THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Westar Energy, Inc. for approval of the Acquisition of Westar Energy, Inc. by Great Plains Energy Incorporated.	))))))	Docket No. 16-KCPE-593-ACQ

STAFF'S REPLY TO JOINT APPLICANTS' RESPONSE TO STAFF'S MOTION TO DECLASSIFY; MOTION FOR LEAVE TO REPLY

The Staff of the Kansas Corporation Commission (Staff and Commission or KCC, respectively) hereby submits the following reply to the *Joint Applicants' Response to Staff's Motion to Declassify All Staff Testimony and Exhibits* (JA Response), and to the extent not contemplated by the procedural schedule, respectfully moves for leave to file such reply:

I. Applicable Law

A. Trade Secrets and Confidential Commercial Information

1. Confidential protection in a Commission proceeding extends to two mandatory categories under K.S.A. 66-1220a: 1) trade secrets; and 2) confidential commercial information.[1]

2. Trade secret is defined as follows:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure and use, and
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

3. To clarify the "independent economic value" requirement to establish a trade secret: a "trade secret must have sufficient value in the owner's operation of its enterprise such

[1]K.S.A. 66-1220a
[2]K.S.A. 60-3320(4)(i),(ii).

that it provides an actual or potential advantage over others who do not possess the information."[3]

4. Additionally, "information related to a single, ephemeral event in the conduct of a business does not meet the requirement that a trade secret be a 'process or device for continuous use in the operation of the business.'[4]

5. "Confidential commercial information" is not defined under the Kansas statutes. However, federal bankruptcy courts have adopted the following definition of commercial information: "[c]ommercial information has been defined as information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtors.'"[5] Adding in the word "confidential" would imply that the holder of such information must also take reasonable steps to maintain its secrecy, similar to a trade secret.

B. Privileges

6. The Commission is also generally bound to recognize privileges under the rules of evidence.[6] Of relevance to this proceeding, the state of Kansas recognizes the attorney-client privilege and the trade-secret privilege.[7]

7. Kansas recognizes what is known as the "attorney work product limitation."[8] However, such limitation is not a privilege, but rather a limitation on discovery.[9]

8. Furthermore:

> The attorney work product doctrine does not offer a per se exemption for all records prepared by or for an attorney. The work product doctrine only applies to those documents and tangible things prepared in anticipation of litigation, and in order for the

[3]Religious Tech. Ctr. V. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1252-53 (N.D. Cal. 1995).
[4]State ex rel. The Plain Dealer v. Ohio Dep't of Ins., 687 N.E. 2d 661, 673 (Ohio 1997).
[5]In re Orion Pictures Corp., 21 F.3d 24, 27-28 (2d Cir. 1994).
[6]*See* K.A.R. 82-1-230(a).
[7]K.S.A. 60-426; K.S.A. 60-432.
[8]Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 218 (2002); K.S.A. 60-426a(f)(2).
[9]Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 218 (2002).

> discovery limitation to apply, there must be a substantial probability that litigation will ensue. "Certainly by implication the... rule precludes any idea of extending the work product doctrine to reports or statements, even if written, obtained by the client or his investigators which are not prepared 'under the supervision of an attorney in preparation for trial.'" (Internal citations omitted).[10]

9. There is no privilege recognized by the Kansas statutes for communications between "financial analysts" or "consultants," nor is there any privilege regarding disclosure of information that a party agreed with someone to keep secret. The U.S. Supreme Court has cited to the following: "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege... No pledge of privacy nor oath of secrecy can avail itself against demand for the truth in a court of justice."[11]

10. Finally, the Kansas Supreme Court has stated that "[p]rivileges in the law are not favored because they operate to deny the factfinder access to relevant information."[12]

C. Common Law Right to Inspect Public Records and Documents; Public Policy

11. The United States Supreme Court has identified a common law right of the public to inspect and copy public records and documents.

