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

CURB's POST-HEARING BRIEF

The Citizens' Utility Ratepayer Board (CURB) herein files its post-hearing brief in the above-captioned docket in accordance with the procedural schedule established in the docket.

I. Introduction and recitation of the facts

1. CURB agrees with KCPL's recitation of the basic background facts of this case as set forth in its brief at paragraphs 1 - 19, and adopts them as if set forth herein, but does not adopt KCPL's statement in paragraph 2 stating that "KCP&L's request for rate adjustments is necessary"; whether the company's request is necessary is a determination that the Commission has yet to make. CURB agrees with KCPL, however, that it is redundant to restate herein the arguments of the parties in their Joint Motion seeking approval of their *Non-unanimous Settlement Agreement on Revenue Requirement* that the agreement satisfies the Commission's "five-factor test" (discussed below), and adopts them as if set forth herein. (¶¶14-22). The Commission also heard the parties' witnesses testify in support of the settlement at the evidentiary hearing and had an opportunity to question them about its terms and potential impact.

2. CURB is a signatory to the Partial Settlement on Revenue Requirement, and adopts the positions and arguments presented therein. CURB is a conditional signatory to the Partial Settlement on Rate Design, as set forth below.

3. This brief presents CURB's arguments on the remaining contested issues in this case. The final revenue requirement and the overall rate of return depend on the positions adopted by the Commission on the contested issues. If the settlement agreements are not approved, the Commission will have to determine the revenue requirement and overall rate of return to be approved based on the evidence in the record.

II. Authorities and legal standards guiding consideration of settlement agreements

4. The Commission's focus in many utility regulation matters is not on resolving disputes among the parties, but on determining public policy and making an assessment of the public interest. The Commission's basic duty in the matters before it is to protect the public interest, which may involve issues not raised by the parties to the proceeding, recognizing that all persons or interests affected may not be present or represented in a proceeding.[1] A stipulation and agreement may settle disputes between the parties, but it does not relieve the Commission of its obligation to assess the impact on the public interest and to develop sound public policy.

5. The Commission must base its decisions and conclusions on the record before it. In general, that involves: (1) investigating the applicable statutes and case law to understand the legal standards in a particular case, which may necessitate a policy determination; (2) finding specific facts in the record that are relevant to each element of the legal standard, which do not necessarily include the opinions, arguments, or conclusions of the parties; and (3) determining whether there is adequate record support for its decision.[2] The Commission is also obligated to

[1] K.S.A. 2011 Supp. 77-201 *Thirteenth.*

[2] K.S.A. 77-526(c): "A final order ... shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed .... ".

justify any deviations from past practices or policies.[3] A stipulation and agreement between parties does not relieve the Commission of its obligation to support its decision with evidence in the record. The Commission's order must demonstrate that it considered and weighed all of the substantial evidence in the record, whether or not it supports the Commission's decision, and whether or not it supports the settlement agreement.

6. The Commission evaluates the evidence in the record as a whole regarding a proposed stipulation and agreement in light of certain standards of review. The Commission has previously recognized its authority to approve settlements containing final terms that have been agreed to by the parties, but that do not reveal how these terms were reached.[4] The law generally favors compromise and settlement of disputes between parties when they knowingly and in good faith enter into an agreement that settles the dispute.[5] When adopting a settlement, the Commission must make an independent finding that the settlement is supported by substantial competent evidence in the record as a whole, that the settlement will establish just and reasonable rates, and that the settlement is in the public interest.[6] The Commission has historically reviewed stipulations and agreements under a five-factor test established by the Commission that the parties are required to satisfy when presenting a settlement for consideration. The factors considered in deciding whether a settlement should be approved are:

1. Was there an opportunity for the opposing party to be heard on the reasons for opposition to the stipulation and agreement?

[3] *Kansas Industrial Consumers Group, Inc. v. State Corp. Comm'n*, 36 Kan.App.2d 83, 90 (2006).

[4] *Order Approving Contested Settlement Agreement*, Docket No. 08-ATMG-280-RTS, May 12, 2008, ¶¶ 9-10.
[5] *Krantz v. University of Kansas*, 271 Kan. 234, 241-242 (2001).
[6] *Citizens' Utility Ratepayer Board v. State Corp. Comm'n*, 28 Kan.App.2d 313, 316 (2000), *rev.denied*, March 20, 2001.

2. Is the stipulation and agreement supported by substantial competent evidence in the record as a whole?

3. Does the stipulation and agreement conform to applicable law?

4. Does the stipulation and agreement result in just and reasonable rates?

5. Are the results of the stipulation and agreement in the public interest, including the interest of the customers represented by the parties not consenting to the agreement?[7]

7. The five-factor test does not relieve the Commission of its duty to make a determination that rates are just and reasonable and that the results of the stipulation and agreement are in the public interest, which requires the Commission to carefully analyze the issues. As set forth in K.A.R. 82-1-230a(b), the Commission has authority to approve, reject or modify a non-unanimous settlement agreement. A stipulation and agreement is, essentially, record evidence for the Commission to consider, and an agreement between the parties regarding how they will present their cases. The Commission's rules provide explicitly that "stipulations shall be regarded as evidence at the hearing and shall not be binding upon the commission."[8]

This case involves setting rates for Westar's customers in Kansas. The Commission must find that these rates are just and reasonable, and must evaluate whether the proposed rates are within a "zone of reasonableness" by taking into account various interests of all parties involved.[9] The "zone of reasonableness" is an elusive range where the rates are most fair to the utility and its customers; the Commission has broad discretion to determine this zone of reasonableness and should seek to set rates that are not so unreasonably low or unreasonably high as to be unlawful. As noted above, the Kansas Supreme Court has articulated that in

[7] *Order Approving Contested Settlement Agreement*, Docket No. 08-ATMG-280-RTS, May 12, 2008, ¶¶11.
[8] K.A.R. 82-1-228(e)(3).
[9] *Farmland Industries, Inc. v. State Corp. Comm'n*, 24 Kan.App.2d 172, 195 (1997).

ratemaking cases, the parties whose interests must be considered and balanced are: (1) utility investors vs. ratepayers, (2) present ratepayers vs. future ratepayers, and (3) the public interest.

III. Partial Settlement on Revenue Requirement issues

8. The signatories to the *Partial Settlement Agreement on Revenue Requirement* reached agreement on many, but not all revenue requirement-related issues in the case. However, the non-unanimous agreement promotes judicial economy; the hearing was scheduled to last five days, but was concluded in three because numerous issues were resolved through the settlement agreement. All signatories are privy to the terms of the settlement and willingly agree to its terms. The law generally favors compromise and settlement of disputes between parties when they knowingly and in good faith enter into an agreement that settles the dispute. [*Krantz v. University of Kansas*, 271 Kan. 234, 241-242 (2001)].

9. The parties who declined to join the agreement did not object to the settlement. The Commission nevertheless must make its own determination whether the terms of the settlement agreement serve the public interest. (K.S.A. 2011 Supp. 77-201 *Thirteenth*).

10. Among the issues in the case that were withdrawn from controversy by the signatories are all the rate base items at issue in this case, except for the disagreements concerning whether KCPL should receive a return on the unamortized balance of the retired Automatic Read Meters (AMR meters), and how long the amortization of the balance should be. This eliminated the need to litigate $2,114,033,286 in rate base claims made by the company. It is necessary for the Commission to make determinations on the return on equity and two contested revenue-related issues in order to determine the company's final revenue requirement. CURB's arguments on these issues are presented below.

11. The signatory parties also resolved numerous issues relating to the cost of service, many of which will need to be adjusted based on the final revenue requirement determined by the Commission: cash working capital, bad debt expense and rate case expense. The parties agreed to a capital structure of 50.48% common equity, 48.97% long-term debt, and 0.55% preferred stock, and also agreed to adopt a cost of debt of 5.55% and a cost of preferred stock of 4.29%. The signatories adopted the updated depreciation rates that were presented by KCPL's witness Dane Watson, and agreed on the schedule of decommissioning cost accruals presented by KCPL's witness Greg Clizer. As noted, the parties request that the Commission make the following determinations in relation to these accruals to enable KCPL to satisfy requirements of federal law: (1) that the accruals are included in KCPL's cost of service and are included in rates for ratemaking purposes, and (2) that the earnings rate assumed for the decommissioning trust takes into consideration the tax rate change and the removal of investment restrictions resulting from the Energy Policy Act of 1992.

12. The signatories agreed on appropriate amortization periods for four items, the balances of the pension and post-employment retirement benefits trackers, a cap on the amount of rate case expenses that may be included in rates, and agreed not to oppose KCPL's request for a waiver on the twelve-month limitation to file its abbreviated rate case. They also agreed on items and issues that can be included in the abbreviated case, including true-ups for actual remaining LaCygne and Wolf Creek project costs. They agreed to work together in a generic docket to be opened to consider the appropriateness of utilities operating electric car charging stations and the inclusion of the costs in customer rates, and agreed to allow KCPL to recover the costs spent thus far on stations. They agreed on the amount of ad valorem expense to be included in base rates; agreed to allow KCPL to implement a Transmission Delivery Charge Rider under

terms agreed to by the parties; agreed to a tracker for Critical Infrastructure Protection and cybersecurity costs, also under terms agreed to by the parties. All agreed that KCPL would not be granted its request for a Vegetation Management Tracker at this time. All agreed that KCPL met in-service criteria for the new environmental control project for LaCygne Units 1 and 2.

13. The partial settlement agreement removed over $2 billion in rate base issues from litigation, as well as numerous disagreements among the parties over cost-of-service items, trackers and policy issues. Resolving these issues saved customers from having to foot the bill for two days of hearing expenses, and if approved, provides certainty on numerous issues to shareholders, customers and the public in general. There is ample evidence in the record to support the agreement. The terms of this agreement are straightforward and not controversial, as evidenced by the fact that none of the non-signatory parties object to the revenue requirement agreement. Although the Commission is not relieved of its obligation to support its ultimate decisions in this matter with evidence in the record, the Commission will find sufficient substantial evidence in the record to support a decision that the agreement fairly and justly resolves the issues settled by the agreement and is in the public interest.

14. The remaining contested issues affecting the revenue requirement are discussed immediately below. The partial settlement on rate design, CURB's arguments on CURB's conditional agreement to the partial settlement on rate design, and the remaining contested rate design issues are presented after the discussion on the contested revenue requirement issues.

IV. Contested Revenue Requirement Issues

A. CURB recommends a return on equity of 8.55%.

(1). Introduction

15. CURB's witness Dr. J. Randall Woolridge recommends the Commission approve an authorized Return on Equity (ROE) for KCPL of 8.55%. (Woolridge, Dir.T. at 2). Dr. Woolridge's recommendation is based on the results if his Discounted Cash Flow Model (DCF) and his Capital Asset Pricing Model (CAPM).

