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State Corporation Commission
of Kansas

7421 West 129th Street
Overland Park, KS 66213

April 17, 2015

VIA ELECTRONIC TRANSMISSION

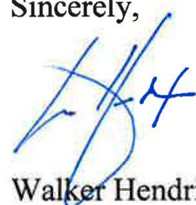
Ms. Neysa Thomas
Acting Executive Director
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, KS 66604

Re: 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 Number 15-GIMG-343-GIG

Dear Ms. Thomas:

Enclosed please find the *Brief of Kansas Gas Service Regarding Jurisdictional Issues* for filing in the above-referenced matter.

Sincerely,



Walker Hendrix

WH/sef
Encl.

cc: Attorneys of Record

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 OF KANSAS GAS SERVICE REGARDING JURISDICTIONAL ISSUES

COMES NOW, Kansas Gas Service, a Division of ONE Gas, Inc. ("Kansas Gas Service") and for its Brief on Jurisdictional issues, submits the following:

1. The Gas Safety and Reliability Policy Act was enacted in 2006. It was designed to permit recovery between rate cases for natural gas utilities making capital investment to comply with state or federal safety requirements and government directed road or highway replacement projects.

2. The Act applies in those situations where a natural gas utility elects to make a filing. It is not mandatory but is discretionary with the applicant.[1] It was enacted to allow natural gas utilities the opportunity to recover revenue for qualifying projects between base rate proceedings. The Act was, in part, drafted to address regulatory lag. It was intended to moderate the frequency of filing rate cases to offset the cost of required capital expenditures and to address the inability of natural gas utilities to earn Commission authorized returns. Although the Act reduces regulatory lag by permitting cost recovery for qualifying projects before a base rate case, it does not eliminate it, because cost recovery is delayed under the Act, resulting in natural gas utilities not having an opportunity to earn their authorized rates of return.

3. Although the Act was passed for many good reasons, it is limited in its scope. There are a number conditions imposed on an applicant. The Act restricts the amount of GSRS revenue that may be collected.[2] The natural gas utility must file a rate case every sixty months, unless deferred by the

[1] K.S.A. 66-2203 (a).
[2] Id.

Commission in its discretion for an additional twelve months.[3] It imposes its own regulatory lag by limiting recovery to once every twelve months and allowing a 120 day interval for approval of a surcharge before the utility is able to recover the allowed amount of revenue.[4] Additionally, the Act places a cap on the annual amount of increase residential customers may incur in any filing at $0.40 per month.[5] This means there can be up to a year and half delay in recovering revenue after a project has been placed in service and used and possibly further delay to the extent a surcharge amount exceeds the $0.40 residential ceiling.

4. The Act places no prohibition on the Commission's broad ratemaking and regulatory authority. The recovery of the Gas System Reliability Surcharge (GSRS) does not foreclose the Commission's independent review in a subsequent general rate proceeding. The Commission may make adjustments for previously approved infrastructure project expenditures and may subsequently determine in a base rate proceeding that GSRS project costs are disallowed. The Act makes it abundantly clear that the Commission's authority to review and consider infrastructure replacement costs as well as other costs in general natural gas rate proceedings is not limited by the establishment of the GSRS mechanism.

5. With the foregoing in mind, the Commission has requested the parties to address the scope of its jurisdiction to establish an alternative ratemaking methodology for pipe replacement going beyond the parameters of the Act. Based on express language of the Act not limiting the Commission's ratemaking authority, the answer would appear abundantly clear in acknowledging the Commission's prerogative to establish an alternative ratemaking mechanism for pipeline infrastructure replacement. Notwithstanding, Kansas Gas Service will discuss the legal merits for instituting alternative rate treatment in addressing future requirements natural gas utilities will be obligated to meet to comply with federal and state requirements or to relocate facilities when required by governmental authority.

[3] K.S.A. 66-2203 (c) and (d).
[4] K.S.A. 66-2204 (b) (3).
[5] K.S.A. 66-2204 (e) (1).

6. With the passage of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011,[6] the U.S. Department of Transportation has been directed to reduce the risk of pipeline failures going forward. The Department has been assigned to review the expansion of integrity management regulations; consider shut-off valves in new pipeline construction; establish the criteria for verifying Maximum Allowable Operating Pressures and monitoring the progress for cast iron pipe replacement. The Pipeline and Hazardous Materials Safety Administration is now considering additional pipeline safety regulations that are anticipated to be published this year. [7] Together with state pipeline replacement programs for unprotected bare steel and cast iron, pipeline investment not foreseen in 2006 when The Gas Safety and Reliability Policy Act was enacted will be required to be undertaken. The magnitude of these investments will place financial strain on utilities because capital expenditures will not produce incremental earnings and regulatory lag will prevent natural gas utilities from earning authorized returns. With the nationwide effort to replace aging pipeline infrastructure, higher capital costs are anticipated from the growing demand for materials and supplies. Overall regulatory compliance and integrity management will increase operating costs, exacerbating the financial need to file more frequent rate cases without adequate interim rate procedures.

7. Although The Gas Safety and Reliability Policy Act was enacted to provide interim rate recovery for pipeline safety replacements and government relocations, the limiting factors in permitting only one application every twelve months, the $0.40 cap and the lag associated with approval process will not permit timely recovery of the anticipated capital investment that will be required in the future. Additional financial considerations will come into play going forward as tax policies affecting accelerated depreciation, scarce resources and increasing interest rates are taken into account. With these factors in mind, the Commission and the parties have started a dialogue about the merits of implementing alternative procedures for addressing pipeline safety and relocation investments. Preliminary discussions and presentations have focused on the merits of the Commission adopting an alternative recovery process

[6] Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, 49 U.S.C.S. 60101 (2012).
[7] See, Pipeline Safety: Safety of Gas Transmission Pipelines, (RIN: 2137-AE72), 76 Fed. Reg. 53086 (August 25, 2011).

that can address changing regulatory conditions and the restricted nature of a GSRS application. This is not to say that the Act will be unable to provide some relief to those that desire to utilize it; but it is to say the Act may impact the rate at which pipeline replacement investment is accelerated in Kansas. Whether an adequate alternative mechanism can be devised to address all the concerns of the parties is still very much up for debate.

8. The Commission does have jurisdiction to establish alternative ratemaking methodologies for pipeline replacement. The Gas Safety and Reliability Policy Act places no limitation on the Commission's governing authority under K.S.A. 66-1,201 to supervise and control natural gas utilities and to do all things necessary and convenient in exercising this authority.[8] The Act does not change the Commission's ability to prescribe reasonable rules and regulations regarding the form of a utility rate. K.S.A. 66-1,203. Moreover, the Commission retains the ability to investigate all utility rates and charges. K.S.A. 66-1,204. The Act places no prohibition on the Commission's ability to adopt alternative ratemaking mechanisms for the recovery of safety related investments or governmental relocation projects. In fact, the Act is very clear in stating the Commission's general ratemaking authority is not compromised. See, *Kansas Gas and Elec. Co. v. State Corp. Com'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986). [9]

9. The act does not modify or otherwise limit the Commission's authority. All The Gas Safety and Reliability Policy Act does is to provide utilities with a procedure for seeking recovery between general rate cases of certain pipeline safety and government relocation capital costs. The Act does not require a utility to make an application. It is entirely discretionary. There is no prohibition against a

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[8] *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n*, 36 Kan.App.2d 83, 91-92, 138 P.3d 338, *rev. denied* 282 Kan. 790 (2006); *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n*, No. 96,264, unpublished opinion filed July 7, 2006, *rev. denied* 282 Kan. 788 (2006); and *U.S.D. No. 259 v. Kansas Corporation Comm'n*, No. 96,251, unpublished opinion filed July 7, 2006, *rev. denied* 282 Kan. 797 (2006).

