

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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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.)

by
State Corporation Commission
of Kansas

**PETITION FOR RECONSIDERATION
OF THE CITIZENS' UTILITY RATEPAYER BOARD**

The Citizens' Utility Ratepayer Board ("CURB"), pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. § 82-1-235, hereby petitions for reconsideration of the April 3, 2013, Order Approving Nonunanimous Settlement Agreement ("April 3rd Order") issued by the Kansas Corporation Commission ("Commission"). In support of its Petition for Reconsideration, CURB states as follows:

1. CURB seeks reconsideration of the Commission's April 3rd Order approving the settlement agreement on the following grounds:

- The Commission failed to follow prescribed procedure;¹
- The Commission's order is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole;² and
- The Commission took action otherwise unreasonable, arbitrary or capricious.³

2. In approving the settlement agreement, the Commission has failed to follow prescribed procedure because the April 3rd Order does not explain the basic findings of fact and law made by the Commission to support its ultimate conclusion that the revenue requirement in the non-

¹ K.S.A. § 77-621(c)(5).

² K.S.A. § 77-621(c)(7).

³ K.S.A. § 77-621(c)(8).

unanimous settlement agreement is reasonable. The Commission has also selectively disregarded or rejected highly relevant evidence detracting from the revenue requirement proposed in the settlement agreement and supporting CURB's recommended revenue requirement. As such, the approval of the settlement agreement revenue requirement is not supported by substantial competent evidence when viewed in light of the record as a whole. Finally, the Commission's decision is unreasonable, arbitrary, and capricious in that it adopts a revenue requirement that fails to meet the basic guidelines the Commission is required to follow in setting a revenue requirement. The \$370,000 revenue requirement approved by the Commission is \$202,500 to \$224,000 ⁴ above the highest revenue requirement supported by substantial competent evidence when viewed in light of the record as a whole. As such, the overall effect of the April 3rd Order is not within the zone of reasonableness as required by Kansas law, and does not result in just and reasonable rates.

3. The evidence in the record of this docket does not support the revenue requirement proposed by the settlement agreement and supports the revenue requirement recommended by CURB.

I. THE COMMISSION HAS FAILED TO FOLLOW PRESCRIBED PROCEDURE.

4. The Commission's April 3rd Order fails to explain the basis of its decision approving the \$370,000 revenue requirement proposed in the settlement as required under Kansas law. A Commission Order must set forth the basic facts which persuaded the Commission in arriving at its decision.

⁴ Crane Opposition, pp. 7-10, , ACC-SA-1, ACC-SA-2, ACC-SA-3; Crane Direct, pp. 7-13, 16-18, Schedule ACC-2; Harden Direct, pp. 5, 7, Schedule SMH-3; CURB Exh. 1; Bell, Tr. pp. 285-86, 299; Bell Direct, p. 12-14, 21-23; Staff Rate Base/Rate of Return Schedules, Schedule B-2, Adjustment No. 2; Shepherd, Tr., p. 211; Shepherd Rebuttal, p.7; Cotton Direct, pp. 6-7. *See also*, Post-Hearing Brief of the Citizens' Utility Ratepayer Board, ¶¶ 20-24

5. K.S.A. § 77-526(c) of the Kansas Administrative Procedures Act ("KAPA") states, in pertinent part:

A final order or initial order *shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, ... Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. ...*⁵

6. K.A.R. § 82-1-232 provides in pertinent part:

Orders of the commission. (a) Form and content. Unless otherwise specified, each order of the commission shall contain the following:

...
(3) a concise and specific statement of the relevant law and basic facts that persuade the commission in arriving at its decision; ...

7. In *Ash Grove Cement Company v. State Corporation Commission*, the court held:

The purpose of findings of fact as mandated by K.A.R. 82-1-232(a)(3) is to facilitate judicial review and to avoid unwarranted judicial intrusion into administrative functions. The Commission must, therefore, express the basic facts upon which it relied with sufficient specificity to convey to the parties, and to the courts, an adequate statement of facts which persuaded the Commission to arrive at its decision."⁶

8. "However, findings must be specific enough to allow judicial review of the reasonableness of the order. To guard against arbitrary action, conclusions of law *must be supported by findings of fact which are in turn supported by evidence in the record.*"⁷

9. The Commission must provide an analysis in the Order in order to ensure due process to litigants who are entitled to understand the rationale underlying an agency order which directly impacts them and who need such information when planning their cases for rehearing and judicial

⁵ K.S.A. § 77-526(c) (emphasis added).

⁶ 8 Kan.App.2d 128, 132 (1982) (citations omitted).

