

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

In the Matter of Southern Pioneer Electric Company )  
Regarding Violation of the Commission's Minimum ) Docket No. 18-SPEE-428-SHO  
Standards For Payment Methods for Utility Bills by )  
Charging Its Customers a Convenience Fee to )  
Submit Bill Payments via Electronic Check. )

**STAFF'S RESPONSE TO THE COMMISSION'S ORDER ON TARIFF VIOLATION**

The Staff of the Kansas Corporation Commission (Staff and Commission, respectively) hereby files its answers to questions posed by the Commission in the Commission's Order on Tariff Violation filed June 19, 2018:

**I. BACKGROUND**

**The Filing of Southern Pioneer's Application Requesting Waiver to Modify Credit Card Payment**

1. On December 8, 2017, Southern Pioneer Electric Company (Southern Pioneer) filed an Application in Docket No. 18-SPEE-241-TAR (Docket 18-241) seeking a waiver from the Commission's Minimum Standards for Payment Methods for Utility Bills and Allowing the Acceptance of Credit Cards (Payment Standards) and proposing revisions to its Schedule of Fees related to a \$3.95 convenience fee for bill payments made by credit card. Through discovery requests of the Citizen's Utility Ratepayer Board (CURB) in Docket 18-241, Staff discovered that Southern Pioneer has been charging a fee of \$3.95 for bill payments made via electronic check (e-check) since April 2012.

**The Intervention of CURB**

2. On April 11, 2018, CURB petitioned to intervene in this docket; its request was subsequently granted by the Commission on April 26, 2018.

### **The Filing of Staff's Report and Recommendation**

3. On March 27, 2018, Staff submitted a Report and Recommendation (R&R), noting that by charging a convenience fee to customers who make bill payments via e-check, Southern Pioneer may be in violation of the Commission's Payment Standards. Staff also noted that to date, Southern Pioneer has not received a waiver to charge a convenience fee for bill payments made via e-check, nor is such convenience fee disclosed in the Schedule of Fees in Southern Pioneer's Rules and Regulations. In its R&R, Staff recommended the Commission issue an Order to Show Cause whether Southern Pioneer is in violation of the Commission's Payment Standards by charging its customers a convenience fee to submit bill payment via e-check.

### **The Issuing of Commission Order to Show Cause**

4. On April 10, 2018, an Order to Show Cause was issued to determine whether Southern Pioneer was in violation of the Commission's Payment Standards by charging its customers a convenience fee to submit bill payments via e-check.

### **The Filing of the Response of Southern Pioneer**

5. On May 10, 2018, Southern Pioneer filed its Response to Order to Show Cause (Response). In its Response, Southern Pioneer stated that it was unaware of its noncompliance until contacted by Staff in March 2018. Southern Pioneer further contended it was charging the convenience fee with a "good faith" belief that its predecessor Mid-Kansas Electric Company, Inc. (Mid-Kansas) had received the requisite waiver from the Commission, based upon a series of e-mails exchanged between Mid-Kansas and Staff regarding a billing insert. Additionally, Southern Pioneer acknowledged that the currently implemented \$3.95 convenience fee has not been provided for in Southern Pioneer's Schedule of Fees or Rules and Regulations. Should it be determined the

convenience fee was not previously approved, Southern Pioneer requested a waiver for the fee in this docket.

### **The Filing of Staff's Reply to Southern Pioneer's Response**

6. On May 21, 2018, Staff submitted its Reply to Southern Pioneer's Response ("Reply"). In its Reply, Staff contended that its inaction regarding the e-check provision in Southern Pioneer's Bill Insert does not constitute Commission approval.<sup>1</sup> Specifically, Staff noted that pursuant to K.S.A. 66-117(c), Commission approval is required before a public utility subject to Commission jurisdiction changes its rates, joint rates, tolls, charges or classifications or schedules, or any rules or regulations or practices pertaining to service,<sup>2</sup> and "at no point did Mid-Kansas nor Southern Pioneer receive outward, formal, or express confirmation that the convenience fee had received Commission approval."

7. Staff also stated that Southern Pioneer's request for a waiver in a Docket pertaining to an Order to Show Cause is not appropriate and therefore its request for a waiver would be better served in a separately filed docket.

8. Staff recommended the Commission find Southern Pioneer in violation of the Payment Standards, Order Southern Pioneer to refund customers who were wrongly billed convenience fees for payment via e-check, and deny Southern Pioneer's request for a waiver.

### **The Filing of CURB's Memorandum in Support of Staff's Reply**

9. On May 31, 2018, CURB filed its Memorandum in Support of State Corporation Commission Staff's Reply to Southern Pioneer's Response to Order to Show Cause. In it, CURB expressed its support for Staff's Reply and likewise urged the Commission to find that Southern

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<sup>1</sup> Staff's Reply to Southern Pioneer's Response [May 21, 2018].

