

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

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by
State Corporation Commission
of Kansas

In the Matter of the Application of Mid-)
Kansas Electric Company, LLC for)
Approval to Make Certain Changes in) Docket No. 12-MKEE-380-RTS
its Charges for Electric Service in the)
Geographic Service Territory Served)
by Southern Pioneer Electric Company)

**ANSWER OF KANSAS ELECTRIC POWER COOPERATIVE, INC
IN OPPOSITION TO MOTION TO STRIKE OF
MID-KANSAS ELECTRIC COMPANY**

Comes now Kansas Electric Power Cooperative, Inc. (KEPCo) and submits its answer to the motion to strike certain testimony of KEPCo witness Stephen Page Daniel (Motion) submitted by Mid-Kansas Electric Company (Mid-Kansas) on April 27, 2012. In support of its answer, KEPCo alleges and states as follows:

1. On April 27, 2012, Mid-Kansas filed its motion alleging that certain identified parts of Mr. Daniel's testimony should be struck for three reasons: "(1) the testimony is irrelevant to the issues in the present docket, (2) this witness is not qualified to testify as an expert in the area for which testimony has been presented, and (3) the testimony is based on speculation, unsupported assumptions and conclusory allegations rather than a factual foundation." Motion at 1-2. Each of these grounds is without merit.

2. KEPCo's intervention was premised on its interest in the LAC rate and was granted to allow it to protect its interests in that rate. Any cost, allocation or practice that affects the LAC rate is relevant to that interest. Mid-Kansas' claim that the Daniel testimony is not relevant to these issues is a misreading of the testimony and erects a straw man to attack that is not present in the testimony.

3. The two matters raised in the motion are the choice of a C-Corporation structure, and the spin-down of the 34.5 kV facilities from Mid-Kansas to the individual members, including Southern Pioneer Electric Company (Southern Pioneer). Mid-Kansas seems to believe that because these matters were dealt with in prior dockets, that they are completely off limits and any testimony touching on them is irrelevant. If KEPCo were mounting an effort to unwind those decisions, that argument might have some merit. That is simply not what Mr. Daniel's testimony is all about. Taking the C-Corporation structure and the 34.5 kV spin-down as givens, Mr. Daniel's intent is to demonstrate that those events had substantial negative impacts on the costs that must be borne by the Mid-Kansas customers served in the Southern Pioneer Division (Southern Pioneer customers). Therefore, when considering all of the cost impacts, KEPCo simply asks the Commission to not add unnecessarily to the top layer of costs and keep the DSC determination at the lowest level consistent with the CoBank mortgage obligations. Setting DSC is akin to setting a rate of return under rate base regulation, the Commission may act within a zone of reasonableness. Because other decisions have made costs unusually high, the Commission is requested to do what it can to limit the damage. It is important to read all of the testimony in context. The discreet sources of costs addressed in the testimony and the motion to strike are within the section discussing the need for balancing of utility and customer interests. Where the utility has made decisions and taken actions that have negative cost implications for

the customers, the Commission can and should take those costs into consideration in setting a rate of return, or, in the context of this case, the appropriate DSC level. The testimony that is subject to this motion is inarguably appropriate to that goal.

4. As to the specific discussion of the negative impact of the C-Corporation structure, this has been put in issue by Mid-Kansas itself. Mr. Daniel's testimony, complained of in the motion, from page 8 through line 6 of page 14, cites to or quotes from testimony of Mr. Lowry and Mr. Epperson and rebuts the assertions made by those Mid-Kansas witnesses. Mr. Daniel's testimony can only be irrelevant if the testimony of Mr. Lowry and Mr. Epperson is irrelevant.