⁷ *Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n*, 28 Kan.App.2d 313, 323-24 (2000).

review. This requirement facilitates judicial review and helps assure more careful administrative consideration to protect against careless and arbitrary action by agencies.⁸

10. The need and necessary content for findings of fact by administrative boards and commissions was discussed in *Kansas Public Service Company*:

When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. *In the absence of findings of fact the reviewing tribunal can determine neither of these things.* The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber method, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion.⁹

11. The Commission's discussion of the proposed revenue requirement in the Order is in stark contrast to these legal standards. To the contrary, the Commission specifically stated in its April 3rd Order that "The Commission will not attempt to summarize the entire record supporting or opposing the SA in this matter.

12. Simply adopting an ultimate finding on an issue, as the Commission has in approving the revenue requirement proposed in the settlement agreement, is insufficient:

An ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. . . . Such an ultimate finding is not enough, in the absence

⁸ *Kansas Public Service Co. v. State Corp. Comm'n of Kansas*, 199 Kan. 736, 744 (1967).

⁹ *Kansas Public Service Co.*, 199 Kan. at 745 (citing, *Saginaw Broadcasting Co. v. Federal C. Comm'n*, 96 F.2d 554, 559) (emphasis added).

of basic findings to support it. This court must first know what the basic findings are before it can give them conclusive weight. We have repeatedly emphasized the need for clarity and completeness in basic or essential findings on which administrative orders rest, and findings based on substantial evidence must embrace the basic findings which are needed to sustain the order." ¹⁰

13. As the Supreme Court found in *Southwestern Bell Telephone Company v. State Corporation Commission*, "[t]he findings of the Commission must be based upon facts. It must be possible for the reviewing court to measure the findings against the evidence from which they were deduced." ¹¹

14. The Commission's Order must therefore provide an analysis of the relevant evidence relied upon by the Commission to establish the basis for the ultimate decision reached. Such an analysis is not present in the Commission's April 3rd Order approving the revenue requirement proposed by the settlement agreement. Appellate courts cannot be expected to hunt through the record on appeal to determine whether the evidence supports the Commission's conclusions:

Moreover, it is equally well settled that the lack of express findings of fact by an administrative agency may not be supplied by implication, and where express findings are required as a matter of procedural law in order to support an administrative determination, it may be stated as a general rule that courts will not search the record in order to ascertain whether there is evidence from which the ultimate finding could be made."

...

The reasons for requiring the findings of basic facts by an administrative agency are so powerful that the requirement has been imposed with undeviating uniformity by this court. The rationale of the rule as gleaned from the forgoing cases and others, is to facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration to protect against careless and arbitrary action, assist the parties in planning their cases for rehearing and judicial review, and keep such agencies within their jurisdiction as prescribed by the Legislature. ¹²

¹⁰ *Kansas Public Service Co.*, 199 Kan. at 743-44.

¹¹ *Southwestern Bell Telephone Company v. State Corporation Commission*, 192 Kan. 39, 47 (1963).

¹² *Kansas Public Service Co.*, 199 Kan. at 744 (citations omitted).

15. While the Commission's findings are not required to set forth with minute particularity as to amount to a summation of all the evidence in the record, on issues of importance (such as the revenue requirement) the Commission must articulate the basic facts on which it relies with sufficient specificity to advise the parties and the appellate courts how it arrived at its decision.¹³ "There must be findings on all applicable standards which govern the Commission's determination, and the findings must be expressed in language sufficiently definite and certain to constitute a valid basis for the order, otherwise the order cannot stand."¹⁴

16. How the Commission approved the \$370,000 revenue requirement proposed by the settlement agreement, and how the Commission evaluated the competing evidence referenced by CURB, is not expressed in the Commission's April 3rd Order. The weight given to the testimony of various experts is not explained, and the testimony by Company and Staff witnesses directly contradicting the basis for their settlement agreement is selectively disregarded in the Commission's Order. The April 3rd Order is unlawful because it fails to meet the standards necessary to advise the parties and the appellate courts as to the basis for the Commission's adoption of the revenue requirement, as required by Kansas law.

17. The Commission correctly notes that electric public utilities subject to the Commission's jurisdiction are "required to furnish reasonably efficient and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such electric public utility, to establish just and reasonable rates, charges, and exactions and to make just and reasonable rules, classifications and regulations"¹⁵ and the Commission has the authority to

¹³ *Id.*, at 744-45. (citations omitted).

¹⁴ *Id.*, at 745 (citations omitted).

