

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

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

POST-HEARING BRIEF OF CURB

The Citizens' Utility Ratepayer Board (CURB) presents its comments and arguments concerning the above-captioned dockets in the following post-hearing brief:

I. Introduction

The Kansas Corporation Commission (KCC or Commission) held a hearing on February 6 and 7, 2014, to hear testimony concerning Howison Heights, Inc., (HHI) that addressed the following topics:

(1) What is the appropriate revenue requirement for HHI?

(2) Is HHI meeting its obligation under its certificate of convenience to provide efficient and sufficient service to its customers, and if not, what should be done?

Additionally, the Commission asked the parties to brief the following issue:

(3) To what extent, if any, can the bankruptcy court preclude the KCC from exercising its regulatory powers to set rates for HHI, order refunds if necessary, and take action to ensure that HHI's customers receive and continue to receive efficient and sufficient service?

The Commission requested that the parties brief these issues. CURB's arguments and conclusions are presented below.

II. Revenue increase

CURB witness Stacey Harden based her rate increase recommendation on the findings of the Commission Staff's July audit of the 2012 test year, then made 11 adjustments to Staff's recommendation. Her recommendation of a rate increase of \$27,266 has been adopted by the Commission Staff. (Baldry, Tr. Vol. 2, at 181). The details of her recommendations and adjustments are found in *CURB's Reply to Staff's Report and Recommendation* that was filed with the Commission on August 5, 2013. She testified that a refund to customers would probably not be necessary if the Commission approves her recommended increase, because she accepts Staff's calculation of the revenue collected under the rate design that has been utilized by HHI, but noted that a final accounting of revenues collected versus the amount approved would be appropriate. (Harden, Tr. Vol. 2, at 257-58).

III. Efficient and sufficient service

It is CURB's position that HHI is not consistently providing efficient and sufficient service to its customers. As for efficiency, meter reading sheets for HHI in September 2013 indicate that approximately 40% of the water it pumps as "lost and unaccounted for". (Harden, *Responsive Testimony*, Jan. 31, 2014, Attachment, HHI response to Staff Data Request No. 25). This is wasteful of a valuable natural resource and the power used to pump the lost water. Mr. Howison testified that replacing 30 meters between June and August in 2013 was an attempt to address this problem. (Howison, Tr. Vol. 1, at 87). However, the meter readings in September

2013 were made after the replacements, so the large losses continue. CURB is concerned that there is little incentive to reduce this loss, not only because it is difficult to identify and remove the hidden cost of the loss from the cost of service, but because reducing the overall volumes taken from the aquifer might eventually result in HHI's water right being reduced.

Further, according to Tim Howison, the owner and operator of HHI, the HHI system was designed in part to serve wholesale and industrial customers—but HHI has no customers other than 60-some residential customers. (Tr. Vol. 1, at 126). It is unclear whether the larger lines installed in anticipation of serving large water users contribute to some of HHI's pressure problems in serving residential customers, but it is clear that a substantial portion of the plant was overbuilt ("gold-plated", "Cadillac") beyond what was required to serve the subdivisions' residential customers. *Id.* Mr. Howison declined to identify any potential wholesale or industrial customers that might become HHI customers. *Id.*, at 89-90). This gives rise to the question of whether any of the cost associated with the excess plant should be recovered in residential rates. And since HHI continues to provide water to its existing residential customers at inconsistent pressures, (discussed below), it is CURB's opinion that it would have been more economically efficient and consistent with its public service obligations for HHI to have addressed the existing, known problems in the system before installing more expensive large water lines in anticipation of serving large-volume customers sometime in the future.

As for the quality of HHI's water, it is currently meeting the standards for drinking water established by the Kansas Department of Health and Environment (KDHE), but the problems with chlorination that led to a boil advisory last fall may resurface when warmer temperatures lead customers to start using more water. (Haynos, Tr. Vol 2, at 279; Howison, Tr. Vol. 1, at 99). HHI has a new chlorinator on its main well and it seems to be maintaining appropriate

chlorine levels. However, HHI must use a second well to meet warm-weather demand, and there is no chlorinator on that well. *Id.* Mixing the water from the two wells and adjusting the chlorinator to achieve proper chlorine levels would be easier if HHI had an appropriately-sized storage tank. Without one, it is not clear whether HHI will be able to maintain stable and safe chlorine levels once the second well must be used to meet demand. It is CURB's opinion that installation of a chlorinator on the second well should be one of the highest priorities for HHI.

