

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

Before Commissioners: Pat Apple, Chair
Jay Scott Emler, Commissioner
Shari Feist Albrecht, Commissioner

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

KANSAS POWER POOL'S SUPPLEMENTAL BRIEF REGARDING JURISDICTION

COMES NOW the Kansas Power Pool (KPP), by and through its undersigned counsel, and for its Supplemental Brief Regarding Jurisdiction, states as follows

I. Background

1. KPP is a municipal energy agency formed under K.S.A. 12-885, *et seq.* KPP provides wholesale capacity, energy and transmission services to its members, who have all signed KPP's Amended Operating Agreement. Currently, KPP serves 24 Kansas municipal electric utilities. The city of Kingman, Kansas (Kingman) joined KPP in 2007. Sixteen of KPP's members are in the Westar Energy transmission zone, seven are in the Mid-Kansas Electric Company (MKEC) zone, and one is in the Midwest Energy zone.¹

2. In the 17-KPPE-092-COM Docket (17-092 Docket), Southern Pioneer Electric Company (Southern Pioneer) filed a Complaint against KPP, asking the Commission to enjoin KPP from installing a new transmission interconnection, which KPP believes is necessary to meet KPP's obligations to Kingman (as well as KPP's other member cities) under KPP's Amended Operating Agreement and to supply Kingman's full energy needs. In the alternative, Southern

¹ Motion to Dismiss, Docket 17-KPPE-092-COM, October 3, 2017.

Pioneer is asking the Commission to require KPP to pay Southern Pioneer monetary damages (which Southern Pioneer calls a “facility switching fee”) in the amount of \$2,505,077.29.²

3. On October 3, 2017, KPP filed a Motion to Dismiss Southern Pioneer’s Complaint.³

4. On October 19, 2017, Kansas Municipal Energy Agency (KMEA) filed a Petition to Intervene in the 17-092 Docket, for the purpose of submitting a brief on jurisdictional issues (essentially, an *amicus curiae* brief).⁴

5. On October 23, 2017, Southern Pioneer and Mid-Kansas filed a response to KMEA’s Petition to Intervene in the 17-092 Docket, in which Southern Pioneer and Mid-Kansas requested the Commission open a general investigation into the jurisdictional issues presented.⁵

6. On November 28, 2017, the Commission issued an Order opening this general investigation into the Commission’s jurisdiction over municipal energy agencies. All of the parties that filed jurisdictional briefs in the 17-092 Docket were made a party to the general investigation. The Commission took administrative notice of the briefs on jurisdiction filed in the 17-092 Docket and ordered any supplementary briefs be filed by December 15, 2017.⁶

7. This general investigation into the extent of the Commission’s jurisdiction over municipal energy agencies is focused on:

- 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. 12-885 *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 to the MEA Act?; and

² *Id.*

³ *Id.*

⁴ Petition to Intervene of Kansas Municipal Energy Agency, 17-092 Docket, October 19, 2017.

⁵ Response of Southern Pioneer Electric Company and Mid-Kansas Electric Company, LLC to Petition to Intervene of Kansas Municipal Energy Agency, Docket 17-092, October 23, 2017.

⁶ Order Opening General Investigation, November 28, 2017.

- 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.⁷

II. ANALYSIS AND ARGUMENT

8. The first question posed in this investigation is, "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?" The plain language of K.S.A. 12-8,111(b) answers this question in the affirmative, since it expressly places the activities and services set forth in K.S.A. 12-885 to K.S.A. 12-8,109 outside the scope of the KCC's jurisdiction. The powers enumerated in K.S.A. 12-885 to K.S.A. 12-8,109 are all powers legislatively granted to MEAs in the legislative certificate of public convenience provided to MEAs,⁸ and subsection (b) of K.S.A. 12-8,111 expressly places these certificated powers outside the scope of the KCC's jurisdiction.⁹

9. The second question posed in this investigation is, "Does K.S.A. 12-885 *et seq.* limit the Commission's jurisdiction over MEAs?" The plain language of K.S.A. 12-8,111(b) also answers this question in the affirmative, since it places MEAs on the same jurisdictional footing as public utilities. By statute, MEAs cannot be subject to more oversight than public utilities. Since the powers and services set forth in K.S.A. 12-885 to K.S.A. 12-8,109 are not areas the Commission would regulate if performed by public utilities, they cannot be regulated if performed by MEAs.

⁷ *Id.*

⁸ K.S.A. 12-8,111(a) reads, "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."

⁹ K.S.A. 12-8,111(a) reads, "*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).