[9] The Kansas Supreme Court stated: "In 1985, the legislature adopted additional statutory amendments to clarify the Commission's authority, power, and jurisdiction to supervise and control public utilities. See K.S.A. 66–101 through 66–101h. These various statutes grant to the KCC broad authority to do all things necessary and convenient for the establishment of just and reasonable rates in order to maintain reasonably sufficient and efficient service from electric public utilities. The Commission is given powers to investigate and to hold hearings. K.S.A. 66–101g declares that the statutory powers shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of the act are expressly granted to and conferred upon the Commission."

utility proceeding independently with a rate application to permit another means by which the costs may be recovered and the timing for collection. The Act does permit a form of recovery, but even that recovery could conceivably be challenged in the next rate case. Now, the costs that are approved under the Act go through Commission review and they address capital investments compelled by safety requirements and governmental authority, which lends support to their prudence. But, there is no express restriction under the Act that would preclude the Commission from taking independent action outside the Act. *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n,* supra. at 94-97.

10. The Commission has not provided a legal interpretation regarding the scope of its authority under The Gas Safety and Reliability Policy Act or its jurisdiction to act under its broader regulatory authority in approving alternative rate mechanisms for pipe replacement. The Act is clear and unambiguous with respect to its scope. Under the rules of statutory construction, an unambiguous statute must be given effect as it is written.[10] There is no need to resort to outside references or legislative history. As noted, the Act is only invoked at the discretion of the parties. The Act is silent with respect to any prohibition affecting the Commission's broad regulatory authority. Finally, the Act does not displace the Commission's ability to make an independent decision with regard to the recovery of costs associated with pipeline replacement. To determine that the Act somehow displaced the Commission's general regulatory authority would require an interpretation not expressed in statute and would lead to an otherwise impracticable result.

11. The scope of the Commission's jurisdiction under the Act can be determined from an examination of the issues involved in the *Kansas Industrial Group* case. In that case, the Kansas Industrial Consumers Group, consisting of large volume commercial and industrial consumers, challenged the implementation of Westar Energy's Environmental Cost Recovery Rider on the grounds that the funding mechanism was not expressly provided in statute as other surcharges were. The Industrial Group argued that based on the doctrine of expressio unius est exclusio alterius, viz., the inclusion of one thing implies the exclusion of another, a legislative intent not to include other surcharges,

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[10] *In re Marriage of Killman*, 264 Kan. 33, 43, 955 P.2d 1228 (1998).

such as the environmental rider, was established. The Court of Appeals rejected this argument, relying on the broad authority otherwise possessed by the Commission under the Public Utility Act. The Court held that the legislature vested the Commission with delegated authority under statutory provisions similar to K.S.A. 66-1,201 through 66-1,204, and was not foreclosed from considering regulatory alternatives that were not otherwise established in statute.[11] This decision was reconfirmed in an unpublished opinion after remand back to the Commission on other issues, including whether the Commission could approve an unbundled transmission service charge that was similar but not in complete conformity with a specific statutory provision for a transmission delivery charge.[12] Under the same rationale used in *Kansas Industrial Group*, the Court upheld the Commission in adopting a transmission charge that was different from the statutorily approved rider on the grounds there was no indication in the statute that prevented an alternative approach from being implemented by the Commission, as long as it was just and reasonable.

12. The Commission has considered two utility requests for alternative ratemaking mechanisms to fund future pipeline replacement brought on by safety, integrity and government relocation considerations.[13] In Docket No. 12-KGSG-721-TAR, Kansas Gas Service requested an infrastructure surcharge to offset the cost of removing cast iron pipe in its system over an 8 year period. After a hearing on the application, the Commission determined cast iron removal was a safety related matter that could be addressed under The Gas Safety and Reliability Policy Act and did not find it necessary to implement an alternative mechanism. The Commission did not consider the scope of its authority to approve an alternative rate mechanism in that docket nor did it interpret statutory provisions in the Act, but it did invite Kansas Gas Service to bring any new issues to the attention of the Commission, leaving future

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[11] The Kansas Court of Appeals said: "Based on the broad statutory authority granted to the Commission, the *expressio unius* doctrine does not appear applicable with respect to determining legislative intent. We conclude the Commission did not exceed its statutory authority by permitting Westar to include the ECRR in its rates." *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n,* supra. at 97.

[12] Supreme Court Rule 7.04(g) 2 (b) provides that an unpublished opinion is not favored for citation, but may be cited as persuasive authority on an issue not addressed in a published opinion or to assist a court in the disposition of an issue.. See, Unified School District No. 259 v. State Corporation Commission, 176 P.3d 250, 2008 WL 400199 (Kan. App. 2008) (CURB *inter alia* was a party in the case) [Attached].

[13] Order Denying Kansas Gas Service's Application for Infrastructure Replacement Program Surcharge, Docket No. 12_KGSG-721-TAR (September 13, 2012 and Order Approving Partial Stipulated Settlement Agreement; Order on Contested Issues, Docket No. 14-ATMG-320-RTS, September 4, 2014.

action by the Commission a possibility. The Commission also considered the rate application of Atmos Energy in Docket No. 14-ATMG-320-RTS and its request to put into place a regulatory asset mechanism to account for system integrity projects in a manner not provided under the Act. The Commission once again did not interpret the scope of its authority under the Act, but did deny the request as not being specific enough and concluded that the GSRS was a way costs could be recovered and suggested possible legislative action to broaden the scope of the Act. However, the Commission did not rule out taking further action apart from the Act and directed Atmos Energy and others to participate in a round table discussion about legislative efforts to expand the scope of the Act, but indicated its decision did not preclude consideration of other "infrastructure improvement mechanisms" in the future. After considerable industry discussion with the Staff and CURB, the instant docket was opened based on the Report and Recommendation issued by the Staff on February 2, 2015. As a preliminary matter, the Commission asked the parties to address jurisdictional issues related to the Act and whether the Commission could take action to implement alternative ratemaking measures to address pipeline replacement. Based on a review of the express language in the Act and case law precedent, as discussed above, it is clear the Commission has that ability to adopt alternative rate mechanisms under its plenary authority under the Public Utility Act and is not restricted by The Gas Safety and Reliability Policy Act. The Commission has not foreclosed taking action and as set forth above, the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 and other factors provides a compelling basis for considering of alternative infrastructure replacement mechanisms. Accordingly, the Commission should consider the other issues set forth in the Order and determine the appropriateness of an alternative recovery mechanism that will allow a reasonable recovery for pipeline replacement costs. Given anticipated pipeline replacement construction activity, an alternative recovery mechanism could be established that would provide graduated and moderate rate increases, fewer rate cases and enhance utility financial integrity.