<sup>2</sup> K.S.A. 66-117(c)

Pioneer is in violation of the Commission's Payment Standards, Order Southern Pioneer to refund customers who were wrongly billed convenience fees for e-checks, and deny Southern Pioneer's request for a waiver.

**The Filing of Commission's Order on Tariff Violation**

10. On June 19, 2018, the Commission filed its Order on Tariff Violation.<sup>3</sup> In that Order, the Commission determined that Southern Pioneer violated its tariff by charging customers who paid their bills via e-Checks an unauthorized convenience fee.<sup>4</sup> Ultimately, the Commission determined that an appropriate remedy was necessary to correct Southern Pioneer's tariff violation.

11. In order to acquire additional information as to the scope of Southern Pioneer's tariff violation, the Commission directed Southern Pioneer to answer the following questions:

- a) How many customers were charged a convenience fee for paying their bills by e-check?
- b) Is Southern Pioneer able to identify which customers paid a convenience fee for paying their bills by e-check?
- c) Is Southern Pioneer able to identify the dollar amount of convenience fees individual customers paid for paying their bills by e-check?

12. The Commission also directed all parties to answer the following questions:

- a) Does the Commission have authority to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by e-check?
- b) What is the legal authority for the Commission to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by e-check?
- c) What is an appropriate amount to fine Southern Pioneer for violating its tariff?

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<sup>3</sup> Commission Order on Tariff Violation ("Order on Tariff Violation) [Jun. 19, 2018].

<sup>4</sup> Id.

## II. LEGAL STANDARDS AND DISCUSSION

### **Staff's Answer to Commission Question a): "Does the Commission Have Authority to Order Southern Pioneer to Issue Refunds to Customers Who Paid a Convenience Fee for Paying Their Bills by e-Check?"**

13. Because the Commission found Southern Pioneer to be in violation of its tariff by charging its customers convenience fees for payment via e-check, the convenience fees were unlawfully collected. Simply put, through both statutory authority and binding case law, the Commission has been granted wide latitude regarding the appropriate remedy for unlawfully collected rates. As Staff will demonstrate below, one such remedy is the ordering of refunds to those customers who paid unauthorized rates.

### **Staff's Answer to Commission Question b): "What is the legal authority for the Commission to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by e-check?"**

14. As alluded to above, the Commission has authority to require refunds for unlawfully collected rates. This principle has been illustrated by Kansas courts, most notably the Kansas Court of Appeals in *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 5 Kan.App.2d 715, 721, 624 P.2d 466 (1981) (rev. denied.). In *Sunflower Pipeline*, Sunflower Pipeline Company (Sunflower), which sold irrigation gas to farmers in Kansas, had a Commission approved rate of \$0.25 per Mcf for the years of 1976 to 1978. However, effective August 1, 1976, Sunflower's previous management implemented a \$0.65 per Mcf for its irrigation service.<sup>5</sup> By doing so, Sunflower began charging customers rates that did not conform to its KCC approved rate of \$0.25 Mcf. Moreover, at no time did Sunflower apply to increase its rates.<sup>6</sup> After

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<sup>5</sup> *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 5 Kan.App.2d 715, 721, 624 P.2d 466 (1981) (rev. denied.).

<sup>6</sup> *Id.*, 716

receiving customer complaints regarding the unauthorized rate, the Commission issued a Show Cause Order to Sunflower to show why it should not be ordered to make refunds to customers who were charged the unauthorized rate.<sup>7</sup> Ultimately, the Commission determined Sunflower had failed to conform to the provisions of K.S.A. 66-117, and directed Sunflower to refund all retail customers the amount received by Sunflower over the previously approved rate of \$0.25 Mcf, plus eight percent interest.<sup>8</sup> Following a successful appeal at the district court, the issue was brought before the Kansas Court of Appeals. The Court of Appeals affirmed the Commission order, specifically holding that refunds are the appropriate remedy for the collection of unlawful rates and concluded that a "full refund should be ordered when charges are not made pursuant to a rate legal at the time of the charge."<sup>9</sup>

15. Applying the facts of *Sunflower Pipeline* to those of the issue at hand, it becomes evident the Commission has the legal authority to issue refunds. As Staff noted above, the Commission determined in its Order on Tariff Violation that Southern Pioneer violated its existing, Commission-approved tariff by charging customers who paid their bills via e-Checks an unauthorized convenience fee.<sup>10</sup> As such, when applying the holding of *Sunflower Pipeline*, the Commission has the power to issue refunds to those Southern Pioneer customers who paid the convenience fee.

