

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 25 2013

CURB PREHEARING BRIEF

by
State Corporation Commission
of Kansas

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files this brief pursuant to the Commission's January 17, 2013, Order on CURB's January 15, 2013 Motions and Mid-Kansas' and Staff's Oral and Written Responses and Order Requesting Briefs ("January 17th Order").

In support of its brief, CURB states as follows:

1. In the Commission's January 17th Order, the Commission requested the parties to prepare legal briefs on the following: "What party, parties or interests does CURB represent in this docket other than those already represented by the member-owned cooperative and Staff?"

2. This is the second occasion in recent years that the authority of CURB to represent residential and small commercial ratepayers in rate cases before the Commission has been questioned; although this is the first occasion CURB has had the opportunity to respond. Curiously, the prior occasion questioned both the failure of MKEC to seek deregulation and the interests represented by both Staff and CURB:

1. Why would Mid-Kansas, LLC's management voluntarily choose not to exempt itself from regulation when the alternative is a very expensive, protracted rate proceeding, paid for by its members and their customers?
2. What independent interest does the staff of the Kansas Corporation Commission or CURB represent if Mid-Kansas, LLC, represents the interests of its members and consumers, and this, why did Staff or CURB pursue this case. Said differently, how did the public benefit from Staff or CURB's expenditures and participation in this case.¹

¹ Order Approving Stipulation and Agreement, Chairman Sievers Concurring Opinion, pp. 2-3, June 30, 2011, KCC Docket No. 10-KCPE-415-RTS.

3. The Commission's January 17th Order abandons the query by Chairman Sievers about why MKEC has not sought deregulation, and what party, parties or interests does *Staff* represent in this docket other than those already represented by the member-owned cooperative. The Commission appears to have concluded that Staff's authority to represent the interest of residential/small business ratepayers is greater than or duplicative of CURB's. CURB respectfully but emphatically disagrees with this erroneous conclusion - as demonstrated below.

4. CURB is the statutory "*official intervenor*" in proceedings before the Commission under Kansas statutes, a fact recognized by the Kansas Supreme Court.² Specifically, CURB has been given the specific statutory right to "represent residential and small commercial ratepayers before the state corporation commission" and to "function as an *official intervenor* in cases filed with the state corporation commission, including rate increase requests."³ CURB is further given the specific statutory right to seek judicial review of Commission orders and decisions.⁴

5. Staff's authority, on the other hand, is not specifically authorized by statute. In fact, the only reference CURB could locate regarding Staff's authority to represent the general public is in definition section of Commission regulations,⁵ which states, "Technical staff may conduct investigations and otherwise evaluate issues raised, and may testify and offer exhibits on behalf of the general public." Staff's interpretation of the "general public" has generally been that it includes the interests of the utility (shareholders) and all classes of rate payers. However, this interpretation is contrary to generally accepted definitions of the term "general public," which include:

² K.S.A. 66-1223(b). See, *Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 24 Kan. App.2d 63, 68, rev. den. 262 Kan. 959 (1997) ("*CURB v. KCC*"). See also, *Farmland Industries, Inc. v. Kansas Corp. Comm'n*, 29 Kan.App.2d 1031, 1047-48, 37 P.3d 640 (2001) ("The bulk of current customers otherwise entitled to receive refunds are *statutorily represented* by CURB. See K.S.A. 66-1223(a)")

³ K.S.A. 66-1223(a) and (b) (emphasis added).

⁴ K.S.A. 66-1223(f).

⁵ K.A.R. 82-1-204(q).

- ordinary people, especially all the people who are not members of a particular organization or who do not have any special type of knowledge⁶
- ordinary people who are not members of a particular group or organization⁷
- the people in a society; people in general⁸
- ordinary people in society, rather than people who are considered to be important or who belong to a particular group⁹
- the ordinary people in a country, rather than people belonging to a particular group¹⁰

6. While CURB is specifically granted the right by statute to appeal Commission orders or decisions, Staff is specifically denied the right to appeal Commission orders. K.A.R. 82-1-204(i)(3). Staff's authority is therefore incomplete and inferior to CURB's statutory authority.

7. CURB has been granted broader and specific statutory authority with the right to appeal, while Staff's authority is incidental, general and incomplete. Statutes related to a specific thing take precedence over general statutes which deal only incidentally with the same subject.¹¹

8. Furthermore, CURB's authorizing statute, K.S.A. 66-1223, was passed in 1989, long after the enactment of K.A.R. 82-1-204(q). It is presumed that the legislature does not intend to enact useless or meaningless legislation.¹² The Legislature is therefore presumed to have intended CURB to represent the interests of residential/small business ratepayers, not Staff.

9. In addition, Staff testimony on how Staff represents the general public has been vague and subjective in prior cases. Specifically, Jeff McClanahan - the current Utilities Division Director,

⁶ Cambridge Business English Dictionary, Cambridge University Press), <http://dictionary.cambridge.org/dictionary/business-english/the-general-public?q=general+public>.

⁷ Oxford Advanced Learner's Dictionary, <http://oald8.oxfordlearnersdictionaries.com/dictionary/general-public>.

⁸ Collins English Dictionary. <http://www.collinsdictionary.com/dictionary/english/general-public?showCookiePolicy=true>.

⁹ Macmillan online English dictionary, Macmillan Publishers Limited, <http://www.macmillandictionary.com/dictionary/british/the-general-public>.