13. Kansas Gas Service looks forward to addressing the other issues set forth by the Commission in its Order of March 12, 2015.

WHEREFORE, Kansas Gas Service, a division of ONE Gas, respectfully prays for an Order determining the scope of the Commission's jurisdiction to establish an alternative recovery mechanism and for such other relief as the Commission deems appropriate.

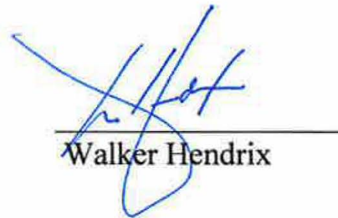
KANSAS GAS SERVICE,
a division of ONE Gas, Inc.

WALKER HENDRIX #08835
7421 West 129th St.
Overland Park, KS 66213
(913) 319-8620
ATTORNEY FOR RESPONDENT

VERIFICATION

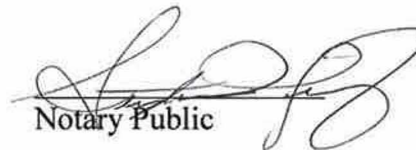
STATE OF KANSAS)
) ss
COUNTY OF JOHNSON)

Walker Hendrix of lawful age, being first duly sworn upon oath, deposes and states: That he is an attorney for Kansas Gas Service, a division of ONE Gas, Inc.; that he has read the above and foregoing Recommendation on Further Proceedings and that the statements therein contained are true according to his knowledge, information and belief.



Walker Hendrix

Subscribed and sworn before me this day of April 13, 2015.



Notary Public

My Appointment Expires: 06/05/18

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 17th day of April, 2015, a true and correct copy of the above and foregoing document was mailed, postage prepaid to:

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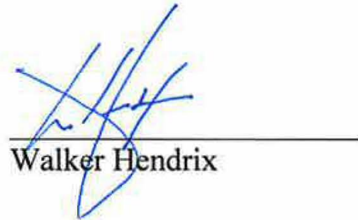

Walker Hendrix

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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
UNIFIED SCHOOL DISTRICT NO. 259, Sedgwick County, State of Kansas, Petitioner/Appellant,
v.
THE STATE CORPORATION COMMISSION of the State of Kansas, Respondent/Appellee.

No. 99,414.
Feb. 11, 2008.

West KeySummary**Electricity 145 11.3(4)**

145 Electricity
145k11.3 Regulation of Charges
145k11.3(4) k. Operating Expenses. Most Cited Cases

A corporation commission could permit an electric utility to recover transmission-related costs through an unbundled transmission service charge (TSC). The relevant statute permitted electric utilities to seek a transmission delivery charge (TDC), which would be reflected as a separate charge on the customers' bills. However, the commission previously permitted the unbundling of transmission costs absent specific statutory authority. Further, allowing electric utility to remove transmission-related costs from base rates and record them on a separate line on customers' bills would not result in unjust or unreasonable rates. K.S.A. 2005 Supp. 66-1237.

Appeal from the Kansas Corporation Commission. Opinion filed February 11, 2008. Affirmed.

Sarah J. Loquist, assistant general counsel, of Unified School District No. 259, of Wichita, for appellant.

Dana A. Bradbury, litigation counsel, and Martha J. Coffman, chief advisory counsel, of Kansas Corporation Commission, of Topeka, for appellee.

Martin J. Bregman and Cathryn J. Dinges, of Westar Energy, Inc. and Kansas Gas and Electric Company, of Topeka, for intervenors Westar Energy, Inc. and Kansas Gas and Electric Company.

Niki Christopher, of Citizens' Utility Ratepayer Board, of Topeka, for intervenor Citzens' Utility Ratepayer Board.

Before CAPLINGER, P.J., GREEN and MALONE, J.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Unified School District No. 259 (the District) appeals from the order of the Kansas Corporation Commission (Commission) in a rate case filed by intervenor Westar Energy, Inc. (WEI) and Kansas Gas & Electric Company (KG & E) (collectively Westar). The challenged order was issued by the Commission following a remand after this court reversed portions of the Commission's prior orders.

In this appeal, the District challenges the Commission's order on remand with respect to its treatment of the LaCygne 2 sale/leaseback transaction. The District argues the Commission failed to adequately explain its reasons for changing its prior treatment of the transaction and, further, that the reasons identified were not supported by substantial competent evi-

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dence.

The District also contends the Commission erroneously permitted Westar to recover its transmission-related costs through an unbundled transmission service charge (TSC) because (1) the mechanism used violated K.S.A.2005 Supp. 66–1237 in various respects; and (2) it was based on costs allowed in a Federal Energy Regulatory Commission (FERC) determination which was not final until after this court's prior opinions were issued and therefore the Commission engaged in retroactive ratemaking.

Factual and procedural background

This appeal emanates from a utility rate case filed in 2005 by Westar. The Commission approved an aggregated revenue requirement increase for Westar totaling just over $3,000,000. Three separate appeals were filed from the Commission's initial rate order, and in three orders issued on July 7, 2006, this court affirmed in part, reversed in part, and remanded the case to the Commission for further proceedings. See *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n,* 36 Kan.App.2d 83, 138 P.3d 338, *rev. denied* 282 Kan. 790 (2006); *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n,* Case No. 96,264, unpublished opinion filed July 7, 2006, *rev. denied* 282 Kan. 788 (2006); and *U.S.D. No. 259 v. Kansas Corporation Comm'n,* Case No. 96,251, unpublished opinion filed July 7, 2006, *rev. denied* 282 Kan. 797 (2006).

In those appeals, this court rejected several challenges raised by the Petitioners to the rate order. However, this court reversed and remanded the Commission's final order on three issues, finding: (1) the Commission's approval of Westar's transmission delivery charge (TDC) was unlawful because the TDC did not comply with the requirements of K.S.A.2005 Supp. 66–1237 (2007 amendments not applicable), 36 Kan.App.2d at 98–104, 138 P.3d 338; (2) the Commission's order approving terminal net salvage depreciation was not supported by substantial competent evidence, 36 Kan.App.2d at 104–10, 138 P.3d 338; and (3) the Commission's decision to change its treatment of the LaCygne 2 sale/leaseback transaction was arbitrary and capricious due to the Commission's failure to explain the reasons for its deviation from its prior rulings regarding that transaction. *U.S.D. No. 259,* No. 96,251, slip op. at 8–9.

***2** Following remand, the Commission issued an order soliciting comments from the parties as to the appropriate procedure to be used to address the three remanded issues and, if refunds became necessary, the manner in which such refunds should be accomplished. After receiving comments from the various parties, the Commission issued an order establishing a procedure for handling the issues on remand.

