

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Chairman Mark Sievers
Commissioner Ward Loyd
Commissioner Thomas E. Wright

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.)

ORDER ON RATE CASE EXPENSE

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The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the files and being

fully advised of all matters of record, the Commission summarizes the arguments of the parties and finds and concludes as follows:

1. Kansas City Power & Light Co. (KCP&L or the Company) filed this rate case on December 17, 2009, as its fourth and final rate case in a series contemplated in the Stipulation and Agreement approved in Docket No. 04-KCPE-1025-GIE (04-1025). In the Commission's decision issued November 22, 2010, KCP&L was awarded a revenue increase of \$21,846,202, which included rate case expense totaling \$5,669,712.¹ Several Petitions for Reconsideration were filed, which were ruled upon by the Commission. Subsequently, in an Order issued February 21, 2011, the Commission granted reconsideration of its prior decisions on rate case expense for this docket, reopened the administrative record to receive evidence on this issue, limited parties participating in the reconsideration process to KCP&L, Citizens' Utility Ratepayer Board (CURB) and the Commission's staff (Staff), allowed additional discovery on this issue, directed filing of appropriate evidence regarding this issue, ordered an evidentiary hearing be scheduled, and designated a new Prehearing Officer to address this issue.² Further requests to reconsider this decision were denied.³ This Order decides the issue of rate case expense.

2. In this proceeding on reconsideration, KCP&L now requests total rate case expense of \$9,033,136 for this docket.⁴ This figure includes \$1,422,832 for CURB and Staff costs that were

¹ Order: 1) *Addressing Prudence*; 2) *Approving Application, in part*; & 3) *Ruling on Pending Requests*, filed November 22, 2010, pages 90-91, 95, 138-42 and Exhibit IV, pages 1-3 (November 22, 2010 Order, pp. 90-91, 95, 138-42 and Exh. IV, pp. 1-3).

² *Order Granting KCP&L's and CURB's Second Petitions for Reconsideration and Clarification*, issued February 21, 2011 (February 21, 2011 Order), ¶¶ 15, 18, 20. See *Order Nunc Pro Tunc Regarding February 21, 2011 Order Granting KCP&L's and CURB's Second Petitions for Reconsideration and Clarification*, issued March 3, 2011, ¶ 3 and Ordering Clause (A) (Commission clarifies that only the rate case expense portion of the revenue requirement for this docket is designated interim, non-final agency action subject to further proceedings).

³ *Order Denying KCP&L's Petition for Reconsideration and Clarification of February 21, 2011 Order*, issued April 6, 2011 (April 6, 2011 Order), ¶¶ 18-19, 21-24.

⁴ Tr. Vol. 15, p. 3374 (Weisensee). In this proceeding, KCP&L initially requested total rate case expense of \$9,070,515, Weisensee Direct, p. 2, but this was reduced to \$9,034,529 in rebuttal testimony due to billing errors identified by Staff Witness Baldry. Weisensee Rebuttal, p. 3. At the hearing, the amount was decreased further to \$9,033,136 based on additional errors found during discovery. Tr. Vol. 15, p. 3374 (Weisensee).

assessed to KCP&L pursuant to K.S.A. 66-1502; the remaining costs of \$7,610,304 are for KCP&L-only rate case expense.⁵ In its November 22, 2010 Order, the Commission awarded KCP&L rate case expense of \$5,669,712 for this proceeding that included \$1,169,712 for CURB and Staff costs and \$4.5 million for KCP&L-only rate case expense.⁶ KCP&L now requests an additional \$3,400,000 to reflect “the rate case expense actually incurred by the Company through November 30, 2010.”⁷ The purpose of this follow-up proceeding is to reconsider and decide what rate case expense to include in the revenue requirement to be recovered from KCP&L’s ratepayers.⁸

3. Eight witnesses submitted prefiled testimony on the issue of rate case expense, as follows: KCP&L witnesses were John P. Weisensee,⁹ Tim M. Rush,¹⁰ and William H. Downey¹¹; CURB witnesses were Ralph C. Smith,¹² Stacey Harden,¹³ and Andrea C. Crane¹⁴; and Staff witnesses were William E. Baldry¹⁵ and Jeffrey D. McClanahan.¹⁶ All eight witnesses testified during the evidentiary hearing, with the Commission presiding, held on September 6 through 8, 2011.¹⁷ Attorneys appearing at the evidentiary hearing were: Frank A. Caro, Jr., Luke A.

⁵ Weisensee Direct, p. 2. In a rate case, expenses incurred by the Commission, its staff, and CURB are assessed against the public utility. K.S.A. 66-1502. *Order Assessing Costs*, filed December 23, 2009.

⁶ November 22, 2010, pp. 90-91, 95.

⁷ Weisensee Direct, p. 2. The Company chose November 30, 2010, as the cut-off date for rate case expense to tie accounting records to the nearest month-end to the cut-off date for rate case expense set by the Commission at November 22, 2010, when the Order setting the revenue requirement for this case was filed. *February 21, 2011 Order*, ¶¶ 28-31; November 22, 2010 Order, p. 90, citing *Columbus Telephone Co. v. Kansas Corporation Comm’n*, 31 Kan. App. 2d 828, 835, 75 P.3d 257 (2003).

⁸ February 21, 2011 Order, ¶ 3.

⁹ Direct Testimony of John P. Weisensee, filed May 6, 2011 (Weisensee Direct); Rebuttal Testimony of John P. Weisensee, filed August 5, 2011 (Weisensee Rebuttal).

¹⁰ Direct Testimony of Tim M. Rush, filed May 6, 2011 (Rush Direct); Rebuttal Testimony of Tim M. Rush, filed August 5, 2011 (Rush Rebuttal).

¹¹ Rebuttal Testimony of William H. Downey, filed August 5, 2011 (Downey Rebuttal).

¹² Direct Testimony of Ralph C. Smith, filed July 6, 2011 (Smith Direct).

¹³ Direct Testimony of Stacey Harden, filed July 6, 2011 (Harden Direct).

¹⁴ Direct Testimony of Andrea C. Crane, filed July 6, 2011 (Crane Direct).

¹⁵ Direct Testimony of Jeffrey D. McClanahan, filed July 6, 2011 (McClanahan Direct).

¹⁶ Direct Testimony of William E. Baldry, filed July 6, 2011 (Baldry Direct).

¹⁷ In this Order, discussion of an evidentiary hearing refers to the September 6 through 8, 2011, evidentiary hearing on rate case expense. Any discussion of the evidentiary hearing in the underlying rate case, which was held August 16 to September 2, 2010, is referred to as the 2010 Evidentiary Hearing.

Hagedorn, Heather Humphrey, and Denise Buffington, on behalf of KCP&L; C. Steven Rarrick on behalf of CURB; and Patrick Smith on behalf of Staff and the public generally.¹⁸ Hearing no objection to notice of the hearing, the Commission found notice was proper and jurisdiction existed over this proceeding at this time and place.¹⁹

4. The decision reflected in this Order is based upon the Commission's evaluation of all evidence presented on rate case expense and, as necessary, evidence presented earlier in this proceeding, including during the evidentiary hearing conducted before the Commission from August 16 through September 2, 2010. Thus, the record as a whole has been considered.²⁰ In reaching its decision, the Commission has evaluated numerous factors and has drawn from its expertise as the administrative agency delegated with the responsibility to regulate public utilities.²¹ This Commission consists of three commissioners, all of whom are attorneys. In addition to reviewing the evidence presented, we have drawn from our individual and combined knowledge and experience to arrive at an amount of rate case expense that we find is prudent and is just and reasonable for KCP&L to recover from its ratepayers for this rate case.

5. As explained below, the Commission in this Order concludes that (1) KCP&L is allowed to recover the assessed rate case expense of \$1,422,832 for Staff and CURB; (2) KCP&L has not presented detailed, credible evidence to establish its management prudently incurred all rate case expense requested in this proceeding; and (3), based on the evidence in this proceeding, KCP&L is allowed to recover from its ratepayers \$4,500,000 in KCP&L-only rate case expense. The Commission is not persuaded that KCP&L has presented sufficient evidence to justify increasing the award of KCP&L-only rate case expense above what the Commission originally approved in its November 22, 2010 Order. Therefore, KCP&L will recover total rate case expense of \$5,922,832 as part of its revenue requirement. KCP&L has had rates recovering the

¹⁸ Transcript of Proceedings, September 6, 2011, Volume 15, page 3334 (Tr. Vol. 15, p. 3334).

¹⁹ Tr. Vol. 15, p. 3335.

²⁰ K.S.A. 2010 Supp. 77-621(c)(7) and (d).

²¹ K.S.A. 66-101, 66-101b, 2010 Supp. 66-104.

four-year amortization of \$5,669,712²² based on the November 22, 2010 Order.²³ To recover the additional \$253,120 awarded, KCP&L shall amortize this additional amount over three years.

I. Background

6. This proceeding was KCP&L's fourth and final rate case in the series of rate cases contemplated in KCP&L's Resource Plan adopted in the Stipulation and Agreement approved in Docket 04-1025 (04-1025 S&A) on December 17, 2009, as reflected in the following Chart of KCP&L rate case proceedings under its Resource Plan:

Chart of KCP&L Resource Plan Proceedings:

<u>Docket No.</u>	<u>Caption</u>	<u>Filed</u>	<u>Hearing</u>	<u>Order</u>
04-KCPE-1025-GIE	<i>In the Matter of the Future Supply Delivery and Pricing of the Electric Service Provided by Kansas City Power and Light Company.</i>	5-18-04	6-17-05	8-5-05
06-KCPE-828-RTS	<i>In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan</i>	1-31-06	10-5-06	12-4-06
07-KCPE-905-RTS	<i>In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan</i>	3-1-07	9-10-07	11-20-07
09-KCPE-246-RTS	<i>In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan.</i>	9-5-08	6-22-09	7-24-09
10-KCPE-415-RTS	<i>In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan.</i>	10-17-09	8-16 to 9-2-10 9-6 to 9-8-11	11-22-10 Pending
11-KCPE-581-PRE	<i>In the Matter of the Petition of Kansas City Power & Light Company (KCP&L) for Determination of the Ratemaking Principles and Treatment That Will Apply to the Recovery in Rates of the Cost to be Incurred by KCP&L for Certain Electric Generation Facilities Under K.S.A. 66-1239.</i>	2-23-11	7-11 to 7-15-11	8-19-11

²² November 22, 2010 Order, pp. 95.

²³ November 22, 2010 Order, p. 83-95.

7. Following a 14-day evidentiary hearing in this rate case, conducted from August 16 through September 2, 2010 (referred to in this Order as the 2010 Evidentiary Hearing), the Commission issued an Order on November 22, 2010, that addressed prudence related to KCP&L's remaining investment in Iatan common plant, environmental upgrades to Iatan Unit 1, and construction of Iatan 2 and that also ruled on numerous other traditional rate case issues.²⁴ The Commission was asked to decide an amount of rate case expense to include in the revenue requirement, but it found this very difficult due to statutory time constraints for issuing an Order and lack of evidence to support KCP&L's requested amount of \$8,319,363. The request included assessed rate case expense for Staff and CURB of \$1,169,712 and the balance for KCP&L-only costs of \$7.1 million (approximately \$5 million for lawyers and legal fees plus expenses, \$2 million for non-lawyer consultants, and \$117,000 for expenses such as photocopies, hotels, etc.).²⁵ The Commission found the amount requested for KCP&L-only legal services of more than \$5 million was excessive, even taking into account the complex issues addressed in this rate case.²⁶ After discussing numerous factors considered in reviewing the evidence on rate case expense, the Commission concluded \$4,500,000 was an appropriate amount of rate case expense for KCP&L-only costs to be recovered from ratepayers. The Commission also approved the assessed rate case expense of \$1,169,712 for Staff and CURB and allowed total rate case expense of \$5,669,712 to be included in KCP&L's revenue requirement.²⁷ In reaching this decision, the Commission held the amount of rate case expense established in its Order would be treated as Interim Rate Relief. In doing so, the Commission recognized that this amount was prudent, just, and reasonable, and that setting the amount cut off conjecture about future costs not known and measurable. But it recognized the decision was subject to challenge.²⁸

²⁴ November 22, 2010 Order, pp. 4-6.

²⁵ November 22, 2010 Order, p. 90.

²⁶ November 22, 2010 Order, p. 92.

²⁷ November 22, 2010 Order, pp. 86-95.

²⁸ November 22, 2010 Order, p. 90.

8. Both KCP&L and CURB challenged the rate case expense decision in their respective Petitions for Reconsideration. In ruling on these Petitions, the Commission rejected KCP&L's assertion that the Company was entitled to recover all rate case expense shown to be prudent and pointed to its statement in the November 22, 2010 Order "that rate case expense must be prudently incurred by the Company and must also be fair and reasonable for them to be borne by ratepayers. Thus, merely showing prudent expenditures is not enough."²⁹ Because the record did not contain sufficient evidence to establish a specific amount for rate case expense, the Commission exercised its judgment to determine an amount of prudently incurred rate case expense that it considered appropriate to be borne by KCP&L ratepayers.³⁰ The Commission reaffirmed its decision that KCP&L-only rate case expense of \$4,500,000 was prudently incurred and was just and reasonable to recover from ratepayers. The Commission then held that this amount of rate case expense would no longer be considered Interim Rate Relief and denied KCP&L's request to create a separate account to record these expenses.³¹ The Commission also addressed CURB's issues on rate case expense.³² Having concluded the amount of \$4,500,000 approved in its November 22, 2010 Order for KCP&L-only rate case expense should not be treated as interim relief, the Commission held the total amount of rate case expense appropriate for KCP&L to recover from its ratepayers as part of the revenue requirement was \$5,669,712.³³

9. Once again, both KCP&L and Westar challenged the Commission's decision on rate case expense in Petitions for Reconsideration. Both criticized the Commission for deciding rate case expense while recognizing the record lacked details on this issue. Also, both KCP&L and CURB pointed out that they recommended the Commission address rate case expense as part of an abbreviated, follow-up rate case proceeding under K.A.R. 82-1-231(b)(3), which the

²⁹ *Order on Petitions for Reconsideration and Clarification and Order Nunc Pro Tunc*, issued January 6, 2011 Order, page 75 (January 6, 2011 Order, p. 75)(footnote omitted), *citing* November 22, 2010 Order, p. 88.

³⁰ January 6, 2011 Order, ¶¶ 74-76.

³¹ January 6, 2011 Order, ¶ 77.

³² January 6, 2011 Order, ¶¶ 78-83.

³³ January 6, 2011 Order, ¶¶ 84-85.

Commission denied, and that resulted in an inadequate record on this issue.³⁴ After reviewing their Petitions, the Commission agreed the issue of rate case expense should be examined further and granted reconsideration in its February 21, 2011 Order, noting the award could be more or less than the rate case expense decided in the November 22, 2010 Order.³⁵ The Commission (1) limited participation in this reconsideration proceeding to KCP&L, CURB and Staff, (2) opened the administrative record to receive new evidence on the issue of rate case expense, (3) ordered that KCP&L and CURB could conduct discovery and file appropriate evidence on this issue, (4) directed an evidentiary hearing be scheduled, and (5) appointed a new prehearing officer to address this issue.³⁶

10. KCP&L filed a final Petition for Reconsideration, arguing the Commission erred in cutting off recovery for rate case expense at November 22, 2010, because the Company would have to bear expenses incurred after that date. The Commission disagreed with KCP&L's argument and denied reconsideration. The Commission explained that it set the cut-off date to coincide with the November 22, 2010 Order following this agency's long-standing practice of recognizing an end-date for inclusion of rate case expense with the order that established the utility's revenue requirement.³⁷ The Commission further noted that its decision to cut off rate case expense on November 22, 2010, took into account the large amount of rate case expense that ratepayers have already been required to pay for KCP&L's series of rate cases arising from its Resource Plan approved in Docket 04-1025. This amount included an additional \$2.3 million rate case expense for KCP&L's last rate case in Docket 09-KCPE-246-RTS (09-246) that the Commission granted in the November 22, 2010 Order.³⁸ We note rate case expense for the two prior rate cases under the Resource Plan included \$1,196,430 for Docket 06-KCPE-828-RTS and \$457,582 for Docket 07-KCPE-905-RTS. Thus, KCP&L has already been approved to receive

³⁴ November 22, 2010 Order, pp. 135-37.

³⁵ February 21, 11 Order, ¶ 8 ("Based on this review, the Commission may decide to grant a smaller or larger amount for rate case expense for this proceeding than decided in its November 22, 2010 Order.").

³⁶ February 21, 2011 Order, ¶ 3.

³⁷ April 6, 2011 Order, ¶¶ 17-24.

³⁸ April 6, 2011 Order, ¶ 18, *citing* November 22, 2010 Order, p. 88.

more than \$3.9 million in rate case expense for implementing its Resource Plan. The Commission has also pointed out that KCP&L proposed a never-ending process by which an outside attorney files a pleading addressing rate case expense and, in doing so, incurs additional rate case expense that KCP&L will seek to recover through additional rate case expense or as a regulatory asset. The Commission rejected KCP&L's proposal, noting that other utilities have not requested rate case expense for proceedings in a rate case that followed the Commission Order setting the Company's revenue requirement.³⁹ The remaining issue to decide here is the amount of rate case expense KCP&L will recover from its ratepayers for this rate case proceeding.

II. Procedural Rulings During the Evidentiary Hearing

11. During the evidentiary hearing, KCP&L Exhibits 4 and 5 were offered into evidence but a decision of whether to admit them was taken under advisement.⁴⁰ KCP&L Exhibit 4 is a chart showing a list of issues with corresponding KCP&L witnesses and attorneys; the date of the document is identified as "11/17/2009 Draft." KCP&L Exhibit 5 is an undated Rebuttal Issues List showing Staff and CURB witnesses, KCP&L witnesses, KCP&L attorneys, and KCP&L regulatory people. Both Exhibits were identified by KCP&L Witness Rush, on redirect examination, as documenting the company's efforts to control, supervise, and monitor the work by the numerous outside attorneys and consultants involved in this proceeding.⁴¹ Staff and CURB objected to admission of these documents and urged the Commission to reject them because neither document was disclosed in response to discovery requests propounded on the subject of assignment of issues.

12. The Commission rejects KCP&L's explanation that it did not disclose these exhibits in response to data requests because the questions did not specifically ask for documents or because KCP&L did not understand until the hearing that provision of sufficient detail was an issue in this proceeding. The Commission is concerned that, in not disclosing these exhibits during discovery, KCP&L was involved in a gamesmanship not appropriate to regulatory proceedings. Utilities

³⁹ April 6, 2011 Order, ¶ 23, and n. 56.

⁴⁰ Tr. Vol. 16, pp. 3848, 3859.

⁴¹ Tr. Vol. 16, pp. 3837-48 (Exh. 4) and 3848-54 (Exh. 5).

control the documents needed to decide issues in a rate case and are obliged under K.A.R. 82-1-231(a) to provide all relevant facts and data pertaining to its business and operations to assist in deciding the issues. Furthermore, information reflected in these exhibits likely would have been helpful when sorting through the hundreds of pages of invoices and billings received from KCP&L. Nonetheless, the Commission concludes KCP&L Exhibits 4 and 5 are relevant to the issue of rate case expense and, therefore, are admitted and are given appropriate weight and consideration by the Commission in its deliberations. The Commission concludes that KCP&L Exhibits 4 and 5 provide minimal evidence to support KCP&L's claim that the Company adopted a detailed process to monitor activities and expenses incurred by outside attorneys and consultants.

13. The Commission also took admission of KCP&L Exhibit 8, titled "2010 Regulatory Strategy Team (RST) Charter," under advisement.⁴² Again, Staff and CURB objected to introducing this exhibit during redirect of KCP&L Witness Rush rather than disclosing it during discovery. The Commission finds KCP&L Exhibit 8 relevant and admits it as part of the record and has given this document the appropriate weight and consideration in the Commission's deliberations.

14. KCP&L Exhibit 2 is a compact disc (CD) that KCP&L argued contains work papers that support testimony of KCP&L Witnesses Weisensee and Rush; the CD was provided to Staff and CURB at the time direct testimony was filed by these witnesses on May 6, 2011. Staff and CURB objected to admission of KCP&L Exhibit 2 because this CD contains invoices and bills from vendors and timekeepers that KCP&L relied upon to support its rate case increase request. Staff and CURB argued contents of this CD should have been offered as part of prefiled testimony of these witnesses when filed, not provided to Staff and to CURB separately as if they merely contained work papers that are usually filed separate from testimony.⁴³ Both Staff and CURB have had access to KCP&L Exhibit 2 from the time KCP&L filed its direct testimony on

⁴² Tr. Vol. 16, pp. 3854-59.

⁴³ Tr. Vol. 16, pp. 3866-72.

the rate case expense issue. The Commission finds the information on KCP&L Exhibit 2 is relevant and admits it into the record. The Commission further finds that, because Staff and CURB had access to this information from the time direct testimony was filed by Weisensee and Rush, Staff and CURB were not prejudiced by admission of KCP&L Exhibit 2 into this record.⁴⁴

15. Finally, the Commission may take official notice of matters that could be judicially noticed in Kansas courts, the record of other proceedings before the Commission, and technical or scientific matters within the Commission's specialized knowledge.⁴⁵ The Commission takes Administrative Notice of the following item from a prior Commission docket that was previously cited in the November 22, 2010 and February 21, 2011 Orders⁴⁶:

- a. In the Matter of an Audit and General Rate Investigation of Rural Telephone Company, Docket No. 01-083, *Order Regarding Rate Design*, filed November 16, 2001.

III. Factors Considered in Determining Rate Case Expense

16. The Commission has a long-standing policy of including fair and reasonable rate case expenses that are prudently incurred by a company in a rate case in costs to be borne by ratepayers.⁴⁷ Historically in Kansas the general rule has been to consider prudently incurred rate case expense among the reasonably necessary expenses a public utility is entitled to recover as part of its revenue requirement in a rate case.⁴⁸ As with any expense recovered in revenue requirement, the utility has the burden to establish by substantial evidence in the record that the expense is known and measurable⁴⁹ and is prudent and reasonable.⁵⁰ Substantial evidence must

⁴⁴ Although this Order has been designated as setting precedent under 2011 House Bill No. 2027, *amending* K.S.A. 2010 Supp. 77-415, our rulings on admission of evidence, namely Exhibits 2, 4, 5, and 8, are specific to the facts before us and do not create precedent for subsequent proceedings.

⁴⁵ K.S.A. 77-524(f); K.S.A. 60-409; K.A.R. 82-1-230(h).

⁴⁶ Tr. Vol. 16, pp. 3918-22.

⁴⁷ *In the Matter of the Application of Westar Energy, Inc.*, Docket No. 05-WSEE-981-RTS, Order on Reconsideration, issued February 13, 2006, ¶ 93. See *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.").

⁴⁸ *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 1002, 1015, 76 P.3d 1071 (2003). See November 22, 2010 Order, pp. 87-88;

⁴⁹ 31 Kan. App. 2d at 1015.

⁵⁰ *Kansas Industrial Consumers v. Kansas Corporation Comm'n*, 36 Kan. App. 2d 83, 111, 138 P.3d 338 (2006). See November 22, 2010 Order, pp. 87-88; January 6, 2011 Order, ¶ 75; Feb. 21, 2011 Order, ¶ 13.

be both relevant and have substance that “furnishes a substantial basis of fact from which issues can reasonably be resolved.”⁵¹ The underlying purpose of this entire proceeding has been to establish “just and reasonable” rates.⁵² The Commission’s goal in a rate case is to determine a rate that is within the “zone of reasonableness.”⁵³

17. In determining whether prudently incurred rate case expense should be considered reasonable and included in revenue requirement recovered from ratepayers, the Commission must weigh and balance competing policies. The Kansas Supreme Court has observed that in setting utility rates, the Commission must consider and balance interests of the following parties: (1) The utility’s investors vs. the ratepayers; (2) the present ratepayers vs. the future ratepayers; and (3) the public interest.⁵⁴ This balancing of competing interests is an integral part of the review conducted by the Commission to determine reasonableness.

