THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas City Power & Light Company to Make Certain Changes in Its Charges for Electric Service.	))))	Docket No. 15-KCPE-116-RTS

RESPONSE OF CURB TO MOTION TO STRIKE

The Citizens' Utility Ratepayer Board (CURB) herein moves the Kansas Corporation Commission (KCC or Commission) to deny the motion of Kansas City Power & Light Company (KCPL) to strike certain portions of CURB's Post-Hearing Brief. CURB states as follows:

1. On July 28, 2015, CURB filed its post-hearing brief in this docket. On August 3, 2015, KCPL filed a motion to strike all or portions of the briefs of several parties. In its motion, KCPL makes three requests that the Commission strike portions of CURB's Post-Hearing Brief. CURB's responses concerning each request are below.

I. CURB's responses to KCPL's motions to strike

2. A. In its motion, KCPL says, **"In its discussion of return on equity (ROE) in its brief, CURB cites to and quotes from an Order in the LaHarpe Telephone Company case."** (Motion to Strike, ¶ 17). KCPL argues that it wants the entire **"reference to and arguments based upon the LaHarpe Telephone Company case Order" to be struck** (*sic*)**." (*Id.*).**

3. The ground of KCPL's objection to the citations to and quotes from the LaHarpe Telephone Company case in CURB's post-hearing brief is the unfounded premise that CURB may not cite to or quote from the LaHarpe Telephone Company case in its post-hearing brief if CURB did not request and the Commission did not grant administrative notice of the case during this docket.

This claim is not supported by Kansas statutes, Commission rules or regulations or common law in the courts of Kansas, nor was this premise based on any order of the Commission in this case.

4. The grant of administrative notice by statute or by request of the Commission order is a convenience to the Commission and the participants in an administrative hearing and helps prevent delays due to arguments about the admissibility, relevance or veracity of certain documents, and allows the Commission to recognize generally known facts and the law of the nation and the states. [*See* K.S.A. 60-409(a) (matters of which judicial notice shall be taken); (b) (matters of which the tribunal may take judicial notice without a request from a party)]. This is a time-saving device to advance the smooth progress of a hearing, eliminate pointless arguments and permits the Commission to allow information into the record without a citation to its source if it is generally known and uncontested.

5. However, a party is not required to request and obtain administrative notice of the legal authorities to be utilized in the party's post-hearing brief. The reader of a brief has time to do research to verify whether the writer properly utilized the source material in its argument. The participants in an evidentiary hearing don't have time to do that while they are in the middle of a hearing. Administrative notice (or judicial notice in the context of judicial proceedings) is generally granted to make the proceedings go smoother. It is wise to secure administrative notice if counsel has any reason to believe that another party may challenge the accuracy or completeness of the copy or the applicability of the legal authority to the instant proceedings. Disputes like this can delay a hearing considerably. Administrative notice provides a degree of certainty to a party that the authority is admissible and recognized in the jurisdiction, gives the other parties an opportunity to review the authority and prepare to address the authority at the hearing. But administrative notice is

not required to provide the parties advance notice of all the legal authorities one intends to cite in a post-hearing brief.

6. Legal authority cited in a brief is not required to be included in the record of the docket, and contrary to KCPL's claim, K.S.A. 60-409 does not require a party to do so. In fact, parties are not required to secure administrative notice of any documents unless the tribunal requires it. To CURB's knowledge, the Commission has never required the parties to request administrative notice of all of the legal authorities it intends to use in its post-hearing brief, and it is not required to place those legal authorities in the record if it wants to use these authorities in its post-hearing brief. That requirement of being in the record applies to facts asserted in the brief, not to the legal authorities that support the parties' arguments on the facts. The argument in CURB's brief at paragraph 26 concerning the LaHarpe Telephone Company case is that the Commission has previously ruled in favor of the methodology used by Staff witness Adam Gatewood to determine growth rates in this case, and should do in this case. That is a legal argument that the Commission should follow precedent, not a dispute concerning facts in the record.

7. Further, the notion is patently absurd that an attorney that served several years as the Commission's General Counsel and has spent much of her subsequent career representing utilities and other parties in proceedings at the Commission[1] is purportedly "disabled" or "prejudiced" in representing her client because she did not have advance notice that an adverse party is going to quote from a prior Commission order in a post-hearing brief filed with the Commission. KCPL had seven days to reply to CURB's brief. An attorney who practices regularly at the Commission and has

1 These facts are not in the record of this case, but CURB maintains that these facts are well-known to the parties to this dispute and qualify as undisputed general knowledge in the community of practitioners of utility regulatory law at the Commission, thus does not require administrative notice or to be placed in the record to be accepted as fact.

seven days to reply to an adverse party's post-hearing brief who is truly disabled or prejudiced in presenting her client's case because she encountered a reference in the brief to a Commission order that was not administratively noticed should perhaps consider another line of work. This claim is totally without merit.