The HHI distribution system in the Big Valley subdivision also has pressure fluctuations that create difficulties for customers. (Howison, Tr. Vol. 1, 97-98, 145). Although HHI has made some improvements to relieve the pressure issues, some customers at low elevations continue to complain about excessive pressures, and customers at high elevations continue to complain of insufficient pressures. (Haynos, Tr. Vol. 2, 262, 265-66). Although Mr. Howison testified that he was knowledgeable about selecting the right location for his subdivisions (*Id.*, at 50), he blames the terrain in the Big Valley area for the pressure problems. (*Id.*, at 141). It is fair to wonder whether, if HHI had installed smaller distribution lines in the area if it would be easier to maintain consistent pressures, or, at least, whether it would have had more money to address this fundamental problem. Certainly, expanding for future growth before addressing the basic needs of existing customers is inconsistent with sound utility management.

During the course of the hearing, Mr. Howison discussed the history of the utility, and inadvertently exposed the deep root of HHI's problems: *this utility was never intended to be a profitable venture*. Mr. Howison's father built a barely-adequate water system to attract home buyers to his subdivision. (Howison, Tr. Vol. 1, at 49, 61). When Mr. Howison took over his father's utility, he, as a second-generation property developer, had the same motivation to make his new developments attractive to home buyers by making water readily available to them, as

well. (*Id.*, at 61, 62). However, the younger Howison was inspired by possibilities of becoming a wholesaler of water and selling to industrial customers, because he knew that the residential customers could not provide enough revenue to make the utility profitable. (*Id.*, at 62, 69, 140). So Mr. Howison subsidized the costs of operating the residential distribution system, while building up the Big Valley section of the system intending to serve wholesale customers, where the real money would come rolling in—eventually. (*Id.*, at 126).

Mr. Howison said that his real estate ventures and property development plans came to a screeching halt in the fall of 2007 with the arrival of the recession, as it did for everyone else involved in real estate. (*Id.*, at 145). His income plummeted, and the records indicate he began borrowing heavily around that time. (*Id.*, at 145-46). No wholesale buyers or industrial customers ever materialized. After he amassed a debt secured by utility assets that is roughly three times their net book value, the FDIC apparently advised his bankers to call in the loans. (Howison, Tr. Vol. 1, at 146). Cut off from borrowing to make ends meet, HHI sought a rate increase from the KCC in 2012.

One problem with this history as told by Mr. Howison is that the timeline of borrowing by Mr. Howison doesn't match up with his story about the standpipe. HHI borrowed a little over \$40,000 to erect the standpipe in January 2007. (Exh. B, *Motion to Initiate Investigation*, Jan. 14, 2013). Mr. Howison testified he wasn't able to start the project because the estimates came in at over \$65,000, so he spent the money on another project in Big Valley. (*Id.*, at 82-83). But Central National Bank continued to lend money to HHI over the next 18 months: in 2007—\$30,300 on July 20, \$30,000 on September 26, \$25,000 on December 28, and in September 2008—\$39,850. Any of those loans, combined with the \$40,000 loan, would have been sufficient to complete the standpipe project (or install the second chlorinator as an alternative). Some of

the money was spent on other improvements to HHI (*Id.*, at 82-83), but it's not clear what the real barrier was to finishing the standpipe project; access to credit apparently was not an issue for HHI until late 2008.

But it was somewhat shocking to hear Mr. Howison's revelations that he never expected the residential distribution system to break even—and that he does not expect it to do so in the future. (*Id.*, at 126, 127, 153). Even he recognizes that it would be unfair and unreasonable to the residential customers to have to pay rates that would cover the actual costs of running HHI; the only hope he has of having enough cash to meet the utility's cost of service is that the real estate business will bounce back, so that he can subsidize it once again with outside funds. (*Id.*, at 96).