12. This common law right has been explained in *Nixon v. Warner Communications, Inc.*:[13]

> It is clear that the courts of this country recognize a general right to inspect and copy record and documents, including judicial records and documents. In contrast to the English practice... American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the

[10]Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 219 (2002).
[11]Branzburg v. Hayes, 408 U.S. 665, fn 21 (1972).
[12]Id.
[13]435 U.S. 589

> issuance of a writ compelling access has been found, for example, in a citizens desire to keep a watchful eye on the workings of public agencies, and in the newspaper publisher's intention to publish information concerning the operation of government.
> It is uncontested, however, that the right to inspect copy judicial records is not absolute. Every court has supervisory power over its own record and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's ***competitive standing***. (Internal citations omitted and emphasis added).[14]

13. There is a strong presumption against sealing court documents:

> Particularly important is transparency in our judicial branch. Its power depends upon the people's confidence. That confidence is founded on the fact that the material judges rely on for decision is available to the public—decisions by which judges' work is judged. *See United States v. Amodeo,* 71 F.3d 1044, 1050 (2d Cir.1995) ("*Amodeo II* ") ("Where access is for the purpose of reporting news ... those interested in monitoring the courts may well learn of, and use, the information whatever the motive of the reporting journalist."). Thus, the presumption against sealing of documents in court files is a strong one.[15]

14. The State of Kansas has adopted the following policy under K.S.A. 45-216(a): "(a) It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

15. Finally, the Kansas Supreme Court explained:

> It is a well established principle that the public has a right to every man's evidence. Any exceptions to the demand for every man's evidence are not lightly created nor expansively construed since

[14]Id. at 598.
[15]U.S. v. Huntley, 943 F. Supp. 2d 383, 385-87 (E.D. New York 2013).

> they are in derogation of the search for truth. (Internal citations omitted).[16]

II. Argument

A. In General – Lack of Competitive Harm

16. At the outset, it is important to point an important issue with respect to this proceeding and the Joint Applicants.

17. K.S.A. 66-1220a refers specifically to trade secrets and confidential commercial information. Trade secrets and commercial information derive their value from not being generally known to competitors.[17] The Joint Applicants have not identified their competitors in the sale of electricity. The Joint Applicants operate as regulated electric monopolies.[18] Their rates are set by regulatory bodies.

18. Joint Applicants make claims of harm that could befall numerous individuals in their Response including employees, customers, communities, shareholders, Board of Directors, regulators, and other stakeholders.[19] These entities/individuals are not the focus of trade secret or confidential commercial information protection laws. The harm must come from information that can be used by competitors to achieve some sort of competitive/commercial advantage over the company. Once trade secret or confidential commercial information has actually been established, the Commission should consider the harm to these other individuals under K.S.A. 66-1220a(a)(2). However, the threshold question of whether the information qualifies as a trade secret or confidential information must still be answered, and the establishment of these types of information relies upon competitive harm.

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[16]Kansas Gas & Elec. v. Eye, 246 Kan. 419, 427 (1990).
[17]*See* Religious Tech. Ctr. V. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1252-53 (N.D. Cal. 1995); In re Orion Pictures Corp., 21 F.3d 24, 27-28 (2d Cir. 1994).
[18]*See* K.S.A. 66-1,170 et seq.
[19]Joint Applicants' Response to Staff's Motion to Declassify all Staff Testimony and Exhibits, Attachment 1 p. 2. (Jan. 20, 2017) (JA Response).

B. Specific Categories Identified by the Joint Applicants

19. The Joint Applicants identify seven (7) categories of information that they argue warrant confidential protection. [20] Staff will explain each category and why such categories are not subject to protection under either K.S.A. 66-1220a or a privilege recognized under Kansas law.

