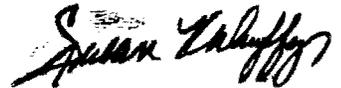


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas)
City Power & Light Company to Modify Its) Docket No. 10-KCPE-415-RTS
Tariffs to Continue the Implementation of Its)
Regulatory Plan.)

STATE CORPORATION COMMISSION

DEC 17 2010



**RESPONSE OF THE
CITIZENS' UTILITY RATEPAYER BOARD TO
KCPL'S PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Citizens' Utility Ratepayer Board (CURB), pursuant to the Commission's December 10, 2010, Order Setting Schedule on Petitions for Reconsideration and/or Clarification and Taking Judicial Notice, files its Response to Kansas City Power & Light Company's (KCPL) Petition for Reconsideration and Clarification (PFR). In support of its Response, CURB states as follows:

I. INTRODUCTION.

1. In the majority of the arguments raised in KCPL's PFR, the Company has simply repeated arguments and factual assertions contained in its post-hearing briefs and testimony. CURB opposes the reconsideration requested by KCPL. CURB's decision not to address each assertion should not be construed as a concession to any argument made by KCPL in requesting reconsideration.

2. KCPL argues throughout its PFR that it is entitled to "regulatory certainty,"¹ and repeatedly complains that the Commission's Order limits it to "only recover about 43% of its

¹ KCPL PFR, ¶¶ 1, 3, 120, 154, 192.

requested revenue deficiency.”² What KCPL really seeks is a regulatory guarantee, not regulatory certainty. Nothing in the regulatory plan docket³ guaranteed that KCPL would receive 100% of the rate increases requested by KCPL, and the three prior settlements bear this out.⁴

3. Contrary to KCPL’s erroneous statement, it did not “establish”⁵ a gross deficiency of \$50.8 million; it merely requested a rate increase of \$50.8 million. Adjustments made by Staff and CURB recommended that the Company’s rate increase be decreased by \$60 million and \$41 million, respectively.⁶

4. KCPL acknowledges the Commission’s “thoughtful and diligent analysis of the difficult issues that have been raised in this docket,”⁷ then concludes without any basis that the Commission split the difference⁸ between Staff’s recommendation of a \$9 million decrease and KCPL’s request for a \$50 million increase in rates. KCPL provides no basis for its “split the difference” conclusion, which should be summarily disregarded by the Commission. To the contrary, the Commission’s Order specifically and methodically addressed each of the line items KCPL seeks to have reconsidered.

5. The Company’s unsupported statements that the Commission’s Order will negatively impact the financial integrity of the Company and its ability to serve its customers⁹ is also without any basis in fact or in the record, and should be likewise disregarded by the Commission.

² *Id.*, at ¶¶ 3, 4, 13, 192.

³ KCC Docket No. 04-KCPE-1025-GIE.

⁴ In the first rate case filed under the regulatory plan, KCC Docket No. 06-KCPE-828-RTS, KCPL requested \$42.27 million, and settled for \$29 million, or 69% of its request. In the second rate case, KCC Docket No. 07-KCPE-905-RTS, KCPL sought \$47.06 million, and settled for \$28 million, or 59%. In the third rate case, KCC Docket No. 09-KCPE-246-RTS, KCPL requested \$71.63 million, and settled for \$59 million, or 82%. In this final rate case under the regulatory plan, KCPL’s revised request was for \$50 million, and was awarded \$21.8 million, or 43.6%.

⁵ KCPL PFR, ¶ 2.

⁶ Order, Exhibit I.

⁷ *Id.*, at ¶ 3.

⁸ *Id.*, at ¶ 4.

⁹ *Id.*

Interestingly, the Company admits the Commission’s Order does not immediately compromise its access to capital markets. Instead, the Company argues (without any basis in fact or in the record) that access to those markets and the associated costs “could” be impacted if investors and credit rating agencies conclude that the Commission and the State of Kansas are “unwilling to provide adequate regulatory recovery and cash flow to KCPL.”¹⁰

6. KCPL has the ability to manage its company and continue to provide safe and reliable service to its customers. If any of the dire unsupported possibilities raised by KCPL do occur, KCPL will be entitled to file subsequent rate cases to address those situations as they arise. However, because KCPL’s dire predictions are completely speculative and unsupported by the record, they should be disregarded by the Commission.

