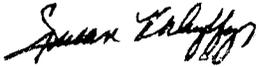


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

JUN 15 2009

 Docket Room

In the Matter of the Application of ITC)
Great Plains, LLC to Amend Its Certificate) Docket No. 08-ITCE-936-COC
of Public Convenience and Authority to)
Transact the Business of an Electric Public)
Utility in the State of Kansas (Ford, Kiowa,)
Clark and Comanche Counties).)

In the Matter of the Application of Prairie)
Wind Transmission, LLC, for a Certificate) Docket No. 08-PWTE-1022-COC
of Public Convenience to Transact the)
Business of an Electric Public Utility in)
Ford, Kiowa, Clark, Comanche, Barber,)
Pratt, Harper, Kingman, Sumner and)
Sedgwick Counties, Kansas.)

CURB's Notice of Objection to Phase 2 Settlement Agreement

The Citizens' Utility Ratepayer Board (CURB) herein timely notifies the Kansas Corporation Commission of its objection to the settlement agreement that was filed on June 1, 2009, in the above-captioned docket. This notice is provided pursuant to K.A.R. 82-1-230a(c) and the Prehearing Officer's verbal order¹ declaring that June 15, 2009, 3:00 p.m. is the deadline for filing objections to said settlement agreement. CURB's objection is founded on the lack of substantial and competent evidence in the record of this docket for the Commission to find that the settlement agreement meets the requisite standards established by law, the Commission and the courts for deciding the important issues in this case.

¹ The written order memorializing the Prehearing Officer's rulings at the June 4, 2009, prehearing conference is pending.

The framework for evaluation of the settlement agreement

1. In this docket, the Commission was presented for the first time with competing requests for certificates of public convenience to build a high-voltage transmission line connecting Spearville and Wichita, with an additional connection to transmission proposed in Oklahoma. In order to grant a certificate to operate as a public utility in the State of Kansas, the Commission stated in its December 18, 2009 *Order* that the Commission must find the

‘public convenience will be promoted by the transaction of said business and permitting said applicants to transact the business of a . . . public utility in this state.’ An applicant must show that ‘public convenience and necessity will be promoted by authorization of the plan for the electric facilities envisioned in the application.’ An entity is required to obtain a certificate before commencing public utility business for the protection and welfare of the people.

Dec. 18 *Order*, at ¶48 (citations omitted). The Commission also noted that its discretion and authority to grant or deny a certificate is broad and includes the authority to impose lawful conditions on a certificate. *Id.*, at ¶49.

2. When considering whether to grant a transmission-only certificate, the Commission has determined that these same standards apply: the Commission must find that a project proposal “promotes the public convenience and is in the public interest.” *Id.*, at ¶50. “The public convenience should be the Commission’s primary concern, the interest of the public utility companies already serving the territory its secondary concern, and the desires and solicitations of the applicant a relatively minor concern.” *Id.*, at ¶49.

3. In specific reference to these proceedings, the Commission stated in its December 18 *Order*, “Because such a huge investment will be needed to construct this line, the Commission is justified in evaluating what impact, financial and otherwise, this project will have upon Kansas customers. This Commission will not rubber stamp the first application to build a 765kV line in Kansas without considering the consequences such a line will have upon

landowners and ratepayers in this state.” Dec. 18 *Order*, at ¶51.

4. The Commission also determined that it would analyze the proposals in this docket by considering eight factors previously identified by the Commission as useful in analyzing whether granting a transmission-only certificate is in the public interest:

- (1) The effect of the transaction on customers
- (2) The effect of the transaction on the environment
- (3) Whether the transaction will be beneficial to state and local economies and to communities served by the resulting public utility operations in the state
- (4) Whether the transaction will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operations in the state
- (5) The effect of the transaction on affected public utility shareholders
- (6) Whether the transaction maximizes the use of Kansas energy resources
- (7) Whether the transaction will reduce the possibility of economic waste
- (8) What impact, if any, the transaction has on public safety.

