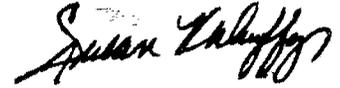


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

DEC 22 2010



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.)

**CURB'S REPLY TO
KCPL'S RESPONSE TO
PETITIONS FOR RECONSIDERATION**

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 Reply to KCPL's Response to Petitions for Reconsideration. In support of its Reply, CURB states as follows:

I. INTRODUCTION.

1. In the KCPL's Response to Petitions for Reconsideration (KCPL's Response), KCPL states that "the purpose of a petition for reconsideration is not to give the party 'another bite at the apple' or to re-raise or re-argue the points that were previously raised by the party in its post-hearing brief, and which were clearly weighed and decided upon in the Commission's Order."¹ However, this is exactly what KCPL did in its Petition for Reconsideration (PFR) and again in KCPL's Response.

2. CURB's decision not to address each assertion contained in KCPL's Response should not be construed as a concession to any argument made by KCPL. Likewise, CURB's decision not to respond to Staff's Response to Petitions for Reconsideration should not be construed as a concession to any argument made by Staff that may be contrary to positions take by CURB.

¹ KCPL Response, ¶ 4.

II. THE COMMISSION SHOULD RECONSIDER OR CLARIFY ITS DECISION REGARDING RATE CASE EXPENSE.

3. With respect to CURB's request that the Commission reconsider its decision on rate case expense, KCPL again argues that the Commission followed the process or "precedent" that the Commission has utilized in the past when handling the issue of rate case expense² without any citation to demonstrate the purported process referenced by KCPL.³ KCPL has failed to demonstrate that the Commission has deviated from any established process or precedent regarding proof of rate case expense.

4. However, even if the standard of proof required by the Commission for rate case expense could be interpreted as a new or different procedure, the Commission's decision to use well-established law regarding fees and expenses is supported by substantial competent evidence and was adequately explained by the Commission. Kansas courts recognize that regulatory bodies may change positions on an issue if the new position is supported by substantial competent evidence, as long as the agency explains the basis for changing its position.⁴

5. However, as occurred in *Western Resources, Inc.*,⁵ KCPL has failed to establish the KCC has deviated from any prior order or policy. It is noteworthy that KCPL has failed to reference even one prior order which it believes is inconsistent with the Commission's Order in this case.

6. KCPL further argues that the Commission's award of \$5.6 million in rate case expense based on summarized, estimated, and unsupported information submitted by the Company is appropriate and not erroneous because the Order notes the Commission relied upon: (1) "its

² KCPL Response, ¶ 27. *See also*, KCPL PFR, ¶ 134.

³ *See*, CURB Response, ¶ 32.

⁴ *Western Resources, Inc. v. Kansas Corp. Comm'n*, 30 Kan. App. 2d 348, 360, 42 P.3d 162 (2002).

⁵ *Id.*

expertise in reviewing rate case expense costs to determine what expenses were prudent and are just and reasonable to recover from ratepayers,” (2) “KCPL’s responses to Data Requests 554 and 555 inquiring about rate cases expenses,” and (3) various other cases.⁶ As discussed in CURB’s PFR, the Commission’s reliance on its expertise and the summarized, estimated, and unsupported information submitted by KCPL in the data requests provided after the discovery deadline had expired, after the hearing, after the record had been closed, and after briefs had been filed is erroneous and constitutes a denial of due process.⁷

7. Contrary to KCPL’s statement that the Commission “examined substantial competent evidence to determine that at least the approved amount of rate case expense was prudent,”⁸ the Commission clearly and repeatedly made findings demonstrating the evidence submitted by KCPL in support of rate case expense was not substantial competent evidence:

- The Commission’s attempt to “determine rate case expense was hampered by a lack of detailed information in the record.”⁹
- Information about the time and amount of services rendered, the general nature and character of the services revealed by the invoices, whether attorneys or consultants presented testimony or other tangible work product that was made a part of the record, the nature and importance of the litigation, and the degree of professional ability, skill, and experience called for and used during the course of the proceeding was “not contained in this record.”¹⁰
- “KCPL submitted summarized total expenses to September 30, 2010, and estimated expenses until the end of this proceeding. The documentation to support these estimates contains very little detailed information that would enable the Commission to make an individualized review of charges by specific consultants and attorneys. In fact, documentation presented for some vendors, including law firms, provides nothing by which to determine total hours, hourly rates, subject matter addressed, etc.”¹¹

⁶ KCPL Response, ¶ 30, citing the Commission’s Order, p. 89.

⁷ CURB PFR, ¶¶ 1-17.

⁸ KCPL Response, ¶ 32 (emphasis added).

⁹ Order, p. 88. (emphasis added).

