

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

Before Commissioners: Pat Apple, Chair  
Jay Scott Emler, Commissioner  
Shari Feist Albrecht, Commissioner

---

In the Matter of the Complaint of Southern Pioneer	)	
Electric Company Against the Kansas Power Pool	)	Docket No. 17-KPPE-092-COM
Regarding Bypass and Duplication of Service for	)	
34.5kV Delivery to the City of Kingman.	)	

---

**MOTION TO DISMISS**

The Kansas Power Pool (KPP) hereby moves to dismiss the Complaint filed herein by Southern Pioneer Electric Company (Southern Pioneer) because (1) the Commission lacks jurisdiction over the subject matter of the Complaint, and (2) the Commission lacks authority to provide the relief requested by Southern Pioneer. KPP offers the following in support of its motion.

**I. Background**

KPP is a municipal energy agency formed under K.S.A. 12-885, *et seq.* KPP provides wholesale capacity, energy and transmission services to its members, who have all signed KPP's Amended Operating Agreement. Currently, KPP serves 24 Kansas municipal electric utilities. The city of Kingman, Kansas (Kingman) joined KPP in 2007. Sixteen of KPP's members are in the Westar Energy transmission zone, seven are in the Mid-Kansas Electric Company (MKEC) zone, and one is in the Midwest Energy zone.

KPP's obligations to Kingman (and other KPP members) are set forth in KPP's Amended Operating Agreement. These obligations include:

1. To provide the means for an adequate power supply for Members in conformance with applicable standards of reliability and safety;
2. To provide the means for optimal use of generation and transmission facilities resulting in the efficient use of natural resources;

3. To attain maximum practicable economy to the Members consistent with applicable standards of reliability and safety and to provide for equitable sharing of the resulting benefits and costs;
4. And to provide any additional services to the Members as directed and approved by the Board of Directors.<sup>1</sup>

Much of Kingman County is served by the very Eastern portion of the MKEC electric system (the old Aquila system). Historically, Kingman was connected by a 34.5 kV line now owned by Wheatland Electric Cooperative, Inc. (WEC) that runs North out of the MKEC Harper substation. This undersized transmission line was only able to deliver 2 MegaWatts (MW) of power to Kingman. Because Kingman has about a 12 MW peak load, Kingman had to self-generate the remaining power the city required, using large diesel engine generators. This situation improved somewhat in 2005, when Kingman (at its own expense) constructed about twenty-six miles of 34.5 kV composite core conductor line West out of Kingman, to the town of Cunningham, in order to connect with an Aquila 34.5 kV line that ran about eighteen miles east out of the Pratt substation. While this new line increased Kingman's energy import capability to 6 MW, it did not allow Kingman to import all of the power it needs. The result was that Kingman's operation of internal power generation was reduced to about five months out of the year.

The old Aquila 34.5 kV line to which Kingman is connected with its new 34.5 kV line is now owned and operated by Southern Pioneer. Thus, KPP (on behalf of its member, Kingman) is a wholesale local access customer of Southern Pioneer and currently pays Southern Pioneer for local access delivery service (LADS) over Southern Pioneer's 34.5 kV line, in order to connect to MKEC's nearby 115 kV Ninnescah line.<sup>2</sup>

---

<sup>1</sup> See Exhibit LWH-1 to Larry Holloway's Prefiled Direct Testimony, KPP 2<sup>nd</sup> Amended Operating Agreement.

<sup>2</sup> See Figure 1, page 6 of Larry Holloway's Prefiled Direct Testimony (also attached hereto as Exhibit 1), for a diagram of the transmission lines at issue in this matter.

Some time ago, KPP began studying ways to better meet its obligations to Kingman (as well as its other member cities) under the Amended Operating Agreement and to supply Kingman's full energy needs. KPP determined it could benefit both Kingman and its other KPP members, if Kingman were able to utilize a direct connection from the 34.5 kV line that Kingman constructed to MKEC's nearby Ninnescah 115 kV line, instead of using Southern Pioneer's 34.5 kV line to connect to that Ninnescah line. Under this proposal (known as the Kingman Direct Connection), Kingman would no longer be subject to the 6 MW import limitations on Southern Pioneer's 34.5 kV line. KPP members would also benefit by receiving additional capacity revenue from Kingman and the ability to market 4 MW of generation capacity from Kingman's internal generating units. The Kingman Direct Connection would also create significant cost savings to KPP members, since KPP would not be forced to pay Southern Pioneer's LADS charges for use of the inadequate Southern Pioneer 34.5 kV line to connect to MKEC's Ninnescah 115 kV line.

Because KPP determined the Kingman Direct Connection would resolve the current prohibitions on KPP's ability to provide an adequate power supply to Kingman (namely, the 6 MW import limit on Southern Pioneer's 34.5 kV line), would optimize use of Kingman's generation and transmission facilities, and it would help attain maximum practicable economy to KPP's members, KPP began taking steps to develop and arrange for construction of the Kingman Direct Connection. These steps included submission of requests to the Southwest Power Pool and MKEC to change the current Kingman network load local delivery point from the current delivery point on the Southern Pioneer 34.5 kV line to a new delivery point (which KPP is preparing to construct) on MKEC's Ninnescah 115 kV line. As these requests indicate, KPP intends to arrange for construction of a new 115-34.5 kV substation to interconnect with a new 34.5 kV line to be built from the new delivery point to the existing Kingman 34.5 kV line. The construction of this

new substation is intended to provide Kingman with full import service for Kingman's 16 MW load, as well as generation export service for Kingman's behind-the-meter generation resources.

