

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

In the Matter of the Investigation into )  
Kansas Gas Service Company, a Division of ) Docket No. 21-KGSG-332-GIG  
One Gas Inc. Regarding the February 2021 )  
Winter Weather Events, as Contemplated by )  
Docket No. 21-GIMX-303-MIS. )

**CURB’S RESPONSE TO THE APPLICATION FOR INTERVENTION, PETITION FOR  
RECONSIDERATION, AND MOTION FOR AMENDMENT OF THE SETTLEMENT  
AGREEMENT AS IT AFFECTS AMERICIAN PACKAGING CORPORATION, OR IN  
THE ALTERNATIVE THAT THE COMMISSION SET THIS MATTER FOR HEARING**

**\*\*Public Version\*\***<sup>1</sup>

COMES NOW, the Citizens' Utility Ratepayer Board (“CURB”) herein responds to the Application for Intervention, Petition for Reconsideration (“PFR”), Motion For Amendment of the Settlement Agreement, and the alternative request to set the matter for hearing, which were filed by American Packaging Corporation (“APC”) on March 16, 2022. For the reasons stated below, CURB urges the Kansas Corporation Commission (“KCC” or “Commission”) to deny all of APC’s requests. In support thereof, CURB states the following:

**Condensed Background**

1. After conducting a live hearing on February 4, 2022,<sup>2</sup> on March 3, 2022, the Commission issued its Order<sup>3</sup> approving the unanimous settlement agreement on Kansas Gas Service Company’s (“KGS”) Motion on Limited Waiver, previously filed on May 28, 2021.<sup>4</sup> The

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<sup>1</sup> This document contains information that has been deemed “confidential.” \*\* Denotes Confidential Information \*\*

<sup>2</sup> See *Order Amending the Procedural Schedule Concerning Waiver of Penalties in KGS’ Tariff*, (January 25, 2022).

<sup>3</sup> *Order Approving Unanimous Settlement Agreement on Waiver of the Penalties Under Kansas Gas Service’s Tariff*, (March 3, 2022).

<sup>4</sup> *Kansas Gas Service Motion for Limited Waiver*, (May 28, 2021).

Order included, among other provisions, a breakdown of the calculated cost of gas amounts assigned to each of KGS's transportation customers and natural gas marketers. The Order, including summary of the procedural history, is incorporated by reference in this response. Specific facts and exhibits will be identified and referenced below where applicable.

2. On March 16, 2022, APC filed an Application for Intervention, PRF and Motion for Amendment of the Settlement Agreement as it affects APC, or in the alternative to set the matter for hearing.<sup>5</sup> APC and its corporate affiliate, Lawrence Paper Company ("LPC") are transportation customers of KGS and have been for years.<sup>6</sup> APC makes several requests in its filing. First, it asks the Commission to approve the application to intervene for the purpose of amending the Commission's Order on the settlement agreement. Second, APC asks the Commission to grant a request to reconsider the final penalty amounts set for only APC. Third, in the alternative to modifying the settlement agreement, APC asks the Commission to set the matter for hearing and to accept additional evidence from APC about the appropriateness of the penalty.

3. In the PFR, APC states that KGS refused to honor requested nominations and make gas deliveries from LPC on behalf of APC from February 8-10, 2021.<sup>7</sup> Further, after KGS declared an Operational Flow Order ("OFO") on February 11, 2021, LPC attempted to nominate and deliver gas to KGS and was refused again from February 13-18, 2021.<sup>8</sup> APC witness, Justin Hill, states that he personally spoke on the phone with a KGS representative on each day of the refused deliveries about the need to reduce APC's nominations to KGS.<sup>9</sup> He continues that KGS's refusal on those days directly resulted in APC recording zero deliveries and incurring penalties. APC

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<sup>5</sup> *Application for Intervention, Petition for Reconsideration, and Motion for Amendment of the Settlement Agreement As It Affects American Packing Corporation, or In the Alternative That the Commission Set This Matter for Hearing*. (March 16, 2022).

<sup>6</sup> *Id.* at pg. 3, ¶9.

<sup>7</sup> *Id.* at pg. 1, ¶6.

<sup>8</sup> *Id.* at Exhibit A *Affidavit of Justin D. Hill*, pg. 1, ¶9. ("Hill Affidavit").

<sup>9</sup> Hill Affidavit at pg. 2, ¶12.

claims it did not hear from KGS about the February 2021 events or the Commission’s March 3, 2022 Order assigning specific penalty amounts until March 4, 2022.<sup>10</sup> APC states that imposition of a penalty under those circumstances would be unfair and unjust and asks for permission to intervene and modify its penalty determination.

### **CURB’s Response**

#### **A. Authority and Case law**

4. The Commission should deny APC’s requests because APC failed to file for intervention at any time before the February 4, 2022, hearing, even though APC had notice of the matter throughout the proceeding. APC alleges that it has been denied the opportunity to present its case as to why it should not incur a penalty under KGS’s tariffs, claiming that APC received insufficient notice of the penalties in this docket.<sup>11</sup> Hearings before the Commission are conducted in accordance with the provisions of the Kansas Administrative Procedure Act, unless otherwise ordered by the Commission in a general investigation.<sup>12</sup> Constitutional protections of due process apply to administrative proceedings as well as judicial ones where such proceedings are quasi-judicial in nature. This occurs when an administrative body acts in a way that interprets law such that it may affect a person’s substantial rights.<sup>13</sup> The exact nature of the notice required to satisfy due process will vary with circumstances and conditions.<sup>14</sup> The fundamental requirements of due process afforded is notice and an opportunity to be heard “at a meaningful time and in a meaningful

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<sup>10</sup> Hill Affidavit at pg. 2, ¶14.