5. Mid-Kansas' motion is largely based on a misreading (or misstatement) of Mr. Daniel's testimony. Looking first to the issue of Southern Pioneer as a C-Corporation, Mid-Kansas erroneously states at paragraph 19 "[Mr. Daniel's] 'expert opinion' is that the structure chosen is unjustifiable when, in fact, it is fully justified." Mr. Daniel does contrast the tax impact of a C-Corporation versus that of a non-taxable cooperative. He does, in fact, quote Mr. Epperson's testimony to the effect that "the chosen business structure does not negatively affect Mid-Kansas customers" and concludes, absolutely correctly, that "Contrary to [Mr. Epperson's] claim of no negative effect on MKEC customers, there is a clear and unjustified negative effect on those customers in the form of imposed income tax expenses that would have been avoided under a not-for-profit cooperative business structure." It is the negative tax impact that is not justified. Mr. Daniel does not say that the tax impact is not justifiable. If there is justification, such as offsetting cost savings by operating Southern Pioneer as a C-Corporation, Applicant has not provided such justification but is free to attempt to do so. Mr. Daniel then quantifies the tax impact (clearly stated in the Mid-Kansas filing) and describes that as a negative impact on the customers of the C-Corporation choice of

operation. The negative impact of over a million dollars in tax expense can be easily perceived and does not require an expert opinion to identify. It is apparent that the motion to strike is simply an effort to avoid having to justify an annual tax burden on the customers of over a million dollars.

6. Mr. Daniel takes two things from the fact that the tax burden exists. First, the tax expense violates paragraph 24 of the Stipulation and Agreement in Docket 524 (quoted from extensively by Mid-Kansas without mentioning this provision). Second, he requests the Commission to take the negative impacts of the structural decisions into consideration in its determination of just and reasonable rates. The Commission is requested, at page 27-28 of the Daniel testimony, to base Mid-Kansas' rates in the Southern Pioneer Division on a lower-than-requested DSC level, for the reasons stated in the testimony.

7. Notably, Mr. Daniel does not argue, suggest or opine that Southern Pioneer should be required to adopt a different structure. The structure is taken as a given. Nor should this testimony be read as a challenge or attack on the Commission's prior actions. Mr. Daniel simply contrasts the chosen structure to that of the other Mid-Kansas members and quantifies the impact of that structure on the customers. The impact of the structure on all customers, including specifically KEPCo in taking service subject to charges under the LAC, is completely relevant and by no means beyond the broad expertise of Mr. Daniel to examine.

8. To the extent that the testimony includes expert opinion, beyond merely pointing out the negative cost impact of the C-Corporation status, Mr. Daniel is admirably qualified to give such opinions. A review of SPD-1, together with additional specific experience identified in the text of the testimony, reveals a witness with 42 years of experience in the electric utility industry with the broadest possible background

of experience. He has also identified specific experience related to his testimony in this case.

9. As a general matter, Mr. Daniel is highly qualified to analyze all aspects of electric utility operation and structure, both cooperatives and C-Corporations. His opinions regarding reasonable rate levels are clearly within his expertise. His understanding of the differences in cost-of-service effects between taxable entities and non-taxable cooperatives is well within his 42 years' experience with regulation and setting of rates for both forms of utility. To the extent that Mid-Kansas believes there is some relevant gap in his qualifications or experience, counsel is invited to cross examine Mr. Daniel on that matter and he can be counted on to fill in any gaps. Mid-Kansas' own footnote 1 to the motion notes the propriety of receiving such evidence in the course of the trial.

10. As to the factual predicate, the facts relied upon on this issue are almost entirely found in the materials filed with the application or obtained in discovery or other Commission dockets such as the 524 docket. The fact that Southern Pioneer is a C-Corporation is not in doubt. The amount of the tax impact is not in controversy. The fact that Southern Pioneer made a choice to incur this tax rather than operate as a cooperative is uncontroverted. The differences in operation between a C-Corporation and a cooperative are matters squarely within the knowledge and experience of Mr. Daniel. To the extent that there are cost factors which Mid-Kansas believes offset Mr. Daniel's arguments, that is a factual issue which it can present and which the Commission can evaluate on the respective merits of the parties' positions. Such a fact issue does not render the testimony subject to a motion to strike.

