THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of ITC Great Plains, LLC for a Siting Permit for the Construction of a Double-Circuit 345-kV Transmission Line in Ford, Clark, Kiowa and Barber Counties, Kansas.	)))))	Docket No. 11-ITCE-644-MIS

CURB's Brief in Support of its Motions

Motions at Issue

1) CURB's motion requesting Commission find it has no jurisdiction to consider alternative proposals where affected landowners have not received the requisite notice under the Transmission Siting Act should be granted, and any action to approve said proposals deemed invalid;
2) CURB's motion to strike information contained in column 5 of ITC Exhibit 4 as hearsay, speculation and irrelevant to proceeding should be granted.

Statutory authority

A. The Transmission Siting Act

The proceedings in this docket are primarily governed by K.S.A. 66-1,177 through 66-1,183, collectively which are commonly referred to as the Transmission Siting Act. Under the provisions of the act, a public utility must acquire a permit from the Kansas Corporation Commission before beginning site preparation for or construction of a 230kV or greater capacity transmission line of five or more miles in length. K.S.A. 66-1,177(a), (b); 66-1,178(a). Additionally, without a permit, no utility may exercise the power of eminent domain to acquire an interest in land for construction of

such a line. K.S.A. 66-1,178(a). To obtain such a permit, the utility must file an application that specifies the proposed location of the line and the names and addresses of all landowners whose land or interest therein is located within 660 feet of the center line of the easement for the proposed line. K.S.A. 66-1,178(a)(1), (2). The utility shall include such other information as may be required by the Commission. K.S.A. 66-1,178(c).

In response to the filing, the Commission is required to schedule a public hearing, to be held in one of the counties that the proposed line will traverse. K.S.A. 66-1,178(b). It shall be held within 90 days of the filing of the application. *Id.* The purpose of the hearing shall be to determine the necessity for and the reasonableness of the location of the proposed line. *Id.* The Commission, may hold an evidentiary hearing, as well. K.S.A. 66-1,178(c). All hearings under the Transmission Siting Act shall be conducted in accordance with the provisions of the Kansas administrative procedure act. K.S.A. 66-1,180. All hearings shall be completed within 30 days of the day the hearing began, unless the utility requests a continuance. K.S.A. 66-1,180.

Notice of the public hearing must be published in area newspapers in the counties where the proposed line will be located. K.S.A. 66-1,179. Notice must be published once each week during two consecutive weeks, and the last publication shall be not less than five days before the hearing. *Id.* Additionally, written notice by certified mail of the public hearing, plus a copy of the application, must be mailed not less than 20 days before the hearing to all landowners whose land or interest therein is within 660 feet of the center line of the easement for the proposed line. *Id.* The Commission may require the utility to publish notice and send the written notices. *Id.*

The Commission is required to issue a final determination on the application within 120 days of the filing of the application. K.S.A. 66-1,178(d). The Commission, in determining the necessity

for the line and the reasonableness of its proposed location, is required to consider the benefit to consumers both within Kansas and outside the state, as well as economic development benefits within Kansas. K.S.A. 66-1,1180. The Commission may withhold or grant approval of the permit, and may condition any permit as the Commission deems just and reasonable and as may best protect the rights of all interested parties and those of the general public. *Id.*

Aggrieved parties may seek review of the Commission's decision under the procedures for review of rate hearings outlined in K.S.A. 66-118a through 66-118e, 66-118g and 66-118h. K.S.A. 66-1,182. The Kansas Court of Appeals has exclusive jurisdiction. K.S.A. 66-118a(b).

A utility may, under K.S.A. 66-1,182(a)(3), avoid the necessity of applying for a permit under the Transmission Siting Act if it instead complies with the siting requirements of the National Environmental Policy Act (NEPA). In *McGinnis v. Kansas City Power and Light Co.*, 231 Kan. 672 (1982), the Kansas Supreme Court determined that a utility that relies on the exception has the burden to provide evidence that it had complied with NEPA. *McGinnis,* 231 Kan. at 672, Syl. ¶3. Specifically, the court found that in determining whether a utility has complied with NEPA and thus is exempt from the Kansas siting requirements, the reviewing court "must review the procedural requirements, specifically and strictly, and should require the electric utility to show that it has adequately given notice and an opportunity to be heard to interested individual landowners affected by a proposed project for construction of an electric transmission line so that their positions on the environmental impact of the proposed transmission line may be considered." *Id.* (It should be noted that although the siting act has been revised since this case was decided, the outcome of this case would not have been different under the subsequent revisions.)