<sup>11</sup> APC Petition for Reconsideration at pg. 5, ¶23-25.

<sup>12</sup> K.S.A. 66-101d; K.S.A. 66-117(g).

<sup>13</sup> *Neely v. Board of Trustees, Policemen’s and Firemen’s Retirement System, City of Wichita*, 205 Kan. 780, 784 (KS SC July 1970).

<sup>14</sup> *Walker v. City of Hutchison, Kan.*, 352 U.S. 112, 115-6 (US S. Ct. December 10, 1956).

manner.”<sup>15</sup> Sufficient notice must be reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action, and afford them an opportunity to be heard.<sup>16</sup>

5. In Kansas, the Commission has broad powers to adopt reasonable and proper rules and regulations to govern its proceedings and to regulate the mode and manner of all investigations and hearings, except that no person desiring to be present at any investigation or hearing by the commission shall be denied admission.<sup>17</sup> Notice of any public sessions for hearing evidence before the Commission can be accomplished through mail, publishing by the Commission, or delegated to an applicant by the Commission.<sup>18</sup> The Presiding Officer must set the time and place for the hearing and give reasonable written notice at least 10 days prior to the hearing to all parties and to all persons who have filed written petitions to intervene.<sup>19</sup> Interested individuals can submit a petition for intervention to appear in an open docket in order to be an active participant. The Commission has broad discretion to grant a petition to intervene if:

- the petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least three days before the hearing;
- the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
- the Presiding Officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.<sup>20</sup>

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<sup>15</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Southwest Kansas Royalty Owners Ass'n v. State Corp. Com'n of State of Kan.*, 244 Kan. 157, 171 (KS SC January 1989).

<sup>16</sup> *Midwest Gas Users' Ass'n v. State Corp. Com'n*, 30 Kan.App.2d 61, 62 (Kan. App. January 2002); *Farmland Industries, Inc. v. State Corp. Com'n Of Kansas*, 24 Kan.App.2d 172, 177 (Kan. App. August 1997).

<sup>17</sup> K.S.A. 66-106(a).

<sup>18</sup> K.A.R. 82-1-208.

<sup>19</sup> K.S.A. 77-518(a).

<sup>20</sup> K.A.R. 82-1-225(a); See K.S.A. 77-521(a).

6. The Commission/Presiding Officer may also grant intervention at any time upon determination that the intervention is sought in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.<sup>21</sup> At least 24 hours before a hearing, the Presiding Officer must issue an order granting or denying any pending petitions for intervention.<sup>22</sup> After a hearing and Commission order, an aggrieved party can file a petition for reconsideration to ask the Commission to reopen the docket to address the grievance.<sup>23</sup> All the evidence, rules and regulations, instruments, and other documents admitted or received in the original hearing or subsequent hearings become a part of the record in the reconsideration.<sup>24</sup> Failure to take timely steps to participate in a docket is fatal to claims of due process violations.<sup>25</sup> In the determination of whether to vacate a Commission order, courts must give due account to the “harmless error” rule.<sup>26</sup> The Kansas Supreme Court has interpreted this to mean that if Commission action is constitutionally authorized by statute, it is presumed valid on review unless it is not supported by substantial competent evidence and is so wide of its mark as to be outside the realm of fair debate, or is otherwise unreasonable, arbitrary, or capricious and prejudices the parties.<sup>27</sup>

## **B. Analysis**

### **1) APC had notice of the proceedings in this docket, but failed to timely take steps to intervene and exercise its due process rights, so APC’s requests should be denied.**

7. The Commission should deny APC’s request to reopen the issue of the penalty waiver as applied to APC and deny APC’s motion to intervene for the same purpose because APC failed to make these filings prior to the February 4, 2022 hearing, after receiving notice of the

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<sup>21</sup> K.A.R. 82-1-225(b).

<sup>22</sup> K.A.R. 82-1-225(d).

<sup>23</sup> K.A.R. 82-1-235(a); K.S.A. 66-118a.

<sup>24</sup> K.A.R. 82-1-235(e).

<sup>25</sup> *W.S. Dickey Clay Mfg. Co. v. State Corp. Com’n of the State of Kansas*, 241 Kan. 744, 749 (KS SC July 1987).

<sup>26</sup> K.S.A. 77-621(e).

<sup>27</sup> *Zinke & Trumbo, Ltd. v. State Corp. Com’n of State of Kan.*, 242 Kan. 470, 475 (KS SC January 1988).

proceedings. First, APC had notice of the penalty tariffs in Section 11.06 of KGS's General Terms and Conditions ("GTC") by virtue of its status as a KGS transportation customer.<sup>28</sup> In addition, APC is also subject to the other tariffs contained in KGS's GTC. Specifically, APC is on notice of KGS procedures related to nominations and delivers requirements during OFOs and Periods of Curtailment ("POC") and parties' respective rights during those events in the whole of Section 11 of the GTC.<sup>29</sup> For example, Section 11.04.07 of the GTC states:

- **Emergency Usage during POCs:** A customer may request to use gas above authorized levels to forestall irreparable injury to life or property. Requests by telephone shall be followed immediately by a written request. Written requests shall state the nature, cause, and expected duration of the emergency and may be submitted by facsimile or electronic mail. The customer must act to eliminate the cause of the emergency as soon as practicable. The charge for usage above authorized levels shall be determined at the time Company receives the customer's request. *Disputes concerning this charge shall be referred to the Commission for resolution.* (Emphasis Added).<sup>30</sup>

Notwithstanding any relevance to APC's claims, this indicates that APC was aware of the Commission and its possible role in KGS's GTC during the relevant time periods.