Dec. 18 *Order*, at ¶52.

5. In approving the Phase 1 settlement agreement that proposed that the Commission find that both companies met the qualifications to be granted certificates of public convenience, the Commission stated that its duty in Phase 2 of this docket would be to “decide which applicant, or combination of applicants, is best qualified to build all or part of this project. All Commission decisions regarding these Applications will be based upon what is in the best interest of the public.” May 22 *Order*, at ¶2. The Commission also stated,

... the Commission anticipates that simultaneous with these proceedings the SPP [Southwest Power Pool] is developing a method to resolve how this project will be funded. A decision regarding the funding methodology for spreading the costs of a regional project over the SPP region is critical not only to the parties but also to this Commission in determining the interests of the public in approving

construction of projects as proposed here. The Commission must be assured that Kansas ratepayers alone will not bear the cost of a transmission line that is being built to benefit customers far beyond its borders.

May 22 *Order*, at ¶2.

6. For the second phase of this docket, the Commission also adopted Staff's recommendation that the Commission address four specific considerations, stating that these considerations "will be critical issues to evaluate during Phase 2." Dec. 18 *Order*, at ¶23. The considerations considered "critical issues" are as follows :

(1) Which Applicant has better financial and management ability to construct and maintain the line?

(2) Is one Applicant more qualified and better situated to construct a 765kV line?

(3) Is it more cost effective for one entity to construct and operate the entire line?

(4) If portions of the line were built by different entities, which is the better entity for each segment?

Id.

7. Finally, in Docket No. 08-WSEE-1041-RTS, the Commission articulated five factors it will consider in determining whether to approve a proposed settlement agreement. *Order Granting Joint Motion and Approving Stipulation and Agreement in its Entirety*, Jan. 21, 2009 ¶¶ 62 – 75. The factors are:

(1) Has each party had an opportunity to be heard on its reasons for opposing the settlement?

(2) Is the Stipulation supported by substantial evidence in the record as a whole?

(3) Does the agreement conform to applicable law?

(4) Will the agreement result in just and reasonable rates?

(5) Are the results of the agreement in the public interest, including the interests of customers represented by any party not consenting to the agreement?

Id. The Commission utilizes its consideration of these questions to make the requisite finding, independently of the conclusions proposed by the settlement agreement, of whether the settlement is supported by substantial competent evidence in the record as a whole. May 22 *Order*, at ¶17 (citation omitted).

Analysis of the settlement agreement under the applicable framework

8. CURB’s objections to the Phase 2 settlement agreement are based primarily on the failure of the evidence in the record as a whole to satisfy the above standards. In considering whether the settlement agreement promotes the “public convenience and necessity” and “protects the welfare of the people” (Dec. 18 *Order*, at ¶48), the following questions and concerns remain:

9. If the “desires and solicitations of the applicant[s] [are] a relatively minor concern” (*Id.*, at ¶49) in comparison to the primary concern for the public convenience, then the fact that the Applicants have agreed to settle this case with Staff and other parties should not be a primary factor in favor of approving the settlement. In particular, the public pressure brought to bear on the Commission by one of the parties to prevent potential delay of the project by coercing the parties to settle (*Id.*, at ¶51) should have no influence whatsoever on the Commission’s determination of whether the settlement agreement is in the public interest. (*Id.*). If one considers the settlement agreement in this context, it is clear that the Applicants would prefer that the Commission turn this hierarchy of concerns upside-down.

10. The magnitude of the “huge investment” (*Id.*, at ¶3) of such critical concern to the Commission is, as yet, unknown. The settlement agreement does not evaluate “what impact, financial and otherwise, this project will have upon Kansas customers.” (*Id.*, at ¶51).