7. Finally, the Company complains that the Commission’s Order treats it “different – and more harsh – than what has previously been deemed fair and reasonable for other Kansas public utilities” on a number of issues. KCPL’s equal protection argument fails based on the very authorities it relies upon.

8. In order for agency action to constitute an equal protection violation, the violation must be arbitrary.¹¹ Contrary to KCPL’s arguments, the Commission’s decisions to treat KCPL differently than Westar are not arbitrary, but are based on rational distinctions made between the two companies, distinctions that are supported by evidence in the record.

¹⁰ *Id.*, at ¶ 5.

¹¹ KCPL PFR, ¶ 107, *Joe Self Chevrolet, Inc., v. Board of County Commissioners of Sedgwick County*, 247 Kan. 625, 633 (1990).

II. ISSUES OF LAW OR FACT FOR WHICH KCPL IS REQUESTING RECONSIDERATION.

A. **KCPL's Claim That The Commission's Order Is Not Within The Zone Of Reasonableness, Is Not Based On Substantial Competent Evidence, And Is Unfair, Unreasonable, Erroneous, Arbitrary, Capricious And Unlawful.**

9. KCPL asserts the Commission's order is not based on substantial competent evidence because there are multiple instances in which the Commission "clearly did not consider or give weight to evidence presented by KCP&L witnesses..."¹² The Commission's decision to not give weight to evidence presented by KCPL witnesses does not require reconsideration. If the Commission failed to properly cite testimony by a KCPL witness, such as KCPL's self-proclaimed "nationally recognized expert on utility returns on equity,"¹³ then the failure to cite this evidence can be cured by citing the evidence and indicating the weight given such evidence in the Commission's Order denying KCPL's PFR.

10. "Once expert testimony is admitted, the Commission has discretion to weigh and accept or reject that testimony."¹⁴ The weight and credibility given to witnesses and testimony is for the Commission to determine,¹⁵ not KCPL.

11. Contrary to KCPL's assertions, the line item portions of the Commission's Order for which KCPL seeks reconsideration are supported by substantial competent evidence. KCPL simply disagrees with the weight, or lack thereof, that the Commission placed on testimony the Company offered on these issues.

¹² *Id.*, at ¶ 16.

¹³ *Id.*

¹⁴ *Kansas Gas and Electric Company v. State Corn. Comm'n*, 14 Kan. App. 2d 527, 538, 794 P.2d 1165, rev. denied (1990).

¹⁵ *Colorado Interstate Gas Co. v. State Corp. Comm'n*, 192 Kan. 1, Syl. 7 6,386 P. 2d 266 (1963).

B. Depreciation.

12. The majority of KCPL's request for reconsideration on the depreciation issues simply repeats arguments made in KCPL's post-hearing brief. CURB incorporates the arguments contained in its post-hearing brief herein by reference.

13. KCPL states that depreciation is "not intended to be used by a regulatory agency as a mechanism to keep rates lower during difficult economic times or to offset rate increases incurring during a time of high investment in new generation."¹⁶ However, KCPL fails to cite any portion of the Commission's Order that indicates the Commission intended its decision on depreciation to accomplish either of these objectives.

14. KCPL further argues that the Commission's decision to reduce the Company's excessive depreciation expense decreases its cash flow and weakens its credit metrics and signals to the investment community that the State of Kansas is a riskier place to invest and to do business.¹⁷ This argument should be disregarded by the Commission as speculative, unsupported by the evidence, and irrelevant.

