THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas City Power & Light Company to Modify Its Tariffs to Continue the Implementation of Its Regulatory Plan.	))))	Docket No. 10-KCPE-415-RTS

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

The Citizens' Utility Ratepayer Board (CURB), pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. § 82-1-235, hereby petitions the Commission for reconsideration and/or clarification of several aspects of its November 22, 2010, Order: 1) Addressing Prudence; 2) Approving Application, In Part; & 3) Ruling on Pending Requests (Order). Specifically, CURB is requesting that the Commission reconsider and/or clarify the portions of its order (a) approving rate case expenses, (b) granting KCPL's Accumulated Deferred Income Tax Adjustment, (c) adopting the Handy-Whitman Index for KCPL's generation/production maintenance expense, and (d) amortizing KCPL's SO_2 emission allowance proceeds over a 22-year period. In support of its Petition for Reconsideration and/or Clarification, CURB states as follows:

I. THE COMMISSION SHOULD RECONSIDER AND/OR CLARIFY ITS DECISION REGARDING RATE CASE EXPENSE.

1. CURB respectfully requests that the Commission reconsider its decision to allow KCPL to recover $5,669,712 in rate case expense from ratepayers. The Commission arrived at this amount utilizing KCPL's summarized, estimated, and unsupported rate case expense claim submitted after the discovery deadline, after the Evidentiary Hearing, and after the record was closed. The revised rate case expense claimed by KCPL was nearly four times the amount in the record

during the hearing and claimed in the Company's Application ($8.3 million vs. $2.1 million). Even after reducing the $8.3 million request, the additional $3.5 million[1] contained in the $5.6 million in rate case expenses awarded by the Commission constitutes one of the largest revenue requirement adjustments in this proceeding without providing parties any opportunity to conduct discovery, cross examine witnesses, brief or argue the issue. This results in an unreasonable denial of due process as well as an increase in the Company's revenue requirement by over one million dollars annually.

2. CURB would also request that the Commission reconsider or clarify its finding that "No party recommended a specific adjustment to rate case expense."[2] As subsequently noted by the Commission in its Order, CURB presented testimony opposed any rate case expense above the $2.1 million contained in KCPL's application and presented during the hearing, as well as recommending that rate case expense be shared between shareholders and ratepayers.[3]

3. Finally, CURB seeks reconsideration and/or clarification regarding the portion of the Commission's Order designating the rate case expenses approved as "Interim Rate Relief." This decision is erroneous, vague and ambiguous, arbitrary and capricious, and unsupported by substantial competent evidence. The Interim Rate Relief language is vague and ambiguous and will result in retroactive ratemaking or require ratepayers to overcompensate KCPL for excessive rate case expense.

4. CURB will address each of the above issues relating to rate case expense separately below.

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[1] The $3.5 million is the amount awarded over the $2.1 million in rate case expense claimed in the Company's Application and contained in the record at hearing.
[2] Order, p. 86.
[3] *Id.*

A. The Commission Should Reconsider Its Decision To Award Rate Case Expense Exceeding the $2.1 Million Contained In The Application And The Record.

5. In its Order, the Commission correctly noted the following well established principles governing the recovery of rate case expenses:

- The Company has the burden of proof to establish that its requested rate case expenses are both known and measurable[4] and reasonable and prudent.[5]
- The record must contain substantial evidence to support the Commission's decision granting rate case expense.[6]
- To recover rate case expense costs, the Commission requires a company to provide actual documentation of expenses incurred rather than relying on estimates.[7]

6. KCPL failed to meet the above appropriate standards of proof by evidence that is substantial when viewed in light of the record as a whole, which the Commission's findings demonstrate with clarity. With respect to the Commission requirement to provide actual documentation of expense incurred rather than relying on estimates, the Commission specifically held that its attempt to "determine rate case expense was hampered by a lack of detailed information in the record."[8] The Commission further found that the following required detailed information was "not contained in this record":

- Information about the time and amount of services rendered,
- The general nature and character of the services revealed by the invoices,
- Whether attorneys or consultants presented testimony or other tangible work product that was made a part of the record,
- The nature and importance of the litigation, and

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[4] *Id.*, at p. 87, citing *Home Telephone Co. v. Kansas Corporation Comm'n,* 31 Kan. App. 2d 1002, 1015,76 P.3d 1071 (2003).
[5] Order, p. 87, citing *Kansas Industrial Consumers v. Kansas Corporation Comm'n,* 36 Kan. App. 2d. 83, 111, 138 P.3d 338 (2006). *E.g., Gulf States Utility Company v. Texas Public Utility Comm'n,* 128 P.U.R. 4th 441, 446 (D. Tex. 1991).
[6] *Id.*, citing *Home Telephone Co.,* 31 Kan. App.2d at 1015. *See also, Westar Energy v. Wittig,* __ Kan. App.2d ___, ___, 235 P.3d 515, 529 (2010).
[7] Order, p. 88, citing *In the Matter of an Audit and General Rate Investigation of Rural Telephone Company,* KCC Docket 01-RRLT-083-AUD, Order Setting Revenue Requirements, issued June 26, 2001, ¶ 70.
[8] Order, p. 88. (emphasis added).

- The degree of professional ability, skill, and experience called for and used during the course of the proceeding.[9]

7. Despite finding the absence of any of the required detailed information in the record, the Commission erroneously interpreted or applied the law[10] when it concluded it would be improper to deny recovery of all rate case expense.[11] In reaching this conclusion, the Commission erroneously interpreted and applied the law cited in support of its decision, *Columbus Telephone Co. v. Kansas Corporation Comm'n,* 31 Kan. App.2d 828, 835, 75 P.3d 257 (2003). Careful examination of the *Columbus Telephone Co.* case reveals no basis for the Commission's conclusion, especially in light of the summarized, estimated, and unsupported rate case expense submitted by the Company.

