

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Petition of Kansas City )  
Power & Light Company (“KCP&L”) for ) Docket No. 11-KCPE-581-PRE  
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. )

Received  
on

**MAY 26 2011**

by  
State Corporation Commission  
of Kansas

**PREHEARING BRIEF OF  
THE CITIZENS’ UTILITY RATEPAYER BOARD**

COMES NOW, the Citizens’ Utility Ratepayer Board (“CURB”) and pursuant to the Commission’s May 9, 2011 Order Addressing Prehearing Officer Report and Recommendation and Adopting Procedural Schedule (“May 9<sup>th</sup> Order”), submits CURB’s Prehearing Brief.

**I. BACKGROUND**

1. In its May 9<sup>th</sup> Order, the Commission directed the parties to brief the following issue in prehearing briefs, as suggested by the Prehearing Officer:

The Prehearing Officer summarized the following legal issue to be addressed in these prehearing briefs: If predetermination of rate-making principles is sought, must the utility establish that use of extraordinary regulatory treatment, instead of traditional regulatory treatment, is needed in order to *seek* preapproval under K.S.A. 2010 Supp. 66-1329 [66-1239]? The Commission agrees with this statement of the legal issue the parties should brief.”<sup>1</sup>

2. It is not clear from the above description whether the Commission seeks briefing on whether the utility must establish that use of extraordinary regulatory treatment is needed in order to “*seek*” preapproval under K.S.A. 66-1239, or whether the utility must establish that use

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<sup>1</sup> Order Addressing Prehearing Officer Report and Recommendation and Adopting Procedural Schedule, ¶ 8 (emphasis added).

of extraordinary regulatory treatment is needed in order to “*obtain*” preapproval under K.S.A. 66-1239. Even though the Prehearing Officer and the Commission used the word “*seek*,” CURB concludes the intent was to have the parties brief whether use of extraordinary regulatory treatment is needed in order to “*obtain*” preapproval under K.S.A. 66-1239.

3. While the utility may not be required to establish that use of extraordinary regulatory treatment is needed in order to “*seek*” preapproval under K.S.A. 66-1239, CURB will discuss below why the utility must establish that use of extraordinary regulatory treatment is needed in order to “*obtain*” preapproval under K.S.A. 66-1239.

**II. A UTILITY MUST ESTABLISH THAT USE OF EXTRAORDINARY REGULATORY TREATMENT, INSTEAD OF TRADITIONAL REGULATORY TREATMENT, IS NEEDED IN ORDER TO OBTAIN PREAPPROVAL UNDER K.S.A. 2010 66-1239.**

**A. K.S.A. 66-1239(c) Does Not Specify Factors or Criteria For Granting or Denying a Petition for Preapproval.**

4. K.S.A. 66-1239(c) does not specify any factors or criteria the Commission must consider before granting or denying a petition for predetermination, nor is the Commission directed to grant a petition for predetermination if certain conditions or criteria have been met by the petitioner.

5. K.S.A. 66-1239(c)(2) provides:

Any utility seeking a determination of rate-making principles and treatment under subsection (c)(1) shall as a part of its filing submit the following information: (A) A description of the public utility's conservation measures; (B) a description of the public utility's demand side management efforts; (C) the public utility's ten-year generation and load forecasts; and (D) a description of all power supply alternatives considered to meet the public utility's load requirements.

6. K.S.A. 66-1239(c)(3) provides:

In considering the public utility's supply plan, the commission *may consider* if the public utility issued a request for proposal from a wide audience of participants willing and able to meet the needs identified under the public utility's generating supply plan, and if the plan selected by the public utility is *reasonable, reliable and efficient*.

7. Neither Section (3) or (4) of K.S.A. 66-1239(c) provide a list of factors or criteria the Commission must consider before granting or denying a petition for predetermination of rate-making principles for the construction of generation facilities. As a result, the decision to grant or deny a predetermination under K.S.A. 66-1239 is left to the wide discretion of the Commission in regulating public utilities generally.