10. The third question posed in this investigation is, “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 to the MEA Act?” As noted above, K.S.A. 12-8,111 expressly limits the Commission’s authority to regulate MEAs by exempting their legislatively-granted powers. Outside of the exercise of those legislatively-granted powers, MEAs are subject to the jurisdiction of the Commission in the same manner as a public utility. However, the unique position of MEAs as compared to public utilities also impacts the Commission’s regulation of MEAs (and, more importantly, the need for such regulation). Regulations should take into consideration both the broad purpose of their enabling laws, as well as the nature of the relationships being governed. For example, regulation of public utilities is prompted by desires to prevent exploitation by a monopoly and predatory behavior upon captive customers. Such concerns are not present in the wholesale energy market, with voluntary contracts negotiated at arms’ length and with legal representation between sophisticated entities, like KPP (and KMEA) and their respective municipal members.

11. The positional distinction between MEAs and public utilities is recognized in K.S.A. 12-8,109, which grants MEAs and their members the right to enter into contracts for sale of electricity from an MEA to its members upon terms and conditions the parties deem reasonable. Further, while public utilities must obtain Commission approval of their rates, MEAs may establish rates and charges for sales of power and services without prior approval of the Commission.¹⁰ Since the MEA statutes establish that the parties (MEAs and their members) may determine if the rates are reasonable through contract, a Commission determination of the reasonableness of the rates is not required for the contract between an MEA and its member(s) to go into effect. The

¹⁰ K.S.A. 12-895(8).

Commission is simply not empowered by statute to set or review terms of these arms-length contracts between MEAs and their members.

12. The last question posed here is, “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.”¹¹ The answers to the first three questions are similarly responsive to this question. In addition, since K.S.A. 12-897 restricts MEAs to wholesale contracts only and prevents direct sales to retail customers, the provisions of the Retail Electric Suppliers Act (K.S.A. 66-1,170, *et seq.*) (RESA) do not apply to MEAs. RESA only governs electric public utilities that provide retail services, and MEAs are not allowed provide such services.

WHEREFORE, KPP respectfully requests the Commission take into consideration the argument and analysis set forth above, and resolve this docket accordingly.

By: /s/ Amy Fellows Cline

Timothy E. McKee, #07135

Amy Fellows Cline, #19995

Triplett Woolf Garretson, LLC

2959 N Rock Rd, Suite 300

Wichita, KS 67226

Ph 316/630-8100

Fax 316/630-8101

temckee@twgfirm.com

amycline@twgfirm.com

Attorneys for Kansas Power Pool

¹¹ *Id.*

VERIFICATION

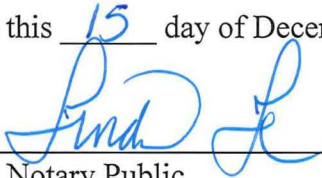
STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

Amy Fellows Cline, of lawful age, being first duly sworn upon my oath, state that I am one of the attorneys representing the Kansas Power Pool in this matter; that I have read the above *Kansas Power Pool's Supplemental Brief Regarding Jurisdiction*; that I know the contents thereof and declare that the statements made therein are true and correct to the best of my knowledge and belief.



Amy Fellows Cline, #19995

SUBSCRIBED AND SWORN to before me this 15 day of December, 2017.



Notary Public

My Appointment Expires:

April 19, 2018



CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2017, the above was served via electronic mail to:

JAMES G. FLAHERTY, ATTORNEY ANDERSON & BYRD, L.L.P.
216 S HICKORY
PO BOX 17
OTTAWA, KS 66067
jflaherty@andersonbyrd.com

GLENDA CAFER, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
glenda@caferlaw.com

TERRI PEMBERTON, ATTORNEY
CAFER PEMBERTON LLC
3321 SW 6TH ST
TOPEKA, KS 66606
terri@caferlaw.com

DAVID H. SNAPP, ATTORNEY
DAVID H. SNAPP, LC
100 MILITARY PLZ STE
211 DODGE CITY, KS 67801-4945
DSNAPP@STARRTECH.NET
E. JAY DEINES, ATTORNEY
DEINES & DEINES
110 N MAIN
PO BOX 398
WAKEENEY, KS 67672
ejdeines@ruraltel.net

SUSAN B. CUNNINGHAM, ATTORNEY
DENTONS US LLP
7028 SW 69TH ST
AUBURN, KS 66402-9421
susan.cunningham@dentons.com

CHRISTOPHER D. KRYGIER, DIRECTOR,
RATES AND REGULATORY AFFAIRS (CENTRAL REGION)
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE
JOPLIN, MO 64801
Chris.Kryqier@LibertyUtilities.com

