

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of Southern Pioneer Electric)
Company, Regarding Violation of the)
Commission’s Minimum Standards for) Docket No. 18-SPEE-428-SHO
Payment Methods for Utility Bills by)
Charging Its Customers a Convenience)
Fee to Submit Bill Payment via Electronic)
Check.)

BRIEF OF THE CITIZENS’ UTILITY RATEPAYER BOARD

COMES NOW, the Citizens’ Utility Ratepayer Board (“CURB”) and submits the following brief, in order to address Commission questions, requested pursuant to the Commission’s Order on Tariff Violation issued on June 19, 2018.

I. BACKGROUND

1. On December 8, 2017, Southern Pioneer Electric Company (Southern Pioneer) filed an Application in Docket No. 18-SPEE-241-TAR (“Docket 18-241”) seeking a waiver from the Kansas Corporation Commission’s (“Commission or KCC”) Minimum Standards for Payment Methods for Utility Bills and Allowing the Acceptance of Credit Cards (“Minimum Standards”).¹ Southern Pioneer proposed revisions to its Schedule of Fees which would eliminate the \$3.95 convenience fee for residential customers using credit cards on transactions related to the payment of their utility bills.² Southern Pioneer requests that the cost associated with the elimination of the \$3.95 convenience fee be recovered through base rates from all residential customers.³ CURB made certain discovery requests in Docket 18-241 that led to the discovery that Southern Pioneer has been charging a fee of \$3.95 for bill payments made via electronic check (“e-check”) since

¹ Docket 18-241, Application (December 8, 2018).

² *Id.* at pp. 3-4.

³ *Id.*

April of 2012.⁴

2. On December 15, 2017, in the 18-241 docket, CURB filed a Petition to Intervene and Motion for Protective Order and Discovery Order and Motion for Procedural Schedule. That motion was approved and CURB was granted intervention in Docket 18-241 on December 21, 2017.⁵

3. On March 27, 2018, Staff submitted a Report and Recommendation (“R&R”), stating that Southern Pioneer may be in violation of the Commission’s Minimum Standards because it has been charging a convenience fee to customers who have made bill payments via e-check since 2012.⁶ Staff also stated that to date, Southern Pioneer has not received a waiver to charge a convenience fee for bill payments made via e-check. Moreover, the convenience fee charged to customers for the use of an e-check is not disclosed in the Schedule of fees in Southern Pioneer’s Rules and Regulations.⁷ Staff recommended that the Commission issue an Order to Show Cause whether Southern Pioneer is in violation of the Commission’s Minimum Standards by charging its customers a convenience fee to submit bill payment via e-check.⁸

4. On April 10, 2018, the Commission issued an Order to Show Cause, in this docket (“Docket 18-428”), to determine whether Southern Pioneer is in violation of the Commission’s Minimum Standards by charging its customers a convenience fee to submit bill payments via e-check.

5. On April 11, 2018, CURB filed a Petition to Intervene and Motion for Protective and Discovery Order, in this docket, and the same was granted on April 26, 2018.⁹

⁴ Staff’s Reply, p. 1.

⁵ Docket 18-241, Order Granting the Citizens’ Utility Ratepayer Board’s Petition to Intervene, Protective Order and Discovery Order (December 21, 2017).

⁶ Docket No. 18-SPEE-428-SHO, Order to Show Cause, Attachment A: Staff’s R&R, p. 1 (March 27, 2018).

⁷ *Id.*

⁸ Staff’s R&R, p. 3.

⁹ 18-428 docket, Order Granting CURB’s Petition to Intervene and Motion for Protective and Discovery Order

6. On May 10, 2018, Southern Pioneer filed its Response to Order to Show Cause (“Response”) acknowledging that it has been charging a convenience fee for e-checks since April 2012 and agreeing with Staff that the convenience fee made via e-check is not provided for in its tariff.¹⁰ Southern Pioneer contended that its charging of the convenience fee for e-checks was done in good faith based on the belief that Mid-Kansas Electric Company, Inc. (Mid-Kansas) had received a waiver from the Commission based on a series of emails exchanged between Mid-Kansas and Staff regarding a bill insert.¹¹ Southern Pioneer also requested a waiver for the convenience fee in this docket should the Commission determine that the convenience fee was not previously approved.¹²

