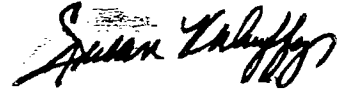


STATE CORPORATION COMMISSION

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

JAN 31 2011



In the Matter of the Application of Kansas)
City Power & Light Company to Modify Its)
Tariffs to Continue the Implementation of Its)
Regulatory Plan.)

Docket No. 10-KCPE-415-RTS

**RESPONSE OF THE CITIZENS' UTILITY RATEPAYER BOARD TO
KCPL'S SECOND PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Citizens' Utility Ratepayer Board (CURB) hereby files its Response to Kansas City Power & Light Company's Petition for Reconsideration and Clarification of the Commission's Order on Petitions for Reconsideration and Clarification and Order *Nunc Pro Tunc* (KCPL's Second PFR).

In support of its Response, CURB states as follows:

I. INTRODUCTION.

1. KCPL argues the Commission's January 6, 2011 Order on Petitions for Reconsideration and Clarification and Order *Nunc Pro Tunc* (January 6th Order) modifying its November 22, 2011 Order (November 22nd Order) making rate case expense final rather than interim is arbitrary, unreasonable, and unlawful.¹ CURB agrees with KCPL that the Commission's January 6th Order making the \$5.6 million rate case expense award final is arbitrary, unreasonable, and unlawful. However, the Commission's January 6th Order is arbitrary, unreasonable, and unlawful for the reasons specified in CURB's Second Petition for Reconsideration (CURB's Second PFR), not on the grounds contained in KCPL's Second PFR.

¹ KCPL's Second PFR, ¶ 2.

2. KCPL spends considerable time in KCPL's Second PFR repeating arguments and factual assertions regarding KCPL's December 7, 2010 Petition for Reconsideration and Clarification (KCPL's Initial PFR) and CURB's December 7, 2010 Petition for Reconsideration and/or Clarification (CURB's Initial PFR).² For the most part, CURB will not respond to these arguments and assertions, but instead incorporates by reference the arguments and assertions contained in CURB's Initial PFR, the December 17, 2010 Response of the Citizens' Utility Ratepayer Board to KCPL's Petition for Reconsideration and Clarification (CURB's Response), CURB's December 22, 2010 Reply to KCPL's Response to Petitions for Reconsideration (CURB's Reply), and CURB's January 21, 2011 Second Petition for Reconsideration (CURB's Second PFR).

3. CURB will respond to the major arguments and factual assertions contained in KCPL's Second PFR below. However, CURB's decision not to address each assertion should not be construed as a concession to any argument or assertion made by KCPL in requesting reconsideration.

II. RESPONSE TO KCPL'S PETITION FOR RECONSIDERATION ON RATE CASE EXPENSE.

4. KCPL asserts that "the rate case incurred or estimate by KCP&L has never been specifically challenged by any party on a line item basis. CURB's objection was a general objection to costs above a certain level, but the prudence or reasonableness of specific costs incurred was not at issue and has not been challenged or addressed in evidence by any party to this proceeding."³ KCPL's assertion is incorrect.

² KCPL's Second PFR, ¶¶18-18.

³ *Id.*, ¶ 2.

5. First, since KCPL's claim for additional rate case expense was never offered or admitted into evidence during or subsequent to the evidentiary hearing,⁴ a fact CURB emphasized in its challenge to the Commission's rate case expense award, CURB was denied any opportunity to challenge the additional rate case expense on a line item basis. This was acknowledged by the Commission in its November 22nd Order:

Finally, the Commission addresses CURB's request for an opportunity to review and challenge rate case costs exceeding KCPL's initial estimated amount of \$2.1 million. Following the end of the evidentiary hearing, the Commission considered the problems faced in setting a schedule to allow discovery and review by the parties before the deadline to issue the Order on November 22, 2010. The Commission was unable to fashion a schedule that allowed a detailed review and still permitted a decision on rate case expense to be included in this Order. The Commission concluded its obligation to include a reasonable and prudent amount of rate case expense outweighed a decision that would effectively deny recovery of any rate case expense in this Order. Having made this decision, the Commission exercised its discretion to set reasonable and prudent rate case expense costs but designated them as Interim Rate Relief. If parties seek to challenge the amount of rate case expense approved in this Order, a subsequent proceeding will allow full review of this issue. If that challenge is successful and establishes the rate case expense costs approved in this Order were not prudent, just or reasonable, the Commission will establish a new amount of rate case expense for this docket that will be included as an adjustment in a future KCPL rate case.⁵

6. The Commission's November 22nd Order therefore expressly acknowledged that CURB and other parties have been denied any opportunity to challenge rate case expense in excess of the \$2.1 contained in the record on a line item basis.

