

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas )  
City Power & Light Company to Modify Its )  
Tariffs to Continue the Implementation of Its )  
Regulatory Plan. )

Docket No. 10-KCPE-415-RTS Received  
on

**AUG 25 2011**

**CURB'S RESPONSE TO KCPL MOTION  
FOR COMMISSION DECISION ON THE PAPER RECORD**

by  
State Corporation Commission  
of Kansas

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files its response to Kansas City Power & Light Company's Motion for Commission Decision on the Paper Record. ("Motion for Decision on Paper Record" or "Motion"). In support of its response, CURB states as follows:

1. On August 15, 2011, KCPL filed its Motion for Decision on Paper Record.
2. In its February 21, 2011 Order, the Commission granted requests for reconsideration by Kansas City Power & Light Company ("KCPL") and CURB, specifically opening the administrative record to receive new evidence on this issue, directing KCPL and CURB to file appropriate evidence regarding this issue, allowing KCP&L and CURB to conduct discovery on this issue, directing an evidentiary hearing be scheduled, and appointing a new prehearing officer to address this issue with KCPL and CURB.<sup>1</sup> The evidentiary hearing was subsequently scheduled for September 6-8, 2011.
3. KCPL did not timely file another petition for reconsideration regarding the Commission's decision to schedule an evidentiary hearing on the rate case issue. KCPL's Motion for Decision on Paper Record is therefore untimely and should be disregarded on that basis alone.

<sup>1</sup> Order Granting KCPL's and CURB's Second Petitions for Reconsideration and Clarification, February 21, 2011, ¶ 3 ("February 21<sup>st</sup> Order").

4. KCPL's Motion for Decision on Paper Record fails to acknowledge the critical issue of whether KCPL has submitted a complete record upon which the Commission can decide the issue of rate case expense. The Commission has specifically and clearly determined that "The responsibility to submit evidence setting out a complete record upon which this Commission can decide the issue of rate case expense lies with KCP&L, not with Staff"<sup>2</sup>

5. While KCPL claims that the record in this proceeding has been fully developed,<sup>3</sup> and that it has provided the detailed information required by the Commission in June,<sup>4</sup> both CURB and Staff have provided testimony that KCPL has failed to comply with the Commission's directive to set out a complete record upon which this Commission can decide the issue of rate case expense.<sup>5</sup>

6. Both Staff and CURB have also filed testimony that finds KCPL's amended claim for rate case expense to be duplicative, excessive, and unreasonable. On the other hand, KCPL has filed opinion testimony claiming its amended claim is reasonable, and not excessive and duplicative.

7. An evidentiary hearing is required for the Commission to determine whether KCPL has presented sufficient evidence as required by the Commission, and if so, which opposing opinion evidence and testimony is more credible and persuasive for the Commission to decide the reasonable and prudent amount of rate case expense that is fair and reasonable to be recovered from ratepayers.

8. KCPL has presented opinion evidence as to the reasonableness of its amended rate case expense claim, and CURB has the due process right to cross-examine that opinion testimony. Moreover, as admitted by KCPL, CURB attempted to inquire as to the basis of many of the opinions

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<sup>2</sup> Order Addressing Prehearing Officer's Report And Recommendation Following Prehearing Conference On March 9, 2011, p. 10.

<sup>3</sup> Motion for Decision on Paper Record, ¶ 15.

<sup>4</sup> Order Addressing Prehearing Officer's Report And Recommendation Following Prehearing Conference On March 9, 2011, p. 10.

<sup>5</sup> Direct Testimony of Jeff McClanahan, July 6, 2011, pp. 4-24; Direct Testimony of Bill Baldry, July 6, 2011, pp. 4-15; Direct Testimony of Stacey Harden, July 6, 2011, pp. 3-6.

rendered by KCPL witnesses, and KCPL objected and refused to answer those questions on the grounds they constituted cross-examination that is not permitted under the Commission's Discovery Order.<sup>6</sup> KCPL seeks to deny CURB the due process opportunity to cross-examine KCPL's witnesses at the evidentiary hearing regarding their opinions that KCPL's \$9 million amended claim for rate cases expense is not duplicative, excessive, and unreasonable.

9. The entire basis of KCPL's Motion for Decision on Paper Record appears to be premised on its conclusion that the only issue to be decided by this Commission is the "actual" amount of rate case expense incurred by KCPL and that opinion evidence is unnecessary.<sup>7</sup> KCPL's conclusion is erroneous and misleading.

10. First, KCPL completely misrepresents the nature of the testimony of its own witnesses, which it claims are merely "fact witnesses."<sup>8</sup> To the contrary, KCPL's pre-filed testimony consists primarily of the very "opinion evidence" KCPL now argues is unnecessary for the Commission's determination of KCPL's amended \$9 million claim for rate case expense. Specifically, each of KCPL's witnesses expressed numerous opinions on the rate case expense issues, presumably as expert witnesses, including but not limited to the following:

- Whether the rate case expense incurred by KCPL was reasonable.<sup>9</sup>
- Whether KCPL's attorney fees were reasonable under Rule 1.5(a)(4) of the Kansas Rules of Professional Conduct.<sup>10</sup>
- Whether Rule 1.5(a)(4) of the Kansas Rules of Professional Conduct as applied by CURB witness Andrea Crane indicates KCPL's rate case costs were unreasonable.<sup>11</sup>

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<sup>6</sup> *Id.*, ¶ 18.

