and necessity. The Commission did not require the filing over every small and immaterial contract, but only contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here. The agreements with KDHE and Sierra Club clearly affect both KCPL's and Westar's public utility franchises and certificates of convenience and necessity.

17. The Commission is justified in exercising a "rule of reason" in determining which contracts and agreements must be filed for Commission review and approval. The Federal Energy Regulatory Commission ("FERC"), as the Commission has done, exercises an appropriate rule of

---

[18] *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467* U.S. *380, 389-90* (1984); *Udall v. Tallman, 380* U.S. 1, 16 (1965); *NLRB v. Hearst Publications, 332* U.S. 111, 130 (1944).
[19] *Pelican Transfer & Storage, Inc. v. State Corporation Commission,* 402 P.2d 762, 195 Kan. 76 (1965).
[20] *See,* Starr, *Judicial Review in the Post-Chevron* Era, 3 Yale J. on Reg. 283, 297 (1986).

reason in its application of Section 205(c) of the Federal Power Act. Section 205(c), balancing its desire not to deprive utilities the flexibility they need to manage their own affairs through substantial federal delay and extensive decision-making, with the need for full disclosure for the benefit of the public interest. [21] This practice has been affirmed by the D.C. Circuit Court, which specifically found that an agency's discretion can be exercised to address the most significant effects on rates and services. [22]

18. The contracts that the Commission has ordered to be filed for approval under K.S.A. 66-136 clearly impact the abilities of both KCPL and Westar to provide safe and reliable service and would negatively impact the Company's public service obligations. The Commission decision is both legally correct and in the public interest.

C. KCPL and Westar's Reliance on the *Kansas Electric* case is Misplaced.

19. KCPL and Westar both cite *Kansas Electric Utilities Company v. Kansas City, Kaw Valley & Western Railway Company* 108 Kan. 285 (1921) Order on Rehearing, 108 Kan. 293 ("*Kansas Electric*"), in support of their argument that K.S.A. 66-136 does not extend the Commission's approval authority to contracts that affect the Companies' franchises or certificates of public convenience or necessity. However, the Companies' reliance on the *Kansas Electric* decision is misplaced. While the *Kansas Electric* Court does find that the interurban railway involved did not have to file a contract with a street-railway company for Commission approval, the Court couched its decision as follows:

---

[21] *Town of Easton, Maryland v. Delmarva Power &Light Co., et al., 24* FERC 161,251 (1983) at 61,531; *See also, California 6 Independent System Operator Corp., 95* FERC 'I[61,195 (May 14, 2001); slip op. at *3-4; Prior Notice and Filing Requirements Under Part III of the Federal Power Act,* Final Order, 64 FERC ¶ 61,139 (1993) at 61,986-89.
[22] *City of Cleveland v. FERC, 773* F.2d 1368, 1376 (D.C. Cir. 1985).

> The contract did not transfer or lease any part of the franchise of the defendant, and did not refer to nor affect that franchise, *nor any right thereunder* within the meaning of the statute. [23]

20. In the instant case, the contracts the Commission is requiring to be filed clearly impact the abilities of both KCPL and Westar to provide safe and reliable service and would negatively impact the Company's public service obligations, and could significantly affect the rights of the Kansas ratepayers to just and reasonable rates as well as sufficient and efficient service.

21. The *Kansas Electric* Court further found that the public utilities commission did not have authority over this transaction because the contract was made:

> ... by an interurban railroad company under the control of that commission, with a street-railway company not under control of the commission, by which contract the interurban company acquires the right to run its cars over the tracks of the street-railway company, and does not modify, restrict, transfer, nor defeat any of the franchise rights of the interurban company. [24]

22. The facts in *Kansas Electric* are clearly distinguishable from the facts present here. The *Kansas Electric* case involved an effort by the interurban railway to improve service, a clear benefit to the public, by expanding its service through additional tracks. In the case at hand, the type of contract the Commission has required to be filed impacts the KCPL and Westar's ability to provide safe and reliable service and impact the Companies' public service obligations.