8. APC took no additional steps to address KGS's refusal of gas deliveries in February 2021 for over a year, and only acted after the Commission had ruled on KGS's motion for limited waiver. In Mr. Hill's affidavit, APC claims that KGS refused to honor nominations and deliveries from LPC on behalf of APC for February 13-18, 2021.<sup>31</sup> This resulted in KGS recording zero deliveries and APC incurring penalties for those dates at the inflated gas prices. Mr. Hill states that KGS representative, Nicole Williams, called him each day of the refused deliveries to discuss the

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<sup>28</sup> See KGS Limited Waiver Motion at pg. 5, ¶ 8.

<sup>29</sup> KGS GTC, Section 11. Accessed at <https://www.kansasgasservice.com/media/KGS/Tariffs/GTC11.pdf>.

<sup>30</sup> KGS GTC at Sheets 3-4.

<sup>31</sup> Hill Affidavit at pg. 2, ¶13.

matter.<sup>32</sup> However, the PFR does not contain any information on actions APC took to follow up with this situation until March 16, 2022.

9. Even if APC cannot be found to have had reasonable notice at the time the Commission opened the docket, APC received actual notice of the penalty waiver issue from KGS. KGS has stated that in addition to contact throughout the Winter Event, KGS also released information about bill increases through news and social media outlets. In a supplemental response to KCC Staff Data Request (“DR”)-003, KGS provided an email dated June 2, 2021 that was sent to representatives of KGS’s transportation customers, which is attached here as confidential Attachment 1. \*\* [REDACTED]

[REDACTED]

[REDACTED] \*\* In this email, the same KGS representative that Mr. Hill says called him during the Winter Event informed the transportation customers that KGS had followed up on the delay of treatment of cash-out and penalties for February 2021 volumes. The message stated that KGS had filed a motion of limited waiver in this docket on May 28, 2021, and provided the docket number. KGS explained that it believed that penalties were appropriate to assess for unauthorized over-deliveries during February 2021 and that the motion asked for permission to waive the penalty multiplier found in Section 11.06.02 of the GTC. KGS also attached the filed motion to the email. KGS stated that it is uncertain when the Commission would address the issue and that KGS would not send penalty invoices until a determination is made.

10. The email and attached motion were reasonably crafted to inform transportation customers about the docket and the continuation of the gas delivery and penalty issue from

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<sup>32</sup> *Id.* at ¶12.

February 2021. Although the email and motion did not specifically mention APC or LPC by name or call upon each customer to seek intervention, they did state that KGS had concluded that penalties were appropriate to be assessed under Section 11.06 of the GTC.<sup>33</sup> This is direct evidence that APC had actual notice of the docket and nature of the proceedings on June 2, 2021, prior to the hearing on this matter. Therefore, APC received sufficient notice to satisfy due process requirements.

11. Even if the Commission finds that the June 2, 2021, email does not constitute sufficient notice, APC had the knowledge and responsibility to apprise itself and timely file for intervention. The Commission provides public access to every filing and order in this docket on the KCC website as those documents are received.<sup>34</sup> The general public can access specific dockets using a variety of search criteria, including docket number. The Commission also posts news releases on its website related to updates in this docket.<sup>35</sup> APC is not a typical ratepayer. It is a business with greater access to resources and more sophisticated levels of analysis and representation available who has been doing business with KGS for years as a transportation customer. At a minimum, after learning that KGS determined that penalties under Section 11.06 were appropriate and a Commission docket was opened to address KGS's action during the Winter Event, APC could have verified the docket's existence and proceeded accordingly. Here, Mr. Hill acknowledges that he spoke with KGS representatives about KGS's refusal to honor LPC's

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<sup>33</sup> KGS Motion for Limited Waiver at pg. 5-6, ¶9.

<sup>34</sup> The page dedicated to Docket No. 21-KGSG-332-GIG on the KCC website can be accessed at: <https://estar.kcc.ks.gov/estar/portal/kscg/page/docket-docs/PSC/DocketDetails.aspx?DocketId=c11e5011-b192-4398-b469-af9f14c3bf28>.

<sup>35</sup> "Kansas Corporation Commission opens company specific investigations related to impacts of weather emergency." March 9, 2021. Accessed at <https://kcc.ks.gov/news-3-9-21>; "KCC issues first order on recovery of February weather event costs." July 8, 2021. Accessed at <https://kcc.ks.gov/news-7-8-21>; "KCC denies requests based on lack of jurisdiction and legal restrictions, but assures consumers state and federal level investigations continue." September 9, 2021. Accessed at <https://kcc.ks.gov/news-9-9-21>; "KCC denies NGTCC's petition for reconsideration in KGS winter event docket." October 12, 2021. Accessed at <https://kcc.ks.gov/news-10-12-21>.



nominations and deliveries in February 2021. However, there is nothing further mentioned about the refused deliveries between KGS and APC. Even if the Commission accepts APC's contention that it only first learned of specific penalty amounts on March 4, 2022, the issue of penalties from February 2021 had been ongoing since KGS filed the motion for limited waiver on May 28, 2022.

12. In W.S. Dickey Clay Mfg. Co. v. State Corporation Commission of the State of Kansas, the Court properly dismissed a petition for judicial review of a Commission order by an industrial user of natural gas for lack of jurisdiction in view of evidence that the user had notice of the administrative proceedings but failed to timely intervene in proceedings and to exhaust all administrative remedies when the user applied for intervention several months after a Commission order was issued on another party's PFR.<sup>36</sup> Here, even if the only PFR is APC's, APC also failed to timely intervene prior to a Commission order on the matter, after APC had received notice of the proceedings. As a result, the PFR, the request to modify the settlement, and intervention for the same should be denied.