The *McGinnis* case arose out of the objections of landowners when KCPL filed an eminent domain proceeding to obtain easements on their land. *Id.* The landowners objected that KCPL had not obtained a permit from the KCC under the state siting act, and had no power of eminent domain. *Id.* Evidence showed that KCPL had not given notice to the landowners as required by K.S.A. 66-1,179. *Id.*, at 676. KCPL countered that it had proceeded under the requirements of NEPA and did not have to obtain a permit from the KCC. *Id.* KCPL argued it had complied with the NEPA rules in effect in 1975 when it filed first environmental impact statements concerning the project, and did not have to provide additional written notice to affected landowners. *Id.* The court found that in 1979, when Kansas lawmakers enacted the NEPA exception, it had relied on assurances from conferees that under recently revised NEPA rules providing for stricter requirements concerning notice, landowners would receive the same sort of notice and an opportunity to be heard on the proposed line that Kansas statutes provided, and that allowing the exception would eliminate the need for the utility to provide notice twice. *Id.*, at 674. Noting the importance to the legislature of the notice provisions, the court ruled that KCPL would be enjoined from proceeding with the condemnation cases until it came forward with evidence that it had acquired a permit from the KCC under the state's siting act [thus demonstrating compliance with its notice provisions] or brought forward evidence that it had complied with the comparable procedural and notice requirements of the most recent version of NEPA. *Id.*, at 684-85.

Thus, whether a utility seeks authority to build a transmission line under the Transmission Siting Act or NEPA, a utility should be required "to show that it has adequately given notice and an opportunity to be heard to interested individual landowners affected by a proposed project for

construction of an electric transmission line so that their positions on the environmental impact of the proposed transmission line may be considered." *Id.,* at Syl. ¶3.

B. Authority on due process and jurisdiction

"The essential elements of due process," according to the Kansas Supreme Court, "are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." *Wertz v. Southern Cloud Unified School District,* 218 Kan. 25, 30, 542 P.2d 339 (1975), quoted in *Copeland v. Robinson,* 25 Kan.App.2d 717 (1998; rev'w denied 1999).. Property is an interest protected by due process. 25 Kan.App.2d at 723; 218 Kan. at 29, 542 P.2d 339.

" '[A]dministrative agencies must ensure litigants their day in court. This includes proper notice as a prerequisite to valid agency action.' " 25 Kan.App.2d at 724; *Farmland Industries, Inc. v. Kansas Corporation Comm'n,* 24 Kan.App.2d 172, 182, 943 P.2d 470, *rev. denied* 262 Kan. ---- (1997) (quoting *Western Resources, Inc. v. Kansas Corporation Comm'n,* 23 Kan.App.2d 664, 666, 937 P.2d 964 [1997]). "Adequate notice goes to the very jurisdictional validity of the proceeding." 25 Kan.App.2d at 724; 24 Kan.App.2d at 182, 943 P.2d 470. Sufficiency of notice is a question of law. 25 Kan.App.2d at 724; 24 Kan.App.2d at 176, 943 P.2d 470.

The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. *Wertz v. Southern Cloud Unified School District,* 218 Kan. 25, 30, 542 P.2d 339 (1975). For due process protection under the 14th Amendment to the United States Constitution to apply, there must be state action and deprivation of an interest sufficient to warrant constitutional protection. 218 Kan. at 29, 542 P.2d 339. Property is an interest protected by due process. 218 Kan. at 29, 542 P.2d 339.

C. Specificity of notice required by the Transmission Siting Act

No Kansas court has addressed how the utility may specify "the proposed location" of the transmission line [K.S.A. 66-1,178(a)(1)] for which the applicant is seeking a permit under the Transmission Siting Act. One must presume, however, in the absence of a legal land description of the proposed route, a sufficiently detailed map might suffice. So long as those who receive a copy of the application can, by perusing the information therein, accurately determine whether their property and interests may be affected by the proposed line, this version of notice probably performs its constitutional job satisfactorily. In fact, a sufficiently detailed map might actually be more useful to persons not familiar with reading land descriptions.