## **II. Southern Pioneer's Complaint**

On September 8, 2016, Southern Pioneer filed a Complaint against KPP, asking the Commission to enjoin KPP from installing this new transmission interconnection or, in the alternative, to require KPP to pay Southern Pioneer monetary damages (which Southern Pioneer calls a "facility switching fee") in the amount of \$2,505,077.29. Southern Pioneer claims the Commission has jurisdiction over the issues raised and relief requested in its Complaint because K.S.A. 60-101 generally gives the Commission "full power, authority and jurisdiction to supervise and control" electric public utilities. Specifically, Southern Pioneer alleges K.S.A. 60-101b requires that public utilities furnish reasonably efficient and sufficient service and facilities for services rendered. Southern Pioneer characterizes the Kingman Direct Connection as "duplicative electric facilities," and claims such alleged "duplicative electric facilities" are not "reasonably efficient" facilities. Southern Pioneer claims the Commission has "liberal statutory power" under K.S.A. 60-101 and K.S.A. 60-101g to prevent "duplicative electric facilities" from being constructed.<sup>3</sup>

KPP brings this motion because Southern Pioneer is asking the Commission to stretch its general supervisory powers beyond the Commission's statutory authority. KPP's proposed Kingman Direct Connection does not violate any statute, regulation, tariff or Commission Order. Southern Pioneer is asking the Commission to regulate KPP's internal business decisions and interfere with KPP's ability to serve its members under its Amended Operating Agreement, which the Commission does not have the power to do. Further, this matter relates to wholesale

---

<sup>3</sup> See Complaint, ¶ 33.

transmission services, which the Kansas Legislature has chosen not to regulate. Last, the Commission simply does not have the power to order the relief requested, since it does not have the power to issue an injunction or require a party to pay monetary damages. The current MKEC tariff under which the wholesale service at issue is provided does not include the “facility switching fee” that Southern Pioneer is asking the Commission to impose. The Commission cannot engage in retroactive rate-making by imposing a fee the Commission has no authority to impose, nor would it be prudent to impose such a fee in this matter. As such, Southern Pioneer’s Complaint should be dismissed.

### **III. Commission Jurisdiction Generally**

Since the Commission is an administrative agency created by statute, it only has the powers granted to it by statute.<sup>4</sup> Thus, any authority the Commission has must be conferred “either expressly or by clear implication from the express powers granted.”<sup>5</sup> And, when determining the extent of the limited jurisdiction of an administrative agency, “nothing is presumed in favor of its jurisdiction.”<sup>6</sup>

The jurisdiction of the Commission has three aspects: (1) personal jurisdiction (i.e., the Commission’s authority over the parties and intervenors involved in the proceedings); (2) subject-matter jurisdiction (whether the matter is one that the legislature has authorized the Commission to decide); and (3) the scope of the authority the legislature has given the Commission (i.e., whether the Commission has the authority to issue the relief requested).<sup>7</sup> Here, KPP does not

---

<sup>4</sup> See *In Protest of Lyerla*, 50 Kan. App. 2d 1012, 1020, 336 P.3d 882, 887 (2014).

<sup>5</sup> *Clawson v. State, Dep’t of Agric., Div. of Water Res.*, 49 Kan. App. 2d 789, 800, 315 P.3d 896, 905 (2013).

<sup>6</sup> *Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009).

<sup>7</sup> See *Armstead v. Sheahan*, 298 Ill.App.3d 892, 895, 233 Ill.Dec. 48, 700 N.E.2d 149, 151 (1998); *Multnomah Cty. Sheriff’s Office v. Edwards*, 361 Or. 761, 778, 399 P.3d 969, 978–79 (2017).

dispute that the Commission has personal jurisdiction over KPP, Southern Pioneer and MKEC. However, 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 Commission have the authority to issue the relief requested by Southern Pioneer.

#### **IV. The Commission Lacks Jurisdiction Over This Dispute**

Southern Pioneer's Complaint relates to (1) the method by which wholesale transmission service can be provided to Kingman; and (2) Southern Pioneer's alleged, unstated expectations when Southern Pioneer entered a settlement agreement with KPP regarding a separate dispute (in what Southern Pioneer calls the "11-597 Docket"). The Commission does not have jurisdiction to decide either of these issues.

- A. Southern Pioneer is conflating the Commission's jurisdiction to establish just and reasonable rates under K.S.A. 66-101b with the Commission's jurisdiction to regulate retail electric service under K.S.A. 66-1,171.

