

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of a General Investigation)
Regarding the Acceleration of Replacement of)
Natural Gas Pipelines Constructed of Obsolete)
Materials Considered to be a Safety Risk.) Docket No. 15-GIMG-343-GIG

BRIEF ON JURISDICTIONAL QUESTION

Pursuant to the Kansas Corporation Commission's ("Commission") Order Setting Procedural Schedule issued March 19, 2015, Black Hills/Kansas Gas Utility Company, LLC, d/b/a Black Hills Energy ("Black Hills Energy") submits the following brief on the question of whether the Commission has jurisdiction and authority to establish alternative ratemaking methodologies for pipe replacement that go beyond the parameters established under the Gas Safety Reliability Policy Act ("GSRS Act").¹ Black Hills Energy submits that the Commission has such authority for the reasons set forth in this brief.

I. **THE COMMISSION HAS LEGAL AUTHORITY TO CONSIDER AND APPROVE ALTERNATIVE RATEMAKING METHODOLOGIES FOR PIPE REPLACEMENT THAT GO BEYOND THE GSRS ACT**

1. The answer to whether the Commission has authority to approve alternative ratemaking methodologies for pipe replacement that go beyond the GSRS Act is found in the 2006 Kansas Court of Appeals case *Kansas Industrial Consumers Group, Inc. v. The State Corporation Commission of the State of Kansas*, 36 Kan.App.2d 83, 138 P.3d 338 (2006), review denied November 8, 2006 ("*KIC case*").

2. In the *KIC* case, a group of industrial customers challenged the Commission's authority to approve two alternative rate-recovery mechanisms for Westar Energy, an energy cost adjustment

¹K.S.A. 66-2201, *et seq.*

("ECA") and an environmental cost recovery rider ("ECRR").² Both surcharges are similar in nature to the alternative ratemaking methodologies for pipe replacement that are proposed by the Commission Staff and the gas utilities in that they will allow the utility to recover its actual cost outside the context of a rate case in order to address the regulatory lag built into the traditional ratemaking process involving litigated rate cases.³ The industrial customers argued (1) changes in rates were required by law to be done in a full blown rate case and not through alternative rate mechanisms,⁴ or in other words, the Commission had no authority to approve alternative rate mechanisms; and (2) since the Legislature had allowed for certain surcharges through legislation, but had not included an ECA or ECRR surcharge in those allowed surcharges, the Commission lacked authority to approve an ECA or ECRR.⁵ The Court rejected both arguments.⁶

3. In finding the Commission had authority to approve alternative rate-recovery mechanisms and was not limited to making all rate changes in the context of a rate hearing, the Court focused its attention on the language contained in K.S.A. 66-117, which sets forth the procedures to implement a public utility rate change.⁷ The Court stated that "K.S.A. 66-117, does not require on its face, every change in rates to be approved in a full-blown rate hearing."⁸ The Court found that

²*Kansas Industrial Consumers Group, Inc. v. The State Corporation Commission of the State of Kansas*, 36 Kan. App. 2d 83, 87, 94-95, 138 P.3d 338 (2006), review denied November 8, 2006.

³*Id.*

⁴*Id.* 36 Kan. App. 2d at 91.

⁵*Id.* 36 Kan. App. 2d at 94-95.

⁶*Id.* at 36 Kan. App. 2d at Syl. 2.

⁷*Id.* at 36 Kan. App. 2d at 92.

⁸*Id.*

because the statute begins with the language "Unless the state corporation commission otherwise orders...", the Legislature had provided the Commission the authority to approve alternative rate-recovery mechanisms outside the traditional ratemaking process.⁹ The Court also indicated the Commission's interpretation that it was granted full power and authority to supervise and control utilities and that those powers were to be liberally construed and the Commission was given all incidental powers necessary to carry into effect the provisions of the public utility act, as expressly granted by the Legislature under the public utility act, was correct.¹⁰

4. With respect to the industrial customers' argument that under the doctrine of *expressio unius est exclusio alterius*, i.e., the inclusion of one thing implies the exclusion of another, the Legislature's actions in permitting surcharges for specific types of expenses infers an intent not to permit surcharges for expenses not specifically authorized by statute, which is parallel to the argument that the GSRS Act excludes all other alternative rate recovery mechanisms relating to pipe replacement, the Court in rejecting that argument found that courts are especially reluctant to apply the doctrine when defining the authority of a regulatory agency.¹¹ The Court concluded as long as the Commission is acting under its broad powers and does so in a reasonable and lawful manner, it has the statutory authority to approve alternative rate mechanisms and surcharges even if such are not included in the list of surcharges that have been approved by the Legislature.¹²

5. A close look at the GSRS Act shows that it was adopted by the Legislature to require

⁹*Id.* at 36 Kan. App. 2d at 93.

¹⁰*Id.* at 36 Kan. App. 2d at 94.

¹¹*Id.* at 36 Kan. App. 2d at 96.