7. Moreover, CURB did specifically challenge KCPL's post-hearing claim for rate case expense in excess of the \$2.1 million contained in the record, a fact acknowledged by the Commission in the January 6th Order: "To the extent needed, however, the Commission clarifies that CURB proposed KCPL's rate case expense not exceed \$2.1 million, as requested in the Application,

⁴ CURB's Initial PFR, ¶¶ 1, 15-17, 29; CURB's Second PFR, ¶¶ 3, 9, 11, 16-28.

⁵ November 22nd Order, p. 95.

and recommended KCPL's rate case expense be shared equally between shareholders and ratepayers."⁶

8. It is noteworthy that KCPL agrees that the evidence of its additional claim for rate case costs have never been introduced into evidence: "The process established by the Commission in its Initial Order allowed for these shortcomings to be corrected through a subsequent proceeding where evidence of these costs would be introduced and evaluated."⁷

9. KCPL further acknowledges that in rejecting CURB's argument that any costs exceeding the \$2.1 million contained in KCPL's application should be denied, the Commission noted that "it reviewed Data Requests about rate case expense, work performed by KCPL&L's expert consultants as reflected in the evidence, and the skill and knowledge demonstrated by KCP&L counsel..."⁸ The data requests referenced by KCPL and the Commission were never offered into evidence by KCPL and never admitted into evidence by the Commission. As a result, the Commission's reliance on this evidence in making its rate case expense award of \$5.6 million is erroneous, unreasonable, arbitrary and capricious, not based on substantial competent evidence when viewed in light of the record as a whole, and constitutes an unlawful procedure or failure to follow prescribed procedure.⁹

10. KCPL requests that the Commission reconsider its January 6th Order on Reconsideration "and allow the record to be re-opened specifically to address rate case expense, or, alternatively, requests that the Commission reinstate the subsequent proceeding and Interim Rate

⁶ January 6th Order, ¶ 80.

⁷ KCPL's Second PFR, ¶ 3.

⁸ *Id.*, ¶ 21.

⁹ *See*, CURB's Initial PFR, ¶¶ 1, 15-17; CURB's Second PFR, ¶¶ 3, 5, 8-9, 11-29.

Relief provisions as set forth in the Initial Order, subject to the conditions set forth in KCP&L Petition for Reconsideration and Clarification, ¶¶ 132-137.”¹⁰

11. The Commission should deny KCPL’s request to reopen the record to allow additional evidence on rate case expense. KCPL failed to offer any evidence of additional rate case expense into the record during or even subsequent to the 14-day evidentiary hearing. Rather than to ask the Commission to admit evidence of additional rate case expense, KCPL submitted its additional rate case expense claim to Staff¹¹ long after the discovery deadline had expired, the hearing had concluded, and the record had been closed. This effectively denied CURB and other parties any opportunity to review the new evidence, conduct discovery on the new evidence, have the new evidence reviewed by consultants, present responding evidence, or cross-examine KCPL witnesses on the new evidence.

12. Under K.A.R. 82-1-230(k), a party may file an application to reopen a closed hearing record for “good cause shown.” However, the Commission has discretion on whether to reopen the record, and precedent exists to deny such a request where there has been an extensive record. “If a party finds itself unable to squeeze all of its evidence on the issue into a record of this size, then it is beyond our help.”¹² The record in *Kansas Pipeline* consisted of 29 witnesses and 17 days of hearings.¹³ Here, the evidentiary hearing included 39 witnesses over 14 days.¹⁴ Accordingly, the Commission should deny KCPL’s request to reopen the record at this late stage of the proceedings.