18. When the Commission is called upon to determine the reasonableness of time billed and labor expended in litigating a case, the utility holds the information needed to support its request. The utility has the burden to prove that the hours billed are reasonable “by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.”⁵⁵ KCP&L has recognized that the Commission is considered an expert in making a

⁵¹ *Home Telephone*, 31 Kan. App. 2d at 1078-79.

⁵² K.S.A. 66-101b; K.S.A. 66-101f.

⁵³ *Kansas Gas & Electric, v. Kansas Corporation Comm’n*, 239 Kan. 483, 488-89, 500-01 (1986), vacated in part by *Kansas Gas and Electric Co. v. Kansas Corporation Comm’n*, 48 U.S. 1044 (1987). See, *Power Comm’n v. Hope Gas Co.*, 320 U.S. 591 (1944); *In re Permian Basin Area Rate Cases*, 390 U.S. 747,770 (1968).

⁵⁴ *Kansas Gas & Electric*, 239 Kan. at 488..

⁵⁵ *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998). See *Kansas Industrial Consumers v. Kansas Corporation Comm’n*, 36 Kan. App. 2d 83, 111-12, 138 P.3d 338 (2006) (the reviewing court will determine if substantial evidence in the record supports an agency’s findings of appropriate attorney fees). February 21, 2011 Order, ¶¶ 21-22 and notes 36-38; November 22, 2010 Order, pp. 88-89.

decision on rate case expense and draws from its knowledge and experience in evaluating the value of services rendered in this proceeding.⁵⁶

19. The Commission has considered a wide range of factors in arriving at an appropriate rate case expense for this docket. Because this issue is being reviewed on reconsideration, the Commission is not faced with the statutory, 240-day deadline of K.S.A. 66-117, which restricted review of rate case expense in the regular rate case proceeding. In issuing its November 22, 2010 Order, the Commission noted the record did not contain detailed information on rate case expense.⁵⁷ In its January 6, 2011 Order, the Commission granted reconsideration of rate case expense and ordered further proceedings to allow KCP&L and CURB to be heard on this issue, including presenting additional evidence to support their claims on rate case expense.⁵⁸ We note that KCP&L has continued to argue that the Commission should have allowed it to recover all its requested rate case expense based on it providing actual expenses to Staff at the end of the limited timeline for issuing an Order in the rate case.⁵⁹ But KCP&L's evidence to support its request, including responses to Staff Data Requests (DRs) 554 and 555 (which responses were submitted on a compact disc that is extremely difficult to decipher), was based on estimates and did not provide detailed evidence to support the request. Granting reconsideration here has allowed KCP&L the opportunity to file whatever evidence it wanted to support its request for rate case expense, resulting in a voluminous record on this issue. Thus, the Commission has not retroactively required a different process than previously used but instead has given KCP&L additional time and opportunity to submit evidence that should have been provided all along under the accepted practice to support a request for rate case expense in this proceeding.

20. Parties were given guidance during this proceeding about what evidence should be presented and how. During the prehearing conference on March 3, 2011, Prehearing Officer

⁵⁶ KCP&L Pre-hearing Brief, filed August 15, 2011, ¶ 5; February 21, 2011 Order, ¶ 23, citing *Snider v. American Family Mut. Ins. Co.*, 45 Kan. App. 2d 196, 244 P.3d 1285 (2011); *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006); *Westar Energy v. Wittig*, 44 Kan. App. 2d 206 (2010).

⁵⁷ November 22, 2010 Order, pp. 88-89.

⁵⁸ February 21, 2011 Order, ¶¶ 15, 26.

⁵⁹ KCP&L Post Hearing Brief, ¶ 22-23.

Coffman discussed the detail of information the Commission wanted, summarizing three different levels of information. First, the Commission wanted a general overview listing all vendors, the total amount of rate case expense requested for each vendor and a brief description of what issue or work was done by each vendor. Second, KCP&L was to provide a summary for each vendor listing each timekeeper working for the vendor and state the overall amount being requested for each timekeeper with a brief description of the nature of the work that timekeeper performed. Third, detailed information was to be provided for each timekeeper that included the hourly rate, number of hours worked, dates these hours were worked, and a description of work performed on those dates. Billing statements for attorneys were to comply with Rule 1.5 of the Kansas Rules of Professional Conduct and any amount for a vendor included in capital costs or capitalized in project costs was to be explained. KCP&L was further expected to clarify any allocation of rate case expense between jurisdictions.⁶⁰ The Commission confirmed its desire to receive information providing detail as described by Prehearing Officer Coffman during the Prehearing Conference.⁶¹

21. Yet the Commission finds the evidence submitted in this proceeding still lacked detail desired to calculate rate case expense. For example, the description of work performed given by timekeepers was almost always set out as block descriptions per day rather than breaking out time spent on specific issues; this rendered impossible any meaningful comparison of work to identify duplication of effort on issues. This lack of detail made it impossible to rationally analyze billings submitted by multiple attorneys from several different law firms. For some consultants, essentially no description was made that could be used to decipher what issues were being addressed by individual timekeepers. The lack of detail in descriptions made it impossible to determine whether the claimed work was actually performed in a competent manner and useful in the rate case, whether the company was prudent in incurring costs for each attorney or consultant,

⁶⁰ Transcript of Prehearing Conference, March 9, 2011 (March 9, 2011 Prehe. Tr.), pp. 7-10. *Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011*, filed April 19, 2011, ¶ 4.

⁶¹ *Order Addressing Prehearing Officer's Report and Recommendation Following Prehearing Conference on March 9, 2011*, issued June 24, 2011, ¶¶ 7, 20.

and whether it is just and reasonable to pass these costs through to ratepayers as rate case expense.

22. KCP&L has argued that the Commission is setting a new policy for deciding rate case expense in this docket, but the Commission has already addressed and rejected that argument.⁶² While the Commission and its Prehearing Officer have articulated directives to give guidance to KCP&L about the information needed, the Commission has previously stated its reasons for requiring a utility to provide actual and detailed documentation of expenses incurred, rather than relying on estimates,⁶³ as follows:

Attorney fees included as a rate case expense to be passed onto regulated ratepayers must be reasonable. Rule 1.5 of the Kansas Rules of Professional Conduct sets out eight factors this Commission should consider in determining whether attorney fees are reasonable. In making its decision, the Commission should draw from its knowledge and expertise in evaluating the value of services provided by the attorneys and exercise its sound discretion in determining reasonable attorney fees. The Commission may reduce an attorney fee award if the recording of tasks worked on is insufficient, if multiple attorneys duplicate their effort, when time is expended on activities unrelated to issues or litigation, and for time spent on travel.

This Commission has allowed recovery of reasonable attorney fees as part of rate case expense. In this docket, the attorney fees submitted for inclusion as a rate case expense have several problems. No effort has been made to provide an itemized statement of the nature of the activity or services performed by any of the attorneys. This prevents the Commission from considering the nature of the legal services provided and from examining the hours submitted to review for duplication of efforts by multiple attorneys, time expended on legal services unrelated to the pending docket, and nonproductive travel time. The Commission

⁶² February 21, 2011 Order, ¶¶ 11-13, *citing* November 22, 2010, pp. 88-89 (Evidence on rate case expense should reflect “the time and amount of services rendered, the general nature and character of the services revealed by 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.”) (citations omitted); January 6, 2011 Order, ¶¶ 73-74.

⁶³ *In the Matter of an Audit and General Rate Investigation of Rural Telephone Company*, KCC Docket 01-RRLT-083-AUD, Order Setting Rate Case Expense, issued November 16, 2001 (Rural Telephone November 2001 Order), ¶¶ 27-32.

also needs to be able to review the billings to assure Kansas ratepayers are not paying high legal rates for services of a non-legal nature. The company and law firm need to be aware that in the future the Commission will not approve attorney fees that do not contain an itemized statement of the nature of the activity or services performed, the amount of time expended for each activity or service, and the identity of the attorney or other personnel that performed each activity or service. The detailed itemization expected by the Commission is standard for most law firms and is provided in corporate billings by public utilities that seek to pass the expense to ratepayers.

Also, the Commission is concerned that the hourly rate for attorney services that [the Company] has asked this Commission to pass onto [its] ratepayers is 30 percent higher than the hourly rate for services provided by extremely experienced regulatory attorneys that have been submitted by other companies in recent rate case dockets conducted before this Commission. The Commission notes that it is concerned about the appropriate amount of attorneys fees that should be passed on in regulated rates to Kansas customers, not how much [the Company] agrees to pay its attorneys for legal consultation about unregulated affairs. This issue will be reviewed closely in future dockets.⁶⁴

23. This quote makes clear the Commission is following a consistent policy requiring detailed documentation of actual expenses incurred, not merely estimates, to establish rate case expense. Before beginning a more granular analysis of KCP&L's request for rate case expense, we note the record before us reflects a remarkable number of timekeepers and billings. Included with this Order as Attachment A is a summary of the hours billed and amounts requested for each firm and individual timekeeper. In this case, six law firms with 47 timekeepers (lawyers, consultants and paralegals) billed more than 16,000 hours toward this case. In addition to the law firms, eight outside consulting firms with a total of 46 individual timekeepers billed more than 9,700 hours. Thus, the total work effort of outside attorneys and consultants on behalf of KCP&L involved 90 individual timekeepers billing more than 25,000 hours of legal and professional services to the litigation portion of this regulatory proceeding. These numbers shock the conscience of the Commission.

⁶⁴ Rural Telephone November 2001 Order, ¶¶ 28-30 (citations omitted). Tr. Vol. 17, pp. 3918-20 (Loyd).

IV. Determining Prudent and Just and Reasonable Attorney Fees

24. The largest portion of KCP&L's rate case expense is for legal fees and expenses. Lack of detail has made it difficult for the Commission to perform a "lodestar calculation" used to set reasonable attorney fees; using this method, reasonable attorney fees are determined by multiplying a reasonable number of hours worked by a reasonable hourly rate to arrive at the "lodestar amount" that is adjusted further to account for the eight factors set out in Rule 1.5 of the Kansas Rules of Professional Conduct.⁶⁵ The eight factors listed in Rule 1.5 to provide guidance in calculating reasonable attorney fees are as follows:

- (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.⁶⁶

25. The Commission notes that, with regard to Rule 1.5(8), none of the agreements for attorney fees were contingent upon the outcome of this proceeding; instead, fixed hourly rates were set for outside law firms, but these rates consistently increased during the course of this proceeding for every attorney whose billings were reviewed. The Commission has been offered no reasonable explanation for why, in the midst of the country's worst recession when most businesses are reducing prices to attract customers, every attorney's hourly rate increased during

⁶⁵ *Sheldon v. Vermonty*, 237 F. Supp. 2d 1270, 1274 (D. Kan. 2002).

⁶⁶ November 22, 2010 Order, p. 89, n. 340.

the pendency of this proceeding. The Commission further notes that, with regard to Rule 1.5(7), all lawyers involved in this proceeding have a good reputation and appear to be capable attorneys. Attorneys Cafer, Caro, Callenbach, and Steiner, who appeared at the 2010 Evidentiary Hearing on behalf of KCP&L, are experienced and known to the Commission. Other timekeepers believed to be attorneys⁶⁷ are not known to the Commission and, based on their respective hourly rate, some appear to be much less experienced.⁶⁸ The remaining factors have been considered in conducting the lodestar calculation discussed in this Order.

26. In updating its actual rate case expense through November 30, 2010, to \$9,033,136,⁶⁹ KCP&L argued that the Commission must take into account that “rate case expenditures involve some degree of management choice and discretion whether to incur the expenses.”⁷⁰ The Commission is aware of the respect it must accord management decisions in reviewing whether decisions made incurring rate case expense in this docket were prudent. In analyzing this issue, the Commission evaluates such management choice and discretion as bounded by “prudence” defined as “carefulness, precaution, attentiveness and good judgment.”⁷¹ In other words, the Commission will not pass through to rates the costs arising from imprudent management choices and discretion because utilities have no right to recover their costs simply because they have incurred them. Rates that may include imprudent or excessive rate case expense costs would be an unjust or unreasonable rate, charge or extraction, and thus prohibited and void.⁷² Following is a discussion of factors we considered in evaluating the evidence as a whole to reach a decision on rate case expense.

⁶⁷ *Infra*, ¶¶ 51-52.

⁶⁸ Schedules JPW2010-14 (Polsinelli Shughart Level 2 Summary) and JPW2010-15 (Schiff Hardin Level 2 Summary).

⁶⁹ Tr. Vol. 15, p. 3374 (Weisensee). See Weisensee Rebuttal, p. 3; Weisensee Direct, p. 2.

⁷⁰ KCP&L Prehearing Brief, ¶ 6, *quoting* 31 Kan. App. 2d 1015, *citing Columbus Telephone Co. v. Kansas Corporation Comm’n*, 31 Kan. App. 2d 828 (2003).

⁷¹ Black’s Law Dictionary 1104 (WEST 5th Ed. 1979). See November 22, 2010 Order, p. 13.

⁷² K.S.A. 66-101b.

A. The American Rule

27. The Commission begins its analysis of attorney fees by noting that the custom and practice of recovering legal expenses in utility cases differs markedly from the general practices of civil and criminal litigation. Under the “American Rule” of civil litigation, parties bear their own attorney fees and costs of litigating a case, unless a contractual or statutory requirement changes this policy.⁷³ The American Rule is well established in Kansas courts, which reflects that generally litigants in this state are expected to bear their own attorney fees.⁷⁴ Intervenors in regulated proceedings in Kansas generally must bear their own legal expenses for participating in the proceeding and appearing before the Commission. Several intervenors in this docket have paid their own attorney fees, including entities such as the Hospital Intervenors and Shawnee Unified School District No. 512.⁷⁵ In Kansas by statute, expenses for the Commission and its Staff and for CURB are assessed against the utility filing a rate case.⁷⁶ Also, the Kansas Supreme Court has set out guidelines for district courts to consider in determining reasonable attorney fees.⁷⁷ In reviewing these guidelines in the context of awarding attorneys fees from a common fund in a class action, the Court noted that the amount of recovery reflected using a lodestar calculation can act as a ceiling on the amount of attorney fees awarded from the common fund.⁷⁸

28. If the American Rule were applied here, KCP&L would be responsible for paying its own expenses and costs, would not recover any rate case expense from ratepayers, and would be required to pay the assessed expenses under K.S.A. 66-1502 for expenses of the Commission, its

⁷³ *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, 279, 241 P.3d 15, 24 (2010). In contrast, under the “English Rule” the losing party pays the prevailing party’s attorney fees. BLACK’S LAW DICTIONARY, (WEST 8th Ed, 2004), p. 570.

⁷⁴ 291 Kan. at 279, *citing* 8 Larson Workers’ Compensation Law § 133.01 (“The obligation to bear one’s own legal fees, then, has become established as a necessary evil, which each client must contrive to bear as cheerfully as he or she can.”).

⁷⁵ November 22, 2010 Order, pp. 2-3.

⁷⁶ K.S.A. 66-1502.

⁷⁷ *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984) *aff’d in part, rev’d in part*, 472 U.S. 797 (1985).

⁷⁸ *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 315-19, 737 P.2d 13, 26-28 (1987) (Kansas Supreme Court outlines different approaches for calculating fair and reasonable attorney fees from a common fund in class action suits, including a percentage of the award, weighing and evaluating a number of factors, the lodestar approach, or a combination adjusted for subjective considerations by the court).

Staff and CURB of \$1,422,832. But historically Kansas utilities have been allowed recovery of prudently incurred rate case expense that is just and reasonable as one of the many components making up revenue requirement.⁷⁹ Therefore, while recognizing KCP&L would recover no rate case expense under the American Rule, the Commission continues to review the amount to be awarded in this proceeding.

B. Percentage of the Award

29. A factor considered in evaluating whether the requested rate case expense is just and reasonable compares similar cases and the size of the rate case expense award in the context of the overall revenue requirement for the utility. KCP&L invited this comparison with the “Wolf Creek” docket,⁸⁰ where utility-owners of the Wolf Creek Nuclear Generating Station sought to include rate case expense in the revenue requirement for that facility to be assessed against ratepayers. KCP&L argued that this case had been compared to the Wolf Creek docket during these proceedings⁸¹ and that, in the Wolf Creek docket, rate case expense was initially estimated to be \$2,078,500, but the actual rate case expense incurred was \$4,719,214, which is more than double the initial estimate. Despite this variance from the initial estimate, the Commission allowed the utility to recover the full amount of its rate case expense from customers.⁸² Here, KCP&L argued that the Commission, as it did in the Wolf Creek docket, should allow KCP&L’s requested rate case expense as a reasonable amount to recover from customers even though it exceeds the original estimate of \$2.1 million by over \$5 million.⁸³

⁷⁹ *Columbus Telephone Co. v. Kansas Corporation Comm’n*, 31 Kan. App. 2d 828, 835, 75 P.3d 257, 262 (2003).

⁸⁰ *Kansas Gas & Elec. Co.*, Consolidated Docket No. 84-KG&E-197-RTS & Docket No. 120,924-U, Order issued Sept. 27, 1985 (Wolf Creek Order).

⁸¹ KCP&L Posthearing Brief, ¶¶ 20-21.

⁸² KCP&L Posthearing Brief, ¶ 21, *citing* Wolf Creek Order, pp. 115-16. Although the Wolf Creek Order does not specify, the rate case expense awarded appears to include the assessment of costs for the Commission and its Staff. The Commission notes that CURB had not been created at that time. K.S.A. 66-1222.

⁸³ KCP&L Posthearing Brief, ¶ 21.

30. We believe it helpful to consider the size of the Wolf Case docket. Parties involved included three utilities (KG&E, KCP&L, and Kansas Electric Power Cooperative), Commission Staff, and numerous intervenors such as the Kansas Attorney General, two public interest associations (Alliance for Liveable Electric Rates and Electric Shock Coalition), the Kansas Independent Oil and Gas Association, a coalition of 12 large industrial customers, a coalition of 10 local government entities, a coalition of 8 municipalities, and several other entities. Public hearings were held in 19 different venues with public testimony given by more than 100 members of the public, hundreds of written public comments were received, and more than 90 witnesses testified during a contentious and complex evidentiary hearing.⁸⁴ In spite of KCP&L's urging that the two dockets are comparable, the Commission concludes the instant proceeding did not approach the complexity of the Wolf Creek docket involving a nuclear power plant.

31. Regarding KCP&L's reliance on the Wolf Creek Order to support awarding rate case expense exceeding an initial estimate, the Commission points out that the amount of rate case expense awarded in its November 22, 2010 Order was \$5.6 million, or a little more than twice the \$2.1 that KCP&L initially estimated here. By comparison, the Wolf Creek Order awarded \$4.7 million in rate case expense, also a little more than twice the estimated rate case expense there of \$2.0 million. These awards appear comparable. KCP&L has not explained, through argument or evidence, why it should receive an even more generous award of rate case expense over its original estimate (\$9 million vs. \$2.1 million) than the amount allowed in the Wolf Creek docket compared with the original estimate there (\$4.7 million v. \$2 million).

32. In evaluating whether the requested rate case expense is just and reasonable, the Commission also finds it helpful to compare the rate case expense allowed to be recovered from ratepayers with the overall revenue requirement awarded the utility. In the Wolf Creek docket, the utility (KG&E) requested a revenue requirement of \$144.9 million; the Commission awarded a revenue requirement of \$135 million. Thus, the rate case expense of \$4.7 million awarded in

⁸⁴ Wolf Creek Order, pp. 1-5.

that highly contested docket, involving costs for construction of a nuclear power plant, was approximately 3.4% of the revenue requirement. Here, KCP&L initially requested a revenue requirement of about \$50.8 million; the Commission ultimately awarded a revenue requirement of \$21.8 million, which included an award of \$5.6 million for rate case expense.⁸⁵ If the 3.4% awarded in the Wolf Creek docket for rate case expense is applied here to the requested revenue requirement of \$50.8 million, KCP&L would be entitled to rate case expense of \$1.73 million; if the 3.4% awarded in rate case expense in the Wolf Creek docket is applied to the awarded revenue requirement of \$21.8 million here, KCP&L would be entitled to rate case expense of only \$741,000.

33. Analyzing this comparison, the Commission also considers the last litigated rate case before the Commission that involved Westar Energy, Inc., and Kansas Gas & Electric Company (collectively Westar), which is the largest electric public utility in Kansas.⁸⁶ Westar's Docket No. 05-WSEE-981-RTS (05-981) was a complex rate case that included 18 intervenors, prefiled written testimony submitted by 44 witnesses, and an evidentiary hearing lasting 13 days. Two attorneys appeared on behalf of Westar.⁸⁷ In Docket 05-981, Westar requested a revenue increase totaling over \$84 million; the Commission awarded an overall revenue requirement increase of \$38,797,189.⁸⁸ The total rate case expense awarded in Docket 05-981 was \$2,081,610.⁸⁹ Thus, rate case expense for that contested docket was approximately 5.4% of the revenue requirement. If the 5.4% awarded in the Westar docket for rate case expense is applied here to the requested revenue requirement of \$50.8 million, KCP&L would be entitled to rate case expense of \$2.74

⁸⁵ November 22, 2011 Order, pp. 91, 95.

⁸⁶ Docket No. 05-WSEE-981-RTS, In the Matter of the Applications of Westar Energy, Inc. and Kansas Gas and Electric Company for Approval to Make Certain Changes in Their Charges for Electric Service, *Order on Rate Applications*, filed December 28, 2005 (Westar December 28, 2005 Order).

⁸⁷ Westar December 28, 2005 Order, pp. 7-10. Counsel appearing on behalf of Westar included Martin Bregman of Westar and Michael Lennen, who previously served as Chairman of this Commission.

⁸⁸ Schedules attached to *Order on Petition For Specific Reconsideration, For the Submission of Additional Evidence and Clarification*, filed February 16, 2006 (Westar February 16, 2006 Order), Schedules.

⁸⁹ Docket 05-981, Direct Testimony of Mary Jo Struttman, filed September 9, 2005, as updated for additional expenses based upon the Commission's ruling in Westar February 16, 2006 Order.

million; if the 5.4% awarded in rate case expense in the Westar docket is applied to the awarded revenue requirement of \$21.8 million, KCP&L would be entitled to rate case expense of only \$1,177,200.

34. Comparing this proceeding with the Westar docket, the Commission notes several of the same issues were considered, including rate of return, depreciation, and other complex accounting issues. Admittedly, prudence was not an issue in Westar's case. Yet the experience, reputation, and ability of the lawyers representing KCP&L and Westar were comparable. The Commission finds consideration of rate case expense awarded in another recently litigated rate case proceeding is helpful in determining an amount of rate case expense that is just and reasonable to pass through to a utility's ratepayers. Having considered the percentage of rate case expense compared with the revenue requirement awarded in other litigated rate case proceedings before this Commission, we conclude that KCP&L's request here significantly exceeds the percentage allowed in other proceedings that were at least as complex, and arguably much more complex, than this proceeding with as much at stake in terms of financial risk for the companies involved. The Commission has taken this into account in setting rate case expense for this proceeding.

C. KCP&L's Initial Estimate

35. The amount of rate case expense KCP&L initially estimated (\$2.1 million) differed substantially from the amount it ultimately claimed (\$9 million). Three explanations are possible for this discrepancy: (1) the company's initial estimate was simply wrong and grossly inadequate given the issues raised; (2) the company failed to reasonably manage its rate case expenses to stay within – or even close to – the \$2.1 million estimate; and (3) the company made a good faith, reasonable initial estimate but was surprised by a host of complexities, opposition, and new issues that could not be reasonably anticipated.