16. For KCC Staff, Mr. Adam Gatewood recommends the Commission approve an authorized ROE of 9.25% for KCPL. (Gatewood, Dir.T. at 3). As will be shown, Mr. Gatewood's ROE recommendation is not based on the results of his DCF, CAPM or Internal Rate of Return models. If his actual model results were used, Mr. Gatewood's ROE recommendation in this case would be similar to that made by Dr. Woolridge. Mr. Gatewood specifically ignores the results of his analysis and instead applies the concept of "gradualism"—a concept never before applied in setting an ROE in Kansas—to make an ROE recommendation "that does not reflect the full extent of the current decline in capital costs." (Gatewood, Dir.T. at 3).

17. KCPL's witness, Mr. Robert Hevert recommends the Commission approve an authorized ROE of 10.3%, out of a recommended ROE range of 10.0% - 10.6%. Mr. Hevert's recommendation is based on Constant Growth and Multi-stage forms of the DCF, a CAPM and a Bond Yield Risk Premium Approach. (Hevert, Dir. T. at 3). As will be shown, Mr. Hevert's recommendation is based on a flawed analysis that relies on overly-optimistic inputs to generate unreasonably high results that are not representative of current capital markets.

18. On behalf of Wal-Mart, Mr. Steve Chriss recommends a maximum 9.5% ROE, but does not produce an independent study to support the recommendation. (Chriss, Dir.T. at 4).

19. Among the three witness that support ROE models, there are slight differences in proxy group selection. However, proxy group differences are not driving the large differences in

the parties' overall analysis, and will not be discussed here. Rather, model methodology and inputs account for most of the variation in their ROE results. As KCPL notes in its Post-Hearing Brief, the major differences among the results are attributable to the difference in long-term growth rates used by each witness.

(2). Mr. Hevert's DCF models rely on inflated growth rates.

20. Mr. Hevert's DCF models are upwardly biased and lead to overstated results. In his single-stage DCF analysis, Mr. Hevert relies only on three sources for the 3- to 5-year forecasted earnings growth rates for his proxy group— Zach's Investment Research, Yahoo Finance and Value-Line. Averaging these sources together, he assumes that his proxy group of electric utilities will grow earnings in perpetuity at an annual rate of 5.54%. However, citing a 2007 study by Easton and Summers, Dr. Woolridge shows that it is well-known that long-term earnings-per-share forecasts of Wall Street securities analysts are overly optimistic and upwardly biased by as many as three percentage points. (Woolridge, Dir.T. at 61; *see also* Woolridge, Dir.T. at Appendix B). Relying solely on these limited Wall Street analyst forecasts predictably leads to an inflated result. Further, single anomalous Wall Street forecasts can drive results. With respect to Mr. Hebert's single-stage DCF analysis, it should be noted that by simply removing Otter Tail Power--with its anomalous 15.5% Value-Line earnings forecast—from Mr. Hevert's proxy group, the "High ROE" indicated range drops from 10.22% and 10.47% down to a range of 9.41% to 9.62%.

21. In his multi-stage DCF, Mr. Hevert adds a long-term economic growth forecast to his shorter-term Wall Street analyst growth rate forecasts. As discussed below, Mr. Hevert's long-term earnings growth rate of 5.61% must be rejected by the Commission.

22. Dr. Woolridge does not limit his DCF analysis to including only narrow and overly-optimistic WallStreet analyst forecasts. Dr. Woolridge believes that the average investor looks at a wide range of both historic and projected data in forming expectations and in making investment decisions. Therefore, Dr. Woolridge utilizes a robust mix of historic and forecasted growth rates for dividend yields, earnings and book value in determining the growth forecast for his DCF recommendation. Dr. Woolridge reviews both 5-year and 10-year historic growth rates in earnings per share, dividends per share and book value per share from Value Line (an average growth rate of 3.6%). (Woolridge, Dir.T., Exhibit JRW-10, at3). Dr. Woolridge reviews the projected five-year growth rates in earnings per share, dividends per share and book value per share from Value Line (an average growth rate of 4.7%).(Woolridge, Dir.T., Exhibit JRW-10, at 4). Dr. Woolridge reviews the sustainable growth rate from Value Line (an average growth rate of 4.0%). (*Id*). Finally, Dr. Woolridge reviews analysts' projected earnings per share growth rates presented by Yahoo, Zack's and Reuters (an average growth rate of 4.7%). (Woolridge, Dir.T., Exhibit JRW-10,at 5). All of these growth rates are publicly available and commonly used by investors in making investment decisions. It is reasonable to expect that in formulating growth expectations, investors will assimilate both historic results and near-term growth forecasts in setting expectations, and will not be myopically focused only on a few Wall Street earnings forecasts, as Mr. Hevert would have the Commission believe. If investors only looked at forward-looking information, Value-Line would be of little use. In fact, 90% of the information contained in a Value-Line report is historic information. Dr. Woolridge's utilization of both historic and forecasted earning information more closely mimics investor behavior, and therefore forms the basis for a reasonable overall grow rate. Based on all of these growth rates, Dr. Woolridge recommends an overall growth rate of 4.7%, and an overall DCF result of 8.55%.

23. Mr. Gatewood utilizes near-term Wall Street analyst growth rates but also recognizes that investors invest for the long term. To account for the long-term nature of investing, Mr. Gatewood incorporates a 4.38% long-term economic growth rate into his DCF model. Overall, Mr. Gatewood's DCF results are similar to Dr. Woolridge's results. Mr. Gatewood shows a Low DCF of 8.09%, and a High DCF of 8.73%, with a Mean DCF of 8.41%. (Gatewood, Dir.T. at 5).

(3). Mr. Hevert's long-term growth rates are impossible to achieve in the real world.

24. Mr. Gatewood contends that Mr. Hevert's results are inflated and produce a growth rate well beyond what is expected of the broad economy (as measured by growth in nominal gross domestic product or nGDP). As Mr. Gatewood points out, it is well established in the economic literature that over the long term, growth in nGDP presents a limit on dividend and earnings growth. (Gatewood, Dir.T. at 26-30, 45.) It is simply impossible for a company to grow earnings and dividends in perpetuity at a higher rate than the overall economy. In the long term, nGDP and company growth must come together.

25. Mr. Gatewood uses an nGDP forecast of 4.38% in his DCF analysis, based on an average of the long-run nGDP forecasts of the Energy Information Agency (EIA) in its 2015 Annual Energy Outlook and that of the Social Security Administration (SSA). This is in line with GDP forecasts of multiple government and private entities as shown in Mr. Gatewood's testimony. Interestingly, Exxon Mobil predicts real GDP growth in the 2.2% to 2.5% range out to 2040. With 1.8% to 2.0% inflation forecasts, Exxon Mobil believes the economy— nGDP— will grow in the range of 4.0% to 4.5% through 2040. (Gatewood, Dir.T. at 22). Mr. Gatewood's 4.38% is also supported by recent testimony filed by the Staff of the Federal Energy Regulatory

Commission (FERC), which also recommends an nGDP figure of 4.39%. (Gatewood, Dir.T. at 45).

26. The Commission has approved of the use of nGDP as a measure of growth in other cases where the formulation of the DCF model was at issue, and has supported Mr. Gatewood's growth rate formulation as reasonable. In the LaHarpe Telephone Company case (LaHarpe), the Commission found Mr. Gatewood's testimony "most persuasive and compelling". (KCC Docket Number 12-LHPT-875-AUD, *Order* of June 26, 2013, at 6). In LaHarpe, the Commission specifically found

> Adam Gatewood's inclusion of nominal Gross Domestic Product (nGDP) in his growth rate analysis is a reasonable and appropriate methodology. Because of volatile short-run earnings growth forecasts, the Commission concludes this consideration of nGDP is helpful to estimate the *long-run growth* for use in the Discounted Cash Flow (DCF) model. Further, it is evident to the Commission that a long-term approach is required by the DCF model because this is how investors value securities in this industry.

(*Id.*, at 7). Further, the Commission dismissed LaHarpe's protestations that reliance on nGDP would restrict LaHarpe's access to capital, stating that "because investors typically use a long-term approach to stock valuation, reliance on nGDP cannot fairly be characterized as a "restriction" on LaHarpes's ability to compete for capital." (*Id.*).

27. In KCPL's most recent full rate case, the Commission found KCPL's proposed 5.7% growth in nGDP "unreasonably optimistic". (KCC Docket 12-KCPE-764-RTS, Order of Dec. 13, 2012, at 9). The Commission specifically found Mr. Gatewood's use of 4.55% for nGDP growth more credible than KCPL's 5.7%. (*Id.*, at 11). On reconsideration, the Commission elaborated on its finding, stating that

> In concluding Gatewood's nGDP growth rate was more credible than the 5.7% advocated by Hadaway, the Commission also relied on the testimony of Dr. Woolridge, who used a growth rate in the 4% range. The Commission was

> presented with evidence from Gatewood and Woolridge, supported by government forecasters, suggesting a growth rate in the 4% range. Only Hadaway advocated a growth rate above 4.55%. Thus, the weight of the evidence supports a finding that Gatewood's growth estimates are more credible than the 5.7% advanced by Hadaway.

(KCC Docket 12-KCPE-764-RTS, *Order Denying Reconsideration*, Jan. 18, 2013, at 6).

In the Commission's recent Atmos Energy rate case order, the Commission again stated

> "The Commission finds the nGDP growth estimates of 4.46% advocated by Gatewood, and consistent with the nominal forecast by the Social Security Administration and Energy Information Administration, to be more credible than the growth rate of 6.33% suggested by Avera in light of current economic conditions. This conclusion is also consistent with prior Commission decisions.

(KCC Docket 14-ATMG-320-RTS, *Order* of Sept. 4, 2014, at 14). And again, on reconsideration, the Commission elaborated on its finding, stating that

> Atmos argues the Commission's decision is invalid because it failed to use reasoned decision-making in its order. Atmos raises two specific examples of the Commission's so called ill-reasoned decision making. First, Atmos attacks the Commission's findings that Staff's long term nGDP growth rate forecast is more credible than the growth rate suggested by Atmos in light of the current economic conditions. Atmos further asserts that the two concepts are not related. Atmos bases its argument upon Dr. Avera's testimony that investors do not consider the overall condition of the economy by means of long term economic growth forecasts when making investment decisions. However, Staff offered evidence that sophisticated investors do in fact consider the general health of the economy in the form of nGDP growth forecasts, as evidenced by nGDP growth forecasts created by Exxon-Mobil, quarterly economic investor updates created by Value Line, and testimony from Mr. Gatewood that most investors can look at a short-term growth forecast and decide for themselves whether they would overpay for a stock when that forecast is extrapolated out 75 years.

(KCC Docket 14-ATMG-320-RTS, *Order Denying Reconsideration*, Oct. 16, 2014, at 8).

