

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

Received
on

AUG 15 2011

**PREHEARING BRIEF OF THE
CITIZENS' UTILITY RATEPAYER BOARD**

by
State Corporation Commission
of Kansas

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files its Prehearing Brief regarding legal issues related to rate case expense. In support of its Prehearing Brief, CURB states as follows:

I. BACKGROUND

1. On December 17, 2009, Kansas City Power & Light ("KCPL") filed the fourth rate case approved by the Commission in Docket No. 04-KCPE-1025-GIE ("1025 Docket").
2. On November 22, 2010, the Commission issued its Order: 1) Addressing Prudence; 2) Approving Application, in Part; & 3) Ruling on Pending Requests, November 22, 2010 ("November 22nd Order"). In the November 22nd Order, the Commission granted KCPL \$5,669,712 in rate case expense.
3. On December 7, 2010, CURB requested reconsideration and clarification of several issues, including the rate case expense awarded by the Commission.
4. On January 6, 2011, the Commission issued its Order on Petitions for Reconsideration and Clarification and Order *Nunc Pro Tunc* ("January 6th Order"). In the January 6th Order, the Commission designated the \$5,669,712 in rate case expense as final agency action and directed Staff to file copies of data requests 554 and 555 and responses in the administrative record
5. On January 21, 2011, CURB filed a second petition for reconsideration, 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 the administrative record. KCPL also sought reconsideration of the January 6th Order.

6. On February 21, 2011, the Commission issued its Order Granting KCPL's and CURB's Second Petitions for Reconsideration and Clarification (February 21st Order). In its February 21st Order, the Commission ordered that the record be reopened to take additional evidence on the issue of rate case costs. It also stated that this evidence should be limited to amounts incurred through November 22, 2010, and that expenses "incurred by KCP&L after that date will be borne by the Company." The Commission also recognized CURB's continued objection to including KCPL's responses to Staff Data Requests 554 and 555 in the administrative record, and stated that this issue would be addressed during these proceedings.¹

7. On April 19, 2011, the Prehearing Officer submitted the Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011 ("Prehearing Officer's Report and Recommendation"). The Prehearing Officer's Report and Recommendation noted that the Commission had granted reconsideration of its prior decision on rate case expense for this docket, had reopened the administrative record to receive evidence on this issue, and had ordered an evidentiary hearing be scheduled limited to the rate case expense issue.²

8. The Prehearing Officer's Report noted that the Prehearing Officer directed KCPL to provide three levels of information for any rate case expense sought in this proceeding.³ The Prehearing Officer also noted CURB's continued objection to including KCPL's responses to Staff data requests 554 and 555 in the record, and concluded that a decision on this issue would be addressed in a later ruling during these proceedings.⁴

¹ Order Granting KCPL's and CURB's Petitions for Reconsideration and Clarification, ¶ 18.

² Prehearing Officer's Report and Recommendation, ¶ 1.

³ Prehearing Officer's Report and Recommendation, ¶ 4.

⁴ *Id.*, at ¶¶ 5, 13.

9. In the Commission's June 24, 2011 Order Addressing Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011 ("June 24th Order"), the Commission acknowledged the three levels of information required by KCPL for any rate case expense sought in this proceeding:

Prehearing Officer Coffman directed KCP&L to provide three levels of information for any rate case expense sought in this proceeding. First, KCP&L is to present an overview of its overall request for rate case expense that lists each vendor for which KCP&L is seeking recovery of expenses, the total amount KCP&L is requesting for each vendor, and a brief description of what issue or work each vendor did on this docket. Second, KCP&L is to provide a summary for each vendor of expenses being requested for that vendor, with each vendor summary (i) listing each timekeeper working for the vendor, (ii) stating the overall amount being requested for each timekeeper, and (iii) briefly describing the nature of the work that each timekeeper performed. Third, detailed information is required for each timekeeper, including (i) the hourly rate charged for that timekeeper, (ii) the number of hours worked by that timekeeper, (iii) dates these hours were worked, and (iv) a description of the work performed on those dates by the timekeeper. The Prehearing Officer specifically noted that billing statements submitted for attorneys providing legal service for this proceeding must comply with Rule 1.5 of the Kansas Rules of Professional Conduct. If billing statements include work done in dockets other than 10-415, an explanation should be given regarding what amount is requested as an expense in 10-415 and how that amount was determined, including a distinction of billing expenses for this docket and for an ongoing rate case proceeding with overlapping issues before the Missouri Public Service Commission. For expenses billed to 10-415 in billing statements, KCP &L must explain what expenses were included in capital costs or capitalized in different project costs and what expenses are requested as rate case expense. Information provided at the detailed level should add up to the amount requested in the vendor summary which in turn should equate to the overall summary of rate case expense requested for this docket.⁵

10. The Commission's June 24th Order noted CURB's continued objection to including KCPL's responses to Staff data requests 554 and 555 in the record, and held that CURB's objections will be decided in a subsequent ruling in this proceeding.⁶

11. The Commission's June 24th Order approved the Prehearing Officer's recommendation for legal briefs on the factors the Commission should evaluate for rate case expense and how those factors

⁵ Order Addressing Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011, ¶ 7.