Determining the issues set forth in Southern Pioneer's Complaint would not be a proper exercise of the Commission's authority under K.S.A. 66-101b. Under that statute, the legislature provided the Commission the authority "to require all electric public utilities governed by this act to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities."<sup>8</sup> However, Southern Pioneer is not complaining about KPP's rates, nor is the Commission being asked to determine whether any KPP rates are just or reasonable in this matter. Rather, Southern Pioneer is asking the Commission to extend its rate-making power beyond the limits the legislature placed upon that power.

---

<sup>8</sup> K.S.A. 66-101b.

Southern Pioneer bases its request for the Commission to exercise its jurisdiction under K.S.A. 66-101b upon the public policy statements in the Retail Electric Supplier's Act (RESA), set forth in K.S.A. 66-1,171. However, RESA applies to *retail* electric service and Southern Pioneer's Complaint relates to *wholesale* electric service. If the legislature wished to regulate wholesale electric service it could have done so, but it chose to limit its expressed intentions to retail electric service. According to the familiar axiom of statutory construction –*expressio unius est exclusio alterius*; i.e., the inclusion of one thing implies the exclusion of another – this choice is significant when interpreting the intention of the legislature.<sup>9</sup> Southern Pioneer has brought its complaint to the wrong forum; in Kansas, regulation of wholesale electric service is a matter Southern Pioneer must take up with the legislature, not the Commission.

The legislature provided the Commission with specific authority to regulate rates under K.S.A. 66-101b and to regulate retail electric service under RESA. Since the matters in Southern Pioneer's Complaint do not fall within either of these parameters, the Complaint should be dismissed.

B. The Commission does not have jurisdiction to regulate the business decisions of KPP which are at issue in Southern Pioneer's Complaint.

Like the Commission, municipal energy agencies, such as KPP, are also creatures of statute. Their powers and authority are set forth in K.S.A. 12-885 through K.S.A. 12-8,111. These powers include:

- (1) The power to enter into franchises, contracts and agreements with this state or the United States or instrumentality thereof, or any public or private person, partnership, association or corporation of this state or of the United States, *for the planning, development, construction or operation of any facility for the production or transmission of electricity or other energy or for any common or other service rendered to, for or by such agency*;<sup>10</sup>

---

<sup>9</sup> See *State v. Moffit*, 38 Kan.App.2d 414, 419, 166 P.3d 435 (Kan. App. 2007); *In re Adoption of C.A.T.*, 47 Kan.App.2d 257, 263, 273 P.3d 813 (Kan. App. 2012).

<sup>10</sup> K.S.A. 12-885(a)(4) (emphasis added).

- (2) The power to make and enter into any other contract or agreement necessary or incidental to the performance of its duties and the execution of its powers under this act, including contracts for the purchase, sale, *transmission* or exchange of power and other energy with the United States or with other energy systems, either privately, cooperatively or publicly owned, within and without the state, subject to the limitations and restrictions provided in this act;<sup>11</sup>
- (3) The power to plan, finance, construct, purchase, operate, maintain, use, share costs of, own, lease, sell, dispose of or otherwise participate in any project or any portion thereof within or without the state, including solar and wind facilities, or the product or service therefrom, or to purchase, own, sell, dispose of or otherwise participate in securities issued in connection with the financing of such project or any portion thereof or acquire any interest in or any right to capacity of such project and may act as agent, or designate one or more of the other persons participating in a project to act as its agent, in connection with the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension of improvement of any project;<sup>12</sup> and
- (4) The power to purchase, sell, exchange or transmit electric energy within and outside the state in such amounts as it determines to be necessary and appropriate to make the most effective use of its powers and to meet its responsibilities, and may enter into agreements with any person with respect to that purchase, sale, exchange or transmission, on such terms and for such period of time as its board of directors determines.<sup>13</sup>

The actions which KPP proposes to take in arranging for construction of the Direct Kingman Connection fall squarely within KPP's statutory authority, as set forth above. KPP has the unqualified power to arrange for the construction of transmission facilities for its members' use. Kingman is directly impacted by KPP's proposal and, in fact, has passed a resolution in support of it.<sup>14</sup> Southern Pioneer is asking the Commission to intervene in KPP's internal business decisions which directly impact and which are, in fact, supported by KPP's members. This is not only presumptuous, but it is outside the Commission's authority.

KPP is obligated to maximize the efficiencies of its electric service to its members under its Amended Operating Agreement, and it has the statutory authority to manage and construct

---

<sup>11</sup> K.S.A. 12-885(a)(5) (emphasis added).

<sup>12</sup> K.S.A. 12-885(a)(6) (emphasis added).

<sup>13</sup> K.S.A. 12-885(a)(13) (emphasis added).

<sup>14</sup> See Prefiled Direct Testimony of Ira Hart, page 7, and Exhibit 2 attached thereto.



transmission facilities in order to meet its obligations. KPP seeks to undertake the Kingman Direct Connection in order to generate revenue and cost savings for its members. There is no statutory or other legal prohibition against KPP shedding Southern Pioneer's LADS charges and the energy import limitations which burden KPP through its use of Southern Pioneer's 34.5 kV line.

C. Southern Pioneer is asking the Commission to reform the 11-597 Docket Settlement Agreement, which is not within the Commission's jurisdiction.