Maps as notice were discussed in a Connecticut zoning case, where the state appellate court ruled that a local planning and zoning commission was deprived of subject matter jurisdiction to change zoning at a public hearing because notice had been deficient. *Delfino v. Planning and Zoning Comm'n of the City of Torrington,* 30 Conn. App. 454 (1993), 620 A.2d 836. A state statute required that a copy of the boundary of the proposed zoning change be filed in the city clerk's office at least ten days before the public hearing on the proposal. *Id.*, at 620 A.2d at 839. The published notice of the public hearing identified the name of the map showing the area of the proposed zoning change, and stated that "Copies of the application and map are on file in the Planning and Zoning Office and the City Clerk's Office;" the notice also gave the address, and stated that the application and map were available for "inspection prior to the hearings." *Id.* The court stated,

> It is quite obvious that if the map referred to in the published notice of the public hearing in this matter was not in fact on file in the office of the city clerk . . . it would be impossible for all those interested to know with any degree of intelligence exactly

> what was proposed in this application for a change of zone . . . . Compliance with the statutory procedure set forth . . . is a prerequisite to any valid and effective change in zonal boundaries . . . . The failure to file such maps in this matter deprives the commission of subject matter jurisdiction and any zone change granted is invalid . . .

Id.; internal citations omitted are as follows: see *Bombero v. Planning & Zoning Commission,* 17 Conn.App. 150, 153-55, 550 A.2d 1098 (1988), *Timber Trails Corp. v. Planning and Zoning Comm'n*, 222 Conn. 374, 378, 610 A.2d 617 (1992), *State ex rel. Capurso v. Flis,* 144 Conn. 473, 48i, 133 A.2d 901 (1957). The court concluded that the lack of evidence that the map was on file at least ten days before the public hearing rendered the zoning change granted to the applicant invalid. *Delfino*, 620 A.2d at 840. Thus, providing the public sufficiently-detailed information to interested persons to determine the precise location of the proposed change was considered an integral part of the notice required to be given to the public.

While the *Delfino* case addresses the issue of the sufficiency of notice to the general public, not specific individuals whose property may be directly affected by the proposal, the requirement of notice to either or both is founded in the same principle that notice must provide sufficient information to the reader of the notice to enable that person, whether an individual property owner or a member of the public at large, to determine whether he or she has an interest that may be affected by the proposal—and sufficiently in advance of the opportunity to be heard. While the Transmission Siting Act does not describe or define what constitutes a sufficient specification of the location of the proposed route, whatever is provided should enable the person receiving the notice to ascertain whether his or her property or other interests will be affected by the proposed route. As in the *McGinnis* case,

supra, the important thing is that the notice enables individuals to determine whether they may be affected by the line and avail themselves of an opportunity to be heard on the proposal.

Statement of the Facts

A. Facts pertaining to CURB's objection to lack of statutory notice on alternative proposals

On May 20, 2011, a prehearing conference was held in this docket. Among the preliminary matters addressed at the conference was the Landowner Group's motion to amend the procedural schedule to continue the evidentiary hearing pending notification of landowners along an alternative route supported by the group. Counsels for ITC and the Landowner Group told the prehearing officer that ITC had been conducting negotiations with the Landowner Group concerning a possible reroute of the proposed line. (Tr., at Prehearing Conf., May 20, 2011, at 7-9). Counsel for ITC told the officer that "there's some likelihood that there will be some landowners that did not receive notice of this Application and this public hearing, probably five or less." *Id.,* at 8. Counsel for the Landowner Group said that his clients were working "feverishly" to discover affected landowners. *Id.*, at 9.

Counsel for CURB stated: "I would prefer that you [prehearing officer] defer your ruling, [because of] the same concerns I had in the Prairie Wind case about the jurisdiction of the Commission to hear testimony on routes that haven't been noticed up, where the landowners haven't been noticed up. I know I was overruled in that case, but I still have those same concerns and to the extent that there may be concern about that, I would – I would be willing to not object now but defer

my objections depending on what the ruling is." *Id.*, at 10. The prehearing officer decided to defer hearing the motion to the day of the evidentiary hearing, pending further discussions between ITC and the Landowner Group. *Id.*, at 10-11.

