

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

In the Matter of the Complaint Against Kansas)	
Municipal Energy Agency Respondent, for an)	
Order Declaring that Kansas Municipal Energy)	Docket No. 18-KAME-156-COM
Agency is Charging Unjust and Unreasonable)	
Rates, By the City of Pratt, Kansas)	
Complainant.)	

**REPLY TO CITY OF PRATT, KANSAS' RESPONSE TO MOTION TO DISMISS PORTIONS OF
COMPLAINT**

COMES NOW, the Kansas Municipal Energy Agency ("KMEA") and files its Reply to the February 12, 2018 *Response to Motion to Dismiss Portions of the Complaint filed by the City of Pratt, Kansas* ("Pratt" or "City"). In support of its Reply, KMEA hereby states as follows:

I. Background

1. On October 6, 2017, the City of Pratt, Kansas filed a formal complaint with the Commission against KMEA, alleging, *inter alia*, violations of K.S.A. 66-101(b) and K.S.A. K.S.A. 12-8,109.

2. On October 20, 2017, the Staff of the Commission filed its legal Memorandum analyzing Pratt's complaint for compliance with Commission regulations. While making no recommendation concerning the validity or truthfulness of Pratt's claims, Staff recommended that the Commission find that the complaint satisfied the procedural requirements for formal complaints as specified in K.A.R. 82-1-220 and established a *prima facie* case for action by the Commission.

3. On January 23, 2018, the Commission issued an Order finding that it has jurisdiction to investigate the complaint, accepting Staff's Memorandum, and directing that the complaint be served upon KMEA.

4. On February 2, 2018, KMEA filed its Answer and Response to Pratt's Complaint. On the same day, KMEA filed a Motion to Dismiss Portions of the Complaint filed by Pratt, asserting that all allegations in the complaint that pertain to the EMP2 Agreement between Pratt and KMEA should be dismissed due to the agreement's arbitration provision.

5. On February 12, 2018, Pratt filed a Response to KMEA's Motion to Dismiss portions of the complaint, asserting arguments that purport to demonstrate that Pratt is not obligated to pursue arbitration to address any of the matters contained in the complaint, and requesting that the Commission deny KMEA's motion to dismiss those portions of the complaint that pertain to the EMP2 agreement so that those issues can be resolved through arbitration.

II. Pratt's Assertion That The EMP2 Agreement Arbitration Provisions Are Narrow Is Misguided

6. Pratt asserts in its Response that in determining the applicability of an arbitration clause, it must first be determined if the arbitration provision is broad or narrow.¹ If the clause is narrow, Pratt argues, parties will only be required to submit to arbitration in those specific situations allowed by the language found therein.² Pratt's sole authority for these statements is *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1260-61 (10th Cir. 2005.)

7. Pratt states that "KMEA would like the Commission to believe that the arbitration clause is broad in its scope." Pratt further asserts that Section 20.04 of the EMP2 Agreement, part of the arbitration clause, narrows the scope of claims which are subject to arbitration to only

¹ Pratt Response at ¶ 5.

² Id.

those issues arising “from the language in and the authority derived from such Agreement.”³ Pratt’s analysis is misguided. The clear terms of Section 20.01 demonstrate that the arbitration clause is broad in its scope, and that it encompasses “any controversy or claim arising out of or relating to this Agreement.”

8. Section 20.01 of the EMP 2 Agreement provides that:

[A]ny controversy or claim arising out of or relating to this Agreement or the breach thereof or appeal from action of the Joint Operating Committee shall be settled by arbitration. Such arbitration shall be conducted before a board of three arbitrators selected by the American Arbitration Association and the arbitration shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association then in effect, subject to the further qualification that the arbitrators named under said rules shall be competent by virtue of education and experience in the particular matter subject to arbitration. [Emphasis supplied.]

Section 20.04 of the EMP2 Agreement, cited by Pratt as effectively narrowing the issues subject to arbitration, provides that:

The Board of Arbitrators shall have no authority, power or jurisdiction to alter, amend, change, modify, add to or subtract from any of the provisions of this Agreement nor to consider any issues arising other than from the language in and authority derived from this Agreement.

9. The *Cummings* court provided a three-part inquiry to determine whether a particular dispute falls within the scope of an agreement’s arbitration clause. Initially,

The court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. **Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties’ rights and obligations under it.**⁴ [Emphasis supplied.]

³ Id. at ¶ 6.

⁴ *Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258, 1261 (2005).

10. In determining whether an arbitration provision is broad or narrow, the court explained that a broad provision is one that “refers all disputes arising out of a contract to arbitration” and a narrow one is a provision in which “the parties clearly manifested an intent to narrowly limit arbitration to specific disputes...”⁵ The arbitration provision signed by the plaintiffs in *Cummings*, in which an employment contract involving an arbitration provision was construed, was markedly narrow. It stated:

In the event FedEx Ground acts to terminate this Agreement (which acts shall include any claim by [plaintiff] of constructive termination) and [plaintiff] disagrees with such termination or asserts that the actions of [defendant] are not authorized under the terms of this Agreement, then each such disagreement (but no others) shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA)...⁶

11. The language of the EMP2 Agreement is remarkably broader than that provision considered in the *Cummings* case and provides for arbitration to settle any controversy or claim arising out of or relating to the agreement. Pursuant to the *Cummings* analysis, “a broad provision is one that refers all disputes arising out of a contract to arbitration,” which is consistent with Section 20.01 of the EMP2 Agreement. The City of Pratt attempts to artificially narrow the arbitration provision by citing the allegedly limited authority of the Board of Arbitrators in Section 20.04. However, Section 20.04 does not and cannot extinguish the broad language appearing in Section 20.01—it merely limits the Board of Arbitrators from altering the contract or considering evidence outside the four corners of the contract.

