

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of Mid-Kansas )  
Electric Company, LLC for Approval to Make ) Docket No. 12-MKEE-410-RTS  
Certain Changes in its Charges for Electric )  
Services in the Geographic Service Territory )  
Served by Lane Scott Electric Cooperative, Inc. )

Received  
on

JAN 17 2013

by  
State Corporation Commission  
of Kansas

**CURB'S REPLY TO MKEC AND STAFF RESPONSES  
TO CURB'S MOTION TO ALLOW ADDITIONAL  
LIVE DIRECT EXAMINATION AND TESTIMONY TO  
ADDRESS PROPOSED SETTLEMENT AGREEMENT AND  
TESTIMONY IN SUPPORT OF SETTLEMENT AGREEMENT**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files this reply to MKEC and Staff Responses to CURB's motion to allow additional live direct examination and testimony to address the proposed settlement agreement and testimony in support of the proposed settlement agreement filed by MKEC and Staff on the afternoon of January 14, 2013. In support of its reply, CURB states as follows:

1. Preliminarily, one wonders what MKEC and Staff are afraid of with respect to the prospect of live direct testimony at the January 22-23 evidentiary hearing. CURB would expect Commissioners to ask CURB's witnesses why CURB opposes the settlement even in the absence of additional direct testimony on the issue. In that event, MKEC and Staff will be in no different position than if the witnesses gave this testimony on direct. Just because pre-filed testimony is customarily filed does not mean it is a right that every party can insist upon, and Staff has supported additional live direct testimony in prior cases.<sup>1</sup>

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<sup>1</sup> Staff supported the opportunity for parties to file additional live direct testimony in the KCPL rate case cited in CURB's

## I. REPLY TO MKEC RESPONSE

2.. In paragraph 4 of MKEC's Response, MKEC implies that the ten day requirement under K.A.R. 82-1-230a(c) for parties to file a written objection to a proposed non-unanimous settlement was the issue debated during the Prehearing Conference, and misrepresents that MKEC requested (and Staff joined the request) that CURB be required to file its written objection on January 17, 2013. To the contrary, the ten day filing requirement for written objections to proposed non-unanimous settlements under K.A.R. 82-1-230a(c) was not the issue debated by the parties before or during the Prehearing Conference. Counsel for CURB did not object to a requirement to file its written objection, since neither MKEC nor Staff requested that CURB file a written objection earlier was made or discussed at the Prehearing Conference. In fact, voluntarily CURB filed the written objection required under K.A.R. 82-1-230a(c) the day of the Prehearing Conference, one day after the proposed settlement agreement was filed and served.

3. What *was* discussed during the Prehearing Conference was whether CURB is required, or should be required, to file pre-filed testimony in opposition to the settlement.<sup>2</sup> CURB *did* object, and continues to object, to the request to file pre-filed testimony prior to the hearing, on the grounds: (1) it was not required by the September 19, 2012, Order Setting Procedural Schedule; (2) the proposed settlement agreement and testimony and support was not filed or served on CURB until the afternoon of January 14, 2013; (3) CURB's witnesses are unavailable to prepare and pre-file the requested testimony prior to the hearing; (4) the Commission has previously granted additional

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Motion. See, Staff Response and Motion in Support of CURB's Motion to Allow Additional Live Direct Examination to Address KCPL's New Rate Design Proposal, or in the Alternative, Strike Portions of the Rebuttal Testimony of KCPL Witness Tim Rush and Motion for Expedited Treatment, August 3, 2010, KCC Docket No. 10-KCPE-415-RTS.