There is no consideration whatsoever to “the consequences such a line will have upon the landowners and ratepayers in this state.” (*Id.*). “The effect of the transaction on customers” (*Id.*, at ¶52) is unknown. Without knowing whether the project will be built at 765kV or 345kV, no one knows how much the project will cost or what the costs and benefits will be for customers. The planning and vetting process for this and other projects at the Southwest Power Pool (SPP) is far from complete, and SPP’s final cost allocation proposals and tariffs have yet to be submitted to the Federal Energy Regulatory Commission (FERC) for approval. Further, the Applicants are still awaiting final approvals from the FERC on several issues concerning rates for this project. No one can say when SPP will complete its plans or when FERC will issue final orders concerning this project. Until they do, approval of the settlement agreement is premature.

11. The Commission itself found much fault with the Applicants’ rate request proposals for this transmission line at FERC.² The KCC opposed their applications, on several grounds. The KCC characterized the incentive returns requested by Prairie Wind as excessive, and unnecessary, because there is no need for additional incentives when there is competition to build the same line. (Prairie Wind Protest, at 3 - 4). The KCC said that it was “inappropriate and disconcerting for existing SPP members [referring to Westar and AEP] to form an LLC, if the primary purpose of creating the LLC apparently is to enable the LLC to receive economic incentives to join SPP.” (*Id.*, at 6). It also argued that Prairie Wind’s efforts to seek incentive returns and get rates approved by FERC before it had even subjected its proposed project to the

² *Motion to Intervene and Protest of the Kansas Corporation Commission*, October 24, 2008, FERC Docket No. ER09-36-000, *in re* Prairie Wind Transmission, LLC [Prairie Wind Protest]; *Motion to Intervene and Protest of the Kansas Corporation Commission*, February 5, 2008, FERC Docket No. ER09-548-000, *in re* ITC Great Plains, LLC [ITC Protest].

SPP planning and vetting processes were premature. (*Id.*, at 4 - 5). The KCC argued similarly against ITC's application for incentive rates at FERC (although ITC has, at least, since become a member of SPP): "The KCC respectfully contends that the incentive rate treatment for transmission projects . . . was intended to encourage transmission expansion projects which would not otherwise be able to be constructed, not to subsidize projects that multiple parties are competing to construct." (ITC Protest, at 5).

12. Unfortunately for Kansas ratepayers, the KCC's protests were largely ignored: Prairie Wind was awarded an incentive return of 12.8%³, and ITC was awarded an incentive return of 12.16%⁴. By comparison, Westar's return on equity approved in its last rate case was 10.4% and its overall rate of return was calculated at just under 8.5%. KCC Docket No. 08-WSEE-1041-RTS, *Order Granting Joint Motion and Approving Stipulation and Agreement in its Entirety*, Jan. 21, 2009, at ¶37. The KCC did not file a petition for reconsideration, and both FERC dockets remain open for consideration of several details concerning the proposed rates and tariffs. The KCC should re-read its own assessment of the unreasonableness of the proposals of Prairie Wind and ITC before it considers approving this settlement agreement, and consider the lost benefits of competition that have been squandered in this process.

13. As for the "effect of the transaction on the environment," the settlement leaves this concern unanswered. (*Id.*, at ¶52). While Prairie Wind says it consulted with environmental experts in designing its proposed route through the habitat of the lesser prairie chicken, and criticized ITC's proposed route for its intrusion on its habitat, under the proposed settlement agreement, ITC will be building the portion of the route that runs through that habitat. We don't

³ *Order Consolidating Proceedings, Granting Rate Incentives, Conditionally Accepting Tariff Revisions and Establishing Hearing and Settlement Procedures*, Dec. 2, 2008, FERC Docket Nos. ER09-35-000 *in re* Tallgrass Transmission, LLC, and ER-36-000 *in re* Prairie Wind Transmission, LLC, 125 FERC ¶ 61,248.

