

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

In the Matter of a General Investigation to)
Determine the Commission's Jurisdiction) Docket No. 18-GIME-217-GIE
over Municipal Energy Agencies.)

INITIAL BRIEF OF MIDWEST ENERGY, INC.

COMES NOW Midwest Energy, Inc. ("Midwest Energy") and, pursuant to the State Corporation Commission of the State of Kansas' ("Commission") November 28, 2017 Order Opening General Investigation, submits its Initial Brief regarding the Commission's jurisdiction over municipal energy agencies ("MEAs"). For its Initial Brief, Midwest Energy states as follows:

I. Background

1. On November 28, 2017, the Commission issued its Order Opening General Investigation ("Order") in order to determine its jurisdiction over MEAs. This issue initially arose in Docket No. 17-KPPE-092-COM Docket ("17-092 Docket"), wherein Southern Pioneer Electric Company ("Southern Pioneer") filed a complaint against Kansas Power Pool ("KPP"), alleging KPP's attempt to bypass Southern Pioneer's facilities results in a duplication of facilities and, thus, increased rates to Southern Pioneer's customers, which is contrary to the public interest. See Complaint of Southern Pioneer Electric Company Against the Kansas Power Pool (Sept. 8, 2016), 17-092 Docket, p. 1 ("Complaint").

2. On October 3, 2017, KPP filed a Motion to Dismiss in the 17-092 Docket claiming the Commission lacks jurisdiction over the subject matter of the Complaint and the authority to provide the relief requested by Southern Pioneer. See Motion to Dismiss (Oct. 3, 2017), 17-092 Docket, pp. 1, 15.

3. On October 19, 2017, the Kansas Municipal Energy Agency ("KMEA") sought to intervene in the 17-092 Docket stating that the Commission's investigation into the complaint against KPP may involve resolving jurisdictional questions that directly impact KMEA's ability and duty to serve its member cities, such as the obligation of KMEA to provide for the economic procurement of transmission capacity. See Petition to Intervene of Kansas Municipal Energy Agency (Oct. 19, 2017), 17-092 Docket, p. 4. Further, KMEA questioned whether the Commission had ever examined the specific enumerated statutory powers granted to an MEA pursuant to K.S.A. 12-885 *et seq.* Id.

4. On October 23, 2017, Southern Pioneer and Mid-Kansas Electric Company, LLC ("Mid-Kansas") jointly filed their response to KMEA's Petition to Intervene. In addition to objecting to KMEA's intervention, Southern Pioneer and Mid-Kansas suggested that the Commission open a general investigation into the jurisdictional issues presented in the 17-092 Docket in order to allow all interested parties the opportunity to participate. See Response of Southern Pioneer Company and Mid-Kansas Electric Company, LLC to Petition to Intervene of Kansas Municipal Energy Agency (Oct. 23, 2017), 17-092 Docket, p. 1. The joint respondents further suggested the Commission stay the complaint proceeding until a jurisdictional determination is made in the general investigation docket. Id.

5. The Commission agreed with Southern Pioneer's and Mid-Kansas' suggestion to open a general investigation regarding the Commission's jurisdiction over MEAs. Specifically, the Commission requested briefs by interested parties on the following issues:

- a) Do the MEAs' enumerated powers under K.S.A. 12-895 fall outside the scope of the Commission's jurisdictional authority under K.S.A. 12-8,111?
- b) Does K.S.A. 12-855 [sic] *et seq.* limit the Commission's jurisdiction over MEAs?

- c) Other than for purposes of certification under K.S.A. 66-131, is the Commission's authority to regulate MEAs the same as its authority to regulate public utilities, including actions taken by MEAs pursuant the MEA Act?
- d) List the areas of operation where the Commission lacks authority or jurisdiction to regulate an MEA as if it were a public utility. State the legal authority denying the Commission's authority or jurisdiction.

Order at p. 3.

6. In the 17-092 Docket, KMEA filed its Response on Intervention and Brief Regarding Jurisdiction on October 24, 2017. On October 31, 2017, KPP filed its Reply Brief in Support of Its Motion to Dismiss. On November 3, 2017 Southern Pioneer and Mid-Kansas filed their Response to Kansas Municipal Energy Agency Response on Intervention and Brief Regarding Jurisdiction ("Southern Pioneer's and Mid-Kansas' Joint Response"). Also on November 3, 2017, Staff filed its Brief in Response to Kansas Power Pool's Motion to Dismiss ("Staff's Brief"). In its November 28, 2017 Order issued in the instant docket, the Commission took administrative notice of the aforementioned jurisdictional briefs filed in the 17-092 Docket. Order at 2. Further, the Commission stated that to the extent the parties have already briefed the above questions in the 17-092 Docket, additional briefing is permissible but not required. *Id.* at 3. For the sake of administrative efficiency, Midwest Energy adopts and incorporates the legal arguments and authorities contained in Southern Pioneer's and Mid-Kansas' Joint Response and Staff's Brief as these pleadings support Midwest Energy's position on the Commission's questions in this general investigation. For its additional argument, Midwest states:

II. Argument

- a) *Do the MEAs' enumerated powers under K.S.A. 12-895 fall outside the scope of the Commission's jurisdictional authority under K.S.A. 12-8,111?*

7. Pursuant to K.S.A. 12-885, "two or more cities may create a municipal energy agency for the purpose of planning, studying and developing supply, transmission and distribution facilities and programs and for the purpose of securing an adequate, economical and reliable supply of electricity and other energy and transmitting the same for distribution through the distribution systems of such cities." K.S.A. 12-895 enumerates the powers of an MEA to carry out the purpose for which the MEA was created; namely, the generation, transmission, and distribution of electricity to its member cities. As such, MEAs constitute public utilities as that term is defined at K.S.A. 66-104. Specifically, K.S.A. 66-104 states that a public utility includes any entity engaged in "the production, transmission, delivery or furnishing of heat, light, water or power." Therefore, the MEAs' role in supplying power to cities falls squarely within the definition of a public utility, which is within the Commission's purview.

8. Further, nothing in the Kansas Municipal Energy Agency Act ("KMEAA"), K.S.A. 12-885 *et seq.*, precludes the Commission from exercising its power and authority to regulate how an MEA carries out the activities listed in K.S.A. 12-895, except for certification under K.S.A. 66-131. Specifically, K.S.A. 12-8,111 states:

(a) The provisions of K.S.A. 12-885 to 12-8,109, inclusive, and any provisions amendatory or supplemental thereto, shall constitute a certificate of public convenience, and any municipal energy agency is authorized to operate as a public utility pursuant to such provisions without obtaining a certificate described in K.S.A. 66-131 or any amendments thereto.

(b) Except with respect to such certificate described in subsection (a), ***any municipal energy agency*** created under the provisions of K.S.A. 12-885 to 12-8,109, inclusive, and any provisions amendatory or supplemental thereto, ***shall be subject to the jurisdiction of the state corporation commission in the same manner as a public utility.*** (Emphasis added.)

While the KMEAA gives MEAs a way to obtain a public utility certificate outside of the Commission's normal process pursuant to K.S.A. 12-8,111(a), all other aspects of Commission jurisdiction over MEAs as public utilities are specifically retained in the statute pursuant to K.S.A. 12-8,111(b).

9. Moreover, there is no conflict in the statutory framework between the KMEAA and the Commission's jurisdiction. The MEAs and the Commission each have their own distinct role, neither of which interfere with the other. MEAs have the ability to do all the things enumerated under the KMEAA, and the Commission has the power to regulate how the MEAs carry out those activities. Therefore, except for the public utility certification process, the MEAs' enumerated powers under K.S.A. 12-895 do not fall outside the scope of the Commission's jurisdictional authority under K.S.A. 12-8,111.

b) *Does K.S.A. 12-855 [sic] et seq. limit the Commission's jurisdiction over MEAs?*

10. Except for the singular exception of certification, K.S.A. 12-8,111(b) explicitly states that MEAs are subject to the Commission's jurisdiction in the same manner as a public utility. Because this statutory language is clear and unambiguous, legislative intent may be determined by the plain language of the statute. See *Merryfield v. Sullivan*, 301 Kan. 397, 343 P.3d 515 (Kan. 2015) ("The fundamental rule of statutory interpretation is that the intent of the legislature is dispositive if it is possible to ascertain that intent."). Here, it is possible to ascertain the manifest intent of the legislature to subject MEAs to the Commission's jurisdiction in the same manner as public utilities through the express language of K.S.A. 12-8,111(b). Therefore, the KMEAA only limits the Commission's authority under K.S.A. 66-131 to require MEAs to obtain a certificate of public convenience and necessity before operating as a public utility.

c) *Other than for purposes of certification under K.S.A. 66-131, is the Commission's authority to regulate MEAs the same as its authority to regulate public utilities, including actions taken by MEAs pursuant the MEA Act?*

11. Yes, except for purposes of certification under K.S.A. 66-131, the Commission's authority to regulate MEAs is the same as its authority to regulate public utilities. In Staff's Brief filed in the 17-092 Docket, for example, Staff addresses the Commission's broad jurisdiction and

authority to regulate public utilities, including MEAs. See Staff's Brief at 6-8. Then Staff sets out a list of specific areas of authority for which the Commission may exercise its jurisdiction and authority over MEAs, such as rates, services, rules and regulations, contracts, tariff interpretation, transmission issues, and complaints, to name a few. See Staff's Brief at 8-11. This list should not be construed as exhaustive, but rather, as illustrative of the Commission's broad authority to supervise and control jurisdictional public utilities. See K.S.A. 66-101. The Commission's broad authority over the rates and transmission of MEAs includes the issue of transmission bypass, which is the underlying issue of the 17-092 Docket. Midwest Energy maintains it is both appropriate and relevant for the Commission to assert its regulatory authority over MEAs on the issue of transmission bypass, particularly where the proposed bypass results in the construction of duplicative electric facilities by public utilities. See, e.g., Staff's Brief at 10.