<sup>2</sup> Transcript of Proceedings, January 15, 2013, p. 37, lines 7-8: "Ms. Pemberton: We have the issue of whether or not CURB is going to be filing any kind of responsive testimony."

direct examination and testimony in at least one prior docket in similar circumstances; and (5) nothing in the Commission's regulations prohibit additional live examination and testimony even when pre-filed testimony is allowed under K.A.R. 82-1-229.<sup>3</sup>

4. In paragraph 5 of MKEC's Response, MKEC erroneously states that CURB filed CURB's Motion to Allow Additional Live Direct Examination and Testimony ("CURB's Motion") on the afternoon of January 17<sup>th</sup>. CURB's Motion was actually filed on the afternoon of January 15<sup>th</sup>, contemporaneously with the filing of CURB's List of Contested Issues and CURB's written Notice of Objection to Settlement Agreement. The record will reflect that CURB also voluntarily filed its written Notice of Objection to Settlement Agreement the day of the Prehearing Conference on January 15<sup>th</sup>, *one day after* the proposed Settlement Agreement was filed and served on CURB and eight days prior to the date required by K.A.R. 82-1-230a(c).

5. CURB has fully complied with the September 19, 2012, Order Setting Procedural Schedule and voluntarily filed the written objection required by K.A.R. 82-1-230a(c) the day after the proposed Settlement Agreement was filed and eight days earlier than required. Pre-filed testimony in opposition to a proposed non-unanimous settlement agreement was not required or contemplated by the parties or the procedural schedule. CURB's witnesses are not available to pre-file the requested testimony in the unreasonable time frame demanded by MKEC and Staff, and the Commission has previously granted additional direct examination and testimony in prior dockets.<sup>4</sup>

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<sup>3</sup> CURB's Motion to Allow Additional Live Direct Examination and Testimony to Address Proposed Settlement Agreement and Testimony in Support of Settlement Agreement, pp. 1-3. *See also*, Order Denying Request To Strike Rebuttal Testimony Of KCPL Witness Tim Rush But Granting Additional Direct Examination Limited To KCPL's Alternative Rate Design Proposal, August 9, 2010, KCC Docket No. 10-KCPE-415-RTS.

<sup>4</sup> *See*, Order Denying Request To Strike Rebuttal Testimony Of KCPL Witness Tim Rush But Granting Additional Direct Examination Limited To KCPL's Alternative Rate Design Proposal, August 9, 2010, KCC Docket No. 10-KCPE-415-RTS.

## II. REPLY TO STAFF RESPONSE

6. Staff argues in paragraph 6 of Staff's Response that it is "fundamentally unfair to wait until January 15, 2013, four (4) business days prior to the evidentiary hearing, to inform the other parties and the Commission that the witnesses would be unavailable to provide pre-filed testimony on the settlement agreement." What Staff fails to acknowledge is that neither the September 19, 2012, Order Setting Procedural Schedule nor K.A.R. 82-1-230a(c) require or contemplate the filing of pre-filed testimony in opposition to a proposed non-unanimous settlement agreement. As a result, CURB didn't have any reason to notify the parties or the Commission that our witnesses were unavailable to pre-file testimony in opposition.

7. What is fundamentally unfair is for Staff and MKEC to expect CURB to anticipate Staff and MKEC's unreasonable assumption that CURB is required to file testimony in opposition to the proposed settlement agreement, a requirement that isn't in the Order Setting Procedural Schedule or in the Commission regulation regarding objections to non-unanimous settlements. If Staff or MKEC wished to have CURB file testimony in opposition to the proposed settlement agreement, they should have contacted counsel for CURB long before the January 15, 2013 Prehearing Conference to request this deviation from both the Order Setting Procedural Schedule and K.A.R. 82-1-230a(c), to allow CURB a reasonable opportunity to accommodate such a request.

8. Staff and MKEC failed to seek such an accommodation in a timely manner, yet now claim CURB is being unreasonable despite the fact CURB's witness is unavailable to accommodate their untimely request. It is Staff and MKEC that are being unreasonable, not CURB. It is CURB that would be prejudiced by a last-minute order to pre-file testimony, now just one business day prior to the evidentiary hearing.