**B. The Commission has Wide Discretion to Grant or Deny a Petition for Preapproval under K.S.A. 66-1239(c).**

8. The Kansas Legislature created the Commission and granted it full and exclusive authority and jurisdiction to supervise, control, and regulate the public utilities of this state. *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986).

9. The Commission has wide discretion in regulating utilities in the interest of the public, including the choice of methodology used to approach the complex issues that the Commission must resolve.<sup>2</sup>

10. The wide discretion given the Commission by the legislature was discussed by the Kansas Court of Appeals in *Midwest Gas Users Ass'n v. Kansas Corporation Commission*, 3 Kan. App.2d 376, 380-81, 595 P.2d 735, *rev. denied*, Kan. 792 (1979):

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<sup>2</sup>*Kansas Gas & Electric Co. v. Kansas Corporation Commission*, 239 Kan. 483, 495, 720 P.2d 1063 (1986).

The legislature has vested the commission with wide discretion and its findings have a presumption of validity on review. *Central Kansas Power Co. v. State Corporation Commission*, 221 Kan. at 511.

...

The commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into fixing utility rates. It is aided by a staff of assistants with experience as statisticians, accountants and engineers, while courts have no comparable facilities for making the necessary determinations. Hence a court may not set aside an order of the commission merely on the ground that it would have arrived at a different conclusion had it been the trier of fact. It is only when the commission's determination is so wide of the mark as to be outside the realm of fair debate that the court may nullify it.<sup>3</sup>

11. The Commission has full and broad power to supervise and regulate public utilities doing business within the state, and the Commission's powers are to be liberally construed and all incidental powers are expressly granted and conferred. *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 236-37, 440 P.2d 660 (1968).

**C. A Utility's Request For Extraordinary Regulatory Treatment Under K.S.A. 66-1239(c) Must Be Needed In Order To Obtain Preapproval.**

12. In the Order Approving Stipulation & Agreement in Docket No. 07-WSEE-616-PRE ("616 Docket"), the Commission addressed the provisions of K.S.A. 66-1239:

Pursuant to K.S.A. 2006 Supp. 66-1239, a utility's Petition seeking predetermination must include detailed information that supports a need for new construction; the filing requirements anticipate a comprehensive decision-making process. Staff's witness, Larry Holloway, opined that a utility should be required to present *compelling evidence for a decision of predetermination* because this constitutes extraordinary regulatory treatment that goes beyond normal considerations in ratemaking proceedings. Provisions of K.S.A. 66-1239(c)(2) imply the utility's planning and selection process must be as comprehensive as possible, the utility's plan must be among the best of all alternatives, *and the utility's request for extraordinary regulatory treatment must be necessary, not just not unreasonable*. Holloway Direct, 6.<sup>4</sup>

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<sup>3</sup> *Midwest Gas Users Ass'n v. Kansas Corporation Commission*, 3 Kan. App.2d 376, 380-81, 595 P.2d 735, *rev. denied*, Kan. 792 (1979) (citations omitted).

<sup>4</sup> Order Approving Stipulation & Agreement, June 11, 2007, Docket 07-WSEE-616-PRE, ¶ 9 (emphasis added).

13. In the May 9, 2011, Final Order in Docket No. 11-WSEE-377-PRE (“377 Docket”), the Commission held:

K.S.A. 66-1239(c)(4) requires that the Commission "issue an order setting forth the rate-making principles and treatment that will be applicable ... to the contract .... " This language *affords the Commission discretion* and permits a finding that principles of traditional regulatory review and treatment occurring after the fact is more appropriate.<sup>5</sup>

In its previous discussions of K.S.A. 66-1239, *the Commission has noted its discretionary nature* and its filing requirements that anticipate a comprehensive decision-making process. KCC Docket # 07-WSEE-616-PRE, Order Approving Stipulation & Agreement, 6-11-2007 (07-616 Order) ¶¶ 8, 9.<sup>6</sup>