In that first order, the Commission held that terminal net salvage costs should be removed from Westar's depreciation calculation subject to a minor "true-up" for deferred income taxes; this resulted in a net decrease to Westar's total revenue requirement of over $11,000,000. The Commission also refused Westar's request to reopen the record for purposes of taking additional evidence on the impact the depreciation adjustment would have on Westar's return on equity.

In that same order, the Commission also addressed this court's ruling on the LaCygne 2 sale/leaseback transaction. The Commission reviewed its past orders from the present docket, as well as its 2001 order from the company's prior rate case—Docket No. 01–WSRE–436–RTS ("the 436 Docket"), and concluded it erred in the 436 docket by treating the gain from the LaCygne transaction as cost-free capital and reducing KG & E's rate base by the unamortized gain. The Commission found that a statement in the 1987 Commission order approving the sale/leaseback was "factually incorrect" and that it erred in the 436 docket in not recognizing that inac-

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curacy. The Commission also set forth various policy rationales supporting its decision to correct its erroneous decision from the 436 docket. After reviewing testimony regarding the original LaCygne transaction, the Commission concluded credible evidence established that a rate base reduction was not appropriate and no evidence existed to suggest KG & E had agreed to use the unamortized gain as a rate base offset.

Pursuant to K.A.R. 82–1–230(k), the Commission reopened the record for the purpose of determining Westar's transmission-related costs. The Commission noted that on remand, Westar was no longer seeking a TDC charge and the Commission would not approve a TDC. Instead, the Commission held it would permit Westar to recover its transmission-related costs "like any other cost associated with this rate case." The Commission further ordered Westar to present prefiled testimony regarding any revenues Westar may have collected through the TDC in excess of its actual transmission costs.

Citizens' Utility Ratepayer Board (CURB), Kansas Industrial Consumer Group, Inc. (KIC) and the District filed petitions for reconsideration challenging nearly every aspect of the order. The Commission rejected these arguments in a subsequent order on reconsideration.

Westar, CURB, and the Commission's Staff (Staff) then filed testimony on the remaining issues. Westar and Staff filed a joint motion seeking to approve a stipulation and agreement (Stipulation) providing Westar's Kansas retail transmission-related revenue costs for its two entities totaled just over $61,000,000. The Stipulation further provided that utilizing these costs would reduce WEI's overall revenue requirement by over $3,000,000 and reduce KG & E's overall revenue requirement by a similar amount. The Commission held a hearing on May 10, 2007, on the pending issues and in an order dated July 31, 2007, rendered its final determinations on the issues on remand. As to the recalculation of depreciation rates due to removal of terminal net salvage costs, the Commission adopted Westar's recalculations which were made as directed by the Commission's prior orders.

***3** As for the TDC, the Commission noted that K.S.A.2005 Supp. 66–1237 had been amended by the 2007 legislature, but acknowledged the amendments could not be applied in this case. The Commission reaffirmed its refusal to permit a TDC in light of this court's interpretation of K.S.A.2005 Supp. 66–1237. Instead, the Commission adopted the terms of the Stipulation, allowing Westar to recover its transmission costs "in the same manner as other costs are treated in a rate case." The Commission found the Stipulation determined Westar's transmission costs for the 2004 test year, the same test year as used in determining Westar's other costs, and included those costs in the cost of service.

The final order provided for recovery of Westar's transmission-related costs through a line-item on the customers' bills denominated as a Transmission Service Charge (TSC). The Commission found that the parties agreed the Stipulation was appropriate for prospective recovery of transmission-related costs. The Commission expressly rejected the suggestions of the District, CURB, and KIC that the Commission was required to use transmission rates from a 1998 FERC order when calculating TDC refunds.

Finally, the Commission determined that refunds of any excess rates obtained by Westar under the TDC would be calculated by determining the difference between (1) the retail transmission revenue requirement determined in the post-remand proceedings and (2) the retail rates and TDC rates actually billed to customers since February 27, 2006. The Commission further ordered that any refunds include interest calculated at a rate of 6.395%. With respect to the form of refunds, the Commission ruled that all Westar cus-

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tomers should be treated identically, rejecting KIC's request that its customers receive refunds in the form of checks. Instead, Westar was ordered to file new tariffs and a plan for implementing refunds within 3 weeks of the order.

The Commission denied petitions for reconsideration filed by the District, CURB, and KIC and reaffirmed its prior rulings. The District filed a timely petition for judicial review with this court. Westar and CURB intervened in this appeal. KIC and CURB likewise filed timely petitions for judicial review which were docketed as Nos. 99,415 and 99,416, respectively.

As in the appeals from the Commission's prior order, the parties raise very similar issues in their three separate appeals. Although separate briefs were filed in each appeal, the court conducted one oral argument for all three appeals and some of the arguments discussed in this opinion were raised by KIC or CURB at oral argument and/or in their briefs.

Standard of Review

Pursuant to K.S.A. 66–118c, we review the Commission's order in accordance with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77–601 *et seq.* On appeal, we presume the validity of the Commission's findings, and we may set aside its order only if it is unlawful, not supported by substantial competent evidence, without foundation in fact, or otherwise unreasonable, arbitrary, or capricious. *Western Resources, Inc. v. Kansas Corporation Comm'n,* 30 Kan.App.2d 348, 351, 42 P.3d 162, *rev. denied* 274 Kan. 1119 (2002). The party challenging the legality of the Commission's orders bears the burden of proof pursuant to K.S.A. 77–621(a)(1). *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n,* 28 Kan.App.2d 313, 315, 16 P.3d 319 (2000), *rev. denied* 271 Kan. 1035 (2001).

***4** The Commission's order is " " 'lawful" if it is within the statutory authority of the commission, and if the prescribed statutory and procedural rules are followed in making the order.' [Citations omitted.]" *Farmland Industries, Inc. v. Kansas Corporation Comm'n,* 24 Kan.App.2d 172, 175, 943 P.2d 470, *rev. denied* 263 Kan. 885 (1997). An order is considered " " 'reasonable" if it is based on substantial competent evidence.' [Citations omitted.]" 24 Kan.App.2d at 175, 943 P.2d 470.

The Commission is granted broad discretion by the legislature in weighing the competing interests involved in utility rate cases. We do not have authority to substitute our judgment for that of the Commission. Rather, we must recognize that the Commission's decisions "involve complex problems of policy, accounting, economics, and other special knowledge." *Western Resources, Inc.,* 30 Kan.App.2d at 352, 42 P.3d 162. Finally, we may reverse or nullify a Commission order only when the decision is " " 'so wide of the mark as to be outside the realm of fair debate.... [Citation somitted.]" " ' *Williams Natural Gas Co. v. Kansas Corporation Comm'n,* 22 Kan.App.2d 326, 335, 916 P.2d 52, *rev. denied* 260 Kan. 1002 (1996).