8. In *Columbus Telephone Co.,* the Court of Appeals affirmed the KCC's denial of expenses incurred after a settlement was reached in a rate case.[12] While the decision recites well-established law on the recovery of prudently incurred rate case expenses, nothing in *Columbus Telephone Co.* supports the Commission's decision to approve rate case expense based on KCPL's summarized, estimated, and unsupported information. The *Columbus Telephone Co.* decision merely held that the KCC's decision to deny the post-settlement rate case expenses did not render its overall true-up adjustment or final revenue requirement outside the zone of reasonableness.[13]

9. After reaching its conclusion to award rate case expense (above the $2.1 contained in the Application), the Commission concluded it would "exercise its judgment to determine an amount of rate case expense that is prudent, just and reasonable, that KCPL will be allowed to recover from

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[9] Order, pp. 88-89, citing: *In re Union Electric Co.,* 2010 WL 1178770, at 7; *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n,* 116 S.W.3d 680, 693 (Mo App. 2003); *Westar Energy,* __ Kan. App.2d ___, ___, 235 P.3d 515, 529 (2010); Kansas Rules of Professional Conduct (KRPC) 1.5(a) (2009 Kan. Ct. R. Annot. 460).
[10] K.S.A. 77-621(c)(4).
[11] Order, p. 89. (emphasis added).
[12] *Columbus Telephone Co.,* 31 Kan. App. 2d at 834-36.
[13] *Id.,* at p. 836.

ratepayers as a part of this proceeding."[14] In support of this decision, the Commission cites the decisions of *Sheila A. v. Whiteman,* 259 Kan. 549, 565, 913 P.2d 181 (1996) and *In re Petition of PNM Gas Services,* 129 N.M. 1, 25-27 (NM Sup. 2000).[15]

10. However, the Commission again erroneously interpreted or applied the law,[16] because neither of these decisions involved summarized, estimated, and unsupported fee claims. In this proceeding, KCPL sought $2.1 million in rate case expense which was not supplemented through the close of the hearing and the record. After the discovery deadline, the evidentiary hearing, and the record was closed - KCPL submitted a claim for an additional $6.2 million in rate case expense.

11. KCPL's claim for over $6.2 million in additional rate case expense was summarized, estimated, and unsupported. Both of the above decisions cited and relied upon by the Commission involve claims for excessive but well-documented fees, not summarized and estimated expenses unsupported by the detailed information the Commission has held must be provided in order to be recovered from ratepayers.[17]

12. The Commission's award of $5.6 million[18] in rate case expenses, based on KCPL's summarized, estimated, and unsupported claim, is erroneous,[19] unreasonable, arbitrary and capricious,[20] and not based on substantial competent evidence when viewed in light of the record as a

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[14] Order, p. 89, citing *In re Petition of PNM Gas Services,* 129 N.M. 1, 25-27 (NM Sup. 2000) (Commission should reduce fees to a reasonable and prudent amount rather than completely deny excessive rate case expense.). See also, *Sheila A. v. Whiteman,* 259 Kan. 549, 565, 913 P.2d 181 (1996) (trial court erred in denying plaintiffs' entire claim for expenses in lengthy class action suit).
[15] *Id.*
[16] K.S.A. 77-621(c)(4).
[17] Order, pp. 87-88.
[18] $6.2 million of KCPL's $8.3 million claim for rate case expense was admittedly submitted after discovery was closed, the hearing had concluded, and the record was closed. Order, pp. 86, 90, 95. (emphasis added).
[19] K.S.A. 77-621(c)(4).
[20] K.S.A. 77-621(c)(8).

whole.[21] This is further demonstrated by the following findings made by the Commission in the Order:

- "KCPL submitted *summarized* total expenses to September 30, 2010, and *estimated* expenses until the end of this proceeding. The documentation to support these *estimates* contains very little detailed information that would enable the Commission to make an individualized review of charges by specific consultants and attorneys. In fact, documentation presented for some vendors, including law firms, provides nothing by which to determine total hours, hourly rates, subject matter addressed, etc."[22]
- "[B]ecause a detailed record is not available, the Commission is not able to evaluate specific amounts that should be allowed for each consultant or attorney."[23]
- "The Commission has reviewed *estimates* from the numerous expert consultants KCPL used in this case. The Commission finds that generally KCPL's decisions regarding use of consultants were prudent. To the extent these consultants conducted studies or otherwise provided information that is in the administrative record of this proceeding and did not duplicate work of other witnesses, these costs are considered prudent, just and reasonable."[24]
- "The estimated expenses for housing attorneys, consultants, and KCPL employees during the Evidentiary Hearing were high considering the Company's proximity to the Commission's Offices."[25]
- "KCPL hired numerous capable attorneys to litigate this proceeding."[26]
- "KCPL *estimated* rate case expense attributable to legal services only exceeds $5 million in this case. Based upon its experience in rate case proceedings, the Commission finds this amount excessive, even accounting for the complex issues considered in this proceeding. In considering attorney fees, the Commission was particularly struck by the lack of detail defining services performed by the numerous attorneys that made no appearance in this proceeding. Information was not provided that would have allowed the Commission to determine an appropriate hourly rate or number of hours expended by attorneys involved in this case. Invoices from some firms reflected charges for multiple attorneys working on multiple projects for KCPL with a portion attributed to this proceeding but no explanation about how that amount was determined."[27]
- "The Commission found *estimated* charges for some legal services particularly disconcerting."[28]
- "Nor will the Commission approve recovery of costs for Morgan Lewis & Bockius as rate case expense. One attorney from this firm, Barbara VanGelder, appeared during the first

[21] K.S.A. 77-621(c)(7).
[22] *Id.*, at p. 89. (emphasis added).
[23] *Id.*, at p. 90. (emphasis added).
[24] *Id.*, at p. 91. (emphasis added). Of course, parties to this proceeding were not provided any opportunity to investigate, cross examine, brief, or argue whether these estimates were duplicative or prudent.
[25] *Id.*, at p. 91. (emphasis added).
[26] *Id.*, at p. 92. (emphasis added).
[27] *Id.*, at p. 92. (emphasis added).
[28] *Id.*, at p. 93. (emphasis added).

