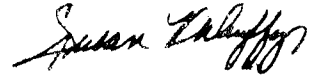


BEFORE THE STATE CORPORATION COMMISSION STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

MAR 08 2010

In the Matter of the Application of)
Sunflower Electric Power Corporation)
and Kansas Electric Power)
Cooperative, Inc. for an Order)
Approving A New Wholesale Power)
Agreement)

Docket No. 06-SEPE-1203-CON



**RESPONSE OF SUNFLOWER ELECTRIC POWER CORPORATION
TO PETITION TO INTERVENE OF
KANSAS ELECTRIC POWER COOPERATIVE, INC
AND MOTION TO OPEN SEPARATE DOCKET**

COMES NOW Sunflower Electric Power Corporation (Sunflower), by and through its attorneys, Mark D. Calcara of the law firm of Watkins Calcara, Chtd., and responds to the Petition to Intervene of Kansas Electric Power Cooperative, Inc. (KEPCo) and Motion to Open Separate Docket and in support thereof states as follows:

I. INTRODUCTION

1. In January, the parties reached an impasse over the implications of the Order issued July 17, 2006 in this Docket and the interpretation of the contractual terms of the Wholesale Power Agreement (WPA) contract interpretation. Some issues involved in this dispute may well be more appropriately decided by the courts as they involve contract interpretation. However, as more fully explained below, the Commission has exclusive jurisdiction to determine whether additional Commission review and approval of the rate charged to KEPCo under the WPA is required when the rate to Sunflower charges its six distribution cooperative members (Members) changes, as it did effective January 1, 2010. Sunflower reads the WPA and the Commission's

2006 order approving the WPA¹ (2006 Order) in this Docket as establishing an automatic adjustment to the KEPCo rate that requires no further filings or Commission approval. If the Commission did not by its 2006 Order approve an automatically adjusting rate, then Sunflower acknowledges that the change in the charges to KEPCo requires application to and approval from the Commission. If that is the Commission's determination, Sunflower seeks further clarification from the Commission as to the form and content of the required review and, ultimately, approval of those changes effective the date of its recent application in this Docket.

2. In an attempt to resolve the dispute with KEPCo, Sunflower made the application in this Docket on February 16, 2010. Sunflower shortly thereafter sought an advisory opinion from Commission Staff² as to the proper interpretation of the 2006 Order, with the hope that if Commission Staff agreed that the 2006 Order approving the WPA constituted an approval of an automatic adjustment clause, the matter would be resolved,³ avoiding the need to tax Commission resources further. Sunflower continues to hope its efforts for an informal solution will work.

II. PETITION TO INTERVENE

3. KEPCo acknowledges that it is already a party in this docket, so its petition to intervene is not necessary. Its pleading is a protest, K.A.R. § 82-1-218(e),

¹ Order Approving Wholesal Power Agreement, KCC Docket No. 06-SEPE-1203-CON, July 17, 2006.

² Sunflower recognizes that an informal staff opinion does not bind the Commission, but hoped it might produce a resolution short of litigation.

³ As KEPCo notes, Sunflower has billed KEPCo for January power based on the new Member rate, but agreed that KEPCo could choose to pay based on the old Member rate while the parties worked through their dispute, subject to interest on the unpaid amount accruing at the contract rate. Otherwise, KEPCo would have been obligated to pay under protest and Sunflower would have been obligated to refund any inappropriate charges, with the same rate of interest.

and as such KEPCo becomes a protestant, K.A.R. § 82-1-204(m) (KEPCo Petition). It need not have intervened again simply to protest the application.

4. As more fully discussed below, if the Commission concludes in its review that approval of the change in charges to KEPCo under the WPA is required, then Sunflower respectfully submits that KEPCo's participation in that review is, by contract, limited to the question of whether the revised charges are discriminatory as provided in Section 4.E of the WPA. If the Commission grants KEPCo's motion to open a new docket in which to review and approve the issues, Sunflower does not object to KEPCo's intervention. In that case, Sunflower respectfully submits that KEPCo's participation in that review is, by contract, limited to the question of whether the charges to KEPCo are discriminatory.

