

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of Howison Heights, Inc., for Approval of the Commission to Make Certain Changes in its Rates for Water Service. )  
) Docket No. 13-HHIW-570-RTS  
)  
)

In the Matter of the Investigation of Howison Heights Inc.'s Ability to Provide Sufficient and Efficient Service. )  
) Docket No. 13-HHIW-460-GIV  
)  
)

**CURB'S RESPONSE TO THE PETITION  
FOR RECONSIDERATION OF HOWISON HEIGHTS**

The Citizens' Utility Ratepayer Board (CURB) presents its response below to the *Petition of Howison Heights, Inc., for Reconsideration of the April 8, 2014 Final Order*, which was filed with the Kansas Corporation Commission (KCC or Commission) on April 23, 2014.

1. CURB agrees with the recitation of facts in the Commission's *Final Order* at paragraphs 1 through 29, and adopts them as if set forth herein.

2. As Staff noted in the *Staff's Response to Petition for Reconsideration*, which was filed with the Commission on April 28, the key finding of the Commission in its *Final Order* was "Howison's recommended rate increase is supported by substantially weaker evidence than CURB's and Staff's recommended increase." (*Staff's Response*, at ¶4; *Final Order*, at ¶34). In essence, the Commission weighed the evidence presented by Howison in support of its increase, and found it wanting. To have weighed all of the evidence presented by the parties, and then made a determination that CURB and Staff met their evidentiary burden in support of their recommendations, but Howison had not, is an entirely appropriate resolution to this case. There is nothing "unconstitutional" about a decision awarding a rate increase that is supported by

substantial competent evidence. “The Kansas Corporation Commission’s (KCC) findings of fact must be specific enough to allow judicial review of the reasonableness of the final order. However, the KCC is not required to explain why it did not accept every piece of evidence presented.” (*Western Resources, Inc. v. Kansas Corporation Comm’n*, 30 Kan.App.2d 348, Syl. ¶9.) “On appeal, the court may not substitute its judgment for that of the agency even though there may be conflicting evidence of record which would support a contrary result.” (*Id.*, at Syl. ¶2).

3. The utility has an opportunity to come forward at any time to apply for a rate increase, but in doing so, it has the burden to come forward with substantial and competent evidence of its expenses and revenues. A typical rate increase application [see filing requirements, K.A.R. 82-1-231(b)(2)] of a large investor-owned utility often contains as many as 500 to 1000 pages of schedules, testimony and data compiled by a bevy of experts in finance, economics and accounting. Recognizing the burden on smaller utilities of providing such detailed applications, the Commission requires much less data and detail in their rate increase applications. (*See* K.A.R. 82-1-231b). Thus, a small utility has a lesser burden in the *amount* of evidence of its costs and expenses that it must present to the Commission. But the utility’s *qualitative* evidentiary burden remains the same as that of larger utilities: the evidence presented must be competent and substantial in the sense that it serves to prove the utility’s need for the rate increase requested. If a utility fails to meet this burden, the Commission must deny the request.

4. In this case, Howison Heights failed to take advantage of the opportunity to present substantial and competent evidence to the Commission to support its rate increase, as it had in November 2011 when it filed its initial rate increase application. CURB maintained that

the evidence included in its November 2011 application was entirely inadequate to meet its burden. (*Final Order*, at ¶5). The Commission's Staff and CURB both advised the owner that the utility needed better recordkeeping and that he needed to segregate the utility's finances from his personal finances and that of his other businesses. Howison chose to withdraw the application and try to sell the utility, instead. (*Final Order*, ¶¶4-5).

5. Months later, having failed to take heed of the advice of Staff and CURB regarding retention of records and segregating the utility's accounts, Howison Heights filed a second application—the one at issue in this case—that was also inadequate, lacking the substantial and competent evidence required to support a Commission order granting Howison's request.

6. Rather than recommend that the Commission reject the application outright, Staff based its recommendation in part on its audit, which found huge gaps in Howison's records, and based in part on Staff's educated guesses on what those gaps should contain. CURB acknowledges that the effort was founded in Staff's general obligation to balance the interests of the utility and ratepayers, but Staff's assumptions simply were not based on the evidence. Staff auditors found records of only about five or six thousand dollars in expenses, and the utility account showed evidence of numerous personal transactions and expenses of other businesses. In addition to recommending a salary for the owner, who had never paid himself a salary previously, Staff used its collective wisdom and experience to develop a revenue requirement for Howison that, in its judgment, represented a reasonable revenue requirement for a utility of Howison's size, despite the lack of documentation.

7. CURB objected to the lack of evidence supporting Howison's request, and objected to Staff's efforts, however well-intentioned, to fill in the many gaps in the record.

Although the Commission initially accepted Staff's recommendations in issuing its interim order, the ultimate decision of the Commission in its *Final Order* was that Howison had failed to meet its evidentiary burden to support its increase request. Although Staff witness William Baldry testified at the evidentiary hearing that he believed that the efforts of Staff in filling in those gaps resulted in a more accurate picture of Howison's need for the full requested increase, the Commission explicitly rejected Staff's efforts to fill in the gaps as "assumptions and conjecture". (*Final Order*, at ¶34). So the Commission did not, as Howison claims, ignore the testimony of its own Staff. Instead, the Commission simply deemed the "assumptions and conjecture" as insufficiently competent evidence to support Howison's request.