36. The Commission concludes little or no control was exercised to match the initial \$2.1 million estimate for rate case expense. In filing its Application, KCP&L estimated its rate case

expense would be \$2.1 million based upon prior other rate cases under KCP&L's Resource Plan.⁹⁰ KCP&L Witness Weisensee testified that this estimate was based on rate case expense for Docket 09-246 of \$2.3 million, taking into account that some issues had already been vetted and the number of parties involved.⁹¹ No specific person was assigned the responsibility to monitor or keep overall rate case expense within this budgeted amount.⁹² When the estimate was developed, KCP&L knew that the rate case would also require a depreciation study, a class cost of service study, and an allocation study and that the issue of prudence had been deferred from the 09-246 Docket to this proceeding.⁹³ Downey testified that rate case expense was treated like a storm budget, in which the Company knew monthly what kind of expenses were billed and paid but no overall budget was maintained.⁹⁴ By the time he became aware that rate case expense had increased significantly over the stated budget, Downey was not sure the company could ask for more then, noting he was not a procedural expert.⁹⁵ Downey did not state whether he asked his advisors about this concern.

37. CURB urged the Commission to limit KCP&L's award to the estimate of \$2.1 million⁹⁶ because the Company either knew or should have known that this docket would be difficult when its Application was filed. Crane pointed out that the company "blew through this estimate as if it was written in dust."⁹⁷ Crane noted several significant issues, including prudence, were deferred from the prior 09-246 Docket and parties knew depreciation, rate of return, and various other accounting issues would be addressed in this docket.⁹⁸

⁹⁰ CURB Exh. 1, CS-80 Rate Case Expense – KCPL, Summary KS, Rate Case schedule – 2010 Rate Case, Direct Filing. Tr. Vol. 15, p. 3385 (Weisensee); Tr. Vol. 16, p. 3664 (Downey). See also Table of Proceedings, *infra* ¶ 6.

⁹¹ Tr. Vol. 15, pp. 3400-02, 3417-18, 3429 (Weisensee); Weisensee Direct, p. 8; Weisensee Rebuttal, p. 8.

⁹² Tr. Vol. 15, pp. 3385-86 (Weisensee); Tr. Vol. 16, pp. 3663-64 (Downey).

⁹³ Tr. Vol. 15, pp. 3389-92 (Weisensee).

⁹⁴ Tr. Vol. 16, pp. 3666-67 (Downey).

⁹⁵ Tr. Vol. 16, p. 3668 (Downey).

⁹⁶ Crane Direct, p. 24.

⁹⁷ Crane Direct, p. 17; Tr. Vol. 16, pp. 3929-32 (Crane).

⁹⁸ Tr. Vol. 16, p. 3932 (Crane).

38. The Commission shares Crane's concern that KCP&L made no attempt to keep the parties or the Commission informed "about the level of rate case costs being incurred, why that level differed so dramatically from the claim included in the filing, or why that level of cost was appropriate. Any information provided about rate case expense was only elicited as a result of data requests propounded by other parties in the case or by cross-examination of the Company's witnesses."⁹⁹ The Company had an affirmative duty to keep the Commission informed by providing appropriate schedules and competent testimony of "all relevant facts and data pertaining to its business and operations" to assist the Commission in arriving at fair, just, and reasonable rates for both the utility and the public.¹⁰⁰ KCP&L did not meet its obligations under this regulation. If the Commission followed this recommendation by CURB, KCP&L would recover rate case expense of \$2.1 million.

D. CURB Proposal for Sharing Rate Case Expense

39. If the Commission allows KCP&L to recover rate case expense exceeding its estimated \$2.1 million, CURB Witness Crane proposed using a methodology that would share a utility's directly-incurred rate case costs 50/50 between KCP&L and ratepayers, subject to some reasonable maximum. Under this method, shareholders would fund a portion of rate case expense. CURB argued both shareholders and ratepayers benefit from an incentive for the Company to keep down these costs. Ratepayers benefit by receiving utility service at just and reasonable rates; shareholders benefit from having an opportunity to increase their margins.¹⁰¹ Crane discussed three options for using a sharing mechanism to ensure ratepayers do not have to pay exorbitant rate case costs, which in her opinion would help level the playing field and balance the interest of shareholders and ratepayers.¹⁰²

40. We are not the only utility commission to struggle with the issue of rate case expense. The Missouri Public Service Commission recently initiated a general investigation of rate case

⁹⁹ Crane Direct, p. 18.

¹⁰⁰ K.A.R. 82-1-231(a).

¹⁰¹ Crane Direct, pp. 25-26; Tr. Vol. 16, pp. 3934-38.

¹⁰² Crane Direct, pp. 27-29.

expense to explore use of a sharing method, such as the one Crane proposed, or to establish a revenue percentage cap on rate case expense passed to ratepayers.¹⁰³ Here, if the amount sought for KCP&L-only rate case expense was divided based upon a 50/50 sharing between shareholders and ratepayers, KCP&L-only rate case expense would be approximately \$3.8 million. The Commission has considered this proposal but does not adopt a 50/50 sharing of rate case expense as a matter of policy. Although we recognize our decision apportions responsibility for rate case expenses between ratepayers and shareholders, we decline to adopt a general policy that formally apportions rate case expense as CURB suggests.

E. CURB Alternative Proposal for Calculating Rate Case Expense

41. CURB Witness Smith presented an alternative proposal that adjusted specific items of rate case expense to remove excessive, duplicative, unreasonable and inadequately documented charges. He discussed individual instances that, in his opinion, reflected unreasonable, excessive or questionable items included in KCP&L's rate case claim, dividing his analysis among (1) Overall Legal Fee Concerns,¹⁰⁴ (2) Specific Concerns Regarding Legal Fees and Expenses Claimed by KCPL,¹⁰⁵ and (3) KCPL Consultant Charges.¹⁰⁶ Under Smith's proposal, the allowance for KCP&L's rate case expense should be limited to \$4.913 million, including \$1.423 million for the Commission, its Staff and CURB costs. The amount of \$4.913 million included approximately \$1.9 million for addressing Iatan Unit 2 prudence issues and \$3 million "for other 'normal' rate case costs, including the KCC and CURB assessment."¹⁰⁷ Also, Smith proposed a cost recovery period of ten years for rate case expense addressing the Iatan Unit 2 prudence issue, which would produce an annual allowance of approximately \$190,000 per year, and a cost recovery period over four years, for an annual allowance of approximately \$754,000. Thus, the

¹⁰³ In the Matter of a Working File to Consider Changes to Commission Rules and Practices Regarding Rate Case Expense, Missouri Public Service Commission File No. AW-2011-0330, *Order Directing Staff to Investigate and Opening a Repository File*, issued April 27, 2011.

¹⁰⁴ Smith Direct, pp. 17-19.

¹⁰⁵ Smith Direct, pp. 19-30.

¹⁰⁶ Smith Direct, pp. 31-38.

¹⁰⁷ Smith Direct, p. 8; Schedule RCS-1, Schedule 1.

total annual cost recovery would be approximately \$944,000 over four years and then \$190,000 over an additional six years.¹⁰⁸

42. The Commission has considered Smith's proposal removing charges he found excessive, duplicative, unreasonable and inadequately documented; we have also considered Smith's proposal regarding cost recovery for rate case expense. We decline to accept either proposal; however, we have considered Smith's analysis of individual issues among the factors we have taken into account in reaching our decision.

F. Lodestar Calculation

43. By far the largest portion of rate case expense requested in this proceeding is for lawyers' fees. The record before us indicates that 47 timekeepers (including attorneys, paralegals, and consultants) associated with six law firms billed 16,407 hours to this case.¹⁰⁹ In Kansas, not only does the rate case expense need to be reasonable, but also the attorney fees themselves must be reasonable.¹¹⁰ To arrive at a reasonable attorney fee, Kansas courts commonly multiply a reasonable number of hours worked by a reasonable hourly rate; this gives the court a "lodestar amount" that may be adjusted further by other factors set out in Rule 1.5(a).¹¹¹ If the eight factors of Rule 1.5 are considered in initially making the lodestar calculation, further adjustments may not be needed.¹¹² Lodestar is defined as: "A reasonable amount of attorney's fees in a given case, [usually] calculated by multiplying a reasonable number of hours worked by the prevailing hourly rate in the community for similar work[.]"¹¹³ Because so much of the rate case expense here is attributable to attorney fees, the Commission will consider the lodestar calculation in determining an appropriate amount to award for this proceeding. For guidance, the Commission has reviewed how district courts use the lodestar calculation. Consistently, those courts required each lawyer

¹⁰⁸ Smith Direct, p. 9; Schedule RCS-1, Schedule 1.

¹⁰⁹ Attachment A, p. 2.

¹¹⁰ Rule 1.5(a).

¹¹¹ *Sheldon*, 237 F.Supp.2d at 1274.

¹¹² 237 F.Supp. at 1274.

¹¹³ Black's Law Dictionary, (WEST 8th Ed., 2008), p. 960.

for whom fees were sought to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks.

44. Using a lodestar analysis, the Commission undertook an extensive analysis of invoices submitted by these timekeepers to make just and reasonable adjustments to these billings. A problem we consistently encountered in reviewing records submitted by KCP&L was the use of block billing. This was particularly problematic in trying to sort out what attorney work was duplicated, both within a law firm and among attorneys at several law firms. We found block billing was used for time expended during a day even if multiple tasks were performed. For example, Cafer billed 8.5 hours on June 24, 2010, for the following activities: "Preparation for CCA witness sessions; conference call with Schiff; conference call with clients re: accounting rebuttal; review draft of DRs; draft letter and serve DRs on staff; draft and serve follow-up letter; emails with clients and consultants; obtain and forward confidential version of Drabinski's revised testimony; draft letter for second set of DRs."¹¹⁴ Block billing was even used when work had to be billed to more than one jurisdiction¹¹⁵ or involved issues not included in this rate case proceeding.¹¹⁶ When block billing is used, the reviewer cannot decipher how much time is spent on a particular task, which is necessary to determine whether tasks are duplicated with respect to that activity. For example, we cannot decipher what amount of 8.5 hours Cafer billed for June 24, 2010, was spent preparing for the CCA session.¹¹⁷ Attorneys clearly know how to record separate time for specific projects on a daily basis. Anne Callenbach of Polsinelli Shughart billed her daily time using a granular identification of tasks; on June 22, 2011, Callenbach billed a total of 7.90

¹¹⁴ KCP&L Exh. 2, Weisensee CD, Weisensee Workpapers, Cafer.pdf, Invoice No. 01-01-10, p. 2.

¹¹⁵ Tr. Vol. 15, pp. 3537-45 (Polsinelli Shughart billings included work on MO Public Service Commission proceedings), 3561-63 (Cafer Law and Schiff Hardin bills for attending MO PSC hearing), 3567-69 (Schiff Hardin billings for work in other jurisdiction); CURB Exh. 21 (Polsinelli Shughart bills), Exh. 26 (Cafer and Schiff Hardin bills), and Exh. 28 (Schiff Hardin bills).

¹¹⁶ Tr. Vol. 15, pp. 3550-54 (Cafer Law billings included research on predetermination issue); CURB Exh 24 (Cafer Law bills).

¹¹⁷ Tr. Vol. 17, pp. 4100 (Harden), and 4155-56, 4165 (McClanahan).

hours by dividing her time into 5 separate notations.¹¹⁸ Unfortunately, the Commission has found no other attorney invoices that follow this example.

45. KCP&L did not consider block billing problematic. Rush testified that no duplication of billing occurred in this case, which we find borders on stating a deliberate falsehood but will deem to be a sign of indifference. Rush stated that each attorney had individual assignments and that, even if more than one attorney read the same witness testimony, each reading was needed to understand a particular aspect of an issue assigned to each attorney.¹¹⁹ Rush asserted that KCP&L questioned law firms when attorneys billed 13 to 17 hours a day to determine if these were legitimate hours; but no correspondence or other written documentation confirms that KCP&L challenged any of these billings.¹²⁰

46. We discuss this problem with block billing in more detail below. For future proceedings, the Commission cautions parties that any request for attorney fees to be included in rate case expense must provide information complying with Rule 1.5, by which attorneys must describe their time allotted to specific issues or tasks “by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.”¹²¹

1. Number of reasonable attorney hours.

47. The first step in the lodestar calculation is determining a reasonable number of hours spent by counsel for the party seeking recovery of attorney fees. Here KCP&L has the burden to establish, for each lawyer for whom it seeks to recover fees, that meticulous, contemporaneous time records have been maintained documenting all hours for which compensation is requested and documenting how those hours were allotted to specific tasks.¹²² If time records are “sloppy

¹¹⁸ CURB Exh. 14, p. 9. The same invoice is at KCP&L Exh. 2, Weisensee CD, Weisensee Workpapers, Polsinelli.pdf, Professional Services Through 6/30/10, p. 9. See Tr. Vol. 16, pp. 378-80 (Rush); Staff Exh. JDM-2, Polsinelli Invoices ending April 30, 2010, pp 6-8.

¹¹⁹ Tr. Vol. 16, pp. 3747-48 (Rush).

¹²⁰ Tr. Vol. 16, pp. 3736-37 (Rush).

¹²¹ *Case*, 157 F.3d at 1250. Cf., *Rural Telephone*, November 2001 Order, ¶¶ 27-32.

¹²² 157 F.3d at 1250.

and imprecise” and do not document adequately how the attorney utilized large blocks of time, then the Commission is justified in reducing the reasonable number of hours.¹²³ The Commission may reject “reconstructed” time records.¹²⁴ Also, the Commission may reject duplication arising from more than one attorney doing the job of one attorney. An applicant for attorney fees must exercise “billing judgment” by “winnowing the hours actually expended down to the hours reasonably expended.”¹²⁵ An attorney is not allowed to recover fees from an adversary that could not be billed to the client; such fees are presumptively unreasonable.¹²⁶ Finally, overall hours expended on each task must be considered to determine if they are reasonable; the number of reasonable hours may be reduced by hours that are “unnecessary, irrelevant and duplicative.”¹²⁷

48. Summary of Hourly Fees in Attachment A. The Summary of Hourly Fees from both attorneys and consultants set out in Attachment A to this Order is drawn from schedules Weisensee attached to his direct testimony.¹²⁸ In this discussion, we focus on hours attributable to attorney fees and later discuss hours attributable to consultants. The Summary of Hourly Fees reflects that KCP&L seeks to recover rate case expense reflecting 16,407.02 hours of work by timekeepers at law firms,¹²⁹ arguing these hours were justified by the complexity, number, and nature of issues raised in this docket.

¹²³ 157 F.3d at 1250.

¹²⁴ *Shrout v. Holmes*, 2001 WL 980238, at 2 (D.Kan., Aug. 10, 2001)(two-thirds of billing hours disallowed because attorney did not keep contemporaneous time records).

¹²⁵ 237 F. Supp. 2d at 1275.

¹²⁶ 157 F.3d at 1250.

¹²⁷ *Carter v. Sedgwick County, Kan.*, 36 F.3d 952, 956 (10th Cir. 1994). See *Case*, 157 F.3d at 1250 (more important than testimony of expert witnesses in deciding reasonableness of hours billed is the court’s discretionary determination of how many hours, in its experience, should have been expended on the specific case, given the maneuverings of each side and the complexity of the facts, law, and litigation).

¹²⁸ Weisensee Direct, Schedules JPW2010-11 through JPW2010-25.

¹²⁹ The Commission is astonished, if not shocked, at the total number of billable man-hours claimed by the company as reimbursable and appropriate to be passed through to ratepayers. Basic math demonstrates the total hours equates to 7.95 years of billable work, assuming no vacation and a 40-hour work week without a break, and, as noted elsewhere, *infra*, ¶ 95, one of these law firms is already recovering in excess of \$20 million for its work during the construction management phase of the Iatan project.

49. We will not allow KCP&L to recover rate case expense for services provided by two of the six law firms listed, Duane Morris and Morgan Lewis. In the November 22, 2010 Order, we denied recovery in rate case expense for work done by these law firms because the hours billed duplicated work performed by other attorneys participating in this proceeding and evidence has not established that their work was actually necessary and essential to proper representation of KCP&L in this proceeding.¹³⁰ No evidence presented on reconsideration has changed our minds regarding this decision. A total of 600 hours is listed in the Summary for work by attorneys at these two firms.¹³¹

50. Having reviewed the record before us, we disallow all hours billed by attorneys at SNR Denton because KCP&L has not provided evidence supporting inclusion of these charges in rate case expense for this docket.¹³² Billings for Steiner do not attempt to give meticulous, contemporaneous descriptions of work performed or allot time to specific tasks related to this docket. Apparently KCP&L had an unwritten understanding with SNR Denton regarding how Steiner's hours would be estimated and divided among KCP&L's jurisdictions, without requiring actual, contemporaneous records of work performed on this docket.¹³³ The 144.18 hours billed for Steiner are disallowed. Also, KCP&L offered no evidence to explain why an additional 19.7 hours billed by SNR Denton should be allowed. This time duplicated work by other outside attorneys and will not be allowed as rate case expense.

51. For us to determine a reasonable number of attorney hours to perform a lodestar calculation, hours billed by non-attorney timekeepers at law firms must be removed. But KCP&L's evidence did not identify which timekeepers were attorneys or why fees for non-attorneys at law firms should be recovered as rate case expense. We will only include hours

¹³⁰ November 22, 2010 Order, p. 93; *Case*, 157 F.3d at 1252.

¹³¹ Duane Morris billed 584.48 hours, and Morgan Lewis 159.18 hours. The actual total is 599.66, which we round to 600.

¹³² SNR Denton (formerly Sonnenschein Nath & Rosenthal) billed hours totaling 163.88, which we round to 164 hours.

¹³³ Tr. Vol. 16, pp. 3782-84 (Rush); CURB Exh. 5, 6, and 7. Rush admitted that nothing in the record confirmed that Steiner actually devoted 25% of his time to the Kansas rate case when he was at SNR Denton. Tr. Vol. 16, p. 3784 (Rush).

clearly attributable to attorneys in determining reasonable attorney hours. Based upon our review of invoices and bills from Schiff Hardin, we conclude nine timekeepers are attorneys — Roberts, Okizaki, Gould, Schermer, Hitchcock, Kolton, Montgomery, Rowe and Markey; these nine attorneys billed a total of 4,549.70 hours. Invoices and hours billed suggest four Schiff Hardin attorneys were primarily involved this proceeding: Roberts, Okizaki, Gould and Schermer.

52. A review of invoices and bills from Polsinelli Shughart indicate the following are attorneys: Caro, Callenbach, Kane, Hagedorn, Sear, Willman, Stohs, Breer, Rupp, Morgan, and Sneed; these 11 timekeepers billed a total of 5,298 hours. Invoices and hours billed indicate four attorneys were primarily involved in this proceeding: Caro, Callenbach, Kane and Hagedorn.

53. In reviewing the Summary of Hourly Fees to calculate a reasonable number of attorney hours, the Commission has excluded all hours billed by attorneys at law firms Duane Morris, Morgan Lewis, and SNR Denton. We note that Cafer Law listed hours for only one attorney, who billed 1,639 hours. Only hours billed by the 9 attorneys at Schiff Hardin (4,550 hours), the 11 attorneys at Polsinelli Shughart (5,298 hours), and the one attorney at Cafer Law (1,639 hours) will be considered in determining a reasonable number of attorney hours for the lodestar calculation. The combined total is 11,487 hours.

54. Exercise of billing adjustment by individual law firms. The Commission notes that evidence in the record does not reflect that any of the law firms involved in this proceeding made a billing adjustment or that KCP&L made any effort to require them to do so. Nowhere is an adjustment seen for lost time, duplication of services, or time spent familiarizing oneself with the law. With regard to Polsinelli Shughart, at the hearing, KCP&L pointed out an occasional invoice from Polsinelli Shughart that indicated “No Charge” for a specific item that involved more than one attorney and clearly duplicated services.¹³⁴ But a review of hundreds of pages of invoices from Polsinelli Shughart does not show a consistent effort to adjust billing to ensure that the work of attorneys in the firm was not duplicated in billing or to account for those occasions when

¹³⁴ McClanahan Direct, Exh. JDM-1, Polsinelli Shughart December 2009 Invoice # 687731, pp. 2-8.

duplication is unavoidable, such as when a new attorney is brought into the case and must “get up to speed” on the facts and the law. In fact, additional examples of duplicate billing were identified at the hearing.¹³⁵ In making this adjustment, we note that KCP&L’s decision to involve so many law firms required numerous attorneys to get “up to speed” on the issues, including each attorney needing to become familiar with this general area of law. Acquiring such background knowledge should have been absorbed by the law firms or by KCP&L in light of its decision to duplicate these efforts.¹³⁶ Based upon its review of invoices and billing statements, the Commission concludes that it is just and reasonable to reduce the 5,298 attorney hours billed by the 11 attorneys at Polsinelli Shughart by 10% to make some accounting for duplication of work, lost time, and coming up to speed by attorneys at this firm.¹³⁷ This adjustment brings reasonable attorney hours for Polsinelli Shughart to 4,768 hours.

55. More alarming was the duplication seen in reviewing Schiff Hardin invoices and billing statements. Schiff Hardin invoices show a constant and repetitive duplication of effort by the four primary attorneys involved in this proceeding. All four attorneys consistently billed for drafting, and repeatedly redrafting, the same direct testimony, which was filed with KCP&L’s Application. Testimony they drafted involved several witnesses that KCP&L has assured the Commission were top experts in their respective fields.¹³⁸ By the time the Application was filed on December 17, 2009, these four attorneys had already billed 830 hours and over \$315,000 in fees.¹³⁹ The evidence shows that Schiff Hardin made no billing adjustments here. No evidence discussed why such duplication was necessary to draft testimony for expert witnesses or to perform similar work. Throughout these proceedings, Schiff Hardin brought in other firm attorneys but made no adjustment for the time needed to acquire “background” information about this area of law or these proceedings. Also, Schiff Hardin attorneys drafted and redrafted testimony

¹³⁵ Tr. Vol. 15, pp. 3537-38 (Weisensee); CURB Exh. 19 (Polsinelli Shughart August 2009 invoice).

¹³⁶ *Case*, 157 F.3d at 1253.

¹³⁷ *Kansas Penn Gaming, LLC v. HV Properties of Kansas, LLC*, Case No. 08-4111-RDR, Memorandum and Order, Slip Op. filed May 18, 2011, at p. 15.

¹³⁸ CURB Exh. 16 and 17.

¹³⁹ Attachment A, Summary of Hourly Fees, p. 2.

as if the attorneys and witnesses were unfamiliar with the Iatan Project or with KCP&L. Based upon the clear duplication of effort by attorneys at Schiff Hardin and lack of any billing adjustment by Schiff Hardin, the Commission concludes that it is just and reasonable to make a billing adjustment for Schiff Hardin attorney hours. In light of the unchecked billings by this firm, we reduce attorney hours for Schiff Hardin by 30% to remove duplication of work by these attorneys.¹⁴⁰ We calculate 4,550 hours billed by Schiff Hardin attorneys reduced by 30%, or 1,365 hours, results in a total of 3,185 hours.

56. As with the other firms, Cafer Law made no billing adjustment to account for background research needed to become familiar with the general area of law involved in the numerous issues presented in this case.¹⁴¹ The unadjusted invoices would suggest that 100% of time billed reflected productive time, which seems contrary to real-world experience. The Commission concludes that it is just and reasonable to make a modest 5% adjustment to reduce the 1,639 hours billed by Cafer Law, reducing its billable hours by 82 hours for a total of 1,557 attorney hours.

57. Exercising billing judgment regarding attorney hours billed by Polsinelli Shughart, by Schiff Hardin, and by Cafer Law does not eliminate the problem of duplicate billing. Adding together the adjusted attorney hours for Polsinelli Shughart (4,768 hours), Schiff Hardin (3,185 hours), and Cafer Law (1,557 hours), we calculate a total of 9,510 attorney hours. But a review of the record in this proceeding establishes an obvious overlap of work among attorneys at Cafer Law, Polsinelli Shughart, and Schiff Hardin law firms, which we address next.

58. Billing Adjustments for Work Done by Multiple Law Firms. The Commissioners, all of whom are lawyers, find it remarkable and evidence of the unreasonable nature of the claimed expense that among the 34 attorneys working for six law firms and billing 12,395 attorney hours in this case, none of them made any adjustments to their bills. No adjustments were made for unproductive time, for duplication of efforts among lawyers in the same firm, or

¹⁴⁰ *Kansas Penn Gaming*, at p. 15.