¹⁵ April 3rd Order, ¶ 49 (citing K.S.A. § 66-101b).

require utilities to establish just and reasonable rates to maintain reasonably sufficient and efficient service,¹⁶ yet the Commission immediately disregards these requirements. Specifically, the Commission appears to place great reliance on the fact that no complaints were received by the Commission regarding the management of the cooperative and that two public comments (opposing the rate increase) were received by the Commission's PACP office.¹⁷ Complaints about management and the number of complaints about a proposed rate increase are irrelevant to the determination of whether a revenue requirement proposed in a non-unanimous settlement results in just and reasonable rates. Further, the Commission dismisses its statutory obligation to determine whether the proposed revenue requirement is just and reasonable – actually postulating that “If the rates or revenue requirements are excessive, the excess accrues to the members, not to an outside group of investors,”¹⁸ and erroneously concluding, without any basis or citation to the record that, “Said differently, the rates in this case are rates that the members have agreed to pay to the Company they own.”¹⁹

18. Further, Commission decisions must be based on “substantial competent evidence which possesses *something of substance and relevant consequence*, and which *furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.*”²⁰ Yet Commission Staff describes the evidence supporting the \$370,000 revenue requirement as only “plausible.”²¹ Staff's made-up debt and interest expense, expressly contrary to the Company's sworn testimony and discovery responses, do not possess *something of substance and relevant*

¹⁶ April 3rd Order, ¶ 49 (citing K.S.A. § 66-101b).

¹⁷ *Id.*, at ¶ 50.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Jones v. Kansas Gas and Electric Co.*, 222 Kan. 390, Syl. ¶ 3, 565 P.2d 597 (1977).

²¹ Staff's Brief, ¶ 10 (“Staff witness Bell describes a *plausible* scenario that *could* produce a \$370,000 revenue increase.”).

consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved."²²

19. The above demonstrates that the Commission has failed to follow prescribed procedure, and the Commission should reconsider its April 3rd Order approving the \$370,000 revenue requirement.²³

II. THE COMMISSION DECISION IS NOT SUPPORTED BY EVIDENCE THAT IS SUBSTANTIAL WHEN VIEWED IN LIGHT OF THE RECORD AS A WHOLE.

20. Appellate courts will consider whether the Commission's action is supported by substantial competent evidence. K.S.A. § 77-621(c)(7). Since it was amended during the 2009 legislative session, the Kansas Judicial Review Act ("KJRA") requires that review courts "determine whether the evidence supporting the [agency's] factual findings is substantial when considered in light of *all* the evidence."²⁴ This is based on the provisions in K.S.A. § 77-621(c)(7) and (d), which state:

(c) The court shall grant relief only if it determines any one or more of the following:

(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act.

(d) For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the

²² *Jones*, 222 Kan. 390, Syl. ¶ 3 (1977).

²³ K.S.A. § 77-621(c)(5).

²⁴ *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan.App.2d 360, 362, 212 P.3d 239 (2009) (emphasis in original).

presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review. (Emphasis added).

21. The statute, as revised, requires the reviewing court to (1) review the evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determinations, if any; and (3) review the agency's explanation as to why the evidence supports its findings.²⁵

22. To meet this standard on appeal, the findings in the April 3rd Order must establish that all relevant evidence both supporting and contradicting the agency's findings was considered and weighed, and the Commission's analysis of such evidence and why it supports its findings must be explained in the Order. Because the overwhelming majority of the highly relevant evidence related to the revenue requirement issues decided by the Commission was selectively disregarded and not mentioned in the Commission's April 3rd Order, the Commission has not shown that evidence supporting the Commission's factual findings is substantial when considered in light of *all* the evidence.²⁶

23. When presented with conflicting evidence, the Commission may not selectively disregard or reject highly relevant evidence related to the issues in its order.²⁷ The Commission's attempts to specify the rationale for its decision on the revenue requirement in this case are inadequate, especially when the Commission has selectively disregarded highly relevant evidence related to the unreasonable and excessive nature of the revenue requirement proposed in the settlement agreement.

²⁵ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P. 3d 66 (2010).

²⁶ *Herrera-Gallegos*, 42 Kan.App.2d at 362 (emphasis in original).

²⁷ *Kansas Industrial Consumers*, 30 Kan. App. 2d at 345.