28. Mr. Hevert proposes an nGDP growth forecast of 5.61%[10], far in excess of the 4.38% used by Mr. Gatewood, and very near the 5.7% nGDP rate rejected by the Commission in KCPL's last full rate case. In developing his nGDP forecast, Mr. Hevert uses long-term historic GDP growth rates. This is ironic, given that in his single-stage DCF model, Mr. Hevert uses only

[10] Mr. Hevert reduced this estimate down to 5.37% in Rebuttal Testimony.

long-term Wall Street analyst forecasts and ignores historic data completely—but in developing his nGDP forecast, Mr. Hevert uses only historic nGDP data and completely ignores the readily-available forward-looking forecasts from government and private sources that Mr. Gatewood utilizes and is a method that the Commission has previously approved.

29. Mr. Hevert's nGDP figure is upwardly biased because it includes the large increases in nGDP from 1960-1980 that were due to inflation and higher prices. These inflation levels have not been seen in 30 years and nGDP growth has consistently fallen. As shown by Dr. Woolridge, nearer-term nGDP rates have decreased. From Dr. Woolridge's testimony:

Table 1

Historic GDP Growth Rates

10-Year Average - 2005-2014	**3.56%**
20-Year Average - 1995-2014	**4.44%**
30-Year Average - 1985-2014	**4.99%**
40-Year Average - 1975-2014	**6.24%**
50-Year Average - 1965-2014	**6.68%**

As is clear from Table 1, the recent averages show that GDP growth rates are falling. There is little convincing evidence that Mr. Hevert's 5.61% nGDP growth rate is reasonable.

30. In case after case, the Commission has supported Mr. Gatewood's methodology, has supported the underlying nGDP forecasts Mr. Gatewood utilizes for long-term growth, has supported his rationale for using those forecasts and has supported the level of nGDP growth Mr. Gatewood has presented. In case after case, the Commission has rejected the utility company witnesses' proposed nGDP forecasts as being excessive and unreasonable in contrast to those

proposed by Mr. Gatewood. Mr. Hevert provides little reason or justification to persuade the Commission to change its stance in the current case.

(4). Mr. Hevert's Capital Asset Pricing Model (CAPM) growth rates are much too high.

31. The majority of Mr. Hevert's evidence supporting an ROE above 10% comes from the results of his CAPM model. Mr. Hevert's CAPM results support an ROE between 11% and 12%. However, Mr. Hevert's CAPM has serious flaws that the Commission should not overlook. Under Mr. Hevert's CAPM, expected market returns in perpetuity are between 13.50% and 13.62%,: both numbers are extremely high. To arrive at these numbers, Mr. Hevert uses a constant growth DFC model applied to the entire S&P 500 to establish expected returns.

32. There are two fundamental flaws with this approach. First, as noted by Dr. Woolridge, Wall Street analysts' 5-year forecasts are notoriously upwardly biased. Using these forecasts leads to expected returns that are overstated. Second, simply reviewing the data that supports these models shows they are upwardly biased. Schedule RBH-4 to Mr. Hevert's testimony contains the underlying data that supports these results. To arrive at market returns, each company in the S&P 500 is listed, as are each company's expected long-term growth rates from Wall Street analysts. As can be readily seen, out of 500 companies in the Bloomberg analysis, Wall Street analysts expect approximately 7 companies out of 500 will have negative growth rate over 5 years. (Hevert, Dir.T., Schedule RBH-4, pages 1-7). 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 500 will have negative returns. But in Mr. Hevert's analysis, only 7 companies have negative growth rates over five years. The Value-Line analysis also finds that 7 companies out of 500

have a negative growth rate over 5 years. (Hevert, Dir.T., Schedule RBH-4, at 1-7). These results are unreasonably optimistic in light of real world experience.

33. The Commission must reject Mr. Hevert's analysis. It is clear that the growth rates produced by Mr. Hevert's CAPM model are far in excess of S&P stock price appreciation from 1960-present (6.83%), S&P earnings per share growth 1960-present (6.92%), and the S&P dividend per share growth 1960-present (5.65%), as shown by Dr. Woolridge. (Woolridge, Dir.T. at 72; Exhibit JRW-14).

34. Mr. Gatewood also produces two CAPM models. Mr. Gatewood produces a CAPM using forecasted returns from stock and bond markets. The results of this model indicate an ROE in the range of 6.61% to 6.96%, which appears quite low by any standard. (Gatewood, Dir.T. at 39). Mr. Gatewood also produces a CAPM using historic measures of returns from stock and bond markets. The results of this model indicate an ROE in the ranges of 10.03% to 10.76%. (Gatewood, Dir.T. at 40). However, Mr. Gatewood also discounts this analysis, stating

> "in relying on historic data, we are assuming that certain trends observed in the past will continue in the future. Most notably, we would be assuming that the historic risk premium relationship observed in the returns on common stocks versus the returns on U.S. Treasury Bonds continues in the future. The historic risk premium is 5.50% which is drastically different than the 3.19% premium expected by professional forecasters and institutional investors. That difference is an indication that institutional investors and professional forecasters do not expect future returns to be as great as those experienced in the past."

(Gatewood, Dir. T. at 40-41). Regarding the CAPM with historic data, during cross-examination, Mr. Gatewood conceded that he has "not come across any substantial research that would lead me to believe that growth rates and returns earned in the past are necessarily representative of what investors expect in the future," and he states specifically that he doesn't put much reliance on his CAPM historic data results. (Gatewood, Tr. at 155). Given this admission, the Commission should place no weight on Mr. Gatewood's CAPM using historic data.

(5). The Commission should reject Staff's use of gradualism to award a higher ROE to KCPL.

35. Mr. Gatewood recommends the Commission adopt a 9.25% ROE. However, this result does not reflect the full extent of the current decline in capital cost indicated by Mr. Gatewood's models. (Gatewood, Dir. T. at 3). Mr. Gatewood's DCF results are between 8.09% and 8.75%, with a mean DCF result of 8.41%. Mr. Gatewood agrees that his DCF results are in line with Dr. Woolridge's recommendation. (Gatewood, Tr., at 153). Mr. Gatewood's Internal Rate of Return (IRR) results are between 7.23% and 9.52%, with a mean result of 8.25%. However, on closer examination, Mr. Gatewood agrees that only one IRR result (TECO Energy) is at 9.52%, and every other IRR result is at or below 8.65%,again, this is in line with Dr. Woolridge's results. (Gatewood, Dir.T. at 34; Tr. at 154). Finally, Mr. Gatewood's CAPM forecasted model results are 6.61% to 6.96%, which are extremely low, and his CAPM historic results are 10.03% to 10.76%. However, as discussed above, Mr. Gatewood, by his own testimony, puts no reliance on his CAPM historic results. What is clear from the evidence is that none of Mr. Gatewood's underlying models support his 9.25% ROE recommendation.

36. The reason why Mr. Gatewood's ROE recommendation isn't supported by his underlying models is that Mr. Gatewood arrives at his 9.25% ROE by applying "gradualism." Gradualism in ratemaking is based on the premise that some utility rate increases are so large that they will have an unreasonably negative impact on customers. To mitigate the impact, the utility commission requires the utility to implement the increase through a series of smaller increases rather than all at once, or simply awards a smaller increase and assumes that the utility will file another rate case if the increase proves to be insufficient. Either way, the customers

have more time to make whatever changes they can make to manage their costs and meet their utility bill obligations.

37. In this case, Mr. Gatewood adapts the concept of gradualism to recommend a higher ROE than his models indicate. He simply believes that 9.0% is the proper lower range for his ROE analysis and he therefore disregards the remainder of his analysis. He arrives at his recommendation by using a narrower range than he normally uses. Mr. Gatewood uses a 50 basis point range, from 9.0 to 9.5%, rather than the 100 basis point range that he normally uses. (Gatewood Dir.T. at 3). Mr. Gatewood agreed at the hearing that if he were to utilize a 100 basis point range, the lower end would be at 8.5%, in line with Dr. Woolridge's recommendation. (Gatewood, Tr. at 146). In fact, during cross-examination, Mr. Gatewood admits that absent gradualism, his ROE recommendation would be between 8.5% and 9.0%. (Gatewood, Tr. at 156). Mr. Gatewood states he has never recommended gradualism in making an ROE recommendation prior to this case. In fact, in testimony Mr. Gatewood makes a strong argument against gradualism, noting that "periodic rate reviews eliminate the need for the Commission to inject any forecasting of trends into their decision." (Gatewood, Dir.T. at 16.) And as noted by Commissioner Emler, if the Commission starts to apply gradualism when the ROE goes down, the Commission also will be obligated to apply gradualism when the ROE is going up. (Emler, Tr. at 186).

38. CURB acknowledges gradualism provides the basis for CURB's request to reinstate the all-electric rate discount that was reduced by the Commission in a prior docket. CURB argues elsewhere in this brief that the all-electric rate was changed too much and too fast, causing rate shock to the all-electric customers. CURB believes it would have been more reasonable for the Commission to have used the principle of gradualism to move the rates more

slowly for these customers. But while gradualism has been applied to movements of rates, as Mr. Gatewood stated, it has never been applied to moderate the movements of the ROE to protect the utility company. Perhaps that's because customers have fewer options available than utilities do when trying to manage dramatic changes in expenses or income, and the negative impacts on customers can sometimes be life-threatening.

39. The Commission should embrace gradualism or reject it, but it would be simply untenable for the Commission to embrace gradualism for shareholders, but then reject gradualism for ratepayers by rejecting CURB's request to reinstate the all-electric discounts to the customers who suffered rate shock as the result of the loss of the discounts.

(6). CURB's ROE recommendation will result in rates that meet the Bluefield and Hope standards.

40. In a March 15, 2015, article entitled "Lower Authorized Equity Returns Will Not Hurt Near-Term Credit Profiles", Moody's Investor Service recognizes that authorized ROE's are declining, but states that "we view cash flow measures as a more important rating driver than authorized ROEs, and we note that regulators can lower authorized ROEs, without hurting cash flow, for instance by targeting depreciation or through special rate structures." Moody's goes on to state

> robust cost recovery mechanisms will help insure that US regulated utilities' credit quality remains intact over the next few years. As a result, falling ROEs are not a material credit driver at this time, but rather reflect regulators' struggle to justify the cost of capital gap between the industry's authorized ROEs and persistently low interest rates. We see utilities struggling to defend this gap, while at the same time recovering the vast majority of their costs and investments through a variety of rate mechanisms.

(Woolridge, Dir.T. at 56-57).

41. The Commission has authorized numerous rate mechanisms for KCPL. And while KCPL complained loudly after the Commission set its ROE at 9.5% in its last full rate case, the fact is that KCPL's average earned ROE over the past five years (2010-2013) is 8.43%. KCPL has been able to raise capital. The Company issued $300 million in senior unsecured, 10-year bonds on March 14, 2013, at 3.15%. In addition, KCPL's Moody's long-term issuer rating was upgraded from Baa2 to Baa1 on January 31, 2014. Given the reduction in capital markets, it is clear that the Commission's prior ROE decision met the standard of *Hope* and *Bluefield* decisions, and a ROE decision in the current case in the range of 8.55% to 9.0%, as supported by the models and testimony produced by Dr. Woolridge and Mr. Gatewood, will continue to meet the criteria established in the *Hope* and *Bluefield* decisions. The Commission should reject Mr. Hevert's arguments and models as being unreasonably optimistic and not in line with prior Commission decisions.

