

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

JUL 06 2006

 Docket Room

In the Matter of Sage Telecom, Inc. Filing)
Tariff Revisions Adding a Public Switched) Docket No. 06-SAGT-1031-TAR
Network Recovery Charge, Adding More)
Plan Minutes to Specified Plans, and)
Making Rate Changes.)

**CURB'S RESPONSE TO STAFF'S
MOTION TO STRIKE CURB'S JUNE 15, 2006 RESPONSE**

COMES NOW, the Citizens' Utility Ratepayer Board (CURB), and submits its response to Staff's Motion to Strike CURB's June 15, 2006 Response. In support of its response, CURB states and alleges as follows:

1. On June 26, 2006, Staff filed its Motion to Strike CURB's June 15, 2006 Response (Staff's Motion to Strike).

2. Staff's Motion to Strike places great emphasis on the 30 day deadline for the Commission to file an order addressing CURB's Petition for Reconsideration, and argues that CURB's "pleading" should be stricken from the record "as untimely." In order to fully examine the "timeliness" of the pleadings and new evidence and issues raised by Sage in this docket, a timeline is set forth below:

- **Day 1** – CURB files its Petition for Reconsideration on May 16, 2006.
 - **Day 10** – Sage files its Response to Petition for Reconsideration on May 25, 2006.
- No New Evidence or Issues are raised by Sage in this response.

- **Day 18** – Staff files its Response to the Petition for Reconsideration on June 2, 2006. Nothing in Staff’s Response indicates Staff is aware of or is in possession of the new evidence ultimately produced by Sage on June 9, 2006, and provided to CURB on June 12, 2006.
- **Day 25** – Sage files its Reply to Staff Response to Petition for Reconsideration on June 9, 2006. The certificate of service indicates the pleading is served on CURB and Staff by U.S. mail on June 9, 2006.
- **Day 27** – CURB receives Sage’s Reply to Staff Response to Petition for Reconsideration on June 12, 2006. This is the first day CURB is made aware of the new evidence and issues raised by Sage.
- **Day 30** - CURB files its Response to New Evidence on June 15, 2006, three days after receiving the new evidence contained in Sage’s Reply to Staff Response to Petition for Reconsideration. In its response, CURB demonstrated that the new evidence produced by Sage on Day 27 was not timely included in the Response to Petition for Reconsideration filed by Sage on May 25, 2006¹ (Day 10). CURB’s response further demonstrated that the new evidence supports CURB’s Petition for Reconsideration on the grounds that:
 - The surcharge contains “**other** cost increases (**such as** higher costs for employee benefits)” contrary to Sage’s tariff filing and materials provided to ratepayers.²
 - Sage admits a rate increase was necessary, but it didn’t believe it could implement a general rate increase competitively, so it implemented the surcharge to disguise the required rate increase.³
 - Sage’s newly disclosed Exhibits A and B demonstrate that Sage does not fully disclose the nature, purpose, and amount, but instead conceals and misrepresents the surcharge⁴ by:
 - Failing to disclose the amount of the \$1.33 surcharge.⁵

¹ CURB Response to New Evidence, ¶¶ 1, 4-5.

² *Id.*, at ¶¶ 2-6.

³ *Id.*, at ¶¶ 7-8.

⁴ *Id.*, at ¶¶ 14-19.

- Misrepresenting the nature and purpose of the surcharge as being a “fee we have to collect,” “required by law,” and required by “State, Local and Federal Regulations.”⁶
 - Representing in Sage Exhibits A and B that the surcharge “is used to offset increased costs incurred in gaining access to incumbent telephone company networks,” but concealing that the \$1.33 surcharge also includes “other cost increases (such as higher costs for employee benefits)” or that it is really a disguised rate increase, contrary to Sage’s claim that it “fully discloses the nature, purpose, and amount of the access recovery charge.”⁷
 - Telling ratepayers that it does not charge for items charged by some telephone companies, yet concealing the fact that most carriers don’t charge a public switched access recovery charge.⁸
- **Day 30** – The Commission issues its Order Denying Petition for Reconsideration, relying heavily upon the new evidence produced by Sage and first provided to CURB **on Day 27**.

3. Staff’s Motion to Strike fails to recognize or even mention the substance of the argument contained in the pleading Staff seeks to strike, specifically that Sage raised new evidence and issues in an untimely manner and that the new evidence supports CURB’s Petition for Reconsideration.

4. Not only does Staff’s Motion to Strike ignore how the new evidence demonstrates the deceptive nature of the surcharge and how the surcharge deceptively disguises what Sage admits is a required rate increase, but Staff appears to accept Sage’s description of the new evidence: “Sage provided background information on why the charge was necessary and explained the reason for

⁵ *Id.*, at ¶ 15.

⁶ *Id.*, at ¶ 16.

⁷ *Id.*, at ¶ 17.

⁸ *Id.*, at ¶ 18.

withdrawing a similar charge proposed in Missouri. Sage also provided information on the notice it gives to customers about the charge.”⁹

5. CURB expected Staff, after previously indicating that it shared some concerns raised by CURB¹⁰ and recommending that the Commission consider further investigation of the propriety of Sage’s public switched network recovery charge in this docket,¹¹ to respond to the newly produced evidence by arguing that the new evidence raises even more concerns about the propriety of Sage’s public switched network recovery charge.

6. CURB wonders why Staff chose not to file a motion to strike the untimely-produced new evidence, filed in the docket just four (4) business days and provided to CURB just three (3) calendar days before the Commission decision was to be issued. Instead, Staff seeks to strike and remove from the record CURB’s response to this untimely-produced new evidence.