In its Complaint, Southern Pioneer has not pointed to any term in the 11-597 Docket Settlement Agreement which it claims is violated by KPP's pursuit of the Kingman Direct Connection. Instead, Southern Pioneer claims the Kingman Direct Connection would frustrate subjective and unspoken *expectations* allegedly held by Southern Pioneer when it entered that agreement. However, just because the Commission ultimately approved the parties' settlement agreement in the 11-597 Docket does not mean the Commission has the power to reform that agreement to now include terms which the parties failed to include in that agreement.

The legislature did not confer upon the Commission the power to change or annul contractual rights or obligations between parties.<sup>15</sup> Indeed, while adjudication of contractual obligations are generally reserved for judicial determination, even courts do not possess the power to add terms to a parties' contract upon which the parties did not agree.<sup>16</sup> And, while courts (rather than the Commission) are generally charged with interpreting the language of contracts, such

---

<sup>15</sup> See *Williams Elec. Co-op., Inc. v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508, 517–18 (N.D. 1956) (“As a general rule administrative agencies, boards, and commissions cannot consider, or adjudicate, contractual rights and obligations between parties. Hence they cannot pass on the validity of, or enforce, nor can administrative agencies, boards, or commissions change or annul contracts, except where they have been granted power by organic or valid statutory enactment to do so.”) citing 73 C.J.S., Public Administrative Bodies and Procedure, § 68, Determination of Contractual Rights, pp. 393 and 394, and cases cited in notes 66 to 73, inclusive; *Preferred Energy Properties v. Wyoming State Bd. of Equalization*, 890 P.2d 1110, 1113 (Wyo. 1995); *Nebraska Pub. Employees, Local No. 251, Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO v. City of Omaha*, 235 Neb. 768, 769–70, 457 N.W.2d 429, 431 (1990).

<sup>16</sup> See *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641, 649 (Ind. 1995).

interpretation is not what Southern Pioneer seeks here. The plain language of the 11-597 Docket Settlement Agreement does not address any of the obligations Southern Pioneer is seeking to impose on KPP. That Agreement is unambiguous, and can only be enforced, by a court or this Commission, as written.<sup>17</sup>

All of Southern Pioneer's alleged unspoken expectations could have been included in the 11-597 Docket Settlement Agreement. In fact, if these expectations were such an important factor to the supposed concessions Southern Pioneer is claiming it made in the agreement, then they certainly should have been included. They were not. Southern Pioneer could have negotiated for an exit fee or a minimum time frame for KPP to take service on Southern Pioneer's 34.5 kV line. It could have negotiated for any number of ways to secure recovery of its alleged "stranded investment" in its 34.5 kV line. But, since Southern Pioneer chose not to negotiate for or seek Commission approval of any such terms, the Commission cannot now renegotiate the deal Southern Pioneer struck. The Commission is limited to enforcing the agreement, as written.

Courts routinely reject a party's request to enforce unstated expectations allegedly held by that party when entering a settlement agreement or consent decree, primarily on the basis that, if the claimed expectations were so important, the party should have negotiated for their inclusion in the agreement.<sup>18</sup> In *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752 (1971), the United

---

<sup>17</sup> *Johnson & Danley Const. Co. v. State ex rel. New Mexico Dep't of Transp.*, No. 29,575, 2009 WL 6622940, at \*3 (N.M. Ct. App. Dec. 10, 2009) ("Courts generally enforce contracts as written, and we are reluctant to add terms to an agreement unless the term is truly necessary or it is clear that the parties actually intended that the term be included.").

<sup>18</sup> See *Johnson & Danley Const. Co. v. State ex rel. New Mexico Dep't of Transp.*, No. 29,575, 2009 WL 6622940, at \*3 (N.M. Ct. App. Dec. 10, 2009); *Johnson v. Robinson*, 987 F.2d 1043, 1049 (4th Cir. 1993); *United States v. Armour & Co.*, 402 U.S. 673, 681–82, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574, 104 S. Ct. 2576, 2585, 81 L. Ed. 2d 483 (1984).

States Supreme Court rejected essentially the same argument Southern Pioneer brings to the Commission when that Court refused to modify a consent decree, noting:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.<sup>19</sup>

The same statements the United States Supreme Court made about the consent decree at issue in *Armour* can be made about the 11-597 Docket Settlement Agreement. Certainly, both Southern Pioneer and KPP had opposing purposes in the 11-597 Docket, and their Settlement Agreement embodies as much of those purposes as Southern Pioneer and KPP had the bargaining power and skill to achieve. Southern Pioneer waived the right to include other terms in that agreement, including the terms it is asking the Commission to insert now.

Southern Pioneer's request to reopen issues that Southern Pioneer and KPP have voluntarily settled has no basis in law or fact, and would undermine the finality of settlements as a whole.<sup>20</sup> Since Southern Pioneer is asking the Commission to reform, not enforce, the terms of the agreement, its Complaint should be dismissed.

---

<sup>19</sup> 402 U.S. at 681-82, 91 S. Ct. at 1757.