⁴ *Order Granting in Part and Denying in Part Rate Incentives, Conditionally Accepting Tariff Revisions, and Establishing Hearing and Settlement Procedures*, Mar. 16, 2009, FERC Docket No. er-548-000, *in re* ITC Great Plains, LLC, 126 FERC ¶ 61,223.

know whether ITC plans to avoid or mitigate the environmental effects on the prairie chickens in that area or not. Furthermore, while the project is touted as a conduit for power to be produced by proposed wind farms, it is likely also to facilitate moving power from western Kansas that is produced by burning coal: whether that may be considered an “effect” of this project on the environment should be addressed, since the Commission has said effects on the environment should be addressed.

14. While much lip service has been given to the projects’ benefits to “state and local economies and communities served by the resulting public utility operations in the state” (*Id.*), without knowing the voltage and projected costs, and how those costs will be allocated throughout the SPP region, no one can quantify the balance of costs to benefits to economies and communities in Kansas.

15. The “effect of the transaction on affected public utility shareholders” (*Id.*) is known, however. Thanks to FERC, Westar Energy shareholders, through their ownership interest in Prairie Wind, will receive returns on Westar’s share of the project that are much higher than the Westar’s authorized rate of return. As noted by the KCC in its protest at FERC, the creation of Prairie Wind enabled Westar to qualify for higher rates of return from FERC than it would have qualified for had Westar itself proposed the project; ITC, too, will receive a higher rate of return for its share of the project than the authorized return of Westar. Thus, the “effect of the transaction on customers” (*Id.*) is clear: they will pay more for the project if Prairie Wind and/or ITC build(s) the project than if any of our home-grown, vertically-integrated utilities had built it. The arrival of merchant transmission builders in Kansas has done nothing for customers except increase the profits to be made from building transmission lines.

16. “Whether the transaction maximizes the use of Kansas energy resources” and “Whether the transaction will reduce the possibility of economic waste” (*Id.*, at ¶52) are two questions that should be addressed by the Commission. While the project is intended primarily to serve as a conduit for power produced by proposed Kansas wind farms, without knowing the cost of the project and its ultimate impact on Kansans’ utility rates, no one can say whether this project maximizes Kansas energy resources or whether it will reduce the possibility of economic waste. Further, with the economy in its present state, there is more than a reasonable possibility that at least some of the proposed wind farms will be delayed or not built at all, at least while money is tight. It would certainly be “economic waste” to spend hundreds of millions of dollars on this line prematurely. Finally, the ratepayers certainly view the excessive returns on equity to be awarded to the Applicants as a prime example of economic waste; we could have had the same project built by Westar itself for 2.4% less.

17. The Commission stated in May that a “decision regarding the funding methodology for spreading the costs of a regional project over the SPP region is critical not only to the parties but also to this Commission in determining the interests of the public in approving construction of projects as proposed here. The Commission must be assured that Kansas ratepayers alone will not bear the cost of a transmission line that is being built to benefit customers far beyond its borders.” (May 22 *Order*, at ¶2). If the SPP’s final decisions on this project and approval by FERC of the tariffs and rates to implement SPP’s decisions are “critical” to determining the public interest of this settlement agreement, then approval of the settlement agreement at this time certainly is premature.

18. Another “critical” issue identified by the Commission is whether it is “more cost effective for one entity to construct and operate the entire line.” (Dec. 18 *Order*, at ¶23). Cost-

effectiveness has not been addressed in this docket at all, and the opportunity for Kansas customers to benefit from the cost-effective and time-tested process of good old-fashioned competition was lost when the Commission opted to pressure its Staff and the parties to settle,

rather than to devise a fair and impartial process of competitive bidding for the project.⁵ Our streets and highway projects are awarded under such a process; it works well to ensure that the public is paying a fair price for such projects. Instead, political pressure to speed up the process led the Commission to encourage the companies to collude rather than compete, with a KCC Staff attorney attending the mediation sessions between the Applicants—a highly unusual arrangement that was not revealed to the other parties until after the settlement agreement had been negotiated.