⁶ June 24th Order, ¶ 14.

should be applied. The Commission indicated the discussion should include the eight factors listed in Rule 1.5 that the Commission is required to consider in setting reasonable attorney fees and factors it should consider in evaluating other rate case expense.⁷

II. ARGUMENT AND AUTHORITIES

12. Because the Commission directed parties to limit prehearing briefs to ten pages in length,⁸ CURB will discuss the legal standards and factors applicable to the recovery of rate case expense in bulleted statements with footnotes to authorities. CURB urges the Commission to apply each legal standard and/or factor to KCPL's amended claim for rate case expense, and will provide further discussion on specific legal standards and/or factors as space allows.

A. Legal Standards and Commission Policies Applicable to the Recovery of Rate Case Expense Generally.

13. The general legal standards and Commission policies applicable to the recovery of rate case expense are itemized below:

- The utility has the burden of proof to establish rate case expense is known and measurable.⁹
- The utility has the burden of proof to establish rate case expenses are prudently incurred by the utility.¹⁰
- A utility is not entitled to recover every expense incurred by the Company in establishing rates.¹¹
- The Commission's decision granting rate case expense must be supported by substantial competent evidence.¹²
- The Commission is considered an expert in reviewing rate case expense and in making the decision will draw from its knowledge, expertise, and experience in evaluating services rendered in this proceeding.¹³

⁷ *Id.*, at ¶ 15.

⁸ *Id.*

⁹ *Greely Gas Company v. State Corp. Comm'n*, 15 Kan. App.2d 285, 288, 807 P.2d 167 (1991); *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App.2d 1002, 1005, 76 P.3d 1071 (2003).

¹⁰ *Kansas Industrial Consumers v. Kansas Corporation Comm'n*, 36 Kan. App.2d 83, 111, 138 P.3d 338 (2006); *Home Telephone*, 31 Kan. App.2d at 1015.

¹¹ *Columbus Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 828, 835-36, 75 P.3d 257 (2003).

¹² *Home Telephone*, 31 Kan. App.2d at 1005.

¹³ *Westar Energy v. Wittig*, 44 Kan. App.2d 182, 184, 235 P.3d 515 (2010). *See also, Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006).

- In determining rate case expense, the Commission should balance the interest of all concerned parties, including investors vs. ratepayers, present ratepayers vs. future ratepayers, and the public interest.¹⁴
- The Commission has a long-standing policy of including fair and reasonable rate case expenses that are prudently incurred in costs to be borne by ratepayers.¹⁵
- The Commission has established a policy of requiring utilities to file actual, detailed information about the expenses incurred to recover rate case expense.¹⁶ The Prehearing Officer's directive to KCPL to provide three levels of information for rate case expense claims provides clarity for this policy.
- The responsibility to submit evidence setting out a complete record upon which this Commission can decide the issue of rate case expense lies with KCPL, not with Staff.¹⁷
- Under its statutory mandate, the Commission must establish "just and reasonable rates" that are both fair to the public and permit public utilities to provide sufficient service while maintaining a reasonable return on their investment.¹⁸

14. Each of the above general legal standards and Commission policies should be applied to the amended rate case expense claim requested by KCPL. Due to space limitations, CURB will discuss specifically only the Commission's long-standing policy that only fair and reasonable rate case expense should be borne by ratepayers and the Commission's mandate to establish just and reasonable rates.

15. The four-fold increase in the Company's amended rate case expense claim, from \$2.1 million in the record to the amended claim of over \$9 million in KCPL's May 2011 testimony, is both alarming and unprecedented. The company utilized over 40 outside attorneys (over 14,000 hours) and 45 consultants (over 11,000 hours), with hourly rates that ranged up to \$855 per hour. The use of these unchecked resources were in addition to KCPL's internal in-house attorneys, accountants, analysts, administrative assistants, etc., the cost of which were included in the Company's salary and wage claim.

¹⁴ *Kansas Gas & Electric v. Kansas Corporation Comm'n*, 239 Kan. 483, 489-491, 720 P.2d 1063 (1986).

¹⁵ November 22nd Order, p. 88, February 21st Order, ¶ 13, citing *In the Matter of the Application of Westar Energy, Inc.*, Docket No. 05-WSEE-981-RTS, Order on Reconsideration, February 13, 2006, ¶93; *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 120-21 (1939) ("[T]he utility should be allowed its fair and proper expenses for presenting its side to the commission.").