¹⁰ Longman Dictionary of Contemporary English Advanced Learner's Dictionary, <http://www.ldoceonline.com/dictionary/general-public>.

¹¹ *Chelsea Plaza Homes, Inc. v. Moore*, 26 Kan. 430, 432, 601 P.2d 1100 (1979); *Cochran v. State, Dept. of Agriculture, Div. of Water Resources*, 291 Kan. 898, 907, 249 P.3d 434 (2011).

¹² *State v. Edwards*, ___ Kan. App. 2d ___, 288 P.3d 494, 503 (2012); *State v. Sedillos*, 279 Kan. 777, 782, 112 P.3d 854 (2005); *In re M.R.*, 272 Kan. 1335, 1342, 38 P.3d 694 (2002); *KPERS v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, 643, 941 P.2d 1321 (1997).

testified recently that Staff works on behalf of the Commission and the public generally.¹³ In determining whether a rate increase request or settlement constitutes an excessive burden on ratepayers or is in the “public interest,” Mr. McClanahan indicated Staff has no standard or policy guiding them, but uses what it considers a much simpler guide – “just what is fair.”¹⁴

10. By “balancing” or “weighing” the interests of the Commission, utility/shareholders, and all ratepayer groups (residential, small and large commercial, school districts, municipals, etc.) regarding what it considers “fair,” Staff purportedly attempts to represent, consider, and weigh the interests of parties whose interests are, more often than not, adverse to each other. In making its recommendations, CURB does not have this inherent conflict of interest¹⁵ but instead represents only the interests of residential/small business ratepayers *as mandated by statute*.

11. MKEC is the certificated utility/party in this rate case. While MKEC only filed this rate increase with respect to the Lane Scott Division certified territory, MKEC serves more than 200,000 customers,¹⁶ so K.S.A. 66-1224 is inapplicable. MKEC does not represent the interests of Lane Scott ratepayers but rather the interests of its five cooperative and one corporation utilities.¹⁷ MKEC remains a regulated utility and until it seeks and obtains deregulation, CURB is the *only* party *statutorily authorized* to represent its residential/small business customers.

12. The Lane Scott division is not a certificated utility, did not file this case, and is not a party in this case. Further, substantial questions exist about whether the Lane Scott Division

¹³ Transcript of Proceedings, Vol. 1, February 13, 2012, p. 208, KCC. Docket No. 12-WSEE-112-RTS.

¹⁴ *Id.*, pp. 208-212.

¹⁵ Conflict of interest concerns gave rise to ethics rules that generally prohibit attorneys from representing parties with adverse interests. Further, when representing multiple clients, lawyers are prohibited from participating in making an aggregate settlement of the claims or against a client without client consent, and confidentiality rules prevent attorneys from revealing information related to the representation without client consent which is difficult with multiple clients with adverse interests. *See*, KRPC 1.7, 1.8(g).

¹⁶ Joint Application, p. 3, ¶ 1, January 7, 2013, KCC Docket No. 13-MKEE-447-MIS.

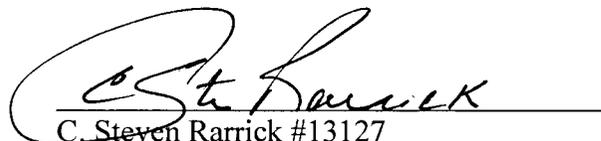
¹⁷ Direct Testimony of Stuart Lowry, p. 2; Direct Testimony of Andrea Crane, pp. 4-5.

customers¹⁸ are fairly and adequately represented by the Board of Lane Scott Electric Cooperative, Inc. ("Parent Company"), which owns the native system and the Lane Scott Division assets. The Parent Company failed to add additional board members after acquiring the Aquila territory, even though the Aquila customers more than doubled their membership. Unlike CURB, the Parent Company has to weigh any decisions it makes regarding the Lane Scott Division residential/small business ratepayers against the native Lane Scott customers and other unregulated business enterprises operated by the Parent Company.

13. CURB is the official statutory intervenor designated by the Kansas Legislature to represent the interests of residential/small business ratepayers, not Commission Staff or MKEC. Both the Kansas Supreme Court and the U.S. Supreme Court have recognized that unless consumer interests are protected, rates cannot be determined to be just and reasonable.¹⁹

WHEREFORE, CURB respectfully submits CURB is the "official" statutory intervenor, representing the interests of residential/small commercial ratepayers pursuant to K.S.A. 66-1223.

Respectfully submitted,



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¹⁸ "Rates are an issue because cooperative members want low rates like everyone else." Direct Testimony of Stuart Lowry, p. 4.

¹⁹ *Kansas Gas and Electric Co. v. State Corp. Comm'n*, 239 Kan. 483, 490, 720 P.2d 1063 (1986), citing *FPC v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 474, 36 L.Ed.2d 426, 93 S.Ct. 1723 (1973).

VERIFICATION

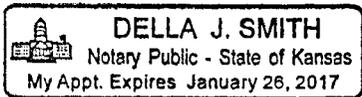
STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

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

That he is an attorney for the above named petitioner; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.


C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 25th day of January, 2013.




Notary Public

My Commission expires: 01-26-2017.

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 25th day of January, 2013, to the following parties who have waived receipt of follow-up hard copies:

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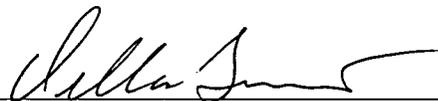
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