**2) The Commission should deny APC's alternative request to set the matter for hearing because modifying the agreement will not serve the interests of justice or the prompt and orderly conduct of these proceedings.**

13. Interests of justice and the prompt and orderly conduct of these proceedings will not be advanced by granting APC's alternative request because APC failed to timely present its case and because modification of the settlement agreement would void the entire agreement. Even if Mr. Hill had no knowledge of how Commission proceedings work, there are two other APC/LPC representatives who received a copy of the motion from KGS, who appear to have also failed to act in response to the June 2021 email. A similarly-situated, reasonable person would view the June 2021, email as something that warrants an inquiry about whether a penalty was being assessed

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<sup>36</sup> *W.S. Dickey Clay Mfg. Co. v. State Corp. Com'n of the State of Kansas*, 241 Kan. 744, 749 (KS SC July 1987).

to them by KGS. This is particularly relevant to APC because it claims it experienced actual issues with deliveries and nominations covered by Section 11.06. Such a line of questioning may even include consulting with legal representation to protect interests. Instead, APC waited to act until after the Commission issued an order on the motion, over a year after the pertinent events occurred.

14. APC could have taken timely steps to intervene or participate in this matter after receiving the June 2, 2021 email, but did not do so. KGS's email and Commission postings put LPC and APC on notice of the proceedings. APC should have been looking into KGS's message and requesting intervention during a reasonable timeframe in this docket. Shortly after the KGS's email, several transportation customers and gas marketers filed petitions for intervention in this docket.<sup>37</sup> There are no indications in the record that APC attempted to do the same or otherwise avail itself with its unique situation to the Commission or directly to KGS after February 2021. Furthermore, there are no explanation of circumstances that precluded APC from being able to intervene after receiving a copy of the motion. The Commission has adopted a broad approach to intervention to avoid excluding interested persons. However, the policy should not be extended so far as to be in conflict with established procedures and timelines. Therefore, due process considerations do not weigh in favor of granting APC's requests.

15. APC claims that it only wants to modify the Order as it applies to APC. However, any recalculation of a transportation customer's share of Winter Event cost will inevitably affect the results for other customers and risks the enforceability of the agreement. One provision of the settlement agreement provides that if the Commission does not approve and adopt the terms of this agreement "in total, without modification," the agreement would be void and no party would be

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<sup>37</sup> See *Natural Gas Transportation Customer Coalition's Petition to Intervene* (June 9, 2021); *Constellation New Energy-Gas Division, LLC Petition To Intervene* (June 10, 2021); *Catholic Diocese of Wichita Petition to Intervene* (June 11, 2021); *TempleLive Wichita LLC Petition to Intervene* (June 15, 2021).

bound by any of the terms.<sup>38</sup> If the Commission grants APC's request to reopen the issue and terms are modified for APC, other parties could utilize that modification as grounds to void the agreement. This would result in parties having to start again with resolving the motion for limited waiver.

16. Marketers' and transportation customers' behavior during the Winter Event was a topic examined in this docket. APC did not weigh in during this time with its information and the parties opted to review the total penalties for the transportation class as a whole. There are no explanations as to why APC could not have filed for intervention and provided its information for review during that time. Therefore, the PFR fails to make a showing of a good faith effort or reason for APC's failing to follow intervention procedures prior to March 16, 2022, and the same should be denied.

17. Even if APC's claims are valid and it is entitled to relief, it should not be allowed to start seeking it after the primary purpose of the docket has been completed (i.e., review of the limited waiver and the KGS financial plan). Allowing previously-uninvolved stakeholders the opportunity to file for intervention after both statutory and practical timeframes have passed undermines the certainty of settlement agreements and leads to an inefficient use of resources. If anyone with a fungible claim can reopen a settlement agreement outside of prescribed and reasonable deadlines for resolution, then confidence in enforcement of the agreement is shattered and orders are never truly final. All intervenors in this docket have spent a significant amount of time and resources to resolve both the limited waiver and financial plan portions of this proceeding. APC's information has existed and has been available since February 2021 and the only reason why it has not been considered by the Commission is because APC chose not to raise its arguments

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<sup>38</sup> *Motion to Substitute Unanimous Settlement Agreement and Approve Unanimous Settlement Agreement*, pg. 11, ¶31 of Attachment A. (January 20, 2022).

until now. Granting APC's requests at this time opens the door for other customers to raise similar out-of-time claims or for current intervenors to challenge newly adjusted amounts, as modest as they might be. Such a policy renders rules for intervention meaningless and, if adopted here, would result in conflict among the signatories to the approved agreement. Any prejudice to APC that stems from failing to present its case is attributed solely to APC's failure to timely participate and should not be considered as grounds to reopen the case.

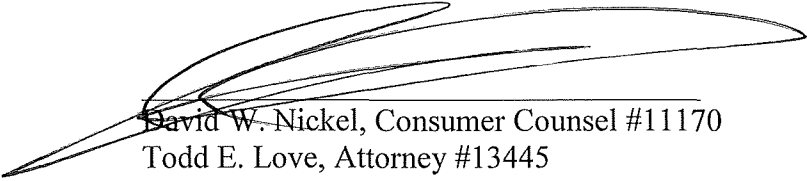
### **Conclusion**

18. APC has failed to timely file and raise the issues that are presented in the PFR and the interests of justice and the prompt and orderly conduct of proceedings are not served by granting its requests. The rules and procedures for intervention are clearly defined by statute and Commission policy. APC is a sophisticated business entity who chose to participate in a special natural gas service arrangement as a KGS transportation customer, subject to all of KGS's terms and conditions. APC received the same degree of notice as other properly intervened transportation customers and gas marketers. The PFR fails to identify new additional information that was not available or known to have existed during the pendency of the motion. APC should have taken affirmative steps towards protecting its interests by apprising itself of the matter after receiving the motion for limited waiver on June 2, 2021. APC fails to establish a reasonable explanation for its delay in filing and for reconsideration of its case. Granting the alternative request and allowing APC to join at this juncture to reopen the settled agreement will send improper policy signals to potentially interested parties in future dockets. Administrative efficiency and fair consideration are best served if all participants abide by the established procedures before the Commission.