Thus, the reorganization plan he plans to present to his creditors in the bankruptcy proceeding this spring is as follows: Forgive some of my debts, and allow me to continue to operate this unprofitable utility that will never be profitable, until I can make enough profit in another business to subsidize this one and pay you back the rest of what I owe. Unfortunately, this is not a plan that should inspire the confidence of HHI's customers or its regulators. And while it's remotely possible that the bankers who were foolish enough to help this utility acquire so much debt will be willing to do just about anything to get out of hot water with the FDIC, it's hard to imagine they are fools enough to believe that this plan is sound.

Simply put, the evidence supports the conclusion that HHI is not, and very likely will never be, an economically-viable business, and the magnitude of HHI's debts threatens the utility's very existence. Aside from the debt, it has too few customers spread out over too much territory. There is currently no industrial or commercial development in the area of sufficient magnitude to provide a potentially lucrative customer base. The distribution system needs costly

capital improvements if it is ever going to provide water to its customers at acceptable pressures and consistently safe chlorine levels all year-round—let alone tackle the aesthetic problems associated with its high iron content. Realistically, rates would have to be set at unaffordable levels just to provide enough revenue to fix what is wrong now. The notion that HHI will ever provide sparkling clear water at consistent pressures and chlorine levels while producing sufficient revenues for debt service and a profit for its operator without burdening its customers with outrageously high rates is such a remote possibility that it must be dismissed as magical thinking.

Whether Mr. Howison is a capable water operator or businessman is probably a moot point at this stage. It is clear that HHI, as a stand-alone entity, is at present and for the foreseeable future incapable of providing efficient and sufficient service to its customers at reasonable rates, regardless of whether the KCC grants the requested increase. HHI is simply too small to be economically viable. Mr. Howison may be correct in his assessment that the rebound of his real estate and development businesses would allow him once again to subsidize the utility—but what happens when he dies or if he is incapacitated and unable to work? Who else would be willing to step in to operate and maintain a utility that must be subsidized out of pocket—a business that has no possibility of ever turning a decent profit? Mr. Howison's willingness to reach into his pocket to keep the utility going is almost touching, but it is not in the long-term interest of his customers to rely solely on his willingness and ability to subsidize its operation. This is an untenable state of affairs for the customers of this regulated utility. The service obligations of public utilities are too vital to be entrusted to the vicissitudes of the real estate market or donations from benefactors.

The only option that presents a realistic, permanent solution for the customers is for HHI to become a part of a larger water utility. A larger utility would be better able to absorb the impact of the capital costs required to provide service to HHI's customers at consistently acceptable levels, and would not have to rely on the recovery of the real estate market to obtain capital for needed maintenance and repairs. It is the only option that presents the possibility that HHI's customers will be able to receive consistently safe water at acceptable pressures—and at rates that won't send them all to the poorhouse; they might even get sparkling clear water that doesn't stain their clothes. This option also offers the most potential for enhancing the value of Mr. Howison's developments because home buyers would have access to good water service at reasonable rates.

Thus, while CURB's recommendation that the KCC order HHI to hire a third-party operator to replace Mr. Howison remains a valid option, after considering the testimony given at the hearing, CURB is less optimistic that this option would serve any purpose other than as a stop-gap measure to provide continuity in HHI's operations while HHI progresses through bankruptcy and foreclosure. Further, it is clearer now after the hearing that the amount that could be utilized to pay a third-party operator in CURB's and Staff's recommendations is likely to be woefully inadequate. The only viable option for HHI is to be absorbed by an adjacent utility: the sooner, the better. CURB is not prepared to speculate whether that option will become available, and at what price, but believes that it is the option to which the Commission should commit its most vigorous efforts, whether through its participation in the bankruptcy proceeding or through exercise of its own regulatory powers.