¹⁰ KCPL’s Second PFR, ¶ 3.

¹¹ KCPL’s responses to data requests 554 and 555 were not offered or admitted into the record, nor has KCPL at any time file a motion to reopen the record to introduce this information into the record of this proceeding.

¹² *Kansas Pipeline Partnership v. State Corp. Comm’n*, 24 Kan.App.2d 42, 50-51, 941 P.2d 390 (1997).

¹³ 24 Kan. App.2d at 50.

¹⁴ January 6th Order, ¶ 16.

13. For the reasons argued in CURB’s Initial PFR, the Commission should not grant KCPL’s request to reinstate the subsequent proceeding and Interim Rate Relief provisions as set forth in the November 22nd Order. As acknowledged by the Commission, this would constitute retroactive ratemaking, giving KCPL the opportunity to avoid any reduction in the rate case expense determined in a subsequent proceeding.¹⁵

14. KCPL further argues that it should “be permitted to present evidence to rebut, among other issues, the Commission’s findings that the fees paid to Nextsource, Inc. and the Communication Counsel of America, Inc. (“CCA”) are not duplicative and that certain estimated charges for some of the legal services are not excessive.”¹⁶ KCPL demands its right “to present evidence to rebut” the Commission’s findings despite its failure to even introduce into the record evidence of the additional rate case expenses to provide parties even a cursory opportunity to rebut the additional rate case expenses claimed by KCPL.

15. Despite denying CURB and other parties any opportunity to review the new evidence, conduct discovery on the new evidence, have the new evidence reviewed by consultants, present responding evidence (rebut), or cross-examine KCPL witnesses on the new evidence that has to date never been offered or admitted into the record of this proceeding, KCPL now asserts it has a right “to present evidence to rebut” the Commission’s findings. KCPL’s demand to rebut the Commission’s findings should be denied.

16. KCPL argues that the Commission’s January 6th Order prohibits KCPL from recovering additional costs billed to KCPL from CURB and Staff above the \$1.169 million contained

¹⁵ January 6th Order, ¶ 84; KCPL’s Second PFR, ¶ 23.

¹⁶ KCPL’s Second PFR, ¶ 13.

in the November 22nd Order.¹⁷ First, KCPL has never offered for admission into the record any evidence of costs in excess of the \$2.1 million in the record. Second, KCPL's argument regarding CURB and Staff costs is completely based on facts not in evidence.¹⁸ Finally, rate case costs are not guaranteed to be recovered, and timing issues in rate cases often result in some costs not being recovered in rates. While it is arguable that KCPL may have underestimated CURB and Staff costs, it was KCPL's burden to present evidence of its rate case expense and there is no evidence in the record to support KCPL's contention.

17. KCPL erroneously states that prior policy allowed Staff and/or CURB to request, "by way of a Data Request, a detailed listing of the expenses, including vendor, amount, and description of services which Staff did in issuing Data Requests Nos. 554 and 555. This is the procedure that KCP&L, Staff, and the other parties followed in the current case."¹⁹ KCPL's assertion is erroneous.

18. First, burden of proving KCPL's rate case expense is on KCPL, not Staff or CURB. Second, the discovery deadline ordered by the Commission was July 30, 2010, and CURB had no duty or means to conduct discovery of KCPL's rate case expense. If KCPL intended to seek rate case expense exceeding the \$2.1 million in evidence during the evidentiary hearing, it was incumbent on KCPL to introduce such evidence to the Commission in a timely manner. KCPL has, to date, failed to offer evidence of additional rate case expense into evidence. Submitting a data request response to Staff after the discovery deadline and after the record was closed does not constitute offering evidence into the record for admission by the Commission. Nor did CURB agree in this or any prior rate case to any procedure that would allow KCPL to informally submit rate case expense

¹⁷ KCPL's Second PFR, ¶¶ 2, 25-30.

¹⁸ KCPL fails to cite to the record with respect the "facts" it alleges in ¶¶ 2, 25-30.

¹⁹ KCPL's Second PFR, ¶ 32.

evidence to Staff as a substitute for its burden of introducing and having admitted evidence of such additional rate case expense. In any event, KCPL, Staff, and CURB lack any authority to set Commission policy regarding the burden of proof and admission of evidence.