7. Equally concerning is the fact that Staff’s Motion to Strike fails to recognize that the new evidence raised in Sage’s Reply to Staff Response to Petition for Reconsideration was not provided to CURB **until the 27th day** in the 30-day window upon which Staff places such emphasis in its Motion to Strike.

8. For the record, Sage’s Reply to Staff Response to Petition for Reconsideration, while filed on June 9, 2006, **was not received by CURB until June 12, 2006.**

9. The new evidence was therefore provided to CURB by Sage **27 days after** CURB’s Petition for Reconsideration was filed, and **17 days after** Sage filed its Response to CURB’s Petition for Reconsideration.

⁹ Staff Motion to Strike, ¶ 6.

¹⁰ *Id.*, ¶ 11.

¹¹ *Id.*, ¶ 10.

10. CURB's response to the new evidence and issues was therefore filed within three days of receiving the new evidence,¹² even though it was not due under Commission rules, until June 22, 2006,¹³ seven days after the Commission decision was issued.

11. Despite the untimely submission of this new evidence by Sage, the new evidence produced by Sage on **Day 27** was heavily relied upon by this Commission in its Order Denying Petition for Reconsideration dated June 15, 2006.¹⁴

12. While it is clear that the Commission relied upon this new evidence in denying CURB's Petition for Reconsideration, Staff is seeking to strike from the record CURB's due process right to respond to the untimely produced new evidence.

13. Staff's concern about leaving a pleading "on the docket"¹⁵ is unfounded. Staff's concern appears to be based on an erroneous assumption the Commission's June 15th Order constitutes final agency action subject to judicial review.

14. The Commission's June 15th Order does not constitute final agency action subject to judicial review under K.S.A. 66-118b or K.S.A. 66-118c. On page 7, the June 15th Order states: "The parties have fifteen days, plus three days if service of this order is by mail, from the date this order was mailed in which to petition the Commission for reconsideration of any issue or issues decided herein. K.S.A. 66-118; K.S.A. 2005 Supp. 77-529(a)(1)." The June 15th Order further states, "The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary."

¹² Staff urges the Commission to strike CURB's Response to New Evidence filed within three (3) days of receiving the pleading containing the new evidence, yet Staff waited eleven (11) days to file its Motion to Strike CURB's Response.

¹³ Under K.A.R. 82-1-217(c) three days are added to the 10 day response time applicable to responsive pleadings under K.A.R. 82-1-218(d).

¹⁴ Order Denying Petition for Reconsideration, ¶¶10, 11, 12, 15, 16.

¹⁵ Staff Motion to Strike, ¶ 10.

15. When the Commission enters a final order, it states so explicitly, as it did in January 2006 when it denied the petition for reconsideration filed by Atmos Energy and Aquila, Inc. in Docket No. 04-GIMX-651-GIV: “This Order constitutes final agency action that is subject to review. K.S.A. 77-607(b)(1). The agency officer designated to receive service of any petition for judicial review is Susan K. Duffy, Executive Director. K.S.A. 77-529(c).” *Order Denying Petition for Reconsideration*, p. 13. *See also*, Docket 01-WPEE-489-CON, *Order Denying Reconsideration*, Sept. 30, 2001, p. 3.

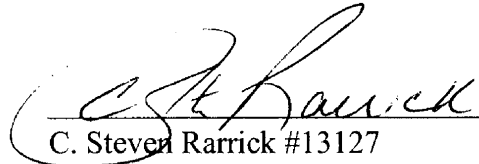
16. As a result, Staff’s concern about leaving a pleading “on the docket” does not provide a reasonable basis to strike CURB’s Response to New Evidence from the record.

17. CURB is the official statutory intervener for residential and small business ratepayers pursuant to K.S.A. 66-1223. This Commission has denied CURB intervention in this docket and dismissed its complaint without any opportunity to conduct discovery or present a meaningful case on behalf of ratepayers. Now Staff seeks to strike CURB’s response to new evidence produced by Sage in an untimely manner, effectively denying CURB a reasonable opportunity to respond before this Commission issued its June 15th Order. In that Order, the Commission relied heavily upon the untimely provided evidence from Sage without any meaningful analysis or consideration of analysis by CURB.

18. Should the Commission grant Staff’s Motion to Strike, CURB may be left with no alternative but to file a new Complaint regarding this tariff in a new docket based upon the new evidence concealed from CURB **until Day 27** in this proceeding.

19. WHEREFORE, based on the above arguments, CURB respectfully requests that the Commission deny Staff's Motion to Strike CURB's June 15, 2006 Response.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Steven Rarrick", is written over a horizontal line. The signature is fluid and cursive.

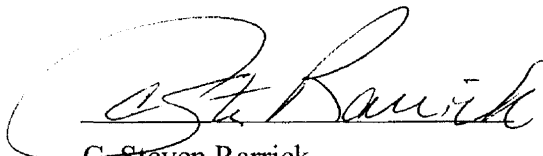
C. Steven Rarrick #13127
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VERIFICATION


STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

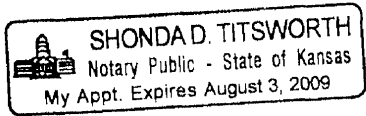
That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.


C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 6th day of July, 2006.


Notary Public

My Commission expires:



CERTIFICATE OF SERVICE

06-SAGT-1031-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 6th day of July, 2006, to the following:

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