15. KCPL asserts that the Commission's depreciation expense reduction of nearly \$25 million is "extreme, punitive, inconsistent with the record, and will clearly have a negative impact on the Company's cash flow going forward."¹⁸ Contrary to KCPL's assertions, the record shows that KCPL has an excess depreciation reserve of over \$330 million,¹⁹ and that KCPL has not filed a

¹⁶ KCPL PFR, ¶¶ 24-25.

¹⁷ *Id.*, at ¶ 25.

¹⁸ *Id.*, at ¶ 27.

¹⁹ Tr. Vol. 9, pp. 1937-40, 1942.

depreciation study on non-nuclear assets since 1976.²⁰ It is unrealistic for KCPL to believe going well over 30 years without filing a depreciation study would not result in substantial adjustments.

16. Moreover, as stated above, the Commission has discretion to weigh and accept or reject expert testimony,²¹ and the weight and credibility given to witnesses is for the Commission to determine.²² The underlying complaint made by KCPL throughout its discussion of depreciation issues is that the Commission did not afford as much weight to Mr. Spanos' testimony as it did to the testimony of Mr. Dunkel. For the reasons set forth in Staff and CURB's post-hearing briefs and the Commission's Order, the Commission's decision to afford greater weight to Mr. Dunkel's testimony is sound, within its discretion, and supported by substantial competent evidence.

17. KCPL also seeks to present additional evidence into the record to support its argument on interim net salvage: "As shown in the chart below, Mr. Spanos determined ..."²³ Both the percentages of interim net salvage and the factors to be applied to interim net salvage contained in this new chart developed by Mr. Spanos after the hearing were not part of the record, and should therefore be stricken from the record and disregarded by the Commission.

C. Return On Equity.

18. KCPL claims the Commission "blindly" adopted the range of returns presented by Staff witness Adam Gatewood, and that the testimony of KCPL witness Hadaway "methodically illustrated" why Staff and CURB's ROE recommendations were flawed. These arguments simply repeat the same arguments made in KCPL's post-hearing brief, and relate to its complaint that the

²⁰ Post Hearing Rebuttal Brief of Kansas City Power & Light Company, ¶ 251.

²¹ *Kansas Gas and Electric Company v. State Corn. Comm'n*, 14 Kan. App. 2d 527, 538, 794 P.2d 1165, rev. denied (1990).

²² *Colorado Interstate Gas Co. v. State Corp. Comm'n*, 192 Kan. 1, Syl. 7 6,386 P. 2d 266 (1963).

²³ KCPL PFR, ¶ 57.

Commission did not give as much weight to its ROE witness as given to Staff and CURB witnesses. Because the Commission has discretion to weigh and accept or reject expert testimony,²⁴ and the weight and credibility given to witnesses is for the Commission to determine,²⁵ KCPL's request for reconsideration should be denied.

19. However, KCPL again attempts to add to the record by introducing new evidence regarding updated Regulatory Research Associates (RRA) data;²⁶ this is information that was not submitted during the hearing, available for discovery, cross examination, post hearing briefs, or argument. This data was not part of the record, and should therefore be stricken from the record and disregarded by the Commission.

20. For the reasons set forth in Staff and CURB's briefs and the Commission's Order, the Commission's decision to afford greater weight to Staff and CURB ROE witnesses is sound, within the Commission's discretion, and is supported by substantial competent evidence. The Commission's decision on ROE should therefore not be reconsidered by the Commission.

D. Equity Units.

21. KCPL argues that removing the equity from the KCPL's capital structure is inconsistent with the prior Commission decisions on parent/subsidiary cost of capital calculations.²⁷

However, the Commission's decision in this docket was driven by the facts relating to KCPL and its parent, GPE. KCPL has made no showing the parent/subsidiary relationships in the 03-WHST-503-

²⁴ *Kansas Gas and Electric Company v. State Corn. Comm'n*, 14 Kan. App. 2d 527, 538, 794 P.2d 1165, rev. denied (1990).

²⁵ *Colorado Interstate Gas Co. v. State Corp. Comm'n*, 192 Kan. 1, Syl. 7 6,386 P. 2d 266 (1963).