7. On May 21, 2018, Staff filed its Reply to Southern Pioneer’s Response to Order to Show Cause (“Staff’s Reply”). In Staff’s Reply, Staff recommended that Southern Pioneer be ordered to refund any customer who paid the unauthorized convenience fee for e-checks, pointing out that Southern Pioneer acknowledged that its tariff does not provide for a convenience fee for e-checks.¹³ More specifically, Staff contended that Commission approval is required before a public utility changes its rates, joint rates, tolls, charges or classifications or schedules, or any rules or regulations or practices pertaining to service, which at no point did Mid-Kansas or Southern Pioneer receive express Commission approval (through an Order) for the convenience fee.¹⁴ Staff also argued that Southern Pioneer’s request for a waiver in this Docket should be denied in that it is not appropriate to bring such a request in an Order to Show Cause.¹⁵ Staff contended that a

(April 26, 2018).

¹⁰ Response, p. 3.

¹¹ *Id.* at pp. 4-5.

¹² *Id.* at p. 5.

¹³ Staff’s Reply, p. 4.

¹⁴ *Id.*

¹⁵ *Id.* at p. 5.

request for waiver of the convenience fee is better served in a separately filed docket.¹⁶

8. On May 31, 2018, CURB filed its Memorandum in Support of State Corporation Commission Staff's Reply to Southern Pioneer's Response to Order to Show Cause (CURB's Support). CURB supported Staff's Reply arguments and urged the Commission to find that Southern Pioneer is in violation of the Commission's Payment Standards, Order Southern Pioneer to refund customers who were wrongly billed convenience for e-checks, and deny Southern Pioneer's request for a waiver.¹⁷

9. On June 19, 2018, the Commission issued its Order on Tariff ("Order") violation. The Commission determined in its Order that Southern Pioneer violated its tariff by charging an unauthorized convenience fee to customers who paid their bills via e-checks.¹⁸ The Commission asked parties to answer a series of questions in order to acquire additional information to determine what the appropriate remedy is in order to correct Southern Pioneer's tariff violation. In particular, the Commission directed Southern Pioneer to answer the following questions:

- a) How many customers were charged a convenience fee for paying their bills by e-check?
- b) Is Southern Pioneer able to identify which customers paid a convenience fee for paying their bills by e-check?
- c) Is Southern Pioneer able to identify the dollar amount of convenience fees individual customers paid for paying their bills by e-check?

10. The Commission directed all parties to answer the following questions:

- a) Does the Commission have authority to order Southern Pioneer to issue refunds to

¹⁶ *Id.*

¹⁷ CURB's Support, p. 3.

¹⁸ Order, pp. 4-5.

customers who paid a convenience fee for paying their bills by e-check?

- b) What is the legal authority for the Commission to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by e-check?
- c) What is an appropriate amount to fine Southern Pioneer for violating its tariff?

II. ARGUMENTS AND AUTHORITIES

11. CURB will address the questions in the order in which they are presented in the Commission's Order. CURB believes the following authorities compel the conclusion that the Commission has regulatory authority to issue refunds to customers who paid unlawful convenience fees for e-checks, as outlined below.

a) Does the Commission have authority to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by e-check?

12. The Commission has authority to order Southern Pioneer to issue refunds to customers who paid unlawful convenience fees for payments made via e-check. As stated in the Commission's Order, the Commission has "full power, authority and jurisdiction to supervise and control electric public utilities doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."¹⁹ Commission approval is required in order for a public utility to make changes to its rates, joint tolls, charges or classifications or schedules of charges, or any rules or regulations or practices pertaining service.²⁰

13. The Commission has the authority to investigate all schedules or rates and regulations of electric public utilities, and if, after that investigation has concluded and it is found that, "any regulation, measurement, practice, act or service complained of is unjust, unreasonable,

¹⁹ Order, p. 1, citing: K.S.A 66-101, 66-101a, and 66-104.

²⁰ K.S.A. 66-117.

unreasonably inefficient or insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of this act or of the orders of the commission,” than the Commission has the power to substitute the same with those that are just and reasonable.²¹ The Commission has adopted Minimum Standards in which e-checks are to be accepted as a “zero fee” payment method, should a utility accept that form of payment for electric service.²²

14. In this case, the Commission found that Southern Pioneer has violated its tariff by charging customers who paid their bills via e-check for unauthorized convenience fees. Because the Commission has determined, after thorough investigation, that Southern Pioneer has not complied with the terms of its tariff as required under K.S.A. 66-117, the Commission has authority under K.S.A. 66-101 and K.S.A. 66-101d (as outlined above) to issue refunds, as one remedy, to make customers whole who have paid unauthorized rates via unlawful convenience fees for e-checks.

b) What is the legal authority for the Commission to order Southern Pioneer to issue refunds to customers who paid a convenience fee for paying their bills by-check?

