

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Joint Application of Mid-)
Kansas Electric Company, LLC, Lane-Scott) Docket No. 13-MKEE-447-MIS
Electric Cooperative, Inc., Prairie Land Electric)
Cooperative, Inc., Southern Pioneer Electric)
Company, Victory Electric Cooperative)
Association, Inc., Western Cooperative Electric)
Association, Inc., and Wheatland Electric)
Cooperative, Inc., Joint Applicants, for an)
Order Approving the Transfer of Certificates of)
Convenience With Respect to All of Mid-)
Kansas' Retail Electric Services and for Other)
Related Relief.)

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CURB BRIEF ON JURISDICTION AND STANDING

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COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), and files this brief pursuant to the Commission's February 14, 2013, Order Setting Procedural Schedule. In support of its brief, CURB states as follows.

I. INTRODUCTION

1. CURB is the statutory "*official intervenor*" in proceedings before the Commission under Kansas statutes, a fact recognized by the Kansas Supreme Court.¹ 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

¹ 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)")

the state corporation commission.”² CURB is further given the specific statutory right to seek judicial review of Commission orders and decisions.³

2. Staff’s authority to represent the general public, on the other hand, is not specifically authorized by statute, but merely referenced in the definition section of Commission regulations.⁴ Any authority Staff may have to represent residential and small commercial ratepayers is also limited in scope, as Staff is expressly denied the right to appeal Commission orders on behalf of the general public.⁵

3. Further, Staff does not represent the interests of residential and small commercial ratepayers, but merely balances those interests with a myriad of other general public interests, including the interests of the Commission, the utility, and other ratepayer groups. Staff’s interpretation of the general public it represents has generally been that it includes the interests of the utility (shareholders) and all classes of ratepayers. Staff testimony on how Staff represents the general public has been vague and subjective.⁶ Certainly, if Staff is “balancing” or “weighing” the interests of the general public regarding what it considers “fair” in making its recommendations, it must necessarily consider the interests of other entities⁷ whose interests are often adverse to the interests of residential and small business ratepayers. CURB does not have this inherent conflict of

² K.S.A. 66-1223(a) and (b).

³ K.S.A. 66-1223(f).

⁴ K.A.R. 82-1-204(q) (“Technical staff may conduct investigations and otherwise evaluate issues raised, and may testify and offer exhibits on behalf of the *general public*.”).

⁵ K.A.R. 82-1-204(i)(3).

⁶ Jeff McClanahan, KCC Utilities Division Director, testified recently that in determining whether a rate increase request or settlement constitutes an excessive burden on ratepayers or is in the “public interest,” Staff has no standard or policy guiding them but uses what it considers a simpler guide – “just what is fair.” Transcript of Proceedings, Vol. 1, February 13, 2012, p. 208-212, KCC. Docket No. 12-WSEE-112-RTS.

⁷ The Commission, and various customers groups such as large commercial, school districts, municipals, irrigation, etc.

interest⁸ but instead represents only the interests of residential/small business ratepayers as mandated by statute.

4. On January 16, 2013, CURB filed its petition to intervene.⁹ On January 17, 2013, CURB's intervention was granted, with the Order finding and concluding that CURB met the requirements of K.A.R. 82-1-225 (petition to intervene stated facts demonstrating its legal rights, duties, privileges, immunities or other legal interests that may be substantially affected by the proceeding) and should be granted intervention.¹⁰ Parties were given fifteen (15) days to petition the Commission for reconsideration.¹¹ To date, no party has filed a petition for reconsideration of the Order granting CURB's intervention.

5. Based on the above, no party other than CURB represents the interests of residential and small commercial ratepayers, including the right to appeal, in this docket. CURB's intervention was properly granted on January 17, 2013, because the requests contained in the Joint Application will or may affect the rates, service received, and rights of the residential and small commercial ratepayers represented by CURB.

II. BACKGROUND

6. On January 7, 2013, Mid Kansas Electric Company, LLC ("MKEC") and its six owners, Prairie Land Electric Cooperative, Inc. ("Prairie Land"), Victory Electric Cooperative Association, Inc. ("Victory"), Western Cooperative Electric Association, Inc. ("Western"), Lane-

⁸ 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).

⁹ CURB Petition to Intervene, January 16, 2013.

¹⁰ Prehearing Officer Order Granting Intervention to Citizens' Utility Ratepayer Board, ¶ 4, p. 4.

¹¹ *Id.*, p. 4.

Scott Electric Cooperative, Inc. ("Lane-Scott"), Wheatland Electric Cooperative, Inc. ("Wheatland"), and Southern Pioneer Electric Company ("Southern") (collectively, "Joint Applicants"), filed a Joint Application seeking an order approving the transfers of certificates of convenience and necessity for MKEC's local distribution system and retail electric services currently serving over 68,000 customers¹² formerly served by Aquila West Plains Kansas ("WPK") electric utility business and operations to its six owners.