²⁶ KCPL PFR, ¶ 74-76, Attachment A (RRA update on Electric Utility ROE (Through 3Q 2010)).

²⁷ *Id.*, at ¶¶ 87-98.

AUD and 04-AQLE-1065-RTS dockets were identical or even similar to the KCPL/GPE relationship, including debt issuance, separate and distinct credit ratings, etc.

22. The Commission decision to remove the equity units is appropriate and supported by substantial competent evidence. CURB incorporates the arguments and facts made in the post hearing briefs and proposed findings of facts/conclusions of law of CURB and Staff on this issue. The Commission should not reconsider its decision to remove the equity units from the Company's capital structure.

E. Environmental Cost Recovery Rider (ECRR).

23. The Company argues that the Commission unreasonably and inequitably differentiated between the circumstances facing KCPL and the circumstances that face Westar. However, the Commission's decision is neither unreasonable nor inequitable, but is based upon substantial competent evidence in the record, including specific facts contained in KCPL's application.

24. First, the ECR rider requested by KCPL was not identical to the ECR rider requested by Westar, granted by the Commission, and subsequently amended. Nor did the Commission deny cost recovery of environmental improvements, but merely the mechanism requested by KCPL.

25. None of the arguments made by the Company in support of its request for reconsideration are different from those made during the hearing or in its post-hearing briefs. The Commission's denial of KCPL's request for an ECR rider is based on substantial competent evidence, and the Commission should deny the Company's request for reconsideration.

F. Pension Tracker And Other Post Employment Benefits (OPEB) Tracker.

26. KCPL argues that the Commission's decision to terminate the pension tracker in this proceeding is inconsistent with the intent of the parties and the 1025 S&A. To the extent "parties" includes CURB, this statement is simply untrue.

27. CURB was not a party to the 1025 S&A, and neither CURB nor the Commission are bound by any of the terms of that agreement. This was specifically noted by the Commission in the 1025 docket.²⁸ The Commission specifically held in the 1025 docket that the Regulatory Plan (1025 S&A) does not bind the Commission, and noted that even "KCP&L acknowledged that the Commission's approval of the Agreement would not require the Commission to make any specific determinations or grant any approvals in subsequent dockets."²⁹ In approving the Regulatory Plan, the KCC noted that "[t]he proposed treatment regarding the specific matters contained in the Agreement appears reasonable at this time, but is subject to future Commission review to ensure that they result in just and reasonable rates and reflect the provision of efficient and sufficient service. K.S.A. 66-101b."³⁰

28. The Commission decision to terminate the pension tracker is reasonable and supported by substantial competent evidence.

29. Further, KCPL seeks to have the Commission reconsider its request to implement a tracker for OPEB costs. The Commission's decision on this issue is supported by substantial competent evidence and should not be reconsidered.

²⁸ CURB Brief, ¶¶ 10-11; Crane D., p. 105; Hearing Exh. 23, 1025 Stipulation, p. 1; Hearing Exh. 24, Order Approving 1025 Stipulation, ¶ 2, 32, 41, 48, 61.

²⁹ Hearing Exh. 24, Order Approving 1025 Stipulation, ¶ 32.

³⁰ Id., paragraph 61.

G. Rate Case Expense.

30. With respect to the amortization period, KCPL has failed to make any argument sufficient to justify reconsideration of the Commission's decision.

31. With respect to rate case expense in the current docket, CURB incorporates the arguments made in CURB's Petition for Reconsideration and/or Clarification (PFR). As noted by KCPL, the Commission did find that KCPL failed to provide sufficient detail and documentation of the services provided by many of its consultants.³¹

32. KCPL complains that it merely followed the "process" purportedly utilized by the Commission in the past for rate case expense,³² yet fails to cite what that process was and the basis for its characterization of the process. The Company simply failed to meet its burden of proof on rate case expense, as demonstrated in CURB's PFR.