9. Staff misleadingly argues that “CURB has had an opportunity to prefile direct testimony in opposition to the Settlement Agreement and testimony in support.” To the contrary, neither the Order Setting Procedural Schedule nor K.A.R. 82-1-230a(c) required or contemplated pre-filed testimony in opposition to a non-unanimous settlement agreement. In fact, Commission practice has been to require parties to file a motion for leave to file testimony that was not contemplated by scheduling orders.

10. Staff next takes the unreasonable and disingenuous position that CURB should be forced to have its capital structure and cost of capital witness, Mr. Benjamin Cotton, provide the requested testimony in opposition to the proposed settlement agreement. First, as Staff well knows, this is Mr. Cotton’s first testimony in a regulatory proceeding and Andrea Crane is CURB’s principle witness.<sup>5</sup> Second, Mr. Cotton addressed only capital structure and cost of capital issues in the nine pages of his testimony.<sup>6</sup> It isn’t difficult to imagine how Staff would react if three of its four witnesses were unavailable and CURB insisted on additional pre-filed testimony from a Staff witness, such as Mr. Adam Gatewood, on issues well beyond the witness’s area of expertise and experience.

11. Finally, Staff argues CURB’s motion should be denied because it was filed after the prehearing motions cutoff. This argument is likewise disingenuous. First, both Staff and MKEC made oral motions at the January 15, 2013, prehearing conference, also after the January 14, 2013, prehearing motion cutoff. Second, Staff fails to acknowledge that CURB’s motion relates to a proposed settlement agreement and testimony in support of the settlement agreement that was filed

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<sup>5</sup> Direct Testimony of Benjamin Cotton, p. 2, November 30, 2012.

<sup>6</sup> *Id.*

and received by CURB less than one hour prior to the January 14, 2013, 3:00 p.m. prehearing motion cutoff. CURB filed its Motion the very next day, on January 15, 2013.

12. Finally, Staff seems to believe the fact that CURB filed testimony in opposition to a settlement in one prior case is legal justification to require CURB to file such testimony in this docket.<sup>7</sup> First, as pointed out above, neither the Order Setting Procedural Schedule nor K.A.R. 82-1-230a(c) requires or contemplates the filing of testimony in opposition. Second, CURB voluntarily<sup>8</sup> agreed to pre-file the testimony in opposition in the Westar case because, as Staff points out,<sup>9</sup> the issues and amount of the rate increase in the Westar rate case were substantially more complex<sup>10</sup> than the issues involved here and CURB believed the testimony would be helpful in clarifying the issues. Moreover, CURB's witness was available to prepare the pre-filed testimony in opposition in the Westar case, a fact not present here. CURB's witness is not available to prepare the testimony in this case, and the Commission has allowed and Staff has supported additional live direct testimony in prior cases. Staff's argument is therefore without merit.

13. Staff's final argument, requesting that CURB be required to pre-file testimony in opposition to the proposed settlement prior to the January 22-23, 2013 evidentiary hearing, should be denied. Neither the Order Setting Procedural Schedule nor K.A.R. 82-1-230a(c) require or contemplate the filing of testimony in opposition. It is unreasonable to require CURB to prepare and pre-file testimony in opposition to the proposed settlement when CURB was not given reasonable

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<sup>7</sup> Staff Response, pp. 5-7.

<sup>8</sup> Staff Response, ¶ 25.

<sup>9</sup> Staff Response, ¶ 22-23.

<sup>10</sup> Staff Response, ¶ 23 (“...the Westar Rate Case dwarfed the Lane-Scott rate case in scope on multiple levels”) (emphasis added).

advance notice it would be required by the Commission. One business day is not reasonable advance notice.

### III. CONCLUSION

WHEREFORE, CURB respectfully requests that the Commission grant CURB's motion to allow additional live direct examination and testimony at the evidentiary hearing to address the proposed settlement agreement and testimony in support of the proposed settlement agreement filed by MKEC and Staff on the afternoon of January 14, 2013.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

12-MKEE-410-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service this 17<sup>th</sup> day of January, 2013, to the following parties who have waived receipt of follow-up hard copies:

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