11. If the Commission does not agree that the tax impact of the chosen structure should be considered, together with other decisions giving rise to higher

customer costs, in setting an appropriate DSC level, it can give Mr. Daniel's testimony such weight as it chooses. There is a great gulf between giving this testimony less than controlling weight and taking the extreme course of striking it from the record. Striking this testimony from the record jeopardizes KEPCo's due process right to produce testimony in support of its positions. In this regard, court cases from civil litigation are not very helpful. There is no controversial medical diagnosis (*Kuxhaven*). There is no jury (*Papen and Struzik*). Commissions are accustomed to admitting testimony that might not go to a jury and adjusting the weight of such testimony in their own deliberations.

12. Interestingly, Mid-Kansas cites to no Commission case where proposed expert testimony was stricken from the record before hearing. The comments in the KCPL Order quoted in paragraph 15 of the Motion simply set the ground rules for specific testimony on rate case expense. Nothing in those ground rules would indicate any need to strike any portion of Mr. Daniel's testimony.

13. It is significant that Mid-Kansas left out the first sentence of the paragraph it quoted. The Commission said: "Regarding use of expert testimony, the Commission notes it has discretion in determining its admissibility." In footnote 44, the Commission cited *Kansas Gas & Electric Co. v. Kansas Corp. Comm'n*, 14 Kan. App. 2d 527 for that proposition. In *Kansas Gas & Electric*, the Commission had admitted and further relied on the testimony of a witness, David A. Schlissel, who was demonstrably less qualified in the particular area in which he gave testimony, the prudence of the operation of a nuclear plant, than is Mr. Daniel in the matters in which he offers testimony, which are squarely encompassed by his 42 years of experience. Both the admission of Mr. Schlissel's testimony and the Commissions ultimate reliance on it were upheld on

appeal. Clearly, the applicable precedent favors the exercise of Commission discretion in favor of the admission of expert testimony.

14. The arguments against Mr. Daniel's review of the financing costs of the 34.5 kV system in the hands of Mid-Kansas rather than the individual members of Mid-Kansas, more particularly, Southern Pioneer, are similarly misplaced.

15. First, contrary to the contention of the motion, the testimony is not irrelevant to the issues of the case. It is a real, albeit small, part of Mr. Daniel's testimony regarding the balancing of the interests between the utility and the customer. The additional cost to finance those facilities is a factor that the Commission can consider in weighing where, in the zone of reasonableness, an appropriate DSC level lies. It should be clear even to Mid-Kansas that the proposed DSC level is a relevant issue to this case in general and to the LAC in particular.

16. Mid-Kansas claims, at paragraph 21, that the testimony is irrelevant because the ownership and classification of these assets were addressed and determined by the Commission in prior cases. If Mr. Daniel were attempting to convince the Commission to reverse those decisions in this case, that argument would have some merit. That is not the case. The claim that KEPCo is making an "attempt now to undermine the Stipulation it signed in this earlier docket" is simply fantasy and ignores what Mr. Daniel is undertaking to show. As with the corporate structure, Mr. Daniel takes the ownership of the facilities as a given. There is no attempt to undo that result. Mr. Daniel merely suggests that, as with the corporate structure, Mid-Kansas, and Southern Pioneer, must live with the negative consequences of their decision to spin down the assets. This decision imposes higher costs on the customers and the Commission is entitled to consider that fact in setting the level of the DSC.

17. The argument that the testimony falls short of the standard discussed in the motion to strike expert testimony is a complete red herring. It does not require a level of qualification not present in Mr. Daniel's background to compare the DSC of Mid-Kansas for its own service to the DSC requested for service in the area served by Southern Pioneer. They are two numbers that can be readily compared. There is no more specific expertise needed here than in noting that the interest rate Southern Pioneer had been paying to FFB, under RUS mortgages, is quantifiably lower than that now paid to CoBank. It is elemental math.

18. Again, at the end of paragraph 22, Mid Kansas assails the testimony for not considering facts Mid-Kansas deems important. Obviously, Mid-Kansas can present those facts to the Commission. That Mr. Daniel has not discussed such allegations of purported fact cannot be grounds for a motion to strike. If every expert could have his testimony stricken for not mentioning a factual contention of the opposition, no expert testimony would ever be heard.