33. The Company further requests that it be permitted to defer any additional amounts of rate case expense over and above the amount awarded in a separate account. CURB opposes this, unless all rate case expense in excess of the \$2.1 million contained in the Company's application is denied pending a subsequent review in KCPL's next rate proceeding.

34. The Company also requests clarification that it be able to demonstrate in any subsequent proceeding that it is entitled to recover rate case expense in excess of the \$5.6 million awarded by the Commission. CURB opposes this request, on the same grounds described in CURB's PFR.

³¹ KCPL PRR, ¶ 134.

³² *Id.*

H. Pension Funding Status Adjustment.

35. KCPL correctly notes that the Commission rejected its \$1.5 million (\$534,040 Kansas jurisdictional) adjustment to account for the overfunded nature of St. Joseph Power & Light's pension at the time of the merger because KCPL did not present substantial competent evidence to support the adjustment.³³ This is supported by the Commission's findings, which CURB will not repeat unnecessarily here.³⁴

36. KCPL asserts that Staff failed to raise the issue of KCPL's failure to insulate Kansas ratepayers from additional pension expense caused by Aquila being underfunded until the evidentiary hearing.³⁵ However, Staff did raise this issue in its prefiled testimony, as noted by the Commission:

In prefiled testimony, Hull questioned KCPL's proposed adjustment and challenged whether it adequately reflected the consolidated pension costs resulting from absorption of the pension plan after the merger with Aquila. This testimony reflected the nature of Staff's concerns; KCPL could have used discovery to clarify its understanding of the basis for Staff's testimony.³⁶

37. The Company simply disagrees with the weight the Commission gave Staff testimony over the testimony provided by Company witnesses. Again, because the Commission has discretion to weigh and accept or reject expert testimony,³⁷ and because the weight and credibility given to witnesses is for the Commission to determine,³⁸ KCPL's request for reconsideration should be denied.

³³ KCPL PFR, ¶¶ 138-139.

³⁴ Order, pp. 55-58.

³⁵ KCPL PFR, ¶ 140-141.

³⁶ Order, pp. 57-58.

³⁷ *Kansas Gas and Electric Company v. State Corn. Comm'n*, 14 Kan. App. 2d 527, 538, 794 P.2d 1165, rev. denied (1990).

³⁸ *Colorado Interstate Gas Co. v. State Corp. Comm'n*, 192 Kan. 1, Syl. 7 6,386 P. 2d 266 (1963).

I. Demand Side Management Programs.

38. CURB will not address the Company's claim that the Commission lacks the statutory authority to require the Company to continue the voluntarily-agreed-to demand side management programs. However, the Commission should consider whether it is good public policy to order a Company to continue programs voluntarily implemented for a specified time period pursuant to a settlement agreement.

39. These programs were voluntarily agreed to in the 1025 docket, and although CURB was not a party to that agreement, CURB acknowledges the Company has performed on the agreement and tariffs. To require the Company to continue these voluntary programs may chill the willingness of KCPL and other utilities to voluntarily implement such programs in the future if they believe they will be required to continue the programs beyond the time period agreed upon.

J. Other Benefits.

40. The Company has failed to provide any justification for its request that the Commission reconsider its Order on Other Benefits, other than to repeat the arguments made at hearing and in the Company's post-hearing briefs. The Commission's Order accurately recites the testimony of the Company, Staff, and CURB on this issue.

41. The Order reflects that the Commission gave more weight to and adopted the testimony of CURB witness Andrea Crane that known and measureable expenses based on the actual costs during the test year is the most appropriate calculation for this expense.³⁹ Because the Commission has discretion to weigh and accept or reject expert testimony,⁴⁰ and the weight and

³⁹ Order, p. 58.

⁴⁰ Kansas Gas and Electric Company v. State Corn. Comm'n, 14 Kan. App. 2d 527, 538, 794 P.2d 1165, rev. denied

credibility given to witnesses is for the Commission to determine,⁴¹ KCPL's request for reconsideration on this issue should be denied.