week of the three-week hearing and cross-examined Staffs expert witness on prudence, Walter Drabinski. Other attorneys were present throughout this entire hearing, including two former KCC General Counsels, one former KCC Assistant General Counsel, and KCPL's in-house counsel. Apparently Van Gelder was hired specifically to cross-examine Drabinski. KCPL is free to decide how it will present its case, but this firm's involvement clearly duplicated work being performed by other very capable attorneys. Allowing expenses for Morgan Lewis to be recovered from ratepayers in rate case expense would be unjust and unreasonable."[29]

- "The Commission is also concerned that, based upon review of a small number of invoices, that errors exist in KCPL's estimate of costs. ... Although this is not a significant amount, the Commission is concerned other errors are contained in KCPL's statement of rate case expense."[30]
- "The Commission finds expenses requested for Schiff Hardin particularly troubling. This firm served KCPL in several roles. One attorney from Schiff Hardin, Kenneth M. Roberts, testified at the hearing about advice this firm gave KCPL's management related to construction projects, suggesting the firm acted as a consultant. But a significant number of exhibits in the record reflect deleted material based upon KCPL's attorney/client privilege with Schiff Hardin. No attorney from Schiff Hardin entered an appearance in this proceeding, but Roberts and at least one other attorney were present during the first week of the hearing. (footnote omitted). Schiff Hardin invoices confirm the hourly rates for its attorneys exceed those for experienced attorneys in the Kansas City metropolitan area. Roberts testified his hourly rate was $550. (footnote omitted). Recently, the local hourly rate for an experienced attorney in the Kansas City metropolitan area with specialized expertise was determined to be $295. (footnote omitted). The highest hourly rate for the most experienced attorney representing KCPL from the Kansas City metropolitan area in this proceeding is $390. Unfortunately, the record is not adequate to allow the Commission to consider whether adopting a "fee customarily charged in the locality for similar legal services" is appropriate for this case, as allowed in KRPC 1.5(a)(3), and, if appropriate, to determine that rate."[31]
- "Even though the issues were complex, the Commission finds it unreasonable to require ratepayers to be responsible for the entire rate case expense costs being sought by KCPL. The Commission is particularly concerned about requiring ratepayers to pay such high legal costs when no opportunity is available to review the services rendered to evaluate whether law firms adjusted charges for duplication of services of multiple attorneys when setting their fees."[32]

13. As stated by the Commission, "To recover rate case expense costs, the Commission has required a company to provide actual documentation of expenses incurred rather than relying on

[29] *Id.*, at p. 93. (emphasis added).
[30] *Id.* (emphasis added).
[31] *Id.*, at p. 94. (emphasis added).

estimates."[33] Further, the documentation must include detailed information regarding "the time and amount of services rendered, the general nature and character of the services revealed by the invoices, whether attorneys or consultants presented testimony or other tangible work product that was made a part of the record, the nature and importance of this litigation, and the degree of professional ability, skill, and experience called for and used during the course of the proceeding."[34] The Commission found that this detailed information was "not contained in this record."[35]

14. The foregoing Commission findings make it abundantly clear that the Commission's award of rate case expense above the $2.1 million in KCPL's Application and presented at hearing is based on summarized, estimated, and unsupported rate case expenses. Notwithstanding the Commission's expertise in knowledge and experience from other rate cases, the Commission cannot rationally base its reduced award of $5.6 million on the $8.5 million of summarized, estimated, and unsupported rate case expenses submitted by KCPL. To do so is erroneous,[36] unreasonable, arbitrary and capricious,[37] and not based on substantial competent evidence when viewed in light of the record as a whole.[38]

15. Furthermore, parties were not afforded any due process with respect to the rate case expenses submitted after the discovery deadline had expired, after the hearing had concluded, and after the record had been closed. The Commission's decision effectively allows recovery of $3.5 million above the $2.1 million contained in the application and in the record during the hearing of

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[32] *Id.*, at pp. 94-95. (emphasis added).
[33] *Id.*, at p. 88.
[34] Order, pp. 88-89, citing: *In re Union Electric Co.*, 2010 WL 1178770, at 7; *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n,* 116 S.W.3d 680, 693 (Mo App. 2003); *Westar Energy,* __ Kan. App.2d ___, ___, 235 P.3d 515, 529 (2010); Kansas Rules of Professional Conduct (KRPC) 1.5(a) (2009 Kan. Ct. R. Annot. 460).
[35] Order, pp. 88-89.
[36] K.S.A. 77-621(c)(4).
[37] K.S.A. 77-621(c)(8).

this matter. This unreasonably denied CURB and all parties substantive and procedural due process. By allowing this, the Commission engaged in an unlawful procedure or failed to follow prescribed procedure.[39]

16. As a result, the Commission's decision to award rate case expenses in excess of the $2.1 million contained in the Application, based on the Company's summarized, estimated, and unsupported rate case expenses, is erroneous, unreasonable, arbitrary and capricious, and not based on substantial competent evidence when viewed in light of the record as a whole. Further, the Commission has denied CURB and all parties substantive and procedural due process, and therefore has engaged in an unlawful procedure or has failed to follow prescribed procedure.

17. Based on the above, CURB respectfully requests that the Commission reconsider its decision to award KCPL $5,669,712 million in rate case expense. The amount awarded to KCPL should be limited to the $2.1 million contained in the Company's Application which was the only amount which the parties were afforded due process opportunities to conduct discovery, cross-examine witnesses, brief, and argue in this proceeding.

B. The Commission Should Reconsider Or Clarify Its Finding That No Party Recommended A Specific Adjustment To Rate Case Expense.