<sup>20</sup> *In re Marriage of Duckworth*, 356 P.3d 436, at \*3 (Kan. Ct. App. September 18, 2015).

## **V. The Commission Lacks Authority to Issue the Relief Sought by Southern Pioneer**

Just as the Commission does not have jurisdiction over the complaints Southern Pioneer has made, it does not have jurisdiction to order the relief Southern Pioneer is seeking. As noted above, the Commission's authority is set forth by statute. It cannot determine matters outside those enumerated by statute, nor can it exercise its authority in a manner that is inconsistent with the administrative structure enacted by the legislature.<sup>21</sup> Since the legislature did not empower the Commission to issue an injunction or award monetary damages, Southern Pioneer's Complaint should be dismissed.

The Commission is generally authorized by K.S.A. 66-101b to ensure electric public utilities establish and maintain just and reasonable rates. Nowhere in the statutory scheme setting up the Commission or outlining its authority is there any provision authorizing the Commission to enjoin a party from taking any action. Rather, injunction is a civil remedy under the jurisdiction of the courts, pursuant to K.S.A. 60-901, *et seq.* The Commission can impose penalties for violations of its regulations and orders, but it cannot enjoin a party from acting. A private party aggrieved by the proposed action of another private party may seek injunctive relief by proper application to the district courts of Kansas. Once again, Southern Pioneer is requesting relief from the wrong authority.

The Commission also does not have the authority to impose monetary damages upon KPP for taking lawful action.<sup>22</sup> KPP's proposed Direct Kingman Connection does not violate any

---

<sup>21</sup> See *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1224–25 (10th Cir. 2017) (“Regardless of how serious the problem an administrative agency seeks to address,...it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’ ”).

<sup>22</sup> Just as FERC is not empowered to order monetary damages or issue reparation orders, neither is the Commission. *S. Union Gas Co. v. F.E.R.C.*, 725 F.2d 99, 102 (10th Cir. 1984).

statute, regulation, tariff or Commission order. The purported “facility switching fee” Southern Pioneer is asking the Commission to impose is simply Southern Pioneer’s self-serving, unilateral calculation of the monetary loss Southern Pioneer claims it will suffer if KPP proceeds with the Direct Kingman Connection. This fee does not arise out of any statute, regulation or Commission-approved tariff.

The Commission’s authority at issue in this matter is limited to approving prospective modifications to tariffs or enforcing tariffs which have already been approved.<sup>23</sup> Here, KPP is not obligated under any tariff to pay an exit or “facility switching” fee. As noted by Commission Staff in Docket 16-KPPE-470-PRE, “Mid-Kansas’s Commission-approved Open Access Transmission Tariff (OATT) already provides the transmission planning methodology and cost-recovery principles that will be applied to the proposed interconnection facilities at issue.”<sup>24</sup> And, MKEC’s existing OATT does not include the fee Southern Pioneer is seeking to impose. Well-established Kansas precedent prevents the Commission from engaging in retroactive ratemaking, and this prohibition applies to tariffs just as much as it applies to rate schedules.<sup>25</sup>

Interestingly, MKEC recently notified KPP that MKEC intends to seek Commission approval of modifications to MKEC’s existing OATT.<sup>26</sup> It is telling that, included in the revisions MKEC discussed with KPP, was a provision to charge wholesale customers an exit fee, which is strikingly similar to the “facility switching fee” Southern Pioneer is asking the Commission to impose here. The fact that MKEC is now seeking to include such a fee in its OATT is evidence

---

<sup>23</sup> See *Kansas Gas & Elec. Co. v. State Corp. Comm’n of State of Kan.*, 14 Kan. App. 2d 527, 532–33, 794 P.2d 1165, 1170 (1990).

<sup>24</sup> Staff’s Motion to Dismiss ¶ 8, p4.

<sup>25</sup> See *Kansas Gas & Elec. Co. v. State Corp. Comm’n of State of Kan.*, 14 Kan. App. 2d 527, 533, 794 P.2d 1165, 1171 (1990).

<sup>26</sup> Page 18 of draft of proposed revisions to MKEC’s Local Access Tariff, draft dated 8/22/2017, attached as Exhibit 2.

that the Commission does not currently have the authority to impose the requested fee on KPP. Seeking to add and enforce this fee against KPP is nothing more than retroactive rate-making, which the Commission cannot undertake. Southern Pioneer has provided no legal basis for the Commission to bypass its own regulatory process for evaluating and approving tariffs, including all of the components of such tariffs.

Even if the Commission had the authority to impose such a fee (which it does not), no parameters exist to govern the exercise of that authority. Before the Commission could order KPP to pay such a fee, the Commission must not only approve the fee's inclusion in a tariff, but it must also approve the terms of the fee's imposition, including the circumstances when imposition of the fee is justified and how the fee should be calculated. Here, Southern Pioneer's fee is not only highly speculative but it is also selfishly one-sided. Even assuming the extent of the unbargained-for cost recovery Southern Pioneer is seeking is a legitimate and reasonable expectation, Southern Pioneer's calculation of its purported damages fails to take into account the cost savings and benefits it would receive from the Kingman Direct Connection (such as alternative feed into Cunningham for Southern Pioneer's retail customers and lower load on Southern Pioneer's antiquated Pratt to Cunningham 34.5 kV line). It also ignores the fact that not all of Southern Pioneer's alleged investment cost is directly related to service to Kingman on Southern Pioneer's 34.5 kV line. Because these facilities also serve Southern Pioneer's retail customers, Southern Pioneer would have to make investments in those facilities regardless of its Kingman service.