20. The first category identified is: (1) Confidential financial information/budget projections, the disclosure of which could affect the Companies' standing in the capital markets, affect the Companies' stock prices, facilitate insider trading violations of the Securities Exchange Commission ("SEC") rules and/or disadvantage the Companies in their contract negotiations.[21]

21. The targeted information is "financial information/budget projections." As referenced in Staff's initial Motion to Declassify, this is simply boilerplate language that does not explain or identify with particularity the information that is a trade secret or confidential commercial information. As the Joint Applicants have the burden of proof in this regard, it is incumbent upon them to identify the specific information at issue that constitutes a trade secret or provides some sort of competitive advantage. They must also explain the steps they took to maintain the secrecy of the information to determine whether it was reasonable under the circumstances. Using the example of DR 7, Staff asked for analysis prepared by Mr. Kemp to support his estimated transactions savings.[22] He provided a spreadsheet in response that contains capital expenditures, operations and maintenance (including employee reductions), and supply chain savings projections. The Joint Applicants assert in their Response that there are "proprietary methods (i.e., financial models) developed and owned by the company, or others on

[20] *See* JA Response pp. 2-3.
[21] JA Response at 2.
[22] JA Response, Attachment 1, p. 2-3.

behalf of the company, used to evaluate this Transaction." This is not specific. Does it refer to all models in Kemp's response? How are the numbers themselves derived from the models confidential? Why do such models provide a competitive advantage? How are such financial models not already generally known in the industry? How did Kemp maintain trade secret status after so many other people have now seen the information? These are the types of things that have to be explained and are absent. The confidential nature has not been proven.

22. With respect to the harm for (1), the Joint Applicants stated that disclosure could "affect the Companies' standing in the capital markets, affect the Companies' stock prices, facilitate insider trading violations of the Securities Exchange Commission ("SEC") rules and/or disadvantage the Companies in their contract negotiations." First, this type of harm would be related to the "public interest" under K.S.A. 66-1220a(a)(2), but it is not related to competitive harm. Second, the Joint Applicants make bald assertions of SEC, FERC, and NERC violations that could occur. They have not identified with particularity what statutes are at issue making it impossible to verify the claims.

23. The Joint Applicants identified (2), (3), and (4) as potential confidential information, but did not label any of Staff's evidence as such, therefore, Staff will not address these in its response.

24. The fifth category is: (5) Trade secret or commercially sensitive information, the disclosure of which would harm the Companies competitively and/or prevent the Companies from protecting such information as allowed under Kansas law. This is the only category covered by K.S.A. 66-1220a.

25. Consider DR 36, which asked how much of Kemp's estimated savings were achieved by reductions in labor (salary and benefit) costs.[23] The JA Response indicates that the "specific functional savings estimates represent the Company's strategy to achieve savings." Again, this does not meet the burden of proof. How are "savings estimates" a process or device for continuous use in the operation of a business? Are all identified estimates trade secrets? How do they derive independent economic value, and how would a competitor use them to their advantage? What steps has the company taken to maintain the secrecy of the estimates? How many of these estimates have already been publically disclosed? Without answers to these types of questions, there is insufficient proof that the information qualifies as trade secrets or confidential commercial information.

26. Looking at the harm explained in response to DR 36, the Joint Applicants state that "disclosing such details could jeopardize the Company's ability to achieve the estimated savings as some are predicated on negotiations with vendors." Again, this would only become relevant if a trade secret or confidential commercial information had been established. Tipping off a vendor could lead to an increase in prices that could affect the public interest under K.S.A. 66-1220a(a)(2). But this type of harm may not be used to establish a trade secret or confidential commercial information actually exists.

27. The sixth category is: (6) Information the Companies are contractually obligated to be kept private, in which the failure to do so could open the Companies to damages. This is not a trade secret or confidential commercial information. The Joint Applicants have cited no authority that would allow the Commission to seal such information. "Kansas administrative agencies have no common-law powers. Any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express

[23]JA Response, Attachment 1, p. 8.

powers granted."[24] The Joint Applicants may be relying upon some other authority to seal this information, but it has not been identified. Case precedent indicates "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records."[25]

28. The final category is: (7) Critical infrastructure information that poses a security risk if made public. This is also not a trade secret or confidential commercial information. Additionally, no citation for authority to seal this information is provided by the Joint Applicants. This could harm the public interest under K.S.A. 66-1220a(a)(2), but trade secret or confidential commercial information must first be established. Further, in the *Kansas Gas & Electric v. Eye*[26] case, it was stated that:

> Nevertheless, we believe the public has an overriding interest in the dissementation of information related to costs, construction, and safety practices of nuclear power plants... The United States Supreme Court has stated that society has a strong interest in the free flow of commercial information. (Internal citations omitted).

