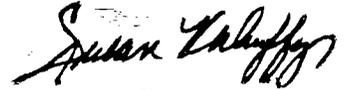


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

JAN 21 2011



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.)

SECOND PETITION FOR RECONSIDERATION

The Citizens' Utility Ratepayer Board (CURB), pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. § 82-1-235, hereby petitions the Kansas Corporation Commission for reconsideration of aspects of the Commission's January 6, 2011, Order on Petitions for Reconsideration and Clarification and Order *Nunc Pro Tunc* (January 6th Order). Specifically, CURB is requesting that the Commission reconsider the portions of its January 6th Order: (a) designating the \$5,669,712 in rate case expense awarded by the Commission as final agency action; and (b) directing Commission Staff to file copies of Data Requests 554 and 555 and responses in this administrative record. In support of its Second Petition for Reconsideration, CURB states as follows:

I. BACKGROUND.

1. In the Commission's November 22, 2010, Order: 1) Addressing Prudence; 2) Approving Application, In Part; & 3) Ruling on Pending Requests (November 22nd Order), the Commission designated the \$5,669,712 in rate case expense awarded by the Commission as "Interim Rate Relief," specifically stating, "If parties seek to challenge the amount of rate case expense approved in this Order, a subsequent proceeding will allow full review of this issue."¹

¹ November 22nd Order, p. 95 (emphasis added).

2. In CURB's initial Petition for Reconsideration and/or Clarification (CURB's Initial PFR), CURB sought reconsideration or clarification of several portions of the Commission's November 22nd Order. With respect to rate case expense, CURB sought reconsideration and/or clarification of the vague nature of the Commission's designation of the rate case expense as Interim Rate Relief, sought reconsideration of the decision to apply any adjustment to challenged rate case expense in a future rate case, and asked the Commission to clarify that the entire revenue requirement be designated as interim, non-final, and subject to refund following a full review and proceeding conducted within this rate case proceeding.²

3. CURB's Initial PFR also emphasized the following:

- KCPL's revised claim for an additional \$6.2 million in rate case expense by KCPL was not part of the record in this proceeding;
- KCPL's data request responses containing the summarized, estimated, and unsupported rate case expense claim for an additional \$6.2 million were submitted after the discovery deadline, after the evidentiary hearing, and after the record was closed;
- KCPL's revised rate case expense was over four times the \$2.1 million amount contained in the record at the close of the hearing and the record; and
- The Commission's consideration of KCPL's revised rate case expense claim unreasonably denied CURB and all parties substantive and procedural due process.³

4. In its January 6th Order, the Commission modified its November 22nd Order by determining its \$5,669,712 total rate case expense award, including \$4,500,000 in KCPL-only expenses, is now designated as final agency action rather than Interim Rate Relief or non-final agency action.⁴

² Petition for Reconsideration and/or Clarification (CURB's Initial PFR), ¶¶ 20-29.

³ *Id.*, at ¶¶ 1, 10, 14-17.

⁴ January 6th Order, ¶¶ 84-85.

5. The Commission's January 6th Order also directed Commission Staff to file a copy of Data Requests 554 and 555 and responses in this administrative record.⁵

6. A petition for reconsideration allows the Commission to correct errors called to its attention and avoid judicial review.⁶

7. K.S.A. 66-118b states that an "order made after reconsideration, abrogating, changing, or modifying the original order or decision, shall have the force and effect as an original order or decision, including the obligation to file a petition for reconsideration." The Commission's January 6th Order abrogates, changes, and/or modifies the Commission's November 22nd Order, thus requiring the filing of this Second Petition for Reconsideration.

8. While Kansas appellate courts have held that requiring reconsideration of an order that does not aggrieve would be a waste of judicial economy,⁷ CURB files this Second Petition for Reconsideration because it is aggrieved by the Commission's January 6th decisions to (a) designate the rate case expense awarded by the Commission as final agency action; and (b) direct Commission Staff to file a copy of Data Requests 554 and 555 and responses in this administrative record.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO DESIGNATE ITS RATE CASE EXPENSE AWARD AS FINAL AGENCY ACTION.