Lacygne 2 Sale/Leaseback Transaction

The District first challenges the Commission's treatment of the 1987 LaCygne 2 sale/leaseback transaction. On remand, the Commission again found that unlike its decision in the 2001 rate case, neither the facts nor policy reasons justified reducing Westar's rate base by the unamortized gain from the transaction. The District contends this decision was arbitrary and capricious and not supported by the evidence.

In Westar's 2001 rate case, the Commission found the remaining unamortized gain KG & E received from the LaCygne 2 sale/leaseback transaction was essentially cost-free capital. The Commission therefore removed the remaining unamortized gain of $86.5 million from KG & E's rate base. Westar (then West-

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ern Resources, Inc.) appealed this aspect of the Commission's order, along with other issues, to this court. With respect to the sale/leaseback issue, this court found the Commission's ruling was supported by substantial competent evidence. *Western Resources,* 30 Kan.App.2d at 357–63, 42 P.3d 162.

In the present rate case, Westar presented the testimony of various employees, including its president and chief executive officer (CEO), James Haines, seeking to reverse the Commission's prior treatment of the unamortized gain. Haines testified the Commission erred in adopting the sale/leaseback adjustment in the prior rate case and that the ruling in the 436 docket was factually incorrect. Because KG & E used all of the gain to directly benefit customers rather than using it for its nonregulated enterprises, Haines asserted the Commission erred in treating the gain as cost-free capital. Haines testified that he and Dick Rohlfs, WEI's director of retail rates, were the principal architects of KG & E's rate stabilization plan, including the sale/leaseback transaction, and he was knowledgeable regarding the mechanics of that transaction.

***5** In its orders prior to remand, the Commission simply found "that the previous Commission's decision as to the unamortized gain on the LaCygne lease should be reversed. The Commission is satisfied by the evidence presented by Westar that the benefits of the transaction have been reflected in the cost of service as promised by Westar." The Commission also found that the utility had not agreed in 1987 to include the unamortized gain in its rate base in the future and that all proceeds of the transaction had been credited to the cost of service.

In the first appeal in this docket, this court noted that the doctrines of res judicata and collateral estoppel are not mandatory in rate proceedings. However, the court pointed out that when an administrative agency deviates from established policies, it must explain the basis for the change, and substantial evidence must support that change. *U.S.D. No. 259,* No. 96,251, slip op. at 5–8. This court held:

> "Here, the Commission failed to give any reason for reversing its order on the LaCygne 2 sale/leaseback issue other than citing Haines' testimony. As previously noted, however, this same evidence had been presented by Westar in the prior rate case. There may have been a valid reason for the Commission to change its ruling on this issue, *but the Commission failed to express one in its order. Even an admission by the Commission that its prior ruling was factually incorrect would have provided a basis for reversing its decision, but the Commission provided no such explanation in its order.* We concluded the Commission's order regarding the LaCygne 2 sale/leaseback was unreasonable, arbitrary, and capricious." (Emphasis added.) *U.S.D. No. 259,* slip op. at 8–9.

On remand, the Commission reviewed its prior orders in this case, as well as its orders from the 436 docket and concluded it erred in the 436 docket in finding Westar had agreed to treat the gain from the LaCygne 2 sale/leaseback as cost-free capital in future rate cases. The Commission specifically found that language in its 1987 order approving the transaction was factually incorrect and that it should have recognized the 1987 error in the 436 docket.

In weighing the credibility of the witnesses involved in the original transaction, the Commission found Westar's witnesses credible. The Commission found no evidence that KG & E had ever proposed to use the unamortized gain as an offset to rate base and, thus, determined its 1987 and 2001 orders were erroneous in finding such a proposal was made. The Commission found the record clearly established the proceeds from the transaction were not used solely to benefit shareholders but were used as an integral part of a rate stabilization plan. Finally, the Commission concluded that perpetuating its prior error would dis-

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courage Kansas utilities from entering into favorable financial arrangements benefitting ratepayers.

In this appeal, the District contends the Commission erred in reversing its interpretation of its prior orders relating to the LaCygne transaction. The District suggests the Commission decision on remand was a "blatant attempt ... to give the mere appearance of compliance with this Court's order" and that the Commission failed to explain the basis for its conclusion that its prior decision was factually incorrect. Finally, the District contends the Commission's determination is not supported by substantial competent evidence.

***6** As noted in our prior opinion:

> "However, rate proceedings are generally considered a legislative, rather than quasi-judicial, function. Thus, the doctrines of res judicata and collateral estoppel are not mandatory. See, *e.g., Kansas Gas & Electric Co. v. Kansas Corporation Comm'n,* 239 Kan. 483, 491, 720 P.2d 1063 (1986) (public utility rate making is a legislative function); *Consumers Energy Co. v. Michigan Public Service Com'n,* 268 Mich.App. 171, 177–78, 707 N.W.2d 633 (2005). " 'The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding." [Citations omitted.]' *OXY USA, Inc. v. F.E.R.C.,* 64 F.3d 679, 690 (D.C.Cir.1995)." *U.S.D. No. 259,* No. 96,251, slip op. at 6.

Thus, the Commission on remand was not precluded from reversing its course regarding its treatment of the LaCygne transaction. Rather, as we stated in our prior order, we must determine whether the Commission presented valid reasons for changing its ruling on this issue. And, as we further stated in that order, an explanation by the Commission that its prior ruling was factually incorrect would represent an acceptable basis for a change of ruling. Moreover, we pointed out that a change in policy can support a change in a prior ruling, but that change too, must be explained and supported by substantial evidence. U.S.D. No. 259, slip op. at 8–9.

Our review of the record on remand reveals that the Commission did both in this case—*i.e.,* on remand, it supported its change of decision both with an explanation of the factual basis for the change in its prior ruling, and it also provided an explanation for the policy reasons underlying that change.

In its final order in this case, the Commission indicated it reviewed the record in both the 436 docket and the present docket in concluding it erred in its 2001 order. The Commission explained that its prior ruling was based upon an erroneous finding of fact in its 1987 order that KG & E had proposed the rate base reduction that was implemented in the Commission's rulings in the prior rate case when, in fact, no such proposal was ever made by the company.

The District and CURB argue that the Commission's findings on remand are not supported by substantial competent evidence because evidence in the record supported the Commission's findings in the 436 Docket. Specifically, the Petitioners point to the testimony of Staff witness James Proctor, the Chief of Financial Analysis for the Commission, and they suggest the Commission ignored the testimony of Proctor and others in reversing its prior ruling regarding the sale/leaseback transaction.

As Westar points out, however, the extensive testimony by Proctor and others on the LaCygne transaction did not address the source of the company's proposal or the company's intent in making the proposal. Rather, their testimony addressed accounting and ratemaking theory and the Commission's intent with respect to its 1987 order.

***7** Perhaps more significant to our analysis here,

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however, is the Commission's recognition of the policy change behind the reversal of its prior treatment of the LaCygne transaction.