III. MOTION TO OPEN SEPARATE DOCKET

5. Sunflower objects to KEPCo's assertion that this matter must be resolved by creating a new "RTS" docket⁴ and the implication that a full rate filing and review is required. The WPA is a "special contract,"⁵ as evidenced by the Commission's assignment of a "CON" docket number to the initial joint application for approval. If KEPCo had thought the proper designation should have been an "RTS" docket (which is what it argues should be the designation for any application to change the charges)⁶ presumably, it would have said so then. The automatically adjusting terms of the WPA that tie KEPCo's charges to the Sunflower Member rate are exactly the sort of risk management tool (like an ECA) favored by the Commission in special contracts to

⁴ KEPCo Petition, ¶30.

⁵ See Commission Order, *In the Matter of a Commission Investigation into the Proper Ratemaking Treatment for*, Docket No. 01-GIME-813-GIE, October 10, 2001 (Special Contract Order).

⁶ KEPCo Petition, ¶30.

ensure that the arrangement does not over time shift costs to Sunflower's native load (the Members), see Special Contract Order, p. 3.

IV. RESPONSE TO KEPCO ALLEGATIONS

6. In its protest, KEPCo argues that Sunflower's computation of WPA charges using the WHM-10 rate is an "amendment" to the WPA that is not effective unless approved by the Commission.⁷ KEPCo also asserts that "Schedule A of the WPA incorporates Sunflower's Schedule WHM-04 (WHM-04) by reference to establish the rate to be charged to KEPCo by Sunflower," KEPCo Petition, ¶8, asserting that the reference to the WHM-04 rate in Schedule A precludes charges based on any revision to the WHM rate until a new rate case has been filed and approved by the Commission.

7. KEPCo's arguments are ones that go to interpretation of the contract, *i.e.*, does the WPA set a formulary rate (Sunflower Member rate plus adder) or does it say the rate *is* the WHM-04 Sunflower Member rate plus adder, requiring a WPA amendment for it to change? KEPCo also asserts that "[a]bsent any requirement for Sunflower to file and receive Commission approval for a revised rate under the WPA, its ability to ensure that any subsequent rate charges under the WPA remain just and reasonable would be compromised." KEPCo Petition, ¶21. These arguments are also

⁷ See KEPCo Petition, ¶17:

Under Kansas law, a tariff setting forth the terms and conditions of the relationship between a utility company and its customers, when filed with the Commission, is more than a mere contract, it is the law. *Shehi v. Southwestern Bell Telephone Company*, 71 P.U.R.3d 244, 382 F.2d 627 (1967). Once approved by the Commission, the WPA contains the rates and terms governing the relationship between Sunflower and KEPCo as to any service qualifying under the agreement. Amendments to the WPA are not effective unless approved by the Commission. *Southwestern Bell Telephone v. State Corporation Commission of the State of Kansas*, 233 Kan. 375, 664 P.2d 798 (1983).

about what the contract says.⁸ Even if KEPCo concedes this, but it asserts that interpretation of the WPA and Schedule A are “in the exclusive jurisdiction of the Commission, subject only to judicial review of the lawfulness and reasonableness of the Commission's determination. *Grindsted Products v. Kansas City Power & Light Co.*, 21 Kan.App.2d 435, 901 P.2d 20 (1995),” Petition, ¶16.

8. Sunflower respectfully requests that issues of contract interpretation (and proper venue for the questions of interpretation and breach) be deferred, with both parties reserving the right to brief these issues fully when and where appropriate. There is no dispute between the parties regarding the Commission’s exclusive jurisdiction to interpret its 2006 Order and that is what Sunflower requests the Commission address first.