12. For example, in Docket No. 96-SEPE-680-CON ("96-680 Docket"), the Commission was confronted with a situation similar to the 17-092 Docket. In the 96-680 Docket, Sunflower Electric Power Corporation ("Sunflower") filed an application for approval of an interconnection and power supply agreement with Norton-Decatur Cooperative Electric Company, Inc. ("Norton-Decatur") and the City of Hill City, Kansas ("Hill City"), effectively bypassing Midwest Energy's existing transmission facilities. In this case, the Commission found that the proposed new substation and interconnection facilities intended to be built by Sunflower and Norton-Decatur to serve Hill City were unnecessarily duplicative and economically wasteful and, therefore, denied Sunflower's application. See, e.g., Order on Reconsideration (Oct. 13, 1997), 96-680 Docket, para. 14.

13. While the facts underlying the 96-680 and 17-092 Dockets are not entirely analogous, the issue of the Commission's authority to prevent the construction of unnecessarily

duplicative and economically wasteful transmission facilities is precisely on point. Therefore, although the purpose of the instant docket is to determine the extent of the Commission's jurisdiction over MEAs, the Commission should not lose sight of its obligation to ensure reasonably efficient and sufficient service at just and reasonable rates, the scope of which clearly encompasses the construction of duplicative electric facilities. See K.S.A. 66-101b; see also K.S.A. 10-1203 and K.S.A. 66-1,171 *et seq.*

14. In addition to the 96-680 Docket, the Commission's policy against bypass and the unreasonable and wasteful duplication of facilities has also been articulated in a number of natural gas pipeline cases. Regarding natural gas pipeline bypass, the Commission determined that to allow a public utility to build new and duplicative facilities in the certificated service territory of the incumbent public utility in order for certain customers to bypass existing facilities would result in increased rates to the remaining customers on the system, which is unjust and unreasonable.¹

15. Finally, over the past several years, KPP, an MEA, has voluntarily participated in numerous Commission dockets, including as an applicant and not mere intervenor.² Similarly, KMEA has submitted to the Commission's jurisdiction on multiple occasions in dockets before the Commission.³ Such participation indicates that these MEAs understand they are subject to the Commission's jurisdiction as contemplated in the KMEAA.

d) *List the areas of operation where the Commission lacks authority or jurisdiction to regulate an MEA as if it were a public utility. State the legal authority denying the Commission's authority or jurisdiction.*

¹ See, e.g., *In the Matter of the Complaint of Kansas Power & Light Company v. Getty Gas Gathering, Inc. and the City of Augusta, Kansas*, Docket No. 153,664-U (Jul. 12, 1998), pp. 10, 13; *In the Complaint of United Cities Gas Company Against Brock Exploration Corp.*, Docket No. 193,478-U (May 29, 1996), Order, ¶ 33.

² See, e.g., Docket Nos. 09-KPPE-255-CON, 11-MKEE-011-COM, 11-GIME-597-GIE, 12-MKEE-380-RTS, 12-KPPE-630-MIS, 12-MKEE-650-TAR, 14-MKEE-170-TAR, 16-KPPE-470-PRE, 17-KPPE-092-COM.

³ See, e.g., Docket Nos. 92-KAME-451-SEC, 94-KAME-016-SEC, 13-GIME-256-CPL, 14-SEPE-287-CON, 18-KAME-156-COM.

16. The Commission lacks authority to regulate an MEA as if it were a public utility only for purposes of certification under K.S.A. 66-131.

17. As explicitly stated in K.S.A. 12-8,111(b), MEAs are subject to the Commission's jurisdiction in the same manner as public utilities. Therefore, the Commission has the full power, authority, and jurisdiction to supervise and control MEAs, and is empowered to do all things necessary and convenient for the exercise of such power, authority, and jurisdiction. See K.S.A. 66-101 *et seq.* The only reservation to the Commission's jurisdiction is the public utility certification process. See K.S.A. 66-8,111(a).

Respectfully submitted,

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VERIFICATION
(K.S.A. 53-601)

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

I, Susan B. Cunningham, being of lawful age, hereby state that I have caused the foregoing Initial Brief of Midwest Energy, Inc. to be prepared, that I have read and reviewed the Initial Brief, and that the contents thereof are true and correct to the best of my information, knowledge and belief.

/s/ Susan B. Cunningham

Susan B. Cunningham

Executed on the 15th day of December, 2017

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Initial Brief of Midwest Energy, Inc. was electronically served on this 15th day of December, 2017, to the persons appearing on the Commission's service as last modified on December 13, 2017.

/s/ Susan B. Cunningham

Susan B. Cunningham