9. CURB's Initial PFR did not seek reconsideration of the Commission's decision to grant parties the right to challenge the amount of the rate case expense awarded by the Commission. To the contrary, CURB indicated its intent to challenge the rate case expense award on the grounds that the award was based on summarized, estimated, and unsupported documentation provided to

⁵ *Id.*, at ¶ 79.

⁶ *Williams Natural Gas Co. v. Kansas Corporation Comm'n*, 22 Kan. App.2d 326, 332, 916 P.2d 52, *rev. denied* 260 Kan. 1002 (1996).

⁷ *Id.*, 22 Kan. App.2d at 333-34.

Staff and therefore the award was erroneous, unreasonable, arbitrary and capricious, and not based on substantial competent evidence when viewed in light of the record as a whole.⁸ CURB further asserted that because the evidence forming the basis for the Commission's November 22nd rate case expense award was not in the record, CURB and other parties were denied substantive and procedural due process, and as a result the Commission had engaged in an unlawful procedure or failed to follow prescribed procedure.⁹

10. CURB's Initial PFR ^{also} asked the Commission to cure inherent errors in the Commission's designation of its rate case expense award as Interim Rate Relief and its decision that any adjustments resulting from successful challenges to the rate case expense award would be applied in KCPL's next rate case.¹⁰

11. The Commission's November 22nd Order gave CURB and other parties the opportunity to challenge the rate case expense award in a subsequent proceeding.¹¹ In doing so, the Commission acknowledged its award of additional rate case expense effectively denied CURB and other parties any opportunity to review and challenge the additional rate case expense in excess of the \$2.1 million contained in the record.¹² This was necessary because KCPL submitted its additional rate case expense claim to Staff¹³ long after the discovery deadline had expired, the hearing had concluded, and the record had been closed, effectively denying CURB and other parties any opportunity to review the new evidence, conduct discovery on the new evidence, have the new

⁸ CURB's Initial PFR, ¶¶ 1, 5-17.

⁹ *Id.*, ¶¶ 1, 15-17.

¹⁰ CURB's Initial PFR,

¹¹ The November 22nd Order gave parties the right to challenge the rate case expense award with full review provided in a subsequent proceeding. November 22nd Order, p. 95.

¹² November 22nd Order, p. 95.

¹³ KCPL's responses to data requests 554 and 555 were not offered or admitted into the record, nor has KCPL at any time file a motion to reopen the record.

evidence reviewed by consultants, present responding evidence, or cross-examine KCPL witnesses on the new evidence.

12. Now, rather than retain the after-the-fact due process rights provided in the Commission's November 22nd Order and clarify how the adjustment to rates would be made without violating retroactive ratemaking principles, the Commission's January 6th Order permanently denies due process to CURB, Staff, or other intervenors regarding the additional \$3.5 million¹⁴ in rate case expense approved by the Commission.

13. The Kansas Supreme Court has held that, "the basic elements of procedural due process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner."¹⁵ Denial of due process is a question of law over which the appellate courts will have *de novo* review.¹⁶

14. The Commission acknowledged the right of the parties to address new evidence in paragraph 121 of the January 6th Order, where the Commission denied KCPL's attempt to introduce new evidence on the issue of KCPL's MOU with the IRS regarding allocation of the Iatan Unit 2 ITC. The Commission succinctly noted the due process problems with allowing the introduction of new evidence after the hearing: "If the Commission were to reopen the record and allow the MOU to be introduced as evidence now, further proceedings would be required to allow parties to conduct discovery and present responding evidence."¹⁷

¹⁴ CURB's Initial PFR, ¶¶ 15-17 ("The Commission's decision effectively allows recovery of \$3.5 million above the \$2.1 million contained in the application and in the record during the hearing of this matter.").

¹⁵ *In re Petition of City of Overland Park for Annexation of Land*, 241 Kan. 365, 370, 763 P.2d 923 (1987).

¹⁶ *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 89, 11 P.3d 1165 (2000).

¹⁷ January 6th Order, ¶ 121 (emphasis added).