18. In its decision granting the $5.6 million in rate case expense, the Commission erroneously determined: "No party recommended a specific adjustment to rate case expense."[40] This is contrary to the evidence. As later noted in the Order by the Commission, CURB opposed

[38] K.S.A. 77-621(c)(7).
[39] K.S.A. 77-621(c)(5).
[40] Order, p. 86.

allowing any rate case expense above the $2.1 million contained in KCPL's application and also recommended that rate case expense be shared 50/50 between shareholders and ratepayers.[41]

19. The Commission's finding that no party recommended a specific adjustment is therefore erroneous,[42] unreasonable, arbitrary and capricious,[43] and not based on substantial competent evidence when viewed in light of the record as a whole.[44] CURB requests that the Commission reconsider or clarify this finding to acknowledge that CURB presented testimony specifically opposing any amount of rate case expense exceeding the $2.1 contained in the Application and presented at hearing, and also recommended that KCPL's rate case expense be shared equally between shareholders and ratepayers.

C. The Interim Rate Relief Aspect Of The Order Is Vague And Will Result In Retroactive Ratemaking, Require Ratepayers To Overcompensate KCPL For Excessive Rate Case Expense, Or Result In The Subsequent Proceeding Being Stayed On Appeal.

20. The Order designates its award of rate case expense as "Interim Rate Relief." The Order further states that, "If parties seek to challenge the amount of rate case expense approved in this Order, a subsequent proceeding will allow full review of this issue. If that challenge is successful and establishes the rate case expense costs approved in this Order were not prudent, just or reasonable, the Commission will establish a new amount of rate case expense for this docket that will be included as an adjustment in a future KCPL rate case."[45]

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[41] *Id.*
[42] K.S.A. 77-621(c)(4).
[43] K.S.A. 77-621(c)(8).
[44] K.S.A. 77-621(c)(7).
[45] *Id.* (emphasis added).

21. The Commission's characterization of its decision on rate case expenses as "Interim Rate Relief"[46] is vague and ambiguous. It is unclear how the Commission contemplates the "full review"[47] afforded in the subsequent proceeding to be held (under a non-final order within this docket or under a final order in a separate docket; whether the overall revenue requirement in the rates implemented on December 1, 2010 will be considered interim rates until the rate case expense issue is resolved, or whether parties will be required to proceed with further appropriate petitions for reconsideration and ultimately, appeals). If the current rates will be considered interim under a non-final order pending the resolution of the rate case expense issue, then the Commission should reconsider and clarify that the adjustment will not be made in a future rate case, but will be made in this rate case before a final order is entered. However, if the Commission does not intend to proceed under interim rates under a non-final order, then appeals will be filed and any subsequent proceeding contemplated under the order will be stayed pending the outcome of the appeal, with the unknown factor of whether the Commission will be ordered to revisit the rate case expense issue on remand, be affirmed, or be ordered to deny rate case expense in excess of what was contained in the Application and presented at hearing.

22. Notwithstanding the vagueness of the Interim Rate Relief aspect, the language in the Order pertaining to a successful challenge to the rate case expense awarded is even more problematic and erroneous. The Order states that if challenge is successful, the new amount of rate case expense

[46] Order, p. 95.
[47] *Id.* CURB interprets "full review" an including an opportunity to conduct discovery, retain expert testimony, cross-examine KCPL's witnesses, brief, and argue the issue.

determined in the subsequent proceeding "will be included as an adjustment in a future KCPL rate case."[48]

23. If the new amount is a reduced amount, any adjustment sought in a future KCPL rate case will be challenged by KCPL as retroactive ratemaking. It is difficult to see how an adjustment in a subsequent rate case would not violate the well-established principle in Kansas prohibiting retroactive ratemaking. "In Kansas, the ban against retroactive ratemaking is more than a policy. The KCC cannot retroactively deprive a utility of its lawfully established rates." *Kansas Gas & Electric Co. v. State Corp. Comm'n of Kansas,* 14 Kan. App.2d 527, 533, 794 P.2d 1165, 1170 (1990).

24. In the alternative, if the subsequent proceeding results in an adjustment to the next rate case but is only applied prospectively, then ratepayers will overcompensate KCPL for excessive rate case expense. This is likewise erroneous. In either event, the adjustment in a future rate case should be reconsidered.

25. The Commission's Order is also vague and ambiguous because it designates rate case expense costs as Interim Rate Relief, but does not specifically designate the overall revenue requirement as interim. Since rate case expenses are part of the overall revenue requirement, and not a separate surcharge, it is unclear whether the Commission intends the overall revenue requirement to be interim. It is also unclear how rate case expense can be interim while the other components of the overall revenue requirement are considered final and subject to appeal.

[48] *Id.*

26. Finally, the Commission did not designate the Interim Rate Relief "subject to refund" as the Commission has in past cases[49] where interim rates have been specified, which also requires reconsideration or clarification.

27. CURB therefore requests that the Commission reconsider the Interim Rate Relief aspect of the rate case expense on the grounds it is erroneous,[50] unreasonable, arbitrary and capricious,[51] and constitutes an unlawful procedure or failure to follow prescribed procedure.[52]

28. In the alternative, CURB seeks clarification of the numerous questions discussed above. However, it is not possible to retain the erroneous aspect of the order that requires an adjustment to a future rate case, since this will result in either retroactive ratemaking or require ratepayers to overcompensate KCPL for excessive rate case expense following a successful challenge. The error may be remedied if the Commission would reconsider the requirement that the adjustment made in a future rate case, and order that the entire revenue requirement be designated as interim, non-final, and subject to refund following a full review and proceeding conducted in this rate case.

29. CURB recommends that the Commission simply reconsider its award of rate case expenses in excess of the $2.1 million contained in the Application, and deny any amounts above the $2.1 million.

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[49] *Order on Rate Application,* July 25, 2001, pp. 5, 51, KCC Docket No. 01-WSRE-436-RTS ("the Commission does order that the rates set in this case be interim and subject to refund until..." "Revenue requirements are set on an interim basis, subject to refund,...").
[50] K.S.A. 77-621(c)(4).
[51] K.S.A. 77-621(c)(8).
[52] K.S.A. 77-621(c)(5).

