

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

In the Matter of the Application of The Empire )  
District Electric Company's Proposed Tariff )  
Revision of the Credit/Debit Card Transaction )                   Docket No. 20-EPDE-459-TAR  
Amounts. )

**CURB'S RESPONSE TO STAFF'S REPORT AND RECOMMENDATION**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and submits its Response to the Report and Recommendation ("R&R") filed by the Staff of the Kansas Corporation Commission ("Staff") in the above-captioned docket on October 20, 2020.<sup>1</sup>

**I. Background**

1. On May 8, 2020, the Empire District Electric Company ("Empire" or "Company") filed an application seeking approval of revised third party fees for credit and debit card transactions used by customers to pay utility bills, and submitted proposed tariffs to reflect fees established in 2013.<sup>2</sup> Currently, Empire's tariff on credit card fees states that the fee for all customers is \$3.95. The proposed fee in this application is \$2.25 per transaction for residential customers and \$13.00 for commercial customers, with a \$10,000 transaction limit. These amounts are also the fees that customers have been paying since 2013.

2. CURB filed a Petition for Intervention on May 11, 2020, and the Kansas Corporation Commission ("Commission") granted the intervention on May 28, 2020.

3. On October 1, 2020, Empire filed another application related to its tariffs on credit card fees in Docket No. 21-EPDE-134-TAR ("21-134 Docket").<sup>3</sup> This application again asks the

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<sup>1</sup> Notice of Filing of Staff's Report and Recommendation, Docket No. 20-EPDE-459-TAR, October 20, 2020. ("20-459 R&R").

<sup>2</sup> Application for The Empire District Electric Company, Docket No. 20-EPDE-459-TAR, May 8, 2020.

<sup>3</sup> Application for the Empire District Electric, Docket No. 21-EPDE-134-TAR, October 1, 2020. ("21-134 Application")

Commission to approve a new credit card fee tariff, but this time as a result of Empire's agreement with its new third party vendor, KUBRA Data Transfer Ltd. ("KUBRA"), which was entered into on October 1, 2019.<sup>4</sup> Under that agreement, residential customers will be charged \$1.75 per transaction with a \$600.00 transaction limit. Commercial customers will be charged \$7.95 per transaction with a limit of \$1,200. The changes represent a decrease from the current fees and lower transaction limits. This application is still pending before the Commission.

4. On October 6, 2020, the Commission issued an order in Docket No. 20-EPDE-448-MIS ("20-448 Docket") that granted Empire's request to waive/reimburse the credit card fees paid by customers through the end of 2020.<sup>5</sup> This waiver was requested and granted in response to the COVID-19 pandemic.

5. On October 20, 2020, Staff filed notice of its R&R in the present docket.<sup>6</sup> Staff reviewed Empire's proposed tariff and the rules and regulations on third party fee collection for credit card transactions. Staff ultimately recommended that the Commission accept the proposed tariff revisions. However, during the review, Staff noted that Empire failed to receive Commission approval for fees established in 2013, which are still being paid today. Staff stated that this constituted a violation of the Filed Rate doctrine, K.S.A. 66-109, and Commission orders out of the 04-GIMX-651-GIV Docket ("04-651 Docket") for this unauthorized change and deviation from Empire's filed tariffs.<sup>7</sup> Staff analyzed the discrepancy and determined that residential ratepayers were not adversely impacted by the change because the filed \$3.95 fees is higher than the \$2.25 fee that residential customers have been paying. Meanwhile, commercial customers,

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<sup>4</sup> 21-134 Application at pg. 4-5.

<sup>5</sup> Order on Empire District Electric Company Application, Docket No. 20-EPDE-448-MIS, October 6, 2020. ("20-448 Order")

<sup>6</sup> 20-459 R&R.

