

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of a General Investigation to )  
Determine the Commission's Jurisdiction ) Docket No. 18-GIME-217-GIE  
over Municipal Energy Agencies. )

**SUPPLEMENTAL BRIEF IN COMPLIANCE WITH THE ORDER OF THE  
COMMISSION**

COMES NOW, Sunflower Electric Power Corporation, Mid-Kansas Electric Company, Inc., Southern Pioneer Electric Company, Victory Electric Cooperative Assoc., Inc., Prairie Land Electric Cooperative, Inc., Wheatland Electric Cooperative, Inc., Western Cooperative Electric Assn., Inc., Lane-Scott Electric Cooperative, Inc. (hereinafter referred to collectively as “Joint Intervenors”) and pursuant to the Order Opening General Investigation (“Order”) issued in this docket on November 28, 2017, hereby files its supplemental brief on the list of issues set out in the Order by the Commission.

**I. GENERAL INVESTIGATION**

1. In response to jurisdictional issues raised in Docket 17-KPPE-092-COM (“17-092 Docket”) by the Kansas Power Pool (“KPP”), the Commission has elected to open a general investigation into the extent of the Commission's jurisdiction over municipal energy agencies (“MEA”). The Commission has asked all parties to address the following issues:

- a) Do the MEAs’ enumerated powers under K.S.A. 12-895 fall outside the scope of the Commission's jurisdictional authority under K.S.A. 12-8,111?
- b) Does K.S.A. 12-855 *et seq.* limit the Commission's jurisdiction over MEAs?
- c) Other than for purposes of certification under K.S.A. 66-131, is the Commission's authority to regulate MEAs the same as its authority to regulate public utilities, including actions taken by MEAs pursuant the MEA Act?

- d) List the areas of operation where the Commission lacks authority or jurisdiction to regulate an MEA as if it were a public utility. State the legal authority denying the Commission's authority or jurisdiction.

2. Mid-Kansas and Southern Pioneer have already addressed the jurisdictional issues listed above to some degree in their pleadings in the 17-092 Docket<sup>1</sup>, and the Commission stated in its Order, “[t]o the extent the parties have already briefed the above questions in the 17-092 Docket, no additional briefing is necessary.”<sup>2</sup> Thus, Joint Intervenors hereby reference and incorporate herein their jurisdictional briefing from the 17-092 Docket, but submit this supplemental brief to (1) address any areas or arguments not already covered in the previous briefings, (2) present their positions and arguments in structural conformity with the Commission's questions in the Order, and (3) present such positions and arguments on behalf of Sunflower and the other Mid-Kansas members participating in this generic docket.

## **II. LEGAL STANDARD**

3. Before addressing each of the specific issues, a general statement of the law as it pertains to the jurisdiction of the Commission is in order. The Commission is an administrative agency of limited jurisdiction, and its jurisdiction is limited to that conferred by statute. *Cities Service Gas Co. v. State Corp. Commission*, 197 Kan. 338, 342, 416 P.2d 736 (1966).

4. K.S.A. 66-101 sets forth the power, authority and jurisdiction of the Commission over the supervision and control of electric public utilities. The Commission is "given 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,

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<sup>1</sup> Joint Brief of Southern Pioneer Electric Company and Mid-Kansas Electric Company, LLC in Response to Kansas Power Pool's Motion to Dismiss, filed October 24, 2017; and Response of Southern Pioneer Electric Company and Mid-Kansas Electric Company, LLC to Kansas Municipal Energy Agency Response on Intervention and Brief Regarding Jurisdiction, filed November 3, 2017.

<sup>2</sup> Order Opening General Investigation, p. 3, ¶ 8.

authority and jurisdiction."<sup>3</sup> The Commission shall have general supervision of all electric public utilities doing business in this state and shall inquire into any neglect or violations of the laws of this state by any electric utility, including the manner of its conduct and its management with reference to the public safety and convenience.<sup>4</sup> Additionally, Kansas statutes provide that the provisions of K.S.A. 66-101 *et seq.*, and all grants of power, authority and jurisdiction made to the Commission, are to be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the Commission.<sup>5</sup> In fact, the courts have gone so far as to state that no utility can escape supervision and control by the Commission.<sup>6</sup>

a) *Do the MEAs' enumerated powers under K.S.A. 12-895 fall outside the scope of the Commission's jurisdictional authority under K.S.A. 12-8,111?*