WHEREFORE, CURB respectfully requests that the Commission deny APC's petition for reconsideration, application for intervention, and motion to modify the settlement agreement and

to further deny APC's alternative request to set this matter for hearing for the reasons above and to issue any and all orders as the Commission deems appropriate.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to be 'David W. Nickel', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

David W. Nickel, Consumer Counsel #11170

Todd E. Love, Attorney #13445

Joseph R. Astrab, Attorney #26414

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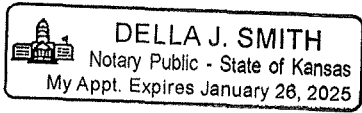
**VERIFICATION**

STATE OF KANSAS                    )  
  )  
COUNTY OF SHAWNEE            )        ss:

I, Joseph R. Astrab, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

  
Joseph R. Astrab

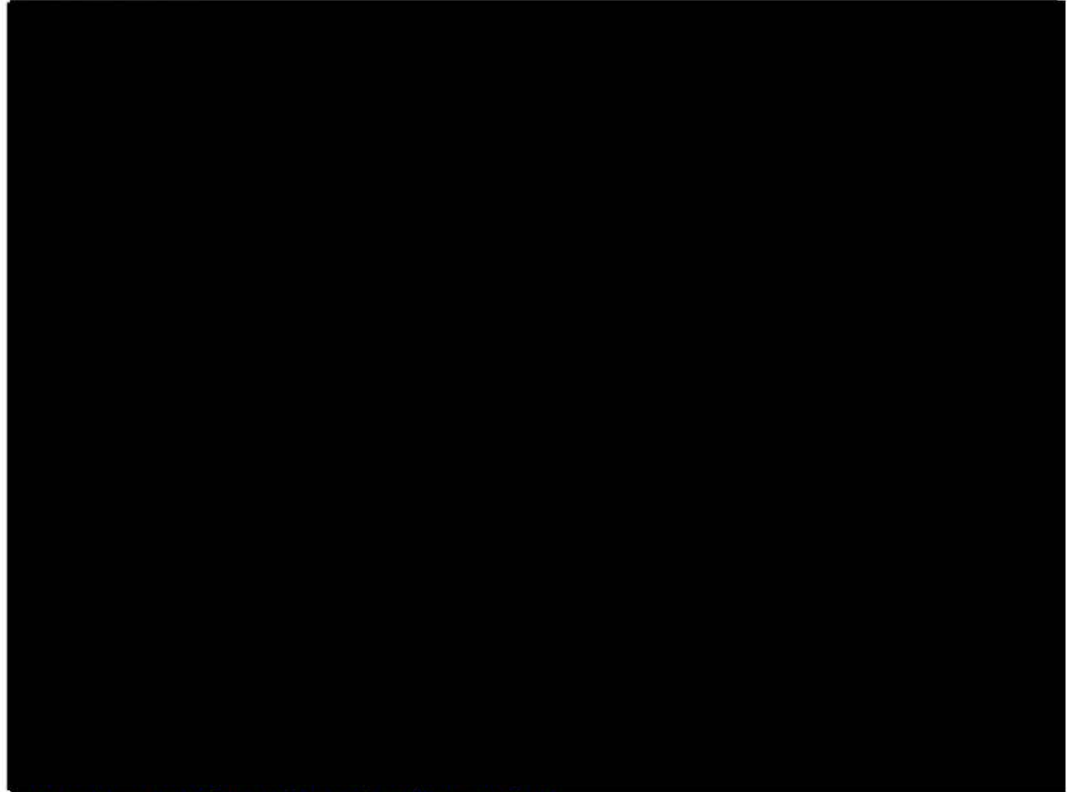
SUBSCRIBED AND SWORN to before me this 24<sup>th</sup> day of March, 2022.



  
Notary Public

My Commission expires: 01-26-2025.

**From:** [Williams, Nicole M](#)  
**To:**



**Cc:** [Marx, Susan M.](#); [Jenkins Hitchye, Judy](#); [Williams, Nicole M](#)  
**Subject:** Motion for Limited Waiver  
**Date:** Wednesday, June 02, 2021 9:46:12 AM  
**Attachments:** [image001.png](#)  
[21-KGSG-332-GIG Motion for Waiver.pdf](#)

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All,

As we have communicated with you over the past few months, we have indicated that the treatment of cash-out and penalties for February 2021 volumes has been delayed while KGS works with the KCC to develop its plan to recover extraordinary costs associated with the winter storm. On Friday, May 28, 2021, KGS filed a Motion for Limited Waiver ("Motion") with the KCC in Docket No. 21-KGSG-332-GIG. In this Motion, KGS indicates that it believes it is appropriate to assess penalties for unauthorized over-deliveries during the Operational Flow Order and the Period of Curtailment during the winter storm. However, KGS has requested that the KCC grant KGS a waiver from Section 11.06.02 of its General Terms and Conditions tariff to allow KGS to reduce the amount of the penalties to be assessed by permitting the removal of the multiplier from the penalty calculation. I have attached a copy of the Motion for your convenience.