She then moved the discussion to the various routes that had been proposed by landowners, and stated, "I just want to make sure all parties are aware that the Commission needs a clear direction about which one of these ITC is proposing to build. I think that there's a distinction between ones that ITC is proposing, or . . . one that anyone, you know, members of the public are proposing." *Id.*, at 11.

At the evidentiary hearing on May 26, by the time parties had cross-examined ITC's main witness concerning notice provided—or not provided—to landowners, evidence had been presented that 47 landowners affected by the ITC/Landowner reroute and the Steele reroute supported by ITC had not received statutory notice of ITC's original proposal. (Tr., at 187). Additionally, ITC presented evidence that written notice of the alternate proposals affecting these 47 landowners was not mailed out until one or two days before the evidentiary hearing began. (Tr., at 21, 187).

Pertinent facts relating to each ITC-supported re-route are discussed in more detail, below. CURB has omitted discussion of reroute proposals that were not supported by ITC in the witness testimony at the evidentiary hearing, as they are not relevant to CURB's objections regarding notice.

1. ITC/Landowner reroute

At the evidentiary hearing on May 26, Alan Myers testified that ITC supported the reroute proposed by the Landowner Group. (Tr., at 88). He also testified that there were 61 landowners along the proposed reroute, 23 of whom had received the statutory written notice of the originally

proposed route. He testified that ITC had sent written notice of the Landowner Group proposed route to all landowners on the route on Monday, May 24 or Tuesday, May 25 by overnight mail or express delivery service. (Tr., at 91-92). He also testified that one of the landowners, Roger Stimpert, had emailed his support for the reroute to ITC during the evidentiary hearing. (Tr., at 92). He also noted that he had heard that another landowner, Will Ellis had expressed support to Stan Ellis, who was in the audience during the evidentiary hearing. (Tr., at 188). During a dialogue with Chair Sievers, it was established that 38 landowners had not received statutory notice of the original proposal. (Tr., at 145). Near the end of the hearing, counsel for the Landowner Group said he had received notice of consent by 20 landowners to the proposed reroute. (Tr., 296). The Commission indicated that the Landowner Group should update those figures in its filing due on on June 9th. (Tr., at 296).

2. ITC/Shooting Star reroute

Initially, the developer of the Shooting Star wind farm appeared at the public hearing in Greensburg, noting that although wind towers had not yet been constructed, site preparations had begun at the site and the proposed transmission line would interfere with several of the towers. (Pub. Hrg., Tr., at 22-27). ITC counsel indicated at the prehearing conference that the company and Shooting Star had discussions to work out a reroute acceptable to the Shooting Star landowners. (Prehrg., Tr. At 11-12). Brent Leopold, ITC counsel, told the prehearing officer that all landowners that would be impacted by the reroute were the same owners that had received the statutory notice of the filed route, but that the altered route would impact some of them "slightly differently". *Id.*, at 11. It was not clear at the prehearing whether ITC was proposing the Shooting Star reroute, or whether

the landowners or developers of the Shooting Star wind farm project were. Mr. Leopold said. "The one reroute that I would say that ITC Great Plains is proposing is the Shooting Star reroute." *Id.*, at 11. Susan Cunningham, outside counsel for ITC, hedged a bit by saying, "I want to be careful when you say we are proposing it. This is our reroute that we developed in response to Shooting Star's comments at the public hearing." *Id.*

At the evidentiary hearing, ITC witness Alan Myers explicitly stated that ITC was recommending the Shooting Star reroute proposal. (Tr., at 88). He also testified that all the landowners had received the statutory written notice of the originally proposed route, and that ITC had mailed to those same landowners additional notice of the proposed Shooting Star reroute on Tuesday, May 25. (Tr., at 99). He stated that, to his knowledge, none of the landowners had objections to the reroute proposal. (Tr., at 99, 104-05). CURB's objection to lack of statutory notice does not apply to this alternative proposal.

3. ITC/Stockwell reroute

The Stockwell reroute only affected one landowner—Stockwell. This route involved lines built by both ITC and Prairie Wind, and the proposed reroute, discussed first in the Prairie Wind docket, did not affect any additional landowners. The line was merely moved to a different spot on Mr. Stockwell's property. *Id.*, at 12 – 13. Since Mr. Stockwell had proposed the reroute, it was clear that he had notice of the proposed route. CURB has no objection to notice on this reroute proposal.