7. Specifically, the Joint Applicants seek approval by the Commission of seven issues related to the spin down of the certificate of convenience and necessity for MKEC's retail electric business:

(i) approving the transfer of Mid-Kansas' Certificate(s) of Convenience and Necessity to its Members with respect to all of its local distribution system and retail electric utility services and operations in the State of Kansas, with Mid-Kansas retaining its certificate as to its generation and transmission assets and services, and its certificated right to provide transmission services in its currently designated retail certificated territory, and a finding the transfers of the Certificate(s) are in the public interest and approving the same;

(ii) if required, approving a Wholesale Requirements Agreement;

(iii) approving adoption by the Members of all applicable retail rates, rules, and tariffs with respect to the local distribution and retail electric utility services necessary to operations;

(iv) approving the Shared Service Agreement, as supplemented, and, to the extent required, approving the Settlement Agreement, as supplemented;

(v) approving and finding that the terms of the wholesale services and rates provided by Kansas Electric Power Cooperative, Inc. ("KEPCo") for the Victory and Prairie Land load in the to be acquired territory be the same as the terms of the currently approved wholesale services and rates provided by Mid-Kansas, as may be modified by Mid-Kansas from time to time, and that the Commission make such finding and order prior to the transfer of the Certificates of Convenience to Victory and Prairie Land; provided further, should KEPCo elect in the future to set terms of wholesale service and rates for Victory and Prairie Land that differ from the approved Mid-Kansas wholesale terms of service and rates, ordering that the wholesale terms of service and rates can be modified only after approval by the Commission;

¹² Joint Application, ¶ 1; Joint Application, November 16, 2005, ¶¶ 2, 14, KCC Docket No. 06-MKEE-524-ACQ.

(vi) if required, approving the assignment of the Wholesale Requirements Agreement by and among Mid-Kansas, the Members, KEPCo and Sunflower Electric Power Corporation ("Sunflower"), as applicable;

(vii) determining the process necessary for the Member cooperatives to become or remain exempt from Commission regulation pursuant to K.S.A. 66-104d after the transfer of the Certificate of Convenience, and modifying the Commission's Order in Docket No. 06-MKEE-524-ACQ as necessary to reflect such determination.¹³

8. CURB, the Western Kansas Industrial Electric Consumers ("WKIEC"), and Kansas Electric Power Cooperative ("KEPCo") have all petitioned for and been granted intervention.

9. MKEC was created to purchase the assets, certificate of convenience and necessity, franchises, and service territory of WPK in 2005.¹⁴ The owners of MKEC are five cooperatives and one corporation.¹⁵ In KCC Docket No. 06-MKEE-524-ACQ ("524 docket"), MKEC sought approval of the acquisition and transfer of the certificate of convenience and necessity, franchises, and service territory from WPK to MKEC.¹⁶

10. MKEC, through a contract with its six owners, provides *retail electric service* to over 68,000 customers.¹⁷ All of these customers either are or will become members of the six MKEC member owners, with the exception of Southern Pioneer, a corporation.

11. The WPK certificate of convenience and necessity was transferred to MKEC in all WPK Kansas service territories in the Commission's Order Adopting Stipulation and Agreement ("524 Order") in the 524 Docket on February 23, 2007.¹⁸

¹³ Application, ¶¶ 16-47; Order Setting Procedural Schedule, ¶ 4.

¹⁴ Joint Application, November 16, 2005, ¶ 1, KCC Docket No. 06-MKEE-524-ACQ.

¹⁵ Joint Application, ¶¶ 1-2.

¹⁶ Joint Application, ¶¶ 7-9; Joint Application, November 16, 2005, pp. 1, 6-7, 10-11, KCC Docket No. 06-MKEE-524-ACQ.

¹⁷ Joint Application, ¶ 1; Joint Application, November 16, 2005, ¶¶ 2, 14, KCC Docket No. 06-MKEE-524-ACQ.

¹⁸ Joint Application, ¶¶ 7-9; Order Adopting Stipulation and Agreement, February 23, 2007, ¶ 14.

12. The Commission appears to be generally focused on the notion that electric cooperatives are member owned and that members vote and control the cooperative. The Commission appears to equate this voting with a reduced need for oversight of member-owned cooperatives. In the current case, CURB believes that a review of the broader background that led up to this case may be helpful. The customers at issue in the current case have been through several transactions, paid large acquisition premiums, lost valuable assets and are now facing a future of higher rates, and at no point in this process were these customers afforded the opportunity to vote on these transactions affecting their electric service. The case today is not the result of member voting and self determination. The case today is the result of a regulatory process and regulatory decisions that did anything *but* ask customers what they thought was in their best interest.

13. In 22 years, the retail customers of MKEC have been sold twice for a total acquisition payment of over \$100 million. MKEC customers, having never had a say in whether they should be sold, are now paying millions of dollars of acquisition costs in rates. MKEC customers also lost, in its entirety, an 8% ownership interest in the Jeffery Energy Center (JEC), an extremely valuable asset. Now, MKEC customers are being asked to pay higher rates as MKEC, through its members, has to make material upgrades on the electric system it purchased at a premium price. MKEC distribution members have uniformly asserted that the WPK system it purchased for a \$45 million acquisition premium was not well maintained and is now falling apart.

14. At no point were MKEC retail customers asked their opinion about paying millions of dollars in acquisition premiums in rates, simply because their utility and the purchasing utility agreed to buy/sell assets at a premium price. At no point were MKEC customers asked if they thought losing ownership in the JEC plant was a good idea. Worse, at the end of the lease, MKEC is going to have

to increase customer rates again to buy another power plant to replace the JEC plant. Finally, at no point were MKEC customers asked if they were interested in paying higher rates to rebuild an electrical system that MKEC members mistakenly thought was worth \$45 million more than book value. In fact, none of the people that actually made these decisions and actually voted on these acquisitions is paying higher rates as a consequence of the decisions. And none of the regulators that have approved these transactions have to live under the rates that resulted from the decisions.