It should be noted that although Mr. Howison testified that the water rights of HHI are his (Howison, Tr. Vol. 1, at 133, 134), not HHI's, the state Division of Water Resources (DWR) lists

HHI as the “water user”.¹ The annual Municipal Water Use Report form from DWR is addressed to the utility, and the use is classified as “municipal”. (*CURB’S Reply to Staff’s Report and Recommendation*, May 20, 2013, Exh. SMH-1, Response to CURB DR 10). Thus, although the utility belongs to Mr. Howison, it appears the water rights are held by the utility.

Further, Mr. Howison’s speculation that he might be able to sell the residential distribution system of HHI but retain ownership of the water right (Howison, Tr. Vol. 1, at 127, 151) is not confirmed by any evidence in the record. Without a utility to run, the purpose for which the water right was approved will no longer be valid, and any change of use will require approval by DWR. Besides, the wells belong to the utility, and are part of the utility property on which the banks are seeking to foreclose. HHI owes more than three times the net book value of the utility’s assets that were used to secure the loans, so it is highly unlikely that Mr. Howison will have the opportunity to choose which parts of the utility he can retain—if any. And it’s highly unlikely, without new wholesale or industrial customers firmly under contract to purchase water from those wells, that the banks would consider allowing Mr. Howison to retain ownership as a part of a reorganization plan to sell water to high-volume users to generate income that could be used to repay HHI’s debts. Mr. Howison may be able to revive his career in real estate and property development as the economy recovers from this recession, but it’s hard to imagine a scenario in which his creditors and the bankruptcy court would view his reorganization plans for HHI as being preferable to liquidating the assets, given his own admission that HHI, without large-volume customers, is never going to be profitable unless rates are set prohibitively high.

¹ See http://hercules.kgs.ku.edu/geohydro/wimas/query_setup.cfm for water right information for the State of Kansas. To search, enter the water right file number or legal description of HHI’s wells, which are printed on the Municipal Water Use Report form found at *CURB’S Reply to Staff’s Report and Recommendation*, May 20, 2013, Exh. SMH-1, Response to CURB DR 10. There are four wells listed that relate to HHI’s water right.

IV How does the bankruptcy stay affect the KCC's authority to regulate HHI?

In the above-captioned dockets, the KCC is considering changing the rates charged by HHI and investigating the utility's ability to provide efficient and sufficient service as required by its certificate of convenience. Thus, there is a possibility that the KCC could alter HHI's revenue stream, order the utility to make customer refunds, or impact the value of the utility or its ability to provide service by modifying or revoking its certificate. The Commission has asked the parties to address the question of whether the Commission is restrained from taking any action in the above-captioned dockets by the stay under 11 U.S.C. § 21 362(B)(4) and (5) that was issued by the court in HHI's bankruptcy proceeding.

It is CURB's opinion that the KCC is not restrained from taking action during the pendency of the stay, nor is it required to seek permission from the bankruptcy court before taking action. CURB recommends, however, that the KCC serve the bankruptcy court with any orders it issues in these dockets, and that any orders issued clearly identify the actions taken or to be taken, identify the evidence supporting the Commission's conclusions, and explain the public interest obligations of the KCC with regard to regulating HHI and the obligations of HHI under Kansas law and its certificate of convenience. Case law supports the conclusion that the KCC may exercise its regulatory powers and make public policy decisions concerning a utility in bankruptcy so long as its actions do not interfere with the "specific congressional bankruptcy objectives." *Application of Timberon Water Co., Inc.*, 114 N.M. 154, 159, 836 P.2d 73, 135 P.U.R.4th 176, N.M., Aug. 05, 1992. It is CURB's opinion that the KCC may change HHI's rates and order refunds if required, and take any action it deems reasonably necessary to exercise its regulatory authority over HHI, even during the pendency of the stay. The cases supporting CURB's opinion are discussed below.