19. KEPCo respectfully makes the following observations concerning each portion of the testimony that is requested to be stricken:

Page 8, line 8 through page 14, line 17. All of this material is expressly in rebuttal to quoted and cited material from Mid-Kansas Testimony and is thus inarguably relevant. Mr. Daniel's qualification to make the arguments presented are fully adequate. This material is clearly appropriate and cannot be stricken.

Page 22, line 25 through page 24, line 14. This material is a straightforward comparison of the DSC requirements of assets in the hands of Mid-Kansas and Southern Pioneer. Its purpose is limited to showing another example of a negative impact on Mid-Kansas customers in the Southern Pioneer area. It is relevant to that purpose, requires no expertise beyond that possessed by Mr. Daniel, and is based on

facts of record in this and another KCC proceeding. There is no infirmity to this testimony and it cannot be stricken.

Page 25, line 21—strike “business structure and”. This is a detail that rises or falls on the first claim. It should fall.

Page 26, line 1—strike “structural and”. This is a detail that rises or falls on the first claim. It too should fall.

Page 26, lines 4 through 11. This is an inarguable statement of fact and is supported by all of the arguments made regarding the first claim.

Page 27, lines 5 through 11. This is also a follow on to the claim regarding the spin down of assets addressed in the second main claim, referring to material on pages 22 through 24. It should remain for the same reasons stated in response to that claim.

Page 27, line 12—strike “structural and”. Again, this claim is a detail that falls under the arguments against the first claim.

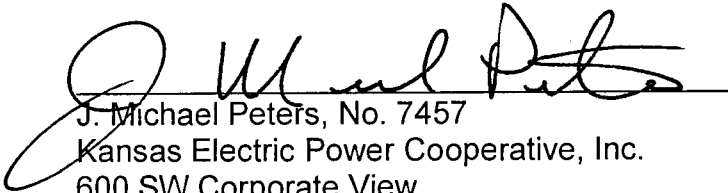
Page 27, line 15 beginning with “Absent a ...” through line 19. This proposed deletion refers to the proposition that Southern Pioneer has not shown that its acquisition has produced quantifiable benefits that offset the negative consequences of its structural and financial decisions. This is an element of the balancing of utility and customer interests and should not be stricken.

Page 28, line 9 beginning with “If, going forward, ...” through line 14. Striking this particular statement is unsupported in the motion and should be rejected on that ground. This is an unassailable statement that the Commission can revisit its DSC determination in the future. If the Commission wishes to not recognize this authority, however, it can order the sentence stricken.

Page 30, line 9 beginning with “Requiring such ...” through line 11. Striking this sentence is unsupported in the motion. To the extent that it is meant as a fall out of

earlier criticism of Mr. Daniel's comparison of the interests of Southern Pioneer and its customers under a cooperative or under a C-Corporation structure, that comparison is wholly within the expertise of Mr. Daniel to make. He has spent much of his professional life consulting on the operations of cooperatives in all of their aspects and nuances.

WHEREFORE, KEPCo prays that the Commission enter an Order rejecting the motion to strike in its entirety.



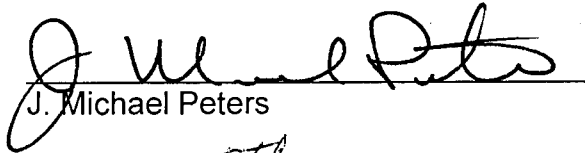
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VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, J. Michael Peters, of lawful age, being first duly sworn upon his oath states:

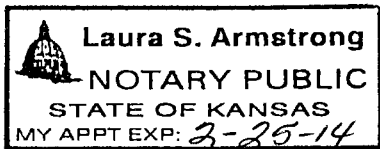
That he is an attorney for the above named petitioner, that he has read the above and foregoing Petition to Intervene, and upon information and belief, states that the matters therein appearing are true and correct.


J. Michael Peters

SUBSCRIBED AND SWORN to before me this 7th day of May, 2012.


Notary Public

My Commission expires 2-25-14



CERTIFICATE OF SERVICE
(12-MKEE-380-RTS)

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing was sent electronically on this 7th day of May, 2012, to the following:

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