Centel to WPK Acquisition

15. On September 18, 1991, the Commission approved the acquisition of the assets and customers of the Centel Corporation (Centel) by Utilicorp United, later to be known as Aquila or WPK.¹⁹ Centel's Kansas electric properties consisted of small widely scattered service areas throughout the central third of the state of Kansas. The largest communities served by Centel were Dodge City, Liberal and Great Bend. These same Centel customers were later sold by WPK to MKEC.

16. WPK paid a \$56 million acquisition premium for Centel and its customers. Before the transaction, Centel owned an 8% undivided interest in the Jeffery Energy Center (JEC) coal plant. WPK's interest in the JEC property had a net book value of \$58.6 million at the time of the transaction. As part of the transaction, Centel sold its interest in JEC to a financing entity for \$114.6 million, which then leased the property back to WPK to supply power to its customers. Instead of outright ownership of a \$58.6 million coal plant supplying power for the WPK customers, WPK was now supplied the same power it previously owned under a 27-year lease, with a price designed to

¹⁹ See, Order and Certificate, September 18, 1991, KCC Docket No. 175,456-U, 91-UCUE-226-MER.

recover \$114.6 million, plus interest. WPK also retained a right to repurchase its JEC interest at the end of the lease.

17. WPK sought to recover the full lease payment, including the acquisition premium, from its customers. KCC staff calculated that about \$5 million of the annual JEC lease payment was to pay for the \$56 million acquisition premium. In a January 19, 2000 Order, after a contentious trial, the Commission allowed WPK to charge customers \$2.35 million of the acquisition premium²⁰ through the JEC lease. WPK's customers were now paying for the power plant they used to own, plus an additional \$2.35 million per year simply as a cost of being sold.

18. Centel's customers were not asked whether they would like to be sold to Utilicorp, were not asked whether they thought they should pay higher rates for the pleasure of being bought, were not asked whether they thought losing JEC was a good idea. Customers didn't get to vote.

WPK to MKEC Acquisition

19. On February 23, 2007 the Commission approved the acquisition of the assets and customers of WPK by MKEC.²¹ MKEC paid an estimated \$45.5 million acquisition premium to purchase the WPK assets.²² According to MKEC, the acquisition premium should be assigned to, and paid through, in the distribution assets of the MKEC members and not through the generation and transmission assets of MKEC.²³ Since the MKEC distribution members financed the acquisition with debt, and the retail rates of most of the members are set based on debt service coverage ratios or TIER, to the extent the acquisition premium was paid for with debt the MKEC retail customers are paying for the \$45.5 acquisition premium in rates.

²⁰ See, Order on Application No. 10, January 19, 2000, ¶ 25, KCC Docket No. 99-WPEE-818-RTS.

²¹ See, Order Adopting Stipulation and Agreement, February 23, 2007, KCC Docket No. 06-MKEE-524-ACQ.

²² See, Direct Testimony of Andrea C. Crane, p. 13, KCC Docket No. 06-MKEE-524-ACQ.

²³ See, Rebuttal Testimony of L. Earl Watkins, Jr, p. 10, KCC Docket No. 06-MKEE-524-ACQ.

20. Further, according to MKEC at the time of the transaction, customers were expected to pay the full JEC lease payment.²⁴ Paying the full JEC lease payment, if set at the same level as that paid by WPK, means that MKEC customers are also now paying the full \$56 million acquisition premium in generation rates from the Centel/WPK transaction, in addition to the \$45 million acquisition premium in distribution rates in the WPK/MKEC transaction.

21. Westar Energy exercised a right of refusal over the transfer of the JEC lease from WPK to MKEC, so Westar now retains ownership of the 8% JEC interest and is leasing power to MKEC throughout the term of the original lease. The overall transaction price MKEC paid to WPK was reduced by approximately \$17 million to reflect this change, but it is unclear whether the JEC lease price changed from the level paid by WPK and the level charged by Westar. At the end of the lease term, ownership of the 8% JEC interest now reverts to Westar Energy, and not back to the MKEC customers that originally owned the JEC interest.

22. MKEC customers could be paying rates nearly \$100 million higher (between \$5-\$10 million in annual amortization) simply because they were sold twice. These customers have lost the value and service of the 8% JEC interest they once owned. And since this power will have to be replaced at the end of the JEC lease term, MKEC customer rates will likely increase again to purchase another plant. There were no customer votes before either of these transactions.

23. Finally, the MKEC distribution members have all come before the Commission to increase retail distribution rates. Each member has made the case that it is currently, or will be soon, incurring substantial costs to rebuild the WPK distribution assets each acquired in the transaction. Each member in its rate case has commented on the generally poor condition and lack of

²⁴ *Id.* at pp. 12-13.

maintenance on the WPK assets, leading one to wonder why these MKEC distribution members voted to pay a \$45 million acquisition premium for such a poorly maintained system. Regardless, it is not the members that voted to buy these assets whose rates are going up to fix the problem. Rather, it is the old Centel/WPK retail customers, sold twice without a vote, whose rates are going up to fix this problem. And that is on top of the acquisition premiums being paid in rates.

24. Each of the seven issues raised in the Joint Application impacts the rights of and rates ultimately charged to residential and small business ratepayers. While CURB may decline to file testimony on some of these issues, it is authorized by statute 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.”²⁵

25. On February 14, 2013, the Commission issued its Order Setting Procedural Schedule, in which it ordered, *sua sponte*:

6. The parties shall file briefs by March 8, 2013, explaining (1) the basis for the Commission's jurisdiction for each of the seven issues identified in paragraph 4 of this order; (2) how each of the seven issues affect residential and small business customers; and (3) K.S.A. 66-1224's applicability to each of the seven issues. Reply briefs are due March 22, 2013.²⁶

26. Below, CURB will address the three issues that the Commission asked the parties to brief.

²⁵ K.S.A. 66-1223(a) and (b).