C. The Automatic Adjustment Clause Issue

9. KEPCo’s arguments citing statutory requirements for review of Sunflower’s wholesale rates to non-Members, K.S.A. 66-104d(f), the requirement to charge only filed rates, K.S.A. 66-109, and to obtain Commission approval for rate changes, K.S.A. 66-117, are inapposite to the underlying issue of whether in its 2006 Order the Commission expected Sunflower to make application for a rate change before passing a new Sunflower Member rate on to KEPCo under the WPA.⁹

⁸ Sunflower submits that the issue of whether a filing is required to change the calculation of the WPA rate would never have arisen but for changes in the way the WHM rate is regulated. In other words, in 2006 did the parties agree that Sunflower would bear the cost of a regulatory lag even though the Members were paying a Commission approved rate? Or did the parties assume that once the WHM rate change was effective, it would automatically be paid by KEPCo as well?

⁹ See *Kansas Industrial Consumers Group*, 36 Kan. App. 2d 83 at 90 (2006): “[A]n agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.” *Southwest Gas Corp. v. FERC*, 330 U.S. App. D.C. 238, 145 F.3d 365, 370 (D.C. Cir. 1998) (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 287 U.S. App. D.C. 337, 922 F.2d 865, 871 [D.C. Cir. 1991]).”

10. KEPCo argues that whatever the parties' intent, Sunflower, by law, may not change the charges to KEPCo to reflect a new Sunflower Member rate without further Commission action:

Even if by some twist of reasoning Sunflower were to argue that KEPCo had in some manner agreed to the application of a new rate to substitute for the WHM-04 rate without the oversight of the Commission, such a rate could not go into effect unless and until it were filed with and approved by the Commission. This is the clear mandate of the Kansas Court of Appeals in *Sunflower Pipeline Company v. State Corporation Commission*, 5 Kan.App.2d 715, 624 P2d. 466 (1981).

KEPCo Petition, ¶26. This, of course, is erroneous. There is broad discretion afforded to the Commission to approve automatically adjusting rates without the need for a full rate hearing, *Kansas Industrial Consumers Group v. State Corporation Commission*, *supra*, at 91. Moreover, the WPA is a "special contract."¹⁰ While special contracts often are between a utility and a large industrial customer, that is not always the case, particularly when Sunflower is involved, since its wholesale sales are regulated by the State, not the Federal Energy Regulatory Commission. The automatically adjusting terms of the WPA that tie KEPCo's charges to the Sunflower Member rate are exactly the sort of risk management tool (like an ECA) favored by the Commission in special contracts to ensure that the arrangement does not over time shift costs to the seller's native load (for Sunflower, the Members), see ¶5, *supra*. K.S.A. 66-117 "does not require, on its face, every change in rates to be approved in a full-blown rate hearing." *Id.* at 92.

Sunflower reads the 2006 Order as contemplating immediately effective updated charges to KEPCo once the Sunflower Member rate is lawfully changed (*i.e.*, an automatic adjustment). Sunflower's Request was intentionally simple because it was

¹⁰ See Special Contract Order, *supra*.

made to ensure that no matter the outcome, there is no “filed rate” bar to passing on the Sunflower Member rate change to KEPCo as soon as possible.

11. If, in the Commission’s judgment, it did not assent to an automatic adjustment in the charges to KEPCo under the WPA without a new filing in the WPA docket each time the Sunflower Member rate changed, then the Commission is required to take up this application. Alternatively, the Commission might determine that the 2006 Order requires clarification because it did not expressly discuss the automatically adjusting nature of Schedule A in 2006, or because the parties failed to say some “magic words” in the Joint Application to qualify the WPA as automatically adjusting. Certainly, if the Commission requires review in this Docket, guidance as to the type of information Sunflower is required to provide and the scope of review the Commission intends would be helpful.

IV. CONCLUSION

12. To summarize, there is broad discretion afforded to the Commission to approve automatically adjusting rates without the need for a full rate hearing,¹¹ and K.S.A. 66-117 “does not require, on its face, every change in rates to be approved in a full-blown rate hearing.”¹² Sunflower urges the Commission to find that the WPA filing is a “special contract,” not a “tariff” as KEPCo alleges, and that the automatically adjusting terms tied to the Sunflower Member rate were essential to its approval because the Commission wanted to ensure that the arrangement would not over time shift costs to Sunflower’s native load (the Members).