<sup>7</sup> Motion for Decision on Paper Record, ¶¶ 4, 14-21 (referencing "actual amount of rate case expense", "opinions... unlikely to add value to the process", "actual data", "factual information", "actual, detailed information", "unnecessary opinion evidence", "factual evidence", "actual documentation").

<sup>8</sup> *Id.*; Motion to Strike, ¶ 3.

<sup>9</sup> Rush Direct Testimony, May 6, 2011, pp. 96-101, 104-108, 111-115.

<sup>10</sup> Rush Rebuttal Testimony, August 5, 2011, pp. 19-23.

<sup>11</sup> *Id.*, pp. 19-20.

- Whether it is unreasonable to believe a utility and the consumer advocate should have a reasonably level playing field, resource wise, to try a rate case.<sup>12</sup>
- Whether it would be reasonable to limit KCPL's recovery of rate case expense to the \$2.1 million original estimate amount actually in the record at the close of the hearing and record.<sup>13</sup>
- Whether KCPL's rate case expense was reasonable as well as a fair and reasonable amount to be recovered from ratepayers.<sup>14</sup>
- Whether the evidence submitted by KCPL met the Commission's requirements and is consistent with industry standards.<sup>15</sup>
- Whether Rule 1.5 of the Kansas Rules of Professional Conduct requires the level of detail being suggested by Staff.<sup>16</sup>
- Whether requiring the level of detail for legal invoices suggested by Staff would be retroactively setting a new standard for attorney invoices that is higher than required by Kansas law or industry standards.<sup>17</sup>
- Whether KCPL failed to provide the Level 3 information required by the Commission for several of its vendors.<sup>18</sup>
- Whether there is insufficient information in the record to ascertain the roles of various law firms and consultants.<sup>19</sup>
- Whether, in the KCPL witnesses "opinion", there is unreasonable or unnecessary duplication of services,<sup>20</sup> including:
  - A legal conclusion about whether a "bright line does not always exist where one subject and/or witness ends and another begins."<sup>21</sup>
  - Whether the use of 44 attorneys was reasonable and duplicative.<sup>22</sup>
  - Whether the fact that all 44 attorneys billed for work related to prudence and that their descriptions were general and nature and did not indicate any specific prudence assignment indicated duplication.<sup>23</sup>
  - That it was not necessary for each attorney to expand the description of their specific area of prudence responsibility in each invoice entry.<sup>24</sup>
  - Whether retaining multiple outside law firms with responsibility for addressing the prudence of the Iatan project was evidence of duplication.<sup>25</sup>

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<sup>12</sup> *Id.*, pp. 20-21.

<sup>13</sup> *Id.*, pp. 2-22.

<sup>14</sup> *Id.*, pp. 23-31; Rush Direct Testimony, pp. 30, 32, 38, 44, 49, 56, 64, 72, 88, 92, 101-102, 108-109, 116-117, 121, 125.

<sup>15</sup> Rush Rebuttal Testimony, pp. 2-5.

<sup>16</sup> *Id.*, pp. 3-5.

<sup>17</sup> *Id.*, p. 4.

<sup>18</sup> *Id.*, pp. 4-5.

<sup>19</sup> *Id.*, pp. 5-13.

<sup>20</sup> *Id.*, pp. 14-16.

<sup>21</sup> *Id.*, p. 15 (citing caselaw in support of his "opinion").

<sup>22</sup> *Id.*, p. 16.

<sup>23</sup> *Id.*, p. 17.

<sup>24</sup> *Id.*, p. 17.

<sup>25</sup> *Id.*, p. 17.

- Whether it was “reasonable and prudent” for KCPL to engage multiple outside counsel and consultants to address the prudence issue.<sup>26</sup>
- Whether specific KCPL witnesses duplicated the efforts of other witnesses or outside experts.<sup>27</sup>
- Application of the factors outlined in the Commission’s February 21, 2011, Order to each outside consultant expenses.<sup>28</sup>
- Whether, in the opinion of KCPL’s witness, KCPL’s consultants had the level of professional ability, skill, and experience required in this case.<sup>29</sup>
- Whether Staff witness McClanahan’s testimony should be disregarded because KCPL’s invoices allegedly comply with Kansas’ legal requirements and were approved by KCPL’s management.<sup>30</sup>
- Other factors KCPL’s witness believes the Commission “should” consider in evaluating the reasonableness and prudence of the Company’s rate case expense.<sup>31</sup>
- The staffing “required” for the 415 docket.<sup>32</sup>
- Whether KCPL’s decision to retain outside help rather than increasing its internal staff was “unusual”.<sup>33</sup>
- Whether the expertise of external experts was necessary and the fees were reasonable and appropriate.<sup>34</sup>
- Whether there are differences between incurring rate case fees in a regulatory proceeding and incurring fees in standard civil litigation.<sup>35</sup>
- Whether KCPL used an excessive number of attorneys.<sup>36</sup>
- Whether there were any unreasonable duplication of services between the various law firms retained by KCPL.<sup>37</sup>
- What constitutes a “reasonable” comparison of KCPL’s Missouri and Kansas rate case costs.<sup>38</sup>
- The similarity or differences between the rate case issues in the 246 docket and the 415 docket as it relates to overall rate case costs.<sup>39</sup>
- Whether KCPL’s allocation methods were inconsistent among the various consultants and law firms.<sup>40</sup>
- Whether the use of multiple allocations was necessary.<sup>41</sup>