15. The Commission's January 6th Order designating its rate case expense award as final agency action permanently denies CURB and other parties any opportunity to review and challenge the new evidence submitted by KCPL. The Commission's January 6th Order therefore denies CURB and other parties substantive and procedural due process, which constitutes an unlawful procedure or failure to follow prescribed procedure.¹⁸ In addition, because the Commission's rate case expense award is based on the Company's summarized, estimated, and unsupported rate case expenses,¹⁹ the January 6th Order making the rate case award final agency action is erroneous,²⁰ unreasonable, arbitrary and capricious,²¹ and not based on substantial competent evidence when viewed in light of the record as a whole.²²

16. CURB respectfully requests that the Commission reconsider its January 6th order designating its rate case expense award as final agency action. Instead, the Commission should deny KCPL's request for rate case expense in excess of the \$2.1 million contained in its Application on the grounds set forth in CURB's Initial PFR, including the fact that the new evidence on additional rate case expense was not in the record when the Commission awarded rate case expense.²³ In the alternative, the Commission should designate the entire revenue requirement, including rate case expense, as interim, non-final agency action subject to refund following a full review and proceeding conducted within this rate case proceeding to determine the reasonableness and prudence of KCPL's revised rate case expense claim.

¹⁸ K.S.A. 77-621(c)(5).

¹⁹ November 22nd Order, pp. 89-95; CURB's Initial PFR, ¶¶ 1, 6-8, 10-12, 14, 16.

²⁰ K.S.A. 77-621(c)(4).

²¹ K.S.A. 77-621(c)(8).

²² K.S.A. 77-621(c)(7).

²³ CURB's Initial PFR, ¶¶ 20-29.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO DIRECT STAFF TO FILE A COPY OF DATA REQUESTS 554 AND 555 AND RESPONSES IN THIS ADMINISTRATIVE RECORD.

17. The Commission's January 6th Order directed Commission Staff to file a copy of Data Requests 554 and 555 and responses in this administrative record.²⁴ KCPL's responses to Staff Data Requests 554 and 555 were submitted to Staff, but never offered or admitted in the record in this proceeding, nor has KCPL filed a motion to reopen the record.

18. CURB objects to the Commission's directive to Staff, *sue sponte*, to file the data requests and responses in the record. While there has been no express ruling by the Commission admitting this evidence, CURB further objects to the admission of Data Requests 554 and 555 and responses into the record at this late stage of the proceeding.

19. CURB gave KCPL and the Commission clear notice that it opposed any claim for rate case expense in excess of the \$2.1 million contained in KCPL's application that was part of the record at the close of the hearing.²⁵ CURB further gave notice it believed it and other parties were entitled to due process rights with respect to any supplemental claims for additional rate case expense.²⁶

20. Despite this, KCPL has never properly presented any evidence for additional rate case expense to the Commission for consideration. The Company has failed to provide sworn evidence providing a foundation for the new evidence, has failed to file a motion to reopen the record to have this evidence considered by the Commission, and has failed to offer the data request responses into evidence.

²⁴ *Id.*, at ¶ 79.

²⁵ January 6th Order, ¶ 73; November 22nd Order, p. 86; Tr. Vol. 1, p. 117 (Rarrick in Opening Statement).

²⁶ November 22nd Order, p. 86; Tr. Vol. 11, pp. 2542-44 (Crane).

21. CURB and other parties are entitled to a reasonable opportunity to examine this new evidence, have the new evidence reviewed by consultants, conduct discovery on the new evidence, object to admission of the new evidence, present responding evidence, and cross-examine KCPL witnesses regarding the new evidence. All of these due process rights have been denied by the Commission's January 6th Order.

22. As noted in the preceding argument, the Commission acknowledged the right of the parties to address new evidence in paragraph 121 of the January 6th Order, where the Commission denied KCPL's attempt to introduce new evidence on the issue of KCPL's MOU with the IRS regarding allocation of the Iatan Unit 2 ITC. The Commission noted the due process problems with allowing the introduction of new evidence after the hearing: "If the Commission were to reopen the record and allow the MOU to be introduced as evidence now, further proceedings would be required to allow parties to conduct discovery and present responding evidence."²⁷

23. This rationale is equally applicable here. Here, the Commission appears to have reopened the record and directed Staff to file in the record KCPL's responses to data requests that were submitted to Staff long after the discovery deadline had expired, the hearing had concluded, and the record was closed. While the Commission's Order does not state that it is admitting the new evidence, the fact that its decision considers this new evidence and directs Staff to file the new evidence in the record indicates the new evidence has been admitted without any due process considerations for CURB and other parties.