24. Decisions by the Commission must be based on “substantial competent evidence which possesses *something of substance and relevant consequence*, and which *furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.*”²⁸ Yet the Commission’s Staff describes the evidence supporting the \$370,000 revenue requirement as only “plausible.”²⁹ Staff’s made-up debt and interest expense, expressly contrary to the Company’s sworn testimony and discovery responses, do not possess *something of substance and relevant consequence*, and which *furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.*”³⁰

25. With respect to Staff’s TIER analysis, the Commission cites testimony that the Company utilized a rate base/rate of return methodology in its application because the Lane Scott Division did not have any “formalized” debt, yet selectively disregards highly relevant evidence in testimony by Company witnesses that irrefutably established that the Lane Scott MKEC division has no debt,³¹ no interest expense,³² no loan covenants or terms and conditions to satisfy,³³ and that it was mathematically impossible to calculate either a TIER or DCS ratio because the Lane Scott MKEC division currently has no debt and no interest expense.³⁴ Other highly relevant evidence related to Staff’s flawed TIER analysis the Commission selectively disregards in its order includes:

²⁸ *Jones v. Kansas Gas and Electric Co.*, 222 Kan. 390, Syl. ¶ 3 (1977).

²⁹ Staff’s Brief, ¶ 10 (“Staff witness Bell describes a *plausible* scenario that *could* produce a \$370,000 revenue increase.”).

³⁰ *Jones*, 222 Kan. 390, Syl. ¶ 3 (1977).

³¹ Shepherd Direct. pp. 7-8; Shepherd, Tr. pp. 210, 246; Morris, Tr. pp. 109, 144; Crane Opposition, pp. 11-14; CURB Exh. 6; CURB Exh. 14.

³² Morris, Tr. p. 109, 144; Crane Opposition, pp. 11-12; Shepherd, Tr. pp. 210, 246; CURB Exh. 14.

³³ Morris, Tr. pp. 109, 144; Crane Opposition, pp. 11-14; Shepherd, Tr. pp. 210, 246; CURB Exh. 14.

³⁴ Shepherd, Tr. pp. 210, 245-46. *See also*, Crane Opposition, pp. 11-12; Shepherd Direct. pp. 7-8; Morris, Tr. p. 109; CURB Exh. 14.

- Staff witness John Bell “assume[d]” that the \$2.9 million is made up of approximately the \$2.4 million and another \$500,000 for incidental items that “we just don’t know how they got there.”³⁵
- Mr. Bell’s “assumption” is inconsistent with his admissions that the Lane Scott MKEC division was actually making payments on that loan prior to the intercompany payments and that he doesn’t know what amount was coming from an intercompany payable or from the Lane Scott MKEC division itself because he wasn’t provided that information by the Company even though Staff specifically requested the information.³⁶
- Mr. Bell’s admission that “This case is fraught with assumptions.”³⁷
- Staff tried but was not able to tie the net operating loss of the MKEC system to the intercompany payable, and Staff has never been given an explanation as to what the components were of the \$2.9 million in intercompany payables.³⁸
- Staff had no way of knowing what the allocations were for any expenses that were included in the \$2.9 million in intercompany payables, and if any of these unknown allocations were incorrect the Lane Scott MKEC division would be subsidizing the unregulated Lane Scott native division.³⁹
- Mr. Bell had no specific example of any of the expenditures included in the \$2.9 million in intercompany payables.⁴⁰
- Mr. Bell testified that the \$2.9 million in intercompany payables “could” include past losses that were incurred by the Company.⁴¹
- Mr. Bell testified that “Additionally, there appears to be significant co-mingling of financing between the Lane-Scott native cooperative and the MKEC-division.”⁴²
- Staff witnesses Adam Gatewood and John Bell could not identify one prior case in which Commission Staff has used nonexistent or hypothetical debt in a TIER analysis.⁴³
- In his 28 years of testifying in cases involving cooperatives, Mr. Bell has never used a “*de facto*” loan in order to come up with numbers for a case.⁴⁴
- A TIER analysis requires examination of the loan document and covenants with respect to what the lender requires of that utility.⁴⁵
- There is no loan document containing terms and conditions, interest rates, or covenants to examine for the Lane Scott MKEC division, which has no debt and does not consider the intercompany payable to be a liability.⁴⁶

³⁵ Bell, Tr. p. 281.

³⁶ Bell, Tr. pp. 281-82.

³⁷ Bell, Tr. p. 282.

³⁸ Bell, Tr. pp. 293-94; Shepherd, Tr., p. 216-18; CURB Exh. 5.

³⁹ Bell, Tr. pp. 294-95.

⁴⁰ Bell, Tr. p. 295.

⁴¹ Bell, Tr. p. 295.

⁴² Bell Direct, p. 16.

⁴³ Bell, Tr. p. 282; Gatewood, Tr. p. 255.

