

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

In the Matter of a General Investigation     )  
Regarding the Acceleration of Replacement     )  
of Natural Gas Pipelines Constructed of     )     Docket No. 15-GIMG-343-GIG  
Obsolete Materials Considered to be a     )  
Safety Risk.     )

**COMMISSION STAFF'S BRIEF ON JURISDICTIONAL AUTHORITY**

COMES NOW Staff of the State Corporation Commission of the State of Kansas (Staff and Commission, respectively) and submits its Brief on Jurisdictional Authority. In support hereof, Staff states as follows:

**I. Background**

1. On March 12, 2015, the Commission issued its Order Opening General Investigation. In its Order, the Commission initiates a proceeding to investigate programs that will allow Kansas local distribution gas utility companies (LDCs) to accelerate replacement of natural gas pipelines constructed of obsolete materials and considered to be a safety risk.<sup>1</sup>

2. Attached to the Commission's Order was a Report and Recommendation (R&R) from Staff. In its R&R, Staff presents a straw-man proposal for accelerated pipeline replacement programs. As part of the proposal, Staff suggests an LDC could request either of two alternative ratemaking mechanisms: 1) a surcharge allowing ongoing recovery of actual costs through an annual filing or 2) a deferred cost recovery mechanism that would track costs (including

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<sup>1</sup> Order Opening General Investigation, March 12, 2015, Ordering Clause A.

depreciation expenses and carrying costs) through a regulatory asset for inclusion in rates in the LDC's next general rate proceeding.<sup>2</sup>

3. To facilitate its general investigation, the Commission requested the parties address a number of questions through comments.<sup>3</sup> The Commission also specifically requested the parties initially address the Commission's jurisdictional authority to establish alternative rate making methodologies for pipe replacement before submitting further comments.<sup>4</sup>

4. On March 19, 2015, following email correspondence between the parties and Prehearing Officer Van Blaricum, the Commission issued its Order Setting Procedural Schedule. The Scheduling Order requires the parties to submit initial briefs on the Commission's jurisdictional authority to establish alternative ratemaking methodologies for pipe replacement.<sup>5</sup> The Scheduling Order also notes the Commission will set further proceedings, if necessary, following an order on the jurisdictional question.<sup>6</sup>

## **II. Legal Analysis**

5. In its Order Opening General Investigation, the Commission requested the parties brief the following single issue: "Does the Commission have the jurisdictional authority to establish alternative rate making methodologies for pipe replacement that go beyond the parameters established under the Gas Safety and Reliability Policy Act?"<sup>7</sup> As described below, the Commission, under its broad statutory ratemaking powers, does have this authority.

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<sup>2</sup> Order Opening General Investigation, Staff Report & Recommendation Attachment, February 2, 2015, Attachment 1, p. 3.

<sup>3</sup> Order Opening General Investigation, ¶ 4.

<sup>4</sup> Order Opening General Investigation, ¶ 4.

<sup>5</sup> Order Setting Procedural Schedule, March 19, 2015, ¶¶ 2-3. (Scheduling Order, ¶¶ 2-3.)

<sup>6</sup> Scheduling Order, ¶ 3.

<sup>7</sup> Order Opening General Investigation, ¶¶ 3-4.

**A. Kansas Law Allows the Commission to Establish Alternative Ratemaking Mechanisms.**

6. This Commission’s general ratemaking authority is broad and plainly authorized under Kansas law. The Kansas Legislature has granted the Commission “full power, authority and jurisdiction to supervise and control the natural gas public utilities . . . .”<sup>8</sup> In exercising such power, the Commission has the “power to . . . require all natural gas public utilities . . . to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service . . . .”<sup>9</sup> Furthermore, “...all grants of power, authority and jurisdiction...made to the commission [within the Natural Gas Act] shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of [the] act are expressly granted to and conferred upon the commission.”<sup>10</sup>

7. Kansas utilities typically request to change rates through a general rate filing described in K.S.A. 66-117 and in accordance with the Commission’s rules of practice and procedure.<sup>11</sup> However, the Commission is not confined to this methodology. Though K.S.A. 66-117 generally requires any change in rates to be approved upon individual application, the statute’s language expressly allows the Commission to prescribe alternative methodologies.<sup>12</sup> In fact, the Kansas Court of Appeals has specifically recognized this authority and found such methodologies may include mechanisms such as surcharges and riders that allow for automatic rate adjustments outside a general rate proceeding.<sup>13</sup>

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<sup>8</sup> K.S.A. 66-1,201.

<sup>9</sup> K.S.A. 66-1,202.

<sup>10</sup> K.S.A. 66-1,207.

<sup>11</sup> K.A.R. 82-1-235.

<sup>12</sup> K.S.A. 66-117(a), “*Unless the state corporation commission otherwise orders...no...public utility...shall make effective any changed rate...except by filing the same with the commission.*”

<sup>13</sup> *Kansas Indus. Consumers Group, Inc. v. The State Corp. Comm’n of the State of Kansas*, 36 Kan. App. 2d 83, 92-94, 138 P.3d 338, 347-48 (2006) (KIC Case).