5. A municipal energy agency is created pursuant to K.S.A. 12-885 *et seq.*, for the purpose of planning, studying and developing supply, transmission and distribution facilities and programs and for the purpose of securing an adequate, economical and reliable supply of electricity and other energy and transmitting the same for distribution through the distribution systems of such cities. Any municipal energy agency formed under the provisions of K.S.A. 12-885 *et seq.* is a quasi-municipal corporation created by agreement between two or more cities pursuant to the Act.<sup>7</sup>

6. K.S.A. 12-895 sets forth the enumerated powers of MEAs, all of which the legislature has empowered a MEA to do. However, the powers to be exercised by a MEA may be limited by agreement by and among the members of the MEA.

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<sup>3</sup> K.S.A. 66-101.

<sup>4</sup> K.S.A. 66-101h.

<sup>5</sup> K.S.A. 66-101g.

<sup>6</sup> *Kansas Gas & Electric v. Public Service Commission*, 124 K. 690, 261 P. 592, 594 (1927).

<sup>7</sup> K.S.A. 12-886(d).

7. KPP has asserted in their Motion to Dismiss Southern Pioneer's complaint filed in Docket 17-KPPE-092-COM that because the state has granted MEAs with certain enumerated powers, the exercise of those powers falls outside the supervision and control of the Commission.

8. Corporations, cooperatives and limited liability companies are also creatures of statute which the legislature has empowered to operate within the state. For example, electric cooperatives are granted enumerated powers very similar to the enumerated powers of MEAs.<sup>8</sup> The general corporation code does the same.<sup>9</sup>

9. Every utility participating in this proceeding is a creature of statute with enumerated powers, none of which negate the supervision or control of the Commission, with the exception of cooperatives whom have elected to self-regulate, a right and process specifically provided for by statute.<sup>10</sup> If the exercise of the enumerated powers in the applicable enabling statute of each utility in this proceeding fell outside the purview of the Commission, then not one public utility would be subject to the supervision and control of the Commission, making the legislative act empowering the Commission to supervise and control public utilities a meaningless and pointless act. To our knowledge, no utility has ever asserted such a limitation.

10. The relevant point of analysis in this proceeding is not what enumerated powers were granted to MEAs, but what supervision and controls were granted by the legislature to the Commission.

11. K.S.A. 12-8,111 is very explicit concerning the jurisdiction of the Commission over MEAs. It says that any municipal energy agency created under the provisions of K.S.A. 12-885 to 12-8,109, inclusive, shall be subject to the jurisdiction of the Commission in the same manner as

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<sup>8</sup> See K.S.A. 17-4606.

<sup>9</sup> See K.S.A. 17-6102.

<sup>10</sup> See K.S.A. 66-104d.

a public utility. The one exception is the requirement for public utilities to obtain a certificate of convenience under K.S.A. 66-131. The language is unambiguous. MEAs do not have to obtain a certificate of public convenience and necessity from the Commission before operating as a public utility in the state, but MEAs are to be subject to the same jurisdiction of the Commission in the same manner as a public utility for all other matters.

12. As already examined above, the enumerated powers of MEAs are the same in most instances as the enumerated powers of most intervenors in these proceeding, whether the intervenor is a corporation, cooperative or limited liability company. And each intervenor undeniably is under the control and supervision of the Commission as to certain functions and activities which each is empowered to do by its enabling statute.

13. MEAs can point to no legislative exemption from the jurisdiction of the Commission, except for the requirement to obtain a certificate of convenience. In fact, the legislature has spoken unequivocally - MEAs are subject to the jurisdiction of the Commission in the same manner as any other public utility. Nothing could be clearer.

*b) Does K.S.A. 12-855 et seq. limit the Commission's jurisdiction over MEAs?*

14. The MEA Act limits the Commission's authority under K.S.A. 66-131 to require the MEA to obtain a certificate of public convenience and necessity before operating as a public utility. It does not limit the Commission's jurisdiction to regulate the operations and rates of an MEA. On the contrary, K.S.A.12-8,111 unequivocally states that MEAs are subject to the jurisdiction of the Commission in the same manner as a public utility.

- c) *Other than for purposes of certification under K.S.A. 66-131, is the Commission's authority to regulate MEAs the same as its authority to regulate public utilities, including actions taken by MEAs pursuant the MEA Act?*

15. Joint Intervenors reference and incorporate herein their response to the first two questions; the Commission's has the same authority to regulate MEAs as it has to regulate all public utilities, including the exercise by MEAs of the enumerated powers under K.S.A 12-895.