If the public's interest in information on the construction and safety practices of nuclear power plants can supersede a utility's confidentiality interest, surely it can supersede the company's interest in keeping the condition assessment reports for its transformers, breakers, and underground distribution lines confidential, as claimed in DR 47, 50, and 52, respectively.[27]

C. Balancing Test Under K.S.A. 66-1220a

29. Assuming, *arguendo*, that upon review of all explanations provided by the Joint Applicants in their Response, the Commission concludes that the Joint Applicants have met their burden to prove that the information claimed confidential actually constitutes trade secrets or

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[24]Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors, 290 Kan. 446, 455 (2010).
[25]Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006).
[26]246 Kan. 419 (1990).
[27]*See* JA Response, Attachment 1, p. 9, 11, 13.

confidential commercial information, the balancing test under K.S.A. 66-1220a still weighs in favor of public disclosure.

30. Staff has cited above to several quotes that explain how important it is to have open judicial documents and proceedings. Staff has also pointed out how insufficiently the Joint Applicants have explained the harm from disclosure. The potential impact on Kansas' economy as a result of this case is enormous, and the public has a right to see Staff's evidence. This case involves the largest public utility in the state being acquired by the holding company of the second largest and affects roughly 950,000 Kansas residents, or 33% of the Kansas population. It is a $12.2 billion transaction. If this case does not rise to the level of public import sufficient to justify an open proceeding, nothing will.

WHEREFORE, Staff respectfully submits its reply, moves for permission to file such reply, and requests that the Commission grant its *Motion to Declassify All Staff Testimony and Exhibits* filed January 10, 2017.

Respectfully Submitted,

Michael Neeley, S. Ct. #25027
Litigation Counsel
Amber Smith, S. Ct. #23911
Chief of Litigation
Andrew French, S. Ct. #24680
Senior Litigation Counsel
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
E-mail: m.neeley@kcc.ks.gov
Phone: 785-271-3173

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

VERIFICATION

Michael Neeley, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing *Staff's Reply to Joint Applicants' Response to Staff's Motion to Declassify; Motion for Leave to Reply* and that the statements contained therein are true and correct to the best of his knowledge, information and belief.

Michael Neeley # 25027
Kansas Corporation Commission of the
State of Kansas

Subscribed and sworn to before me this 23rd day of January, 2017.

PAMELA J. GRIFFETH
Notary Public - State of Kansas
My Appt. Expires 08-17-2019

Notary Public

My Appointment Expires: August 17, 2019

CERTIFICATE OF SERVICE

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I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Reply to Joint Applicants' Response to Staff's Motion to Declassify; Motion For Leave to Reply was served by electronic service on this 23rd day of January, 2017, to the following:

W. ROBERT ALDERSON, JR., ATTORNEY
ALDERSON ALDERSON WEILER CONKLIN BURGHART & CROW LLC
2101 SW 21ST STREET (66604)
TOPEKA, KS 66604
Fax: 785-232-1866
boba@aldersonlaw.com

MICHAEL E. AMASH, ATTORNEY
BLAKE & UHLIG PA
SUITE 475 NEW BROTHERHOOD BLDG
753 STATE AVE.
KANSAS CITY, KS 66101
Fax: 913-321-2396
mea@blake-uhlig.com

KURT J. BOEHM, ATTORNEY
BOEHM, KURTZ & LOWRY
36 E SEVENTH ST STE 1510
CINCINNATI, OH 45202
Fax: 513-421-2764
kboehm@bkllawfirm.com

JODY KYLER COHN, ATTORNEY
BOEHM, KURTZ & LOWRY
36 E SEVENTH ST STE 1510
CINCINNATI, OH 45202
Fax: 513-421-2764
jkylercohn@bkllawfirm.com