¹⁶ November 22nd Order, p. 88; February 21st Order, ¶ 13; *In the Matter of the Audit and General Rate Investigation of Rural Telephone Company*, Docket No. 01-RRLT-083-AUD, Order Setting Revenue Requirements, June 26, 2001, ¶¶ 68-70.

¹⁷ Order Addressing Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011, ¶ 20.

¹⁸ K.S.A. 66-101b; K.A.R. 82-1-231(a). *United Cities Gas Co. v. Brock Exploration Co.* 995 F.Supp. 1284, 1293 (D. Kan. 1998).

16. In contrast, CURB fully litigated this case for a cost of \$188,051, using one attorney, and three consultants (only two filed testimony). The Company spent over forty times what CURB spent, and over five times the combined amount incurred by CURB and Staff. Again, this amount is over and above the amount spent by the Company for internal personnel costs. The ultimate decision before the Commission is whether the \$9 million sought by KCPL is a fair and reasonable rate case expense that should be borne by ratepayers and whether awarding this excessive amount will violate the Commission's mandate to establish just and reasonable rates.

B. The Eight Factors under Rule 1.5 of the Kansas Rules of Professional Conduct.

17. In determining the reasonableness of attorney fees, Rule 1.5(a) of the Kansas Rules of Professional Conduct (KRPC)¹⁹ sets forth the eight criteria that should be considered by the court:

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

18. The Kansas Supreme Court has urged the use of the Rule 1.5 factors in determining the reasonableness of attorney fees.²⁰ However, the Court of Appeals has recently indicated that even when a

¹⁹ Kansas Supreme Court Rule 226, Kansas Rules of Professional Conduct (KRPC) 1.5 (2010 Kan. Ct. R. Annot. 458). It should be noted that KRPC 1.5 (c) states, "A lawyers fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney."

²⁰ *In re Marriage of Strieby*, ___ Kan. App.3d ___, 255 P.3d 34, 2011 WL 2112795, 16 (Kan. App. 2011) (citing *Davis v.*

district court does not expressly address the factors under KRPC 1.5(a), an award of attorney fees does not constitute an abuse of discretion where the district court generally discusses some of the factors.²¹

19. Each of the eight factors will need to be examined by the Commission, utilizing its knowledge, expertise, and experience in evaluating services rendered in this proceeding. However, of particular importance is the “time and labor” component of factor (1), in light of the duplicative and excessive hours billed by both attorneys and consultants for KCPL in this proceeding.

20. KCPL is seeking to recover attorney fees stemming from over 14,000 hours for outside law firm personnel time billed to this case. These invoices were never questioned, and the staggering amount of attorney time is on its face excessive. However, CURB’s concerns go beyond the staggering amount of time KCPL allowed to be billed by its attorneys in this docket.

21. In *Davis v. Miller*, 269 Kan. 732, 748-751, 7 P.3d 1223 (2000), the Kansas Supreme Court addressed the reasonableness of attorney fees under Rule 1.5 and held that “Fees which are not supported by ‘meticulous, contemporaneous time records’ that show the specific tasks being billed should not be allowed.”²²

22. The Commission will receive evidence demonstrating that KCPL has not provided the meticulous, contemporaneous time records directed by the Prehearing Officer. Because of this, the voluminous amount of billing records in this case is not easily analyzed under what has been described by some courts as a lodestar analysis.²³ The lodestar analysis is determined by multiplying the number of

Miller, 269 Kan. 732, 751, 7 P.3d 1223 (2000).

²¹ *In re Marriage of Strieby*, 255 P.3d at 49 (the district court discussed the results obtained, the reasonableness of the fee, and counsel’s expertise).

²² 269 Kan. at 748 (citing *Case v. Unified School District No. 233, Johnson County*, 157 F.3d 1243, 1250 (10th Cir. 1998)).

²³ *De Jesus Nazario v. Moris Rodriguez*, 554 F.3d 196, 207 (1st Cir. 1983); *Family Winemakers of California v. Jenkins*, 2011 WL 2312534, 2 (D. Mass).

hours productively spent by a reasonable hourly rate. When applying the lodestar approach, a court deducts “duplicative, unproductive, or excessive hours.”²⁴

23. Here, as in the *Family Winemakers* case cited above, the task of applying the lodestar approach is extremely difficult, if not impossible, because the individual billing entries for a vast majority of the hours are voluminous and constitute “block billing.” “The term ‘block billing’ refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.”²⁵

24. Courts have the authority to reduce hours that are billed in block format because such a billing style makes it difficult, if not impossible, to ascertain how much time counsel expended on specified tasks to determine the reasonableness of the hours expended with respect to specific time entries.²⁶

25. The 10th Circuit Court of Appeals in *Robinson v. City of Edmond* noted:

In its decision, the district court quite appropriately expressed concern about the use of “block billing” practices. The use of billing practices that camouflage the work of a lawyer does naturally and quite correctly raise suspicions about whether all the work claimed was actually accomplished or whether it was necessary. This concern is particularly important in a situation where a party is seeking to have his opponent pay for his own lawyer’s work.²⁷

26. Here, like the cases cited above, it has not been possible to comb through KCPL’s billing documents with precision to identify and deduct unreasonable time.²⁸ In light of the record, or lack thereof, the Commission should limit the Company to the \$2.1 million rate case expense claim contained in

²⁴ *Family Winemakers of California v. Jenkins*, 2011 WL 2312534, at 2.