Specifically, the Commission pointed out:

"Given that the September 17, 1987 order approving the transaction contemplated uncertainty as to what Westar planned to do with the proceeds, *failing to recognize the factually incorrect statement in the September 17, 1987 order would send a strong signal that the proceeds from a gain do not necessarily have to inure to the benefit of ratepayers.* In other words, faced again with proceeds from a sale, and armed with the knowledge that the Commission will not only amortize the gain but also use the unamortized gain as a rate base reduction, the best course of action from the utility's perspective would be to distribute the proceeds to shareholders rather than use it for the benefit of ratepayers." (Emphasis added.)

Notably, the Commission concluded that if it were to continue to require the use of the proceeds of the sale/leaseback as a rate base offset contrary to KG & E's proposal, the Commission would discourage utilities from proposing ratepayer-favorable financial arrangements in the future.

Recognition of specific policy reasons is an acceptable and necessary basis for the agency's change of course. As noted by one federal circuit court:

"Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, *and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.*" (Emphasis added) *Greater Boston Television Corp. v. F.C.C.,* 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied* 403 U .S. 923 (1971).

Further, we note that an administrative agency "is not precluded from taking appropriate action [to protect the public interest] because of a mistaken action on its part in the past." *Warburton v. Warkentin,* 185 Kan. 468, 477, 345 P.2d 992 (1959).

We conclude the Commission complied with our mandate in the prior appeal by setting forth detailed factual and policy reasons for the reversal of its prior treatment of the LaCygne 2 sale/leaseback transaction for purposes of future rates. And because substantial competent evidence supports the Commission's decision, we affirm the Commission's treatment of the LaCygne 2 sale/leaseback transaction.

Transmission Service Charge

The District next challenges the Commission's order pertaining to Westar's transmission-related costs, contending the Commission erroneously permitted recovery of such costs because (1) the mechanism used violated K.S.A.2005 Supp. 66–1237 in various respects; and (2) it was based on costs allowed in a FERC determination which was not final until after this court's prior opinions were issued.

Factual Background

***8** In the initial rate proceeding, the Commission allowed Westar to recover these costs through a transmission delivery charge (TDC) pursuant to K.S.A.2005 Supp. 66–1237. This court reversed the Commission's ruling because the TDC allowed by the Commission did not comport with explicit requirements of that statute. *Kansas Industrial Consumers Group, Inc.,* 36 Kan.App.2d at 98–104, 138 P.3d 338.

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On remand, Westar and other parties presented evidence regarding Westar's actual transmission-related costs, including evidence that Westar had filed an application with FERC in 2005 to update its transmission service revenue requirements. While the application was tentatively approved in 2005, FERC did not establish a final transmission revenue requirement rate until November 7, 2006. In determining these rates, FERC utilized a 2004 calendar year—the same test year used in the Commission's rate proceeding in this docket. Westar requested that its retail jurisdictional portion be based on the FERC-determined costs, which resulted in aggregated transmission costs of over $62,000,000 for the two Westar entities.

Westar's witness agreed that based on the Commission's original orders allowing the TDC, it had changed its rates through the TDC. Westar and the Southwest Power Pool (SPP) calculated the refunds for transmission services based upon (1) FERC's reduction of Westar's tentative rate in its final order and (2) the charges resulting from the TDC increase.

Staff's witnesses testified that Westar's calculations of transmission charges were supported by the approved FERC settlement and, therefore, were appropriately applied to determine the company's transmission costs. Staff expressed some concerns regarding whether Westar properly recalculated the transmission-related costs connected with wholesale purchasers and proposed revisions to the calculations to resolve those perceived inconsistencies. Staff also agreed with Westar's methodology for calculating the TDC refunds but asserted the refunds should include the revisions it proposed with respect to wholesale transmission-related costs.

In prefiled rebuttal testimony, Westar's witness agreed with the calculations in Staff's testimony. Thereafter, Westar and Staff entered into the Stipulation, which various witnesses testified in support of at the subsequent evidentiary hearing. Westar's Dick Rohlfs testified that the transmission-related costs would be based on the costs found in the 2006 FERC order, which was based, in turn, on 2004 test year costs. He explained that although the transmission charges would remain unbundled—*i.e.,* listed separately on customers' bills as a "Transmission Service Charge" rather than incorporated into base rates—the TSC was different than an TDC because it was based on a fixed rate tied to the company's 2004 application filed with FERC and was not subject to change.

In its subsequent orders, the Commission approved the Stipulation with respect to Westar's prospective transmission costs and the calculation of refunds due as a result of the improper TDC. The Commission determined that the final approved costs determined by FERC in 2006, which were based on the same test year as Westar's pending retail rate case, best reflected Westar's transmission costs during the 2004 test year. The Commission further determined that refunds should be based on the differential between the amount Westar charged under the TDC and Westar's transmission costs as reflected in the final FERC order.

Exclusiveness of K.S.A.2005 Supp. 66–1237

***9** On appeal, the District argues the Commission erred in permitting Westar to recover transmission-related costs through an unbundled transmission service charge (TSC). The Petitioners contend that because the only statute specifically permitting unbundled transmission charges is K.S.A.2005 Supp. 66–1237, unbundling is permitted only in that context.

Generally, administrative agencies such as the Commission, as creatures of statute, may only act within the scope of authority granted by authorizing statutes. *Legislative Coordinating Council v. Stanley,* 264 Kan. 690, 706, 957 P.2d 379 (1998). Whether the agency has exceeded its statutory authority requires

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interpretation of the statutes establishing the agency; this presents a question of law subject to our unlimited review. *In re Tax Appeal of Trickett,* 27 Kan.App.2d 651, 654–55, 8 P.3d 18 (2000).

The interpretation of a statute by an administrative agency which is charged with the responsibility of enforcing that statute is generally entitled to judicial deference, and if there is a rational basis for the agency's interpretation, it should be upheld on judicial review. *Southwestern Bell Tel. Co. v. Kansas Corporation Comm'n,* 29 Kan.App.2d 414, 418, 29 P.3d 424 (2001). Although this court gives deference to the agency's interpretation of a statute, the final construction of a statute lies with the appellate court; the agency's interpretation, while persuasive, is not binding on the court. *In re Appeal of United Teleservices, Inc.,* 267 Kan. 570, 572, 983 P.2d 250 (1999).

K.S.A.2005 Supp. 66–1237 was enacted in 2003 and provides:

"(a) Any electric utility subject to the regulation of the state corporation commission ... may seek to recover costs associated with transmission of electric power, in a manner consistent with the determination of transmission related costs from an order of a regulatory authority having legal jurisdiction, through a separate transmission delivery charge included in customers' bills. The electric utility's initial transmission delivery charge resulting from this section shall be determined by the commission from transmission-related costs approved in the electric utility's most recent retail rate filing. *If an electric utility elects to recover its transmission-related costs through a transmission delivery charge, the commission shall, effective the same date as the effective date of the initial transmission delivery charge, reduce the electric utility's retail rates to such a level that the sum of the revenue recovered from such retail rates and the initial transmission delivery charge is equal to the revenue recovered from the retail rates in effect immediately prior to the effective date of the initial transmission delivery charge.*" (Emphasis added.)