23. The *Kansas Electric* case was similarly distinguished by the Commission in an order issued on November 8, 2002, in Docket No. 01-WSRE-949-GIE regarding Westar's predecessor, *Western Resources, Inc.*.[25] In that Order, the Commission noted that Western Resources, Inc. argued that the *Kansas Electric* had limited the applicability of K.S.A. 66-136, and that the statute did not

---

[23] 108 Kan. at 298.
[24] *Id., Syl 7.*
[25] No. 51 Order Requiring Financial and Corporate Restructuring by Western Resources, Inc., November 8, 2002, Docket No. 01-WSRE-949-GIE, ¶ 58.

extend the Commission's approval authority to contracts that "may affect" the public utility.[26] The Commission disagreed, first stating the *Kansas Electric* decision involved an unaffiliated business and further noting the outcome may have been different had further factual showing been made regarding the effect on the regulated entity. The Commission specifically noted that "there was no disagreement between the majority and dissenting court on whether the public utility had the right to harm its ability to perform its public service obligations. No such right existed."[27] The applicable portion of the Commission's November 8, 2002 order is recited below:

> 58. Finally, with regard to K.S.A. 66-136, a statute that provides the Commission broad authority over all matters affecting the provision of utility service, WRI argues that case law has limited the applicability of the statute. Citing *Kansas Electric Utilities Company v. Kansas City, Kaw Valley & Western Railway Company* 108 Kan. 285, 289 (1921)(*Kaw Valley*), WRI argues that the statute does not extend the Commission's approval authority to contracts that "may affect" the public utility. However, in that case, the contract at issue involved an unaffiliated business, and not, as here, an affiliated company. *Kaw Valley* did not involve circumstances where, as here, all the relevant entities are affiliates; nor did it address entities and their managements that mixed utility and nonutility interests to the detriment of the public utility. Even so, the decision on rehearing in *Kaw Valley* shows that the outcome might have been different had further factual showing been made regarding the effect on the regulated entity. The majority court stated that the trial court's factual determination on whether K.S.A. 66-1336 was triggered was correct. *Id.* at 292. On rehearing, the majority court summarized its understanding of the facts, finding that the "contract carries into effect the defendant's franchise and does not assign, transfer, or lease it, nor any part of it, nor refer to or affect it, nor modify, restrict, or defeat its operation." *Id.* at 299. The point is further illustrated from the dissenting opinion where the dissenting court argued that the majority court's decision was based upon a misconception of the facts that would have required Commission approval under K.S.A. 66-136. *Id.* at 301. There was no disagreement between the majority and dissenting court on whether the public utility had the right to harm its ability to perform its public service obligations. No such right existed. *Id.* at 301.[28]

[26] *Id.*
[27] *Id.*
[28] *Id.* (emphasis added).

24. Also of note in the *Western Resources, Inc.,* 01-WSRE-949-GIE Docket is the Commission's rejection of a "management prerogative" argument made by Westar's predecessor, Western Resources, Inc., that is indistinguishable from the "management" argument made by KCPL[29] and Westar in their Petitions for Reconsideration. The Commission rejected this argument, finding the "Commission's obligation to protect the public utility from investment in nonutility businesses is triggered when there is a causal connection between the nonutility activities and a substantial likelihood of harm to the regulated public utility[30] and concluded:

> In sum, the Commission finds that the authority and obligations conferred upon it by statute to oversee and protect the integrity of utility operations provide ample basis and obligation for it to act to assure that WRI's ability and obligation to provide utility service on a basis that is just and reasonable, efficient and sufficient, is not compromised by management action that place the utility at risk for the benefit of nonutility business ventures.[31]

25. The Commission clearly has authority under K.S.A. 66-136 to require the filing and approval of contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here - contracts that Company witness have admitted impact the ability of the Company to provide safe and reliable service and would negatively impact the Company's public service obligations. The Commission decision is both legally correct and in the public interest.

D. The Commission Should Not Stay or Suspend Its Decision Regarding K.S.A. 66-136.

26. Neither KCPL nor Westar have cited sufficient reason to stay or suspend its decision

[29] KCPL Petition for Reconsideration, ¶¶ 19-21; Westar Petition for Reconsideration, ¶¶ 31-35.
[30] No. 51 Order Requiring Financial and Corporate Restructuring by Western Resources, Inc., November 8, 2002, Docket No. 01-WSRE-949-GIE, ¶ 63.
[31] *Id.,* at ¶ 66 (emphasis added).

regarding the filing of contracts that significantly affect a utility's franchise or certificate of convenience and necessity. The agreements at issue are contracts that Company witnesses have admitted impact the abilities of the Company to provide safe and reliable service and would negatively impact the Company's public service obligations. As such, potential harm to Kansas ratepayers may occur if these types of contracts are not submitted for review and approval by the Commission. In this docket, it can be argued that had the Commission been presented with these contracts, the Companies might not have been under the time deadlines it agree to in those contracts, and therefore the Commission decision would not have been time critical as it was under the circumstances of those contracts.