<sup>7</sup> Id. at pg. 1 of R&R.

including small commercial customers, have been overpaying for fees compared to the filed tariff. As a result, Staff recommended that the Commission order Empire to refund the over collection amount, plus interest, that these customers paid through October 16, 2020.<sup>8</sup> Staff further stated that the refund should come out of Empire's shareholder profits and that the negative credit impact from this and Empire's forthcoming with this violation warranted no further penalties.

## **II. CURB's Response to Staff's R&R**

6. CURB reviewed the application and Staff's R&R from the perspective of residential and small commercial ratepayers. CURB supports Staff's analysis of the proposed tariff and the conclusion to approve the same. Staff states that Empire's proposal in this docket falls within a range of fees used by other utilities in Kansas. CURB also finds Empire's proposed fees to be reasonable because the fees fall in the middle of the pack compared to other utilities. Additionally, Empire boasts the highest transaction limit of all utilities that charge third party credit card fees.<sup>9</sup> This higher transaction limit allows CURB constituents to pay larger bills in fewer transactions, thus lowering the overall impact of these fees on customers' bills.

7. CURB also supports Staff's analysis and recommendations regarding the determination and impact of Empire's violations. Residential customers benefited from the fee change in 2013 by paying a lower fee than the filed tariff fees. CURB agrees with Staff that the savings for residential customers does not require further action or restitution. In regards to commercial customers, a refund with interest is an appropriate remedy in this docket. CURB further emphasizes the need to fund the refund with shareholder profits. Empire's customers are not to blame for the over collection, but rather Empire's failure to adequately monitor its fees and

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<sup>8</sup> 20-459 R&R at pg. 8.

<sup>9</sup> *See Id.* at pg. 5.

tariffs for the last seven years. Credit card transaction fees are already confined to the individual customer who uses that option to pay their bills. The entirety of Empire's customer base should not have to bear the costs for these fees, especially those who do not use that service. If approved by the Commission, CURB is hopeful that Empire will diligently and swiftly act to make all the affected commercial customers whole as recommended by Staff.

8. During its review, CURB has encountered an unusual problem. At the root of this docket is the goal of correcting the long-standing violations associated with its failure to obtain required Commission approval of changes to certain tariffs. However, approval of the proposed tariff in this docket does not necessarily prevent additional violations in the near future. Empire has filed another application in the 21-134 docket to change its credit card fees because it entered into a new agreement with KUBRA. The KUBRA fees have not yet been approved by the Commission. More importantly, the KUBRA fees are different than the fees proposed in this docket. CURB does not intend to offer its opinion on the KUBRA rates in this docket, but makes the reference to illustrate its impending concerns. Charging the new KUBRA fees prior to approval in 21-134 would likely result in further violations by Empire, regardless of whether the proposed tariff is approved in the present docket. Fortunately, customers are not currently being charged or are being reimbursed credit card fees until the end of 2020 as a result of the order in the 20-448 Docket. A decision in the 21-134 docket is not due until May 31, 2021.<sup>10</sup> Although Empire has the option to request an extension of the credit card fee waiver into 2021,<sup>11</sup> if Empire resumes charging customers the transaction fees before a resolution is reached in 21-134, Empire would once again be in violation of the rules and regulations, similar to how it has been since 2013: the fees proposed

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<sup>10</sup> Order Granting CURB's Petition to Intervene, Discovery Order, Protective Order, Suspension Order, Docket No. 21-EPDE-134-TAR, October 20, 2020.

<sup>11</sup> 20-448 Order at pg. 6.

in 21-134 would not match the fees in its approved tariff; alternatively, the fees proposed in the current docket, *even if* approved, are not revenue neutral in comparison to the fees imposed by the new vendor.

9. While CURB appreciates Empire's efforts to bring the issue to light and to best serve its customers, CURB is particularly troubled by the timeline that led to this situation. Empire has been charging fees different than its filed tariff since 2013, resulting in nearly 1,300 overcharged transactions by commercial customers.<sup>12</sup> In August 2018, Empire began a request for proposal ("RFP") process to get a new third party vendor for its paperless billing services.<sup>13</sup> This process led to the October 2019 agreement with KUBRA and a Scope of Work Agreement in February 2020.<sup>14</sup> It is not until May 2020 that parties and the Commission receive a filing about Empire's credit card fees, and is it limited to the fees established in 2013. Finally, in October 2020, the 2019 agreement with KUBRA is brought to the Commission for approval. CURB has issued discovery in 21-134, pending response, to gain insight into the timing of the two applications from the Company's perspective.