19. KCPL has failed to establish any prior practice by the Commission shifted the burden of proof on rate case expense from the utility to Staff and CURB. The procedure in place is that the Company bears the burden of proof on all revenue requirement expenses, including rate case expense, and the Company failed to meet that burden for any amount in excess of the \$2.1 million in the record of this proceeding.

20. As acknowledged by KCPL, the Commission noted that CURB's opening statement put KCPL on notice that CURB was contesting any claim for rate case expense in excess of the \$2.1 million contained in the application. KCPL's assertion that "Nor did Staff or CURB submit any evidence that any specific rate case expenses submitted by KCP&L were unreasonable"²⁰ is glaringly incorrect; CURB expressly opposed any rate case expense in excess of the \$2.1 million in the record and KCPL has never submitted (offered into evidence) any evidence of rate case expense in excess of the \$2.1 million contained in the application. As a result, CURB had no opportunity to challenge any specific rate case expense claim by KCPL in excess of the \$2.1 million.²¹

21. KCPL provided data request responses to Staff, but never offered those responses into the record, never filed a motion to reopen the record to consider such additional evidence, and never received a ruling from the Commission admitting the data request responses into the record of this proceeding. This unavoidably raises the question of how CURB or other parties could be expected

²⁰ KCPL's Second PFR, ¶ 38.

²¹ See, CURB's Initial PFR, ¶¶ 1, 15-17; CURB's Second PFR, ¶¶ 3, 5, 8-9, 11-29.

to challenge the additional rate case expenses sought by KCPL as unreasonable when KCPL never offered for admission into the record any evidence of additional rate case expense.

22. CURB and other parties have clearly been denied due process regarding KCPL's claim for additional rate case expense. KCPL never offered or admitted into the record evidence of additional rate case expense, yet the Commission has granted KCPL \$3.5 million more in rate case expense than the \$2.1 million contained in the record. CURB and other parties have been denied any opportunity to review any new evidence of additional rate case expense, conduct discovery on the new evidence of rate case expense, have the new evidence reviewed by consultants, present responding evidence (rebut), or cross-examine KCPL witnesses on the new evidence of additional rate case expense.

23. The Commission should not reopen the record to allow additional evidence of rate case expense by KCPL, but should reject KCPL's claim for rate case expense in excess of the \$2.1 million contained in the record. KCPL could easily have quantified estimated rate case expenses toward the end of the 14-day evidentiary hearing, but failed to do so.

24. Because of an agency's need to close the record in order to reach a decision, it is not an abuse of discretion for a Commission to refusing to consider a party's rate case expense evidence filed more than two months after the conclusion of the hearing.²² Further, a Commission may reject a speculative estimate of future expenses that could have been easily quantified toward the end of the proceeding.²³

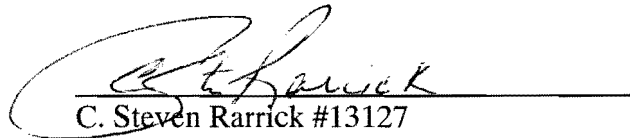
²² *City of Amarillo v. Railway Comm'n of Texas*, 894 S.W.2d 491, 495-96, (1995).

²³ *City of Port Arthur v. Railroad Commission*, 886 S.W.2d 266, 272-73 (Tex.App. – Austin 1994); *City of Amarillo v. Railway Comm'n of Texas*, 894 S.W.2d 491, 496, Ftn. 3 (1995).

III. CONCLUSION.

25. CURB respectfully requests that the Commission deny KCPL's Second Petition for Reconsideration and that the Commission reconsider its decision to award KCPL rate case expense in excess of the \$2.1 million contained in the record as requested in CURB's Second PFR. In the alternative, the Commission should designate the entire revenue requirement (including rate case expense) as interim, non-final agency action subject to refund following a full review and proceeding conducted within this rate case proceeding to determine the reasonableness and prudence of KCPL's revised rate case expense claim.

Respectfully submitted,

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

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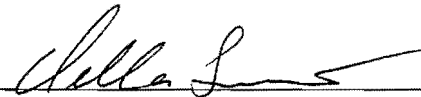
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