19. Such collusion is contrary to good economic policy. While FERC has been

⁵ See: KCC News Release, December 18, 2008, *KCC Urges Companies to Work Together in Major Transmission Line Project* (“[KCC Chairman] Wright said, “It would be very unfortunate if this project, a critical part of a regional system of EHV construction, and most likely the first to be built in the country, was to be delayed for failure to resolve issues through compromise and collaboration.”); KCC Chairman Thomas Wright *Media Statement re high voltage transmission line project*, December 18, 2008 (“The Kansas Corporation Commission strongly urges both companies to work together to reach an agreement to construct this transmission project An agreement could enable both companies to benefit, whereas, a decision for one company over another most likely translates into major delays with court challenges and on-going questions. . . . The Governor and the Kansas Electric Transmission Authority have also encouraged the parties to work together.”); KCC News Release, February 12, 2009, *Kansas regulator applauds progress of Southwest Power Pool; Midwest is one step closer to a modern transmission system* (“Meanwhile, the Kansas Corporation Commission will continue working to bring the competing companies together to reach a compromise on building new transmission lines in Kansas.”). It is worth noting that prior to the parties’ being released from their obligation to keep confidential the fact that a settlement agreement had been reached, the signatories informed the Governor a settlement had been reached, and signed the agreement at a ceremony held in the Governor’s office. (The Governor had earlier invited himself to a settlement conference to urge the parties to settle.) Additionally, Chairman Carl D. Holmes of the Kansas Electric Transmission Authority, a party to this docket (who is also Chairman of the House Energy and Utilities Committee and sits on the House committee that controls the KCC’s budget) wrote a letter on December 1, 2008, to the Commission to urge settlement. The political and external pressures on the parties to reach settlement—when the negotiations of which are normally a private process in which the parties feel free to walk away if agreement cannot be reached—was unprecedented. It is regrettable that the same pressures were not brought to bear to protect ratepayers from the loss of the advantage of having competitive proposals from which to choose.

charged by Congress to encourage transmission investment by granting bonus rates of return, the Commission is still charged with protecting the ratepayers of this state against unjust or unreasonable retail rates. We have lost a valuable opportunity to be assured that the ultimate total cost of the project will be as low as could be expected in a competitive marketplace, even if FERC has predetermined the level of profits to be earned on those projects. Without that assurance, this Commission cannot say with any certainty that this settlement agreement will result in just and reasonable rates. Ratepayers would be much better off with our vertically-integrated and regulated public utilities building these projects at their authorized rates of return than having independent transmission companies colluding to share the spoils of so-called incentive returns to build these projects.

20. That is one of the many reasons that approval of the settlement agreement is premature. The SPP and FERC have not yet: issued their final determinations on such issues as whether the line will be built at 345kV or 765kV; established a reliable estimate of the line's benefits and costs to the various members of SPP; determined how the costs of the line will be allocated throughout the SPP footprint; or made other decisions that will affect the wholesale rates, which are still under consideration by FERC. The Commission has said these determinations are "critical" to determining the public interest of this line: so why is it even considering approval of the settlement agreement before these determinations are made?

21. If the KCC deferred its consideration of who should build the project until the final determinations of SPP and FERC are made, the KCC would have the necessary information to fashion a request for proposals, and require parties interested in building the line to submit their proposals. The KCC could conduct a competitive bidding process in which the relative merits and costs of competing proposals could be considered. There is no reason to

expect that the losers in such a procedure would be able to delay the project unreasonably: the decisions on who will build highways and water plants and other critical components of our national infrastructure are made in this fashion every day. Why should we make decisions on who will build transmission “superhighways” any differently? To willingly toss away the opportunity for the ratepayers to benefit from competition between companies is simply irresponsible: it’s not good economics, it’s not good government, and it’s not good regulation.