²⁶ Order Setting Procedural Schedule, p. 4.

III. THE COMMISSION HAS JURISDICTION TO DETERMINE EACH OF THE SEVEN ISSUES IDENTIFIED IN THE JOINT APPLICATION.

27. While CURB does not disagree that the issues in this docket are complex and interwoven,²⁷ the principal issue contained in the Joint Application is the request to transfer MKEC's certificate of convenience and necessity for MKEC's retail electric business to six separate utilities. The other issues are related to the principal issue, or related to specific rights specified in the 524 S&A and Order which applies to the Joint Application.

28. The jurisdiction of the Commission to grant or assign a certificate of convenience and necessity is specified in K.S.A. 66-131 and K.S.A. 66-136:

No common carrier or public utility, including that portion of any municipally owned utility defined as a public utility by K.S.A. 66-104, governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the corporation commission that public convenience will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state.²⁸

...

No franchise or certificate of convenience and necessity granted to a common carrier or public utility governed by the provisions of this act shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the commission. The provisions of this section shall not apply to local exchange carriers that have elected price cap regulation pursuant to subsection (b) of K.S.A. 66-2005, and amendments thereto, unless a transaction subject to this section is solely between such carrier and a local exchange carrier that has elected rate of return regulation pursuant to subsection (b) of K.S.A. 66-2005, and amendments thereto, operating wholly within this state.²⁹

²⁷ *Id.*, ¶ 7.

²⁸ K.S.A. 66-131(a).

²⁹ K.S.A. 66-136.

29. K.S.A. 66-136 specifically states that not only must the transfer of the certificate of convenience and necessity be approved by the Commission, but also that “no contract or agreement with reference to or affecting such ... certificate of convenience and necessity or right thereunder [will] be valid or of any force and effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the Commission.”³⁰

30. In seeking approval to transfer MKEC’s certificate of convenience and necessity and approval of the related rates and contracts to the six separate utilities, MKEC and all six utilities requesting the transfer and approval must also demonstrate that they are able to meet all the duties and obligations of a public utility in Kansas for the specified service territory. They must also address and demonstrate they can comply with the duties and obligations they agreed to be bound by pursuant to the terms of the 524 S&A and Order.³¹

31. CURB will discuss below the Commission’s jurisdiction to determine each of the seven issues identified in the joint application.

Issue #1: Approving the transfer of Mid-Kansas' Certificate(s) of Convenience and Necessity to its Members with respect to all of its local distribution system and retail electric utility services and operations in the State of Kansas, with Mid-Kansas retaining its certificate as to its generation and transmission assets and services, and its certificated right to provide transmission services in its currently designated retail certificated territory, and a finding the transfers of the Certificate(s) are in the public interest and approving the same.

32. The jurisdiction of the Commission to transfer a certificate of convenience and necessity is specified in K.S.A. 66-131 and K.S.A. 66-136.

³⁰ *Id.*

³¹ Acknowledgement of the Terms and Conditions of Stipulation and Agreement, March 19, 2007, KCC Docket No. 06-MKEE-524-ACQ.

Issue # 2: If required, approving a Wholesale Requirements Agreement.

33. The Wholesale Requirements Agreement is a “contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder” that must be approved by the Commission under K.S.A. 66-136.

Issue # 3: Approving adoption by the Members of all applicable retail rates, rules, and tariffs with respect to the local distribution and retail electric utility services necessary to operations.

34. The adoption of MKEC’s retail rates, rules, and tariffs falls within the “contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder” that must be approved by the Commission under K.S.A. 66-136. In addition, each of the six MKEC member-owners must have its rates, rules, and tariffs approved by the Commission as none are able to deregulate unless and until the former WPK customers have been given the opportunity to vote to deregulate, separate from native customers, a right specifically negotiated and included in the 524 S&A and approved in the 524 Order.³²

Issue # 4: Approving the Shared Service Agreement, as supplemented, and, to the extent required, approving the Settlement Agreement, as supplemented.

35. The Shared Service Agreement is a “contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder” that must be approved by the Commission under K.S.A. 66-136.

³² Joint Application, ¶¶ 40-47; 524 S&A, ¶ 25; 524 Order, ¶ 16.

Issue # 5: Approving and finding that the terms of the wholesale services and rates provided by Kansas Electric Power Cooperative, Inc. ("KEPCo") for the Victory and Prairie Land load in the to be acquired territory be the same as the terms of the currently approved wholesale services and rates provided by Mid-Kansas, as may be modified by Mid-Kansas from time to time, and that the Commission make such finding and order prior to the transfer of the Certificates of Convenience to Victory and Prairie Land; provided further, should KEPCo elect in the future to set terms of wholesale service and rates for Victory and Prairie Land that differ from the approved Mid-Kansas wholesale terms of service and rates, ordering that the wholesale terms of service and rates can be modified only after approval by the Commission.

36. The issues surrounding the terms of the wholesale services and rates provided by KEPCo likewise constitute a "contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder" that must be approved by the Commission under K.S.A. 66-136.

Issue # 6: If required, approving the assignment of the Wholesale Requirements Agreement by and among Mid-Kansas, the Members, KEPCo and Sunflower Electric Power Corporation ("Sunflower"), as applicable.