24. The Commission's consideration and admission of this new evidence without providing CURB and other parties due process is inherently unlawful, unreasonable, unjust, arbitrary

²⁷ January 6th Order, ¶ 121.

and capricious, and contrary to the rules of evidence. There has been no foundation provided for this new evidence, no opportunity to examine the new evidence that was four times the amount contained in the application, no opportunity to conduct discovery, no opportunity to present responding evidence, and no opportunity to cross examine the witnesses supporting the new evidence (which is not sponsored with sworn testimony).

25. The Kansas Supreme Court has held that, "the basic elements of procedural due process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner."²⁸ Denial of due process is a question of law over which the appellate courts will have *de novo* review.²⁹

26. CURB and other parties were provided neither reasonable notice nor an opportunity to be heard at a meaningful time and in a meaningful manner with respect to this new evidence. The Commission's consideration and admission into the record of this new evidence without providing any opportunity to be heard at a meaningful time and in a meaningful manner violates CURB's procedural due process rights.

27. The Commission's January 6th Order directing Staff to file this new evidence into the administrative record is erroneous,³⁰ unreasonable, arbitrary and capricious,³¹ not based on substantial competent evidence when viewed in light of the record as a whole,³² is contrary to the rules of evidence, and constitutes an unlawful procedure or failed to follow prescribed procedure.³³

²⁸ *In re Petition of City of Overland Park for Annexation of Land*, 241 Kan. 365, 370, 763 P.2d 923 (1987).

²⁹ *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 89, 11 P.3d 1165 (2000).

³⁰ K.S.A. 77-621(c)(4).

³¹ K.S.A. 77-621(c)(8).

³² K.S.A. 77-621(c)(7).

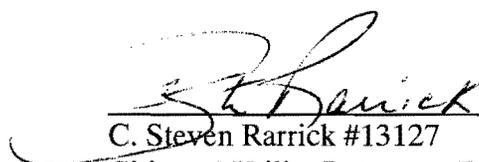
³³ K.S.A. 77-621(c)(5).

28. Based on the above, CURB respectfully requests that the Commission reconsider its January 6th Order directing Staff to file this evidence in the record of this docket. The Commission should deny KCPL's request for rate case expense in excess of the \$2.1 million contained in the record on the grounds set forth in CURB's Initial PFR, including the fact that the new evidence on rate case expense was not in the record when the Commission awarded rate case expense.³⁴

IV. CONCLUSION.

29. CURB respectfully requests that the Commission reconsider the portions of its January 6th Order (a) designating the \$5,669,712 in rate case expense awarded by the Commission as final agency action, and (b) directing Commission Staff to file a copy of Data Requests 554 and 555 and responses in this administrative record. The Commission should deny KCPL's request for rate case expense in excess of the \$2.1 million contained in the record.

Respectfully submitted,


C. Steven Rarrick #13127
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

³⁴ CURB's Initial PFR, ¶¶ 20-29.

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 21st day of January, 2011, to the following:

* JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 SOUTH HICKORY
PO BOX 17
OTTAWA, KS 66067
Fax: 785-242-1279
jflaherty@andersonbyrd.com

MICHAEL E. AMASH, ATTORNEY
BLAKE & UHLIG PA
SUITE 475 NEW BROTHERHOOD BLDG
753 STATE AVE.
KANSAS CITY, KS 66101
Fax: 913-321-2396
mea@blake-uhlig.com

JAMES R. WAERS, ATTORNEY
BLAKE & UHLIG PA
SUITE 475 NEW BROTHERHOOD BLDG
753 STATE AVE.
KANSAS CITY, KS 66101
Fax: 913-321-2396
jrw@blake-uhlig.com

STACI OLVERA SCHORGL, ATTORNEY
BRYAN CAVE LLP
1200 MAIN STREET
SUITE 3500
KANSAS CITY, MO 64105
Fax: 816-855-3604
soschorgl@bryancave.com

* GLENDA CAFER, ATTORNEY
CAFER LAW OFFICE, L.L.C.
3321 SW 6TH STREET
TOPEKA, KS 66606
Fax: 785-271-9993
gcafer@sbcglobal.net

* BLAKE MERTENS
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5169
bmertens@empiredistrict.com