B. KCPL's fossil fuel inventory claim in its Application is higher than necessary to ensure reliable and uninterrupted service.

42. In considering whether KCPL's claim for fossil fuel inventory is too high, the Commission is being asked to determine a dollar balance for ratemaking purposes, not to determine the actual physical inventory balance or to determine a target level for future balances. Fuel inventory costs are included in the company's rate base and earn a return of and on the costs until the fuel is burned to produce power, and then the cost is booked as an expense and is recovered through the energy charge adjustment. The optimal dollar amount of inventory for ratemaking purposes is a level that covers the cost of the amount of fuel necessary to keep on hand for generation needs, plus an amount that provides a prudent margin of safety in the event

that the normal delivery of fuel is interrupted. If the balance set too low, then the company may not recover enough from customers to cover its fuel needs. If set too high, excessive balances included in rates are costly to ratepayers because they are paying returns on fuel that isn't needed. When the actual inventory balances are lower than the amount used for ratemaking purposes, KCPL does not provide refunds to ratepayers, and is not proposing to do so in this case. (Brunk, Tr. at 308). Therefore, determining the appropriate inventory balance is an important function of the Commission's duty to ensure that the utility has an opportunity to earn a reasonable return on its investments while ensuring that customer rates are fair, reasonable and rationally based to the extent possible on the utility's actual costs of serving customers.

43. To help determine the optimal amount of fuel inventory to keep on hand, on an annual basis KCPL uses a Utility Fuel Inventory Model (UFIM), which uses a variety of inputs to calculate target inventory balances for various times of the year. However, the actual physical inventory fluctuates continuously between base rate cases because of constant changes in the volumes and the prices. In KCPL's last rate case, the target balances produced by using the UFIM model—and used by the company to calculate its fossil fuel inventory claim for ratemaking purposes—turned out to be remarkably close to the actual historical balances. (Crane, Tr. at 328). In this case, however, the target balances set by the UFIM and used to calculate KCPL's fuel inventory balance claims for ratemaking purposes are much higher than historical balances—and so far off the mark for ratemaking purposes that CURB and the Commission Staff both propose setting the appropriate levels in another way.

44. It should be noted here that neither Staff nor CURB recommended using actual inventory levels from the test year for ratemaking purposes because the test year was a year in which a flood and other difficulties disrupted fuel deliveries, resulting in actual inventory

balances that were lower than normal. (Crane, Dir.T. at 21; Fry, Dir.T. at 3). No party has suggested that KCPL should maintain fuel inventory levels that put the utility at risk of not being able to serve its customers. However, it also should be noted that despite the lower-than-normal inventory levels during the test year, KCPL did not run out of coal or fail to serve its customers, although it did purchase some power during the year. (Brunk, Tr. at 298). The margin of safety that is included in recommended inventory levels to ensure that all electric utilities can weather disrupted deliveries served its intended purpose during the test year.

45. The Commission Staff based its recommendation on average historical levels over the preceding 25-month period ending in March 2015. (Fry, Dir.T. at 3; for the amount see Confidential Exhibit AMF-02b attached to his testimony). CURB proposes setting the level slightly higher than Staff proposes, and bases its recommendation on the levels used to set KCPL's rates in its previous rate case, which as noted above were based on UFIM targets that closely mirrored the actual 2013 balances. (Crane, Tr. at 328). Both recommendations are lower than the company's claim. (For company's claim, see Confidential Schedule WEB-1, attached to Brunk, Direct Testimony).

46. KCPL's model used in this case does not simply aim to set target fuel inventory levels to meet its generation needs, plus an amount that ensures it will have enough fuel to weather any delayed deliveries, but also includes levels intended to maximize off-system sales. (Brunk, Tr. at 317). The company's witness admitted that inventory levels would be lower if the company were not trying to maximize off-system sales margins. (Brunk, Tr. at 317). But setting inventory levels at this higher level does not protect KCPL in case of shortages, because the margin of safety is already included in the calculation before the extra amounts for off-system sales are added, and the higher level doesn't protect ratepayers in case of shortages, either. The

company doesn't need extra insurance against shortages, because it doesn't lose money when it purchases power; KCPL's cost of purchased power is reimbursed 100% through the energy cost adjustment included on customer bills. (Brunk, Tr. at 299-300). And ratepayers would be providing this extra level of inventory for no purpose except to provide KCPL increased returns on an inflated rate base.

47. KCPL also admits that inputs to its UFIM model presume that as KCPL's authorized rate of return declines, the company will increase its inventory levels. (Brunk, Dir.T. at 10). So rather than targeting inventory levels based on actual operational needs, the model will produce higher target levels to increase the company's total yield in returns on fuel inventory in response to any reduction in the authorized rate of return, and that's *in addition to* the increases made to maximize off-system sales. The model purportedly intended to help the utility accurately predict appropriate fuel inventory levels to maintain an adequate supply to serve its operational needs is instead manipulated to produce elevated target inventory levels to improve KCPL's bottom line. Not only does this defeat the purpose of determining the appropriate return on equity for the utility, but increases fuel inventory for reasons entirely unrelated to the cost of serving customers. Maximizing the returns on fuel inventory by manipulating inputs to elevate the inventory target levels above what is reasonably needed to serve customers and provide a margin of safety is unfair to customers who have to pay the returns.

48. The Commission must determine whether it is appropriate to set KCPL's rates based on an inflated fossil fuel inventory level that is not reflective of actual historic levels and is designed to provide extra profits to KCPL. By basing the fuel inventory for ratemaking purposes on the levels established in the last rate case, as CURB proposes, the ratepayers would be providing the margin of safety that is more than adequate to protect against shortages. KCPL did

not run out of fuel at the levels established in its last case—in spite of significant delivery delays—and is highly unlikely to do so if those levels were established in this case.

49. Using the levels proposed by Staff would provide a slightly smaller margin of safety, but given the fact that the levels are based on average actual balances over the 25-month period that ended in March 2015, which were more than sufficient to provide the margin of safety necessary to weather late deliveries, the Commission could reasonably find that Staff's proposed levels are appropriate for setting rates, as well.

50. Further, as noted above, KCPL incurs no cost if a temporary fuel shortage creates the need to purchase power; the entire cost is borne by ratepayers, as are all of KCPL's costs of producing and purchasing energy to serve its customers. But there are additional costs borne by ratepayers if they are required to pay a return on excessive inventory levels beyond those that provide the margin of safety against shortages.

51. No one wants KCPL to run out of fuel, and to our knowledge, it never has. But the Commission could use the actual historical levels of recent years (as Staff proposes) or use the levels established in KCPL's last rate case (as CURB proposes) and either way, be confident that its decision will provide KCPL a fair opportunity to recover enough money from ratepayers to maintain an appropriate margin of safety against late fuel deliveries. The Commission's decision also would not require the ratepayers to provide returns to KCPL on unnecessary and excessive inventory levels. That is a fair and reasonable balance between the interests of KCPL and its customers.

52. The Kansas Court of Appeals has said, "The KCC may not arbitrarily disallow an actual, existing expense incurred during a test year. However, claims for future expenses which are merely conjectural are not generally allowed unless the claims are based on known and

measurable post-year changes." [*Columbus Telephone v. Kansas Corporation Comm'n*, 31 Kan.App.2d 828, 834 (2003)]. The Kansas Supreme Court has stated that "the ratemaking process involves a balancing of the investor and consumer interests and . . . does not insure that the business shall produce net revenues." [*Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483 at 489 (1986)]. What is required, said the court, is that "the regulatory authority balance competing and investor interests to determine just and reasonable rates providing a return on used and useful property." (*Id*., at 490).

53. The excessive coal inventory targets used by KCPL in this case to calculate its fossil fuel inventory claim are merely conjectural, because they are inconsistent with actual historical inventories of recent years and inconsistent with the targets produced by its UFIM in KCPL's last rate case. Recent historical data shows that setting the levels based on Staff's recommendation or on CURB's would provide KCPL sufficient margins of safety, just as they did during the test year—which was a year marked by significantly more delays in fuel deliveries than is typical. Further, KCPL admits that the inventory level targets have been increased to enable KCPL to maximize off-system sales and respond to reductions in returns on the inventory rate base—not to serve customer load. In other words, the excess is not "used and useful," in serving customers, so customers should not be required to provide a return on the excess.

54. In balancing the interests of KCPL versus its customers, the Commission should consider whether the inventory targets are inflated to serve KCPL's interests or the ratepayers. As discussed above, ratepayers yield no benefit from this excess, but must provide KCPL more money to maintain higher levels of coal inventory than is actually necessary to serve customers. But CURB's recommendation would provide KCPL sufficient revenues to serve customers and maintain a prudent margin of safety even in years when deliveries are delayed, but would not

provide extra revenues on inventory levels that maximize off-system sales and increase the returns on rate base. Staff's recommendation would provide a slightly narrower margin of safety, but, as recent historical data shows, would also provide KCPL sufficient revenues to serve customers and maintain a prudent margin of safety in inventory levels, even in years when deliveries are delayed. Either recommendation would be more reasonable to adopt for ratemaking purposes than KCPL's claim, and would help ensure that ratepayers are only paying KCPL a return on rate base that is actually "used and useful" in serving customers.

C. AMR Meters: unamortized balance & appropriate amortization period

(1). The Commission should not approve a return on the unamortized balance of KCPL's investment in the AMR meters.

55. KCPL is requesting recovery of the unamortized balance of the company's investment in Automatic Meter Read (AMR) meters, which are being replaced with Advanced Metering Infrastructure (AMI) meters over a two-year period. (Heidtbrink, Dir.T. at 10 – 11). KCPL also is requesting a return on the unamortized balance. (Crane, Dir.T, at 23 – 24). While CURB and the Commission Staff both agree that KCPL should be authorized to earn return <u>of</u> the unamortized balance, both also agree that KCPL should not be allowed to earn a return <u>on</u> the unamortized balance. The basis for their agreement is that the AMR meters, once retired, will no longer be used and useful in the provision of service to customers. (Crane, Dir.T. at 24); Grady, Dir.T. at 29). K.S.A. 66-128 does not require the Commission to include the old meters in rate base because they are retired and no longer used and useful in the provision of service. (Grady, Dir.T. at 28 – 30). Their inclusion in the rate base is solely at the Commission's discretion. Further, it is unreasonable to require ratepayers to pay KCPL a return on the investment in the

new AMI meters while also paying KCPL a return on the old meters. (Grady, Dir.T., at 30; Crane, Dir.T. at 25).