In KCC Docket # 08-WSEE-309-PRE, the Commission employed principles of law agreed by the parties which included that the Commission *may consider matters of policy and the public interest*, including impacts on the environment (see K.S.A. 66-1262), and may apply the prudence review factors set forth in K.S.A. 66-128g. 08-WSEE-309-PRE, Final Order, 12-27-07 (08-309 Order), ¶11.<sup>7</sup>

[In the 09-8-309 docket] The Commission found K.S.A. 66-1239 did not limit its broad authority to continue to oversee a utility's investment and operations. 08-309 Order, ¶ 13.<sup>8</sup>

14. The Orders in both the 616 and 377 Dockets recognize the Commission's wide discretion in approving or denying petitions for predetermination under K.S.A. 66-1239. The Order Approving Stipulation & Agreement in the 616 Docket, which cites Staff witness Larry Holloway's opinion, indicates Commission agreement with Mr. Holloway that a utility should be required to present compelling evidence for a decision of predetermination and that the utility's request for extraordinary regulatory treatment under K.S.A. 66-1239(c) must be necessary or needed in order to obtain preapproval.

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<sup>5</sup> Final Order, May 9, 2011, Docket No. 11-WSEE-377-PRE, ¶ 11 (emphasis added).

<sup>6</sup> *Id.*, at ¶ 13 (emphasis added).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Id.*, at ¶ 15.

15. It is important to note that the issue being briefed is whether extraordinary regulatory treatment is needed in order to obtain preapproval under K.S.A. 66-1239, not the separate requirement of whether the generation facility project itself is needed or prudent.<sup>9</sup> If extraordinary regulatory treatment is not needed but the generation facility project is necessary and prudent, the utility is entitled to proceed with the construction of generation facility under traditional regulatory treatment.

16. Accordingly, the Commission should determine that a utility's request for extraordinary regulatory treatment must be necessary or needed in order to obtain preapproval under K.S.A. 66-1239(c).

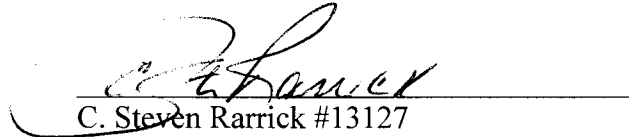
### **III. CONCLUSION**

17. The provisions of K.S.A. 66-1239(c) does not specify any factors or criteria the Commission must consider before granting or denying a petition for predetermination of rate-making principles for the construction of generation facilities. As a result, the decision to grant or deny a predetermination under K.S.A. 66-1239 is left to the wide discretion vested in the Commission to regulate public utilities generally. The Commission has previously cited with approval the proposition that a utility's request for extraordinary regulatory treatment under K.S.A. 66-1239(c) must be necessary or needed in order to obtain preapproval. As a result, CURB respectfully requests that the Commission determine that a utility's request for extraordinary regulatory treatment under K.S.A. 66-1239(c) must be needed in order to obtain preapproval

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<sup>9</sup> The Commission has determined that K.S.A. 66-1239 also requires demonstration of a need for the contract or generation, and that utilities must consider alternatives and demonstrate a comprehensive planning and selection process of a suitable choice that meets that need. *Id.*, at ¶ 12.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Rarrick", is written over a horizontal line. The signature is fluid and cursive.

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

**VERIFICATION**

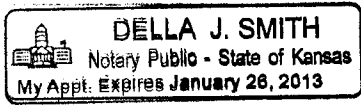
STATE OF KANSAS )  
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COUNTY OF SHAWNEE )

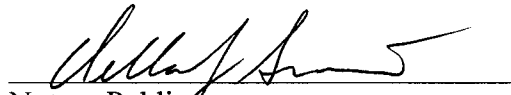
I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the above named petitioner; 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 26<sup>th</sup> day of May, 2011.



  
\_\_\_\_\_  
Notary Public

My Commission expires: 01-26-2013.