⁴⁴ Bell, Tr. p. 298.

⁴⁵ Gatewood, Tr. pp. 255, 257-58.

26. In *Williams Natural Gas Co. v. State Corp. Comm'n*, the Kansas Court of Appeals determined that the Kansas Corporation Commission has no power to permit an entity to add to its rate base or otherwise recover costs which were not incurred by that entity.⁴⁷ The *Williams* court was especially troubled by the fact that the Applicants did not directly assume any debt or liability as a result of its purchase of the assets of the entities involved.⁴⁸ Here, like the Applicants in *Williams*, Staff's TIER analysis attempts to set the revenue requirement for the Company based on interest expense that was not incurred by the Company. The Company stated on numerous occasions in testimony and discovery responses that it did not have debt, did not incur interest expense, and did not consider the intercompany payable a liability.

27. The evidence established that this is the only case in which Commission Staff has used nonexistent or hypothetical debt in a TIER analysis, yet Staff chose to do so in this docket and the Commission selectively disregarded this fact and failed to explain why this deviation from prior Commission practice was reasonable.⁴⁹

28. With respect to the rate base/rate of return analyses by MKEC, Staff, and CURB, the Commission likewise selectively disregarded highly relevant evidence showing the proposed \$370,000 revenue requirement is unreasonable, excessive, and not supported by substantial competent evidence. MKEC chose to file its case based upon a rate base, rate of return approach.⁵⁰ The Commission disregards Staff's own testimony and admission that it performed a thorough rate

⁴⁶ Morris, Tr. pp. 142-44; Crane Direct, p. 21; CURB Exh. 6.

⁴⁷ *Williams Natural Gas Co. v. State Corp. Comm'n*, 22 Kan.App.2d 326, 335-37, 916 P.2d 52 (1996).

⁴⁸ *Id.*, at 337.

⁴⁹ Bell, Tr. p. 282; Gatewood, Tr. p. 255. In 28 years of testifying in cases involving cooperatives, Mr. Bell has never used a "de facto" loan in order to come up with numbers for a case. Bell, Tr. p. 298.

⁵⁰ Crane Opposition, p. 7; Shepherd Rebuttal, pp. 5-6.

base, rate of return analysis,⁵¹ did not omit or fail to include any operating expenses in its rate base, rate of return recommendation, and believed its \$31,333 rate base, rate of return rate increase recommendation covers the Lane Scott MKEC division's cost of service, including depreciation expense and an operating margin.⁵²

29. The Commission likewise selectively disregards highly relevant evidence related to Staff's criticism⁵³ of the Company's use of a rate base, rate of analysis or methodology in this case was not supported by the testimony of Staff's own witnesses:

- The use of a capital structure with zero long-term debt could be handled by using a reasonable hypothetical capital structure which has been used by Staff and approved by the Commission in prior cases, such as the 50% equity, 50% debt capital structure tied to national and median ratios used by CURB.⁵⁴
- The use of a capital structure with 100% negative equity could be handled by using a hypothetical capital structure.⁵⁵
- The assumption that Lane Scott will have zero debt in the future could be handled by using a hypothetical capital structure.⁵⁶
- The need to make a determination on how to treat the acquisition premium on Lane-Scott's books with regard to its treatment in rate base could be handled by adopting the adjustment proposed by both CURB and Staff, which is consistent with the principle that ratepayers shouldn't have to pay for assets that weren't actually paid for by the utility and consistent with prior rate cases.⁵⁷
- The fact that prior filings by other MKEC cooperatives were not based on a rate base, rate of return methodology is irrelevant as the KCC has utilized a rate base, rate of return methodology for other cooperatives, such as Midwest Energy.⁵⁸

30. While the Commission briefly mentions CURB's argument that the \$370,000 revenue requirement proposed in the settlement agreement is excessive and not supported by the rate base,⁵⁹

⁵¹ Bell, Tr. p. 297.

⁵² Bell, Tr. pp. 296-97.

⁵³ Bell Direct, pp. 10-11.

⁵⁴ Bell, Tr. pp. 283-84. *See also*, Cotton Direct, pp. 2-9; Harden Direct, p. 5; Morris, Tr. pp. 144-46; CURB Exh. 7.

⁵⁵ Bell, Tr. p. 284.

⁵⁶ Bell, Tr. pp. 284-85.

⁵⁷ Bell, Tr. pp. 285-86.

⁵⁸ Gatewood, Tr., p. 254; Bell, Tr. pp. 285-86.