10. CURB certainly understands the challenges that the COVID-19 pandemic has presented and appreciates Empire shifting focus from other projects to work on its own set of waivers to help customers. However, Empire's decision to file the present docket three months after having finalized a work plan with KUBRA is perplexing. But for the 20-448 order and waivers, Empire was set to be in violation of the rules and regulations immediately after attempting to remedy the violations from 2013. The 21-134 Docket's proposed tariff virtually makes the proposed tariff in this docket moot.

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<sup>12</sup> Staff's R&R at pg. 7.

<sup>13</sup> 21-134 Application at pg. 3.

<sup>14</sup> Id. at pg. 4.

11. But to effectuate that mootness, the Commission would have to order approval of the 21-134 tariffs before the end of 2021. Such an aggressive timeframe may not be realistic due to the additional time off for holidays and volume of analysis and discovery that must be done. Empire could utilize the extension provision from the 20-448 docket to request to continue waiving the transaction fees, but that would require additional filings in 20-448 and an examination of the request as the waiver is based on COVID-19 concerns. This route may also run into similar time constraints. As such, if Empire resumes fee collections on January 1, 2021 without approval of the 21-134 tariff or extension of the transaction fee waiver, Empire risks either: 1) violating the 20-459 tariff by charging the fee amounts and limitations under the KUBRA agreement; or 2) over collecting fees for KUBRA by charging the 20-459 fee amounts which would no longer be revenue-neutral. Neither scenario is ideal and risks additional penalties for Empire. From CURB's perspective, the over-collection of credit card transaction fees by Empire is the more concerning of the two outcomes.

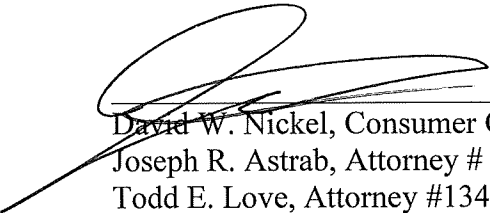
12. While CURB is reserving final comments on the 21-134 docket, CURB does recognize the benefits for customers associated with lower credit card fees. In an attempt to realize those benefits before getting an order in the 21-134 docket while minimizing the risk of further violations by Empire with this docket, CURB recommends that the Commission modify the language of the proposed tariff here to read that the fee charged will be "up to" the proposed amounts and to further indicate that transaction limits "may be" up to the transaction limit amounts listed in the KUBRA agreement and 21-134 application. This modification would allow the flexibility for Empire to charge the lower KUBRA fees without violating their filed tariff language or over-collecting from customers. Once Empire resumes collecting these fees, customers will pay

the lower KUBRA fees. As soon as the 21-134 docket has been concluded, Empire's tariffs can be updated to reflect those results.

13. CURB recognizes that there may not be a perfect solution to this unique situation. This option necessarily incorporates a discussion about transaction limits that is better held within the facts of the 21-134 docket. On the outset, CURB can foresee the possibilities of some customers with large bills having to pay more in fees, in total, for multiple transactions. Although it is not an ideal outcome, CURB is investigating this issue and others for their potential impacts in the 21-134 docket. However, CURB believes this modification is a reasonable interim solution to the issues that CURB has identified presently. CURB remains open to further discussions with the parties in order to develop a recommendation that complies with the rules and regulations.

14. WHEREFORE, CURB submits this response and notifies the parties that CURB supports the R&R filed by Staff, but further requests consideration of a modification to the proposed tariff as described above.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

20-EPDE-459-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 30<sup>th</sup> day of October, 2020, to the following:

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