The *Timberon* case arose out of a water utility rate case. *Application of Timberon Water Co., Inc.*, 114 N.M. 154, 836 P.2d 73, 135 P.U.R.4th 176, N.M. (Aug. 5, 1992). The issue relevant to these dockets concerned whether the state utility commission properly denied the inclusion of contributions in aid of construction (CIAC) in the utility's rate base that is used to calculate rates, while Timberon was in the midst of a bankruptcy proceeding. The utility commission's policy on CIAC reasoned that when the developer of a subdivision provided the capital to be used in connecting new utility customers rather than the utility or its investors, the utility should not be able to recover that capital (and earn a return on it) through depreciation rates. *Id.*, at 157. The result of excluding CIAC in the rate base was that the rates approved by the commission were lower than they would have been had the CIAC been included in the rate base. The bankruptcy trustee in the utility's bankruptcy challenged the commission's action on the basis that the lower rates impaired the utility's ability to meet operation, maintenance and margins, and was therefore infringing on the objective of the bankruptcy proceeding under Chapter 11, which was to implement a reorganization plan for the utility. *Id.*, at 158.

The New Mexico Supreme Court disagreed with the trustee. "Statutes derived from the state's police power "should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent." (*Id.*, at 159). "The Commission's authorization to set rates for utility companies is clearly set forth in the Public Utilities Act promulgated pursuant to this state's police power. We may not disturb this important police power unless its effect conflicts with specific congressional bankruptcy objectives." *Id.* The court also found, "In 11 U.S.C. § 362(4) and (5), Congress expressly provided for the exercise of a state's regulatory power, *such as exercised by the Commission in its ratemaking function.*" (*Id.*, emphasis added). In applying the facts of the case to these guidelines, the court said,

In the case at hand, the Commission is not using its ratemaking function as a precept to force the debtor to pay a prepetition debt. The Commission merely used the doctrine, accepted here and in numerous other jurisdictions, that excluded CIAC from the utility's rate base. The Commission did not impose a hidden judgment or liability and did not adjudicate a private right. The Commission's action falls squarely within the definition of "police or regulatory" and thus within the exception to the § 362 stay.

(*Id.*, at 160). The court thus held,

After studying the relevant case and statutory law, we believe that Congress in no way intended to preempt the ratemaking proceedings of this case, or the widely accepted CIAC doctrine used as part of the calculation of a fair rate of return. In fact, we believe that Congress specifically provided for this sort of standard ratemaking proceeding in § 362(b)(4)–(5), which excepts police and regulatory proceedings from the automatic stay. For these reasons, we reject Behles' preemption argument.

Id.

In applying the court's reasoning to these dockets, the KCC may set rates for a utility using its usual doctrines and policies as guidance without interfering with the bankruptcy proceeding or violating the stay. By contrast, if the KCC were utilizing the opportunity in the rate case to order Howison to pay outstanding regulatory fees, for example, the Commission would be acting in its own pecuniary interest, not as a regulator, and an objection to its action would probably be upheld. But Congress did not intend to halt the exercise of the KCC's police or regulatory power during bankruptcy.

The *Timberon* court also noted that making an exception to commission policy for a utility that sought bankruptcy protection would be unfair to other utilities. "Every other utility receives rates wherein CIAC has been excluded from the rate base when appropriate." (*Id.*, at 159). It would not be appropriate to allow the bankrupt utility to gain "a competitive edge" by filing for bankruptcy, and then be able to earn a return on CIAC while other utilities could not.

Id.

Other courts have upheld the exercise of the utility commission's police and regulatory powers are not stayed by the bankruptcy stay, even if the commission issues an order that may negatively impact the utility. *In re Pacific Gas and Elec. Co.*, 263 B.R. 306, Bkrcty.N.D.Cal. (June 01, 2001) arose out of the great California energy crisis of 2001. Pacific Gas and Electric's rates had been frozen in 1998 by the state utility commission as a part of a plan to implement deregulation of the state's electric utilities. The rate freeze was scheduled to end in 2002. Then power costs soared in 2000, and PGE began losing millions in operating costs. (*Id.*, at 308). PGE filed for bankruptcy and sought an injunction against the enforcement of the rate freeze, under the theory that the stay applied to the commission's accounting decisions. (*Id.*, at 320). The court found that ratemaking falls under the policymaking and regulatory exception to the stay, and denied the injunction. The court cited cases where courts had upheld commission action during a stay to re-auction the broadcast license of a company that had failed to make payments on the license and enforce environmental laws even where enforcement would reduce the assets of the estate in bankruptcy. *Id.* Both were cases in which demonstrable harm would accrue to the bankrupt's assets from the administrative actions, but both decisions were founded on sound commission policies to protect the public interest. *Id.*