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ALLOW KCPL'S ACCUMULATED DEFERRED INCOME TAX ADJUSTMENT.

30. CURB respectfully requests that the Commission reconsider its decision to approve KCPL's accumulated deferred income tax adjustment (ADIT), which substantially reduces the pre-tax payment on plant (PTPP) benefit negotiated in prior rate cases. The Commission's decision is contrary to the evidence, erroneous,[53] unreasonable, arbitrary and capricious,[54] and not based on substantial competent evidence when viewed in light of the record as a whole.[55]

31. The Commission's Order fails to even recognize the evidence in the record presented by CURB and other intervenors that demonstrates the Company's adjustment for ADIT violates the agreement reached between the parties and is contrary to representations made by KCPL during the regulatory plan proceeding and during the rate cases implementing the regulatory plan.

32. The Company represented to the Commission and the parties in the 1025 docket that ratepayers would receive a dollar-for-dollar rate base reduction for the PTPP.[56] In order to avoid the very misunderstanding involved with this issue, CURB and the other intervenors demanded, as part of the settlement in the last rate case (246 docket), that the Company provide a detailed description of how the pre-tax payment on plant on behalf of customers identified in each of the first three cases "will affect rate base and overall revenue requirements within the context of KCPL's fourth rate case under the 1025 stipulation." This negotiation and agreement resulted in the 246 Docket S&A that gave KCPL an additional $18 million annually in PTPP.[57]

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[53] K.S.A. 77-621(c)(4).
[54] K.S.A. 77-621(c)(8).
[55] K.S.A. 77-621(c)(7).
[56] Hearing Exh. 107, p. 11; Hearing Exh. 106, pp. 11-12, footnote 22.
[57] Tr. Vol. 11, p. 2556, lines 20-25, p. 2557, lines 1-25, p. 2558, lines 1-25, p. 2559, lines 1-9; Tr. Vol. 2, p. 387, lines 2-25, p. 388, line 1; Hearing Exh. 34, Schedule CBG-2; Crane D., p. 48, lines 15-21, p. 49, lines 1-13.

33. The Commission's Order fails to acknowledge the substantial evidence demonstrating that the detailed description was negotiated by the parties and incorporated into the settlement testimony by Mr. Giles in the 246 docket, including but not limited to the following:

- As part of the negotiations to pay an additional $18 million annually in pretax payment on plant (PTPP), the parties to the 246 docket demanded the description contained in Schedule CBG-2 attached to Chris Giles testimony in support of the 246 docket Stipulation.[58]
- Schedule CBG-2 contains a description requested by the parties of how KCPL believes the pre-tax payment on plant on behalf of customers which has been identified in each of the first three cases under the 1025 Stipulation and Agreement "will affect rate base and overall revenue requirements within the context of KCPL's fourth rate case under the 1025 stipulation." [59]
- Schedule CBG-2, attached to Chris Giles testimony in support of the 246 docket Stipulation, does not mention accumulated deferred income taxes (ADIT).[60]
- Schedule CBG-2 states that "The accumulated CIAC amounts will be treated as increases to the depreciation reserve and be deducted from rate base in any future KCPL rate proceedings, beginning with the 2009 rate case (Iatan 2 case)."[61]
- Schedule CBG-2 states that "In the estimated example above, the total cumulative amount of pre-tax payment on plan on behalf of customers of $74 million would be added to the accumulated depreciation reserve as of the date rates resulting from the fourth rate case under the Regulatory Plan are effective (January 1, 2011). The effect of this would be to lower rate base as if the customers had already paid for this amount of plant investment, and therefore no return on this $74 million would be forthcoming to the Company as part of rates going forward. In addition, there would be no depreciation expense related to this customer-paid plant amount ($74 million in this example) included in KCP&L's future revenue requirement."[62]
- Schedule CBG-2 further states "This is a permanent addition to the depreciation reserve and so will have the impact of never allowing the Company to earn a return on or a return of (depreciation expense) a portion of its rate base equivalent to the amount of accumulated pre-tax payment on plan on behalf of customers."[63]

[58] Tr. Vol. 2, p. 389, lines 14-21; Hearing Exh. 34, Schedule CBG-2.
[59] Tr. Vol. 2, p. 387, lines 2-25, p. 388, line 1; Hearing Exh. 34, Schedule CBG-2; Crane D., p. 48, lines 15-21, p. 49, lines 1-13) (emphasis added).
[60] Tr. Vol. 2, p. 385, lines 16-25, p. 386, lines 1-25, p. 387, line 1; Hearing Exh. 34, Schedule CBG-2. (emphasis added).
[61] Hearing Exh. 34, Schedule CBG-2, p. 1; Crane D., p. 48, lines 15-21, p. 49, lines 1-13.
[62] Hearing Exh. 34, Schedule CBG-2, pp. 1-2; Crane D., p. 48, lines 15-21, p. 49, lines 1-13. (emphasis added).
[63] Hearing Exh. 34, Schedule CBG-2, p. 2; Crane D., p. 48, lines 15-21, p. 49, lines 1-13. (emphasis added).