**CERTIFICATE OF SERVICE**

11-KCPE-581-PRE

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 26<sup>th</sup> day of May, 2011, to the following:

CRAIG D. SUNDSTROM, ATTORNEY  
A NEW ENERGY, LLC  
101 N ROBINSON, THIRTEENTH FLOOR  
OKLAHOMA CITY, OK 73112

GLENDIA CAFER, ATTORNEY  
CAFER LAW OFFICE, L.L.C.  
3321 SW 6TH STREET  
TOPEKA, KS 66606

TERRI PEMBERTON, ATTORNEY  
CAFER LAW OFFICE, L.L.C.  
3321 SW 6TH STREET  
TOPEKA, KS 66606

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

HEATHER A. HUMPHREY, GENERAL COUNSEL  
KANSAS CITY POWER & LIGHT COMPANY  
ONE KANSAS CITY PLACE 1200 MAIN STREET (64105)  
P.O. BOX 418679  
KANSAS CITY, MO 64141-9679

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

ANDREW SCHULTE, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD ROAD  
TOPEKA, KS 66604-4027

PATRICK T. SMITH, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD ROAD  
TOPEKA, KS 66604-4027

W. THOMAS STRATTON, CHIEF LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD ROAD  
TOPEKA, KS 66604-4027

ROBERT V. EYE, ATTORNEY AT LAW  
KAUFFMAN & EYE  
112 SW 6TH AVE STE 202  
COLUMBIAN BUILDING  
TOPEKA, KS 66603-3850

JAMES A. ROTH  
PHILLIPS MURRAH P.C.  
CORPORATE TOWER, 13TH FLOOR  
101 NORTH ROBINSON  
OKLAHOMA CITY, OK 73102

ANNE E. CALLENBACH, ATTORNEY  
POLSINELLI SHUGHART  
6201 COLLEGE BLVD STE 500  
OVERLAND PARK, KS 66211-2435

FRANK A. CARO, ATTORNEY  
POLSINELLI SHUGHART  
6201 COLLEGE BLVD STE 500  
OVERLAND PARK, KS 66211-2435

DONALD K. SHANDY, ATTORNEY  
RYAN WHALEY COLDIRON SHANDY, PLLC  
900 ROBINSON RENAISSANCE  
119 NORTH ROBINSON  
OKLAHOMA CITY, OK 73102

HOLLY BRESSETT, ATTORNEY  
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM  
85 2ND ST FL 2  
SAN FRANCISCO, CA 94105-3456

DOUGLAS HAYES, ATTORNEY  
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM  
1650 38TH ST STE 102W  
BOULDER, CO 80301-2624

GLORIA SMITH, ATTORNEY  
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM  
85 2ND ST FL 2  
SAN FRANCISCO, CA 94105-3456

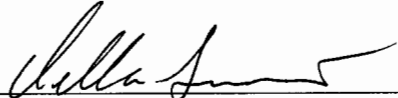
CHERYL A. VAUGHT, ATTORNEY  
VAUGHT & CONNER, PLLC  
1900 NW EXPRESSWAY STE 1300  
OKLAHOMA CITY, OK 73118-1822

MARTIN J. BREGMAN, EXEC DIR, LAW  
WESTAR ENERGY, INC.  
818 S KANSAS AVENUE  
PO BOX 889  
TOPEKA, KS 66601-0889

CATHRYN J. DINGES, CORPORATE COUNSEL  
WESTAR ENERGY, INC.  
818 S KANSAS AVENUE  
PO BOX 889  
TOPEKA, KS 66601-0889

C. MICHAEL LENNEN, VP REGULATORY AFFAIRS  
WESTAR ENERGY, INC.  
818 S KANSAS AVENUE  
PO BOX 889  
TOPEKA, KS 66601-0889

DICK F. ROHLFS, DIRECTOR, RETAIL RATES  
WESTAR ENERGY, INC.  
818 S KANSAS AVENUE  
PO BOX 889  
TOPEKA, KS 66601-0889

  
\_\_\_\_\_  
Della Smith  
Administrative Specialist