**B. The Gas System Reliability Surcharge: K.S.A. 66-2201, et seq.**

8. The Gas System Reliability Surcharge (GSRS) was passed by the Kansas legislature in 2006.<sup>14</sup> Under the GSRS statute, Kansas LDCs are allowed to pass through the costs of certain natural gas utility plant projects as a surcharge on customers' monthly bills. LDC's are not required to recover such costs exclusively through the GSRS.<sup>15</sup> Rather, the GSRS mechanism is an accommodation *available* to LDCs for more timely recovery of expenses. Under the statute, eligible projects are limited to infrastructure projects to comply with state or federal safety requirements<sup>16</sup> and "facility relocations required due to construction or improvement of a highway, road, street, public way or other public work."<sup>17</sup>

9. The GSRS has a number of terms that are favorable to LDCs and limit the review process the Commission would traditionally employ. When an LDC makes a GSRS filing, Staff's examination is limited to whether the submitted costs "are in accordance with the provisions of K.S.A. 66-2202 through 66-2204 . . . and to confirm proper calculation of the proposed charge."<sup>18</sup> Staff must file a report on its findings within 60 days, and the Commission must issue an order within 120 days.<sup>19</sup> If the two items listed above are satisfied, the Commission is statutorily bound to allow recovery through the GSRS.<sup>20</sup>

10. Further limiting the Commission's discretion is the restrictive and prescriptive list of items it may consider in determining the appropriate level of pretax revenue an LDC will be

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<sup>14</sup> K.S.A. 66-2201, et seq.

<sup>15</sup> K.S.A. 66-2203(a): "...a natural gas public utility...may file a petition and proposed rate schedules with the commission to establish or change GSRS rate schedules that will allow for the adjustment of the natural gas public utility's rates and charges to provide for the recovery of costs for eligible infrastructure system replacements."

<sup>16</sup> K.S.A. 66-2202(f)(1)-(2).

<sup>17</sup> K.S.A. 66-2202(f)(3).

<sup>18</sup> K.S.A. 66-2204(b)(2).

<sup>19</sup> K.S.A. 66-2204(b)(2)-(3).

<sup>20</sup> K.S.A. 66-2204(b)(4).

able to recover through the GSRS.<sup>21</sup> For example, under certain circumstances, the Commission is bound to calculate a return on equity based on an average of the filed positions of the LDC and Staff in the LDC's most recent general rate proceeding.<sup>22</sup> In any other context, the Commission would not use this methodology, but its hands are tied under the statute.

11. As a tradeoff to these limitations on the Commission's typical broad ratemaking authority, the legislature explicitly limited the LDCs' use of the GSRS mechanism. The GSRS statute states that "GSRS shall be charged to customers as a monthly fixed charge and not based on volumetric consumption. Such monthly charge shall not increase more than \$.40 per residential customer over the base rates in effect for the initial filing of a GSRS. Thereafter, each filing shall not increase the monthly charge more than \$.40 per residential customer over the most recent filing of a GSRS...." Therefore, when an LDC *chooses* to recover costs through the accommodating terms of the GSRS mechanism, the LDC can only apply for cost-recovery up to a certain level.

12. Because any new separate program would contain entirely different terms – and would not change the terms of the GSRS mechanism – the new program would not conflict with the GSRS mechanism. The plain language of the GSRS statute does not state that it is the exclusive manner for LDCs to recover infrastructure replacement costs. It is simply a voluntary accommodation that an LDC may *choose* to utilize to effectuate cost-recovery between general rate cases. Any new cost-recovery mechanism would be an entirely distinct program with a different purpose and different terms. The programs described in Staff's straw-man proposal would not serve as an extension or expansion of the GSRS mechanism in any way.

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<sup>21</sup> K.S.A. 66-2204(d)(1)-(9): "In determining the appropriate pretax revenue, the commission shall consider *only* the following factors . . . ." (Emphasis added.)

<sup>22</sup> K.S.A. 66-2204(d)(9).

**C. The Plain Language of the Gas System Reliability Surcharge Statute Does Not Preclude the Commission from Creating an Entirely Separate Cost-Recovery Mechanism for Replacement of Pipelines Constructed of Obsolete Materials.**

13. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.<sup>23</sup> When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it *and will not read into the statute something not readily found in it*. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent.<sup>24</sup>

14. Therefore, because the Commission unquestionably has broad authority to establish alternative ratemaking methods, the question is whether the proposed alternative ratemaking mechanisms (surcharge or regulatory asset) for pipeline replacement, conflict with the explicit statutory language of the GSRS statute. Staff submits that a separate program for recovery of these costs does not conflict with the plain language of the GSRS statute.

15. First and most importantly, the GSRS statute, by its express terms, does not purport to be the exclusive means of cost-recovery for all infrastructure system replacement. The statute merely provides one optional avenue of cost recovery in the time between rate cases for a specific subset of infrastructure repair and replacement. LDCs are not bound to utilize this accommodation.