37. The assignment of the Wholesale Requirements Agreement by and among MKEC, its six owners, KEPCo, and Sunflower is also a "contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder" that must be approved by the Commission under K.S.A. 66-136.

Issue # 7: Determining the process necessary for the Member cooperatives to become or remain exempt from Commission regulation pursuant to K.S.A. 66-104d after the transfer of the Certificate of Convenience, and modifying the Commission's Order in Docket No. 06-MKEE-524-ACQ as necessary to reflect such determination.

38. The Commission's jurisdiction to determine issue #7 stems from the Commission's authority to approve the transfer of a certificate of convenience and necessity under K.S.A. 66-136, both in this docket and as applied in the 524 docket. The Joint Applicants are seeking to abrogate a

negotiated provision in the 524 S&A, approved in the 524 Order, which granted former WPK customers the right to vote to deregulate, separate from native customers, before allowing deregulation of Commission jurisdiction over the rates and services to the acquired WPK customers.³³ CURB was a party to the 524 proceedings and a signatory party to the 524 S&A, and will be providing testimony that this provision was a critical term that led to CURB agreeing to the terms of the S&A that was ultimately approved by the Commission in the 524 Order.

39. The Commission specifically noted and relied upon MKEC provided testimony in support of the 524 S&A stating the conditions specified in the S&A were just and reasonable, in the public interest, and *the result of arms length negotiations* between the signatories to the S&A:

The witness testifying on behalf of MKEC noted that conditions contained in the Agreement were *the result of arm length negotiations* between the signatories, argued that *these conditions were just and reasonable and in the public interest*, and asserted that the conditions will not prohibit MKEC from providing reliable electric service to acquired WPK customers at a reasonable cost consistent with sound business practice. Testimony of L. Earl Watkins, Jr., filed January 10, 2007, p. 9 (Watkins, 9); Supplemental Testimony of L. Earl Watkins, Jr., filed January 12, 2007, pp 1-3 (Watkins Supplemental, 1-3).³⁴

40. The Commission further specifically noted in the 524 Order:

16. The Commission specifically approves provisions in the Agreement that *describe the procedures for acquired WPK customers of Lane Scott, Western and any other MKEC member with the ability to choose deregulation to vote on the decision to deregulate. ...*³⁵

41. As a result, the Commission has the jurisdiction to determine issue #7 in this docket.

³³ Joint Application, ¶¶ 40-47.

³⁴ 524 Order. *See also*, Testimony in Support of the Stipulation and Agreement of L. Earl Watkins, Jr., January 10, 2007, p. 9.

³⁵ 524 Order, ¶¶ 15-16 (emphasis added).

IV. EACH OF THE SEVEN ISSUES IDENTIFIED IN THE JOINT APPLICATION AFFECT RESIDENTIAL AND SMALL BUSINESS CUSTOMERS.

42. CURB will briefly address below how each of the seven issues identified in the Joint Application will affect residential and small Commercial customers.

Issue #1: Approving the transfer of Mid-Kansas' Certificate(s) of Convenience and Necessity to its Members with respect to all of its local distribution system and retail electric utility services and operations in the State of Kansas, with Mid-Kansas retaining its certificate as to its generation and transmission assets and services, and its certificated right to provide transmission services in its currently designated retail certificated territory, and a finding the transfers of the Certificate(s) are in the public interest and approving the same.

43. The transfer of MKEC's certificate of convenience and necessity to the six separate utilities will affect residential and small commercial ratepayers in numerous ways with respect to the service provided, the rates charged, and the rights of former WPK customers negotiated in the 524 S&A and approved in the 524 Order. The Commission must ensure that each Member to whom a Certificate is transferred has the financial, operational, and managerial capability to provide utility service to the former WPK customers that are being transferred to its jurisdiction. Such a transfer will impact all aspects relating to the provision of utility service in the future, including the rates and charges to customers, the ability of the Members to finance capital improvements that may be necessary, the ability of the Members to meet the Commission's customer service standards, and all other aspects of the provision of utility service.

Issue # 2: If required, approving a Wholesale Requirements Agreement.

44. The Wholesale Requirements Agreement will ultimately affect the rates paid by residential and small commercial ratepayers. The costs associated with the Wholesale Requirements

Agreement will ultimately be passed through to the former WPK ratepayers by each Member. Therefore, this Agreement has a direct impact on future rates.

Issue # 3: Approving adoption by the Members of all applicable retail rates, rules, and tariffs with respect to the local distribution and retail electric utility services necessary to operations.

45. The issue of whether the Commission approves the adoption by the six separate utilities of MKEC's retail rates, rules, and tariffs for each service territory will certainly affect the service provided and the rates charged to residential and small commercial ratepayers.

Issue # 4: Approving the Shared Service Agreement, as supplemented, and, to the extent required, approving the Settlement Agreement, as supplemented.

46. The issue of whether the Commission approves the Shared Service Agreement and the Settlement Agreement among KEPCo, Sunflower Electric Power Cooperative ("Sunflower"), MKEC, Victory and Prairie Land will likewise affect the service provided and the rates charged to residential and small commercial ratepayers in the service territories being transferred to Victory and Prairie Land. This is because these agreements will have an impact on the resources used to provide electric generation services to these two Members, and will also have an impact on the generation costs that can be charged to Victory and Prairie Land. Since these generation costs will ultimately be passed through to the ratepayers of Victory and Prairie Land, these agreements will have a direct impact on the rates paid by residential and small commercial customers.