- Schedule CBG-2 states, "In addition to this rate base effect, revenue requirements in the next rate case will be reduced by the removal of the annual level of pre-tax payment built into rates as of August 1, 2009, or $33 million."[64]
- While John Weisensee testified that Mr. Giles "should have"[65] discussed the ADIT (Weisensee R., p. 7, line 21), Mr. Giles never mentioned ADIT in his description of how PTPP would "affect rate base and overall revenue requirements within the context of KCPL's fourth rate case under the 1025 stipulation."[66]

34. As reflected above, this negotiated description specifically gave a detailed explanation of how PTPP "will affect rate base and overall revenue requirements" within the context of this rate case. The description of how rate base and overall revenue requirements would be affected did not suggest or even mention any offset for ADIT, and CURB and other intervenors relied upon this description in agreeing to an additional $18 million annually in PTPP to KCPL. The Company's requested ADIT adjustment regarding the rate base impact and overall revenue requirements of the pretax payment on plant (PTPP) clearly violates the agreement in the last rate case (246 docket). This reduces the benefit bargained for by ratepayers by over $28.4 million.[67]

35. The Commission completely disregarded this overwhelming evidence in allowing KCPL's ADIT adjustment, despite the Commission's declaration in other sections of its order that "if we did not presumptively bind parties to their prior agreements, it would have a chilling effect on the settlement process and Kansas policy favoring settlement"[68] and "absent a sound justification for ruling otherwise, binding parties to their bargains is sound policy and consistent with signaling regulatory certainty."[69] KCPL should be bound by their prior agreement, reflected in Hearing Exhibit 34, Schedule CBG-2. Binding KCPL to this bargain, in which it obtained an additional $18

[64] Hearing Exh. 34, Schedule CBG-2, p. 2.
[65] Weisensee R., p. 7, line 21.
[66] Hearing Exh. 34, Schedule CBG-2. (emphasis added).
[67] Post Hearing Brief of the Citizens' Utility Ratepayer Board (CURB Brief), ¶ 235; Crane D., p. 47, lines 1-6.
[68] Order, p. 54, citing Order Approving Contested Settlement Agreement, Docket No. 08-ATMG-280-RTS, May 12,2008, (citing *Bright* v. *LSI Corp.*, 254 Kan. 853, 858 [1994]).

million annually in PTPP, is sound policy and consistent with signaling regulatory certainty. Failing to do so will definitely have a chilling effect on the settlement process and Kansas policy favoring settlement.

36. Schedule CBG-2 to Hearing Exhibit 34 clearly reflects the understanding of the parties of how PTPP would affect rate base and overall revenue requirements within the context of this rate case. KCPL's claim that Mr. Giles's failure to include its proposed ADIT adjustment to rate base and the overall revenue requirement in the negotiated description as a mere "oversight"[70] is simply not credible.

37. Any proposed adjustment that would eliminate over one third, or $28.4 million of the $77 million PTPP benefit to ratepayers is a material term to the parties' agreement that Mr. Weisensee honestly admits in his testimony that Mr. Giles "should have"[71] included in the detailed written explanation of how PTPP "will affect rate base and overall revenue requirements" within the context of this rate case. Reference to ADIT wasn't included in Schedule CBG-2 because it wasn't part of the agreement negotiated between the parties.

38. The Commission's decision allowing the $28.4 million ADIT reduction in the benefit negotiated by CURB and other intervenors is erroneous,[72] unreasonable, arbitrary and capricious,[73] and not based on substantial competent evidence when viewed in light of the record as a whole.[74] CURB respectfully requests that the Commission reconsider this decision.

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[69] Order, p. 127,
[70] KCPL Brief, ¶ 448.
[71] Weisensee R., p. 7, line 21.
[72] K.S.A. 77-621(c)(4).
[73] K.S.A. 77-621(c)(8).
[74] K.S.A. 77-621(c)(7).

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ADOPT KCPL'S HANDY-WHITMAN INDEX FOR GENERATION/PRODUCTION MAINTENANCE EXPENSE.

39. CURB respectfully requests that the Commission reconsider its decision to adopt the Handy-Whitman Index for KCPL's generation/production maintenance expense. The Commission's decision is contrary to the evidence, erroneous,[75] unreasonable, arbitrary and capricious,[76] and not based on substantial competent evidence when viewed in light of the record as a whole.[77]

40. In determining finding use of the Handy-Whitman Index appropriate for normalizing KCPL's generation/production maintenance expense, the Commission was "persuaded by the predictability inherent in an industry index and note that FERC has found that the Handy-Whitman Index specifically supplies a known and unbiased adjustment factor in some instances where figures are not subject to a full review."[78] However, contrary to the situation noted by FERC, the figures submitted by KCPL for generation/production maintenance expense were subject to a full review and the Company's proposal to adjust historic costs by the Handy Whitman Index factors is not supported by this full review.

41. CURB witness Andrea Crane's full review and analysis of the Company's historic generation/production maintenance costs supports CURB's recommendation that using the actual test year costs to be more reasonable based on the following:

- While the Company's historic steam maintenance costs have fluctuated from year-to-year, the actual test year costs appear reasonable in light of these fluctuations.
- Historic costs have fluctuated up and down over the past several years, increasing from 2003 to 2004, decreasing in 2005, increasing in 2006 and in 2007, and declining in the test year:

[75] K.S.A. 77-621(c)(4).
[76] K.S.A. 77-621(c)(8).
[77] K.S.A. 77-621(c)(7).
[78] Order, p. 51. (emphasis added).

Test Year	
2008	$26,517,598
2007	$29,753,040
2006	$27,086,136
2005	$22,860,355
2004	$25,367,568
2003	$24,690,941
Average	$26,145,144

- The actual test year cost was relatively close to the seven-year average for steam maintenance costs.[79]

42. In addition, the purported study relied upon by the Company references improperly included labor, whereas KCPL's generation/production maintenance adjustment does not include a labor component, thus making the information relied upon by the Company inapplicable. Ms. Crane also pointed out that this purported study wasn't a study at all, but merely a sample, without providing any of the parameters of the sample.[80]

43. KCPL has provided no support for using the Handy-Whitman Index, and the full review and analysis of the Company's generation/production maintenance costs does not support the use of the index. CURB therefore respectfully requests that the Commission reconsider its decision finding the use of the Handy-Whitman Index appropriate for normalizing KCPL's generation/production maintenance expense, and that the Commission adopt CURB's recommended adjustment for generation/production maintenance expense shown in Schedule ACC-32.[81]

[79] Crane D., p. 81, lines 17-21, p. 82, lines 1-9.
[80] Tr. Vol. 11, pp. 2514-2516.
[81] Crane D., p. 83, lines 4-9.