16. Additionally, K.S.A. 66-101 vests the Commission with "full power, authority and jurisdiction to supervise and control the electric public utilities doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority,

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. 718, 720.

<sup>10</sup> Order on Tariff Violation

and jurisdiction.”<sup>11</sup> In extrapolating the Commission power vested within the statute, the court in *Sunflower Pipeline* determined, “The power of the KCC [Commission] to order refunds for overcharges in violation of the act is implied K.S.A. 66-101.”<sup>12</sup>

17. Further, *Sunflower Pipeline* adopted the order of the Commission, which called for the issuance of refunds along with interest. Therefore, when applying the standard set forth in *Sunflower Pipeline*, the Commission has authority to add interest to refunds issued to Southern Pioneer customers who paid the unlawful convenience fee for payment via e-check. Adding interest to the refund will make affected customers whole by compensating them for the time-value of their money that was collected through unlawfully charged fees. Staff recommends calculating the interest rate based upon the Commission-approved Customer Deposit Rates (*See* annual Orders in Docket No. 98-GIMX-348-GIV), which reflect prevailing interest rates on short-term, risk-free investments.

**Staff’s Answer to Commission Question c): “What is an appropriate amount to fine Southern Pioneer for violating its tariff?”**

18. K.S.A. 66-138(a)(2) allows the Commission to assess a civil penalty between \$100–\$5,000 for each violation of the Public Utilities Act, including tariff violations. Staff recommends Southern Pioneer be assessed penalties for two such violations, totaling \$5,000.

19. First, Southern Pioneer should be fined \$2,500 for violating the Payment Standards §(C) by not accepting e-checks as a zero fee method of payment. While Staff believes Southern Pioneer’s claims that it was unaware of its non-compliance, Southern Pioneer should have taken better care to verify whether the requisite waivers had been granted by the Commission. Therefore, Staff

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<sup>11</sup> K.S.A. 66-101

<sup>12</sup> *Sunflower Pipeline*, 718.

believes assessing a penalty value in the middle of the spectrum (\$2,500) is appropriate for this violation.

20. Second, Southern Pioneer should be fined \$2,500 for violating the Payment Standards §(D)(1)(ii) by not fully disclosing the convenience fee associated with e-checks in its Schedule of Fees. While Staff believes Southern Pioneer's omission of the e-check convenience fee from its Schedule of Fees was unintentional, Southern Pioneer should have taken better care to ensure its tariff fully disclosed all fees associated with payment methods. Therefore, Staff believes assessing a penalty value in the middle of the spectrum (\$2,500) is also appropriate for this violation.

21. While, as specified above, Staff believes Southern Pioneer was unaware of its non-compliance, now that Southern Pioneer has been found in violation of the Payment Standards, it is important that the error be corrected in a timely fashion. Therefore, Staff points to K.S.A. 66-138(a) which notes that every day a public utility fails to comply with any order or direction of the commission shall constitute a separate and distinct violation of the Act. Thus, if Southern Pioneer does not promptly comply with the Commission's final Order in this Docket, Staff would recommend the Commission assess additional penalty of \$100 per day in violation.

### **III. CONCLUSION**

22. Because the Commission has been granted both explicit and implicit authority to order full refunds plus interest for unlawful charges, Staff recommends the Commission Order Southern Pioneer to issue full refunds plus interest to Southern Pioneer customers charged e-check convenience fees. Staff recommends calculating the interest rate based upon the Commission-approved Customer Deposit Rates.

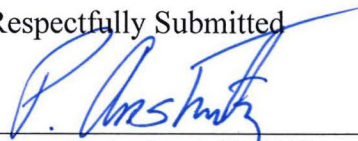
23. Additionally, K.S.A. 66-138(a)(2) allows the Commission to assess a civil penalty between \$100-\$5,000 for each violation of the Public Utilities Act, including tariff violations. Staff recommends Southern Pioneer be assessed penalties for two such violations, totaling \$5,000:



\$2,500 for violating the Payment Standards §(C) by not accepting e-checks as a zero fee method of payment and \$2,500 for violating the Payment Standards §(D)(1)(ii) by not fully disclosing the convenience fee associated with e-checks in its Schedule of Fees. If Southern Pioneer does not promptly comply with the Commission's final Order in this Docket, Staff would recommend the Commission assess additional penalty of \$100 per day in violation.

WHEREFORE, Staff requests the Commission consider its Response to the Commission's Order on Tariff Violation, and for such other and further relief as the Commission deems just and proper.

Respectfully Submitted



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For Commission Staff

## CERTIFICATE OF SERVICE

18-SPEE-428-SHO

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Response to the Commission's Order on Tariff Violation was served via electronic service this 26th day of July, 2018, to the following:

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**CERTIFICATE OF SERVICE**

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