8. Further, there is nothing in Commission regulations regarding briefs after a hearing that requires a party to request administrative notice of every legal authority it intends to cite to in its brief. [*See* K.S.A. 82-1-230(i)]. Administrative notice is intended to streamline the proceedings, not to provide counsel advance notice of every legal argument that may be made by another party in a post-hearing brief. Not only are parties not required to give advance notice of the legal arguments one is going to make in a post-hearing brief, it is sometimes impossible for counsel to be sure until the end of an evidentiary hearing what legal questions need to be argued in a post-hearing brief. While *facts* cited to in the brief must be part of the evidentiary record, and the citations to legal authority in a pleading must be in a form that enables other counsel or the members of the tribunal to locate and verify the accuracy of the citation and determine whether the cited information actually supports the argument, *there is no requirement whatsoever in this proceeding or in any other proceeding that counsel must seek and obtain notice of the administrative body for each and every legal authority the counsel intends to cite to as authority that supports the legal arguments made in a post-hearing brief.*

9. CURB also notes that KCPL did not cite to any Commission order in this docket that requires the parties to obtain administrative notice of all legal authorities to be utilized in their post-hearing briefs—because no such order was issued. The Commission is presumed to be familiar with its own orders, particularly those of recent vintage, which also are easily accessed on the

Commission's website at any hour of the day or night—a great aid to attorneys working after hours. It is highly unlikely that the Commission would require parties to obtain administrative notice of one of its own orders for use in a post-hearing brief, and it did not do so in this case. Administrative notice need not be requested for orders or other documents used in a legal brief, especially for those issued by the same administrative body that presided over the instant proceeding. Failing to do so does not prejudice the adverse party, especially a party who has seven days to respond to the pleading.

10. Finally, in spite of the fact that KCPL also objects (as discussed below) to missing citations in CURB's post-hearing brief, KCPL does not provide one single citation to the page numbers, paragraphs or line numbers in CURB's brief that it wants stricken from the record. Motions to strike should specifically identify the information that the movant seeks to be stricken from the record. On this ground alone, KCPL's motion should be denied.

11. Therefore, for all the reasons stated above, CURB respectfully requests that the Commission deny KCPL's Motion to Strike the argument and references in its post-hearing brief concerning the LaHarpe order because (1) parties are not required by any law or regulation to request or obtain administrative notice of the sources of legal authority it will cite to in a post-hearing brief, and the Commission has not issued any order requiring that the parties do so; and (2) KCPL did not provide any paragraphs, page numbers or line numbers to identify the specific portions of CURB's brief that KCPL wants the Commission to strike.

12. B. KCPL also seeks to strike: **"factual assertions it** [CURB] **makes in all of paragraph 56 of its brief regarding the Automated Meter Reading (AMR) meters except for**

the first sentence. As such, all but the first sentence of this paragraph should be struck [*sic*] **as it is arguing facts that are not in the record**." (Motion to Strike, at ¶ 19).

13. The factual assertions made by CURB in ¶ 56 of CURB's post-hearing brief are matters of general knowledge known to most of the participants in Commission rate case proceedings, and as such, are "such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute". (K.S.A. 60-409(b)(3). The Commission, with a few exceptions, approves depreciation rates for every utility under its jurisdiction and presumably understands the basic goal of depreciation amortization in a utility regulatory context is that the customers will provide recovery of and a return on the utility's investment in a capital asset over the expected service life of the asset. (Grady, Tr. Vol. 2, at 274). Counsel for KCPL and the Commissioners had an extensive discussion of this issue with Staff witness Justin Grady at the evidentiary hearing and no one asked Mr. Grady the legal authority for his basic arguments. (Tr., Vol. 2, at 258-90). The Commissioners' questions during cross-examination of Mr. Grady indicated that they all have a basic understanding of how amortization works and understand the dispute over the appropriate amortization period for the unamortized balance of the retired meters. (*Id.*).

14. Further, CURB's ¶ 56 is simply an introductory summary of the general rule that underlies the dispute, and was intended to be illuminative to a reader less familiar with utility regulatory depreciation and amortization than are the participants in this proceeding. Admittedly, CURB could have researched Commission orders or Kansas cases discussing the general rules and policies relating to depreciation and sought sources to support every statement made in ¶ 56, but did not do so. Admittedly, CURB might have found support in the record for every statement made in ¶

56 but did not attempt to do so. The reason why CURB did not provide citations is because CURB believes everything stated in ¶ 56 is generally known in the utility regulatory community and certainly to the participants in this proceeding, and the information is not particularly controversial or subject to dispute. Admittedly, the paragraph is also not essential to CURB's argument and striking it will cause no harm to CURB. However, the inclusion of this general information will cause no harm to KCPL, either, and may be helpful to a reader less familiar with the general policies that underlie the dispute.

15. CURB requests that the Commission consider whether inclusion of the information is prejudicial or harmful to KCPL in determining whether KCPL's objection to the contents of ¶ 56 justifies striking all but the first sentence of ¶ 56 from the record.