MARTIN J. BREGMAN
BREGMAN LAW OFFICE, L.L.C.
311 PARKER CIRCLE
LAWRENCE, KS 66049
mjb@mjbregmanlaw.com

ANDREW J ZELLERS, GEN COUNSEL/VP REGULATORY AFFAIRS
BRIGHTERGY, LLC
1712 MAIN ST 6TH FLR
KANSAS CITY, MO 64108
Fax: 816-511-0822
andy.zellers@brightergy.com

GLENDA CAFER, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
Fax: 785-233-3040
glenda@caferlaw.com

TERRI PEMBERTON, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
Fax: 785-233-3040
terri@caferlaw.com

THOMAS J. CONNORS, ATTORNEY AT LAW
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
tj.connors@curb.kansas.gov

DAVID W. NICKEL, CONSUMER COUNSEL
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
d.nickel@curb.kansas.gov

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

DELLA SMITH
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
d.smith@curb.kansas.gov

SHONDA SMITH
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
sd.smith@curb.kansas.gov

DANIEL R. ZMIJEWSKI
DRZ LAW FIRM
9229 WARD PARKWAY STE 370
KANSAS CITY, MO 64114
Fax: 816-523-5667
dan@drzlawfirm.com

ASHLEY M. BOND, ATTORNEY
DUNCAN & ALLEN
1730 RHODE ISLAND AVENUE NW
SUITE 700
WASHINGTON, DC 20036-3155
Fax: 202-289-8450
amb@duncanallen.com

KEN HOLMBOE, ATTORNEY AT LAW
DUNCAN & ALLEN
1730 RHODE ISLAND AVENUE NW
SUITE 700
WASHINGTON, DC 20036-3155
Fax: 202-289-8450
kh@duncanallen.com

GREGG D. OTTINGER, ATTORNEY
DUNCAN & ALLEN
1730 RHODE ISLAND AVENUE NW
SUITE 700
WASHINGTON, DC 20036-3155
Fax: 202-289-8450
gdo@duncanallen.com

SHANNON FISK, ATTORNEY
EARTHJUSTICE
1617 JOHN F KENNEDY BLVD
SUITE 1675
PHILADELPHIA, PA 19103
sfisk@earthjustice.org

KEVIN HIGGINS
ENERGY STRATEGIES, LLC
PARKSIDE TOWERS
215 S STATE ST STE 200
SALT LAKE CITY, UT 84111
Fax: 801-521-9142
khiggins@energystrat.com

WILLIAM R. LAWRENCE
FAGAN EMERT & DAVIS LLC
730 NEW HAMPSHIRE SUITE 210
LAWRENCE, KS 66044
Fax: 785-331-0303
wlawrence@fed-firm.com

ALI NELSON, PARALEGAL
FAGAN EMERT & DAVIS LLC
730 NEW HAMPSHIRE SUITE 210
LAWRENCE, KS 66044
Fax: 785-331-0303
anelson@fed-firm.com

SARAH STEELE
GILMORE & BELL, P.C.
ONE MAIN PLACE
100 NORTH MAIN, STE. 800
WICHITA, KS 67202
ssteele@gilmorebell.com

DOUGLAS L. HEALY, ATTORNEY AT LAW
HEALY LAW OFFICES, LLC
3010 E BATTLEFIELD STE A
SPRINGFIELD, MO 65804
doug@healylawoffices.com

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

TERRY M. JARRETT, ATTORNEY AT LAW
HEALY LAW OFFICES, LLC
3010 E BATTLEFIELD STE A
SPRINGFIELD, MO 65804
terry@healylawoffices.com

DARRELL MCCUBBINS, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1464
PO BOX 33443
KANSAS CITY, MO 64120
Fax: 816-483-4239
kwhiteman@ibew1464.org

DUANE NORDICK, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1523
609 N BROADWAY
WICHITA, KS 67214
duane_nordick@sbcglobal.net

DAVID PINON, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1613
6900 EXECUTIVE DR
SUITE 180
KANSAS CITY, MO 64120
local1613@earthlink.net