²⁵ *Robinson v. City of Edmond*, 160 F.3d 1275, 1284 n. 9 (10th Cir. 1998); *Family Winemakers of California v. Jenkins*, 2011 WL 2312534, at 2; *HRPT Properties Trust v. Lingle*, 2011 WL 775905, 14 (D. Hawaii) (citations and quotation marks omitted).

²⁶ *HRPT Properties Trust v. Lingle*, 2011 WL 775905, at 14, citing *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948, (9th Cir. 2007); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004) (reducing requested hours because counsel’s practice of block billing “lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness.”); *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40, (1983) (holding that applicant should “maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.”). See also *Seamands v. Sears Holding Corp.*, 2011 SL 884391, 11-12 (D. Kan) (court disallowed 30 percent of block-billed hours).

²⁷ *Robinson v. City of Edmond*, 160 F.3d at 1284 (10th Cir. 1998) (footnote omitted).

²⁸ *Family Winemakers of California v. Jenkins*, 2011 WL 2312534, at 3.

its application as recommended by CURB. In the alternative, the Commission may be required to evaluate where feasible the amount of time spent by KCPL's legal team of over 40 attorneys on particular aspects of the case, "rather than the time spent by any individual timekeeper, and extrapolating from that sample an overall measure of reasonable hours, always bearing in mind the lodestar principle of avoiding 'duplicative, unproductive, or excessive hours.'" ²⁹

27. Excessive hours and duplication of time by over 40 KCPL attorneys are pervasive in the Company's billing records, with numerous attorneys attending the same conferences and hearings, reviewing the same testimony and pleadings, preparing the same witnesses for hearing, and researching the same legal issues. The use of block billing by KCPL's 44 attorneys (and consultants) makes it impossible to ascertain the reasonableness of the hours expended on specific tasks. Accordingly, CURB recommends that the Commission limit KCPL to the \$2.1 million rate case expense claim contained in its application and in the record at the close of the evidentiary hearing in November 2010. However, should the Commission decide to go further, it may be necessary for the Commission to impose "across-the-board reductions" similar to those made in the *HRPT Properties Trust* case. ³⁰

C. Factors the Commission Should Consider in Evaluating Other Rate Case Expense.

28. The general legal standards and Commission policies applicable to the recovery of rate case expense discussed previously should be applied by the Commission to rate case expenses other than attorney fees, such as consultant fees, travel, and lodging. These standards and policies were discussed above and CURB will not unnecessarily repeat them here.

29. The Rule 1.5 factors provide additional guidance to the Commission in evaluating other rate case expense. CURB will not unnecessarily repeat the discussion of these factors here.

²⁹ *Id.*, citing *Torres-Rivera v. O'Neil Cancel*, 524 F.3d 331, 340 (1st Cir. 2008) (holding that when "time records ... are ill-suited for evaluative purposes" a court "may adjust those entries to achieve an equitable result").

³⁰ *HRPT Properties Trust v. Lingle*, 2011 WL 775905 at 14.

30. In addition, the factors listed at pages 88-89 of the Commission's November 22nd Order are likewise reasonable for the Commission to consider, including 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 actually used in the course of the proceeding.

31. In determining an appropriate amount for these other rate case expenses, the Commission should be considered an expert and should draw from its knowledge, expertise, and experience in evaluating services rendered in this proceeding in the same way it is considered an expert in evaluating attorney fees.³¹

32. KCPL is seeking to recover consultant fees stemming from over 11,300 hours for outside consultant time billed to this case, a staggering and excessive amount. Those consultant fees should also be analyzed with respect to the general and specific factors described above.

III. CONCLUSION

33. WHEREFORE, CURB submits its prehearing brief for the Commission's consideration in determining the fair and reasonable amount of rate case expense to be borne by ratepayers in this docket.

Respectfully submitted,



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³¹ *Westar Energy v. Wittig*, 44 Kan. App.2d 182, 184, 235 P.3d 515 (2010). See also, *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006).

VERIFICATION

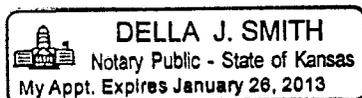
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.


C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 15th day of August, 2011.




Notary Public

My Commission expires: 01-26-2013.

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 15th day of August, 2011, to the following:

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