16. C. KCPL also seeks to strike a sentence in ¶ 32 of CURB's post-hearing brief included in a discussion of Mr. Hevert's testimony on long-term growth rates. It is the sentence that follows the statement, "Put another way: according to Wall Street, if you invest in the S&P 500, you have a 98.6% chance of receiving a positive return over 5 years": "**In reality, however, every year, 20-30% of companies in the S&P will have negative returns."** KCPL wants this sentence stricken from the record because it doesn't refer to a fact in the record and therefore assumes a fact that is not in the record of this docket.

17. KCPL is correct that CURB did not cite this information to the record. CURB was trying to make the simple point, as argued elsewhere in that section, that Mr. Hevert used an overly-optimistic growth rate to develop his recommendation for the return on equity to be established in this case. CURB accurately states that Mr. Hevert relies on data that suggests only seven companies out of the S&P 500 will see negative returns in the future. KCPL does not argue with this fact.

CURB argues that expecting only seven companies to have negative returns over time is unrealistic and biases Mr. Hevert's results upward. While CURB agrees that the Commission must make a decision based on the record, the Commissioners are not expected to leave every vestige of common knowledge or common sense at the door when they enter the hearing room. On its face, expecting only seven companies out of 500 will have negative returns is ridiculous. Common sense and common understanding of markets will lead the average person to a different conclusion. The Commissioners need not have a specific citation in the record to use their common knowledge and understanding of markets to understand why Mr. Hevert's findings are not credible.

18. That said, CURB agrees and concedes to KCPL's objection. The data in the statement at issue is not located in the record. CURB does not object to the Commission striking that sentence in CURB's brief from the record, and does not believe that any prejudice or harm will result from the deletion. Even if stricken, the point made by CURB in the total argument is nevertheless true. KCPL is using data that is overly optimistic, which has the effect of biasing KCPL's results. Further, the Commission is not required to rely entirely on facts in the record and may use common knowledge and common sense in making its determinations.

II. Request for relief

19. Therefore, for the reasons stated above, CURB respectfully requests the following:

20. A. The Commission should deny KCPL's request to strike references and quotes from the Commission's LaHarpe Telephone Company order in its post-hearing brief on the grounds that the case was not administratively noticed by the Commission, because parties are not required to request or obtain administrative notice of legal authorities counsel intends to refer to in their post-

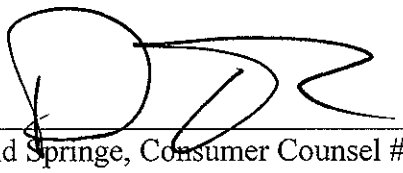
hearing briefs, particularly those from the jurisdiction in which the proceeding is being heard; the order is easily accessed by anyone with internet access; the Commission is presumed to be familiar with its own orders, and there is no prejudice to KCPL's experienced counsel in including the information from the case. Further, KCPL failed to provide citations that would enable the Commission to specifically identify the information that KCPL seeks to strike, and the motion could be granted on this ground alone.

21. B. Regarding KCPL's motion to strike all but one sentence in ¶ 56 of CURB's brief, CURB acknowledges the lack of citation to evidence in the record, but contends that the information was intended to be introductory information to the reader explaining the underlying basis for the dispute among the parties, and is not and was not intended to be evidence. Further, the information is accurate and generally known to parties who participate in rate cases, but may be helpful to the reader who is not familiar with depreciation issues that are a part of virtually every rate case proceeding. CURB respectfully requests that the Commission determine whether inclusion of the information in CURB's brief is prejudicial or harmful to KCPL; if not, the Commission should deny KCPL's motion to strike. If it is prejudicial or harmful, the Commission should then determine whether the informative value of this information outweighs the harm to KCPL if it remains on the record. CURB believes the information has value to a reader unfamiliar with depreciation issues in the context of utility regulation, and including it will not harm or prejudice KCPL's ability to advocate for its client.

22. C. Regarding KCPL's motion to strike one sentence in ¶ 32, CURB acknowledges that the sentence referred to a fact not in evidence. Further, deletion of the sentence will not harm or prejudice CURB's ability to make the basic argument that Mr. Hevert's growth rates

are overly optimistic, especially given that the Commission may use common sense and common understanding as well as facts in the record in making its determinations. CURB acknowledges that the Commission has grounds to grant KCPL's motion to strike the sentence.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS)
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COUNTY OF SHAWNEE)

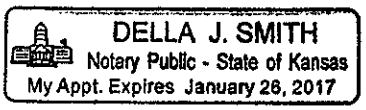
I, David Springe, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

David Springe

SUBSCRIBED AND SWORN to before me this 13th day of August, 2015.

Notary Public

My Commission expires: 01-26-2017.



CERTIFICATE OF SERVICE

15-KCPE-116-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 13th day of August, 2015, to the following parties:

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