JILL SCHWARTZ, SR. MANAGER,
RATES AND REGULATORY AFFAIRS (CENTRAL REGION)
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE
JOPLIN, MO 64801
Jill.Schwartz@LibertyUtilities.com

JOSEPH D. GASPER
GASPER LAW OFFICE
419 MAIN ST
PO BOX 251
STOCKTON, KS 67669
gasperlaw@gmail.com

SARAH STEELE
GILMORE & BELL, P.C.
ONE MAIN PLACE
100 NORTH MAIN, STE. 800
WICHITA, KS 67202
ssteele@gilmorebell.com

MITCHELL L. HERREN, ATTORNEY
HINKLE LAW FIRM L.L.C.
1617 NORTH WATERFRONT PARKWAY SUITE 400
WICHITA, KS 67206
mherren@hinklaw.com

CASEY L. JONES, ATTORNEY
HINKLE LAW FIRM L.L.C.
1617 NORTH WATERFRONT PARKWAY SUITE 400
WICHITA, KS 67206
cjones@hinklaw.com

BRETT D. LEOPOLD, PRESIDENT
ITC GREAT PLAINS, LLC
3500 SW FAIRLAWN RD STE 101
TOPEKA, KS 66614-3979
bleopold@itctransco.com

ROBERT J. HACK, LEAD REGULATORY COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST
31ST FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
rob.hack@kcpl.com

TIM RUSH, DIR. REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST
31ST FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
TIM.RUSH@KCPL.COM

ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST
31ST FLOOR (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
roger.steiner@kcpl.com

BRIAN G. FEDOTIN, DEPUTY GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
b.fedotin@kcc.ks.gov

STEPHAN SKEPNEK, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD TOPEKA, KS
66604-4027
s.skepnek@kcc.ks.gov

PAUL MAHLBERG, GENERAL MANAGER
KANSAS MUNICIPAL ENERGY AGENCY
6300 W 95TH ST
OVERLAND PARK, KS 66212-1431
Mahlberg@kmea.com

SAM MILLS, DIRECTOR, MANAGING DIRECTOR
ELECTRIC OPERATIONS
KANSAS MUNICIPAL ENERGY AGENCY
6300 W 95TH ST
OVERLAND PARK, KS 66212-1431
mills@kmea.com

MARK CHESNEY, CEO & GENERAL MANAGER
KANSAS POWER POOL
100 N BROADWAY STE L110
WICHITA, KS 67202
mchesney@kpp.agency

LARRY HOLLOWAY, ASST GEN MGR OPERATIONS
KANSAS POWER POOL
100 N BROADWAY STE L110
WICHITA, KS 67202
lholloway@kpp.agency

CURTIS M. IRBY, GENERAL COUNSEL
KANSAS POWER POOL
LAW OFFICES OF CURTIS M. IRBY
200 EAST FIRST ST, STE. 415
WICHITA, KS 67202
cmirby@sbcglobal.net

DOW MORRIS, GENERAL MANAGER
LANE-SCOTT ELECTRIC COOPERATIVE, INC.
410 S HIGH
PO BOX 758
DIGHTON, KS 67839-0758
dow.morris@lanescott.coop

ED WILTSE, GENERAL MGR.
LANE-SCOTT ELECTRIC COOPERATIVE, INC.
410 S HIGH
PO BOX 758
DIGHTON, KS 67839-0758
ed.wiltse@lanescott.coop

JOHN F. MCCLYMONT, ATTORNEY
McCLYMONT LAW OFFICE, PA
120 S STATE ST PO BOX 364
NORTON, KS 67654
jfmc@att.net

JAMES BRUNGARDT, MANAGER, REGULATORY RELATIONS
MID-KANSAS ELECTRIC COMPANY, LLC
301 W 13TH ST
PO BOX 980
HAYS, KS 67601
jbrungardt@sunflower.net

COREY LINVILLE, VICE-PRESIDENT
POWER SUPPLY AND DELIVERY
MID-KANSAS ELECTRIC COMPANY, LLC
301 W 13TH ST
PO BOX 980
HAYS, KS 67601
clinville@sunflower.net

AL TAMIMI, VICE-PRESIDENT,
TRANSMISSION PLANNING AND POLICY
MID-KANSAS ELECTRIC COMPANY, LLC
301 W 13TH ST
PO BOX 980
HAYS, KS 67601
atamimi@sunflower.net

ROBERT MUIRHEAD, VICE PRESIDENT
CUSTOMER SERVICE
MIDWEST ENERGY, INC.
1330 CANTERBURY ROAD
PO BOX 898
HAYS, KS 67601-0898
bmuirhead@mwenercw.com