56. Additionally, the Commission Staff regards the retirements of 500,000 to 600,000 meters over a two-year period to be "extraordinary," because of the rapid pace of the retirements and the significant impact on the accumulated depreciation balance. (Grady, Tr. at 261-62). Normally, the amortization period is based on the meter's projected service life, and thus the company's investment in a meter has been completely recovered, or is close to being completely recovered when the meter wears out and is replaced. That isn't so in this case. Further, all of a utility's meters aren't normally all replaced at once. Historically, an older meter has been replaced with a new model only when the older meter malfunctioned, a practice that served to spread out upgrades—and the costs of upgrades—over an extended period of time. All of the factors outlined above led CURB and Staff to oppose allowing a return on the unamortized balance on the old meters.

57. While neither Staff nor CURB challenge the prudence of the decision to deploy the new AMI meters, Staff argued that KCPL should share in some of the negative economic impact of its decision to retire the AMR meters before their full costs had been recovered. (Grady, Dir.T, at 30 – 31). KCPL's witness on this issue did not know why the amortization period was not based on their expected service life. (Klote, Tr. at 242-43). This should not be surprising, given that KCPL admitted that in evaluating the costs of installing the new AMI meters, the company hadn't taken into account the impact of the remaining unamortized balance on the retired AMR meters. (Grady, Tr. at 277; Dir.T. at 31).

58. In its argument for earning a return on the old meters, KCPL says its shareholders expect to earn returns on their investments in utility assets. (Brunk, Tr. at 237-38). However, in

spite of shareholder expectations, when the Commission authorizes a return on equity in a rate case, there is never any guarantee to the shareholders that they will earn a return of their investments and a return on their investments. The utility is accorded a reasonable opportunity to earn its authorized return and recover its investments from customers, not a guarantee. "The ratemaking process involves a balancing of the investor and consumer interests and . . . public utility regulation does not insure that the business shall produce net revenues." [*Kansas Gas & Electric Co. v. Kansas Corporation Comm'n,* 239 Kan. 483, 489 (1986)]. Additionally, shareholders of public utility stocks receive returns that are higher than the returns granted to bondholders because they face more risk that they will not recover a return of and on their investments. Thus, the higher returns compensate shareholders for accepting the risk that they may not recover their entire investment and may not earn the authorized rate of return.

59. The recommendation of CURB and the Commission Staff to allow KCPL to recover the unamortized balance of the investment in the old meters while recommending denial of a return on the balance is a reasonable compromise that fairly balances the interests of shareholders and customers. Shareholders earned a return on their investment while the AMR meters were used and useful, and they will continue to recover their investment once the meters are no longer used and useful, but will no longer earn a return under CURB's and Staff's proposals. Customers will provide shareholders recovery of the remaining balance of their investment in the old meters as well as recovery of their investment in the new ones, but will not be required to provide shareholders a return on the remaining unamortized costs of the retired meters while they are also paying a return on the costs of the new meters. Shareholders will also enjoy additional earnings because there will be a larger rate base, and the company will enjoy

increased cash flow. (Crane, Dir.T. at 24 - 25). Further, both the utility and its customers will benefit from the increased capabilities of the new AMI meter technology.

60. The recommendations of CURB and Staff provide an equitable sharing of the benefits and costs of KCPL's decision to deploy new AMI meters before the AMR meters were fully amortized. This compromise would not be punitive, as KCPL claims, and is similar to compromises made by other regulatory commissions that have addressed this issue. (Grady, Tr. at 269). Adopting the recommendations of CURB and Staff would achieve a just and reasonable allocation of the impacts of a corporate decision that was not unreasonable or imprudent, but nevertheless resulted in negative impacts as well as positive impacts.

(2). The Commission should determine the appropriate amortization period for recovery of the unamortized balance of the costs of the retired AMR meters.

61. Theoretically, when an asset is placed in the rate base, the length of the amortization period for recovery of the cost of the asset from customers is based on the expected service life of the asset. However, for ratemaking purposes, rather than developing an amortization balance claim for each individual asset, the utility's depreciation expert aggregates and averages the remaining lives of all of its rate base assets to arrive at a composite average remaining life for its rate base. That composite average life becomes the basis for determining the appropriate amortization of depreciation on the rate base to be included in the utility's revenue requirement request. CURB accepted KCPL's proposal to recover the unamortized balance of the retired AMR meters over ten years because it corresponded to the ten-year amortization period for unrecovered general plant that was adopted in KCPL's 2010 rate case, which was slightly longer than the 8.9 years composite average remaining life that was

calculated for its total general plant. (Docket No. 10-KCPE-415-RTS; Crane, Dir.T, at 252; Watson, Dir.T. at 10-11).

62. However, the early retirement of the AMR meters has sparked a disagreement between Staff and KCPL about the length of the remaining expected service life of the retired meters, which informs each of their recommendations on the appropriate length of amortization of the unrecovered costs of the retired meters. Staff proposes a 20-year amortization period for recovery of the costs of the retired meters, which Staff claims corresponds approximately to their remaining average useful life of 23.8 years. (Grady, Tr. at 278-79). KCPL claims the average remaining life is only 16.78 years but recommends a 10-year amortization. (McCullars, Dir.T. at 10). CURB's witness takes no position as to which of their opinions is correct, and either of their recommendations is acceptable to CURB. (Crane, Tr. at 252-53).

63. Since these meters are being retired early, their useful service life has been cut short, and it is up to the Commission to determine whether their remaining service life is relevant or not to the determination of the appropriate amortization period for the unrecovered costs. A Kansas Court of Appeals case is instructive in circumstances like these where theory and practice may reasonably diverge: "Under the statutory standard of just and reasonable it is the result reached and not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end." [*Sekan Electric Coop. Ass'n v. Kansas Corporation Comm'n*, 4 Kan.App.2d 477, 481 (1980), citing *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591 at 602 (1944)]. Thus, the Commission has the discretion to determine whether it is necessary to resolve the dispute over the remaining lives of the AMR meters before determining an appropriate amortization period, and to consider other factors, such as the positive and

negative impacts of the decision to prematurely retire them. The Commission may consider the totality of the circumstances in determining the appropriate amortization period for the unrecovered balance of the costs and approve a length of time for recovery that it finds is supported by the evidence in the record.

V. Rate design and cost allocation issues

A. The Commission should approve the Non-Unanimous Rate Design Settlement.

64. CURB supports the provisions of the Non-Unanimous Rate Design Settlement filed in this proceeding on June 16, 2015. (Rate Design Settlement). In the interest of brevity, CURB will not restate the support for the Rate Design Settlement contained in the Joint Motion accompanying the agreement. The Joint Motion addressed the five factors the Commission considers when determining whether a non-unanimous settlement is in the public interest. Nor will CURB address or duplicate the arguments in support of the Rate Design Settlement set forth in KCP&L's Initial Post Hearing Brief. To the extent CURB is a signatory to the Rate Design Settlement, the Commission may assume CURB is in agreement with KCPL's arguments in support of the agreement, with the exception of those arguments related to CURB's request to reinstate the all-electric discounts.

65. CURB filed the testimony of Ms. Stacey Harden supporting the Rate Design Settlement. Ms. Harden explains that the Rate Design Settlement resolves all contested rate design issues pertaining to: a) the design of TDC Rider rates; b) class billing determinates; c) class revenue allocation; d) residential customer charge levels; e) residential inclining block rates; f) hours use rates for KCPL's non-residential class, and g) LGS rate design parameters. In

addition, the Rate Design Settlement provides for implementation of various uncontested tariff revisions, as originally proposed by KCPL. (Harden, Settlement Testimony at 4).

66. The Rate Design Settlement provides a reasonable resolution to a number of highly contested issues. Each signatory achieved some of its litigation objectives and compromised on others. While Wal-Mart is contesting the agreement, provisions related to the design of the TDC rates Wal-Mart requested are included in the agreement. The provisions of the agreement fall within the testimony supported by various parties and therefore the agreement is supported by evidence in the record.

67. CURB does want to highlight several provisions of the agreement that CURB believes are fair for customers and KCPL, are supported by the record and that support judicial economy by removing contested issues from the case and streamlining the litigation of the issues that remain. First, the agreement sets the class revenue allocations. The Rate Design Settlement does not adopt a specific cost-of-service methodology. However, the relative class increases assigned to the residential and small commercial classes are consistent with the results of KCPL's BIP cost of service study, and are set forth in the Direct Testimony of Mr. Paul Norman. (Harden, Settlement Testimony at 5). CURB has supported the use of the BIP methodology through several rate cases as the preferred guide on which to base class cost allocations. These results are also similar to KCPL's proposed system-average increase. KCC Staff also sponsored a class cost of service model with results that differed from those indicated by the BIP or system average. (Solorio, Dir.T. 17-21). Based on this model, Staff proposed its own class revenue allocation, utilizing gradualism as a guide. (Glass, Dir.T. at 36-43). While the Commission has expressed support for the BIP in the past, there is always a legitimate possibility that the Commission will switch positions, utilizing the KCC Staff model and class revenue allocation.

While Wal-Mart contests the class revenue allocation in the Rate Design Settlement, if the Commission moves to the KCC staff allocation model, Wal-Mart will see an even larger allocation of cost to the Large General Service class. The allocation to the LGS class contained in the Rate Design Settlement is a midpoint between the KCPL and KCC Staff models, a reasonable compromise supported by substantial evidence in the record. KCPL explains in great detail in its Post-Hearing Brief why Wal-Mart's argument for using an A&P 4CP methodology to allocate costs in this case is unreasonable. CURB supports and otherwise adopts KCPL's arguments on the issue.

68. Second, the agreement provides residential customers a degree of certainty about rate design and the level of the residential customer charge. The Rate Design Settlement increases the residential customer charge to $14.00. While this is higher than CURB's recommended $11.33 customer charge, and higher than KCC Staff's recommended $13.00 customer charge, it is much lower than KCPL's proposed $19.00 customer charge. The $14.00 residential customer charge is a compromise. However, under the settlement, KCPL also agrees the keep the residential customer charge at $14.00 through KCPL's proposed abbreviated rate case next year and through the pendency of any following rate case that KCPL may file at a later date. Practically speaking, this means the residential customer charge will be fixed at $14.00 for several years, providing a level of certainty to residential customers that is rare in rate cases. (Harden, Settlement Testimony at 7). CURB believes that certainty has great value to customers trying to manage their utility bills.

69. Finally, the Rate Design Settlement can accommodate a Commission ruling in favor of CURB's all-electric issue. According to paragraph 17 of the agreement, "if the Commission chooses to reinstate the all-electric rate differentials, and the Commission changes

the revenue requirement allocations as shown in paragraph 6 and/or the Residential rate design parameters in paragraph 8 to accommodate its decision, the parties agree that neither of these changes will constitute material changes to the Rate Design Settlement Agreement for purposes of paragraph 15 of the Agreement, or any other paragraph that would nullify the overall agreement."