<sup>26</sup> *Id.*, pp. 17-18.

<sup>27</sup> Rush Direct Testimony, pp. 30, 36, 41, 47, 54, 72, 118, 119.

<sup>28</sup> *Id.*, pp. 30-33, 36-38, 41-44, 47-49, 55-56, 60-64, 66-67, 70-72, 86-88, 91-92, 120.

<sup>29</sup> *Id.*, pp. 32,

<sup>30</sup> Rush Rebuttal Testimony, p. 18.

<sup>31</sup> Downey Rebuttal Testimony, August 5, 2011, pp. 6-7.

<sup>32</sup> *Id.*, at pp. 7-10.

<sup>33</sup> *Id.*, at p. 8.

<sup>34</sup> *Id.*, at pp. 10-13.

<sup>35</sup> *Id.*, at pp. 10-11.

<sup>36</sup> *Id.*, at p. 11.

<sup>37</sup> *Id.*, at p. 12.

<sup>38</sup> Weisensee Rebuttal Testimony, August 5, 2011, p. 7.

<sup>39</sup> *Id.*, at p. 8.

<sup>40</sup> *Id.*, at pp. 9-10.

- Whether the allocation process could result in Missouri and Kansas ratepayers being charged for the same expense.<sup>42</sup>
- Whether rate case expense for KCC and CURB in this docket include charges for the 246 and 1025 dockets.<sup>43</sup>
- Whether prudence-related rate case costs should be amortized over ten years, with the remaining rate case costs amortized over four years.<sup>44</sup>
- Whether it is reasonable to conclude that rate case expenses in excess of \$5,669,712 that have been written off KCPL's books should not be recoverable.<sup>45</sup>

11. The above referenced opinion evidence goes far beyond simply presenting the factual data requested by the Commission, as misrepresented by KCPL. Instead, as demonstrated above, each of KCPL's witnesses expressed opinions regarding KCPL's \$9 million amended rate case expense claim, including but not limited to whether the Company's expenses were duplicative, excessive, necessary, reasonable, in conformance with Rule 1.5 of the Kansas Rules of Professional Conduct, a fair and reasonable amount to be recovered from ratepayers, complied with the level of detail required by the Commission, etc.

12. KCPL's entire premise that the only issue to be decided by this Commission is the "*actual*" amount of rate case expense incurred by KCPL and opinion evidence is unnecessary is therefore disingenuous, something KCPL has recently been found guilty of on another issue by this Commission.<sup>46</sup>

13. KCPL argues that the standards for meeting due process requirements vary to assure the basic fairness of each particular action according to its circumstances, and that "the basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time

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<sup>41</sup> *Id.*, at p. 10.

<sup>42</sup> *Id.*, at pp. 11-12.

<sup>43</sup> *Id.*, at pp. 12-13.

<sup>44</sup> *Id.*, at pp. 14-15.

<sup>45</sup> *Id.*, at p. 16.

<sup>46</sup> The Commission recently determined a position taken by KCPL in Docket No. 11-KCPE-581-PRE to be disingenuous as well. Order Granting KCP&L Petition for Predetermination of Rate-Making Principles and Treatment, August 19, 2011, Docket No. 11-KCPE-581-PRE, ¶ 50.

and in a meaningful manner.” KCPL continues: “These requirements are satisfied if the [Commission] provides notice that is reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>47</sup>

14. In its February 21<sup>st</sup> Order, the Commission gave CURB notice of the Commission’s decision to reconsider the rate case expense award and that it would afford CURB and KCPL the opportunity to present evidence and objections at an evidentiary hearing, which the Commission scheduled for September 6-8, 2011. The opportunity to present evidence and objections at an evidentiary hearing includes the right to cross-examine witnesses regarding their testimony and opinions. KCPL seeks, just two weeks prior to the evidentiary hearing, to contravene the notice given to CURB and deny CURB the opportunity to be heard at a meaningful time and in a meaningful manner. KCPL’s attempt to deny CURB this due process right should be denied.

15. Wherefore, CURB respectfully requests that the Commission deny KCPL’s Motion for Decision on Paper Record.

Respectfully submitted,

  
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<sup>47</sup> Motion for Decision on Paper Record, ¶¶ 9-10 (citations omitted).



**CERTIFICATE OF SERVICE**

10-KCPE-415-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic mail this 25<sup>th</sup> day of August, 2011, to the following:

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