¹⁰ Order, pp. 88-89, citing: *In re Union Electric Co.*, 2010 WL 1178770, at 7; *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm’n*, 116 S.W.3d 680, 693 (Mo App. 2003); *Westar Energy*, __ Kan. App.2d ___, ___, 235 P.3d 515, 529 (2010); Kansas Rules of Professional Conduct (KRPC) 1.5(a) (2009 Kan. Ct. R. Annot. 460).

¹¹ Order, p. 89. (emphasis added).

- “[B]ecause a detailed record is not available, the Commission is not able to evaluate specific amounts that should be allowed for each consultant or attorney.”¹²
- “The Commission has reviewed estimates from the numerous expert consultants KCPL used in this case.”¹³
- In considering attorney fees, the Commission was particularly struck by the lack of detail defining services performed by the numerous attorneys that made no appearance in this proceeding. Information was not provided that would have allowed the Commission to determine an appropriate hourly rate or number of hours expended by attorneys involved in this case. Invoices from some firms reflected charges for multiple attorneys working on multiple projects for KCPL with a portion attributed to this proceeding but no explanation about how that amount was determined.¹⁴
- “The Commission found estimated charges for some legal services particularly disconcerting.”¹⁵
- “The Commission is also concerned that, based upon review of a small number of invoices, that errors exist in KCPL's estimate of costs. . . . Although this is not a significant amount, the Commission is concerned other errors are contained in KCPL's statement of rate case expense.”¹⁶
- “Even though the issues were complex, the Commission finds it unreasonable to require ratepayers to be responsible for the entire rate case expense costs being sought by KCPL. The Commission is particularly concerned about requiring ratepayers to pay such high legal costs when no opportunity is available to review the services rendered to evaluate whether law firms adjusted charges for duplication of services of multiple attorneys when setting their fees.”¹⁷

8. KCPL argues the interim rate relief mechanism ordered by the Commission “is a more reasonable approach” “if the issues raised in its Petition are addressed.”¹⁸ However, noticeably lacking from KCPL’s response is any indication that it would not consider any subsequent downward adjustment to its rate case expense in a subsequent rate case to constitute retroactive ratemaking.¹⁹

9. The Company’s failure to address the retroactive ratemaking issue is understandable - KCPL seeks to “have its cake and eat it too.” KCPL is perfectly content to have the Commission’s

¹² *Id.*, at p. 90. (emphasis added).

¹³ *Id.*, at p. 91. (emphasis added). Parties to this proceeding were not provided any opportunity to investigate, cross examine, brief, or argue whether these estimates were duplicative or prudent.

¹⁴ *Id.*, at p. 92. (emphasis added).

¹⁵ *Id.*, at p. 93. (emphasis added).

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.*, at pp. 94-95. (emphasis added).

¹⁸ *Id.*, at ¶ 43.

¹⁹ *Id.*, at ¶¶ 39-44.

award of \$5.6 million in rate case expense be considered interim. This will give the Company the opportunity to seek to have the \$5.6 million amount increased in a subsequent rate case. More importantly, in the event the \$5.6 million award is reduced in a subsequent rate case, the Company will then cry “foul” and claim retroactive ratemaking. It is this very scenario that CURB seeks to avoid in seeking reconsideration of the interim aspect of the Commission’s rate case expense award.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ALLOW KCPL’S ACCUMULATED DEFERRED INCOME TAX ADJUSTMENT (ADIT).

10. KCPL’s response to this issue fails to address the substantial competent evidence submitted by CURB regarding the agreement between the parties on ADIT in the last rate case, nor support its baseless allegation that the Commission made some type of negative finding regarding the “demeanor of witnesses”²⁰ during the evidentiary hearing. CURB was not a party to the 1025 S&A, is not bound by the 1025 S&A. More importantly, the parties clearly negotiated a written description of how the KCPL and the parties to the subsequent rate case settlements intended the PTPP to affect rate base and overall revenue requirements within the context of this rate case.²¹

IV. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ADOPT KCPL’S HANDY-WHITMAN INDEX FOR GENERATION/PRODUCTION MAINTENANCE EXPENSE.

11. KCPL misconstrues both the argument made by CURB and the rationale used by FERC in determining that the Handy-Whitman Index specifically supplies a known and unbiased adjustment factor in some instances where figures are not subject to a full review.²² Consistent with

²⁰ KCPL Response, ¶¶ 46, 49.

²¹ Tr. Vol. 2, p. 387, lines 2-25, p. 388, line 1; Hearing Exh. 34, Schedule CBG-2; Crane D., p. 48, lines 15-21, p. 49, lines 1-13) (emphasis added).

²² Order, p. 51. (emphasis added).