70. While parties retain their right to seek judicial review of a Commission order reinstating the all-electric rate differentials, if the Commission does reinstate the all-electric differentials, the terms of the agreement allow the Commission to change the class cost allocations in paragraph 6 to spread any loss of revenue to all classes, and to change the rate parameters in paragraph 8 to rebalance the residential rate in implementing the decision. These changes will not be considered material changes to the agreement and will not nullify the agreement. As such, the overall Rate Design Settlement remains intact, regardless of the outcome of CURB's all-electric issue. If the Commission agrees with CURB, the settlement can accommodate any remedy set forth by the Commission. If the Commission disagrees with CURB, the base agreement will remain intact and can be approved by the Commission without any risk that the signatories can scuttle the settlement.

71. For the above reasons, the Rate Design Settlement represents a reasonable compromise of the contested revenue allocation and rate design issues in this case. The class allocations and rate design terms contained therein are supported by the substantial testimony of the parties to this case. The rates that result from the settlement will fall within the zone of reasonableness and will be lawful. Wal-Mart's challenge to the agreement and argument that the Commission should adopt the A&E 4CP methodology to allocate cost must be rejected as unreasonable and outside the zone of reasonableness.

B. All-electric customer discounts should be restored to previous levels.

(1.) Introduction

72. CURB requests the Commission make a determination about whether residential customers taking service under KCPL's all-electric tariff were treated fairly when existing tariff discounts were substantially reduced at the conclusion of KCPL's 2010 rate case, KCC Docket 10-KCPE-415-RTS. (10-415 Docket). Prior to the 10-415 Docket, customers taking service under the all-electric rate received a 34% discount on the first 1000 kWh's of use and a 51% discount on all usage above 1000 kWh's. After the 10-415 Docket, these discounts were reduced to 10% and 21% respectively, resulting in substantial increases in all-electric customer bills. Customers who were told KCPL was proposing an 11% increase in bills ended up with 30% to 40% bill increases. While the Commission in many other cases has utilized the concept of gradualism when changing rates to not create rate shock and anger customers, these all-electric customers were treated differently. The rate proposal that the Commission adopted was filed after the public hearings in the docket, so the all-electric customers had no notice of the increase and no opportunity to address the Commission about the magnitude of the increase. The Commission ordered a rate design docket to be opened, but ultimately the docket was folded into KCPL's next rate case. To date, the Commission has never directly addressed the question of whether these customers were treated unfairly in the 10-415 Docket. While CURB recognizes that bringing this question to the Commission at this late date has caused some consternation among the parties, the CURB Board believes that it is important for the Commission to finally address this question and these customers directly and to put to rest this controversy once and for all.

73. If the Commission agrees that the all-electric customers were treated unfairly, CURB offers a remedy for the Commission to consider. CURB's proposed remedy reinstates the discounts at the level customers enjoyed prior to the reduction and keeps the relative percentage discount through the year 2025. If CURB's remedy is adopted by the Commission, KCPL's revenues will be reduced. To insure KCPL recovers its costs and remains whole, the Commission must decide whether to spread the lost revenue across all classes of customers or to collect the lost revenues directly from residential customers. CURB recommends collecting any lost revenues during the winter months. CURB also recommends that the remedy apply to all current all-electric customers, but the all-electric class should be closed to new customers. New all-electric customers will be placed into a new all-electric class with discounts matching the existing 10% and 21% proposed in the rate deign settlement in this case.

(2). Preliminary matters

74. There are several preliminary matters that must be addressed before getting to the actual question at hand. First, Dr. Glass provides an extensive history of the KCPL dockets leading up to the 10-415 Docket and the KCPL rate case dockets subsequent to the 10-415 Docket. (Glass, Cross T., at 2-6). CURB will not repeat that history here, but agrees with Dr. Glass's general presentation of the history. Second, CURB asks the Commission to decide whether the all-electric customers were treated fairly in the 10-415 Docket. On cross-examination, Dr. Glass clarified that he was not providing any testimony to the Commission on this fairness question. (Glass, Tr. at 656, 674). While Dr. Glass provided broad testimony on economics and addresses the mechanical challenges involved in implementing a remedy, Staff provided no testimony on the issue of fairness.

75. Third, the Commission should disregard the testimony and arguments of the natural gas utilities, Atmos Energy (Atmos) and Kansas Gas Service Company (KGS) on the all-electric question in this case. While the gas companies have been granted intervention in this case, they do not represent KCPL's residential and small commercial customers in the proceeding. In recent orders, the Commission has been clear that CURB is the statutory representative for residential and small commercial customers, and outside business interests have been denied the right to represent these same interests in rate cases.[11] The comments made both at trial and in briefs by the natural gas companies and KCPL suggesting that CURB is not representing its clients properly are highly objectionable, prejudicial and unprofessional. The CURB Board chose to pursue this policy question with the Commission and the Consumer Counsel as its attorney is ethically bound to pursue this policy with diligence.

76. The natural gas companies are entitled to represent their own interests in this case as commercial customers that take service from KCPL, but both Atmos and KGS have apparently chosen not to do so. On cross examination, the witness for KGS was unsure whether KGS was a KCPL customer, could not identify the tariff KGS takes service under, could not identify how much KGS pays to KCPL for service each year, and could not identify nor provide testimony on the impact of KCPL's proposed rate increase on KGS. (Raab, Tr. p 468-469). Likewise, the witness for Atmos also did not know whether Atmos was a customer of KCPL, could not identify the tariff Atmos takes service under, could not identify how much Atmos pays to KCPL for service each year, and could not identify nor provide testimony on the impact of KCPL's proposed rate increase on Atmos. (Fogle, Tr. at 488-489).

[11] See *Order Denying Petition to Intervene of the Alliance for Solar Choice*, KCC Docket No. 15-WSEE-115-RTS, Oder dated June 11, 2015.

77. Both natural gas company witnesses stated they were only there to testify about residential customers. (Raab, Tr. at 469; Fogle, Tr. at 489). The testimony of both witnesses is focused on the all-electric discount and the perceived harm to their ability to compete for customers if CURB's proposal is adopted by the Commission. Yet, during cross-examination, neither witness could identify a single customer who is currently taking service under KCPL's all-electric tariff that their companies could actually compete for and provide service to. (Raab, Tr. at 471; Fogle, Tr. at 490). Therefore, any claimed harm to the gas companies to their ability to compete with KCPL was ethereal, because they failed to provide any evidence that they can actually compete for KCPL's current all-electric customers at all. And since neither witness could identify any current KCPL all-electric customers they could potentially serve, then the gas companies could only be competing with KCPL for new all-electric customers. However, CURB's proposal would put any new all-electric customers on a rate schedule with the existing KCPL discount levels, so the competitive positions of the natural gas companies would be no worse than they were prior to this case if the Commission adopts CURB's position. Given that the gas companies aren't attempting to protect an interest of their own as customers of KCPL, and cannot represent CURB's clients, they really have no actual stake in the outcome, especially since they cannot identify a single all-electric customer they could serve if the discounts weren't restored. Further, they would suffer no harm from the implementation of CURB's proposal because they would be left in the same position after this case as before. Therefore, the Commission should accord little, if any, weight to the testimony of the natural gas companies against CURB's all-electric proposal.

78. Finally, with respect to KCPL, it must be noted that KCPL was against reducing the all-electric discounts in the 10-415 Docket. KCPL was content with the level of the all-

electric discount and was not concerned that other customers might be paying extra to support those discounts. Having produced the Paul Normand study that showed the discounts were too large, KCPL proposed across-the-board increases in the 10-415 Docket, recommending the Commission ignore the results of the study. It was KCPL's across-the-board increase that went into the customer notice. There is a certain irony in CURB asking to reinstate the old discounts in this case while KCPL is fighting to keep the discounts at the new reduced level. But regardless of the irony of the situation, if the Commission agrees with CURB that the all-electric customers were treated unfairly, CURB's proposed remedy keeps KCPL whole from a revenue standpoint. When weighing the merits of the arguments KCPL makes against CURB's proposal, the Commission should keep in mind that no matter the outcome of this case, KCPL will get its revenue from customers.

(4). The Commission should determine that all-electric customers were treated unfairly in the 10-415 Docket.

79. CURB requests the Commission determine whether KCPL's all-electric customers were treated unfairly in the 10-415 Docket. CURB argues that customers were treated unfairly because 1) the notice of public hearing alerted customers to a 11.5% rate increase, but the all-electric customers ended up with 30% to 50% increase and were not given a chance to address the issue in a timely manner during the case; 2) while it is common practice to use gradualism when moving rates, the Commission did not apply gradualism to moderate the impact on the all-electric customers, and 3) in the 10-415 Docket, the Commission ordered required opening a rate design docket, but the docket was never opened because the issue was eventually folded into KCPL's next rate case.

80. Fairness, as defined by KCPL witness Mr. Lutz, is "to take into account all of the variables presented at the time of your decision and weighing them against each other to try to determine that an equitable solution or equitable result is achieved." (Lutz, Tr. at 393). An equitable result was not achieved in the 10-415 Docket and the Commission had never addressed this question or these customers directly.

(a) Notice of the proposed increase was legally sufficient but misleading and inaccurate.

81. CURB is not arguing that notice was legally deficient in the 10-415 Docket. Rather, CURB is suggesting that it is unfair to tell customers in a notice that the average residential customer will see an 11.5% rate increase—and then increase rates to many of those customers by over 30%. The Notice of Public Hearing filed by KCPL in the 10-415 Docket notified customers that it was seeking an 11.5% rate increase. According to the notice that was provided to all residential customers, KCPL's request would add approximately $11.08 per month to a typical residential bill. (Harden, Dir.T., at 7). Just because a notice passes legal muster doesn't mean customers were treated reasonably or justly in the general context of what is considered "fair". The notice left the all-electric customers without a clue that their rate discounts were in peril.

82. The rate design that was ultimately adopted by the Commission was submitted in KCPL's rebuttal testimony, long after the public hearings had taken place. (Rush, Rebut.T., 10-415 Docket). The residential customers on the all-electric tariff impacted by the Commission decision never had an opportunity to comment on the proposal or to address the Commission about the impact that a 30%-plus increase would have on their bills. CURB agrees with KCPL that the end result of a case never matches up with the notice that was given, because evidence

and party positions evolve during every rate case. However, CURB maintains that this case was an anomaly, a true outlier in Commission history. The end result of the vast majority of rate cases is a lower increase than that originally proposed by the company. CURB can think of no other rate case where a utility proposed an 11% increase and the case resulted in a 30% increase. KCPL equates legal notice to treating customers fairly. According to KCPL, as long as customers receive some minor scrap of paper hinting that rates may change, notice is legal and any increase imposed is as a result of the proceeding is "fair." It is fortunate for customers that the Commission, not KCPL, is vested with protecting the public interest and making the decision whether the notice was actually fair to the customers who received increases that were almost three times the increase they were told they might be facing.