RAYMOND ROGERS, BUSINESS MANAGER
IBEW LOCAL UNION NO. 225
PO BOX 404
BURLINGTON, KS 66839-0404
rcrogers@cableone.net

JOHN GARRETSON, BUSINESS MANAGER
IBEW LOCAL UNION NO. 304
3906 NW 16TH STREET
TOPEKA, KS 66615
Fax: 785-235-3345
johng@ibew304.org

BILL MCDANIEL, BUSINESS MANAGER
IBEW LOCAL UNION NO. 412
6200 CONNECTICUT
SUITE 105
KANSAS CITY, MO 64120
Fax: 816-231-5515
business.manager@me.com

JOHN KRAJEWSKI, PRESIDENT
J K ENERGY CONSULTING LLC
650 J STREET STE 108
LINCOLN, NE 68508
Fax: 402-438-4322
jk@jkenergyconsulting.com

RICHARD S. HARPER
JENNINGS, STROUSS & SALMON, P.L.C
1350 I Street, NW
Suite 810
WASHINGTON, DC 20005
Fax: 202-371-9025
rharper@jsslaw.com

ALAN I. ROBBINS, ATTORNEY
JENNINGS, STROUSS & SALMON, P.L.C
1350 I Street, NW
Suite 810
WASHINGTON, DC 20005
Fax: 202-408-5406
arobbins@jsslaw.com

DEBRA D. ROBY, ATTORNEY
JENNINGS, STROUSS & SALMON, P.L.C
1350 I Street, NW
Suite 810
WASHINGTON, DC 20005
Fax: 202-371-9025
droby@jsslaw.com

JOHN R. WINE, JR.
410 NE 43RD
TOPEKA, KS 66617
Fax: 785-246-0339
jwine2@cox.net

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

ANDREW FERRIS, DIRECTOR OF ELECTRIC SUPPLY PLANNING
KANSAS CITY KANSAS BOARD OF PUBLIC UTILITIES
312 N 65TH STREET
KANSAS CITY, KS 66102
aferris@bpu.com

ANGELA LAWSON, SENIOR COUNSEL
KANSAS CITY KANSAS BOARD OF PUBLIC UTILITIES
540 MINNESOTA AVENUE
KANSAS CITY, KS 66101-2930
alawson@bpu.com

ROBERT J. HACK, LEAD REGULATORY COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST 19th FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
rob.hack@kcpl.com

DARRIN R. IVES, VICE PRESIDENT, REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST 19th FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2110
darrin.ives@kcpl.com

ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST 19th FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
roger.steiner@kcpl.com

MARY TURNER, DIRECTOR, REGULATORY AFFAIR
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST 19th FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2110
mary.turner@kcpl.com

BRIAN G. FEDOTIN, DEPUTY GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3314
b.fedotin@kcc.ks.gov

ANDREW FRENCH, SENIOR LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3314
a.french@kcc.ks.gov

DUSTIN KIRK, DEPUTY GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
d.kirk@kcc.ks.gov

MICHAEL NEELEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
m.neeley@kcc.ks.gov

AMBER SMITH, CHIEF LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
a.smith@kcc.ks.gov

MARK DOLJAC, DIR RATES AND REGULATION
KANSAS ELECTRIC POWER CO-OP, INC.
600 SW CORPORATE VIEW (66615)
PO BOX 4877
TOPEKA, KS 66604-0877
Fax: 785-271-4888
mdoljac@kepco.org

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

WILLIAM G. RIGGINS, GENERAL COUNSEL
KANSAS ELECTRIC POWER CO-OP, INC.
600 SW CORPORATE VIEW (66615)
PO BOX 4877
TOPEKA, KS 66604-0877
Fax: 785-271-4884
briggins@kepco.org

CATHRYN J DINGES, CORPORATE COUNSEL
KANSAS GAS & ELECTRIC CO.
D/B/A WESTAR ENERGY
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
cathy.dinges@westarenergy.com