Issue # 5: Approving and finding that the terms of the wholesale services and rates provided by Kansas Electric Power Cooperative, Inc. ("KEPCo") for the Victory and Prairie Land load in the to be acquired territory be the same as the terms of the currently approved wholesale services and rates provided by Mid-Kansas, as may be modified by Mid-Kansas from time to time, and that the Commission make such finding and order prior to the transfer of the Certificates of Convenience to Victory and Prairie Land; provided further, should KEPCo elect in the future to set terms of wholesale service and rates for Victory and Prairie Land that differ from the approved Mid-Kansas wholesale terms of service and rates, ordering that the wholesale terms of service and rates can be modified only after approval by the Commission.

47. The approval and findings requested by the Joint Applicants with respect to the terms of the wholesale services and rates provided by KEPCo will likewise affect the service provided and the rates charged to residential and small commercial ratepayers in the service territories being transferred to Victory and Prairie Land. To the extent that KEPCo provides generation to these two Members at rates that are different than the rates charged by MKEC, then retail residential and small commercial customers in these two Member areas will likely pay rates for generation that are different than the rates paid for generation by residential and small commercial customers in the other four Member areas. As long as the former WPK customers in the Victory and Prairie Land service territories are regulated, then the Commission has the responsibility to ensure that the rates paid by these customers for generation is reasonable.

Issue # 6: If required, approving the assignment of the Wholesale Requirements Agreement by and among Mid-Kansas, the Members, KEPCo and Sunflower Electric Power Corporation ("Sunflower"), as applicable.

48. The requested approval of the assignment of the Wholesale Requirements Agreement by and among MKEC, its six owners, KEPCo, and Sunflower will also affect the service provided and the rates charged to residential and small commercial ratepayers. If the assignment is not

approved, problems securing debt by the six utilities could arise, which could impact future upgrades and future rates paid by residential and small commercial ratepayers.

Issue # 7: Determining the process necessary for the Member cooperatives to become or remain exempt from Commission regulation pursuant to K.S.A. 66-104d after the transfer of the Certificate of Convenience, and modifying the Commission's Order in Docket No. 06-MKEE-524-ACQ as necessary to reflect such determination.

49. The Commission's jurisdiction to determine issue #7 stems from the Commission's authority to approve the transfer of a certificate of convenience and necessity under K.S.A. 66-136, both in this docket and as applied in the 524 docket. The Joint Applicants are seeking to abrogate a negotiated and Commission-approved provision in the 524 S&A (and not appealed by MKEC or its Members), which granted former WPK customers the *right* to vote (separate from the native customers) on whether to approve deregulation of Commission jurisdiction over their rates and services.³⁶ CURB was a party to the 524 proceedings and a signatory party to the 524 S&A, and will be providing testimony that this provision was a critical term that led CURB to agree to the terms of the S&A that was ultimately approved by the Commission in the 524 Order.

50. The Commission specifically noted and relied upon MKEC provided testimony in support of the 524 S&A stating the conditions specified in the S&A were just and reasonable, in the public interest, and *the result of arms length negotiations* between the signatories to the S&A:

The witness testifying on behalf of MKEC noted that conditions contained in the Agreement were *the result of arm length negotiations* between the signatories, argued that *these conditions were just and reasonable and in the public interest*, and asserted that the conditions will not prohibit MKEC from providing reliable electric service to acquired WPK customers at a reasonable cost consistent with sound business practice. Testimony of L. Earl Watkins, Jr., filed January 10, 2007, p. 9 (Watkins, 9);

³⁶ Joint Application, ¶¶ 40-47.

Supplemental Testimony of L. Earl Watkins, Jr., filed January 12, 2007, pp 1-3 (Watkins Supplemental, 1-3).³⁷

51. The Commission further specifically noted in the 524 Order:

16. The Commission specifically approves provisions in the Agreement that *describe the procedures for acquired WPK customers of Lane Scott, Western and any other MKEC member with the ability to choose deregulation to vote on the decision to deregulate. ...*³⁸

52. As a policy matter, CURB believes the request by Joint Applicants to abrogate a condition negotiated between the parties “at arm’s length,” supported by the parties and found by the Commission to be just and reasonable and in the public interest, should be considered carefully because of the chilling effect such action would have on settlements in future dockets.

53. Issue #7 therefore affects specific rights negotiated for residential and small commercial ratepayers in the 524 S&A and Order.

V. K.S.A. 66-1224 DOES NOT APPLY TO ANY OF THE SEVEN ISSUES IDENTIFIED IN THE JOINT APPLICATION.

54. K.S.A. 66-1224 provides that, “Neither the [CURB] board or the consumer counsel shall have the power or authority concerning any action taken by an *electric* or telephone *cooperative* with a membership of less than 15,000.”³⁹

55. CURB will demonstrate below that K.S.A. 66-1224 does not apply to any of the seven issues identified in the Joint Application for the reasons specified below:

- CURB was a party to the 524 WPK acquisition docket, and a signatory party to the 524 Stipulation and Agreement approved in the 524 Order involving retail service to over 68,000 WPK customers.

³⁷ 524 Order. *See also*, Testimony in Support of the Stipulation and Agreement of L. Earl Watkins, Jr., January 10, 2007, p. 9.

³⁸ 524 Order, ¶¶ 15-16 (emphasis added).

³⁹ K.S.A. 66-1224 (emphasis added).