FERC's rationale, CURB's argument is that "the figures submitted by KCPL for generation/production maintenance expense were subject to a full review" and that the "Company's proposal to adjust historic costs by the Handy Whitman Index factors is not supported by this full review."²³

12. The full review and analysis of the Company's historic generation/production maintenance costs performed by Andrea Crane establishes that using the actual test year costs is more reasonable than utilizing the Handy-Whitman Index. Both the up and down fluctuations of the Company's historic steam maintenance costs and the fact that the actual test year costs were relatively close to the seven-year average support this conclusion.²⁴

13. Contrary to KCPL's continued assertion, the analysis referenced by KCPL was not a "study" as the Company asserts, but merely a sample without any supporting parameters.²⁵

14. CURB therefore respectfully requests that the Commission reconsider its decision finding the use of the Handy-Whitman Index appropriate for normalizing KCPL's generation/production maintenance expense and adopt CURB's recommended adjustment for generation/production maintenance expense shown in Schedule ACC-32.²⁶

V. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO AMORTIZE SO₂ EMISSION ALLOWANCE PROCEEDS OVER A 22-YEAR PERIOD.

15. KCPL's Response fails to acknowledge that the Commission's decision is based upon its underlying erroneous conclusion that prior agreements contained a "condition that the parties

²³ CURB PFR, ¶ 40.

²⁴ Crane D., p. 81, lines 17-21, p. 82, lines 1-9; CURB PFR, ¶ 41.

²⁵ Tr. Vol. 11, pp. 2514-2516.

²⁶ Crane D., p. 83, lines 4-9.

would renegotiate” the 22-year amortization period.²⁷ This finding by the Commission is erroneous, and KCPL’s response fails to dispute this, but instead admits the parties agreed that the amortization period would be determined in this case based on the recommendation of the parties.

16. The S&A’s in the 905 Docket and 246 Docket rate cases did not provide that the amortization of the regulatory liability for SO₂ emission allowance proceeds would be renegotiated, but instead stated that the SO₂ emission allowance proceeds would be “amortized over a time period to be determined in the 2009 rate filing” and “amortized over a time period to be determined in the Company’s next rate case.”²⁸

17. The parties’ agreement that a term would be determined in a subsequent proceeding did not constitute an agreement to renegotiate the term; it simply indicated the term would be determined in the subsequent proceeding. This determination would be made by the Commission, whether by approving a negotiated agreement or deciding the issue after considering evidence submitted by opposing parties. Here, the parties could not agree, and the Commission was required to make the decision based upon the evidence before it. Instead, the Commission erroneously concluded the prior agreements required a negotiated solution rather than deciding the issue based upon the evidence in the record.

18. Rather than consider the evidence submitted by the parties, the Commission’s Order fails to even discuss the factors cited by CURB as to why a 10-year amortization is more reasonable than a 22-year period proposed by the Company. Instead, the Order merely contains the unsupported

²⁷ Order, pp. 53-54. (emphasis added).

²⁸ Joint Stipulation and Agreement, KCC Docket No. 07-KCPE-905-RTS, p. 10; Crane D., pp. 76-77.1 Post Hearing Brief of Kansas Power & Light Company (KCPL Brief), ¶369; Crane D., pp. 76-77; Joint Stipulation and Agreement, KCC Docket No. 09-KCPE-246-RTS, ¶ 27. (emphasis added).

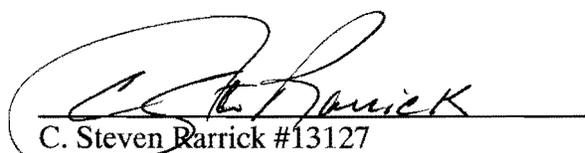
conclusion that the Commission was more persuaded by KCPL's proposal to amortize the proceeds over 22-years.²⁹

19. CURB respectfully requests that the Commission reconsider its decision to amortize SO₂ emission allowance proceeds over a 22-year period rather than the 10-year period proposed by CURB. The Commission's decision is contrary to the evidence, erroneous,³⁰ unreasonable, arbitrary and capricious,³¹ and not based on substantial competent evidence when viewed in light of the record as a whole.³²

VI. CONCLUSION.

20. CURB requests that the Commission reconsider the portions of its order (a) approving rate case expenses, (b) granting KCPL's Accumulated Deferred Income Tax Adjustment, (c) adopting the Handy-Whitman Index for KCPL's generation/production maintenance expense, and (d) amortizing KCPL's SO₂ emission allowance proceeds over a 22-year period.

Respectfully submitted,



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²⁹ Order, pp. 53-55.

³⁰ K.S.A. 77-621(c)(4).

³¹ K.S.A. 77-621(c)(8).

³² K.S.A. 77-621(c)(7).

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

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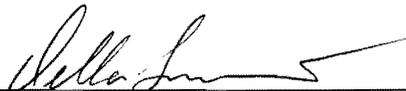
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