8. Howison hangs its entire argument on the fact that the Commission approved interim rates at the level of Howison's requested increase, then changed its mind by the time of its *Final Order*—as if changing its mind, in and of itself, is evidence of the irrationality of its final decision. Howison fails to recognize the changed circumstances from the time of the interim—*i.e.*, temporary—order and the *Final Order*. A key difference is that the Commission had much more evidence to consider by the time it issued its *Final Order*. Perhaps in light of CURB's criticisms of Staff's speculations on the gaps found in the first audit, the Commission had ordered a second audit. The second time around, Staff based its increase recommendation on the actual evidence found in the second audit, and did not assume or speculate concerning the potential contents of the many gaps in the records. As a result, CURB's and Staff's rate increase recommendations were virtually aligned after the second audit.

9. Additionally, by the *Final Order*, the Commission had the opportunity to hear face-to-face testimony from the utility's owner, an opportunity it had not had at the time it issued its interim order. By the time of its final order, the Commission also had much more information

in its possession about the condition of the utility, the history of its operations and financing, and the proceedings in foreclosure and bankruptcy that are pending in state and federal court. By then, the Commission had conducted an inquiry into its legal authority to act during the pendency of those proceedings. By then, the Commission also had heard comments from a large contingent of Howison's customers, and heard testimony from Staff members who personally observed Howison's operations.

10. Simply put, the Commission's *Final Order* in this rate case was based on more substantial and competent evidence than was available at the time it approved the interim rate increase. It was based on the substantial competent evidence in the record as a whole, and therefore meets the standard of judicial review.

11. It is entirely understandable that Howison Heights believes that the increase approved by the Commission is insufficient to meet its expenses and provide a margin of profit, but the outcome is primarily the result of the utility's failure to maintain its records (i.e., evidence) in the manner that CURB and the Commission Staff had recommended. If a utility requires a \$47,000 rate increase to meet its expenses and turn a reasonable profit, then it is the utility's responsibility and burden to retain and maintain records in a manner that permits a routine audit to confirm the legitimacy of its claim. Simply asking for the increase without providing evidence of the need is not enough.

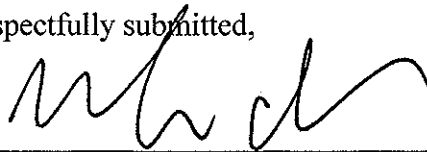
12. It is not unconstitutional to deny a claim that is not supported by substantial competent evidence. Mr. Baldry's opinion that Staff's and CURB's recommended increase based on the second audit is insufficient to meet Howison's expenses and provide a margin of profit may ultimately prove correct—but there is no concrete evidence before the Commission in this case to confirm it, and the Commission explicitly considered and rejected his opinion. The

Commission approved the increase that it found to be supported by the evidence. It is the utility's responsibility to preserve and organize the records that provide support for rate increase requests. The utility has the opportunity at any time to file an application for a rate increase, but it also has the burden every time to provide evidence to support its request.

13. *Hope* and *Bluefield* provide valid authority on the issues they address, but they do not address a salient fact at the heart of virtually every rate case: a utility's books and records constitute a major portion of the substantial and competent evidence that establish the legitimacy of the utility's rate increase request. A utility imperils its ability to meet the minimal evidentiary standard when it fails to retain records that provide evidence of its expenses and organize them in such a manner that allows them to be located and identified during a routine audit. A utility should not rely on the willingness of the Commission to accept the educated guesses of its staff members as suitable substitutes for actual evidence of its expenses. Further, a utility casts a veil over the clarity of its needs when its accounts and records contain evidence of personal transactions and those of unrelated businesses. A small utility is accorded greater latitude and laxity in the presentation of its case before this Commission than a large utility, but it is not released from the basic obligation to prove its case. The holdings of *Hope* and *Bluefield* simply don't require a utility commission to approve a \$47,000 increase to a utility that could only provide evidence of five or six thousand dollars in expenses. Thus, there was nothing unconstitutional, unreasonable or arbitrary in the determinations of the Commission in its *Final Order*.

Therefore, CURB respectfully requests that the Commission deny the petition for reconsideration of Howison Heights, Inc., and uphold the findings and determinations contained in its *Final Order*.

Respectfully submitted,



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**VERIFICATION**

STATE OF KANSAS )  
 ) ss:  
COUNTY OF SHAWNEE )

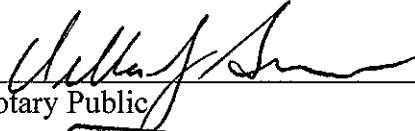
I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the above named petitioner; that she has read the above and foregoing Intervention, and, upon information and belief, states that the matters therein appearing are true and correct.

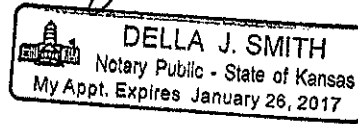


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Niki Christopher

SUBSCRIBED AND SWORN to before me this 5<sup>th</sup> day of May, 2014.



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Notary Public



My Commission expires: 01-26-2017.



CERTIFICATE OF SERVICE

13-HHIW-570-RTS/13-HHIW-460-GIV

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 5<sup>th</sup> day of May, 2014, to the following parties:

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