K. Off-System Sales Allocator.

42. KCPL has failed to provide any justification for the Commission to reconsider its decision to deny KCPL's request to change the off-system allocator. The rationale and reasoning of the Commission is sound, and supported by substantial competent evidence.

L. Income Tax Expense – Accumulated Deferred Investment Tax Credit and Excess Deferred Income Taxes.

43. KCPL's request for reconsideration on this issue should be denied. While CURB is somewhat sympathetic to the Company's situation, KCPL has not asked the Commission to reopen the record, has not provided the additional evidence it references, and has not provided any basis or foundation for the calculations and adjustments described. KCPL claims this information "was not available at the time of the hearing,"⁴² a fact that CURB contests.

44. KCPL references advice of "outside counsel" regarding a September 9, 2010 "Memorandum of Understanding" with the IRS. While CURB has no direct knowledge or way of acquiring such knowledge, it is reasonable to assume KCPL was negotiating this memorandum of understanding during the course of the hearing, and quite probably before the hearing, yet no mention of this issue was made until after the Order was issued. KCPL was aware of this issue and could have provided notice to the parties and the Commission, yet for unexplained reasons, KCPL chose to remain silent on this issue until long after the hearing concluded.

(1990).

⁴¹ Colorado Interstate Gas Co. v. State Corp. Comm'n, 192 Kan. 1, Syl. 7 6,386 P. 2d 266 (1963).

⁴² KCPL PFR, ¶ 164.

45. CURB was not orally advised of these issues until November, two months after the Memorandum of Understanding was reached with the IRS. However, CURB has not been provided any documents regarding this issue nor any explanation of how the Company has calculated its proposed adjustment to the revenue requirement awarded by the Commission. The Company's Petition for Reconsideration likewise contains no documentation, but merely summaries of the Company's interpretation of the facts and issues. CURB has no way to verify these calculations, has been provided no opportunity to conduct discovery, to cross examination, or to brief the issue. The Commission has no substantial competent evidence in the record, or even evidence submitted after the record was closed, to reconsider its Order on the grounds raised by KCPL.

46. Furthermore, KCPL has failed to provide any evidence or authority that there has ever been a denial of tax credits similar to what KCPL describes. In the discussions with KCPL in November, KCPL could not identify any situation similar to this case where such a denial of tax credits was made.

47. Based on the foregoing, the Commission should deny KCPL's request for reconsideration to correct the amount of accumulated deferred investment tax credit and excess deferred income taxes included as a reduction to the Company's income tax expense in this case.

M. Request for Nunc Pro Tunc.

48. CURB does not oppose the Company's request for a Nunc Pro Tunc Order based on the argument made by KCPL in paragraph 190 of KCPL's PFR, to the extent any understatement is verified and agreed to by Staff.

III. PETITION FOR CLARIFICATION.

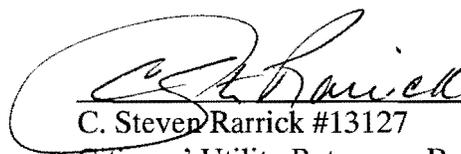
A. Incentive Compensation.

49. CURB agrees that the Ordering clause at p. 140 of the Order misstates the Commission decision described at pp. 46-51 of the Order. The Commission should clarify that it accepted Staff's recommendation to (a) disallow 50% of the costs of the Annual Incentive Program (AIP) for officers related to executive payout in 2010, (b) disallow 50% of the annual costs related to restricted shares for the Long-Term Equity Incentive Plan (LTIP), and (c) disallow 100% of the costs related to performance shares payouts for the LTIP.⁴³

III. CONCLUSION.

50. CURB respectfully requests that the Commission deny KCPL's Petition for Reconsideration, with the exception of (a) the Company's request for a Nunc Pro Tunc Order described in paragraph 190 of KCPL's PFR and (b) the Company's request for clarification regarding the incentive compensation disallowance recommended by Staff and accepted by the Commission.

Respectfully submitted,


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⁴³ Order, p 48, 50-51.

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

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, electronic service, or hand-delivered this 17th day of December, 2010, to the following:

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