⁵⁹ April 3rd Order, ¶ 43.

rate of return evidence in the record, the Commission selectively disregards the highly relevant evidence that established the unreasonableness of the revenue requirement based on a rate/base, rate of return analysis. As the record demonstrates, even if the Commission accepted MKEC's capital structure of 100% equity and its ROE of 8.171%⁶⁰ and adopted only three adjustments that are either unopposed by MKEC or proposed by both Staff and CURB, the \$370,000 proposed rate increase is clearly unreasonable, excessive, and not within the zone of reasonableness.⁶¹ These three adjustments to MKEC's rate base, rate of return recommendation are summarized below.

- MKEC's filed revenue deficiency decreases from \$510,915 to \$281,000 with the \$2.9 million adjustment (\$2.6 million net adjustment) to Plant in Service for the Aquila acquisition adjustment recommended by both CURB and Staff.⁶² The acquisition adjustment made by CURB and Staff is reasonable, consistent with how negative acquisition adjustments have been treated in past cases,⁶³ consistent with the principle that ratepayers shouldn't have to pay for assets that weren't actually paid for by the utility,⁶⁴ and consistent with the 524 S&A and Order.⁶⁵
- MKEC's filed revenue deficiency decreases further to either \$181,130 with the \$78,439 adjustments made by CURB to depreciation expense on the acquisition adjustment⁶⁶ or to \$202,449 with the \$99,758 adjustment made by Staff to the amortization of the acquisition adjustment.⁶⁷ This adjustment will be discussed more fully in Argument D below.
- The Company's filed revenue deficiency decreases further by another \$34,915 with the uncontested \$400,596 rate base adjustment for materials and supplies,⁶⁸ assuming the Company's requested return of 8.718% - resulting in a reasonable revenue deficiency between \$146,000 and \$167,500, well below the \$370,000 rate increase reached in the proposed settlement between MKEC and Staff.⁶⁹ This is why CURB

⁶⁰ By proposing this scenario, CURB is not conceding MKEC's 100% capital structure, which CURB maintains is unreasonable and inefficient and would lower a reasonable revenue requirement even further. *See*, Cotton Direct Testimony, pp. 6-7; Shepherd, Tr., p. 211; Shepherd Rebuttal, p.7.

⁶¹ Crane Opposition. This testimony was unopposed at the evidentiary hearing.

⁶² Crane Opposition, pp. 7-9, ACC-SA-1; Bell, Tr. pp. 285-86, 299; Bell Direct, p. 13-14.

⁶³ Bell, Tr. pp. 285-86; Bell Direct, pp. 13-14.

⁶⁴ Bell, Tr. p. 286; Bell Direct, p. 12-13; Crane Direct, pp. 7-13.

⁶⁵ Bell Direct, p. 23.

⁶⁶ Crane Direct, pp. 16-18, Schedule ACC-2; Crane Opposition, p. 9, ACC-SA-2; Harden Direct, pp. 5.

⁶⁷ Crane Opposition, pp. 8-10, ACC-SA-3; Staff Rate Base/Rate of Return Schedules, Schedule B-2, Adjustment No. 2; Bell Direct Testimony, pp. 21-22.

⁶⁸ Crane Opposition, p. 10; Harden Direct, pp. 5, 7, Schedule SMH-3; CURB Exh. 1.

⁶⁹ Crane Opposition, p. 10; Harden Direct, p. 7, Schedule SMH-3; CURB Exh. 1.

could not agree to the settlement, and why the \$370,000 rate increase proposed in the settlement is excessive and unreasonable.

- The resulting \$146,000 to \$167,500 revenue deficiency range still includes the Company's unreasonable and inefficient 100% capital structure.⁷⁰ A reasonable revenue deficiency range is even less if the Commission adopts CURB's hypothetical capital structure based on national and state median ratios.⁷¹

31. The Commission has selectively disregarded the facts demonstrating two nearly identical adjustments made by Staff and CURB regarding the negative acquisition adjustment⁷² and associated depreciation or amortization⁷³ plus the additional adjustment (uncontested by MKEC) related to the \$400,596 rate base error in the application for materials and supplies,⁷⁴ would reduce the Company's requested revenue deficiency from \$510,915 to between \$146,000 and \$167,500.⁷⁵

32. The Commission's April 3rd Order has likewise selectively disregarded the duty of MKEC and Lane Scott's to maintain *separate records and books*, as required in the Commission's 524 Order approving the 524 S&A. The undocumented and made up debt by Staff is the direct result of Lane Scott's failure to document any intercompany loan, yet the Commission doesn't deem this fact worth of mentioning. The record clearly demonstrates that MKEC and Lane Scott have not complied with the requirements of the 524 S&A and Order for member distribution cooperatives to "maintain separate books and records,"⁷⁶

⁷⁰ Shepherd, Tr., p. 211; Shepherd Rebuttal, p.7; Cotton Direct, pp. 6-7.