IV. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO AMORTIZE SO_2 EMISSION ALLOWANCE PROCEEDS OVER A 22-YEAR PERIOD.

44. CURB respectfully requests that the Commission reconsider its decision to amortize SO_2 emission allowance proceeds over a 22-year period rather than the 10-year period proposed by CURB. The Commission's decision is contrary to the evidence, erroneous,[82] unreasonable, arbitrary and capricious,[83] and not based on substantial competent evidence when viewed in light of the record as a whole.[84]

45. In approving the 22-year amortization period, the Commission referenced the language of the 1025 S&A and determined:

> "Since the condition that the parties would renegotiate did not materialize, as a matter of policy, the Commission will hold *the parties* to the language of the 1025 S&A. Not only is this ruling fair, but it signals a high degree of regulatory certainty when we follow our prior orders. Though we can change course and articulate a different policy, there must be a valid reason. No such reason exists concerning this issue. Moreover, if we did not presumptively bind parties to their prior agreements, it would have a chilling effect on the settlement process and Kansas policy favoring settlements."[85]

46. CURB respectfully submits that the Commission's reasoning cited above is erroneous and flawed. First, the Commission fails to note that CURB was not a party to the 1025 S&A, and neither CURB nor the Commission are bound by any of the terms of that agreement. This was specifically noted by the Commission in the 1025 docket.[86]

47. The Commission specifically held in the 1025 docket that the Regulatory Plan (1025 S&A) does not bind the Commission, and noted that even "KCP&L acknowledged that the

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[82] K.S.A. 77-621(c)(4).
[83] K.S.A. 77-621(c)(8).
[84] K.S.A. 77-621(c)(7).
[85] Order, pp. 53-54. (emphasis added).
[86] CURB Brief, ¶¶ 10-11; Crane D., p. 105; Hearing Exh. 23, 1025 Stipulation, p. 1; Hearing Exh. 24, Order Approving 1025 Stipulation, ¶ 2, 32, 41, 48, 61.

Commission's approval of the Agreement would not require the Commission to make any specific determinations or grant any approvals in subsequent dockets."[87] In approving the Regulatory Plan, the KCC noted that "[t]he proposed treatment regarding the specific matters contained in the Agreement appears reasonable at this time, but is subject to future Commission review to ensure that they result in just and reasonable rates and reflect the provision of efficient and sufficient service. K.S.A. 66-101b."[88]

48. Since neither CURB nor the Commission are bound by the 1025 S&A, the Commission's should have considered CURB's argument that the SO_2 emission allowance proceeds should be amortized over a 10-year period. Instead, the Commission's Order fails to even discuss the factors cited by CURB as to why a 10-year amortization is more reasonable than a 22-year period proposed by the Company, but merely contains an unsupported conclusion that the Commission was more persuaded by KCPL's proposal to amortize the proceeds over 22-years.[89]

49. Furthermore, the Commission's Order misconstrues both CURB's argument and the agreements in the S&As subsequent to the 1025 Agreement when it concludes that "CURB admits the S&As subsequent to the 1025 Agreement merely indicated that the parties would renegotiate their prior agreements to amortize the liability over the life of the environmental assets at the time of this case."[90] This conclusion is both contrary to CURB's argument and the language in the S&As in the 905 Docket and 246 Docket rate cases. The S&A's in those rate cases did not provide that the

[87] Hearing Exh. 24, Order Approving 1025 Stipulation, ¶ 32.
[88] Id., paragraph 61.
[89] Order, pp. 53-55.
[90] Order, p. 53.

amortization of the regulatory liability for SO_2 emission allowance proceeds would be renegotiated, but instead stated that the SO_2 emission allowance proceeds:[91]

> "will be amortized over a time period to be determined in the 2009 rate filing."
>
> "will be amortized over a time period to be determined in Company's next rate case, with such amortization reflected in rates beginning with the rates resulting from that case."[92]

50. In summary, CURB was not a party to the 1025 agreement and did not agree in subsequent rate case S&As that the parties would renegotiate the amortization period for SO_2 emission allowance proceeds in this rate case. CURB agreed in the 908 Docket and 246 Docket S&As to have the Commission determine the amortization period - which is exactly what CURB asked the Commission to determine, based on the evidence presented by CURB.

51. The evidence presented by CURB, and ignored by the Commission based on its erroneous interpretation of the prior S&As, is summarized below:

- KCPL's response to CURB-59 demonstrates that the overwhelming majority of the SO_2 emission allowance proceeds included in the regulatory liability was received in 2005-2007.
- It is unreasonable to ask ratepayers to wait for up to 22-years for the return of these proceeds.
- The ten-year amortization period provides a better balance between the period of time over which the majority of these proceeds were received and the period over which the proceeds will be returned to ratepayers.
- The use of a ten-year period will provide greater rate relief to ratepayers now because it is most needed now given current economic conditions and because there is a greater likelihood of returning it to the same customers that were receiving service when the proceeds were being received by KCP.
- The revenue requirement associated with the investment in new plant is at its highest in this case, due to the fact that at this time there is virtually no depreciation reserve to offset the investment in the new generating facility.
- The use of a ten-year amortization period will not only provide a better match with the period of time over which most of the emission allowance proceeds were received, but it will also

[91] Joint Stipulation and Agreement, KCC Docket No. 07-KCPE-905-RTS, p. 10; Crane D., pp. 76-77.
[92] Post Hearing Brief of Kansas Power & Light Company (KCPL Brief), ¶369; Crane D., pp. 76-77; Joint Stipulation and Agreement, KCC Docket No. 09-KCPE-246-RTS, ¶ 27. (emphasis added).

provide a significant financial benefit to ratepayers by returning these proceeds more quickly.[93]

52. CURB therefore respectfully request that the Commission reconsider its decision to amortize SO_2 emission allowance proceeds over a 22-year period, and adopt the 10-year period proposed by CURB.