These glaring omissions in Southern Pioneer's calculation of its alleged damages highlight the importance of the Commission's rate-setting regulatory process, because these considerations are exactly the ones undertaken in that process. Permitting Southern Pioneer to retroactively impose its requested fee would undermine the integrity of that rate-setting process, inhibit judicial

review of the Commission's decision, and undermine the parties' expectations. The rate-setting procedures structure the Commission's exercise of discretion, and provide guidance to a reviewing court to determine whether that discretion was appropriately exercised. Without such structure, the Commission's actions necessarily become arbitrary and capricious. And, the terms of an adopted rate or tariff manage the parties' expectations, since those terms control the consequences for the parties' behavior. Changing those terms after the fact is unfair, because it imposes unexpected (and maybe unintended) consequences upon the parties.

Since the Commission does not have the authority to order the relief Southern Pioneer is requesting, the Complaint should be dismissed.

## **VI. Conclusion**

If the Commission extends its plenary powers as broadly as Southern Pioneer is requesting, it will undermine the legislative constraints that have been placed on those powers. The Commission's statutory power simply does not encompass the complaints Southern Pioneer has raised or allow the Commission to order the relief sought by Southern Pioneer. The Complaint should be dismissed for lack of jurisdiction.

By: /s/ Amy Fellows Cline

Timothy E. McKee, #07135

Amy Fellows Cline, #19995

Triplett Woolf Garretson, LLC

2959 N Rock Rd, Suite 300

Wichita, KS 67226

Ph 316/630-8100

Fax 316/630-8101

[temckee@twgfirm.com](mailto:temckee@twgfirm.com)

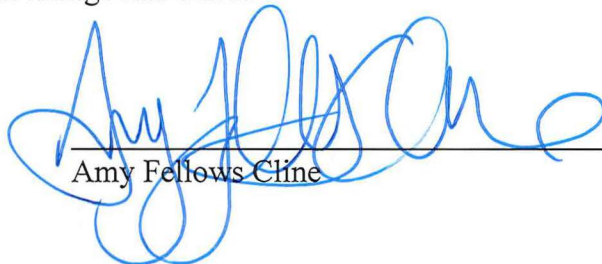
[amycline@twgfirm.com](mailto:amycline@twgfirm.com)

*Attorneys for Kansas Power Pool*

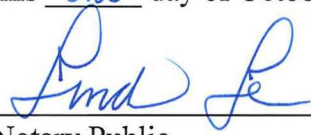
## VERIFICATION

STATE OF KANSAS            )  
  ) ss:  
COUNTY OF SEDGWICK    )

Amy Fellows Cline, of lawful age, being first duly sworn upon my oath, state that I am one of the attorneys representing the Kansas Power Pool in this matter; that I have read the above motion to dismiss; that I know the contents thereof and declares that the statements made therein are true and correct to the best of my knowledge and belief.

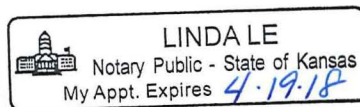
  
\_\_\_\_\_  
Amy Fellows Cline

SUBSCRIBED AND SWORN to before me this 3rd day of October, 2017.

  
\_\_\_\_\_  
Notary Public

My Appointment Expires:

April 19, 2018





## **CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of October, 2017, the above Motion to Dismiss was served via electronic mail to:

Samuel Feather, Deputy General Counsel  
Kansas Corporation Commission  
1500 SW Arrowhead Road  
Topeka, KS 66604-4027  
[s.feather@kcc.ks.gov](mailto:s.feather@kcc.ks.gov)

Stephan Skepnek, Litigation Counsel  
Corporation Commission  
1500 SW Arrowhead Road  
Topeka, KS 66604-4027  
[s.skepnek@kcc.ks.gov](mailto:s.skepnek@kcc.ks.gov)

Al Tamimi, VP, Transmission Planning and Policy  
Mid-Kansas Electric Company, LLC  
301 W 13<sup>th</sup> St.  
P.O. Box 980  
Hays, Kansas 67601  
[atamimi@sunflower.net](mailto:atamimi@sunflower.net)

James Brungardt, Regulatory Affairs Administrator  
Sunflower Electric Power Corporation  
301 W. 13<sup>th</sup> St.  
P.O. Box 1020 (67601-1020)  
Hays, Kansas 67601  
[jbrungardt@sunflower.net](mailto:jbrungardt@sunflower.net)

Taylor P. Calcara, Attorney  
WATKINS CALCARA CHTD.  
1321 Main St. Ste. 300  
P.O. Drawer 1110  
Great Bend, Kansas 67530  
[tcalcara@wcrf.com](mailto:tcalcara@wcrf.com)