¹¹ *Kansas Industrial Consumers Group v. KCC*, supra, at 91.

¹² *Id.* at 92.

13. The Commission has exclusive jurisdiction to consider what it intended in the 2006 Order approving the WPA. It clearly has the authority to rule no further Commission approvals of the KEPCo rate are necessary upon the lawful modification of the Sunflower member rate.

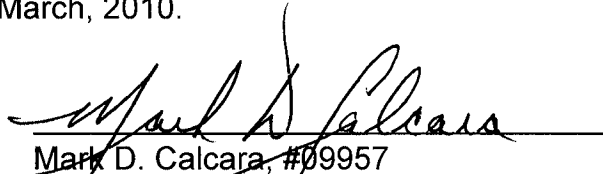
14. Sunflower believes the Commission has sufficient information and knowledge as to the intent of the 2006 Order but should the Commission find it helpful, Sunflower is willing to submit a brief on the issue to assist the Commission in its determination.

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15. For all of the reasons set forth above, Sunflower respectfully requests the following:

- a. That the Commission deny KEPCo's petition to intervene as not necessary, deny KEPCo's motion to open an "RTS" docket, but, if it deems necessary, reassign a 2010 CON docket number to this matter;
- b. Determine whether additional Commission review and approval of the rate charged to KEPCo under the WPA is required when the rate to Sunflower charges its six distribution cooperative members (Members) changes, as it did effective January 1, 2010;.
- c. such other matters as this Commission deems fit.

Respectfully submitted this 8th day of March, 2010.

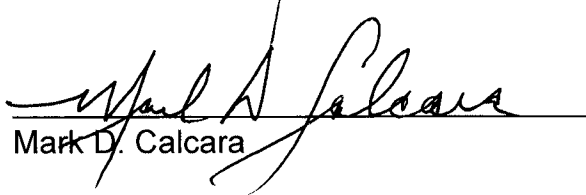


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VERIFICATION

STATE OF KANSAS)
)ss.
COUNTY OF ELLIS)

Mark D. Calcara, being of lawful age and duly sworn, states that he has caused the foregoing Reply of Sunflower Electric Power Corporation to be prepared, that he has read and reviewed the foregoing, and that the contents thereof are true and correct to the best of his knowledge and belief.


Mark D. Calcara

CERTIFICATE OF SERVICE

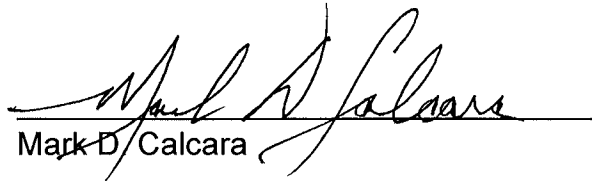
I, the undersigned, hereby certify that a true and correct copy of the above and foregoing was placed in the United States mail, postage prepaid, this 8th day of March, 2010, addressed to the following:

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Mark D. Calcara



SUNFLOWER ELECTRIC POWER CORPORATION

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March 8, 2010

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MAR 08 2010



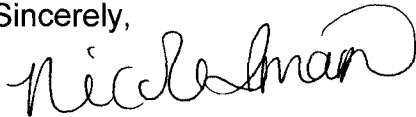
Re: Docket No. 06-SEPE-1203-CON

Ms. Duffy:

Attached please find one original and eight copies of the "Response of Sunflower Electric Power Corporation to Kansas Electric Power Cooperative, Inc.'s Petition to Intervene and Motion to Open Separate Docket" in Docket No. 06-SEPE-1203-CON. This follows the filing submitted via facsimile on March 8, 2010.

If you have any questions or need additional information, please contact Lindsay Shepard at 785.623.6618.

Sincerely,



Nicole Iman
Corporate Services Administrative Assistant

Enclosures (9)

C: Records