JEFFREY L. MARTIN, VICE PRESIDENT, REGULATORY AFFAIRS
KANSAS GAS & ELECTRIC CO.
D/B/A WESTAR ENERGY
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
jeff.martin@westarenergy.com

LARRY HOLLOWAY, ASST GEN MGR OPERATIONS
KANSAS POWER POOL
100 N BROADWAY STE L110
WICHITA, KS 67202
Fax: 316-264-3434
lholloway@kansaspowerpool.org

CURTIS M. IRBY, GENERAL COUNSEL
KANSAS POWER POOL
LAW OFFICES OF CURTIS M. IRBY
200 EAST FIRST ST, STE. 415
WICHITA, KS 67202
Fax: 316-264-6860
cmirby@sbcglobal.net

JOHN MICHAEL ADRAGNA ESQ.
MCCARTER ENGLISH, LLP
1015 15TH STREET, NW
12TH FLOOR
WASHINGTON, DC 20005
Fax: 202-296-0166
jadragna@mccarter.com

KIMBERLY BRICKELL FRANK ESQ.
MCCARTER ENGLISH, LLP
1015 15TH STREET, NW
12TH FLOOR
WASHINGTON, DC 20005
Fax: 202-296-0166
kfrank@mccarter.com

WILLIAM DOWLING, VP ENGINEERING & ENERGY SUPPLY
MIDWEST ENERGY, INC.
1330 CANTERBURY ROAD
PO BOX 898
HAYS, KS 67601-0898
Fax: 785-625-1487
bdowling@mwenergy.com

EARNEST A. LEHMAN, PRESIDENT & GENERAL MANAGER
MIDWEST ENERGY, INC.
1330 Canterbury Rd
PO Box 898
Hays, KS 67601-0898
elehman@mwenergy.com

ANNE E. CALLENBACH, ATTORNEY
POLSINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fax: 913-451-6205
acallenbach@polsinelli.com

FRANK A. CARO, JR., ATTORNEY
POLSINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fax: 816-753-1536
fcaro@polsinelli.com

SUNIL BECTOR, ATTORNEY
SIERRA CLUB
2101 WEBSTER, SUITE 1300
OAKLAND, CA 94312-3011
Fax: 510-208-3140
sunil.bector@sierraclub.org

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

HOLLY BENDER
SIERRA CLUB
133 S BUTLER ST, STE. 106
MADISON, WI 53703
Fax: 608-257-3513
holly.bender@sierraclub.org

JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH ST STE 750
OVERLAND PARK, KS 66210-2362
Fax: 913-661-9863
jim@smizak-law.com

RENEE BRAUN, CORPORATE PARALEGAL, SUPERVISOR
SUNFLOWER ELECTRIC POWER CORPORATION
301W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
Fax: 785-623-3395
rbraun@sunflower.net

JAMES BRUNGARDT, REGULATORY AFFAIRS ADMINISTRATOR
SUNFLOWER ELECTRIC POWER CORPORATION
301W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
Fax: 785-623-3395
jbrungardt@sunflower.net

DAVIS ROONEY, VICE PRESIDENT AND CFO
SUNFLOWER ELECTRIC POWER CORPORATION
301W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
Fax: 785-623-3395
hrooney@sunflower.net

AL TAMIMI, VICE PRESIDENT, TRANSMISSION PLANNING AND POLICY
SUNFLOWER ELECTRIC POWER CORPORATION
301W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
Fax: 785-623-3395
atamimi@sunflower.net

MARK D. CALCARA, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN ST STE 300
PO DRAWER 1110
GREAT BEND, KS 67530
Fax: 620-792-2775
mcalcara@wcrf.com

TAYLOR P. CALCARA, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN ST STE 300
PO DRAWER 1110
GREAT BEND, KS 67530
Fax: 620-792-2775
tcalcara@wcrf.com

DAVID L. WOODSMALL
WOODSMALL LAW OFFICE
308 E HIGH ST STE 204
JEFFERSON CITY, MO 65101
Fax: 573-635-7523
david.woodsmall@woodsmalllaw.com

Pamela Griffeth
Administrative Specialist