⁵ *Id.* at 1262.

⁶ *Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258, 1260 (2005).

12. Not only is the arbitration clause clearly broad, but Pratt's complaint allegations are directly related to the EMP2 Agreement and are plainly "a controversy or claim arising out of or relating to [the] Agreement or the breach thereof." Pratt's response claims:

While Pratt does believe that KMEA has breached the terms of the EMP 2 Agreement, this is not the issue that Pratt is seeking to have the Commission decide. Instead, Pratt is asking the Commission to decide whether the actions of KMEA were in violation of certain statutory provisions governing the conduct of all electric public utilities, and by extension, municipal energy agencies, specifically K.S.A. 12-8,109 and K.S.A. 66-101b.⁷

First, Pratt does not assert any violations of K.S.A. 12-8,109 with regard to the EMP2 Agreement. Second, Pratt's claim that KMEA violated K.S.A. 66-101b is clearly premised on a claim that KMEA breached the EMP2 Agreement. If KMEA followed the provisions of the freely-negotiated and valid EMP2 Agreement, which KMEA maintains that it did, then its policies cannot be said to be "unjust and unreasonable" under K.S.A. 66-101b. To find otherwise would undermine the validity of all contracts subject to Commission jurisdiction. Pratt's attempt to separate its claim of breach and its claim under K.S.A. 66-101b is disingenuous and a transparent attempt to avoid the arbitration clause in the EMP2 Agreement. Additionally, Pratt's statement that it is not asserting a breach of contract is directly contrary to its Formal Complaint, in which it asserts that "KMEA *failed to comply with* EMP2 in adopting the Policies."⁸

13. This Commission has previously issued Orders dismissing complaints and confirming that a party's agreement to use contractually specified dispute resolutions such as arbitration should be honored.⁹ Similarly, all of Pratt's allegations pertaining to the EMP2

⁷ Id. at ¶ 7.

⁸ Pratt Complaint at ¶ 47(e) (emphasis added); see also Pratt Complaint at ¶¶ 17-31.

⁹ See Docket No. 10-WLST-577-COM, Order Dismissing Complaint filed June 15, 2011, p. 2; Docket No. 08-KEPE-403-COM, Order filed December 22, 2008, p. 5.

Agreement should be dismissed because any and all controversies or claims arising out of or relating to the EMP2 Agreement must be settled by arbitration in accordance with Article XX of the EMP2 Agreement. Enforcement of Pratt's contractual obligation to settle any and all EMP2 disputes through arbitration does not deprive the Commission of its jurisdiction and authority to investigate the non-EMP2 issues raised in Pratt's complaint.

WHEREFORE, KMEA respectfully requests that the Commission grant KMEA's motion to dismiss those portions of the complaint pertaining to the EMP2 Agreement, deny all of Pratt's claims for relief, and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

POLSINELLI PC

By: _____


Frank A. Caro, Jr. (KS BAR # 11678)
Anne E. Callenbach (KS BAR # 18488)
900 West 48th Place, Suite 900
Kansas City, MO 64112
Phone: (816) 572-4754
Facsimile: (816) 753-1536
fcaro@polsinelli.com
acallenbach@polsinelli.com

ATTORNEYS FOR
KANSAS MUNICIPAL ENERGY AGENCY

VERIFICATION

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

Anne E. Callenbach, being first duly sworn upon her oath, deposes and states that she is Counsel for Kansas Municipal Energy Agency, that she has read and is familiar with the foregoing and that the statements therein are true to the best of her knowledge, information and belief.



Anne E. Callenbach

Subscribed and sworn to before me this 22 day of February, 2018.





PHYLLIS E. EDWARDS
NOTARY PUBLIC-NOTARY SEAL
STATE OF MISSOURI
CLAY COUNTY
MY COMMISSION EXPIRES 1/30/2021
COMMISSION # 13471396

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response was mailed, postage prepaid, this 22 day of February, 2018, to:

MITCHELL L. HERREN
RACHEL M. SILVA
HINKLE LAW FIRM LLC
1617 N. WATERFRONT PKWY
STE 400
WICHITA, KS 67206
MHERREN@HINKLAW.COM
RSILVA@HINKLAW.COM

AMBER SMITH
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
A.SMITH@KCC.KS.GOV

STEPHAN SKEPNEK
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
S.SKEPNEK@KCC.KS.GOV

PAUL MAHLBERG, GENERAL MANAGER
KANSAS MUNICIPAL ENERGY AGENCY
6300 W 95TH ST
OVERLAND PARK, KS 66212-1431
MAHLBERG@KMEA.COM

SAM MILLS
KANSAS MUNICIPAL ENERGY AGENCY
6300 W 95TH ST
OVERLAND PARK, KS 66212-1431
MILLS@KMEA.COM



Anne E. Callenbach