Corey Linville, VP, Power Supply and Delivery  
Mid-Kansas Electric Company, LLC  
301 W 13<sup>th</sup> St.  
P.O. Box 980  
Hays, Kansas 67601  
[clinville@sunflower.net](mailto:clinville@sunflower.net)

Renee Braun, Corporate Paralegal, Supervisor  
Sunflower Electric Power Corporation  
301 W. 13th St.  
P.O. Box 1020 (67601-1020)  
Hays, Kansas 67601  
[rbraun@sunflower.net](mailto:rbraun@sunflower.net)

Mark D. Calcara, Attorney  
WATKINS CALCARA CHTD.  
1321 Main St. Ste. 300  
P.O. Drawer 1110  
Great Bend, Kansas 67530  
[mcalcara@wcrf.com](mailto:mcalcara@wcrf.com)

Randall D. Magnison  
Executive Vice President – Assistant CEO  
Southern Pioneer Electric Company  
PO Box 430  
Ulysses, Kansas 67880  
[rmagnison@pioneerelectric.coop](mailto:rmagnison@pioneerelectric.coop)

/s/ Amy Fellows Cline  
Amy Fellows Cline, #19995  
*Attorneys for Kansas Power Pool*

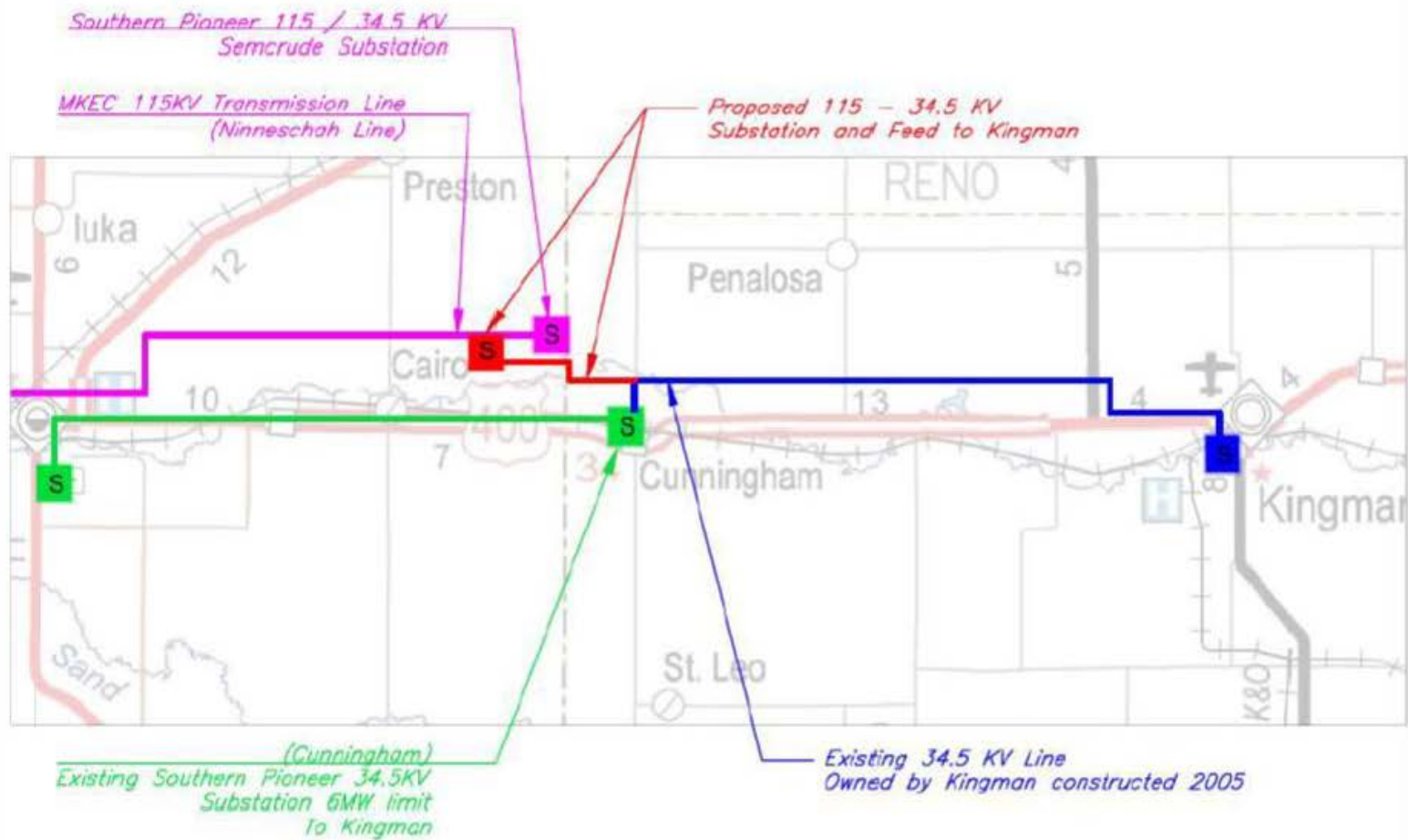


Figure 1

# Local Access Tariff

for

Prairie Land Electric Cooperative, Inc.,  
Southern Pioneer Electric Company,  
The Victory Electric Cooperative Association, Inc.,  
Western Cooperative Electric Association, Inc.,  
and Wheatland Electric Cooperative, Inc.