The court in PGE also took note of cases that have found that "stays of regulatory proceedings are not automatic, but can be granted if party shows necessity for stay." *Id.*, at 321. Thus, a commission has no obligation to voluntarily curtail action in a docket simply because a utility has filed for bankruptcy. A commission may continue taking actions affecting a utility in bankruptcy until the party succeeds in getting a ruling from the bankruptcy court enforcing the stay.

Another case explored the extent to which a commission may act during bankruptcy even if the action harms the value of the bankrupt party's assets. *In re Yellow Cab Co-op. Ass'n*, 192 B.R. 555, D.Colo. (Feb. 23, 1996). Yellow Cab's certificate gave it authority to operate 600 cabs, but it had never operated more than 300 cabs over the previous five-year period. *Id.*, at 557. The purchaser of Yellow Cab during its bankruptcy was ordered by the bankruptcy court to apply to the utility commission for approval of the transfer of the certificate of authority from Yellow Cab. *Id.* The commission decided to modify the new certificate to allow the purchaser to operate 300 cabs, not 600 cabs, on the basis that Yellow Cab's unused authority to operate 600 cabs had lapsed for nonusage; to allow the new company to operate 600 cabs would be detrimental to the public interest because other cab companies in the area had expanded their fleets in reliance on Yellow Cab's longstanding non-use of its full certificated authority. *Id.* The bankruptcy court determined that the decision was of "insufficient public interest" to warrant an exemption from the stay. On appeal, the U.S. District Court analyzed whether the commission's Yellow Cab decision related to the protection of the commission's pecuniary interest or to a public policy interest, and whether it was actually adjudicating private rights. *In re Yellow Cab Co-op. Ass'n*, 200 B.R. 237, D.Colo. (Sept. 12, 1996). The court found that the commission's decision that Yellow Cab's authority to operate the full 600 cabs had gone dormant from non-use was a public policy decision based on a valid public policy consideration that "destructive competition may result from unconditional approval of the transfer." (*Id.*, at 241). Having found that the commission was not acting in its own pecuniary interest, nor was it adjudicating the private rights of the parties in authorizing the buyer of Yellow Cab to operate only 300 cabs, the court held that the stay did not apply to the commission's action. *Id.*

The above cases are illustrative of the proposition that the KCC may continue to exercise its policymaking and regulatory authority during the stay issued by the court hearing HHI's bankruptcy. The KCC is not attempting to collect fees from HHI, nor is it adjudicating a dispute between HHI and another utility. The KCC's authority to set the rates of publicly-regulated utilities is legislative in nature and policy-driven. While CURB does not recommend modifying HHI's certificate of convenience, the Commission may do so on valid policy grounds, including protecting the customers, protecting the public interest or even protecting the interest of competing utilities, such as in the *Yellow Cab* case.

Further, it is HHI's responsibility to seek an injunction of KCC action if it seeks enforcement of the stay against the Commission. Until it does so, the Commission may continue to exercise all the power and authority granted to it by the legislature, so long as it does not act in its own pecuniary interest (to collect delinquent regulatory fees or fines, for example) or engage in adjudication of private interests. The exercise of government police powers and regulatory authority may continue unabated so long as it does not unreasonably interfere with the purposes for which the bankruptcy laws were enacted by Congress.

Respectfully submitted,



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VERIFICATION

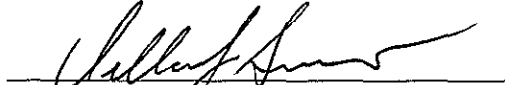
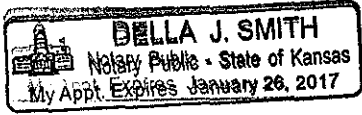
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

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 February, 2014.



Notary Public

My Commission expires: 01-26-2017.

CERTIFICATE OF SERVICE

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

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 28th day of February, 2014, to the following parties:

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