¹⁴¹ 157 F.3d at 1253.

for duplication of efforts among lawyers working in different law firms. The implication is that the work was 100% productive and non-duplicative. The Commission has made an adjustment to attempt to account for duplication in billings and to account for background research on issues by attorneys at Polsinelli Shughart, by attorneys at Schiff Hardin, and by the attorney at Cafer Law. A cursory review of invoices submitted by all the outside law firms in this proceeding, including testimony submitted by KCP&L's witnesses, and working papers contained in KCP&L Exhibit 2 and responses to DRs 554 & 555¹⁴² confirms that no billing adjustment was made overall in relation to rate case expense requested for this proceeding. In calculating reasonable attorney hours, the Commission has already excluded hours billed by attorneys from Duane Morris, Morgan Lewis, and SNR Denton due to the lack of evidence to support recovering for billings by these firms in rate case expense. Identifying duplication of attorney work among law firms is tedious and requires laborious review of invoices that was made impossible here because attorneys billed work using block descriptions rather than detailed descriptions of work efforts. Two areas in particular illustrate this problem.

59. First, we consider the time spent by KCP&L's attorneys refuting testimony of Staff Witness Drabinski on prudence. KCP&L Witness Downey, who was President and Chief Operating Officer at KCP&L during implementation of the Resource Plan and the 2010 Evidentiary Hearing, noted that the primary purpose of the 10-415 Docket was to address

¹⁴² Two CDs are included in the administrative record of the proceeding. One CD contains Staff's DRs 554 and 555 and KCP&L Responses to these DRs. This CD was made a part of the record in the November 22, 2010 Order, p. 89. Because the CD had not yet been submitted, the Commission directed Staff to file a copy in its January 6, 2011 Order, ¶ 79, which was done on January 13, 2011. Staff's DRs 554 and 555 and KCP&L's overview responses are filed as Attachment B to Staff's Notice of Filing of Revised Schedules and Documents as Requested by the Commission; the CD containing KCP&L's Responses to DRs 554 and 555 are submitted as Attachment C to Staff's Notice. To help clarify what is contained in the administrative record, we note that Staff Witness Bill Baldry attached two CDs to his Direct Testimony that also has this information; one CD contains Staff's DR 554 and KCP&L's Responses, the other CD contains Staff's DR 555 and KCP&L's Responses. In addition to the CD with DRs 554 and 555, a second CD, which includes Weisensee's workpapers and additional invoices, was filed as KCP&L Exh. 2 in the September 2011 evidentiary hearing and is referred to throughout this Order as KCP&L Exhibit 2. See *infra*, ¶ 14. As did the parties, we refer to the CD containing Weisensee's workpapers as KPC&L Exh. 2; we refer to the CD containing DRs 554 and 555 and Responses as DRs 554 and 555. See Tr. Vol. 17, pp. 3969-70.

prudence so that KCP&L could recover its investment in the Iatan Project.¹⁴³ He testified here that, after Drabinski filed his prudence testimony, the Company “made management decisions strategically to significantly increase our effort in the area,” noting this was “a 2 billion dollar bet” on the investment in Iatan.¹⁴⁴ KCP&L concluded it was “absolutely mission critical to the Company to explain, defend and validate all of the work we had done over the past 5 years, so, yes, we did ramp up dramatically because we felt there was a fundamental risk to the Company, to its customers and to all the other stakeholders who were involved in this decision.”¹⁴⁵ Attorneys working on this proceeding obviously took to heart Downey’s directive that made discrediting Drabinski’s testimony on prudence “absolutely mission critical.”

60. CURB Witness Harden examined attorney hours billed after Drabinski’s direct testimony was filed on June 15, 2010.¹⁴⁶ Harden reviewed attorney invoices covering the 20 calendar days from June 10 to 30, 2010, looking for references to reviewing, analyzing, or discussing Drabinski’s testimony. She calculated 17 different timekeepers from four law firms reported 974.7 billable hours during these 20 days, totaling \$351,843.50 in fees.¹⁴⁷ Harden’s calculations included 20.8 hours for Duane Morris, which has already been disallowed, and 23.5 hours for O. Glover of Schiff Hardin, who does not appear to be an attorney.¹⁴⁸ After deducting 44.3 hours for those two adjustments, attorney hours billed for work on Drabinski’s testimony during this 20-day period is 930 hours. In reviewing daily descriptions reported in attorney invoices, Harden found block-form descriptions that included work on other tasks as well as

¹⁴³ Downey Direct, p. 2.

¹⁴⁴ Tr. Vol. 16, p. 3667 (Downey).

¹⁴⁵ Tr. Vol. 16, pp. 3667-68 (Downey).

¹⁴⁶ The Drabinski testimony filed June 15, 2010, was treated as confidential. Due to concern about confidential information contained in Drabinski’s Direct Testimony, a draft of at least portions of this testimony was given to attorneys representing KCP&L as early as June 10, 2011. See CURB Exh. 15, pp. 1, 2, and 6 (pages of invoices from Cafer Law, Schiff Hardin, and Polsinelli Shughart, respectively). A redacted version of Drabinski Direct Testimony was filed on June 24, 2011.

¹⁴⁷ Harden Direct, p. 4, and Exh. SMH-1.

¹⁴⁸ Harden Direct, Exh. SMH-1.

reviewing Drabinski's testimony. As a result, Harden testified she could not pinpoint exactly how many hours were devoted to reviewing this testimony during those 20 days.¹⁴⁹

61. To illustrate the problem with block billing, Weisensee was given CURB Exhibit 15 at the hearing; this exhibit contains invoices for June of 2010 from Cafer Law (p. 1), Schiff Hardin (pp. 2-3), Duane Morris (pp. 4-5), Polsinelli Shughart (pp. 6, 8) and Charles Whitney at Duane Morris (p. 7).¹⁵⁰ These pages show that timekeepers at Cafer Law (Cafer), at Schiff Hardin (Roberts, Okizaki, Schermer, Gould, and Glover), at Duane Morris (Bates, Cook and Whitney), and at Polsinelli Shughart (Kane, Caro, Hagedorn and Callenbach) used various descriptions for the task of reviewing Drabinski's testimony. For example, Roberts of Schiff Hardin credited four hours on 6/11/10 for the following work: "Review of Walter Drabinski's testimony; confer with Carrie Okizaki and Eric Gould regarding same and CCA process for Dan Meyer and myself; telephone conference with Jerry Reynolds regarding Drabinski's testimony."¹⁵¹ This invoice shows that four other timekeepers at Schiff Hardin also reviewed and analyzed Drabinski's testimony that day, as well as other work resulting in billing these hours: Okizaki, 7.75 hours; Schermer, 2.25 hours; Gould, 8.75 hours; and Glover 4.75 hours. Like Harden, this Commission has no way to determine what portion of the 27.5 hours billed to KCP&L that day by Schiff Hardin was spent reviewing Drabinski's testimony versus doing other tasks. This problem is compounded by multiple timekeepers at multiple firms recording multiple events in block billing during the course this proceeding.

62. In addition to Harden's review of billings for 20 days in June 2010, invoices show that during June and July 2010, Cafer Law billed 314 hours, Polsinelli Shughart billed 1,162 hours, and Schiff Hardin billed 4,051.60 hours; this is a total of 5,530 hours over this two-month period.¹⁵² No evidence suggests any law firm or KCP&L management in filing its request for rate case expense made a billing adjustment in any way to account for duplication of effort with

¹⁴⁹ Harden Direct, pp. 4-5, and Exh. SMH-1.

¹⁵⁰ Tr. Vol. 15, pp. 3520-27, and CURB Exh. 15, Portions of Law Firm Invoices for June 2010.

¹⁵¹ CURB Exh. 15, Aug. 31, 2010 Invoice for Schiff Hardin, p. 6.

¹⁵² Attachment A, pp. 1-2.

regard to attorney review of Drabinski's testimony. Much of this work was claimed to focus on developing prefiled rebuttal testimony or to be in response to prefiled testimony of witnesses, particularly Drabinski. The Commission, based on our experience as lawyers and in presiding over hearings before this agency, finds it is unreasonable to conclude that rebutting testimony of a single witness (Drabinski) and a single issue (prudence) is such a complex legal exercise that it requires the effort of 17 timekeepers in four law firms billing almost 1,000 hours.¹⁵³

63. The Commission understands KCP&L wanted to challenge and rebut Drabinski's testimony criticizing management's handling of the Iatan Project, but KCP&L made the management decision to ramp up significantly to meet this challenge without regard for cost. Now KCP&L asks us to require ratepayers to pay the entire expense for management's decision to "ramp up significantly" because management decided it was "absolutely mission critical . . . to explain, defend and validate all of the work [management] had done over the past 5 years."¹⁵⁴ While challenging and rebutting testimony is important in any rate case, the Commission expects law firms to exercise judgment with regard to fees that will be passed through to ratepayers, just as a law firm does for clients directly represented by the firm. Because neither the firms nor the Company make adjustments in billings, the Commission finds it just and reasonable to reduce the reasonable number of attorney hours by 310 hours, or approximately one-third of the hours Harden attributed to working on Drabinski's testimony during June 2010. The Commission deducts 310 hours from the 9,510 attorney hours, which totals 9,200 attorney hours.

64. A second example of duplicate attorney work among law firms is witness training. In its November 22, 2010 Order, the Commission denied KCP&L's request to include billings for the Communications Counsel of America (CCA) in rate case expense.¹⁵⁵ The Commission found preparation of witnesses is routinely part of the services attorneys perform before a hearing and, in light of the numerous capable attorneys hired to litigate this proceeding, the Commission

¹⁵³ Attachment A, pp. 1-2.

¹⁵⁴ Tr. Vol. 16, pp. 3667-68 (Downey).

¹⁵⁵ November 22, 2010 Order, p. 92.

disallowed rate case expense for CCA as duplicative.¹⁵⁶ KCP&L urged the Commission to reconsider its decision disallowing CCA expenses and offered additional evidence to support their recovery. Before discussing the duplication of attorney work connected with the CCA sessions, we address KCP&L's argument that expenses for CCA should be allowed as rate case expense.

65. The Duane Morris law firm hired CCA "to assist Duane Morris in giving legal advice to KCP&L with respect to certain aspects of the Iatan Projects."¹⁵⁷ This Consulting Agreement fails to define what professional services CCA will provide to Duane Morris in advising KCP&L, but it discusses fees "to cancel or reschedule a seminar."¹⁵⁸ CCA expenses "for sessions" were billed to KCP&L c/o Albert Bates, Jr., at the Duane Morris law firm; no hourly rate is shown.¹⁵⁹ Evidence shows CCA was retained to provide Witness Development Skills Labs for this rate case on December 9, 2009, well before Drabinski filed his testimony on prudence. Invoices from CCA indicate three Witness Development Skills Labs were conducted during 2010: Phase I for three days, June 7-10, with 5-8 participants and 2 consultants; Condensed Phase I for two days, June 30-July 1, with 2 participants and 1 consultant; and Phase II for 2.5 days on July 12-14, for 9-12 participants and 3 consultants.¹⁶⁰ The total amount KCP&L asks to be included as rate case expense for CCA is \$102,997.45.¹⁶¹

66. Evidence KCP&L has offered does not change the Commission's decision to disallow expenses for CCA in rate case expense. While witness preparation might be valuable for company employees, training for outside expert consultants and lawyers is an inappropriate expense to be borne by ratepayers. The fundamental reason a company hires outside consultants, experts, and specialist lawyers is the skill and training those individuals already possess to do their jobs. Moreover, the outside expert or lawyer retains the intellectual capital associated with

¹⁵⁶ November 22, 2010 Order, p. 92, citing *Sheila A. v. Whiteman*, 259 Kan. 549, 568-69, 913 P.2d 181 (1996).

¹⁵⁷ KCP&L Exh. 1, p. 5.

¹⁵⁸ KCP&L Exh. 1, p. 6.

¹⁵⁹ Tr. Vol. 17, pp. 3969-71 (Weisensee); Weisensee Direct, Schedule JPW2010-24.

¹⁶⁰ KCP&L Exh. 2, Weisensee Workpapers, CCA.pdf, pp. 1-10.

¹⁶¹ Weisensee Direct, Schedule JPW2010-10 and Schedule JPW2010-24.

such training and is unjustly enriched by receiving it at ratepayer expense. The Commission finds it inappropriate for KCP&L to ask its ratepayers to bear the expense of training outside, well-paid expert witnesses and experienced attorneys. While KCP&L management can decide to incur this expense, the Commission will not allow recovery for CCA seminars from ratepayers and reaffirms its decision denying recovery of the CCA fees and expenses in rate case expense.

67. The problem of recovery for CCA fees and expenses is exacerbated by billing time and expenses by outside counsel and witnesses who attended the CCA training sessions. In reviewing the evidence presented in this proceeding, the Commission realized that merely disallowing the bill for CCA services does not address the duplication of billings by those participating in CCA sessions. A review of attorney invoices quickly reveals that the CCA sessions were not limited to training lay witnesses. The June 2010 invoice for the Cafer Law shows Cafer devoted six days to preparing for and attending CCA training, a total of 54.25 hours in one week. Then, on June 29-30, 2010, Cafer billed an additional 16.25 hours to travel to and prepare for CCA training in Chicago and to “attend CCA training for Meyers and Roberts.”¹⁶² Expenses of \$1,739 for attending these two seminars were also listed in her invoice. Had Cafer been the only attorney preparing for and attending the CCA sessions, perhaps including that cost in rate case expense could have been justified. But invoices from Polsinelli Shughart¹⁶³ and Schiff Hardin¹⁶⁴ reflect that attorneys from those law firms also prepared for and attended these sessions.

68. CURB Witness Harden looked at the expense of CCA training. She accumulated hours billed by attorneys to prepare for and attend CCA sessions for four law firms: Cafer Law, Polsinelli Shughart, Schiff Hardin, and SNR Denton. She estimated the total charges for this training, including CCA and law firm charges, was over \$410,000. In Exhibit SMH-4, Harden

¹⁶² KCP&L Exh. 2, Weisensee Workpapers, Cafer FINAL.pdf, Cafer Statement July 1, 2001, Invoice No. 070110, pp. 2-3.

¹⁶³ KCP&L Exh. 2, Weisensee Workpapers, Polsinelli.pdf, Invoice No. 731115 for June 2010, pp. 2-5, 11-14.

¹⁶⁴ KCP&L Exh. 2, Weisensee Workpapers, Schiff-Services, June_1_2010_to_September_30_2010.pdf, Invoice No. 1509969, pp. 2-11, 26-33.

listed the nine witnesses trained in the CCA sessions: Downey, Heidtbrink, Davis, Bell, Archibald, Giles, Roberts, Blanc and Meyer.¹⁶⁵ Assuming these figures, we note the average cost to train each witness was \$45,000 per witness for each of the nine witnesses. The Commission concludes that this amount and work effort by consultants is not prudently incurred and it would be neither just nor reasonable to expect ratepayers to bear such costs.

69. The Commission has already deducted hours attributable to SNR Denton in calculating reasonable attorney hours. After deducting SNR Denton's hours from the total reached by Harden, attorneys at the other three firms billed 875 attorney hours to prepare for and attend CCA training. The Commission further notes that the hours billed include the most experienced attorneys in KCP&L's legal team -- Cafer, Caro, Roberts, and Okizaki. Presumably the hourly rate for these attorneys already takes into account their experience, prior training, and success in working with witnesses. Once again, neither the law firms nor KCP&L made any billing adjustment for the hours incurred preparing for and attending the CCA training sessions. While KCP&L management may decide specialized training for witnesses was appropriate to prepare its employees as well as hired consultants and attorneys for hearing, we find no evidence suggests this training was actually necessary or essential for KCPL to present its case here. The Commission concludes the decision to employ CCA to train witnesses, outside counsel and hired experts for this proceeding was unreasonable and imprudent. Having reviewed the evidence, and taking into account the experience and knowledge of the attorneys involved here, the Commission concludes that it is just and reasonable to reduce by 875 hours the total number of hours to calculate reasonable attorney hours. This results in a total of 8,325 reasonable attorney hours.

70. Billing Errors. During the hearing, it became apparent that parties were still identifying errors in invoices and billing statements submitted by law firms.¹⁶⁶ The Commission understands that, due to the hundreds of invoices submitted and reviewed in this proceeding,

¹⁶⁵ Harden Direct, p. 18, Exh. SMH-4. See Tr. Vol. 17, p. 4021 (Weisensee) (listing witnesses trained at CCA sessions).

¹⁶⁶ Tr. Vol. 15, pp. 3532-69, discussing CURB Exh. 17 through Exh. 28 (Weisensee).

errors will be found. But once again, no adjustments were made to the invoices to account for billing errors. The presumption presented to the Commission was that for more than 16,000 billable hours of six law firms, none of it had any errors. During the hearing, CURB identified numerous billing errors when questioning Weisensee. Identical billings for the same service by the same timekeeper were pointed out in Schiff Hardin billings.¹⁶⁷ Billings by Polsinelli Shughart showed time entries were miscoded to this proceeding that should have been billed to other KCP&L jurisdictional proceedings.¹⁶⁸ Cafer Law invoices illustrated the problem with using block billing for tasks involving different jurisdictional proceedings.¹⁶⁹ The Commission does not know, and cannot know, how many undiscovered billing errors remain in the invoices presented. What the Commission knows from its review of this record is that neither the law firms nor KCP&L made any billing adjustment to account for billing errors in attorney hours. And it is unreasonable to conclude that no billing errors were made by the 34 lawyers at six law firms billing a total of 12,395 hours. The Commission finds it just and reasonable to make a 5% adjustment to account for billing errors by deducting 416 hours resulting in a total number of 7,909 reasonable attorney hours to use in making a lodestar calculation.

71. Summary. Our effort to determine reasonable attorney hours among the three law firms is a difficult task that defies precision. Having reviewed the evidence presented on rate case expense as well as evidence from the earlier proceeding in this docket, this Commission exercises its discretion and concludes that, for purposes of making a lodestar calculation, 7,909 hours is an appropriate number to use for reasonable attorney hours for this proceeding.

2. Reasonable hourly rate for attorney work.

72. After determining a number to use for reasonable attorney hours, to complete the lodestar calculation, the Commission must determine a reasonable rate. To do this, the

¹⁶⁷ Tr. Vol. 15, pp. 3532-34 (Weisensee); CURB Exh. 18.

¹⁶⁸ Tr. Vol. 15, pp. 3537-50 (Weisensee); CURB Exh. 21 to 23.

¹⁶⁹ Tr. Vol. 15, pp. 3550-56 (Weisensee); CURB Exh. 24.

Commission considers what lawyers of comparable skill and experience practicing in the area in which the litigation occurred would charge for their time.¹⁷⁰

73. KCP&L has the responsibility to show that the rates it agreed to pay outside attorneys and seeks to include in rate case expense are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.¹⁷¹ The Commission touched upon this issue in its November 22, 2010 Order, noting the most experienced attorney representing KCP&L from this area was charging \$390 per hour but concluding the record was not adequate to adopt a “fee customarily charged in the locality for similar legal services.”¹⁷² KCP&L questioned this discussion in its Reply to Responses made to its first Petition for Reconsideration,¹⁷³ but the Commission did not grant reconsideration on this issue.¹⁷⁴ However, when the Commission later granted reconsideration on the issue of rate case expense, KCP&L was given the opportunity to submit whatever evidence it wanted on this issue.¹⁷⁵ KCP&L has presented evidence discussing the value of services provided by Cafer,¹⁷⁶ Roberts,¹⁷⁷ Caro,¹⁷⁸ and other individual attorneys,¹⁷⁹ but no evidence was presented about the prevailing market rates in this area. Therefore, the Commission must rely upon its own knowledge to establish an appropriate reasonable rate to make a lodestar calculation.

74. Evidence established that Cafer began work on this proceeding charging \$200 an hour, but soon changed her billing rate to \$300 an hour.¹⁸⁰ Many attorney timekeepers were involved at Polsinelli Shughart and at Schiff Hardin; we begin by reviewing the hourly rate for the four primary attorneys at each firm. Invoices from Polsinelli Shughart reflect that the

¹⁷⁰ *Case*, 157 F.3d at 1256.

¹⁷¹ *Sheldon*, 237 F. Supp. at 1278.

¹⁷² November 22, 2010, p. 94, citing *Westar Energy*, 235 P.3d at 531.

¹⁷³ Reply of KCP&L to Staff's, CURB's, and MUUG's Responses to KCP&L's Petition for Reconsideration and Clarification, filed December 22, 2011, ¶¶ 79-80.

¹⁷⁴ January 6, 2011 Order, ¶ 74.

¹⁷⁵ February 21, 2011 Order, ¶¶ 15, 21-23, 26-27.

¹⁷⁶ Tr. Vol. 16, pp. 3759-60 (Rush).

¹⁷⁷ Tr. Vol. 16, pp. 3686-88 (Downey); Tr. Vol. 16, pp. 3796-97 (Rush).

¹⁷⁸ Tr. Vol. 16, p. 3797 (Rush).

¹⁷⁹ Tr. Vol. 16, p. 3797 (Rush).

¹⁸⁰ KCP&L Exh. 1, pp. 2-3.

attorneys' hourly rates increased during the course of the proceeding: Caro's per hour rate increased in increments from \$375 to \$390 to \$400; Callenbach increased from \$260 to \$280 to \$300; Kane increased from \$200 to \$215 to \$235; and Hagedorn increased from \$185 to \$200.¹⁸¹ Schiff Hardin invoices reflect hourly rates for attorneys that are higher than initial rates listed in the Contract for Legal Services, although the rate charged per attorney during this proceeding did not increase. Roberts' initial rate was \$495 per hour, but his rate in this proceeding was \$555 per hour; Okizaki's initial rate was \$350 per hour, but the billed rate was \$450 per hour; Gould's initial rate was \$245 per hour, but the billed rate was \$295 per hour; and an initial rate was not listed for Schermer, who billed at \$330 per hour.¹⁸² Clearly attorney hourly rates in this proceeding vary widely, from \$185 to \$555.¹⁸³

75. The Commission had considered the distribution of hours worked by attorneys reporting hours as timekeepers. Considering the unadjusted billable hours the various attorneys billed to KCP&L, 9.3% fell in the \$500-600 range; 9.3% in the \$400-500 per hour range; 14.8% in the \$350-400 range; 7.3% in the \$300-350 range; 37.0% in the \$250-300 range; 12.4% in the \$200-250 range; and 9.0% under \$200 per hour. Thus, almost 60% of the billed hours fell in the range of \$300 per hour and under. Moreover, of the three law firms being considered for the lodestar calculation, all of the time charged at a rate of over \$400 an hour were for attorneys at Schiff Hardin, for which KCP&L is already recovering more than \$20 million in capital costs for consulting work.

76. The most experienced attorneys from this area for which this Commission has responsibility, and who appear regularly before us, charged rates in the range of \$250 to \$400 per hour with the vast majority of those hours billed at \$300 per hour and less. If the hourly rate of

¹⁸¹ Schedule JPW2010-15, pp. 2-5.

¹⁸² KCP&L Exh. 1, p. 145; Schedule JPW2010-15, pp. 2-5.

¹⁸³ Because the Commission will not allow recovery for services by attorneys at Morgan Lewis and Duane Morris, we will not consider their hourly rates in determining a reasonable attorney hourly rate. The Commission notes that hourly rates for attorneys at Morgan Lewis were \$540, \$600, \$750, and \$855 per hour. Schedule JPW2010-13, pp. 2-5. The hourly rates for attorneys at Duane Morris were \$210, \$215, \$430, \$480, and \$575 per hour. Schedule JPW2010-12, pp. 2-6.