administered by

Mid-Kansas Electric Company, LLC

Effective Date: \_\_\_\_\_

Exhibit 2

## TABLE OF CONTENTS

1. Definitions .....	1
2. General Terms of Service .....	5
2.1 Purpose .....	5
2.2 Applicability.....	5
2.3 Administration.....	5
2.4 General Responsibilities of the Parties.....	5
2.5 Specific Requirements for Generator Owners on the Local System.....	5
2.6 Notice .....	6
2.7 Billing and Payment.....	6
2.8 Credit Worthiness and Security .....	6
2.9 Metering and Power Factor Correction.....	6
2.10 Losses.....	7
2.11 Load Shedding and Curtailment.....	7
2.12 Unauthorized Use.....	7
2.13 Force Majeure, Liability and Indemnification .....	8
2.13.1 Force Majeure.....	8
2.13.2 Liability.....	8
2.13.3 Indemnification.....	8
2.13.4 Further Limitation of Liability .....	9
2.14 Dispute Resolution .....	9
2.14.1 Internal Dispute Resolution Procedures .....	9
2.14.2 Rights Under Applicable Law.....	9
3. Load Service .....	10
3.1 Description.....	10
3.2 Initiating Service .....	10
3.2.1 Application for Initiating and Continuation of Service .....	10
3.2.2 System Requirements to Accommodate Service .....	10
3.2.3 Service Agreement Requirements .....	10
3.2.4 Operating Agreement Requirements .....	10
3.3 Charges for Load Service .....	11
3.4 Annual Updates .....	11
3.5 Operating Restrictions .....	11

4. Generation Service .....	12
4.1 Description.....	12
4.2 Initiating Service .....	12
4.2.1 Application for Initiating or Continuation of Service .....	12
4.2.2 System Requirements to Accommodate Service .....	12
4.2.3 Service Agreement Requirements .....	12
4.2.4 Operating Agreement Requirements .....	12
4.3 Generation Service Reservation Charge .....	13
5. System Requirements for Local Delivery Service .....	14
5.1 General.....	14
5.2 Initial Assessment of Application for Local Delivery Service.....	14
5.3 Local Studies and SPP Transmission Studies.....	14
5.4 Local System Impact Study .....	15
5.4.1 Local System Impact Study Agreement .....	15
5.4.2 Local System Impact Study Methodology .....	15
5.4.3 Local System Impact Study Procedures .....	15
5.5 Local Facilities Study.....	16
5.5.1 Local Facilities Study Agreement.....	16
5.5.2 Local Facilities Study Methodology .....	16
5.5.3 Local Facilities Study Procedures .....	16
5.6 Restudy .....	16
5.7 Cost Allocation for Identified Requirements and Upgrades .....	17
5.8 Implementation of Identified Requirements and Upgrades.....	17
6. Rate Stability Make-Whole Provisions for Protection of Customers on the Local System.....	18
7. Annual Planning Meeting .....	19
8. Penalty Provisions.....	20
8.1 Local Load in Excess of Load Forecast.....	20
8.2 Load Forecast in Excess of Local Load.....	20
8.3 Generators Operating in Excess of Local Load .....	21
8.4 Generation Service in Excess of Reservation.....	21
8.5 Failure to Secure Service .....	22



Local Access Tariff  
Administered by Mid-Kansas Electric Company, LLC  
Effective Date: \_\_\_\_\_

**DRAFT 8/22/17**

ATTACHMENT A – APPLICATION FOR LOAD SERVICE .....	23
ATTACHMENT B – APPLICATION FOR GENERATION SERVICE .....	24
ATTACHMENT C – LOCAL DELIVERY SERVICE AGREEMENT .....	25
ATTACHMENT D – LOCAL DELIVERY OPERATING AGREEMENT.....	35
ATTACHMENT E – COST ALLOCATION AGREEMENT.....	44

## **6. RATE STABILITY MAKE-WHOLE PROVISIONS FOR PROTECTION OF CUSTOMERS ON THE LOCAL SYSTEM**

If the Local Delivery Customer terminates Local Delivery Service prior to the term specified in the Local Delivery Service Agreement without consent of the System Owner, or if the System Owner terminates service for cause prior to the term specified in the Local Delivery Service Agreement, the Administrator will assess a make-whole payment from the Local Delivery Customer. The make-whole payment shall be a calculation of the net present value of lost revenue from Load Service Demand Charges and/or Generation Service Reservation Charges plus any property taxes or other tariff rates applied to the load for the 10 years following the date of termination less the net present value of any savings incurred by the System Owners due to a reduction in losses directly attributable to the terminated service over the same period of time plus any other agreed upon benefits. The discount rate used in the net present value calculation shall be the lower of the FERC interest rate or the System Owner's average borrowing rate at the time of the termination.