16. The Commission Staff in its brief filed in the 17-092 Docket sets forth a number of areas where MEAs are subject to the control and supervision of the Commission pursuant to, *inter alia*, the provisions of K.S.A. 66-101. The list is not exhaustive but illustrates the breadth and scope of the Commission's jurisdiction. The Staff stated as follows:

Specifically, the Commission has authority to ensure MEAs furnish reasonably efficient and sufficient service and facilities, establish just and reasonable rates, charges and exactions, and make just and reasonable rules, classifications and regulations. K.S.A. 66-101b. The Commission has authority to make sure that every MEA rule, regulation, classification, rate, charge or exaction is just and reasonable. *Id.* MEAs may be required to "publish and file with the commission copies of all schedules of rates and shall furnish the commission copies of all rules and regulations and contracts" between the MEA and other electric public utilities "pertaining to any and all jurisdictional services to be rendered by such electric public utilities." K.S.A. 66-101c. Furthermore, just as the Commission has jurisdiction to regulate contracts made by public utilities, so it has jurisdiction to regulate MEA contracts.<sup>11</sup>

17. The Joint Intervenors concur with the Commission Staff's recitation of areas over which the Commission has jurisdiction of MEAs and adopts by reference Staff's analysis of the Commission jurisdictional scope as provided by Staff in the 17-092 Docket.

18. The Joint Intervenors specifically take issue with KPP on the issue of the Commission's jurisdiction over wholesale transmission service. KPP asserted in the 17-092 Docket that the Kansas legislature withheld from the Commission jurisdiction over wholesale transmission service because it specifically granted the Commission jurisdiction over retail electric

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<sup>11</sup> Staff's Brief in Response to Kansas Power Pool's Motion to Dismiss, p. 8, ¶ 17.

service under the Retail Electric Supplier Act of Kansas, K.S.A. 66-1,171 *et seq.* (“RESA”), but did not specifically grant the Commission jurisdiction over wholesale transmission service.<sup>12</sup> To support this argument, KPP relies on the axiom of statutory construction known as *expressio unius est exclusio alterius*, which means “the inclusion of one thing implies the exclusion of another”.<sup>13</sup> However, as regards the application of this axiom to the legislature’s grant of jurisdiction to the Commission under Chapter 66 of the Kansas Statutes Annotated, the Kansas Court of Appeals has rejected such limitation, stating “[b]ased on the broad statutory authority granted to the Commission, the *expressio unius* doctrine does not appear applicable with respect to determining legislative intent.”<sup>14</sup> The Court explained that federal courts were reluctant to apply the doctrine in the administrative law context, and that they were especially reluctant to apply it when defining the authority of a regulatory agency, such as the FCC which has been given broad “necessary and proper” authority.<sup>15</sup> In other words, the *expressio unius* doctrine does not override the broad grant of authority given to the Commission under K.S.A 66-101 *et seq.*<sup>16</sup>

19. KPP also argued in the 17-092 Docket that “the Commission does not have jurisdiction over KPP’s wholesale transmission service decisions made in an effort to comply with KPP’s obligations to its members under the Amended Operating Agreement, nor does the

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<sup>12</sup> KPP Motion to Dismiss filed October 3, 2017, p. 7.

<sup>13</sup> KPP Motion to Dismiss filed October 3, 2017, p. 7.

<sup>14</sup> *Kansas Industrial Consumers Group, Inc. v. State Corp. Comm.*, 36 Kan.App.2d 83, 97 (2006).

<sup>15</sup> *Kansas Industrial Consumers Group, Inc. v. State Corp. Comm.*, 36 Kan.App.2d 83, 96 (2006).

<sup>16</sup> See Docket No. 07-GIMX-247-GIV, *In the Matter of a General Investigation Regarding Energy Efficiency Programs*, Final Order, issued October 10, 2007, pp. 9-10, rejecting the proposition that the inclusion in a statute of a provision allowing the Commission to increase rate of return for energy efficiency investments prohibits it from adopting other energy efficiency incentives, stating, “[h]owever, the Commission’s statutory grant of authority is not limited by [the *expressio unius*] legal doctrine”. See also Docket No. 15-GIMG-343-GIG, *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*, Order on Jurisdictional Issue, issued June 18, 2015, p. 4, rejecting the *expressio unius* argument in relation to the adoption of a GSRS, stating that the Kansas Court of Appeals “held that the doctrine should not be applied to the Commission ratemaking powers because the legislature has granted the Commission broad quasi-legislative ratemaking authority, and that broad grant of power overcomes any argument that the Commission has not been expressly authorized to prescribe a specific ratemaking methodology.”