\$300 is used, multiplying the reasonable number of attorney hours of 7,909 by \$300 results in a lodestar calculation of \$2,372,700. If the hourly rate of \$285 is used, multiplying the 7,909 reasonable attorney hours by \$285 results in a lodestar calculation of \$2,254,065. If the hourly rate of \$275 is used, multiplying the 7,909 reasonable attorney hours by \$275 results in a lodestar calculation of \$2,174,975. Having reviewed the record as a whole, the Commission finds these lodestar calculations using an hourly rate of \$275 to \$300 provides a range of appropriate attorney fees to consider in determining just and reasonable rate case expense for this proceeding. KCP&L is already recovering a sizeable amount for Schiff Hardin's work as a consultant, which supports our decision to give less weight to Schiff Hardin's hourly billing rates in determining a reasonable attorney hourly rate for the lodestar calculation for this proceeding. In considering and weighing various factors to reach a decision on rate case expense, the Commission has given significant weight to the lodestar calculation to determine a just and reasonable amount to include in rate case expense for attorney fees that is appropriate to recover from KCP&L's employees. The Commission now turns its analysis to rate case expense for non-attorney consultants.

V. Determining Rate Case Expense for Non-attorney Consultants

77. Billings by consultants present issues similar to the law firm billings. Invoices were inconsistent in their detail and it was impossible to determine the degree to which work effort was properly undertaken, duplication of work effort occurred, and any effort was made to review and manage billings by consultants. In total, eight outside consulting firms (excluding consultants hired by outside law firms and included in billings of those firms) with a total of 46 individual timekeepers billed more than 9,700 hours to this proceeding for a total of \$1,806,785.¹⁸⁴ At a high level, the Commission used a lodestar analysis that adjusted an appropriate amount of attorney charges from the requested \$5,141,986 to \$2,372,700 (using \$300/hour), \$2,254,065 (using \$285/hour) and \$2,174,975 (using \$275/hour), or a reduction of approximately 58%, 56.2%, and 53.8%. Thus, using these percentages, the range of allowed

¹⁸⁴ Attachment A, pp. 3-4.

expenses for legal and consulting services would range from \$2.92 million at \$275 per hour to \$3.21 million at \$300 per hour.

A. Billings by Consultants Generally

78. In its November 22, 2010 Order, the Commission found billings by several outside consultants were appropriate to include in rate case expense.¹⁸⁵ During this proceeding, questions have been raised regarding fees for some of these outside consultants. We address those concerns in discussing individual consultants. As with all rate case expense, we evaluate consultants' expenses to determine whether the expense was prudently incurred and is a just and reasonable amount that is appropriate to recover from KCP&L's ratepayers.

79. Black & Veatch: Black & Veatch Corporation addressed issues related to jurisdictional allocations in terms of client and operations expenses and with an emphasis on an off-system, sales-margin allocator to examine the proper way to allocate between Missouri and Kansas.¹⁸⁶ KCP&L Witness Loos, Director of Black & Veatch's Enterprise Management Solutions Division, submitted prefiled direct and rebuttal testimony and testified as a witness at the 2010 Evidentiary Hearing.¹⁸⁷ The bills from Black & Veatch show four timekeepers reported 398 hours and a total expense of \$67,865.¹⁸⁸ During the hearing, Weisensee testified that Black & Veatch had been working with KCP&L before this docket and the Company believed it efficient and effective to continue using that firm rather than going through a Request for Proposal (RFP) process.¹⁸⁹ CURB expressed concern that Black & Veatch billings did not include detailed descriptions of hourly work. But we note the Consulting Services Agreement defined the work to be performed in detail.¹⁹⁰ Although the Commission did not accept the allocator proposed by

¹⁸⁵ November 22, 2010 Order, p. 91.

¹⁸⁶ Tr. Vol. 17, pp. 3961-62 (Weisensee).

¹⁸⁷ Rush Direct, pp. 39-45. See November 22, 2010 Order, pp. 125-28.

¹⁸⁸ Weisensee Direct, p. Schedules JPW2010-10 and JPW2010-17. Tr. Vol. 15, p. 3379. The total expense billed was \$67,864.72, which we round up to \$67,865. JPW2010-17.

¹⁸⁹ Tr. Vol. 17, pp. 4045-46 (Weisensee).

¹⁹⁰ Tr. Vol. 15, pp. 3509-10 (Weisensee); CURB Exh. 9; KCP&L Exh. 1, pp. 1-2.

Loos, we conclude the decision to retain Black & Veatch was prudent and the amount asked to be included in rate case expense is just and reasonable.

80. FINANCO, Inc.: KCP&L retained Financial Analysts Consultants, Inc. (FINANCO), to address return on equity (ROE) as well as KCP&L's requested capital structure and overall rate of return. The principal contact was Dr. Samuel C. Hadaway, who submitted prefiled direct and rebuttal testimony and testified at the hearing.¹⁹¹ In its November 22, 2010 Order, the Commission considered Hadaway's proposal in discussing capital issues, although it did not adopt his testimony.¹⁹² The Executed Engagement Letter between Great Plains Energy and FINANCO was dated October 19, 2005, but the billing rates for timekeepers were updated in an undated sheet attached to the initial Letter.¹⁹³ Two timekeepers billed a total of \$79,875, which KCP&L seeks to recover in rate case expense.¹⁹⁴ Bill Baldry questioned hours spent on rebuttal testimony and identified errors in billings submitted by FINANCO.¹⁹⁵ In response, Weisensee testified that these were coding errors and that these expenses were properly billed to and included in this proceeding.¹⁹⁶ We conclude the decision to retain FINANCO was prudent and the amount sought to be included in rate case expense is just and reasonable.

81. Gannett Fleming, Inc.: KCP&L retained Gannett Fleming, Inc. to develop and sponsor the depreciation study that was filed with its Application. The primary contact was John G. Spanos, Vice President of the Valuation and Rate Division. Spanos conducts depreciation, valuation and original cost studies, determines service life and salvage estimates, conducts field reviews, and presents recommended depreciation rates to clients and before regulatory agencies.¹⁹⁷ In addressing depreciation issues in its November 22, 2010 Order, the Commission reviewed Spanos' depreciation study and discussed his proposals in detail. We adopted Spanos'

¹⁹¹ Rush Direct, pp. 28-33.

¹⁹² November 22, 2010 Order, pp. 37-44.

¹⁹³ KCP&L Exh. 1, pp. 11-16.

¹⁹⁴ Weisensee Direct, Schedules JPW2010-10 and JPW2010-18. The total expense billed was \$79,874.18, which we round up to \$79,875. Weisensee Direct, Schedule JPW2010-18.

¹⁹⁵ Baldry Direct, pp. 6-7, 10-11.

¹⁹⁶ Weisensee Rebuttal, p. 3; Tr. Vol. 17, p. 3968 (Weisensee).

¹⁹⁷ Rush Direct, pp. 45-49.

depreciation study except to the extent we approved proposals by Staff Witness Dunkel modifying components of the Spanos study.¹⁹⁸ A Statement of Work set out the agreement between Great Plains Energy Services, Inc. and Gannett Fleming, Inc. regarding the depreciation studies.¹⁹⁹ KCP&L seeks to recover the cost of the depreciated study allocated to this rate case, which totals \$44,347.²⁰⁰ The Commission concludes the decision to retain Gannett Fleming was prudent and the amount requested to be included in rate case expense is just and reasonable.

82. Management Applications Consulting, Inc. (MAC): This vendor was retained to develop the account class cost of service (CCOS) that KCP&L was required to file under the 04-1025 S&A to provide the rate of return results at existing revenue levels for the Kansas jurisdictional customer CCOS study for KCP&L's electric business.²⁰¹ KCP&L asked to include the entire amount billed by Management Applications Consulting (MAC) of \$111,242 in rate case expense.²⁰² During the hearing, CURB questioned Weisensee about the lack of description for tasks performed in invoices submitted by this vendor. Weisensee explained this vendor only performed the class cost of service study and all work recorded by timekeepers with MAC addressed this issue.²⁰³ Normand's CCOS study was submitted with the Company's Application, and Normand testified during the 2010 Evidentiary Hearing. Rush pointed out that the Commission ultimately adopted Normand's CCOS study and used it as a basis for determining rate design for KCP&L.²⁰⁴

83. The Commission shares CURB's concern that Normand and other timekeepers with MAC did not provide detailed descriptions of the work performed. The Master Agreement for Professional Services between Great Plains Energy Service, Inc. and MAC describes in detail the professional services that will be provided and attaches updates to the original Agreement

¹⁹⁸ November 22, 2010 Order, pp. 60-75.

¹⁹⁹ KCP&L Exh. 1, pp. 17-24.

²⁰⁰ Weisensee Direct, Schedules JPW2010-10 and JPW2010-19.

²⁰¹ Rush Direct, pp. 33-39.

²⁰² Weisensee Direct, Schedules JPW2010-10 and JPW2010-20.

²⁰³ Tr. Vol. 15, pp. 3501-0, Vol. 17, p. 4032; CURB Exh. 9.

²⁰⁴ Rush Direct, p. 35.

executed in April of 2008.²⁰⁵ Work Order No. 3 specifically addresses the CCOS study to be prepared for this rate case, sets out objectives to be completed by MAC, lists the consultants and their assigned tasks, and provides a Milestones and Delivery schedule to be performed.²⁰⁶ Attachment A to Work Order No. 3 contains a list of billing rates by classification of the timekeepers.²⁰⁷ The Commission concludes that the decision to retain MAC to perform the CCOS study was prudent. Even though the Master Agreement was very detailed, the Commission finds lack of detail in invoices problematic in reviewing these expenses submitted for recovery as rate case expense. The Commission concludes invoices submitted by MAC do not adequately describe the work performed by the timekeepers and finds it just and reasonable to reduce the expenses submitted for MAC of \$111,242 by 10%, or \$11,124. The reduced amount of \$100,118 is just and reasonable to include as rate case expense.

84. Siemens Energy, Inc.: A line loss study is used to quantify the losses that result from operating the electric system and to associate those losses to the customer classes responsible for those losses. Siemens Energy performed a comprehensive Electric Loss Study for the KCP&L system in 2006 and updated that Study considering operation of the new 850 MW Iatan 2 generating unit.²⁰⁸ This was the only line loss study conducted for this rate case and was used by other parties to normalize revenues. The expenses for this study were split between four jurisdictions, resulting in an expense for this case of \$20,027.²⁰⁹ The Commission concludes the decision to retain Siemens Energy was prudent and the amount asked be included in rate case expense is just and reasonable.

85. Towers Watson: KCP&L retained Towers Watson to rebut direct testimony by Staff Witness Hull regarding pension-related matters, including a recommendation to disallow the

²⁰⁵ KCP&L Exh. 1, pp. 32-58.

²⁰⁶ KCP&L Exh. 1, pp. 51-57.

²⁰⁷ KCP&L Exh. 1, p. 58.

²⁰⁸ Rush Direct, pp. 117-18.

²⁰⁹ Weisensee Direct, Schedules JPW2010-10 and JPW2010-23. Invoices for Siemens Energy totaled \$80,105.00, of which 25% was assigned to this docket. That amount, \$20,026.25, was rounded up to \$20,027. Schedule JPW2010-23.

pension cost adjustment proposed by KCP&L relating to St. Joseph Light & Power Company. KCP&L worked primarily with C. Kenneth Vogl, a consulting actuary with substantial technical and consulting experience on employee benefit plans.²¹⁰ Vogl submitted prefiled rebuttal testimony and testified during the 2010 Evidentiary Hearing. The Commission examined Vogl's criticism of Staff's recommendations but did not adopt Vogl's position.²¹¹ KCP&L seeks to recover in rate case expense the entire amount billed for Tower Watson of \$19,964.²¹² The Commission concludes the decision to retain Towers Watson was prudent and the expense requested be included in rate case expense is just and reasonable.

B. Consultants Hired to Address Prudence

86. Numerous KCP&L witnesses submitting testimony related to prudence regarding the Iatan Project covered all aspects of prudence, including balance of plant and cost controls.²¹³ As discussed above in addressing duplication of work by attorneys,²¹⁴ KCP&L management claimed it needed to "ramp up" its efforts to address prudence after Drabinski filed testimony regarding prudence with respect to the Iatan 2 unit that, according to KCP&L, used a different approach than in the 09-246 Docket with respect to the Iatan 1 Unit. Rush testified that over 70%, or approximately \$5.5 million, of the \$7.7 million KCP&L-only rate case expense was incurred to address the prudence issue.²¹⁵ Rush justified this amount as needed to analyze whether management of the Iatan project was prudent under K.S.A. 66-128g, including briefing of Kansas precedent and decisions on prudence nationally.²¹⁶ Rush also cited Drabinski's testimony to support retention of numerous experts. Downey described this as a "bet the company" case with a \$2 billion price tag, which suggests to us why KCP&L placed no restraint

²¹⁰ Rush Direct, pp. 89-93; Tr. Vol. 16, p. 3824.

²¹¹ November 22, 2010 Order, pp. 55-58.

²¹² Weisensee Direct, Schedules JPW2010-10 and JPW2010-25. The amount billed totaled \$19,963.53, which we have rounded up to \$19,964. Schedule JPW2010-25.

²¹³ Rush Direct, p. 10; Tr. Vol. 16, p. 3752 (Rush).

²¹⁴ *Infra*, ¶ 63.

²¹⁵ Rush Direct, pp. 11-12.

²¹⁶ Rush Direct, pp. 5-6, 9-11.

on the effort to address prudence.²¹⁷ While management may decide to “bet the company” in response to what it perceives to be a significant threat to the goodwill and reputation of the company, the Commission will not allow recovery of this bet in rate case expense unless the utility meets its burden to show such expenses were prudently incurred, are just and reasonable, and are appropriate to recover from ratepayers. The consultants discussed next were engaged to address prudence.

1. Pegasus Global Holdings, Inc.

87. Pegasus Global Holdings, Inc. (Pegasus), and specifically Dr. Kris R. Nielsen, was initially hired by KCP&L to audit the Iatan Project independent from KCP&L’s fact witnesses. Nielsen submitted testimony in the 09-246 Docket that was adopted into the record in this docket because prudence issues regarding Iatan Unit 1 were deferred from the 09-246 Docket to this rate case.²¹⁸ KCP&L asserted Pegasus was further retained to perform an independent audit for this rate case to examine whether KCP&L made reasonable and prudent decisions with regard to Iatan Unit 2. Nielsen also read, analyzed, and compared findings of Drabinski with findings by Pegasus regarding prudence issues. Nielsen submitted direct and rebuttal testimony and testified at the 2010 Evidentiary Hearing.²¹⁹

88. The expenses for Pegasus that KCP&L seeks to recover in rate case expense total \$1,070,480; with the exception of Schiff Hardin, this is the largest amount KCP&L requests for an expert consultant.²²⁰ The Consulting Agreement was executed between Duane Morris and Pegasus on August 19, 2008, “to provide professional consulting services to Duane Morris to assist Duane Morris in giving legal advice to KCP&L with respect to the rate proceedings under the terms and conditions hereinafter set forth.”²²¹ Duane Morris paid Pegasus for its services.²²²

²¹⁷ Tr. Vol. 16, pp. 3667, 3700. See KCP&L Posthearing Brief, p. 10, n. 31.

²¹⁸ Rush Direct, pp. 82-89.

²¹⁹ November 22, 2010 Order, pp. 11-33.

²²⁰ Weisensee Direct, Schedules JPW2010-10 and JPW2010-22. The total amount requested is \$1,070,479.35, which is rounded up to \$1,070,480. Schedule JPW2010-22.

²²¹ KCP&L Exh. 1, p. 128.

Rates for professional services were listed in an attached Hourly Fee Schedule dated February 1, 2008, which matched the rates charged in this proceeding.²²³

89. The Commission notes Pegasus spent almost 1,300 hours and incurred expenses of over \$360,000 before KCP&L's Application was filed in December 2009; an additional 375 hours and more than \$105,000 was billed during the period of discovery before Drabinski's testimony was filed. During the two months after filing Drabinski's testimony, June and July 2010, Pegasus billed over 1,400 hours and more than \$361,000 – whether in aid of the analysis of Drabinski's testimony or in preparation of rebuttal cannot be determined from the record. For the month of the 2010 Evidentiary Hearing, August 2010, Pegasus billed 622 hours and over \$180,000.²²⁴ The Commission concludes hiring Pegasus to conduct an independent study was prudent, but the work performed and billed after completing this independent study far exceeded the amount of work that a consultant of Neilson's purported stature and experience would be expected to incur to review Drabinski's testimony, analyze Drabinski's analysis, and compare the results of these two studies. Still, had Pegasus been the only prudence consultant hired to do this analysis, these expenses might be considered reasonable. But KCP&L management did not rely only upon the expertise of Pegasus to respond to Drabinski.

2. Daniel Meyer of Meyer Construction Consulting, Inc.

90. Schiff Hardin was engaged by KCP&L to provide both consulting and legal advice to KCP&L regarding the Iatan Project. As part of its role in monitoring the Resource Plan's progress and costs, Schiff Hardin retained Daniel Meyer of Meyer Construction Consulting, Inc. According to Rush, Meyer's direct testimony analyzed the Control Budget Estimate, cost re-forecasts, external reporting mechanisms, and the Balance of Plant contracting methodology; in rebuttal testimony, Meyer focused on some issues discussed by Drabinski, such as Iatan Unit 2

²²² KCP&L Exh. 1, p. 129. We note Charles W. Whitney was designated as Duane Morris' authorized representative and was not replaced even though Whitney was not with that firm after July 2009.

²²³ KCP&L Exh. 1, pp. 128 and 136; Weisensee Direct, Schedule JPW2010-22.

²²⁴ Summary of Hourly Fees, Attachment A, p. 3.

Project costs, the Project Definition Report and cost re-forecasts, and specific contracts, purchase orders, change orders, and other cost drivers.²²⁵ Schiff Hardin, not KCP&L, retained Meyer as stated in the Contract for Legal Services Agreement and Attachment A entered into between KCP&L and Schiff Hardin.²²⁶ Meyer's hourly rate was listed as \$395 an hour, but Meyer billed \$450 an hour.²²⁷ KCP&L seeks to recover \$488,328 in rate case expense for Meyer.²²⁸

91. Meyer's expenses were not billed to KCP&L but are contained in a list of "CLIENT DISBURSEMENTS/CHARGES" in Schiff Hardin invoices. For example, Schiff Hardin Invoice #1524871, dated October 19, 2010, lists three items as "Professional Services – Vendor: MEYER" under the date 9/24/10; together these items total \$472,016.²²⁹ These three billings from Meyer are attached to this Schiff Hardin invoice, giving the date work was performed, the number of hours worked each day; descriptions of work performed are very limited. In the billing for June 2010, Meyer billed as follows: approximately 56 hours for "work on various Kansas Unit 2 rate case cost issues & response to Vantage [i.e. Drabinski] report"; 13.35 hours on June 30, 2010, to "attend CCA meeting @ SH office"; 12.25 hours for "Work on Kansas Unit 2 rate case issues; meet @ SH office on same"; no description is given for work performed by associates, for which Meyer bills \$77,025.²³⁰ Similarly, Meyer's billing for July 2010 included 39.5 hours to attend two CCA sessions, one on July 1, and the other on July 13 and 14; the description for the remaining 195.5 hours billed in July 2010 is "Work on various Kansas Unit 2 rate case cost issues & response to Vantage Report"; no description is given at all for associate billing that totals over \$76,000.²³¹ During August 2010, Meyer billed 231 hours to prepare for

²²⁵ Rush Direct, pp. 57-65.

²²⁶ KCP&L Exh. 1, pp. 145, 148.

²²⁷ KCP&L Exh. 1, p. 145; Weisensee Direct, Schedule 2010JPW-15, p. 20. Tr. Vol. 15, p. 3485 (Meyer hourly rate is \$450).

²²⁸ Weisensee Direct, Schedule JPW2010-15, pp. 1, 20.

²²⁹ KCP&L Exh. 2 (CD Rom), Schiff-Services_June_1_2010_to_September_30_2010.pdf, pp. 1, 12, 19-24. See CURB Exh. 3, (Meyer billings for June, July, August and September 2010).

²³⁰ KCP&L Exh. 2 (CD Rom), Schiff-Services_June_1_2010_to_September_30_2010.pdf, pp. 24. See CURB Exh. 3, p. 6 (Meyer billing for June 2010). Tr. Vol. 15, pp. 3488-89 (Weisensee).

²³¹ KCP&L Exh. 2 (CD Rom), Schiff-Services_June_1_2010_to_September_30_2010.pdf, p. 22. See CURB Exh. 3, p. 4 (Meyer billing for July 2010). Tr. Vol. 15, pp. 3487-88 (Weisensee).

and attend the 2010 Evidentiary Hearing, which totaled \$103,950; the billing for associates this month was 407.50 hours and totaled over \$67,000, with no itemized description of work.²³² CURB Witness Smith reviewed Meyer's billing and recognized he submitted testimony and testified at the hearing, but Smith found Meyer's billing suggested not much cost containment was occurring.²³³

92. The Commission questions whether KCP&L acted prudently in approving Schiff Hardin's hiring to Meyer Construction to work on the issue of prudence. Allowing Schiff Hardin to hire an important consultant on prudence obscured our ability to review the work performed to determine if the Company was prudent in contracting for this consultant's services and to decide whether this expense is just and reasonable and is appropriate to recover from ratepayers. In light of all the other rate case expense requested for consultants regarding prudence, and having taking into account the entire record in this proceeding, the Commission finds the evidence regarding expenses for Meyer do not support a finding that retaining this consultant was prudent or that these expenses are just and reasonable.

3. J. Wilson & Associates

93. Schiff Hardin also contracted with J. Wilson & Associates, specifically with Jim Wilson, who worked for five years on project controls for the infrastructure projects at the Iatan site. Jim Wilson collected information about the Iatan Project and provided it to Meyer, who relied upon this information in performing his analysis.²³⁴ Schiff Hardin's Contract for Legal Services with KCP&L listed J. Wilson & Associates as a third-party consultant, with Jim Wilson listed at \$250 per hour and another timekeeper at \$160 per hour; Wilson's billings charged \$300 per hour.²³⁵ KCP&L seeks to recover in rate case expense the amount Schiff Hardin billings show for the amount billed by Wilson of \$119,375.²³⁶

²³² CURB Exh. 3, p. 2; Tr. Vol. 16, pp. 3281-85 (Weisensee).

²³³ Tr. Vol. 16, p. 3605 (Smith).

²³⁴ Rush Direct, p. 59; Tr. Vol. 15, p. 3792 (Rush).

²³⁵ KCP&L Exh. 1, p. 145; Tr. Vol. 16, p. 3639.

²³⁶ Weisensee Direct, Schedule JPW2010-15, pp. 1, 14.

94. The evidence does not establish why Schiff Hardin, with all its resources as a consulting firm, needed to retain services of J. Wilson to assist Meyer. The amount KCP&L seeks to recover in rate case expense for Meyer and Wilson exceeds \$600,000. We note that during the months of June through August 2010, Meyer incurred over \$400,000 and Wilson over \$100,000. During these same three months, Pegasus incurred over \$541,000. Yet no adjustment was made for the work of these consultants assigned to prudence. We do not include expenses for Wilson in rate case expense.

4. Steven Jones Retained by Schiff Hardin

95. Schiff Hardin invoices also include expenses for subcontractor Steven Jones, who testified about processes and procedures for procurement of equipment and the use of Kiewit for the Balance of Plant work. Rush stated that Jones “is uniquely qualified to testify as to these issues, as from March 16, 2006 through April 2009, he was the Director of Procurement for KCP&L.”²³⁷ Apparently Jones handled all procurement activities for KCP&L’s Resource Plan as well as for the commercial management and administration of the Iatan project contracts and the material management and distribution for the Iatan project. At some point, Jones became a subcontractor through Schiff Hardin rather than a contractor with KCP&L. Here, KCP&L seeks to recover through rate case expense a total of \$188,795 for Jones, as listed in Client Disbursements and Charges in Schiff Hardin invoices.²³⁸ The Commission’s obvious concern, not addressed in the evidence, is why Jones was retained by Schiff Hardin as a consultant rather than continuing his relationship directly with KPC&L. CURB Witness Smith expressed concern that Jones’ fees were not contained.²³⁹ The record does not state Jones’ hourly rate when he worked as a contractor directly with KPC&L or explain why he became a consultant for Schiff Hardin. We find KCP&L has not provided sufficient evidence to find it just and reasonable to include expenses for Wilson in rate case expense.