At this time, we do not have a good estimate for when the KCC will address this issue. KGS will not provide an invoice for penalties until the KCC makes a determination on our Motion. Additionally, KGS will not be requiring payment or making payment on imbalances while this issue is under consideration. We will provide further guidance as soon as we are able to do so.

We appreciate your patience as we work through these complicated issues with our regulator.

Nicole Williams  
Manager Transport/Storage Svcs







**Judy Jenkins Hitchye**  
Managing Attorney  
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Overland Park, KS 66213  
P: 913-319-8615  
C: 512-952-9809  
E: judy.jenkinshitchye@onegas.com

May 28, 2021

**VIA ELECTRONIC TRANSMISSION**

Ms. Lynn Retz  
Executive Director  
Kansas Corporation Commission  
1500 S.W. Arrowhead Road  
Topeka, KS 66604

Re:

In the Matter of Kansas Gas Service, a Division of ONE Gas, Inc. Regarding February 2021 Winter Weather Events, as Contemplated by Docket No. 21-GIMX-303-MIS.

Docket No. 21-KGSG-332-GIG

Dear Ms. Retz:

On behalf of Kansas Gas Service, a Division of ONE Gas, Inc., please find a copy of the *Motion for Limited Waiver*, as filed in the above-referenced matter.

Please feel free to contact me with any questions or concerns regarding this filing.

Sincerely,

/s/ *J.J. Hitchye*  
Judy Jenkins Hitchye

JH/sef  
Encl.

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

In the Matter of the Application of Kansas Gas )  
Service, a Division of One Gas, Inc. Regarding )  
February 2021 Winter Weather Events, as ) Docket No. 21-KGSG-332-GIG  
Contemplated by Docket No. 21-GIMX-303-MIS )

**MOTION FOR LIMITED WAIVER**

Kansas Gas Service, a Division of One Gas, Inc. (“Kansas Gas Service” or “Movant” or “Company”) submits the following application pursuant to K.S.A. 66-1,201, 66-1,207, 77-526 and K.A.R. 82-1-202, K.A.R. 82-11-6, and other applicable statutes and regulations. Movant is requesting a waiver of certain of its Kansas Corporation Commission (“Commission”) approved tariff provisions in addressing the winter weather event of February 2021. In support of its Motion, Kansas Gas Service states as follows:

1. Movant is a natural gas public utility operating in the state of Kansas pursuant to certificates of convenience and necessity issued by the Commission. Movant's principal place of business within the state of Kansas is located at: 7421 West 129<sup>th</sup> Street, Overland Park, Kansas 66213. Movant is a division of ONE Gas, Inc. (ONE Gas) and serves approximately 645,000 customers located in over 360 communities in Kansas.

2. The names, addresses and phone numbers of the persons authorized to receive notices and communications with respect to this Motion on behalf of Kansas Gas Service are as follows:

Judy Jenkins Hitchye  
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a Division of ONE Gas, Inc.  
7421 West 129th Street  
Overland Park, Kansas 66213  
(913) 319-8615  
[Judy.JenkinsHitchye@onegas.com](mailto:Judy.JenkinsHitchye@onegas.com)

Janet L. Buchanan  
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3. For the sake of clarity, it is necessary to define certain terms that appear throughout this Motion. The terms defined are as follows:

- a) **Gas Sales Customer** – shall mean a customer for which Kansas Gas Service is responsible for procuring an adequate supply of natural gas to meet said customer’s needs.
- b) **Marketer** – shall mean a third-party natural gas marketer providing natural gas procurement services to a Kansas Gas Service’s customer as the customer’s Agent in accordance with the Company’s General Terms and Conditions (“GTC”), Section 10.03. The Marketer may provide service to individual transportation customers (individually balanced) or provide service to a group of transportation customers in aggregation groups as permitted in GTC, Section 10.04.
- c) **Individually Balanced Transportation Customer** - shall mean a customer being served from Kansas Gas Service’s natural gas pipeline facilities and who is individually responsible for procuring a supply of gas adequate for its needs.

4. Pursuant to Kansas Law, Kansas Gas Service has a duty and obligation to serve its customers in accordance with its tariffs and orders of the Commission.<sup>1</sup> On February 15, 2021, the Commission issued an Emergency Order in Docket No. 21-GIMX-303-MIS (“Emergency

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<sup>1</sup> K.S.A. 66-1,202; *See generally*, the Company’s General Terms and Conditions and specific customer class rate schedules.

Order”) which acknowledged the State of Disaster Emergency Proclamation issued by Governor Kelly, the higher than normal wholesale natural gas prices, and the potential for reliability issues related to the prolonged cold weather. The Emergency Order required jurisdictional natural gas and electric utilities to “. . . do everything necessary to ensure natural gas and electricity service continue[d] to be provided to their customers in Kansas.”<sup>2</sup> The Commission also authorized jurisdictional natural gas and electric utilities to defer, into a regulatory asset, any extraordinary costs associated with ensuring that their customers or the customers of interconnected Kansas utilities that are non-jurisdictional to the Commission continued to receive utility service during the cold weather event.

5. Prior to the Commission’s Emergency Order, Kansas Gas Service had begun communicating with its Gas Sales Customers, Marketers and Individually Balanced Transportation Customers, urging them to prepare for the cold weather. Relevant to this Motion, on February 4, 2021, the Company sent a Critical Notice to both the Marketers and Individually Balanced Transportation Customers. This Critical Notice advised of the need to be mindful of the upcoming weather and to make sure that confirmed nominations of natural gas into the Company’s system were adequate for planned usage during the winter weather event. The notification was effective February 6 through February 15, 2021. On February 9, 2021, Kansas Gas Service provided notice that it was extending the Critical Notice through February 16, 2021.