PATRICK PARKE, GENERAL MANAGER
MIDWEST ENERGY, INC.
1330 CANTERBURY ROAD
PO BOX 898
HAYS, KS 67601-0898
patparke@mwenergy.com

RANDY MAGNISON, EXECUTIVE VICE PRESIDENT - ASSISTANT CEO
PIONEER ELECTRIC COOP. ASSN., INC.
1850 W OKLAHOMA
PO BOX 368
ULYSSES, KS 67880-0368
rmagnison@pioneerelectric.coop

ANNE E. CALLENBACH, ATTORNEY
POL SINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
acallenbach@polsinelli.com

FRANK A. CARO, ATTORNEY
POL SINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fcaro@polsinelli.com

ALAN MILLER, CEO
PRAIRIE LAND ELECTRIC COOPERATIVE, INC.
PO BOX 360
NORTON, KS 67654
amiller@ple.coop

KELLY B. HARRISON, PRESIDENT
PRAIRIE WIND TRANSMISSION, LLC
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
kelly.harrison@westarenergy.com

RANDY MAGNISON, EXEC VP & ASST CEO
SOUTHERN PIONEER ELECTRIC COMPANY
1850 W OKLAHOMA
PO BOX 430
ULYSSES, KS 67880-0430
rmagnison@pioneerelectric.coop

LINDSAY SHEPARD, EXECUTIVE VP GENERAL COUNSEL
SOUTHERN PIONEER ELECTRIC COMPANY
1850 W OKLAHOMA
PO BOX 430
ULYSSES, KS 67880-0430
lshepard@pioneerelectric.coop

RENEE BRAUN, CORPORATE PARALEGAL, SUPERVISOR
SUNFLOWER ELECTRIC POWER CORPORATION
301 W. 13TH
PO BOX 1020 (67601-1020) HAYS, KS 67601
rbraun@sunflower.net

JAMES BRUNGARDT, MANAGER, REGULATORY RELATIONS
SUNFLOWER ELECTRIC POWER CORPORATION
301 W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
jbrungardt@sunflower.net

THOMAS K. HESTERMANN, MANAGER, REGULATORY RELATIONS
SUNFLOWER ELECTRIC POWER CORPORATION
301 W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
tkhestermann@sunflower.net

TOM LOWERY, OPERATIONS MANAGER
VICTORY ELECTRIC COOPERATIVE ASSN., INC.
3230 N 14TH ST
PO BOX 1335
DODGE CITY, KS 67801-1335
tom@victoryelectric.net

MARK D. CALCARA, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN ST STE 300
PO DRAWER 1110
GREAT BEND, KS 67530
mcalcara@wcrf.com

TAYLOR P. CALCARA, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN ST STE 300
PO DRAWER 1110
GREAT BEND, KS 67530
tcalcara@wcrf.com

JAMES M. MCVAY, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN ST STE 300
PO DRAWER 1110
GREAT BEND, KS 67530
jmcvay@wcrf.com

MO AWAD, DIRECTOR, REGULATORY COMPLIANCE
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
mo.awad@westarenergy.com

CATHRYN J. DINGES, SENIOR CORPORATE COUNSEL
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
cathv.dinges@westarenergy.com

JEFFREY L. MARTIN, VICE PRESIDENT, REGULATORY AFFAIRS
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
jeff.martin@westarenergy.com

PATRICK T. SMITH, CORPORATE COUNSEL
WESTAR ENERGY, INC. 818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
patrick.smith@westarenergy.com

LARRY WILKUS, DIRECTOR, RETAIL RATES
WESTAR ENERGY, INC.
FLOOR #10
818 S KANSAS AVE
TOPEKA, KS 66601-0889
larry.wilkus@westarenergy.com

DENNIS DEINES, CO-GENERAL MANAGER
WESTERN COOPERATIVE ELECTRIC ASSN., INC.
635 S 13TH ST
PO BOX 278
WAKEENEY, KS 67672-0278
dennisd@westerncoop.com

STACEY MALSAM, MANAGER OF ACCOUNTING & FINANCE
WESTERN COOPERATIVE ELECTRIC ASSN., INC.
635 S 13TH ST
PO BOX 278
WAKEENEY, KS 67672-0278
stacevm@westerncoop.com

ANGELA M. CLOVEN
THE EMPIRE DISTRICT ELECTRIC COMPANY
PO BOX 127
602 S JOPLINE AVENUE
JOPLIN, MO 64802-0127
acloven@empiredistrict.com

/s/ Amy Fellows Cline
Amy Fellows Cline, #19995
Attorneys for Kansas Power Pool