22. If the Department of Transportation decided that the best way to decide who should build a highway is to lock the competing companies in a room with a mediator—and an agency attorney to ensure they stay focused on settlement—and encourage them to divvy up the parts of the highway each will build—and the DOT approved their mediated agreement *without even asking for the price*—there would be a public uproar. There should be public uproar here, as well, because the outcome of approving this settlement agreement would be no different. All in all, it can be said that the signatories to the settlement agreement are asking the Commission to buy a pig in a poke, and at a premium price. It may turn out to be a very good pig, but we don’t know whether it will or not, yet. The only thing we do know for sure right now is that the sellers are going to make a pretty penny on the deal, whether the pig turns out to be a good buy or not. This is not a wise way to buy pigs, and it’s not a wise way to decide who is going to build major transmission projects, either.

23. Therefore, CURB objects to the approval of the settlement agreement on all of the grounds stated above. Any decision on who should build the project is premature until the SPP and FERC processes have run their course and a reliable estimate of the scale and potential cost of the project is a part of the record. Only then can the Commission can determine the potential impact on Kansas ratepayers and decide if proceeding with this project is necessary

and in the public interest. In the meantime, the Commission should develop a fair and impartial process for awarding the right to build the project through the issuance of a request for proposals and assessing the comparative merits and costs of each proposal submitted. It is only through such a process that the Commission can be assured that the cost of the project is just and reasonable. At the very least, any certificates awarded by the Commission in this docket should be awarded with conditions that ensure that the Spearville-Wichita line will cost the Kansas ratepayers no more than it would have if it were built by our Kansas electric utilities.

24. CURB's concerns about the settlement agreement may be summarized with three unanswered questions: What is the point of allowing independent merchant transmission companies to obtain certificates of convenience in Kansas if the result is that ratepayers must pay higher returns to them than they pay to their monopoly utilities? How can we assess the economic benefits of this project to Kansans if we don't know what size it will be and who is going to help pay for it? How can the Commission possibly determine whether granting certificates to these companies is in the public interest if we don't have the information necessary to determine the benefits and costs? Until the Commission can answer these questions, it cannot possibly make a reasoned determination under the standards articulated by the Commission, the law and the courts.

25. Concerning the five factors the Commission considers in determining whether to approve a proposed settlement agreement (May 22 *Order*, at ¶17), the arguments above have already addressed whether the stipulation is supported by substantial evidence in the record as a whole (no), whether the agreement will result in just and reasonable rates (no), and whether the results of the agreement are in the public interest, including the interests of customers

represented by any party not consenting to the agreement (no). If the answers to these three questions is “no”, then it goes without saying that approving the agreement would not conform to applicable law, which requires that a Commission decision be supported by substantial evidence, result in just and reasonable rates, and be consistent with the public interest.

26. This filing is CURB’s sole opportunity to be heard on its reasons for opposing the settlement prior to the evidentiary hearing. CURB was excluded from the mediations among Applicants and Staff, and excluded from all settlement discussions in Phase 2 until the substantive terms of the settlement had already been agreed to by the signatories. In other words, CURB had no part in negotiating this settlement agreement. The interests of the customers represented by CURB are not represented in this settlement agreement, and approval of the agreement is certainly not in the public interest, for all the reasons stated above.

That said, CURB nevertheless plans to actively participate in the evidentiary hearing and all other proceedings in this docket, exercising all of its attendant rights and privileges as a party to this docket.

Respectfully submitted,



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CERTIFICATE OF SERVICE

08-ITCE-936-COC & 08-PWTE-1022-COC

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, e-mailed, or hand-delivered this 15th day of June, 2009, to the following:

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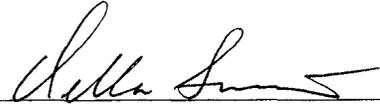
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CERTIFICATE OF SERVICE

08-ITCE-936-COC & 08-PWTE-1022-COC

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