27. Again, KCPL has misinterpreted the Commission's Order as requiring the filing of any contract "based solely upon whether they involve material amounts of money or whether there would be a financial impact on the Company."[32] The Commission's August 19th Order does not contain this language, but instead states, "Going forward, the Commission concludes contracts that significantly affect a utility's franchise or certificate of convenience and necessity, such as the agreements at issue here, are the type that should be presented to the Commission, not just its Staff."

28. Likewise, KCPL provides no basis for its claim that "a flood of contracts" will be filed in light of the Commission's decision.[33]

29. Nothing prevents KCPL or Westar from requesting a general investigation be opened to obtain further clarification if needed.

---

[32] Motion of Kansas City Power & Light Company to Stay or Suspend in Part the Commission's Order Regarding K.S.A. 66-136., ¶ 5.
[33] *Id.*, at ¶ 4.

IV. The Commission's Decision Denying KCPL and Westar the Ability to Pass Through Costs of the La Cygne Project Through an ECRR was Correct and Supported by Substantial Competent Evidence.

30. The language defining the Commission's authority to issue an order setting for the rate-making principles and treatment that will be applicable to the public utility's stake in the generating facility under K.S.A. 66-1239(c)(4) is clear:

> The Commission shall issue an order setting forth the rate-making principles and treatment that will be applicable to the public utility's stake in the generating facility or to the contract in all rate-making proceedings on or after such time as the generating facility is placed in service or the term of the contract commences.

31. As correctly noted by the Commission, K.S.A. 66-1239(c)(4) only authorizes the Commission to issue an order setting forth rate-making principles and treatment that will be applicable on and after such time as the generation facility is placed in service."[34]

32. KCPL cites the provisions of K.S.A. 66-128(b)(2)(C) as supporting its position that the Commission may authorize an ECRR under K.S.A. 66-1239(c)(4). However, the provisions of 66-1239(c)(4) do not incorporate or reference the terms or definitions contained in K.S.A. 66-128(b)(2)(C), which admittedly apply to CWIP, not predetermination.

33. Furthermore, the Commission's decision that use of an ECRR is not appropriate under the circumstances of the La Cygne retrofit are supported by substantial competent evidence, which is summarized below:

- The Commission noted that an ECRR mechanism is not specifically provided for by statute, but has been implemented by the Commission in a past case involving Westar based on the specific circumstances of that case dealing with recovery of its mandated federal environmental compliance costs.[35]

---

[34] August 19, 2011, Order Granting KCP&L's Petition for Predetermination of Rate-Making Principles and Treatment, ¶ 76 (emphasis added).
[35] *Id.*, at ¶76.

- The Commission declined to allow KCP&L to recover its environmental costs for the La Cygne unit retrofits at issue in this proceeding through an ECRR in a previous proceeding.[36]
- Subsequent to the Westar case and this matter, the Kansas legislature enacted statutes that provided for recovery of Construction Work in Progress (CWIP).[37]
- KCP&L seeks recovery of costs for a construction project that is expected to require four years to complete.[38]
- K.S.A. 2010 Supp. 66-1239(c)(4), the provision under which KCP&L filed its application in this matter, states that "The commission shall issue an order setting forth rate-making principles and treatment that will be applicable on and after such time as the generating facility is placed in service."[39]
- Staff Witness McClanahan listed concerns the Commission expressed when denying KCP&L's request for an ECRR in Docket 10-415 and asserted that no new compelling evidence has caused Staff to reconsider this issue.[40]
- Staff pointed out benefits from using an ECRR will be reduced if KCP&L files rate cases during the life of the La Cygne Project, Giles recognized this to be a possibility.[41]
- Staff further argued an ECRR for KCP&L and Westar were not equivalent, noting Westar's ECRR will include more projects than La Cygne and KCP&L's ECRR will require additional calculations to separate Kansas and Missouri jurisdictional costs.[42]
- Staff was also concerned that Kansas ratepayers will not realize the full benefit of an ECRR because KCP&L does not have an ECRR in Missouri.[43]
- As a result of rate increases over the last four years, Staff noted that an ECRR would not provide the rate stability claimed by KCP&L, but would simply continue a trend of annual rate increases.[44]
- CURB, like Staff, asserted reasons given for rejecting KCP&L's request for an ECRR in Docket 10-415 have not changed.[45]
- KCP&L's customers have had rate increases of $138 million during the last 5 years (a 40% overall increase) in the four rate cases in KCP&L's Resource Plan from Docket 04-1025, and these rate increases will continue using an ECRR.[46]
- CURB also argued K.S.A. 2010 Supp. 66-1239(c)(4) precludes use of an ECRR by requiring the Commission to issue an order establishing rate-making principles and treatment "that will be applicable to the public utility's stake in the generating facility ... in all rate-making proceedings on and after such time as the generating facility is placed in service."[47]