⁷¹ Cotton Direct, pp. 2-9; Harden Direct, p. 5; Bell, Tr. pp. 283-84; Morris, Tr. pp. 144-46; CURB Exh. 7.

⁷² See, CURB Brief, ¶ 21, 51-55; Crane Direct, pp. 7-13; Crane Opposition, pp. 7-9, ACC-SA-1; Bell, Tr. pp. 285-86, 299; Bell Direct, pp. 12-14, 23.

⁷³ See, CURB Brief, ¶ 22, 66-68; Crane Direct, pp. 16-18, Schedule ACC-2; Crane Opposition, pp. 7-10, ACC-SA-1, ACC-SA-2, ACC-SA-3; Harden Direct, pp. 5; Bell, Tr. pp. 285-86, 299; Staff Rate Base/Rate of Return Schedules, Schedule B-2, Adjustment No. 2; Bell Direct, pp. 13-14, 21-22.

⁷⁴ See, CURB Brief, ¶¶ 23, 56-57; Crane Opposition, p. 10; Harden Direct, pp. 5, 7, Schedule SMH-3; CURB Exh. 1.

⁷⁵ See, CURB Brief, ¶¶ 21-23; Crane Opposition, pp. 9-11; Harden Direct, pp. 5, 7, Schedule SMH-3; CURB Exh. 1.

⁷⁶ The Company did not keep separate books and records because it deemed it to be "not economically practical," even though the same witness admitted it isn't that difficult or expensive to maintain separate checking accounts for the regulated (MKEC) and unregulated (native) companies. Crane Direct, pp. 21-23; Morris Direct, p. 2; Morris, Tr. pp. 137-38. See also, 524 Order, ¶ 15; 524 S&A, ¶ 14.

33. In approving the revenue requirement proposed in the settlement agreement, the Commission seems to rely on testimony that the \$370,000 revenue requirement “falls within the range of the Company and Staff,”⁷⁷ and appears to place great reliance on the fact that no complaints were received by the Commission regarding the management of the cooperative and that two public comments (opposing the rate increase) were received by the Commission’s PACP office.⁷⁸ Without any basis or citation to the record, the Commission dismisses its statutory obligation to determine whether the proposed revenue requirement is just and reasonable by erroneously concluding: “If the rates or revenue requirements are excessive, the excess accrues to the members, not to an outside group of investors. Said differently, the rates in this case are rates that the members have agreed to pay to the Company they own.”⁷⁹ The Commission disregards substantial evidence in the record that detracts from the proposed revenue requirement contained in the settlement agreement, and concludes without any factual findings that it “finds that substantial competent evidence exists and supports the finding that the SA is reasonable and should be approved.”⁸⁰

34. A reasoned decision or order cannot result from an analysis that ignores almost the entirety of the testimony, evidence, and argument presented regarding the revenue requirement issue. The Commission's April 3rd Order approving the \$370,000 revenue requirement proposed by the settlement agreement is not supported by factual findings that are substantial when considered in light of *all* the evidence⁸¹ and selectively disregards or rejects highly relevant evidence related to the revenue requirement issue.⁸² As a result, the Commission’s April 3rd Order approving the

⁷⁷ April 3rd Order, ¶ 42.

⁷⁸ April 3rd Order, ¶ 50.

⁷⁹ April 3rd Order, ¶ 50.

⁸⁰ April 3rd Order, ¶ 52.

⁸¹ *Herrera-Gallegos*, 42 Kan.App.2d at 362.

⁸² *Kansas Industrial Consumers*, 30 Kan. App. 2d at 345.

\$370,000 revenue requirement must be reconsidered as it is not supported by evidence that is substantial when viewed in light of the record as a whole.⁸³

III. THE COMMISSION DECISION IS OTHERWISE UNREASONABLE, ARBITRARY AND CAPRICIOUS.

35. The Commission's April 3rd Order approving the revenue requirement proposed in the settlement agreement is otherwise unreasonable, arbitrary, and capricious because the decision is not "fairly and reasonably determined" as required in *Farmland Industries v. State Corporation Commission*:

Traditionally, utility rates are set by determining "(1) a rate base, (2) a fair rate of return, and (3) reasonable operating expense. In determining these factors, there are numerous elements pertaining to each which must be fairly and reasonably determined if a fair return is to result."⁸⁴

36. The rationale presented above in Arguments I⁸⁵ and II⁸⁶ establish the Commission's April 3rd Order is otherwise unreasonable, arbitrary, and capricious because the elements related to the \$370,000 revenue requirement were not fairly and reasonably determined.