16. Furthermore, the purpose of the GSRS is entirely separate and distinct from the scope of a system-wide obsolete pipeline replacement program. GSRS projects are very specifically defined to include only 1) infrastructure projects to comply with state or federal

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<sup>23</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

<sup>24</sup> *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009). (Emphasis added.)

safety requirements and 2) facility relocations required due to public works projects. Staff's proposed accelerated pipeline replacement program, on the other hand, would cover system-wide replacement of all pipeline infrastructure constructed of obsolete materials considered to be a safety risk. Therefore, the scopes of the programs are quite different, with different goals for each, as well.

17. Finally, the GSRS is an entitlement offered to LDCs that they are not required to utilize. As noted in paragraphs 7 and 8 above, the GSRS program contains a number of very favorable terms to LDCs that restrict the KCC's traditional ratemaking powers. These terms are balanced out by a cap that limits the use of GSRS. Any new and separate mechanism would not change the \$0.40 cap on the LDCs' use of GSRS and, therefore, would not conflict with the plain language of the GSRS statute.

### **C. The *Expressio Unius Doctrina* Does Not Apply in this Context**

18. The *expressio unius* doctrine – to express or include one thing implies the exclusion of the other<sup>25</sup> – is a canon of interpretation used to determine legislative intent when it is not otherwise discernable from the words of the statute.<sup>26</sup> The plain language of the GSRS statute is not ambiguous, and, therefore, the Commission need not apply the doctrine. Furthermore, in the KIC case, the Kansas Court of Appeals held that the doctrine should not be applied to the Commission's ratemaking powers because the legislature has granted the Commission broad quasi-legislative ratemaking authority, and that broad grant of power overcomes any argument that the Commission has not been expressly authorized to prescribe a specific ratemaking methodology.<sup>27</sup> Therefore, the Commission's broad ratemaking authority

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<sup>25</sup> *Expressio unius est exclusio alterius*, Black's Law Dictionary (10th ed. 2014).

<sup>26</sup> *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998.)

<sup>27</sup> See *KIC v. KCC*, 36 Kan. App. 2d at 97.

acts as a backstop where the legislature has not explicitly prescribed the method in which that ratemaking authority should be wielded.

19. The Kansas legislature has created various surcharges by statute. However, the legislature has not specifically authorized a surcharge for accelerated replacement gas pipelines constructed of obsolete materials. Under the holding in the KIC Case, the absence of specific statutory authorization does not limit the Commission's ability to create a surcharge for accelerated replacement of gas pipelines constructed of obsolete materials. Only an express statutory limitation will defeat the legislature's grant of broad ratemaking authority to the Commission. The GSRS statute does not contain an express statutory limitation.

**D. Even If the Commission Finds the *Expressio Unius* Doctrine Excludes a New Infrastructure Replacement Surcharge, a Regulatory Asset Mechanism Is Unambiguously Allowed under the Plain Language of the GSRS Statute.**

20. The most plausible argument for applying the *expressio unius* doctrine arises from the final provision of the GSRS statute. The provision states, "Nothing in this section shall be construed as limiting the authority of the commission to review and consider infrastructure system replacement costs along with other costs during any general rate proceeding of any natural gas public utility."<sup>28</sup> While the actual plain language of the statute does not support this reading, one might contend that the law implies the GSRS is the only ratemaking mechanism to consider gas system infrastructure replacement costs *outside* a general rate proceeding (an application of the *expressio unius* doctrine because it relies on an implication, rather than the words of the statute).

21. Even if such an interpretation were followed, a regulatory asset mechanism would still be permissible, as that mechanism would not set rates outside a general rate proceeding. A regulatory asset would simply track costs associated with pipeline replacement projects. The

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<sup>28</sup>K.S.A. 66-2204(i).



Commission would then consider those costs in the LDC's next rate case and determine whether and how they should be incorporated into rates. However, as explained above, the Commission has authority to establish *any* reasonable alternative ratemaking methodology, and the plain language of the GSRS statute does not conflict with this broad authority.

WHEREFORE Staff submits its *Brief on Jurisdictional Authority* and recommends the Commission find it has authority to establish alternative ratemaking mechanisms, including both surcharges and deferred cost recovery mechanisms, for recovery of costs associated with accelerated replacement of natural gas pipelines constructed of obsolete materials considered to be a safety risk.

Respectfully submitted,




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**VERIFICATION**

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  ) ss.  
COUNTY OF SHAWNEE            )

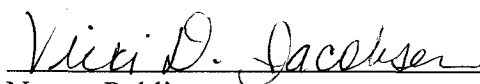
Andrew French, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Commission Staff's Brief on Jurisdictional Authority*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



\_\_\_\_\_  
Andrew French, #24680  
Litigation Counsel  
The State Corporation Commission  
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 16<sup>th</sup> day of April, 2015.



  
\_\_\_\_\_  
Notary Public

My Appointment Expires: June 30, 2018

## CERTIFICATE OF SERVICE

15-GIMG-343-GIG

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing docket was served via electronic service this 17th day of April, 2015, to the following:

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