---

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*, at 81.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*, at 82.
[46] *Id.*
[47] *Id.*

- The ECRR is a Commission creation and directly conflicts with this explicit statutory language requiring any rate-making treatment be applied "on or after" the plant comes online."[48]
- Staff has no more than 5 days to review Westar's ECRR, and CURB has only 15 days, which is not adequate time to review prudence of a project or the specific expenditures.[49]
- Westar's ECRR submission does not contain as much information as supplied in this predetermination docket, such as a supply plan model, load forecast data, demand response information, or data about alternatives.[50]
- Collecting costs annually from customers through an ECRR results in more total dollars to the utility on a net present value basis than if construction costs are placed in AFUDC and carried until the next utility rate case.[51]
- The Commission noted many differences between the ECRR being considered here and the rate recovery proposal initially presented to the Commission by Westar in Docket 05-981.[52]
- The rider the Commission approved in Docket 05-981 almost six years ago allowed Westar to recover its costs for making specific environmental improvements on identified generation plants under EPA requirements imposed on Westar. No questions were raised then about whether the underlying generation plant should be retrofitted or closed. Tr. Vol. 4, 893 (Pavlovic) ("The issue of retrofit for environmental reasons is a relatively new one."). With this docket, the Commission finds itself in a new era with a different set of statutes and proposed environmental upgrades based on contractual commitments and, as yet, environmental rules and regulations that have not been fully implemented by the EPA. The consideration in this case involved a complex assessment of a broad range of alternatives that included major changes to the facility. Use of an ECRR is not appropriate for such circumstances.[53]
- The ECRR in this case appears to have become a mechanism for increasing a utility's annual revenues to satisfy demands for growth made by the financial community rather than a mechanism for dealing with environmental compliance costs. The report by J.P. Morgan is attached to KCP&L's witness Cline's Direct Testimony provided particular insight into how the financial community views environmental riders and predetermination.[54]
- Although the Commission found the definitive estimate for the La Cygne Project reasonable given anticipated compliance with environmental requirements, the project will have a significant impact on ratepayers' bills. Recent downturns in the economy have placed stress upon many ratepayers of both KCP&L and Westar.[55]
- The Commission noted that many of the environmental improvements included in the La Cygne Project will meet requirements that have not yet been fully implemented, but instead

[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* Westar's argument that "Mr. Rohlfs' testimony on this matter was unchallenged and uncontradicted is therefore incorrect. See, CURB Post-Hearing Brief, ¶¶ 65-69; Tr. Vol. 5, pp. 1568-1574.
[52] *Id.*, at 83.
[53] *Id.*
[54] *Id.*, at 84.
[55] *Id.*, at 85.

are anticipated to take effect in the future. Significant questions have arisen regarding the modified cap and trade feature of the CSAPR, the availability of excess credits, the market that may develop for such credits, and the potential cost of credits. [56]

- The potential future cost that utility companies will undoubtedly expect customers to bear is presently unforeseeable or speculative at best, but undoubtedly will be significant. The parties recognized many uncertainties exist regarding determinations the Commission must make in this proceeding. Predicting what Congress will do in the future is one of the biggest uncertainties, including decisions about the environment and the future of the EPA. [57]
- Based upon its review of the entire record in this proceeding, the Commission denies KCP&L's request for an ECRR to pass through costs of the La Cygne Project to its ratepayers. Although Westar was not an applicant in this proceeding, it participated throughout this administrative process as an intervenor. For that reason, the Commission further makes clear in this Order that costs of the La Cygne Project as described in this Order and identified as a definitive cost in KCP&L Exhibit 5, will not be passed through Westar's ECRR to its customers. [58]

34. The reasons cited for denying KCPL's recovery of costs through an ECRR were likewise applied to Westar, and nothing in Westar's Petition for Reconsideration demonstrates the Commission's decision was erroneous and not based on substantial competent evidence. The circumstances have simply changed from those involved in Westar's original ECRR proceeding, and the Commission's decision is supported by the substantial competent evidence cited above.

V. KCPL Is Estopped from Seeking Reconsideration by Announcing Its Agreement to Proceed with the La Cygne Project Retrofit Pursuant to the Commission's Predetermination of Rate-Making Principles.

35. KCPL has publicly announced it would proceed with the La Cygne project retrofit pursuant to the Commission's August 19, 2011. [59] KCPL apparently believes it can "pick and

---

[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Attachment 2: Great Plains Energy, Inc. 8-K, August 29, 2011, p. 3, Item 8.01 ("KCP&L expects to proceed with the project in September 2011.").