²³⁷ Rush Direct, pp. 65-67; Tr. Vol. 15, p. 3794 (Rush); Tr. Vol. 17, p. 4012 (Weisensee).

²³⁸ Weisensee Direct, Schedule JPW2010-15, pp. 1, 17; Summary of Hours, Attachment A, p. 3;

²³⁹ Tr. Vol. 16, p. 3606 (Smith).

5. Schiff Hardin as consultants on prudence.

96. The Schiff Hardin law and consulting firm has presented troubling issues in determining an appropriate rate case expense in this docket.²⁴⁰ Schiff Hardin was a key consultant in managing construction of Iatan 2,²⁴¹ but KCP&L also claims the firm provided legal services totaling \$2,852,109.83 that should be included in rate case expense.²⁴² This amount is in addition to approximately \$20 million Schiff Hardin was paid for consulting on Iatan 2 that KCP&L is already recovering through capitalized costs for the Iatan project that are included in the revenue requirement to be recovered from ratepayers over the life of the Iatan project, with carrying costs.²⁴³

97. The Commission notes that in its dual role as attorney and consultant, Schiff Hardin asserted attorney/client privilege for quarterly reports to KCP&L management about construction of Iatan 2. Those Reports were not only treated as Confidential during the 2010 Evidentiary Hearing, but also were claimed protected by the attorney/client privilege, which prevented other parties and the Commission from reading them.²⁴⁴ The Commission cannot assess the reasonableness of the work done by Schiff Hardin if its consulting work is shielded from the Commission's review through KCP&L's assertion of a confidential attorney-client communication.²⁴⁵ Although none of the parties objected to KCP&L's assertion of the attorney-client privilege during the 2010 Evidentiary Hearing, given KCP&L's lax or non-existent management of its legal expenses, the Commission questions whether Schiff Hardin's work was properly protected as confidential attorney-client privileged communications. The line between legal and consulting work is not clear in this proceeding.

²⁴⁰ November 22, 2010 Order, p. 94.

²⁴¹ Tr. Vol. 4, pp. 934-37 (Downey).

²⁴² Weisensee Direct, Schedule JPW2010-15.

²⁴³ Tr. Vol. 16, p. 3744 (Rush) (KCP&L paid Schiff Hardin in excess of \$20 million as an expert non-legal consultant on the Resource Plan); Crane Direct, p. 15.

²⁴⁴ Tr. Vol. 5, pp. 952-59 (Downey); Exhibits 60-63 (Confidential Status Reports by Schiff Hardin).

²⁴⁵ Tr. Vol. 16, p. 3795 (Wright) ("We have no way sitting [] here to know what exactly is done by Schiff Hardin the lawyers as opposed to Schiff Hardin the consultants.").

98. Downey testified the work by Kenneth Roberts and his team was important in assisting him with building the project, challenging KCP&L's internal management team to recognize the importance of reporting requirements relating to the Iatan 2 Project, and ultimately communicating all elements of the effort to construct the Iatan 2 Project to both the Missouri and Kansas commissions.²⁴⁶ But Downey stated KCP&L leadership managed the project, not Schiff Hardin, noting the Executive Oversight Committee reviewed Schiff Hardin's reports monthly.²⁴⁷ Downey described Schiff Hardin as "an aid to us in managing a very huge, complex project that involves many skills that we don't normally wrestle with during the normal course of . . . the ongoing electric utility business."²⁴⁸ Yet Downey could not identify any evidence to show anyone in KCP&L management questioned or scrutinized Schiff Hardin invoices even though these invoices reflect continuous duplication of effort by Roberts and the rest of his legal team.²⁴⁹

99. We note the Contract for Legal Services, dated January 17, 2007, listed five law firm timekeepers with individual hourly rates and four additional consultant timekeepers with individual hourly rates.²⁵⁰ But Schiff Hardin billings include invoices for 13 law-firm timekeepers and additional consultants. The record contains no evidence that KCP&L ever approved Schiff Hardin's use of an additional law firm timekeepers or consultants even though the Contract for Legal Services states, "All fees and costs are subject to annual adjustments, which must be supplied to and approved by KCP&L's General Counsel at least 30 days prior to the effective date of any such adjustments."²⁵¹ Rush asserted that "every attorney that we utilized is somewhere below the mean paid for attorney fees throughout the regions that they are representing,"²⁵² although nothing in the evidence confirms his opinion.

²⁴⁶ Tr. Vol. 16, pp. 3687-88.

²⁴⁷ Tr. Vol. 16, p. 3678 (Downey).

²⁴⁸ Tr. Vol. 16, p. 3677 (Downey).

²⁴⁹ Tr. Vol. 15, pp. 3527 (Weisensee) and CURB Exh. 16 and 17 (Schiff Hardin vouchers drafting and redrafting testimony of witnesses).

²⁵⁰ KCP&L Exh. 1, pp. 143, 145.

²⁵¹ KCP&L Exh. 1, pp 145-46.

²⁵² Tr. Vol. 16, p. 3739 (Rush).

100. The evidence does not show review or approval for Schiff Hardin to use additional unlisted timekeepers, and does not show KCP&L's General Counsel approved any adjustment in hourly rates or costs for Schiff Hardin even though the contract clearly required him to approve "annual adjustments" at least 30 days before the effective date of any adjustment.²⁵³ The Commission concludes that the Company was inattentive in reviewing Schiff Hardin billings and that KCP&L has not met its burden to establish detail needed to find the total amount requested for Schiff Hardin in rate case expense is just and reasonable.

101. The Commission finds Roberts and his team have already been well paid for work consulting on Iatan, and KCP&L has already been allowed to recover more than \$20 million as costs for Schiff Hardin in rates. Also, the Commission has allowed hours to be included for work by additional Schiff Hardin attorneys, who were brought into this proceeding without approval by KCP&L's general counsel. The Commission concludes our decision on rate case expense, which relies significantly on the lodestar calculation, includes appropriate compensation to KCP&L for the legal work in this rate case proceeding, including that provided by Schiff Hardin and other prudence consultants.

C. NextSource and Use of Retired KCP&L Employees

102. KCP&L asked that \$415,981 be included in rate case expense for NextSource, Inc., which is a consultant and temporary employee resource provided by this staff services company for a variety of business operations functions.²⁵⁴ This included services of two former KCP&L employees, Chris Giles (billings total \$272,625) and Chris Davidson (billings total \$93,630), and one current KCP&L employee, Forest Archibald (billings total \$11,900).²⁵⁵

103. Giles was formerly KCP&L's Vice President, Regulatory Affairs, but retired in 2009. Rush stated that Giles was instrumental in developing and implementing the Regulatory Plan and that Giles retired from KCP&L "to specifically enter the regulated utility consulting

²⁵³ KCP&L Exh. 1, pp. 145-46.

²⁵⁴ Weisensee Direct, Schedule JPW2010-10; Tr. Vol. 15, 3413-22 (Weisensee).

²⁵⁵ Weisensee Direct, Schedules JPW2010-10 and JPW2010-21, pp. 1, 5-8, 13-14.

field.”²⁵⁶ The Commission notes the remarkable timing of Giles’ retirement that afforded him an opportunity to consult on this proceeding. Davidson also retired from KCP&L and continued working on the same issues regarding the Resource Plan. She was supervised by Weisensee, who was the responsible party directing and reviewing Davidson and even encouraged NextSource to provide a raise for her work on the Resource Plan.²⁵⁷

104. The Commission is troubled by KCP&L’s hiring of retired employees rather than hiring and training replacement employees but recognizes the ongoing nature of the Resource Plan shows why former employees might be useful as witnesses in specific instances. Overall, the Commission finds KCP&L failed to presented evidence sufficient to show why such extensive use of NextSource was necessary and essential to presenting its case in this proceeding. We have taken this into account in setting the rate case expense in this proceeding.

D. Other Vendors Providing Services

105. Weisensee noted that, in preparing for and managing a case of this complexity, KCP&L needed to use outside vendors to provide ancillary services. KCP&L used the advertising agency Kuhn & Wittenborn, Inc. to purchase the schedule of newspaper advertisements the Commission required be used to notify KCP&L’s Kansas customers about the public hearings scheduled for this proceeding. KCP&L asks the Commission to include as rate case expense \$33,366 for services provided by Kuhn & Wittenborn.²⁵⁸

106. Other ancillary vendors included (1) XACT Data Discovery that provided printing service for the Application, minimum filing requirements and filed testimony, for which KCP&L sees to recover \$57,724 in rate case expense²⁵⁹; (2) XPEDX that provided supplies for document services for filings, for which KCP&L seeks to recover \$7,778 in rate case expense²⁶⁰; and(3) lodging expenses for KCP&L representatives to stay at the Hampton Inn in Topeka, Kansas,

²⁵⁶ Rush Direct, pp. 50-57; Tr. Vol. 16, p. 3752 (Rush).

²⁵⁷ Tr. Vol. 15, pp. 3421-27 (Weisensee).

²⁵⁸ Weisensee Direct, p. 122 and Schedules JPW2010-10 and JPW2010-27.

²⁵⁹ Weisensee Direct, p. 122 and Schedules JPW2010-10 and JPW 2010-28.

²⁶⁰ Weisensee Direct, p. 122 and Schedules JPW2010-10 and JPW 2010-29.

during the 2010 Evidentiary Hearing, for which KPC&L seeks to include \$36,058 in rate case expense.²⁶¹

107. In the November 22, 2010 Order, the Commission listed Kuhn & Wittenborn and Excellence (Copying) with other outside vendors that provided helpful information for this proceeding and for which costs were found to be prudent and just and reasonable without duplicating work of others. Regarding housing of attorneys, consultants, and KCP&L employees in the November 22, 2010 Order, the Commission found this expense was high considering the Company's proximity to the Commission's office and concluded shareholders should have some responsibility for paying housing costs.²⁶²

108. Overall the expense for these four Other Vendor Services totals \$134,925. In addition, KCP&L seeks recovery for (1) "Miscellaneous vendors" that each individually billed less than \$5,000 in the amount of \$7,549 and (2) "Expense Reports" that KCP&L employees reported for meals, lodging, mileage, etc., in the amount of \$25,327; these two sets of expenses total \$32,876. These amounts do not begin to cover miscellaneous expenses billed by outside attorneys and consultants for meals, lodging, travel, mileage, etc. The amount for such expenses for Polsinelli Shughart was \$26,267²⁶³ and for Cafer Law was \$52,154, which included \$49,353 for the transcript of the 2010 Evidentiary Hearing.²⁶⁴ Such expenses for Schiff Hardin were over \$100,000.²⁶⁵ We have not evaluated the cost of each flight taken by an attorney or consultant, each meal eaten, each night in a hotel or other such minutia, nor do we believe this necessary. The overall expenses KCP&L has incurred through hiring many outside consultants and attorneys resulted in an unusually large amount it has asked to be included as part of rate case expense. In reaching our decision on rate case expense, we took into account the total miscellaneous expenses KCP&L asked to be reimbursed by ratepayers. We find that the total amount of expenses

²⁶¹ Weisensee Direct, p. 122 and Schedules JPW2010-10 and JPW2010-26.

²⁶² November 22, 2010 Order, p. 91.

²⁶³ Weisensee Direct, Schedules JPW2010-10 and JPW2010-14, pp. 1, 16.

²⁶⁴ Weisensee Direct, Schedules JPW2010-10 and JPW2010-11, pp. 1, 3.

²⁶⁵ Weisensee Direct, Schedules JPW2010-10 and JPW2010-15, pp. 1, 22.

requested is excessive based upon the evidence presented and that it is appropriate for KCP&L shareholders to bear the costs of such expenses not covered by the rate case expense we award.

VI. Further Considerations for Rate Case Expense in This Proceeding

109. Issues arose during this proceeding that the Commission will address in light of evidence in the record. The Commission has found that, based on its review of evidence in the record as a whole, KCP&L management did not act prudently and carefully and was inattentive in reviewing and monitoring the expense incurred for attorney fees and for consultants in pursuing this rate case. In fact, KCP&L management allowed an exorbitant amount of rate case expense, particularly attorney fees, to be incurred in this proceeding and then asked that ratepayers pay this entire expense. The process KCP&L used to oversee and monitor rate case expense as it was incurred by attorneys and consultants did not coordinate the work of attorneys in the various firms, which resulted in extensive duplication of effort. No effort was made to limit the number of hours expended by attorneys. KCP&L management may decide to incur extraordinary expenses to defend criticism by other parties in a rate case, and without regard to the cost, but it is inappropriate for ratepayers to bear 100% of such costs in rate case expense. The Company has the burden to show the amount requested as rate case expense is both prudently incurred and to support the portion passed through to ratepayers as a just and reasonable expense.

A. KCP&L's Process Used to Monitor Rate Case Expense.

110. The Commission examines the procedure KCP&L management purportedly put in place to monitor use of attorneys and consultants. The Commission knows that KCP&L employed a very detailed reporting process to ensure its management was informed regarding project construction and management, including receiving data weekly that allowed management to monitor compliance with the budget for the Iatan construction project. KCP&L also developed a detailed, formal protocol to coordinate and assign responsibility for work among the various contractors involved in the Iatan construction project, and documented efforts undertaken to construct Iatan Unit 2 and comply with other requirements under KCP&L's comprehensive

Resource Plan.²⁶⁶ Yet, a similar monitoring process was not used for rate case expense. While KCP&L set a budget for its construction activities associated with Iatan, no budget or expenditure limits were adopted for the rate case expense associated with this phase of the Iatan project for either consultants or attorneys.²⁶⁷ No formal protocol coordinated efforts and resources of outside law firms and consultants. No process was used to watch for duplication of work or overlapping services. No incentive was present for KCP&L management to demand granularity regarding rate case expense or to control costs that would eventually be sought through rate case expense.²⁶⁸ The evidence indicates KCP&L management either had no review process for rate case expense or developed a review process for rate case expense that was completely inadequate.

111. Weisensee, a manager in KCP&L's Regulatory Affairs Department, was primarily responsible for the revenue requirement issue in this rate case.²⁶⁹ He testified a regulatory asset account was set up to defer rate case costs in April 2009. Project and activity identification numbers (IDs) were assigned to income statement accounts and an account number indicated the appropriate jurisdiction. At the end of each month, the Accounting department transferred all incremental rate case costs to the appropriate deferral account. Incremental rate case costs refer to non-internal labor costs because internal labor costs are recovered through the payroll annualization.²⁷⁰ But internal labor for department 490, Construction Management, was treated as an exception. Usually this department charged time to capital projects, but here internal labor for department 490 was assigned to rate case expense for providing support to the docket, such as answering data requests.²⁷¹ The Commission notes wages, bonuses, and benefits of attorneys

²⁶⁶ Tr. Vol. 16, pp. 3677-78 (Downey). See, November 22, 2010 Order, pp. 28-29 (summarizing tools KCP&L used to ensure management decisions were based on available data). See also, Rush Direct, p. 8 ("KCP&L brought on industry experts to provide support and experience and implemented rigorous controls, processes and procedures to ensure the proper schedule and cost control on the [Iatan 2] project.").

²⁶⁷ Tr. Vol. 15, pp. 3389-92 (Weisensee); Tr. Vol. 16, 3364-65 (Downey).

²⁶⁸ Tr. Vol. 26, pp. 3914-15 (Rush).

²⁶⁹ Tr. Vol. 17, pp. 3953-54 (Weisensee).

²⁷⁰ Weisensee Direct, p. 4; Tr. Vol. 15, p. 3404 (Weisensee).

²⁷¹ Weisensee Direct, pp. 4-5.

working in house on the rate case were recovered as an ongoing cost of operation through payroll annualization.

112. Weisensee explained that invoices for rate case vendors generally went to the person or department responsible for selecting and monitoring the particular vendor's services and costs, referred to as the "responsible person."²⁷² If the invoice was appropriate, the responsible person approved it for payment. If the invoice triggered questions or concerns, the responsible person contacted the vendor for an explanation and made appropriate adjustments before approving the invoice for payment. KCP&L Accounting and Regulatory Affairs departments were involved in a month-end closing process. The Regulatory Affairs department was responsible for monitoring rate case costs throughout the case.²⁷³ Weisensee reported a month-end closing process validated the reasonableness of rate case costs, but we note those participating were in accounting, not the responsible person for reviewing the invoices.²⁷⁴ Individuals in accounting seem ill-prepared to assess the reasonableness of legal and consulting invoices, but KCP&L's process seems to have vested final review in those individuals.

113. Evidence at the hearing suggested KCP&L's review process for legal expenses did not ensure careful and attentive review of work by outside law firms or consultants those firms employed. The legal department was the responsible person for reviewing law firm invoices, except Schiff Hardin invoices were assigned to another responsible party. But no responsible person assigned to review law firm invoices testified here, even though we previously noted rate case expense attributable to legal services here was excessive.²⁷⁵ Nor does the evidence show a responsible person actively monitored or questioned charges accumulated by any outside law firm. KCP&L pointed to notations occasionally questioning a mislabeled assignment or correcting an inappropriate account number assigning jurisdiction,²⁷⁶ but numerous miscoded

²⁷² Weisensee Direct, p. 5.

²⁷³ Weisensee Direct, p. 5.

²⁷⁴ Tr. Vol. 15, p. 3411.

²⁷⁵ November 22, 2010 Order, p. 92.

²⁷⁶ Tr. Vol. 15, pp. 3548-3550 (Weisensee).

expenses not caught during KCP&L's review process were pointed out during the hearing.²⁷⁷ No evidence shows a responsible party reviewed invoices to identify and adjust for duplication of work even though we found duplication of research assignments, testimony drafting, and witness preparation was obvious when we reviewed and compared invoices from law firms. Instead of adopting a process to ensure careful and cautious review of invoices, the evidence shows the Company pursued an unrestrained mission to validate KCP&L management's conduct with regard to Iatan 2. KCP&L used outside law firms and consultants to validate this work without regard for the cost. In contrast to the very detailed review and monitoring of the construction work on Iatan, done with extensive and costly help of the "Roberts team," no similar review process reviewed and monitored rate case expense, including hours incurred by the "Roberts team" to pursue the Company's stated mission for this rate case.²⁷⁸ The Commission finds the failure to develop and implement such a review process with regard to rate case expense supports our conclusion that not all rate case expense accumulated by KCP&L was prudently incurred.

B. Retainer Agreements.

114. The Commission finds KCP&L management acted imprudently when it failed to enter into retainer agreements, or engagement contracts, with one of the law firms and several of the outside consultants. KCP&L was directed to provide, at the beginning of the evidentiary hearing, a copy of retainer agreements or engagement letters with each vendor for which KCP&L requested recovery of rate case expense in this proceeding.²⁷⁹ KCP&L provided copies of sixteen agreements.²⁸⁰

²⁷⁷ Baldry Direct, pp. 10-15 and Exh. WEB 2, pp. 1-6. Weisensee Rebuttal, pp. 2-3; Tr. Vol. 15, pp. 3593-69 (Weisensee); Tr. Vol. 17, pp. 3963-68 (Weisensee).

²⁷⁸ Tr. Vol. 16, p. 3716 (Downey).

²⁷⁹ *Prehearing Officer's Order Denying KCP&L's Motion to Strike Testimony of CURB Witnesses Crane, Harden and Smith, Scheduling Filing of Post-hearing Briefs, and Directing KCP&L to File Retainer Agreements*, issued September 2, 2011, ¶ 10.

²⁸⁰ KCP&L Exh. 1.

115. KCP&L could not provide a copy of a retainer agreement with the law firm Morgan Lewis & Bockius even though that firm billed \$155,227 for its work in this case.²⁸¹ Counsel for KCP&L explained that KCP&L and Morgan Lewis had a long-standing relationship beginning in 1999 and that an engagement letter or retainer contract with Morgan Lewis apparently did not exist for this rate case.²⁸² In its November 22, 2010 Order, the Commission did not allow recovery of costs for Morgan Lewis because work by the only attorney from that firm appearing at this hearing duplicated work of other experienced attorneys, including two former General Counsels to the Commission, one former Assistant General Counsel, and KCP&L's in-house regulatory attorney. The Commission concluded work of Morgan Lewis clearly duplicated work performed by other capable attorneys and refused to allow billing by this firm to be included in rate case expense.²⁸³

116. Now the Commission has learned KCP&L management did not enter into a retainer agreement for Morgan Lewis to provide service in this rate case. Regardless of the length of their relationship, failure to enter into a retainer agreement with Morgan Lewis regarding this complex proceeding reflects KCP&L management's carelessness and lack of judgment when incurring rate case expense here. Cafer, a former General Counsel to the Commission, was initially assigned the prudence issue for KCP&L, including cross-examination of Staff Witness Drabinski, and no evidence has explained why Van Gelder was actually necessary or essential to cross-examine Drabinski to present KCP&L's case. This was a management decision with no adjustment in billing judgment for duplicated effort. Evidence presented in this proceeding affirms the Commission's initial decision not to allow recovery of fees for Morgan Lewis as part of rate case expense.

117. Billings for Morgan Lewis include pretrial work by attorneys in the firm and reimbursement for work by subcontractor Global Prairie. No evidence has been offered to show

²⁸¹ Weisensee Direct, Schedules JPW2010-10 and JPW2010-13.

²⁸² Tr. Vol. 17, pp. 4017-18 (Buffington).

²⁸³ November 22, 2010 Order, p. 93.

prehearing work by Morgan Lewis attorneys was actually necessary or essential in presentation of KCP&L's case. The Commission will not allow charges these attorneys, who do not have a retainer agreement, to be included in rate case expense. Morgan Lewis invoices also billed for work by Global Prairie, which exceeded \$47,000. Apparently Global Prairie developed a microsite and other communications to provide "accurate and timely information to customers and other external stakeholders about [KCP&L's] pending rate case."²⁸⁴ Cost to retain a public relations firm is not an appropriate rate case expense and it seems unusual, if not extraordinary, that a law firm would be charged with hiring such a firm. But no retainer agreement was produced describing what Morgan Lewis was hired to do in this case, so the Commission cannot objectively assess what KCP&L instructed Morgan Lewis to do. The Commission will not allow recovery of any expenses billed by Morgan Lewis, including those for Global Prairie, as part of rate case expense in this docket.

VII. Assessment of Expenses for Commission, Staff and CURB.

118. KCP&L requests rate case expense to reimburse its assessment under K.S.A. 66-1502 for expenses incurred by the Commission, Staff of the Commission, and CURB. In the November 22, 2010 Order, the Commission approved KCP&L's request to recover the estimated costs for the Commission and CURB totaling \$1,169,712.²⁸⁵ Now KCP&L asks that it be allowed to recover the total amount it has been assessed for CURB and the Commission up to November 30, 2010. This amount includes \$1,234,781 for the Commission and its Staff and \$188,051 for CURB; the total is \$1,422,832.²⁸⁶ As noted in our November 22, 2010 Order, KCP&L has no control over costs incurred by the Commission and CURB. In light of the work done by Staff and CURB in responding to the effort by KCP&L, the Commission finds the total of \$1,422,832 is a reasonable amount to include as rate case expense passed through to customers. KCP&L is allowed to recover this amount in rate case expense of this proceeding.

²⁸⁴ Weisensee Direct, Schedule JPW2010-13, p. 6; Tr. Vol. 15, pp. 3443-45 (Weisensee); Tr. Vol. 17, p. 3992 (Weisensee).

²⁸⁵ November 22, 2010 Order, p. 90.

²⁸⁶ Schedules JPW2010-10, JPW2010-30 (the KCC), and JPW2010-31 (CURB).