6. On February 9, 2021, Kansas Gas Service received notice of a standard Operational Flow Order (“OFO”) from Southern Star Central Gas Pipeline, Inc., (its upstream natural gas transmission provider) to begin on February 11, 2021. Later that same day, Kansas Gas Service issued an OFO for its transportation customers to begin on February 11, 2021 and remain in effect

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<sup>2</sup> *Emergency Order*, Docket No. 21-GIMX-303-MIS, In the Matter of Record Natural Gas Prices and Potential System Reliability Issues from Unprecedented and Sustained Cold Weather, February 15, 2021, page 2, paragraph 3.

until further notice. Accordingly, Kansas Gas Service notified all Marketers and Individually Balanced Transportation Customers that:

- a. natural gas nominations for all customers with electronic flow meters (“EFM”) were to be equal to the customer’s daily usage;
- b. those customers that do not have EFM are required to make sure natural gas nominations were equal to their required daily quantity (“RDQ”); and
- c. that any usage of gas in excess of confirmed nominations would be subject to penalties.

7. On February 14, 2021, Kansas Gas Service determined that it was necessary to restrict usage for all but residential and human needs customers.<sup>3</sup> The Company issued a Curtailment Notice to become effective February 15, 2021, to remain in effect until further notice. Again, Kansas Gas Service notified Marketers and Individually Balanced Transportation Customers of the restriction. Kansas Gas Service’s Curtailment Notice referenced Governor Kelly’s State of Disaster Emergency Proclamation and directed transportation customers to curtail their usage to the level necessary to protect their facilities from harm. Specifically, the Curtailment Notice directed customers to:

- a. switch to an alternate or back-up fuel source, if possible, or;
- b. place their facility into plant protection or idle mode, or;
- c. limit gas usage to the minimum system requirements necessary to prevent freezing of pipes and protect equipment and/or facility, or;
- d. take other steps to reduce natural gas usage to the extent possible and necessary in order to prioritize service to residential and human needs customers.

This curtailment did not apply to schools, hospitals, health care facilities, hotels or lodging

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<sup>3</sup> While Kansas Gas Service believed it might become necessary to discontinue service to one or more of its commercial customers, fortunately, all customer classes conserved to the extent required to avoid discontinuation of service to any customer. During the duration of the winter event, Kansas Gas Service maintained service to all customers, though at times, not at the preferred volumes of some customers.

facilities, grocery stores, universities, colleges, churches, public safety buildings, multi-family dwellings and apartments for uses other than electric generation. Pursuant to the Company's tariffs, during a Period of Curtailment, ("POC") any usage of gas in excess of confirmed nominations would be subject to higher penalties.<sup>4</sup>

8. During the OFO and POC, some Marketers and certain Individually Balanced Transportation Customers did not balance confirmed nominations with usage. Section 11.06 of the GTC in Kansas Gas Service's tariffs, provides that "[a] customer's unauthorized usage under an OFO or POC may cause the incurrence of penalties." Further, Section 11.06.02 of the GTC establishes the calculations of penalties as follows:

Penalties for Unauthorized Over-Deliveries or Under-Deliveries shall be calculated as follows:

(1) **Standard OFO Penalties:** For each day of the Standard OFO, the greater of \$5 or 2½ times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma) times the MMBtu of Unauthorized Over- or Under-Deliveries that exceed the tolerance level applicable under Section 11.06.01.

(2) **Emergency OFO Penalties:** For each day of the Emergency OFO, the greater of \$10 or 5 times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma) times the MMBtu of Unauthorized Over- or Under-Deliveries that exceed the tolerance level applicable under Section 11.06.01.

(3) **POC Penalties:** For each day of the POC, the greater of \$20 or 10 times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma) times the MMBtu of Unauthorized Over- or Under-Deliveries that exceed the tolerance level applicable under Section 11.06.01.

9. Kansas Gas Service believes it is appropriate to assess penalties in this instance.

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<sup>4</sup> See, Kansas Gas Service's General Terms and Conditions, Sections 11.05 and 11.06.

The failure of some Marketers and some Individually Balanced Transportation Customers to provide adequate gas supplies during the period of the OFO and POC jeopardized the ability of Kansas Gas Service to provide service to all its customers. Because some Marketers and some Individually Balanced Transportation Customers did not secure and/or deliver enough gas supply to meet their needs, there was a tangible risk that Kansas Gas Service's resources would not be sufficient to maintain distribution system pressures and other operational needs, as well as to provide service to all of the Company's customers during the exceptionally cold weather. Following the Commission's order to take actions required to provide service to its customers, the Company secured additional gas supplies for the continuation of service to Gas Sales Customers and, when necessary, to transportation customers to ensure operational integrity balance on the system and the availability of service to all customers. Had the Company not been able to acquire additional gas supplies, unplanned outages may have occurred, including possible outages to human needs customers. Based on the foregoing circumstances, Kansas Gas Service has determined that the assessment of penalties is necessary.

10. Under the provisions of the tariff, once it is determined that penalties will be assessed, Kansas Gas Service does not have discretion or flexibility in the calculation of the penalty amount. The tariff states that penalties "shall" be calculated as prescribed. As a result, if Kansas Gas Service follows the tariff provisions as written and given the extraordinarily high market gas prices experienced during the periods of the OFO and POC, the Company would accordingly issue penalties to Marketers and Individually Balanced Transportation Customers that would also be of an extraordinary nature.<sup>5</sup>

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<sup>5</sup> Section 11.06.03 of the GTC states that penalties for aggregation groups shall be billed to and collected from the agent representing the aggregated customers. Penalties for customers that are not part of an aggregation agreement are directly assessed the penalty.