15. As discussed above, the Commission has authority to issue refunds for unlawfully collected rates, in violation of the terms of a tariff, pursuant to K.S.A. 66-101 and K.S.A. 66-101d. Kansas court precedent supports this principle. More specifically, the Kansas Court of Appeals has determined that “[t]he power of the KCC to order refunds for overcharges in violation of the act is implied from K.S.A. 101, which grants the state corporation commission ‘full power, authority and jurisdiction to supervise and control the public utilities doing business in the state’ and ‘to do all things necessary and convenient for the exercise of such power, authority, and

²¹ K.S.A. 66-101d.

²² Minimum Standard, Section (C).

jurisdiction.”²³ In *Sunflower Pipeline*, the Court affirmed a Commission order, finding that Sunflower Pipeline Company had failed to conform with provisions of K.S.A. 66-117, upon Show Cause, in that it did not file for changes in its charges with the Commission when it entered into contract rates of 65 cents per Mcf for its irrigation service, in violation of the Commission approved rate of 25 cents per Mcf.²⁴ The Court in *Sunflower Pipeline* held that refunds are an appropriate remedy and concluded that the “KCC has power to order refunds for charges in excess of published rates.”²⁵ In addition to the Commission having the power to order refunds for charges in excess of published rates, the Kansas Court of Appeals has also held that Commission has the power to order interest on refunds ordered for imprudent or unreasonable actions.²⁶

16. Like *Sunflower Pipeline*, the Commission has found, in its Order, that Southern Pioneer has violated its tariff by charging customers an unauthorized rate (e-check convenience fee). Given that Southern Pioneer is in violation of its authorized Commission approved tariff the Commission has the power, pursuant to the holding in *Sunflower Pipeline*, to issue refunds to Southern Pioneer customers who have been charged the unauthorized e-check convenience fee. Moreover, the Commission may issue refunds to those customers along with interest. CURB recommends that the Commission order Southern Pioneer to issue full refunds plus interest to those customers that have been charged e-check convenience fees.

c) What is an appropriate amount to fine Southern Pioneer for violating its tariff?

17. Pursuant to K.S.A. 66-138(a)(2) the Commission may impose civil penalties ranging from \$100 to \$5,000 for any violation of the Public Utilities Act, including tariff

²³ *Sunflower Pipeline Co. v. State Corp. Comm'n*, 5 Kan. App. 2d 715, 719, 624 P.2d 466, 470 (1981) (rev. denied).

²⁴ *Id.*, 716-720.

²⁵ *Id.*, 720.

²⁶ “We conclude the KCC has the inherent power under K.S.A. 66–101 to impose interest on refunds when, as here, the refund is ordered for imprudent or unreasonable actions.” *Kansas Gas & Elec. Co. v. State Corp. Comm'n of State of Kan.*, 14 Kan. App. 2d 527, 540, 794 P.2d 1165, 1175 (1990).

violations. CURB recognizes that the Commission has the authority to issue penalties; however, CURB does not take a position as whether a fine is necessary in this case or what that amount should be. CURB defers to the Commission's judgement on this issue.

III. CONCLUSION

18. The Commission has the power to order full refunds, plus interest, if a utility charges in excess of its published rates or is in violation of its Commission approved tariff. The Commission found Southern Pioneer to be in violation of its tariff by charging customers convenience fees who paid their bills via e-checks. CURB respectfully recommends that the Commission issue full refunds plus interest to Southern Pioneer customers who were charged e-check convenience fees. CURB does not take a position on whether or not Southern Pioneer should be charged a penalty, or what that penalty should be. CURB defers to the Commission's judgement on the penalty issue.

WHEREFORE, CURB respectfully submits its *Brief* and respectfully requests that the Commission take into consideration the principles of law discussed above, and recommends that the Commission issue full refunds plus interest to Southern Pioneer customers who were charged e-check convenience fees, and for such other relief as the Commission deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

18-SPEE-428-SHO

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 30th day of July, 2018, to the following:

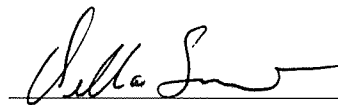
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