- MKEC is not a cooperative as defined by K.S.A. 66-104d(a) with respect to its retail electric service and operations.
 - MKEC is not a cooperative as defined by K.S.A. 66-104d(a) with respect to its wholesale services because MKEC is not owned by four or more electric cooperatives.
 - MKEC, a regulated utility, is seeking to transfer its certificate of convenience and necessity for its retail electric service to over 68,000 former WPK customers.
- A. **K.S.A. 66-1224 does not apply to any of the seven issues because CURB was a party to the 524 WPK acquisition docket and a signatory party to the 524 Stipulation and Agreement.**

56. CURB was both a party to the 524 acquisition docket and a signatory party to the 524 S&A. CURB was granted intervention in the 524 docket by the Commission and participated as a full party in that proceeding. Moreover, no party objected to CURB's status or CURB's participation in that docket.⁴⁰ Apart from the fact that MKEC is not a cooperative as defined by K.S.A. 66-104d(a) (to be more fully discussed later in this Brief), CURB is entitled to participate in this docket by virtue of its involvement in the 524 docket. In the 524 docket, CURB represented the interests of the residential and small commercial customers served by WPK, and CURB was actively involved in the arms length negotiations that gave rise to the conditions to the acquisition that were specified in the 524 S&A and approved by the Commission in the 524 Order.

57. The Commission, in approving the 524 S&A, specifically noted that the conditions were just and reasonable, in the public interest, and would not prohibit MKEC from providing

⁴⁰ MKEC did seek to limit the intervention of other parties to the 524 docket. *See*, Mid-Kansas Electric Company, LLC, Motion to Limit Petition to Intervene by Midwest Energy, Inc., January 9, 2006; Mid-Kansas Electric Company, LLC, Motion to Limit Petition to Intervene by Kansas Electric Power Cooperative, Inc., January 23, 2006; Mid-Kansas Electric Company, LLC, Motion to Reconsider Order Granting Intervention of Westar Energy, Inc. and Kansas Gas and Electric Company, September 8, 2006, KCC Docket No. 06-MKEE-524-ACQ.

reliable electric service to the acquired WPK customers at a reasonable cost consistent with sound business practice.⁴¹

58. The seven issues contained in the Joint Application were contemplated in the conditions arms length negotiations⁴² between the signatory parties in the 524 docket on behalf of residential and small commercial ratepayers. CURB has the continued right to participate fully in this docket to ensure the conditions negotiated in the 524 S&A and approved in the 524 Order are followed and not abrogated.

B. K.S.A. 66-1224 does not apply to any of the seven issues because MKEC is not a cooperative as defined by K.S.A. 66-104d(a) with respect to its retail electric service and operations.

59. MKEC is not a cooperative as defined by K.S.A. 66-104d(a) with respect to the MKEC local distribution facilities and retail electric utility business and operations that the Joint Applicants are requesting approval to spin down in this docket. The definition of a cooperative, as used in K.S.A. 66-1224, must be read in conjunction with the definition of a cooperative under K.S.A. 66-104d(a), which clearly does not include the retail electric service provided by MKEC as indicated by the language, "providing electric service *at wholesale*:"

(a) As used in this section, "*cooperative*" means any corporation organized under the electric cooperative act, K.S.A. 17-4601 et seq., and amendments thereto, or which becomes subject to the electric cooperative act in the manner therein provided; or *any limited liability company or corporation providing electric service at wholesale in the state of Kansas that is owned by four or more electric cooperatives that provide retail service in the state of Kansas*; or any member-owned corporation formed prior to 2004. (emphasis added)⁴³

⁴¹ Order Adopting Stipulation and Agreement, February 23, 2007, ¶ 11.

⁴² *Id.*

⁴³ K.S.A. 66-104d(a).

60. The Joint Application requests Commission approval for transfer of MKEC's certificate of convenience and necessity for MKEC's *retail* electric business, not wholesale electric business. The rationale behind including a limited liability company or corporation providing electric service at *wholesale* that is owned by four or more electric cooperatives that provide *retail* service is that the members of the electric cooperatives will have a voice, or vote, in the *wholesale* services provided and rates charged by the wholesale electric service provider. This docket pertains to the *retail* service, not the wholesale service, provided by MKEC, so MKEC is not a cooperative as defined by the express language contained in K.S.A. 66-104d(a).

C. K.S.A. 66-1224 does not apply to any of the seven issues because MKEC is not a cooperative as defined by K.S.A. 66-104d(a) with respect to its wholesale electric service because MKEC is not owned by four or more electric cooperatives.

61. MKEC is also not a cooperative as defined by K.S.A. 66-104d(a) because MKEC is not "*owned by four or more electric cooperatives that provide retail service in the state of Kansas.*"⁴⁴ To the contrary, MKEC is owned by five cooperatives and one corporation (Southern Pioneer).

62. As mentioned above, the rationale behind including a limited liability company or corporation providing electric service at *wholesale* that is owned by four or more electric cooperatives that provide *retail* service is that the members of the electric cooperatives will have a voice, or vote, in the *wholesale* services provided and rates charged by the wholesale electric service provider. Here, the customers of Southern Pioneer have no voice or vote in the retail services and

⁴⁴ *Id.*

rates of Southern Pioneer, and therefore by extension, no voice or vote in the wholesale services and rates charged by MKEC.