VIII. Conclusion

119. The Commission concludes that \$5,922,832 is an appropriate amount to recover for rate case expense for this proceeding. We are aware that not every timekeeper submitting hours, hourly rate, and expenses, as reported by KCP&L, has been specifically evaluated and identified in this Order, as doing so would double its length. In reviewing the evidence submitted by the parties on reconsideration, the Commission has reviewed hundreds of pages of testimony, numerous exhibits, and thousands of invoices and billing statements. Suffice it to say, the Commission has considered the record as a whole in making this decision. Having done so, the Commission finds that the rate case expense to be included in revenue requirement and recovered from ratepayers is \$5,922,832. This rate case expense will be amortized over four years. We note that KCP&L has had rates recovering the four-year amortization of \$5,669,712²⁸⁷ as specified in the November 22, 2010 Order.²⁸⁸ In order to recover the additional \$253,120 awarded in this Order, KCP&L shall amortize the amount over three years.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission hereby awards \$5,922,832 as prudently incurred and just and reasonable rate case expense to be recovered from KCP&L's ratepayers, as set forth in this Order.

(B) Parties have agreed to electronic service, with no hard copy follow-up. Parties have fifteen days from the date of service of this Order in which to petition the Commission for reconsideration of any matter decided herein. K.S.A. 66-118b; K.S.A. 2010 Supp. 77-529(a)(1).

(C) The Commission designates this Order as precedent under 2011 House Bill 2027, *amending* K.S.A. 2010 Supp. 77-415, that may be relied upon in any subsequent adjudication.

(D) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders as it may deem necessary.


²⁸⁷ November 22, 2010 Order, p. 95.

²⁸⁸ November 22, 2010 Order, pp. 83-95.

BY THE COMMISSION IT IS SO ORDERED.

Sievers, Chmn, concurring; Loyd, Com.; Wright, Com.

Dated: JAN 18 2012


ORDER MAILED JAN 18 2012
Patrice Petersen-Klein
Executive Director

mjc

Docket No. 10-KCPE-415-RTS

Chairman Sievers, concurring:

I write this concurring opinion to express concern about the incentives inherent in the regulatory process that inflate costs and flow those costs through to both customers and investors during the deepest most prolonged recession our country has experienced in more than a half a century. I also offer my observations as a former corporate manager and a lawyer who has worked in both private practice and as in-house counsel for a number of regulated firms.

At a high level, the Commission's role is to promote the public interest by balancing the interests of both consumers and investors. In this portion of the proceeding, KCP&L claimed rate case expenses totaling about \$9 million. The Commission affirmed its order granting KCP&L recovery of about \$5.7 million. Thus, consumers are asked to bear about 66% of claimed rate case expenses and investors about 34%. The Commission concludes that nothing presented in this portion of the case suggested that that balancing from the Commission's prior order is inappropriate, unjust or unreasonable.

I was not on the Commission during the litigation of the 415 docket, so I cannot opine about the merits of case or the performance of the individuals involved. I believe that many talented individuals participated in and contributed to this case. What is apparent to me, however, is that the rate case expenses associated in this matter are well beyond anything this Commission has previously approved and found to be "*just and reasonable*" or "prudent" and well beyond my experience.

At a high level, I start my analysis with the observation that a large proportion of the population has a dim view of government. It is viewed by some as inefficient and ineffective, and as dominated by efforts at ensuring on-going access to entitlement programs. Again, at a high level, this case presents two basic policy questions to me: (1) To what degree can a firm invoke the power of government (the Commission's rate making authority) to require others to pay for its legal expenses, and (2) To what degree do government processes (the litigious rate making process itself) contribute to those expenses.

As the Commission described in detail in its Order, and in Attachment A, the number of lawyers and consultants engaged in just this portion of the proceeding is remarkable. There were six different law firms with a total of 47 lawyers and consultants engaged by those firms billing a total of more than 16,000 hours of time and \$5.1 million to this proceeding. In addition, this portion of the proceeding involved eight outside consulting firms with a total of 46 individual time keepers who billed more than 9,700 hours and about \$1.8 million. Thus, a total of more than 90 time keepers billing more than 25,000 hours of legal and professional services were engaged in just this portion of this regulatory proceeding that dealt largely with a single hearing focused largely on a single issue -- the prudence of the Iatan project.

In this case, the awarded revenue requirement underlying these claimed rate case expenses is about \$21.8 million, so the claimed rate case expenses of \$9 million are approximately 41% of

awarded revenue requirements and the rate case expenses of \$5.7 million awarded by the Commission are 26% of awarded revenue requirements. As I will describe below, historically, awarded rate case expenses ranged between 0.8% and 5.9% of revenue requirements.

It is important to emphasize that the rate case expenses considered in this portion of this docket dealt largely with a single issue and a single hearing. KCP&L's witness testified that 70% of its expenses in this proceeding were focused on supporting the prudence of management decision to build the Iatan unit.¹ Most of the work effort in question in this portion of the case was allegedly devoted to an analysis of this issue, and specifically rebutting the testimony of a single Staff rebuttal witness, Walter Drabinski.² So, the work efforts under consideration here were not generally the costs of a wide ranging rate case that presented novel public policy considerations.

Nobel Prize winning economist Milton Friedman is famous for categorizing spending decisions into four categories, generally ranked from most to least efficient.³

1. Category one is spending your own money for your own benefit. Spending in this category is the most efficient. You are very careful with that money because it represents your work efforts and you are in the best position to know what you want to spend your money on. The spender has an economic incentive to minimize expenditures and personal insight into the benefits resulting from the spending.
2. Category two is when you spend your own money on someone else. For example, spending in this category might include when I buy a present for my wife. I am careful with the money, set a budget, but it's always questionable whether this was something she really wanted. The spender has an incentive to minimize expenditures, but may not have insight into the benefits of the spending.
3. Category three is when you spend someone else's money on yourself. An example of this is when you travel or dine out at your employer's or client's expense. You're careful, but not as much as when you're spending your own money. The spender has less incentive to minimize spending, and limited insight into the benefits of the spending.
4. Category four is when you spend someone else's money on someone else. Spending in this category has the potential of being the least efficient. Popular examples of this include government spending – the money comes from the taxpayer and government agencies decide who and what to spend it on. It can be inefficient because the agency that makes the spending decision did not have to earn the money being spent and it is speculating about what the recipient needs or wants. The spender has neither the incentive to minimize expenditures nor the insight into the benefits of the spending.

Fundamentally, this case involves spending in categories three and four – spending someone else's money. Lawyers and consultants hired by the utility are spending somebody else's money (consumers' and/or the investors' money) to pursue litigation. The company assumes it will recover whatever it spends on the litigation from either consumers or investors.

¹ Rush Direct, pp. 11-12.

² Tr. Vol. 16, pp. 3667-68 (Downey).

³ M. Friedman & R. Friedman, FREE TO CHOOSE: A PERSONAL STATEMENT, pp. 115-119 (1990).

CURB and Staff are also funded by assessments paid by the company, but at a far lower level that companies typically spend in a case. No one has an economic incentive to minimize their spending.

The amount to spend on rate cases and legal fees is a managerial decision. It rises to a Commission matter when the Commission is asked to allocate the spending between consumers and investors. As this case demonstrated, as a practical matter, because utility cases can involve many parties and contentious issues, an inquiry into the level of rate case expenses can open the door to parties second guessing the company's management decisions (*e.g.*, why does the company hire expensive outside lawyers rather than add additional in-house counsel to handle rate case matters), the hourly charges of attorneys, retainer agreements, "Lodestar" analyses, and cases that devolve into mind-numbing proceedings to examine invoices from lawyers and expert consultants and assess who did what, when they did it and whether it was prudent or not. Moreover, the problem of excessive rate case expenses is worsened and potentially never ends if, in every case, a separate proceeding is opened so that lawyers and expert witnesses are given license to question the fees charged by other lawyers and experts.

As a starting point, and as the Commission observed in its Order, it is important to recognize that recovery of legal expenses is not handled consistently between the judicial system and utility regulatory proceedings.

As the Commission points out in its Order, the "American" rule of civil and criminal litigation is that, absent a contractual or statutory requirement, parties to litigation bear their own attorneys' fees and the costs of prosecuting or defending their case.⁴ Under the American rule, litigants typically hire lawyers and pay for the pursuit of their legal matters. Kansas courts follow the American rule⁵ implying that Kansas courts believe it to be just and reasonable for litigants to bear their own attorneys' fees absent a statutory or contractual provision to the contrary.

It is also worth observing that lobbying expenses are consistently disallowed by this Commission.⁶ Utility customers are not asked to pay for the company's expenses when it lobbies

⁴ In contrast, under the "English" rule the losing party pays the prevailing party's attorneys' fees.

⁵ The Kansas Supreme Court in *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 241 P.3d 15, 24 (Kan. 2010) observed:

The "American Rule" is well established in Kansas so that, in the absence of statutory or contractual authorization, each party to the litigation is responsible for his or her own attorney fees, and the Kansas Act does not create an exception. See *Farm Bureau Mut. Ins. Co. v. Kurtenbach*, 265 Kan. 465, 479-80, 961 P.2d 53 (1998) (the "American rule" ... which is well established in Kansas, is that in the absence of statutory or contractual authorization, each party to litigation is responsible for his or her own attorney fees"); 8 Larson's Workers' Compensation Law § 133.01 ("The obligation to bear one's own legal fees, then, has become established as a necessary evil, which each client must contrive to bear as cheerfully as he or she can."); see also *Hodges v. Johnson*, 288 Kan. 56, 70, 199 P.3d 1251 (2009) ("In Kansas, courts are not permitted to award attorney fees without specific statutory authorization.").

⁶ See, *e.g.*, the adjustments made to the requested revenue requirements in *In the Matter of an Audit and General Rate Investigation of Wheat State Telephone Company, Inc.*, Order Docket No. 03-WHST-503-AUD (Sept. 9, 2003); and, *In the Matter of the Application of Western Resources, Inc for Approval to Make Certain Changes in its Electric Service*, Order on Reconsideration, Docket No. 01-WSRE-436-RTS (Sept 5, 2001).

the legislature or engages in political activities – those are viewed as expenses properly borne by investors. Yet, when the Commission acts in its legislative role and sets rates,⁷ recovery of rate case expenses from customers have historically been allowed. I don't believe there is any logical reason why it is appropriate to disallow recovery of the expenses of lawyers and experts who lobby the legislature, but allow recovery of expenses associated with hiring lawyers and experts to appear before the Commission when it acts in its delegated legislative role.

This inconsistent treatment is an historical artifact of regulation that we live with today. I can only wonder what the regulatory environment would be like if litigants bore their own legal expenses as is the case with traditional litigation rather than have a common law “right” to pass them on to someone else.

Rate case expenses are usually small in comparison to the overall request made in a typical rate case and the amount ultimately awarded, but these expenses are important for at least three policy considerations.

1. First, recovery of rate case expenses – whether those are expenses of the company or the assessments by CURB or the Commission Staff – are functionally equivalent to a “tax” levied on utility services to pay for the advocacy of interests that may or may not be aligned with the utility customers’ or investors’ interests even though they ultimately pay for that advocacy.⁸ In addition, rate case expenses have virtually no relationship to the quality of service, the reliability of the service, product development or anything that consumers or investors would readily recognize as economically valuable or something they would willingly pay for if asked to approve such expenses before they are incurred.
2. Second, while a certain level of rate case expenditures are necessary to meet the requirements of participating in the regulatory process, when a company incurs significant rate case expenses it makes a wager hoping to recover more (or avoid a bad result) by spending more on lawyers and expert witnesses to make its case in the hearing room. In the marketplace, firms make similar wagers with investments in new products, marketing plans and the like in hopes of attracting more business, but bear the financial consequences of failure. In the regulatory world, however, the burden of the financial consequences of a failed litigation effort is determined by regulators and courts.
3. Finally, the utility regulatory process is asymmetric and the level of rate case expenses are, to a large degree, driven by the litigation efforts of other public interest parties with various economic incentives to reach accommodation in the case and who do not face the costs their activities engender. For example, CURB and Staff were parties in this matter whose expenses are funded by assessments paid by utility companies. Non-profit, public interest

⁷ *Kansas Gas and Elec. Co. v. State Corp. Com'n*, 239 Kan. 483, 720 P.2d 1063, 1072 (Kan. 1986).

⁸ Micro-economics texts routinely include a demonstration that taxes transfer money from the payors to the recipient and in the process result in a deadweight loss that makes society worse off – the higher the tax, the larger is the deadweight social loss. When taxes are used to fund public programs, one can argue that the social benefits of the tax-funded programs are equal to or greater than the tax revenues taken from consumers and producers. Rate case expenses and legal expenses, however, do not typically fund programs with broad social or public interest benefits.

interveners may be funded by contributions made to it by their members and exist primarily to engage in litigation to advance social objectives or just to participate in a particularly controversial public utility proceeding. If Staff or CURB or non-profit public interest interveners are particularly aggressive in pursuit of their positions, as KCP&L has argued in this case, that adds to the utility's rate case expenses and legal bills. But, the regulatory process is fundamentally asymmetric – if a utility loses in regulatory litigation, it bears the financial consequences of its loss; if a public interest intervener loses, it does not directly bear the financial consequences of the loss. In such instances, is it fair/just to restrict the recovery from customers of the legal and rate case expenses the utility might incur defending itself against such entities?

The Commission found no Kansas statute, and none were cited by the parties that deal directly with the appropriate level of rate case expenses or attorneys' fees for public utilities. The case law standards applicable to rate case expenses tend to be broad statements of general principle. Based on my review, Kansas Courts appear to assume that, unlike many other litigants who have no common law right to recover their legal fees from adverse parties, utilities have a right to recover prudently incurred rate case expenses and legal fees from customers.

The Commission's authority over a determination of rate case expenses is rooted in its obligation to determine and maintain "*just and reasonable*" rates. K.S.A. 66-101b directs the Commission to "establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities." The statute also declares that "[e]very unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited and is unlawful and void." The Kansas Supreme Court has plainly held that "All of these [state and federal utility] cases clearly support the general principle that a state regulatory agency, in setting a rate for a public utility, must have as its goal a rate fixed within the 'zone of reasonableness' after an application of a balancing test in which the interests of all concerned parties are considered."⁹

So, what does "*just and reasonable*" include and how wide is the "*zone of reasonableness*?" The common meaning of the words "just" and "reasonable" provides some obvious guidance. "Just" implies an assessment of fairness – is this a fair result? "Reasonable" connotes an assessment of what's prudent, rational or customary given the circumstances. I believe that both "just" and "reasonable" can include a comparison of how past cases were handled or similarly situated companies acted or were treated.

While the Commission, in previous orders and by its practice requires that parties conform to the provisions of Rule 1.5 of the Kansas Rules of Professional Conduct, the eight factors set out in Rule 1.5 were developed to create standards governing traditional litigation and the conduct of private attorneys. I do not believe these factors were intended to be the entire inquiry into or substitute for the public interest the Commission must make in matters before it. Recall that the "reasonable" recovery of attorneys' fees in traditional litigation is the American rule where parties bear 100% of their own legal expenses absent an agreement to the contrary.

⁹ *Gas and Elec. Co. v. State Corp. Com'n*, 239 Kan. 483, 720 P.2d 1063, 1072 (Kan. 1986).

As used in Rule 1.5, “reasonable” is defined by reference to a standard governing private performance and conduct and not “just and reasonable” under a public interest analysis. Said differently, “reasonable” under Rule 1.5 does not include an assessment of the factors traditionally included in an assessment of “just and reasonable” such as the zone of reasonableness, a public interest balancing of consumer and investor interests, an assessment of the financial ability of the public utility to continue to provide service, whether there is an excessive burden on consumers or whether the resultant recovery is unduly discriminatory.

To get a sense of what rate case expense awards had been previously approved by the Commission and gauge the “zone of reasonableness” I looked at past awards of rate case expenses as a simple percentage of the awarded rate case expense.

Summary of Rate Case Expense Awards in Past KCC Cases

Docket # Source	Settled or Litigated?	Awarded Revenue Requirement	Awarded Rate Case Expenses	Rate Case Expenses as % of Revenue Requirement
08-ATMG-280-RTS Testimony of Bill Baldry	Settled	\$2,100,000	\$89,674 3 year amortization	4.3%
10-ATMG-495-RTS Testimony of Bill Baldry	Settled	\$3,855,000	\$61,589 3 year amortization	1.6%
05-AQLG-367-RTS Testimony of Justin Grady	Settled	\$2,700,000	\$522,414 3 year amortization	19.3%
05-EPDE-980-RTS Testimony of Bill Baldry	Settled	\$5,100,000	\$41,180 5 year amortization	0.8%
10-EPDE-314-RTS Testimony of Jeremy Croy	Settled	\$2,790,000	\$164,232 5 year amortization	5.9%
06-KGSG-1209-RTS Testimony of Justin Grady	Settled	\$52,000,000	\$745,602 3 year amortization	1.4%
06-MDWG-1027-RTS Testimony of Bill Baldry	Settled	\$3,350,000	\$129,624 3 year amortization	3.9%
08-MDWE-594-RTS Testimony of Laura Bowman	Settled	\$10,028,870	\$270,964 3 year amortization	2.7%
11-MDWE-609-RTS Testimony of Kristina Luke	Settled	\$1,800,000	\$76,784 3 year amortization	4.3%
05-WSEE-981-RTS Testimony of Mary Jo Struttman	Litigated	\$38,797,189	\$2,081,610 5 year amortization	5.4%

Docket # Source	Settled or Litigated?	Awarded Revenue Requirement	Awarded Rate Case Expenses	Rate Case Expenses as % of Revenue Requirement
08-WSEE-1041-RTS Testimony of Laura Bowman	Settled	\$130,000,000	\$1,365,443 3 year amortization	1.1%
09-WHLE-681-RTS Testimony of Andria Finger	Settled	\$4,819,343	\$38,162 5 year amortization	0.8%
11-MKEE-439-RTS Testimony of Kristina Luke	Settled	\$3,058,931	\$113,382 5 year amortization	3.7%
Past Awards in Cases Involving KCP&L				
06-KCPE-828-RTS Testimony of Laura Bowman	Settled	\$29,000,000	\$1,196,430 4 year amortization	4.1%
07-KCPE-905-RTS Testimony of Laura Bowman	Settled	\$28,000,000	\$457,852 4 year amortization	1.6%
09-KCPE-246-RTS Testimony of John Weisensee in Docket No. 10-KCPE-415-RTS	Settled	\$59,000,000	\$2,300,000 4 year amortization	3.9%

Based on the above, with the exception of the Aquila case (05-AQLG-367-RTS), the Commission's past award of rate case expenses ranges from about 0.8% to 5.9% of the awarded revenue requirements. While the circumstances and risks in each case certainly differ, the awards listed above provide some guidance of what has been customary ("*reasonable*") in past cases, including cases that involved KCP&L. Because these awards have been previously approved by the Commission and generally found to be "*just and reasonable*" I believe there is a presumption that rate case expenses that fall within this range are within the "*zone of reasonableness*."

Most of the cases presented in the table above settled, so, in a very real sense, they represented agreement between the litigants about the "*reasonableness*" of the proposed recovery which included rate case expenses. Said differently, if the cases that settled included an unreasonable figure for rate case expenses – either exorbitant or grossly inadequate – the case would not likely have settled.

An argument could be made that an "apples-to-apples" comparison of the rate case expenses of settled cases with the claimed expenses in this litigated case should only include KCP&L's pre-hearing charges. As shown in Attachment A to the Commission's Order that summarizes the claimed expenditures in each phase of this proceeding, roughly \$4.6 million in claimed charges were incurred prior to the hearing (excluding CURB and Staff's assessments), which is about 66% of the total rate case expense claimed by KCP&L associated with its efforts in this proceeding. If one excludes KCP&L's hearing and post-hearing expenses, and assumes that the CURB and Staff pre-hearing assessments were \$939,069 (66% of the final amount of \$1,422,832), the total rate case expenses in the uncontested portion of this case comparable to the

historical rate case expenses in settled cases is about \$5.5 million. \$5.5 million is 25% of the awarded revenue requirement of \$21.8 million in this case and about 11% of the \$50.8 million requested by KCP&L. Thus, even after making an adjustment to distinguish this litigated case with the settled cases, this case is far from the historical norm awarded by the Commission even accounting for the difference between settled and litigated cases.

The proportionally largest awarded rate case expense was 19% of the awarded revenue requirement, a case involving Aquila's provision of natural gas services to its customers. Like this case, it involved many parties and interveners. Like this case, it resulted in the utility receiving a fraction of the requested revenue requirement (44% for Aquila vs. 39% for KCP&L). Thus, the rate case expenses in the Aquila case were about 19% of the awarded revenue requirement (\$2.7 million) and about 9% of the requested revenue requirement (\$6.2 million).¹⁰ If the results of the settled Aquila case were applied to this matter, the awarded rate expenses would be between \$4.1 million (19% of the revenue requirement of \$21.8 million awarded to KCP&L) and \$4.6 million (9% of KCP&L's requested revenue requirement of \$50.8 million). The amount requested in this case – \$9 million – is about double these amounts, so this case represents an aberration even when compared to the proportionally largest award made by the Commission.

The Commissioners also bring their individual experiences to bear in assessing what's just and reasonable. In my experience, managing to a budget involved some basic activities that were missing in this case:

1. When firms manage to a budget, an aggregate limit is set for expenses, the limit is well documented, and managers' performance is assessed against whether they met this limit. In this case, the only estimate of legal expenses was set early on at \$2.1 million and then that estimate appears to have been ignored. No documentation of tracking against the budget or basic "how are we doing" monitoring appears to have been developed as the case proceeded. The irony of this case is that KCP&L appears to have very sophisticated systems for tracking and managing construction activities and costs, but nothing comparable for tracking and managing rate case expenses.
2. When firms are actively managing to a budget, bills from outside vendors are closely scrutinized and adjustments are common. As in-house counsel, I regularly disputed the billings from outside lawyers and would call them and demand adjustments if the work they performed seemed inappropriate to the task or excessive. As an outside lawyer, my clients often called me to ask what I did, why they were being charged for some work efforts and to demand an adjustment. This case is remarkable to me because even though six different law firms with a total of 47 lawyers and consultants engaged by those firms billed a total of more 16,000 hours, and eight outside consulting firms with a total of 46 individual time keepers billed a total of 9,700 hours, virtually no billing adjustments were made.

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In addition, the rate case award is higher because Staff used a normalized rate case expense amount rather than actuals through a cut-off date. See Direct Testimony of Justin Grady at p. 10.

3. Managing to a budget means that someone – usually a company employee – is rewarded or punished for meeting or failing to meet the budget. Responsible managers typically have an incentive to closely monitor spending. In private sector firms, it is common to have monthly reports of how spending compares with the budget and to tell vendors to stop working when it is apparent that their bills will exceed the budget. In this case, no one appeared accountable for meeting or beating the rate case expense budget and tracking of budgeted amounts seems to be non-existent.
4. When a firm actively manages its legal/consulting expenses, projects and billings are usually supported by detailed documentation. In private practice, I usually sent clients a generic retainer agreement that spelled out rates and billing practices. When clients asked me to do something for which significant work effort was involved, I would send the client a letter or an e-mail that memorialized our conversation and my understanding of the work the client wished me to do along with my estimate of the work effort and charges that would be involved. My invoices were often a narrative of the work I had done, the expenses incurred and the hourly charges. In this case, some large, sophisticated firms had no retainer agreement and block billing seemed to be the rule rather than the exception. In addition, virtually every lawyer raised his/her hourly rate in the midst of the case without any explanation or documentation in the form of an agreement with their client.

A major explanatory difference between my experiences and the circumstances of this case, however, is that the firms I worked for were firms that were not guaranteed recovery of their expenses through regulation, but when they spent money on litigation, it was their own money, and not something that could be passed on to someone else. Likewise, my clients in private practice were spending their own money on legal efforts. In Friedman's hierarchy, my clients' and employers' frame of reference was largely in spending categories 1 and 2.