4. ITC/Steele reroute

The Steele reroute was developed by ITC in response to a Mr. Steele, who was in the planning stages of drilling two irrigation wells in anticipation of installing two pivot irrigation units on his property, in an area that would be traversed by the proposed line. (Tr., at101-02). He testified that the reroute would impact 19 landowners within 660 feet of the rerouted line, and that 10 of them had received notice of the original proposal. (Tr., at 102). Mr. Myers testified that two landowners, one of whom had received notice of the original proposal, and one who had not, had contacted ITC to indicate their support for the reroute. (Tr., at 175). Myers told the Commission that 9 landowners had not received statutory notice of the original proposal. (Tr., at 146). CURB's objection to lack of statutory notice applies to this alternative proposal.

B. Facts pertaining to CURB's objection regarding ITC Exhibit 4 (fifth column only)

ITC, during Alan Myers' testimony during the evidentiary hearing, introduced ITC Exhibit 4. It was a spreadsheet entitled ITC/Landowner Group Re-Route, and dated May 26, 2011. The spreadsheet had eight columns, each entitled, from left to right (1) Tract Name, (2) Full Name [of owner of said tract],)3) et al. [i.e., additional owners, if any], (4) Full Address, (5) Support for Re-Route Y/N/?, (6) Impact upon Tract, (7) Received Notice of ITC Great Plains Open House Y/N?, and (8)Notice to Landowner of KCC Hearing either on this tract or another tract? (ITC Exh. 4).

CURB objected to the information contained in the fifth column from the right, "Support for Re-route". (Tr., 96). Counsel stated the basis for her objection was "To the extent that we do not have these landowners' comments in the record, I would submit this is hearsay." (Tr., at 96). Counsel for ITC argued (1) that administrative agencies may relax the rules of strict evidence, and

(2) stated that ITC would be willing to submit the comments supporting the information in column 5 "through briefing and the rest of this hearing." (Tr., at 96). CURB's motion was overruled. (Tr., at 96).

After hearing Mr. Myers' testimony about the "logic we used in putting the assessment of NA or not applicable" in column 5, it was apparent that where Mr. Myers had no direct knowledge of whether a landowner of a tract supported or opposed the ITC/Landowner reroute, Mr. Myers' had used his own judgment to assess the likelihood that the landowner of the particular tract in question would object to the ITC/Landowner reroute. (Tr., at 105-10).

Thus, CURB renewed its objection to admitting into evidence the contents of column 5 on ITC Exhibit #4, on the grounds that the contents were not only hearsay, but that ITC's testimony that several entries in the column were not even based even on hearsay, but on ITC's own "assumption, speculation or conjecture on their part as to what the landowner's reaction will be when they receive notice. I don't think that's relevant. The landowners are the ones that should be providing any reaction to the notice, not ITC." (Tr., at 233).

The Commission determined that CURB should brief its objection and file it on June 9.

Arguments

1) **CURB's motion requesting Commission find it has no jurisdiction to consider alternative proposals where affected landowners have not received the requisite notice under the Transmission Siting Act should be granted, and any action to approve said proposals deemed invalid;**

CURB renews its motion that the Commission find that it has no jurisdiction to consider alternative proposals that affect landowners who did not receive the statutory notice of ITC's application at least 20 days prior to the public hearing held on April 20, 2011. K.S.A. 66-1,179. The 47 landowners who first received written notice of the proposed reroutes from the notices mailed on May 24 and 25, 2011, had no opportunity whatsoever to participate in the public hearing in April, or the evidentiary hearing in May. Written notice shall be mailed at least 20 days before the public hearing. K.S.A. 66-1,179. The public hearing was held on April 20, over a month before notice was provided. Therefore, notice was ineffective to protect their due process rights in this case, and the Commission is deprived or jurisdiction to hear evidence on these proposed reroutes.

CURB believes that the statute provides the appropriate procedure for addressing ITC's alternative route: deny the permit, and require ITC to reapply for the permit with a revised application containing information on the route ITC is now proposing. K.S.A. 66-1,178. The Commission would be free to prescribe a shorter schedule than 120 days for the second application, admit testimony from the first hearing into the record, or adopt other procedures to speed up the process, so long as the statutory notice and procedural requirements are met.