63. The parties to the 524 contemplated that Southern Pioneer would ultimately become a cooperative. However, in KCC Docket No. 12-MKEE-380-RTS, the Commission noted that Southern Pioneer had been provided more than enough time to make the decision regarding its business structure, and ordered Southern Pioneer to affirmatively declare the corporate structure it intended to operate under in future proceedings:

(v) The Commission concludes that more than enough time has passed and considerable counsel has been provided to Southern Pioneer to allow it to make an informed decision regarding the appropriate business structure. Further reporting or monitoring the decision-making would serve no useful purpose. Therefore, the Commission directs Southern Pioneer that unless Southern Pioneer makes a filing with the Commission within sixty (60) days of this Order declaring that it will either become a cooperative or merge with PECE (along with a plan and time line for doing so), *the Commission will, going forward, treat Southern Pioneer as any other C-corporation and will analyze Southern Pioneer's applications in the same manner it does all other C-corporations it regulates.*

...

C. The Commission specifically orders Mid-Kansas and Southern Pioneer to affirmatively declare, within 60 days of this Order, the corporate structure to which Southern Pioneer will conform in future proceedings. If Southern Pioneer elects to become a cooperative or merge with PECE, the Commission further orders Mid-Kansas to file a plan and timeline to accomplish the merger or change within 60 days of this Order.⁴⁵

64. On August 15, 2012, Southern Pioneer notified the Commission and parties that it would continue to operate as a C-corporation business structure.⁴⁶ As a result, in this application,

⁴⁵ Order Approving Settlement Agreement with Modifications, June 25, 2012, pp. 21, 26-27, KCC Docket No. 12-MKEE-380-RTS (emphasis added).

⁴⁶ Mid-Kansas Electric Company and Southern Pioneer Electric Company Notifying the Commission that Southern Pioneer Will Continue to Operate Under a C-Corporation Business Structure, August 21, 2012, KCC Docket No. 12-MKEE-380-RTS.

Southern Pioneer is to be treated by the Commission in the same manner as the Commission treats all other C-corporations it regulates.

65. If MKEC was a cooperative as defined by K.S.A. 66-104d(a) (a limited liability company or corporation providing electric service at wholesale owned by four or more electric cooperatives), MKEC could and would have filed for deregulation. MKEC is not a cooperative because it is partially owned by a corporation. As a result, K.S.A. 66-1224 does not apply to any of the seven issues because MKEC is not a cooperative as defined by K.S.A. 66-104d(a).

D. K.S.A. 66-1224 does not apply to any of the seven issues because MKEC, a regulated public utility, is seeking to transfer its certificate of public convenience and necessity for its retail electric service to over 68,000 former WPK customers.

66. The Joint Application is seeking an order approving the transfers of the certificate of convenience and necessity for MKEC's local distribution system and retail electric services currently serving over 68,000 customers⁴⁷ formerly served by WPK to the six utility owners of MKEC.

67. MKEC was created to purchase the assets and certificate of convenience and necessity of WPK in 2005.⁴⁸ The owners of MKEC are five cooperatives and one corporation.⁴⁹ In the 524 docket, MKEC sought approval of the acquisition and transfer of the certificate of convenience and necessity, franchises, and service territory from WPK to MKEC.⁵⁰ On April 1, 2007 MKEC and the MKEC members began operation of the WPK electric transmission and distribution facilities in Kansas.⁵¹

⁴⁷ Joint Application, ¶ 1; Joint Application, November 16, 2005, ¶¶ 2, 14, KCC Docket No. 06-MKEE-524-ACQ.

⁴⁸ Joint Application, November 16, 2005, ¶ 1, KCC Docket No. 06-MKEE-524-ACQ.

⁴⁹ Joint Application, ¶¶ 1-2; Joint Application, November 16, 2005, ¶ 1, KCC Docket No. 06-MKEE-524-ACQ.

⁵⁰ Joint Application, ¶¶ 7-9; Joint Application, November 16, 2005, pp. 1, 6-7, 10-11, KCC Docket No. 06-MKEE-524-ACQ; Application, July 26, 2007, ¶ 1, KCC Docket No. 08-MKEE-099-MIS.

⁵¹ Application, July 26, 2007, ¶ 4, KCC Docket No. 08-MKEE-099-MIS.

68. The Joint Applicants seek to transfer MKEC's certificate of convenience and necessity to serve those 68,000 former WPK customers in this docket. CURB is authorized by statute to represent residential and small commercial ratepayers before the commission and to function as an *official intervenor* in cases filed with the commission.⁵²

69. As a result, K.S.A. 66-1224 does not apply to this docket because MKEC is a regulated certified electric utility as defined by K.S.A. 66-104, subject to the jurisdiction of the Commission⁵³ with respect to the rates and service it provides to over 68,000 former WPK customers.⁵⁴

VI. CONCLUSION.

70. WHEREFORE, CURB respectfully requests that the Commission determine that the Commission has jurisdiction to determine each of the seven issues, each of the seven issues affect residential and small commercial customers, and K.S.A. 66-1224 does not apply to any of the seven issues.

Respectfully submitted,



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⁵² K.S.A. 66-1223(a) and (b).

⁵³ Joint Application, ¶ 2.

⁵⁴ Joint Application, ¶ 1; Joint Application, November 16, 2005, ¶¶ 2, 14, KCC Docket No. 06-MKEE-524-ACQ.

VERIFICATION

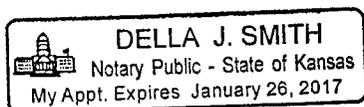
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

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

That he is an attorney for the 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 8th day of March, 2013.




Notary Public

My Commission expires: 01-26-2017.

CERTIFICATE OF SERVICE

13-MKEE-447-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 8th day of March, 2013, to the following parties who have waived receipt of follow-up hard copies:

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