K.S.A.2005 Supp. 66–1237 permits electric utilities to seek a TDC, which is reflected as a separate charge on the customers' bills. The TDC is a clearly defined and distinct mechanism that allows for interim adjustments "whenever there is a change in transmission-related costs" resulting from a proper regulatory order. K.S.A.2005 Supp. 66–1237(b). The District argues that by enacting this statute, the legislature intended to preclude the Commission from unbundling transmission-related costs except in connection with TDCs.

***10** The District's argument is primarily based on the doctrine of *expressio unius exclusio alterius, i.e.,* the inclusion of one thing implies the exclusion of another. Significantly, we declined to apply this doctrine, albeit in a different context, in the prior appeal in this case. There, we considered whether the Commission had the ability to impose a surcharge for recovering capital expenditures for environmental compliance upgrades absent explicit statutory authority. The petitioners argued that because the legislature had enacted statutes permitting surcharges in certain contexts, the Commission was precluded from imposing an environmental surcharge without statutory authority. We rejected this argument, finding the surcharge statutes did not expressly limit the broad discretionary authority extended to the Commission by other statutes. 36 Kan.App.2d at 94–97, 138 P.3d 338.

The Commission points out that prior to the enactment of K.S.A.2005 Supp. 66–1237, it permitted at least two other electrical utilities to unbundle transmission-related costs. To support this assertion, the Commission requested that we take judicial notice of two prior Commission dockets—dockets unrelated to this case—wherein the Commission unbundled transmission costs. We denied this motion, but we

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note that the District, in responding to this argument, does not dispute that the Commission previously permitted the unbundling of transmission costs absent specific statutory authority. Instead, the District argues that regardless of the Commission's prior actions, after the enactment of K.S.A.2005 Supp. 66–1237, the only means of unbundling transmission costs is through the mechanism provided by that statute.

The District sites no legislative history or other evidence indicating the legislature intended to prohibit unbundling of transmission-related costs except within the narrow confines of a TDC. Moreover, the District does not suggest that allowing Westar to remove transmission-related costs from base rates and record them on a separate line on customers' bills somehow results in unjust or unreasonable rates.

For these reasons, we reject the District's assertion that K.S.A.2005 Supp. 66–1237 provides the exclusive means to unbundle transmission costs.

Compliance with K.S.A.2005 Supp. 66–1237

In a related argument, the District asserts the TSC approved by the Commission is nothing more than a TDC with a different name; therefore, the TSC is invalid because it fails to meet the requirements of K.S.A.2005 Supp. 66–1237. In response, Westar and the Commission do not claim the TSC meets the requirements of K.S.A.2005 Supp. 66–1237; rather, they claim the statute is inapplicable.

The District points out that the similarities between the TSC and the TDC are substantial—*i.e.,* they both involve unbundled transmission rates that are reflected separately on customers' bills. The Commission and Westar contend, however, that a TSC differs significantly from a TDC because a TSC is an unbundled rate that is fixed or static unless another rate case or other proceeding is filed; a TDC, on the other hand, is subject to automatic changes when the utility presents an appropriate regulatory order to the Commission.

***11** The District seeks to minimize this distinction, noting that under K.S.A.2005 Supp. 66–1237, a utility *may* seek a rate change based on a regulatory order which reflects revised transmission-related costs. The District suggests there are no automatic changes and utilities will only seek revisions under a TDC when the costs rise but will take no action if their transmission-related costs decrease.

Unquestionably, the TDC and the TSC do have some similarities, and the TSC does not comply with K.S.A.2005 Supp. 66–1237. Morever, it is undisputed that a government entity may not do indirectly what it is prohibited from doing directly. See *State v. Nguyen,* 285 Kan. 418, 172 P.3d 1165 (2007) (discussing the doctrine of unconstitutional conditions). However, it is clear from the overall language and structure of K.S.A.2005 Supp. 66–1237 that is was designed to provide a mechanism for electrical utilities with preapproved TDC provisions to pass on regulatory-approved changes in transmission-related revenue requirements in an immediate fashion with minimal regulatory processes. Significantly, the TSC approved by the Commission on remand does not allow for such a mechanism.

Rather, it is undisputed that the TSC may be altered only if Westar undertakes a full-blown rate proceeding or some other detailed procedure, such as reapplying for a TDC based upon K.S.A.2005 Supp. 66–1237 once its "final rates" are established in this matter.

For these reasons, we reject the District's suggestion that the TSC is functionally equivalent to a TDC. Therefore, we conclude the Commission was not obligated to comply with the requirements of K.S.A.2005 Supp. 66–1237 in permitting the TSC.

Adoption of 2006 FERC Order

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The District also challenges the Commission's adoption of the 2006 final FERC order in determining Westar's transmission-related costs for purposes of prospective rates and/or the amount Westar must refund to customers for revenues it earned based on the now-invalid TDC charges. The District contends the use of the FERC order, which was not finalized until after this court's order remanding the case, constitutes unlawful retroactive ratemaking and/or is otherwise contrary to Commission regulations.

The District suggests the Commission's reliance on the 2006 FERC order violates standard regulatory principles prohibiting retroactive ratemaking. We disagree. The rule against retroactive ratemaking prohibits the Commission from " 'adjusting current rates to make up for a utility's over- or under-collection in prior periods." ' *Consolidated Edison Co. of New York, v. F.E.R.C.,* 347 F.3d 964, 969 (D.C.Cir.2003). Retroactive ratemaking also can occur when a utility is required to refund revenues collected based on lawfully established rates. *Kansas Pipeline Partnership v. Kansas Corporation Comm'n,* 24 Kan.App.2d 42, 57, 941 P.2d 390, *rev. denied* 262 Kan. 961 (1997). Likewise, refusing to order a utility to make full refunds of amounts charged over Commission-approved tariffs also constitutes retroactive ratemaking. *Sunflower Pipeline Co. v. Kansas Corporation Commission,* 5 Kan.App.2d 715, 722, 624 P.2d 466, *rev. denied* 229 Kan. 671 (1981).

***12** However, we have held on several occasions that the Commission has the power, subject to judicial review, to correct errors in the ratemaking process without retroactively ratemaking. See *Farmland Industries, Inc. v. Kansas Corp. Comm'n,* 25 Kan.App.2d 849, 971 P.2d 1213 (1999). A rate order is not "final" until after the rates are approved on appeal or the time for appeal from the Commission's order has expired. Thus, if we reverse all or a portion of a Commission rate order, the utility's rates are not final until the Commission issues an order on remand and that subsequent order becomes final. *Kansas Pipeline Partnership,* 24 Kan.App.2d at 55–57, 941 P.2d 390. Thus, refunds ordered or other changes made upon remand do not constitute retroactive ratemaking because no retroactive action has occurred. 24 Kan.App.2d at 56–58, 941 P.2d 390.