The ruling in *McGinnis*, supra, supports CURB's assertion that these landowners have not been afforded the process which is due. The lack of notice to landowners affected by a transmission line deprived the utility the right to go forward with condemnation cases to acquire easements. 231 Kan. at 684-85. *Delfino*, supra, supports CURB's assertion as well. The failure to have maps of a zoning change available for inspection by interested persons deprived the zoning commission of subject matter jurisdiction, because "it would be impossible for all those interested to know with any degree of intelligence exactly what was proposed." 620 A.2d at 839. Whether the lack of notice is

founded in the failure to notify those who by our siting statute must receive written notice, whether it is founded in providing in the notice a map of the proposed route that no longer represents the location of the route the utility is proposing, or whether the notice simply was not provided in time to allow the individual to affect the second step of due process, which is to avail his or herself of the opportunity to be heard by the decisionmaker—notice is deficient in this case. "Adequate notice goes to the very jurisdictional validity of the proceeding. *Copeland v. Robinson,* 218 Kan. at 724.

The 47 landowners will have an opportunity to be heard at the second public hearing, but only on the specific reroutes proposed by ITC at the public hearing. They are being denied the opportunity to raise questions about the transmission line in general, and being denied the opportunity to have the Commission consider their own reroute proposals. That, in essence, is a denial of due process. Those 47 landowners might have other ideas about how the route should be altered, but their right to comment will be limited to the alternative routes presented.

CURB is not certain that conducting another public hearing of any sort cures the defect of lack of notice. K.S.A. 66-1,178 requires that the public hearing be held not more than 90 days after the date the application was filed on March 14. The second public hearing will be held well outside that window.

CURB is aware of the difficulties created by a statute that requires this proceeding to conclude with a final order within 120 days. That is why CURB, in this and other proceedings, has raised the question of whether the legislature contemplated an 120-day process that would have landowners receiving notice that their property may be affected more than 90 days after the application was filed, more than a month after the public hearing had been held, and just a day or less

before the evidentiary hearing. There must be some sort of limit to new proposals to prevent landowners from being deprived due process.

Further, since the Commission is not even required to hold an evidentiary hearing, the public hearing is clearly intended by statute to be the primary opportunity for the public to be heard on the proposed line. Notice of that hearing is therefore crucial for someone to have an opportunity to be heard. Limiting the second public hearing to comments on ITC-supported alternatives only deprives those who only received notice of the second hearing of the right to comment generally on the new route, and deprives them of the opportunity to offer alternatives of their own that will be vetted by ITC and considered by the Commission. Limiting the general public from commenting on the alternative routes deprives them of their opportunity to be heard as well. If all interested persons had been accorded due process to appear in the first proceeding, then CURB acknowledges that a second public hearing could be held that limits comments to alternative routes without depriving individuals of due process. But where some individuals are being denied the full range of due process as contemplated in the statute, the second hearing will not cure the defect.

Importantly, the lack of notice is not inconsequential. The statute requires that landowners who may be affected be given a minimum of 20 days' written notice of the public hearing; publication to the public in general is required to be given twice in two weeks, with the last notice published no less than 5 days before the public hearing. Landowners with land or an interest therein also get a copy of the application, which specifies the proposed location of the route. Thus, the statute provides that landowners who may be affected by the line are entitled to get notice in advance of the general public, they receive more detailed information about the proposed location than the general public, and get their notice delivered to them by certified mail. Clearly, the legislature

intended that any landowners who may be affected by the line be fully informed of the proposed location of the line sufficiently in advance of the hearing to adequately determine whether they have concerns or objections prior to the public hearing. The lack of this statutorily-required notice to the 47 landowners affected by the ITC/Landowner reroute and the Steele reroute proposed by ITC deprived them of due process. Property is an interest protected by due process. *Wertz, supra*, 218 Kan. at 29.