V. CONCLUSION.

53. CURB requests that the Commission reconsider the portions of its order (a) approving rate case expenses, (b) granting KCPL's Accumulated Deferred Income Tax Adjustment, (c) adopting the Handy-Whitman Index for KCPL's generation/production maintenance expense, and (d) amortizing KCPL's SO_2 emission allowance proceeds over a 22-year period.

Respectfully submitted,

C. Steven Rarrick #13127
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

[93] CURB Brief, ¶ 185-192; Crane D., pp. 78-79.

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 7th day of December, 2010.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2013

Notary of Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, electronic service, or hand-delivered this 7th day of December, 2010, to the following:

* JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 SOUTH HICKORY
PO BOX 17
OTTAWA, KS 66067
Fax: 785-242-1279
jflaherty@andersonbyrd.com

MICHAEL E. AMASH, ATTORNEY
BLAKE & UHLIG PA
SUITE 475 NEW BROTHERHOOD BLDG
753 STATE AVE.
KANSAS CITY, KS 66101
Fax: 913-321-2396
mea@blake-uhlig.com

JAMES R. WAERS, ATTORNEY
BLAKE & UHLIG PA
SUITE 475 NEW BROTHERHOOD BLDG
753 STATE AVE.
KANSAS CITY, KS 66101
Fax: 913-321-2396
jrw@blake-uhlig.com

STACI OLVERA SCHORGL, ATTORNEY
BRYAN CAVE LLP
1200 MAIN STREET
SUITE 3500
KANSAS CITY, MO 64105
Fax: 816-855-3604
soschorgl@bryancave.com

* GLENDA CAFER, ATTORNEY
CAFER LAW OFFICE, L.L.C.
3321 SW 6TH STREET
TOPEKA, KS 66606
Fax: 785-271-9993
gcafer@sbcglobal.net

* BLAKE MERTENS
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5169
bmertens@empiredistrict.com

* KELLY WALTERS, VICE PRESIDENT
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5173
kwalters@empiredistrict.com

* C. EDWARD PETERSON, ATTORNEY
FINNEGAN CONRAD & PETERSON LC
1209 PENNTOWER OFFICE CENTER
3100 BROADWAY
KANSAS CITY, MO 64111
Fax: 816-756-0373
epeters@fcplaw.com

* DAVID WOODSMALL, ATTORNEY
FINNEGAN CONRAD & PETERSON LC
1209 PENNTOWER OFFICE CENTER
3100 BROADWAY
KANSAS CITY, MO 64111
Fax: 816-756-0373
dwoodsmall@fcplaw.com

DARRELL MCCUBBINS, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1464
PO BOX 33443
KANSAS CITY, MO 64120
Fax: 816-483-4239
local1464@aol.com

JERRY ARCHER, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1613
6900 EXECUTIVE DR
SUITE 180
KANSAS CITY, MO 64120
local1613@earthlink.net

BILL MCDANIEL, BUSINESS MANAGER
IBEW LOCAL UNION NO. 412
6200 CONNECTICUT
SUITE 105
KANSAS CITY, MO 64120
Fax: 816-231-5515
bmcdaniel412@msn.com

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

* LEO SMITH, BOARD OF DIRECTORS
INTERNATIONAL DARK SKY ASSOCIATION
1060 MAPLETON AVENUE
SUFFIELD, CT 06078
leo@smith.net

* ROBERT WAGNER, PRESIDENT, BOARD OF DIRECTORS
INTERNATIONAL DARK SKY ASSOCIATION
9005 N CHATHAM AVENUE
KANSAS CITY, MO 64154
rwagner@eruces.com

* CURTIS D. BLANC, SR. DIR. REG. AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
curtis.blanc@kcpl.com

DENISE M. BUFFINGTON, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
denise.buffington@kcpl.com

* ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
roger.steiner@kcpl.com

* MARY TURNER, DIRECTOR, REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2110
mary.turner@kcpl.com

* DANA BRADBURY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
d.bradbury@kcc.ks.gov
**** Hand Deliver ****

* PATRICK T SMITH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
p.smith@kcc.ks.gov
**** Hand Deliver ****

* MATTHEW SPURGIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
m.spurgin@kcc.ks.gov
**** Hand Deliver ****

* W. THOMAS STRATTON, JR., CHIEF LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
t.stratton@kcc.ks.gov
**** Hand Deliver ****

* JOHN P. DECOURSEY, DIRECTOR, LAW
KANSAS GAS SERVICE, A DIVISION OF ONEOK, INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
jdecoursey@kgas.com

* WALKER HENDRIX, DIR, REG LAW
KANSAS GAS SERVICE, A DIVISION OF ONEOK, INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
whendrix@oneok.com

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

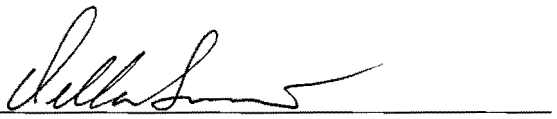
* JO SMITH, SR OFFICE SPECIALIST
KANSAS GAS SERVICE, A DIVISION OF ONEOK, INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
josmith@oneok.com

* FRANK A. CARO, JR., ATTORNEY
POLSINELLI SHUGHART
6201 COLLEGE BLVD
SUITE 500
OVERLAND PARK, KS 66211
Fax: 913-451-6205
fcaro@polsinelli.com

* JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH STREET
SUITE 750
OVERLAND PARK, KS 66210
Fax: 913-661-9863
jim@smizak-law.com

* ANNE E. CALLENBACH, ATTORNEY
POLSINELLI SHUGHART
6201 COLLEGE BLVD
SUITE 500
OVERLAND PARK, KS 66211
Fax: 913-451-6205
acallenbach@polsinelli.com

* REID T. NELSON
REID T. NELSON
D/B/A ATTORNEY AT LAW
3021 W 26TH STREET
LAWRENCE, KS 66047
rnelson@sbids.state.ks.us



Della Smith

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