The District attempts to distinguish *Kansas Pipeline Partnership* by noting it involved refunds of rates held invalid; they claim this case involved retroactively increasing rates. We view this as an overly narrow interpretation of *Kansas Pipeline Partnership.* In that case, the Commission permitted the applicants to increase their rates to include certain " 'market entry costs" 'and related carrying costs incurred by companies acquired by the applicants. 24 Kan.App.2d at 44, 941 P.2d 390. This court reversed that portion of the rate order, finding no evidence the applicants actually incurred the costs in question and remanding to the Commission with broad directions to reconsider the issue. 24 Kan.App.2d at 45, 941 P.2d 390.

On remand, the Commission denied the applicants' request to reopen the record to submit additional evidence in support of the market entry costs. Instead, the Commission found the applicants did not incur such costs and ordered them to refund to their customers all portions of rates collected that were based on the costs in question. 24 Kan.App.2d at 45–46, 941 P.2d 390.

In the second appeal of *Kansas Pipeline,* this court held the ordering of refunds of the revenues collected under the invalid rate was not retroactive ratemaking because the rate had never been final. 24 Kan.App.2d at 60, 941 P.2d 390. However, implicit in that decision is the notion that had the Commission permitted the applicants to present additional evidence and that evidence established they were entitled to recover those costs, inclusion of those costs would not "increase" rates retroactively because, again, the rates were never final in the first place.

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Here, the Commission accepted additional evidence after remand as to the appropriate calculation of Westar's transmission-related costs. This action was within the Commission's discretion. See 24 Kan.App.2d at 50, 941 P.2d 390. While the FERC order was not final until after this court's previous opinions, it is undisputed that the FERC order itself was based on Westar's transmission information from a 2004 test year—the same test year used by the Commission in determining other aspects of Westar's revenue requirement.

***13** Operating expenses and revenues used in calculating a utility's revenue requirement, including transmission-related items, are usually based upon the expenses the utility actually incurred during the test year. In order to avoid speculation, the accepted practice is to base future rates upon known past and present conditions through the use of data gathered during the test year. See *Gas Service Co. v. Kansas Corporation Commission,* 4 Kan.App.2d 623, 635–36, 609 P.2d 1157, *rev. denied* 228 Kan. 806 (1980) (quoting *Narragansett Elec. Co. v. Harsch,* 117 R.I. 395, 416, 368 A.2d 1194 [1977]). In this case, the Commission originally used data from the 2004 calendar year as its test year in calculating Westar's revenue requirement.

The District contends the Commission's use of the FERC-approved rate is improper because it was not known or measurable during the original proceeding. Again, although the FERC order was not final until after the Commission's original proceedings were closed, the underlying information upon which the FERC order was based was known and based on the 2004 test year. In its original rate filings, Westar presented testimony and exhibits discussing the TDC and included copies of its FERC filings, which included 2004 transmission revenue requirement information. In addition, Westar's initial application included summaries of transmission-related expenses for the year ending December 31, 2004, as well as SPP transmission revenues and expenses for both WEI and KG & E. Thus, the same or substantially similar result could have been reached had the Commission technically ignored the FERC rate order and simply performed a similar evaluation of the evidence of Westar's 2004 transmission-related costs and revenues from the exhibits presented in the application.

At oral argument, KIC contended the Commission acted improperly in that it effectively permitted Westar to amend its rate application without adequate notice to Westar's customers. Yet, as we noted above, Westar clearly indicated in its initial application that it sought to recover its transmission-related costs in this proceeding; the mechanism proposed by Westar to recover these costs was a TDC. The parties could not have known before the Commission issued its initial orders whether the Commission would permit recovery of these costs through a TDC.

While the Petitioners challenged the propriety of using a TDC throughout the proceedings, they also had the opportunity to challenge the expenses and revenues related to the company's transmission operations. KIC cites no authority precluding a utility from recovering necessary and prudent operating costs simply because the mechanism it proposed to use to recover those costs was rejected by the Commission and/or an appellate court.

Significantly, none of the Petitioners contend that the calculations utilized by FERC (and indirectly by the Commission) in calculating transmission costs were inflated or otherwise incorrect for test year 2004. In fact, CURB clearly asserted the final revenue requirement figure was appropriate for prospective transmission-related rates. Nor do any of the parties to these appeals suggest that they were deprived of an opportunity to challenge Westar's calculations for the transmission-related items included in the original application or denied an opportunity to seek additional information or present testimony on remand regarding

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the propriety of the actual revenue requirement calculations.

***14** The District argues the transmission-related prospective rates and/or TDC refunds should have been based on the final FERC rates in effect when the rate case was originally before the Commission. The 2004 rates Westar actually paid to SPP for transmission services were based on a 1998 FERC order that was based on Westar's 1994 revenue requirement. As the Commission notes, however, there is a difference between the rates Westar paid to SPP in 2004 and its actual cost of transmission service in that year.

While the Commission arguably could have relied on Westar's actual costs paid to SPP in calculating the revenue requirement, it was not obligated to do so. The Commission found that Westar had invested significant funding to construct and maintain transmission facilities since 1998, and such investment should be taken into account in determining the revenue requirement in this case. The Commission concluded it was more appropriate to rely on calculations based on data from the same test year it used in determining Westar's nontransmission costs. This decision is neither arbitrary nor capricious.

Kansas courts have consistently recognized that in setting a rate for a public utility the state regulatory agency "must have as its goal a rate fixed within 'the zone of reasonableness' after an application of a balancing test in which the interests of all concerned parties are considered." *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n,* 239 Kan. 483, 491, 720 P.2d 1063 (1986); see also *Western Resources, Inc. v. Kansas Corporation Comm'n,* 30 Kan.App.2d 348, 352, 42 P.3d 162, *rev. denied* 274 Kan. 1119 (2002) (this court may reverse or nullify a KCC order only when the decision " " 'is so wide of the mark as to be outside the realm of fair debate." " ') With respect to setting prospective rates, the Commission's reliance on the transmission-related revenue requirement as found by FERC based on test year 2004 does not result in a rate outside the "zone of reasonableness."

Because the transmission-related rates ordered by the Commission are reasonable for purposes of prospective rates, they are also reasonable for purposes of calculating the refund due Westar's customers resulting from the collection of TDC charges. While this court reversed the implementation of the TDC, the Commission is obligated only to order refunds for rates which were "in excess of what the rates would have been ... had the rates been set in a manner consistent with the law."

Contrary to the District's assertions, we have no basis to conclude that had the Commission properly interpreted K.S.A.2005 Supp. 66–1237 in its initial orders it would have allowed a TDC based on the preexisting 1998 FERC rate or even the 2001 rates approved in the prior retail rate case. While this court is not in a position to speculate as to what the Commission would have done if the TDC had been originally rejected, we can be certain that in any event, the Commission would have permitted Westar to recover a reasonable revenue requirement for its transmission operations.

***15** Accordingly, we conclude the Commission did not act arbitrarily, capriciously, or unreasonably in determining Westar's transmission revenue requirement and its formula for calculating refunds due to customers as a result of the improper TDC.

Affirmed.

Kan.App.,2008.
Unified School District No. 259 v. State Corp. Com'n
176 P.3d 250, 2008 WL 400199 (Kan.App.)

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