Contrast these requirements with the notice given to the general public: in this case, through the published notice, the general public was notified that ITC had applied for a permit to build a new transmission line from "Sunflower Electric Power Corporation Spearville Substation near Spearville, Kansas, to a new substation in northern Clark County near Bloom, Kansas, to a new substation east of Medicine Lodge, Kansas." *See* Exhibit 1 to *Affidavit of Publication and Notice to Landowners*, April 19, 2010. The public was informed it could contact ITC for further information about the proposed project. *Id.* No map was included, as was in the mailing to affected landowners. *Id.*

The difference in notice requirements for the general public and landowners is clearly the result of the fact that the permit sought in these applications confers the power of eminent domain on the utility. K.S.A. 66-1,178(a). Property is an interest protected by due process. *Wertz, supra*, 218 Kan. at 29. The landowners along the proposed route may be subject to a taking of one or more attributes of property ownership if the line traverses their property, such as the right to deny access to their property or to conduct certain activities such as drilling or constructing buildings within the right-of-way acquired by the utility. While most utility easements are obtained through negotiations between the utility and the landowner, a landowner who objects to the terms offered by the utility

may ultimately be subject to an eminent domain proceeding. Notice of the Commission proceeding to grant the right of eminent domain to the utility for purposes of acquiring the necessary right-of-way for the line is thus given to landowners whose property may be subject to a taking for a public purpose.

While CURB recognizes that these proceedings are intended to take and respond to input from the public, it is one thing for members of the public to propose alternative routes and for the Commission to decide to condition approval of the permit on the utility modifying the route in conformance with one or more alternative proposals, but it is an entirely other thing for the utility itself to adopt an alternative route late in the proceeding and expect its original notice to affected landowners to suffice as the process which is due to them and the public in general.

It should be noted that the Transmission Siting Act does not require the Commission to hold an evidentiary hearing. The Act clearly contemplates that the Commission could make a decision without holding an evidentiary hearing. Given that the public hearing may be the sole opportunity of property owners to appear before the Commission and express their concerns, proper notice of the public hearing to landowners is essential so that they may exercise their right to be heard.

Where statutory notice has not been provided to affected landowners specifying the location of the alternative routes now proposed by ITC, CURB does not believe that the Commission has the jurisdiction to take action to approve them. If it does so, the action will be invalid. Therefore, CURB renews its motion that the Commission find that it has no jurisdiction to consider alternative proposals that affect landowners who did not receive the statutory notice of ITC's application at least 20 days prior to the public hearing held on April 20, 2011.

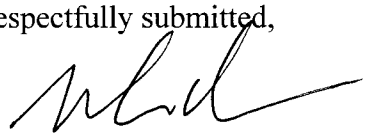
2) **CURB's motion to strike information contained in column 5 of ITC Exhibit 4 as hearsay, speculation and irrelevant to proceeding should be granted.**

CURB renews its motion to strike from the record the information contained in column 5 of ITC Exhibit 4, as hearsay and as conjecture that is irrelevant to these proceedings. ITC Exhibit 4, column 5 contained several notations made by Alan Myers that he indicated were based on his opinion of whether certain tract owners in the vicinity of the ITC/Landowner reroute would think about the reroute. His opinion of the reasonableness of the reroute is relevant, but his opinion about what a landowner might say about the reasonableness of the reroute is irrelevant. CURB is hard pressed to find any possible reason for why this information would be relevant to these proceedings, even under the liberal evidentiary standards of the Commission. Mr. Myers was on the stand as a witness because of his expertise and knowledge about the siting process of ITC, not for his ability to guess what landowners might think.

The offer of counsel for ITC to support the column 5 entries with documentation later is of no comfort, either. (Evid. Hrg. Tr., at 96). The fact that some of Mr. Myers' baseless assumptions may turn out to be correct is irrelevant. The information contained in column 5 would be irrelevant, even if it turned out to be true, because it was not based on evidence, but conjecture. If the company presents evidence that tract owners on ITC Exhibit 4 have opinions about the reroutes, that evidence would be relevant—but not to support the proposition that Mr. Myers' conjectures turned out to be true. No evidence of the tract owners' opinions would convert the information in column 5 from irrelevant to relevant.

CURB renews its motion to strike from the record the information contained in column 5 of ITC Exhibit 4, as hearsay and as conjecture that is irrelevant to these proceedings.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the Citizens' Utility Ratepayer Board; that she has read the above, and foregoing document and upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 9th day of June, 2011.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2013

Notary Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

11-ITCE-644-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, electronic service, or hand-delivered this 9th day of June, 2011, to the following:

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