11. Any penalties collected from Marketers and Individually Balanced Transportation Customers in the manner prescribed in GTC 11.06.03, are to be credited to the cost of gas the Company incurs on behalf of its Gas Sales Customers. At Sheet 4 of the Cost of Gas Rider (“COGR”), Kansas Gas Service’s tariff states:

Other Charges or credits shall be included as a separate component of the Cost of Gas and included only to the extent provided by a separate schedule, rider, or section of COGR, and approved by the Commission.

Penalty provisions are contained within the tariffs of Kansas Gas Service and are essentially a credit for the cost of gas the Company incurred to provide service to transportation customers who consumed gas supplies not provided by the Marketer or the Individually Balanced Transportation Customer as required to meet the transportation customer’s usage during the OFO and POC. Kansas Gas Service believes that crediting any penalty amounts collected against the extraordinary cost of gas (that is currently being deferred for recovery at a later date) is consistent with the COGR tariff requirements.

12. While the penalty provisions are in place to discourage Marketers and Individually Balanced Transportation Customers from creating imbalances on the distribution system at critical times of operation, Kansas Gas Service requests that in this instance, the Commission grant the Company a waiver from Section 11.06.02 of its GTC tariff to allow the Company to reduce the amounts assessed by permitting the removal of the multiplier from the penalty calculation. This relief will allow Kansas Gas Service to recover the cost of gas purchases which were required to keep the system in balance and operating when Marketers and Individually Balanced Transportation Customers did not provide adequate gas supplies during the winter weather event.

13. Without the collection of penalties, Gas Sales Customers would subsidize the additional gas cost incurred to serve transportation customers who did not adequately supply



natural gas to the Kansas Gas Service distribution system during the OFO periods and/or POC. Recently, Staff has expressed its support for using penalties to recover gas costs incurred for transportation customers in Docket No. 21-BHCG-370-MIS (“370 Docket”). In supporting a request for a temporary waiver of penalty provisions made by Black Hills Kansas Gas Utility Company, d/b/a Black Hills Energy, Staff states:

Staff generally supports a Local Distribution Company (LDC) using the penalty provisions in its Tariff to bill Transportation customers for the costs of FERC-regulated penalties or gas costs that the LDC incurred on behalf of the Transportation customer. These penalty provisions should be used to recoup the cost of these penalties *or gas costs, so that the LDC Sales customers are not harmed*. However, if interstate gas pipeline penalties will be waived, Black Hill's penalties may need to be waived as well because these penalties were never meant to be a profit center or to produce an unreasonable windfall for Sales customers.<sup>6</sup> (*Emphasis added*).

In the 370 Docket, the Commission found Staff’s recommendation to be reasonable and approved the temporary waiver request. Similarly, permitting Kansas Gas Service to remove the multiplier from the penalty calculation as requested, is consistent with Staff’s recommendation and position that penalties are not meant to be a “profit center or to produce an unreasonable windfall for Sales customers.” Removing the multiplier as requested by Kansas Gas Service would result in assessment of substantially lower penalties that would more closely reflect the estimated additional cost of gas procured by Kansas Gas Service to meet the usage of the transportation customers who did not comply with either the OFO and/or the POC. As stated previously, Kansas Gas service believes it is consistent with requirements of its COGR tariff to credit any penalties collected against the extraordinary gas costs currently being deferred for recovery at a later date.

14. Kansas Gas Service is prepared to invoice Marketers and Individually Balanced

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<sup>6</sup> *Order Approving Temporary Waiver*, Docket No. 21-BHCG-370-MIS, In the Matter of the Application of Black Hills Kansas Gas Utility Company, LLC d/b/a Black Hills Energy, for a Waiver of Tariff, Exhibit A, page 2.

Transportation Customers for penalties as calculated under either the current tariff method or under the requested waiver. Additionally, the Company will endeavor to collect all such amounts to offset the cost of gas associated with the winter weather event that has been deferred. Finally, the Company requests the Commission deem a grant of this waiver request as non-precedential in future Kansas Gas Service proceedings.

*WHEREFORE*, for the reasons set forth herein, Kansas Gas Service respectfully asks the Commission to issue an order approving the Company's Motion for a Limited Waiver, of Section 11.06.02 of the GTC as outlined in this Motion, to permit Kansas Gas Service to calculate penalties associated with the winter weather event as prescribed herein and for such other relief as the Commission may deem just and reasonable.

Respectfully submitted,

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**VERIFICATION**

STATE OF KANSAS        )  
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COUNTY OF JOHNSON    )

I, Judy Jenkins Hitchye, of lawful age, being first duly sworn upon oath, states as follows: I am a Managing Attorney for Kansas Gas Service, a Division of ONE Gas, Inc. I have read the above *Motion for Limited Waiver* and all the statements therein are true to the best of my knowledge, information and belief.

/s/ Judy Jenkins Hitchye  
Judy Jenkins Hitchye  
  
*Affiant*

SUBSCRIBED AND SWORN to before me on 5/28/21.

  
Notary public

My Appointment Expires:

06/05/22



## CERTIFICATE OF SERVICE

I, Judy Jenkins Hitchye, hereby certify that a copy of the above and foregoing *Motion for Waiver* was forwarded this 28<sup>th</sup> day of May, 2021, addressed to:

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21-KGSG-332-GIG

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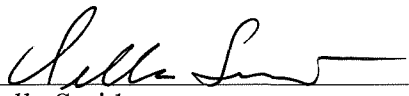
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