Commission have the authority to issue the relief requested by Southern Pioneer.”<sup>17</sup> The Joint Intervenor are deeply troubled by this assertion, and hopefully, the Commission shares our concerns.

20. If KPP’s argument that the KCC lacks jurisdiction over wholesale transmission services is correct, it would leave a major area of utility operations without any regulatory oversight since FERC lacks jurisdiction over MEAs as expressed in the Federal Power Act (FPA). Section 201 of the FPA, as amended, exempts the following entities from FERC jurisdiction:

...the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty...<sup>18</sup>

KPP is exempt from FERC jurisdiction because MEAs are political subdivisions of the State and Section 201 exempts political subdivisions of a State from FERC jurisdiction.<sup>19</sup>

21. Taking KPP’s argument at face value, any decision KPP makes to construct transmission facilities to provide wholesale transmission service is beyond the reach of the jurisdictional arm of the Commission. This would entitle MEAs to construct transmission without Commission oversight whether necessary or not, even if it duplicates existing facilities and services, causes reliability problems for the bulk electric system, or it is not the most efficient solution for transmission service. If KPP is correct, which it is not, then Kansas ratepayers are at significant risk in bearing the cost of unnecessary facilities and services.

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<sup>17</sup> KPP Motion to Dismiss, p. 6.

<sup>18</sup> 16 U.S.C.A. § 824(f).

<sup>19</sup> *See, e.g.,* K.S.A. 74-8902(o) (defining “political subdivision” as “political or taxing subdivisions of the state, including municipal and quasi-municipal corporations, boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups or administrative units thereof ...”).



22. Of even greater concern is the fact that the Joint Intervenors are experiencing early indications of a business model in which transmission facilities are being built by third parties in its territories for profit. The consideration of need or reliability is secondary, if considered at all. If the cost was borne only by the members of the MEA, it would still be a concern as the effects are to “strand” existing local distribution or transmission facilities, resulting in cost shifts for those existing facilities to wholesale and captive retail customers taking service from the local utility. However, these rate impacts are further exacerbated by the apparent intent of the MEAs to not pay for unnecessary transmission facilities, but rather, build their transmission facilities in such a manner that they qualify for uplift of the cost into the SPP revenue requirements so as to shift the costs of the duplicative facilities to other customers by socializing them across the entire transmission zone in which the transmission facilities reside through increased SPP transmission rates. Left unchecked, this business model will become an unfortunate and unnecessary burden upon the wallets of all Kansas electric retail customer and the aesthetics of the Kansas landscape.

23. The Kansas legislature has the power to regulate wholesale intrastate transmission service and service over the local distribution system within the borders of Kansas. The Kansas legislature has delegated regulation in this area to the Commission via its broad grant of authority under Chapter 66. Joint Intervenors request that in its ruling in this generic proceeding, the Commission make clear that it has full power and authority to control and provide oversight of wholesale transmission service by MEAs, similar to that of other non-jurisdictional utilities, such as cooperatives, including the setting of wholesale transmission rates.

- d) *List the areas of operation where the Commission lacks authority or jurisdiction to regulate an MEA as if it were a public utility. State the legal jurisdiction to regulate authority denying the Commission's authority or jurisdiction.*

24. The Commission lacks authority to regulate an MEA as if it were a public utility only for purposes of granting it a certificate under K.S.A. 66-131. An MEA does not have to show the Commission it is financially, managerially and operationally qualified to operate as a public utility in Kansas because the legislature has already made that determination by statute. However, like other public utilities, an MEA's operations under that "certificate" are subject to the Commission's jurisdiction and authority. This includes wholesale transmission services and rates.

### **III. CONCLUSION**

25. As unequivocally expressed by the Kansas legislature, MEAs are subject to the jurisdiction of the Commission in the same manner as a public utility. The language is so plain and clear it defies any other interpretation or limitation. For the reasons stated herein, the Joint Intervenors request that the Commission rule it has jurisdiction over MEA in the same manner as a public utility and finally resolve this question consistent therewith.

Respectfully Submitted,

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