I believe that the excesses of this case arose because of the incentives created by traditional regulation. The Commission has historically allowed 100% recovery of rate case expenses (except when spending exceeded some unquantifiable "prudent" standard or the Rule 1.5 standard), Kansas case law supports the notion that regulated firms have a right to recover their rate case expenses rather than follow the American rule that the Courts apply to everyone else, KCP&L relies on contractors and outside counsel rather than employees to prosecute its regulatory proceedings and the major interveners – CURB and Staff – are both fee funded agencies where their expenses are passed along to ratepayers. In Friedman's hierarchy, everyone is spending someone else's money and has no incentive to minimize that spending or direct insight into the benefits of such spending.

It is important to emphasize that excessive rate case expenses are not just a phenomena that affects consumers. To the extent that excessive rate case expenses are disallowed, they raise costs that reduce the returns realized by investors. In this case, it would have been interesting to see how investors might have reacted to a management announcement that it was planning to spend \$9 million of investors' money on lawyers and consultants in a \$50.8 million rate case and that 70% of that spending would be devoted to rebutting the testimony of a single witness, Walter Drabinski.

In the regulatory environment, excessive legal or rate case expenses are not naturally controlled by the discipline of the market. Investors don't punish utility managers for spending

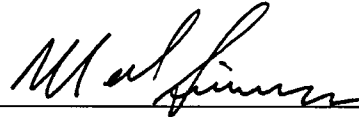
too much on legal fees and rate cases so long as those expenses are automatically flowed through to rates – they are gambling with someone else’s money. Inflating prices with excessive legal and rate case expenses will not be punished in the market by more cost efficient new entrants offering lower-priced alternatives because government flatly prohibits competitive entry. The regulatory theory is that a single, regulated provider can and will provide service at lower costs than multiple, competing providers and that regulators can and will prevent imprudent expenditures. In my brief tenure as a Commissioner, I have not seen large numbers of lawyers, experts and consultants in cases involving regulated competitive industries, such as telecom, trucking, and oil and gas.

It’s surprising to me that these excesses have not arisen before now.

I would have preferred that the Commission use this case to establish an explicit policy with respect to rate case expenses that would provide guidance to others in future cases. However, not having input from a broad base of affected parties makes establishing policy in narrow cases problematic and I respect the Commission’s decision to not articulate an explicit policy. For what it is worth, here is the policy I recommend be applied in future cases:

- a. Rate case and legal expenses that are assessed by the Commission, its Staff and CURB and thus, cannot be avoided by the utility, are recoverable in rates paid by consumers. To deny recovery of these unavoidable, uncontrollable costs would be unjust and unreasonable, and recovery is mandated by statute.
- b. If a case primarily involves questions that do not implicate the public interest, but are matters that are fundamentally matters of private interests (e.g., a case involving a contest between a utility and a single customer), rate case expenses and legal expenses should be borne by the parties as they are in private litigation and borne by the litigants absent a contractual or statutory requirement to the contrary.
- c. If proposed rate case expenses fall within the “*zone of reasonableness*” as defined by the range of awards as a percentage of the awarded revenue requirement previously approved by the Commission (i.e., generally between 0.8% and 5.9% of the awarded revenue requirement from past Commission decisions), the Commission will presume that such expenses are “*just and reasonable*” consistent with its past findings and awards. Those challenging such a presumption would bear the burden of presenting sufficient evidence to demonstrate that the award sought is adverse to the public interest. Such a presumption seems efficient in that it will avoid future cases devolving into discovery battles, second guessing management decisions and contested litigation over attorneys’ fees and rate case expenses as occurred in this proceeding.
- d. If rate case expense falls outside the presumptive “*zone of reasonableness*,” then the utility bears the burden of showing that recovery from customers is “*just and reasonable*” which, consistent with past Commission practice, requires the following:
 - i. Sufficient evidence showing that the requested expenses are reasonable using the metric established by Rule 1.5 of the Kansas Rules of Professional Conduct, that the requested expenses are rational and customary given the circumstances of the case (“*reasonable*”) and that it is fair (“*just*”) to pass such expenses on to customers;
 - ii. Evidence showing that recovery of the requested expenses is “*just and reasonable*” and in the public interest as might be demonstrated by evidence to assess: (1) the

- impact on the financial ability of the public utility to continue to provide service; (2) the burden on consumers; and/or (3) whether the recovery is unduly discriminatory;
- iii. As required by the Commission in its past decisions, the requested expenses must be supported by an itemized statement of the nature of the activity or services performed, the amount of time expended for each activity or service, and the identity of the attorney or other personnel that performed each activity or service; and,
 - iv. As described by the Commission in its past decisions, the Commission may reduce an attorney fee award if the recording of tasks worked on is insufficient, if multiple attorneys duplicate their effort, when time is expended on activities unrelated to issues or litigation, and for time spent on travel.

A handwritten signature in cursive script, appearing to read 'Mark Sievers', is written over a horizontal line.

Mark Sievers -- Chairman

		Application July 2009 - Dec 2009		Discovery Jan 2010 - May 2010		Rebuttal Jun 2010 - July 2010		Hearing Aug 2010		Post-Hearing Sept, Oct, Nov 2010		Total By Attorney/Consultant	
		Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges
LEGAL SERVICE PROVIDERS													
Cafer Law Office	1. Glenda Cafer	524.00	\$142,925.00	228.25	\$68,475.00	314.00	\$94,200.00	268.75	\$80,625.00	304.25	\$91,275.00	1,639.25	\$477,500.00
Duane Morris	1. C.W. Whitney	4.12	\$2,369.00									4.12	\$2,369.00
	2. A. Bates	125.36	\$60,172.80	33.00	\$16,005.00	110.40	\$53,544.00	113.00	\$54,805.00	13.40	\$6,499.00	395.16	\$191,025.80
	3. J.D. Cook	100.20	\$43,086.00	12.20	\$5,490.00	48.50	\$21,825.00	17.70	\$7,965.00			178.60	\$78,366.00
	4. C. Dougherty	0.20	\$42.00									0.20	\$42.00
	5. D.A. Nosse					6.40	\$1,376.00					6.40	\$1,376.00
	Total for Duane Morris	229.88	\$105,669.80	45.20	21,495.00	165.30	\$76,745.00	130.70	\$62,770.00	13.40	\$6,499.00	584.48	\$273,178.80
Morgan Lewis	1. A.J. Conway-Hatch	1.40	\$756.00									1.40	\$756.00
	2. F.F. Fielding	1.68	\$1,436.40									1.68	\$1,436.40
	3. S.P. Mahinka	1.40	\$1,260.00									1.40	\$1,260.00
	4. B. VanGelder	1.40	\$924.00			5.80	\$3,828.00	146.20	\$96,492.00	1.30	\$858.00	154.70	\$102,102.00
	Total for Morgan Lewis	5.88	\$4,376.40	0.00	0.00	5.80	\$3,828.00	146.20	\$96,492.00	1.30	\$858.00	159.18	\$105,554.40
Polsinelli Shughart	1. Frank Caro	430.60	\$166,312.50	236.70	\$92,313.00	373.90	\$145,821.00	291.80	\$113,802.00	366.90	\$146,760.00	1,699.90	\$665,008.50
	2. Ann Callenbach	228.50	\$63,020.00	159.60	\$44,688.00	236.90	\$66,332.00	272.20	\$76,216.00	230.70	\$69,210.00	1,127.90	\$319,466.00
	3. B.L. Kane	303.60	\$63,615.25	159.70	\$34,335.50	297.50	\$63,962.50	221.10	\$47,536.50	420.20	\$98,747.00	1,401.25	\$308,196.75
	4. L.A. Hagedorn	47.10	\$8,713.50	63.85	\$11,812.25	253.70	\$46,934.50	247.25	\$45,741.25	380.15	\$76,030.00	992.05	\$189,231.50
	5. S.A. Damarco	17.10	\$1,710.00									17.10	\$1,710.00
	6. T.J. Sear	3.70	\$1,258.00	6.40	\$2,176.00							10.10	\$3,434.00
	7. S.C. Willman							1.75	\$612.50			1.75	\$612.50
	9. K.D. Stohs	15.00	\$3,450.00							7.80	\$1,950.00	22.80	\$5,400.00
	10. K.J. Breer									1.30	\$357.50	1.30	\$357.50
	11. A.F. Ruup	1.10	\$385.00									1.10	\$385.00
	12. A. Morgan	36.60	\$10,106.00									36.60	\$10,106.00
	13. W.W. Sneed	3.00	\$975.00									3.00	\$975.00
	Total for Polsinelli	1,086.30	\$319,545.25	626.25	\$185,324.75	1,162.00	\$323,050.00	1,034.10	\$283,908.25	1,407.05	\$393,054.50	5,314.85	\$1,504,882.75

Rate Case Expense

Summary of Hourly Fees by Provider by Activity Time Frame (Disbursements are excluded)

		Application July 2009 - Dec 2009		Discovery Jan 2010 - May 2010		Rebuttal Jun 2010 - July 2010		Hearing Aug 2010		Post-Hearing Sept, Oct, Nov 2010		Total By Attorney/Consultant	
		Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges
Schiff Hardin	1. Ken Roberts	136.75	\$75,896.25	40.50	\$22,477.50	292.75	\$162,476.25	206.50	\$114,607.50	163.50	\$90,742.50	840.00	\$466,200.00
	2. Carrie Okizaki	189.25	\$85,162.50	66.25	\$29,812.50	386.00	\$173,700.00	160.00	\$72,000.00	196.05	\$88,222.50	997.55	\$448,897.50
	3. Eric Gould	347.00	\$102,365.00	72.00	\$21,240.00	496.00	\$146,320.00	233.25	\$68,808.75	210.80	\$62,186.00	1,359.05	\$400,919.75
	4. Amanda Schermer	157.00	\$51,810.00	13.75	\$4,537.50	278.75	\$91,987.50	197.00	\$65,010.00	184.10	\$60,753.00	830.60	\$274,098.00
	5. Aaron Hitchcock	36.50	\$6,570.00									36.50	\$6,570.00
	6. Othiel Glover	23.00	\$3,220.00	54.75	\$7,665.00	230.75	\$32,305.00	71.00	\$9,940.00			379.50	\$53,130.00
	7. Kevin Kolton			1.00	\$520.00	86.00	\$44,720.00	24.75	\$12,870.00			111.75	\$58,110.00
	8. Virgil Montgomery					81.50	\$42,380.00	30.00	\$15,600.00			111.50	\$57,980.00
	9. H. Hennig Rowe					66.25	\$28,487.50			7.25	\$3,117.50	73.50	\$31,605.00
	10. Ned Markey					167.50	\$41,875.00	21.75	\$5,437.50			189.25	\$47,312.50
	11. Sean Hoadley			1.25	\$243.75	88.00	\$17,160.00	96.50	\$18,817.50			185.75	\$36,221.25
	12. Thomas Griebel					20.75	\$2,386.25					20.75	\$2,386.25
	13. J. Wilson			43.42	\$13,026.00	279.50	\$83,850.00	75.00	\$22,500.00			397.92	\$119,376.00
	14. Meggan Witte					220.00	\$11,000.00	33.50	\$1,675.00			253.50	\$12,675.00
	15. Beverly Maus			148.41	\$7,420.50	318.50	\$15,925.00	101.50	\$5,075.00			568.41	\$28,420.50
	16. Steve Jones			290.13	\$79,784.38	226.25	\$62,218.75	154.50	\$42,487.50			670.88	\$184,490.63
	17. Kathryn Hejdl			162.88	\$16,287.50	71.75	\$7,175.00	29.00	\$2,900.00			263.63	\$26,362.50
	18. Project Control Serv			24.50	\$3,062.50	3.50	\$437.50	13.50	\$1,687.50			41.50	\$5,187.50
	19. Meyer Construction					737.85	\$273,032.50	438.50	\$171,388.35	36.25	\$16,312.50	1,212.60	\$460,733.35
	20. Shawn Hoadley			1.25	\$187.50							1.25	\$187.50
Total for Schiff		889.50	\$325,023.75	920.08	\$206,264.63	4,051.60	\$1,237,436.25	1,886.25	\$630,804.60	797.95	\$321,334.00	8,545.38	\$2,720,863.23
SNR Denton	1. Zobrist	3.00	\$1,425.00			0.30	\$145.50					3.30	\$1,570.50
	2. R. Steiner	18.25	\$6,661.25	47.18	\$17,220.70	78.75	\$28,743.75					144.18	\$52,625.70
	3. S. Cunningham					6.00	\$2,160.00	9.90	\$3,564.00			15.90	\$5,724.00
	4. L. Gilbreath	0.50	\$87.50									0.50	\$87.50
Total for SNR Denton		21.75	\$8,173.75	47.18	\$17,220.70	85.05	\$31,049.25	9.90	\$3,564.00	0.00	\$0.00	163.88	\$60,007.70
Total for Legal Services Providers		2,757.31	\$905,713.95	1,866.96	\$498,780.08	5,783.75	\$1,766,308.50	3,475.90	\$1,158,163.85	2,523.95	\$813,020.50	16,407.02	\$5,141,986.88

Rate Case Expense

Summary of Hourly Fees by Provider by Activity Time Frame (Disbursements are excluded)

		Application July 2009 - Dec 2009		Discovery Jan 2010 - May 2010		Rebuttal Jun 2010 - July 2010		Hearing Aug 2010		Post-Hearing Sept, Oct, Nov 2010		Total By Attorney/Consultant	
		Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges
CONSULTANTS													
Black & Veatch	1. Larry Loos	170.00	\$23,567.75	79.00	\$11,222.04	76.00	\$10,536.17	52.00	\$16,055.00	21.00	\$6,483.75	398.00	\$67,864.72
	2. Robert Brady	49.00	\$6,793.06	6.00	\$831.80	9.00	\$1,247.70					64.00	\$8,872.57
	3. Gregory Macias	46.00	\$4,905.51			5.00	\$533.21					51.00	\$5,438.71
	4. Mathew Powis	148.00	\$11,995.03									148.00	\$11,995.03
	Total for Black & Veatch	413.00	\$47,261.34	85.00	\$12,053.85	90.00	\$12,317.08	52.00	\$16,055.00	21.00	\$6,483.75	661.00	\$94,171.02
FINANCO, Inc.	1. Sam Hadaway	23.50	\$9,400.00			55.25	\$22,100.00	34.00	\$13,600.00	32.25	\$12,900.00	145.00	\$58,000.00
	2. Heidebrecht	28.00	\$7,000.00			40.00	\$10,000.00	10.00	\$2,500.00	6.00	\$1,500.00	84.00	\$21,000.00
	Total for FINANCO	51.50	\$16,400.00	0.00	\$0.00	95.25	\$32,100.00	44.00	\$16,100.00	38.25	\$14,400.00	229.00	\$79,000.00
Gannet Fleming, Inc.	1. John Spanos	63.00	\$6,240.00	26.00	\$2,535.00	26.00	\$3,022.50	44.00	\$4,290.00	41.00	\$3,997.50	200.00	\$20,085.00
	2. Cheryl Rutter	5.00	\$280.00	1.50	\$60.00	1.00	\$60.00	1.50	\$60.00	2.00	\$80.00	11.00	\$540.00
	3. Krista McCormick	25.00	\$1,060.00	7.50	\$300.00	4.50	\$180.00	5.00	\$200.00	3.00	\$120.00	45.00	\$1,860.00
	4. Richard Clarke	3.00	\$585.00									3.00	\$585.00
	5. Ned Allis	304.00	\$16,050.00	7.00	\$367.50	2.00	\$210.00	2.00	\$105.00			315.00	\$16,732.50
	6. Samantha Marino	1.50	\$100.00							5.00	\$262.50	6.50	\$362.50
	7. Frederick Johnston	1.00	\$55.00	3.00	\$172.50	8.50	\$805.00	10.00	\$575.00	5.00	\$287.50	27.50	\$1,895.00
	Total for Gannet Flemming, Inc.	402.50	\$24,370.00	45.00	\$3,435.00	42.00	\$4,277.50	62.50	\$5,230.00	56.00	\$4,747.50	608.00	\$42,060.00
Mgt. App. Consulting	1. Paul Normand	192.00	\$37,440.00	4.00	\$780.00	34.00	\$6,630.00	12.00	\$2,340.00	31.00	\$6,045.00	273.00	\$53,235.00
	2. James Harrison	28.75	\$5,606.25					1.00	\$195.00			29.75	\$5,801.25
	3. Debbie Gajewski	141.00	\$25,380.00	4.00	\$720.00	18.00	\$3,240.00	9.50	\$1,710.00	1.00	\$180.00	173.50	\$31,230.00
	4. Michael Morganti	47.00	\$8,460.00									47.00	\$8,460.00
	5. Michael Normand	56.50	\$4,520.00									56.50	\$4,520.00
Total for Management Applications Consulting		465.25	\$81,406.25	8.00	\$1,500.00	52.00	\$9,870.00	22.50	\$4,245.00	32.00	\$6,225.00	579.75	\$103,246.25

Summary of Hourly Fees by Provider by Activity Time Frame (Disbursements are excluded)

		Application		Discovery		Rebuttal		Hearing		Post-Hearing		Total	
		July 2009 - Dec 2009		Jan 2010 - May 2010		Jun 2010 - July 2010		Aug 2010		Sept, Oct, Nov 2010		By Attorney/Consultant	
		Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges
NextSource Inc.	1. Chris Davidson	415.25	\$29,619.88	215.00	\$16,067.90	316.50	\$25,666.13	185.75	\$15,289.13	87.25	\$6,987.75	1,219.75	\$93,630.77
	2. Melissa McEachron	11.90	\$321.66	294.25	\$8,105.89	109.50	\$3,083.65	22.00	\$618.20	101.25	\$2,919.03	538.90	\$15,048.43
	3. Chris Giles	270.00	\$67,500.00	243.00	\$60,750.00	284.00	\$71,000.00	208.50	\$52,125.00	85.00	\$21,250.00	1,090.50	\$272,625.00
	4. Forrest Archibald	61.00	\$6,832.00	45.25	\$5,068.00							106.25	\$11,900.00
	5. Marty Jenson	93.75	\$3,263.87	61.00	\$2,136.03	17.50	\$601.65	51.50	\$1,770.57	11.00	\$378.18	234.75	\$8,150.29
	6. Catherine Schubert	4.75	\$117.34									4.75	\$117.34
	7. Alan Yee	21.25	\$1,880.63	11.25	\$995.63	8.00	\$723.60					40.50	\$3,599.85
	8. Kelly Bradfield	3.00	\$152.10							0.25	\$12.49	3.25	\$164.59
	9. George Mislavovich	21.50	\$2,046.80	1.50	\$145.80							23.00	\$2,192.60
	10. Donald Wilker	8.25	\$730.13	19.99	\$1,769.12							28.24	\$2,499.24
	11. Meagan Bange	13.00	\$710.58	11.50	\$664.04	29.00	\$1,636.38					53.50	\$3,011.00
	12. Michelle Young	14.75	\$591.50	12.00	\$482.12							26.75	\$1,073.62
	13. Chris Stainaker	25.49	\$881.70	30.74	\$1,076.27							56.23	\$1,957.97
	14. Denise Williams			0.25	\$10.50							0.25	\$10.50
Total for NextSource		963.89	\$114,648.16	945.73	\$97,271.28	764.50	\$102,711.40	467.75	\$69,802.90	284.75	\$31,547.45	3,426.62	\$415,981.19
Pegasus Global Holdings	1. K. Nielsen	327.56	\$96,630.20	127.79	\$37,699.23	297.80	\$87,851.00	160.00	\$47,200.00	62.50	\$18,437.50	975.65	\$287,817.93
	2. P. Galloway	249.58	\$73,626.10	26.88	\$7,929.01	190.60	\$56,227.00	106.90	\$31,535.50			573.96	\$169,317.61
	3. J. Dignum	405.25	\$119,548.75	142.77	\$42,116.27	317.85	\$93,765.75	267.50	\$78,912.50	9.00	\$2,655.00	1,142.37	\$336,998.27
	4. G. Tucker	41.54	\$12,254.30	7.98	\$2,353.51	90.90	\$26,815.50	65.50	\$19,322.50	16.60	\$4,897.00	222.52	\$65,642.81
	5. J. Owen	120.30	\$35,488.50	33.94	\$10,012.30	89.00	\$26,255.00					243.24	\$71,755.80
	6. B. Pearson	61.00	\$9,150.00	3.19	\$478.50	195.50	\$29,325.00	21.95	\$3,292.50			281.64	\$42,246.00
	7. J. Black	90.50	\$13,575.00	32.60	\$4,890.00	159.50	\$23,925.00					282.60	\$42,390.00
	8. C. Kennedy					107.00	\$16,050.00					107.00	\$16,050.00
	9. K. Williams					9.50	\$1,425.00					9.50	\$1,425.00
Total for Pegasus Global Holdings		1,295.73	\$360,272.85	375.15	\$105,478.82	1,457.65	\$361,639.25	621.85	\$180,263.00	88.10	\$25,989.50	3,838.48	\$1,033,643.42
Siemens Energy	1. Edrissa Cham	108.00	\$4,725.00									108.00	\$4,725.00
	2. Octavio Guterrez	137.00	\$7,706.25									137.00	\$7,706.25
	3. Subcontractor Labor	124	\$7,595.00									124.00	\$7,595.00
Total of Siemens		369.00	\$20,026.25									369.00	\$20,026.25
Towers Watson	1. Ken Vogel					4.5	\$2,812.50	10	\$6,250.00	2	\$1,300.00	16.50	\$10,362.50
	2. Jason Benbow					11	\$5,115.00	3	\$1,395.00	3.5	\$1,785.00	17.50	\$8,295.00
	Total for Towers Watson					15.5	\$7,927.50	\$13.00	\$7,645.00	\$5.50	\$3,085.00	\$34.00	\$18,657.50
Total for Consultants		3,960.87	\$664,384.85	1,458.88	\$219,738.94	2,516.90	\$530,842.74	1,283.60	\$299,340.90	525.60	\$92,478.20	9,745.85	\$1,806,785.63

Docket No. 10-KCPE-415-RTS

Rate Case Expense

Summary of Hourly Fees by Provider by Activity Time Frame (Disbursements are excluded)

	Application July 2009 - Dec 2009		Discovery Jan 2010 - May 2010		Rebuttal Jun 2010 - July 2010		Hearing Aug 2010		Post-Hearing Sept, Oct, Nov 2010		Total By Attorney/Consultant	
	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges	Hours	Charges
TOTAL FOR LEGAL SERVICES	2,757.31	\$905,713.95	1,866.96	\$498,780.08	5,783.75	\$1,766,308.50	3,475.90	\$1,158,163.85	2,523.95	\$813,020.50	16,407.02	\$5,141,986.88
TOTAL FOR CONSULTANTS	3,960.87	\$664,384.85	1,458.88	\$219,738.94	2,516.90	\$530,842.74	1,283.60	\$299,340.90	525.60	\$92,478.20	9,745.85	\$1,806,785.63
GRAND TOTAL	6,718.18	\$1,570,098.80	3,325.84	\$718,519.02	8,300.65	\$2,297,151.24	4,759.50	\$1,457,504.75	3,049.55	\$905,498.70	26,152.87	\$6,948,772.50

Source: Rate Case Proceeding Direct Testimony of John P. Weisensee dated May 6, 2011. Schedules JPW2010-11 through JPW2010-25

CERTIFICATE OF SERVICE

JAN 18 2012

10-KCPE-415-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Order on Rate Case Expense was served by electronic mail this 18th day of January, 2012, to the following parties who have waived receipt of follow-up hard copies:

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CERTIFICATE OF SERVICE

JAN 18 2012

10-KCPE-415-RTS

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CERTIFICATE OF SERVICE

JAN 18 2012

10-KCPE-415-RTS

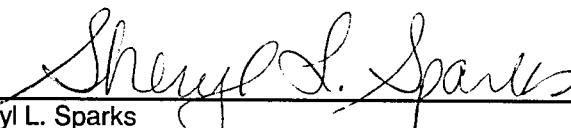
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