* KELLY WALTERS, VICE PRESIDENT
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5173
kwalters@empiredistrict.com

* C. EDWARD PETERSON, ATTORNEY
FINNEGAN CONRAD & PETERSON LC
1209 PENNTOWER OFFICE CENTER
3100 BROADWAY
KANSAS CITY, MO 64111
Fax: 816-756-0373
epeters@fcplaw.com

* DAVID WOODSMALL, ATTORNEY
FINNEGAN CONRAD & PETERSON LC
1209 PENNTOWER OFFICE CENTER
3100 BROADWAY
KANSAS CITY, MO 64111
Fax: 816-756-0373
dwoodsmall@fcplaw.com

DARRELL MCCUBBINS, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1464
PO BOX 33443
KANSAS CITY, MO 64120
Fax: 816-483-4239
local1464@aol.com

JERRY ARCHER, BUSINESS MANAGER
IBEW LOCAL UNION NO. 1613
6900 EXECUTIVE DR
SUITE 180
KANSAS CITY, MO 64120
local1613@earthlink.net

BILL MCDANIEL, BUSINESS MANAGER
IBEW LOCAL UNION NO. 412
6200 CONNECTICUT
SUITE 105
KANSAS CITY, MO 64120
Fax: 816-231-5515
bmcdaniel412@msn.com

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

* LEO SMITH, BOARD OF DIRECTORS
INTERNATIONAL DARK SKY ASSOCIATION
1060 MAPLETON AVENUE
SUFFIELD, CT 06078
leo@smith.net

* ROBERT WAGNER, PRESIDENT, BOARD OF
DIRECTORS
INTERNATIONAL DARK SKY ASSOCIATION
9005 N CHATHAM AVENUE
KANSAS CITY, MO 64154
rwagner@eruces.com

* CURTIS D. BLANC, SR. DIR. REG. AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
curtis.blanc@kcpl.com

DENISE M. BUFFINGTON, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
denise.buffington@kcpl.com

* ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
roger.steiner@kcpl.com

* MARY TURNER, DIRECTOR, REGULATORY AFFAIRS
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PLACE
1200 MAIN STREET (64105)
P.O. BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2110
mary.turner@kcpl.com

* DANA BRADBURY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
d.bradbury@kcc.ks.gov
**** Hand Deliver ****

* PATRICK T SMITH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
p.smith@kcc.ks.gov
**** Hand Deliver ****

* MATTHEW SPURGIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
m.spurgin@kcc.ks.gov
**** Hand Deliver ****

* W. THOMAS STRATTON, JR., CHIEF LITIGATION
COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
t.stratton@kcc.ks.gov
**** Hand Deliver ****

* JOHN P. DECOURSEY, DIRECTOR, LAW
KANSAS GAS SERVICE, A DIVISION OF ONEOK,
INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
jdecoursey@kgas.com

* WALKER HENDRIX, DIR, REG LAW
KANSAS GAS SERVICE, A DIVISION OF ONEOK,
INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
whendrix@oneok.com

CERTIFICATE OF SERVICE

10-KCPE-415-RTS

* JO SMITH, SR OFFICE SPECIALIST
KANSAS GAS SERVICE, A DIVISION OF ONEOK,
INC.
7421 W 129TH STREET STE 300 (66213)
PO BOX 25957
SHAWNEE MISSION, KS 66225-9835
Fax: 913-319-8622
josmith@oneok.com

* FRANK A. CARO, JR., ATTORNEY
POLSINELLI SHUGHART
6201 COLLEGE BLVD
SUITE 500
OVERLAND PARK, KS 66211
Fax: 913-451-6205
fcaro@polsinelli.com

* JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH STREET
SUITE 750
OVERLAND PARK, KS 66210
Fax: 913-661-9863
jim@smizak-law.com

* ANNE E. CALLENBACH, ATTORNEY
POLSINELLI SHUGHART
6201 COLLEGE BLVD
SUITE 500
OVERLAND PARK, KS 66211
Fax: 913-451-6205
acallenbach@polsinelli.com

* REID T. NELSON
REID T. NELSON
D/B/A ATTORNEY AT LAW
3021 W 26TH STREET
LAWRENCE, KS 66047
rnelson@sbids.state.ks.us



Della Smith

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