83. Commissioner Apple summed up the issue by stating, "What we are really talking about here is things that were within the rules, but was purely bad form that the notice that the customer received was truly not what happened or close to what happened." (Apple, Tr. at 629). CURB wholeheartedly agrees.

(b). Gradualism should have been utilized in discontinuing the discounts.

84. In this current rate case, Dr. Glass testified that Staff did not support KCPL's proposed increase in the residential customer charge because it would be an 80% increase, which would violate Staff's interpretation of gradualism and would cause rate shock to customers. (Glass, Dir.T at 24). However, in total dollar terms, KCPL's proposed increase was only $8.29. By comparison, Dr. Glass admitted that in the 10-415 Docket, the all-electric discount reduction had far greater impact than just $8.29. In fact, Dr. Glass called the impact on customers "dramatic" (Glass, Tr. at 669), and conceded that it created "rate shock". (Glass, Tr. at 760). Dr.

Glass described spending hours on the telephone with irate customers and handling complaints from customers too abusive for the Commission's Public Affairs Office to handle. (Glass, Tr. at 659-660).

85. Every witness on rate design in this proceeding acknowledges that gradualism is an important policy tool when moving customer rates. (Glass, Dir. T. at 41-43 ;Lutz, Tr. at 414; Raab, Dir. T. at 28, Tr. at 478; Fogle, Tr. at 491). But gradualism wasn't used in the 10-415 Docket. The movement in the all-electric tariff was substantial. KCPL all-electric customers were not protected from rate shock through the application of gradualism.

86. There is evidence of indifference in the 10-415 Docket to the plight of KCPL's all-electric customers. While CURB recommended only a slight reduction to 28% discount levels, and was concerned about mitigating customer rate impacts resulting from the changes (10-415 Docket, Kalcic, Dir.T, at 11), Dr. Glass described at the evidentiary hearing in this case how he was pressured by the Director of Utilities and the KCC General Counsel to produce a more extreme proposal. (Glass, Tr. at 671). The clear impression left by Dr. Glass's testimony was that pressure was exerted on Commission Staff to provide testimony supporting a Commission-driven policy to achieve rates that encourage conservation—all at the expense of KCPL's all-electric customers.

(c). Rate Design Docket

87. In its order in the 10-415 Docket, the Commission required a docket be opened to specifically focus on KCPL's rate design, to insure fair cost apportionment among the rate classes and focusing on incorporating rate designs that address emerging issues, such as energy-efficiency and conservation goals. (10-415 Docket, Order of Nov.22, 2010, at 124). At the

evidentiary hearing in this docket, Dr. Glass made abundantly clear that, at the time, the Commission was focused on conservation goals and reducing usage, and was using rate proceedings to implement desired policy changes. (Glass, Tr. at 683). While the proposed rate design docket might have afforded customers an opportunity to address the Commission on the reduction in the all-electric discounts, and might have afforded the Commission the opportunity to address the all-electric customers directly on the issue, the docket was never opened. KCPL and KCC Staff filed a Joint Motion to incorporate the docket into KCPL's new rate case, KCC Docket No. 12-KCPE-764-RTS (12-764 Docket).

88. KCPL and the gas companies suggest that CURB could have—and perhaps should have—raised the all-electric discount issue in the 12-764 Docket. While that may be a fair criticism, when Dr. Glass was asked directly whether CURB could have raised the all-electric issue in the 12-764 Docket, he said yes, but also explained that the situation at the time was more complex. As Dr. Glass explains, by the time of the 12-764 Docket, there was a new KCC Chairman and new Commissioners. In approving the KCPL and Staff Joint Motion to combine the rate design docket with the rate case in the 12-764 Docket, the Commissioners issued an order with a series of other questions for the parties to address. The new Chairman had his own ideas about what was important in rate design—ideas that were significantly different than the policies established by the previous Commission. (Glass, Tr. at 661). All parties shifted to address the new priorities as outlined by the new Commission.

89. And just as changes in the membership of the Commission can result in revisions of Commission policies and priorities, the changes in the membership of the CURB Board also can result in revisions of its policies and priorities. Therefore, regardless of whether the CURB Board at the time of the 12-764 Docket chose to raise the issue of the fairness of the all-electric

customer rate increase, the current CURB Board has made it a priority and has chosen to raise the issue. CURB is not legally precluded from raising any issue at the Commission at any time, and if the Commission wants to address the issue, it may do so.

(d). CURB's proposed remedy is to reinstate the discounts.

90. If the Commission agrees that the all-electric customers were treated unfairly in the 10-415 Docket, CURB suggests that the Commission reinstate the all-electric discounts at the 35% and 51% levels. (See Harden, Dir.T., at 11). These discounts should remain in effect until 2025. Leaving the discounts in place for 10 years should allow customers who invested in all-electric heating appliances and based their purchase on analyses that incorporated the then-existing discounts to reap the payback of the investment. (Harden, Dir. T. at 12, Tr. at 605-606). The Commission should close the all-electric class so that no new customers can receive this level of discount. (Harden, Dir. T. at 12). New customers should be placed on a new all-electric tariff with discount levels equal to the 10% and 21% currently offered. (*Id.*).

91. There are several other decisions the Commission must make if it agrees with CURB's proposed remedy. First, since reinstating the all-electric discount will reduce KCPL's revenues, the lost revenue must be collected from customers. CURB believes that since the all-electric customers were not treated fairly, the Commission may reasonably choose to collect the lost revenues from all customer classes. If the Commission chooses this option, CURB recommends allocating the lost revenues ratably in accordance with the revenue allocation terms in paragraph 7 of the Rate Design Settlement. (Harden, Settlement T. at 9). Alternatively, the Commission could order the lost revenue to be collected from within the residential customer

class. CURB recommends that the Commission order any revenues to be recovered from residential customers shall be recovered during the winter months. (*Id.*).

92. Second, the Commission must decide whether to reinstate the discounts for both the Res-C and Res-D rate classes by attempting to mirror the discounts that existed prior to the 10-415 Docket or to simply reinstate the discount for the Res-C customers only. The Res-C and Res-D rate structure are currently the same, but the rate structures were different prior to the 10-415 Docket. Ms. Harden proposes a structure that mirrors the pre-10-415 Docket discounts for these classes, approximating the then-available discounts. (Harden, Settlement T. at Exhibit SMH-1, columns 5-6). Ms. Harden also proposes a rate structure to be adopted in the event that the Commission chooses to simply reinstate the Res-C discount. (Harden, Settlement T. at Exhibit SMH-1, columns 7-8). Res-C is the largest rate class under the all-electric discount and customers on Res-C take service from a single meter. Res-C customers were the most impacted by the 10-415 decision, and the Commission could limit any remedy to just this class.

93. While this may appear complicated at first, as Dr. Glass noted in cross-examination by Commissioner Albrecht, "if you give us latitude, if you give Staff and CURB and whoever else is involved this latitude, actually it took Mr. Springe and myself about 30 seconds to come up with a reasonable answer." (Glass, Tr., at 688).

(5). CURB disagrees that its proposal is not based on substantial competent evidence.

94. KCPL argues that CURB's proposal is not based on substantial competent evidence. CURB disagrees. CURB presents a set of facts and explains the procedural history of the 10-415 Docket. Factually, the all-electric proposal adopted by the Commission was introduced late in the 10-415 case, and that proposal presented an outcome that was very

different than what KCPL provided in its notice to customers. The all-electric customers impacted by this change never had a chance to comment to the Commission on the actual level of rate increases that resulted from the Commission's decision in the case. There is no mathematical proof or in-depth study necessary to prove these simple facts. The facts exist, and they are true; they therefore meet the substantial and competent evidence standard. The Commission is capable of looking at the basic facts of the case and determining whether it believes the all-electric customers were treated fairly.

95. KCPL argues that CURB's proposed remedy in this case is not cost-based and CURB agrees. CURB is asking the Commission to right a wrong, to offer a remedy to resolve a past harm, and to put the all-electric customers back in the position they were in before the rate change. CURB does not claim that its remedy is cost-based, and further, KCPL points to no authority that limits the Commission to making only cost-based decisions. The Commission has broad discretion to determine the method of setting rates. While KCPL is free to argue that CURB is wrong, or that CURB's proposed remedy is wrong, the Commission has full power and authority to supervise and control public utilities and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction. (K.S.A. 66-101). This authority is liberally construed and all incidental powers necessary to carry out the provision of the act are expressly granted to the Commission. (K.S.A. 66-101g). But most importantly, the Commission has the power to require utilities to establish just and reasonable rates. (K.S.A. 66-101b).

96. KCPL argues that CURB must bring forth a case supported by evidence showing that reinstatement of the discounts will result in just and reasonable rates, and that CURB has failed to do so. CURB disagrees. As stated above, CURB is seeking redress of a past harm to

customers. If the Commission agrees with CURB that these customers were treated unfairly, and if the Commission adopts CURB's proposal to remedy this injustice, this result by its nature is a statement that the remedy and resulting rates are just and reasonable. Perhaps KCPL is confused by the word "just" in the commonly used term "just and reasonable".

97. KCPL argues that Ms. Harden made no attempt to identify the actual customers negatively impacted by the rate design approved in the 10-415 Docket. CURB agrees. For simplicity's sake, and for KCPL's benefit, Ms. Harden simply applies her proposed remedy to all existing all-electric customers. CURB does not have access to KCPL's billing system or the manpower to perform this analysis. For administrative ease, CURB recommends simply applying the remedy to all current all-electric customers, knowing that some of them were likely not members of the all-electric classes at the time the discounts were reduced. KCPL should be indifferent to the Commission's remedy, since it will get all of its money regardless of which customers will provide it. Whether CURB is able to identify each and every customer who lost their discount is irrelevant to the question of whether CURB's proposed remedy should be adopted. However, if the Commission views this concern of KCPL as relevant, then CURB invites the Commission to order KCPL to go through the process of identifying the specific customers harmed by the 10-415 Docket's rate design decision.

98. KCPL attempts to place numerous legal challenges in the way of the Commission addressing the simple question asked by CURB: Were the all-electric customers treated fairly in the 10-415 Docket? CURB suggests the Commission disregard KCPL's protests, because regardless of the outcome, KCPL will be made whole. There is ample record evidence for the Commission to answer this simple question. The Commission should once and for all address the question and determine the appropriate rate for the all-electric customers and put the issue to rest.

VI. CURB's responses to the Commission's questions

A. Does the Commission need to address the legal issues (res judicata) before it can consider the equitable issue of fairness?

99. CURB generally agrees with KCPL's statement of the law on res judicata. CURB would note that its proposal is made within a rate case, an otherwise legislative proceeding. And while CURB asks whether a past action was fair, CURB's proposed remedy is prospective and not retroactive. Finally, KCPL cannot claim harm due to redundant or costly litigation because it filed this case and KCPL's customers pay the cost of the case in rates. Ultimately, preclusion doctrines such as res judicata and estoppel are intended to prevent the harm caused by forcing an otherwise unwilling participant to re-litigate an issue that was decided in a prior proceeding. There is no harm in this instance.