¹²*Id.* at 36 Kan. App. 2d at 97.

the Commission to allow natural gas utilities to recover costs relating to two specific items: (1) costs incurred by the utility to comply with pipeline safety requirements (as costs related to fixing leaking pipes, cathodic protection, and other items specifically mentioned in the pipeline safety act and not those projects relating to the acceleration of replacement of obsolete piping); and (2) costs incurred by the utility when it is requested by government entities to relocate its pipeline. (K.S.A. 66-2202(f) (definition of projects covered by GSRS)).¹³ The Legislature under the GSRS Act stated that the Commission shall allow recovery of these two types of cost under the GSRS surcharge when requested by the gas utility. There is no language contained in the GSRS Act that suggested the Legislature intended for the Commission to be precluded from looking at other alternative rate mechanisms to cover cost recovery for pipeline projects. Nor is there any language suggesting that natural gas utilities are precluded from requesting some other type of recovery mechanism, or that the GSRS surcharge was the only mechanism that could be approved by the Commission with respect to pipeline replacement. Instead, the GSRS Act simply required the Commission to allow a utility to implement a GSRS surcharge when requested by the utility. As in the *KIC* case, it is fair to assume the intent to permit the GSRS surcharge by the Legislature did not preclude natural gas utilities from asking for other types of mechanisms, or the Commission from approving other alternative rate mechanisms dealing with cost recovery of pipeline projects, and according to the Court, as long as the Commission's decision to implement other mechanisms is reasonable and lawful, such will be upheld as being within their powers to do so. Accordingly, the Commission has the legal authority under its broad incidental powers to approve alternative ratemaking methodologies for pipe replacement that go beyond the GSRS Act.

¹³K.S.A. 66-2202(f).

II. FROM A POLICY STANDPOINT THE COMMISSION SHOULD NOT SIMPLY REJECT THE ALTERNATIVE RATEMAKING METHODOLOGIES FOR PIPE REPLACEMENT BECAUSE THE LEGISLATURE ADOPTED THE GSRS ACT

6. There is a reason why the Legislature provided the Commission with broad authority and specifically indicated in the statutes establishing the Commission's authority that the Commission's powers shall be liberally construed and the Commission shall be conferred all incidental powers necessary to carry out the provisions of the Public Utility Act.¹⁴ The Legislature has entrusted the Commission, with its Staff of experts, to supervise and control the utilities that operate in Kansas. A review of the actual authority the Legislature has conferred upon the Commission clearly demonstrated why from a policy standpoint the Commission should not simply reject the alternative ratemaking proposals because the Legislature has adopted the GSRS Act. Instead, the Commission should use the powers that were conferred upon it by the Legislature, take advantage of the experts that it has working for it, as well as the expertise of the utility, and make its decision on whether to approve the alternative ratemaking proposals to replace obsolete pipe, based upon the merits of such proposals.¹⁵

III. CONCLUSION

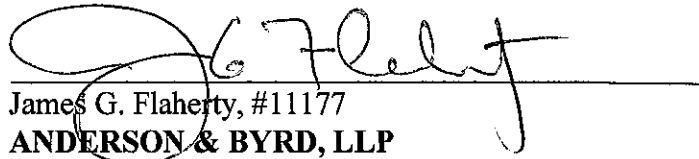
7. The Commission has the authority to consider and approve alternative ratemaking proposals for pipe replacement that go beyond the parameters established under the GSRS Act for the reasons set forth herein.

8. Black Hills Energy has had an opportunity to review the Brief Regarding Jurisdictional

¹⁴K.S.A. 66-1,201. "The Commission is given full power, authority and jurisdiction to supervise and control the natural gas public utilities... doing business in Kansas and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

¹⁵See testimony provided by Staff Witness Haynos in the 320 Docket.

Issues being filed in this docket by Kansas Gas Service, a Division of ONE Gas, Inc. ("KGS"), and concurs with the statements and conclusions set forth in KGS's brief.



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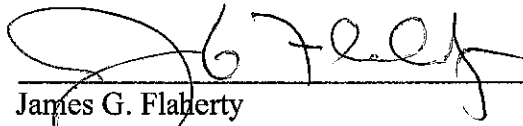
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VERIFICATION

STATE OF KANSAS, COUNTY OF FRANKLIN, ss:

James G. Flaherty, of lawful age, being first duly sworn on oath, states: That he is an attorney for Black Hills/Kansas Gas Utility Company, LLC, d/b/a Black Hills Energy; that he has read the above and foregoing Brief on Jurisdictional Question, knows the contents thereof; and that the statements contained therein are true.




James G. Flaherty

SUBSCRIBED AND SWORN to before me this 17th day of April, 2015.



Appointment/Commission Expires:



Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent by electronic mail this 17th day of April, 2015, addressed to:

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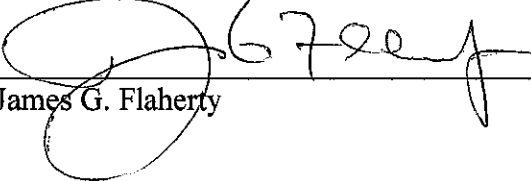
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