100. Regardless, the Commission should not use any variation of the preclusion doctrine to avoid answering the question of whether the all-electric customers were treated fairly in the 10-415 Docket. Certainly, an administrative agency charged with the protection of the public interest is not precluded from taking appropriate action to that end because of mistaken action on its part in the past. [*Warburton v. Warkentin*, 185 Kan. 486, 477 (1959)].

101. As an aside, if the Commission entertains the notion that claim preclusion or issue preclusion are applicable doctrines in this instance, CURB would note that in the 12-764 Docket, the Commission set forth a clear ruling and standard on what data sources were reasonable and acceptable for determining nGDP in ROE calculations. KCPL did not appeal that ruling. And yet, in the current case, KCPL is functionally asking the Commission to overturn that prior ruling and use a different set of data to develop an nGDP estimate—a set of data that is more to KCPL's advantage. Taken at face value, claim preclusion and issue preclusion law would apply

equally to KCPL on the issue of nGDP data sources if the Commission applies the doctrine of preclusion to decline to decide issues that have been decided previously in other dockets.

B. By not raising the notice/fairness of notice in the appeal of the 10-415 Order, does res judicata apply? Is the Commission estopped by the Court of Appeals ruling in the 415 case?

102. Res judicata does not apply to legislative rate cases. And contrary to KCPL's contention, CURB should not be estopped from raising the issue in this case. While KCPL is still focused on the technical legality of notice, arguing that CURB could have filed an appeal on the legality of customer notice at the end of the 10-415 Docket, CURB is focused on the ultimate impact on customers. And it wasn't until after the fifteen days for a petition for reconsideration to be filed had passed, and after the date for an appeal to be pursued had passed that the rates actually impacted customer bills. Only then did the customer calls started coming into the Commission. By the time the realization set in that the rate change may have been too aggressive and it became clear that customers were upset that they didn't know that a rate change of this magnitude was coming and had no opportunity to address the Commission about a 30% bill increase, the time for appeal had passed.

103. In KCPL's version of the law, if some sort of notice has been given to customers *and* the Commission has made a decision based on evidence *and* no one complains about the ultimate impact of that decision within fifteen days (even if rates are not actually on consumer bills yet), then every party, including the Commission, is estopped from trying to remedy a decision that ultimately turned out to be wrong, or is estopped from mitigating an impact of a decision that was worse than expected. That's simply not consistent with the Commission's

continuing obligation to ensure that the utilities are performing their jobs and the customers are providing sufficient revenues so that they can continue to do their jobs.

104. The Commission is not perfect. Sometimes the Commission gets things wrong. CURB believes that parties and the Commission should be allowed to fix those errors and to address reasonable customer concerns, regardless of when those errors come to the attention of the Commission. Adopting some notion that after 15 days, every party is estopped from ever raising a claim again is a dangerous and unwise precedent to follow.

105. CURB also finds it odd that, up to this point, the other KCPL criticism of CURB is that this issue was not raised by the Board in the 12-764 case. This argument carries with it the presumption that CURB could have raised the issue in the 12-764 case, which is the opposite argument that KCPL is making for estoppel of the issue in this case. Logically, if estoppel applies here, then CURB would have been equally estopped from making the argument in the 12-764 Docket. But KCPL argues that CURB should have made the argument in 12-764.

106. Clearly, CURB was not precluded from making the argument in the 2-764 Docket, but for reasons explained by Dr. Glass (discussed further in the response at D, below), most parties shifted focus to questions being raised by the new Chair of the KCC during that docket. Regardless of the reasons for not raising the issue earlier, CURB does not believe that res judicata applies in a ratemaking docket, where the power being exercised by the Commission is essentially legislative in nature, not judicial. As is often noted in opinions concerning utility regulatory, the Commission is required at times to make decisions that involve questions of facts and policy. Many of its decisions require weighing the various interests to determine the fairness of a proposal. This proposal calls for the same sort of weighing of interests.

C. Does the failure to raise the issue of notice/fairness of the all-electric discount in the 12-764 Docket create any estoppel or laches issues?

107. Admittedly, of all the arguments in this case concerning the timing of CURB's request, the fact that CURB did not raise the issue in the 12-764 Docket is probably the most compelling, if the point is to suggest that CURB had a chance to raise the issue and did not do so. It is a fair criticism of CURB's action or inaction at the time. However, it does not necessarily follow that this fair criticism rises to the level of justifying legal preclusion of consideration of the issue. As stated above, CURB is entitled to raise issues before the Commission that the members of the Board believe are important for the Commission to address. While the CURB Board at the time of the 12-764 Docket may not have raised the issue, it does not follow that a subsequent CURB Board is forever precluded from raising an issue. Nor does it follow that this Commission is somehow precluded from changing or remedying an action of a prior Commission if this Commission finds evidence or a compelling policy reason to support doing so. Indeed, as noted above, the Commission has a continuing obligation to ensure that rates are just and reasonable, and that its policies in light of the current circumstances are reasonable. The need for constant review, investigation and response to changing circumstances in ratemaking is why legislatures turn the task over to an agency with experts who can devote full time to the task.

108. Taken in their entirety, using the doctrines of res judicata, estoppel or laches as a means to preclude parties from raising an issue at a later date limits all parties and the Commission to the fifteen-day time period for filing a petition for reconsideration in the original case at issue. This extremely narrow limit should be balanced against the broad legislative powers and authorities granted to the Commission. Impacts from Commission decisions that

affect the public interest may occur more than fifteen days after the decisions. Surely the legislature did not intend that the Commission's broad discretion be so limited that it can only respond to the unintended impact of a decision if someone complains within fifteen days of its issuance, or to be so rigid in its policy stances that the Commission cannot revisit an issue and consider revising policies in response to changing conditions.

109. Finally, KCPL's all-electric customers have sought for years to have the Commission answer the question of whether the customers were treated unfairly during the 10-415 Docket. The Commission should not use legal doctrine to avoid having to answer this question. Regardless of the Commission's opinion about the propriety of CURB's timing CURB in raising the question, KCPL's all-electric customers still deserve an answer.

D. If res judicata applies, would new evidence of potential wrongdoing or irregularities in the Commission's decision in 10-415 to reduce the all-electric discount offset any res judicata concerns?

110. Again, CURB does not believe res judicata applies. But if the Commission were inclined to adopt the position that res judicata does apply, then it would also be reasonable to assume that new evidence of irregularities in the 10-415 Docket would mitigate any res judicata concerns. CURB tends to agree with KCPL that the statements made by Dr. Glass in this case about the pressure brought to bear on Staff during the docket are not enough to support a conclusion of impropriety, without more. However, the statements certainly offer a glimpse into the means by which the Commission at that time was pursuing its priority to encourage energy conservation through changes in rate design. It would not be unreasonable to surmise from Dr. Glass's testimony that the Commission's approval of the large reduction in the all-electric

discounts was entirely consistent with a policy priority to revise or eliminate any rate design provisions that encourage energy consumption, and that the Commission was not focused so much on the potential negative impacts on consumers, but rather on the positive impacts that could be achieved by reducing consumption. In fact, the application of gradualism to moderate the movement in rates might have been inconsistent with achieving policy goals in that docket. In context, while there is no evidence of actual malfeasance, these revelations certainly support the notion that the all-electric customers received less fair treatment and consideration than perhaps is usually accorded customers when making rate changes.

E. History of KCPL's actual rates

Please refer to Attachment A to KCPL's Initial Post-Hearing Brief.

F. Regarding Wal-Mart's claim that KCPL's Missouri-jurisdictional customers pay lower rates than Kansas jurisdictional customers

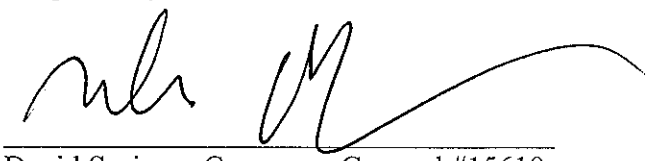
Please See Attachment B to KCPL's Initial Post-Hearing Brief.

VII. Conclusions and request for relief

111. CURB has supported its arguments above with substantial competent evidence in the record, and made a good faith effort to present the legal arguments in accordance with current law. The Commission could reasonably grant all of CURB's proposals and be assured that the result will be fair and equitable to KCPL and its customers and would be consistent with the public interest. Therefore, CURB requests that the Commission adopt the proposals and

provide the remedies set forth above, requests that it approve the two settlement agreements discussed above to which CURB is a signatory, and requests any such other relief that the Commission may deem just and reasonable in implementing CURB's proposals.

Respectfully submitted,



David Springe, Consumer Counsel #15619
Niki Christopher #19311
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Niki Christopher, 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.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 28th day of July, 2015.

Notary Public

My Commission expires: 01-26-2017.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 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 28th day of July, 2015, to the following parties:

SAMUEL FEATHER, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
s.feather@kcc.ks.gov

ANDREW FRENCH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
a.french@kcc.ks.gov

BRIAN G. FEDOTIN, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
b.fedotin@kcc.ks.gov

GLENDA CAFER, ATTORNEY
CAFER PEMBERTON, L.L.C.
3321 SW 6TH ST
TOPEKA, KS 66606
glenda@caferlaw.com

TERRI PEMBERTON, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
terri@caferlaw.com

ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
roger.steiner@kcpl.com

MARY BRITT TURNER, DIRECTOR REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY , MO 64141-9679
mary.turner@kcpl.com

DARRIN R. IVES, VICE PRESIDENT REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY , MO 64141-9679
darrin.ives@kcpl.com

ROBERT J. HACK, LEAD REGULATORY COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
rob.hack@kcpl.com

ANDREW J. ZELLERS, GEN COUNSEL/VP REGULATORY AFFAIRS
BRIGHTERGY, LLC
1617 MAIN ST 3RD FLR
KANSAS CITY, MO 64108
andy.zellers@brightergy.com

WALKER HENDRIX, DIR, REG LAW
KANSAS GAS SERVICE, A DIVISION OF ONE GAS, INC.
7421 W 129TH ST
OVERLAND PARK, KS 66213-2634
whendrix@onegas.com

DAVID L. WOODSMALL
WOODSMALL LAW OFFICE
308 E HIGH ST STE 204
JEFFERSON CITY, MO 65101
david.woodsmall@woodsmalllaw.com

JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 S HICKORY
PO BOX 17
OTTAWA, KS 66067
jflaherty@andersonbyrd.com

ROBERT V. EYE
ROBERT V. EYE LAW OFFICE, L.L.C.
123 SE 6TH AVENUE, SUITE 200
TOPEKA, KS 66603-3850
bob@kauffmaneye.com

Della Smith
Administrative Specialist