37. The Commission's April 3rd Order approving the \$370,000 revenue requirement proposed by the settlement agreement is not supported by factual findings that are substantial when considered in light of *all* the evidence⁸⁷ and the Commission erroneously selectively disregarded or

⁸³ K.S.A. § 77-621(c)(7).

⁸⁴ *Farmland Industries v. State Corporation Commission*, 24 Kan. App. 2d 172, 188-89, 943 P.2d 470 (1997) (citing *Southwestern Bell Tel. Co.*, 192 Kan. at 47).

⁸⁵ The Commission's failure to follow prescribed procedure as required by K.S.A. § 77-621(c)(5).

⁸⁶ The Commission's April 3rd Order is based on determinations of fact that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole as required by K.S.A. § 77-621(c)(7).

⁸⁷ *Herrera-Gallegos*, 42 Kan.App.2d at 362.

rejected highly relevant evidence pertaining to the unreasonableness of the \$370,000 proposed revenue requirement.⁸⁸

38. The Commission's April 3rd Order is not fairly and reasonably determined because the Commission selectively disregarded the highly relevant evidence discussed in paragraph numbers 24-27 above regarding Staff's flawed TIER analysis. The Commission's April 3rd Order is likewise not fairly and reasonably determined because the Commission selectively disregarded the highly relevant evidence discussed in paragraph numbers 24, 28-32 above regarding the rate base/rate of return analyses by MKEC, Staff, and CURB.

39. The Commission's April 3rd Order is not fairly and reasonably determined because the Commission erroneously places great reliance on the fact that no complaints were received by the Commission regarding the management of the cooperative and that two public comments (opposing the rate increase) were received by the Commission's PACP office.⁸⁹ The Commission's April 3rd Order is not fairly and reasonably determined because the Commission erroneously dismisses its statutory obligation to determine whether the proposed revenue requirement is just and reasonable by erroneously concluding, without any basis or citation to the record, that: "If the rates or revenue requirements are excessive, the excess accrues to the members, not to an outside group of investors. Said differently, the rates in this case are rates that the members have agreed to pay to the Company they own."⁹⁰

40. By selectively disregarding this highly relevant evidence that detracts from Staff's TIER and MKEC's rate base/rate of return revenue requirement recommendations and making

⁸⁸ *Kansas Industrial Consumers*, 30 Kan. App. 2d at 345.

⁸⁹ April 3rd Order, ¶ 50.

⁹⁰ *Id.*

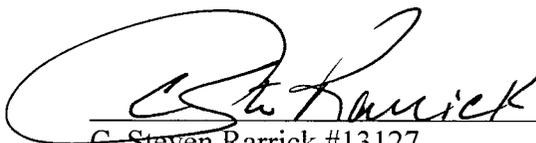
erroneous findings with respect to its erroneous conclusions that the rates in this case have been agreed to by MKEC customers, the Commission cannot possibly fairly and reasonably determined that the \$370,000 proposed revenue requirement was within the zone of reasonableness or that it results in just and reasonable rates.

41. The Commission's April 3rd Order approving the \$370,000 revenue requirement must therefore be reconsidered as the Commission took action otherwise unreasonable, arbitrary or capricious.⁹¹

IV. CONCLUSION

42. WHEREFORE, CURB respectfully requests that the Commission reconsider its April 3rd Order approving the \$370,000 revenue requirement proposed in the settlement agreement and based on the substantial and highly relevant evidence in the record, approve the revenue requirement proposed by CURB. In the alternative, CURB requests that the Commission approve a revenue requirement no greater than \$146,000 to \$167,500, based on the substantial and highly relevant evidence in the record.

Respectfully submitted,



C. Steven Rarrick #13127
David Springe #15619
Niki Christopher #19311
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

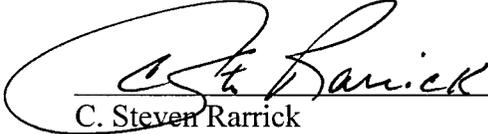
⁹¹ K.S.A. § 77-621(c)(8).

VERIFICATION

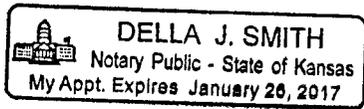
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

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 18th day of April, 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 18th day of April, 2013, to the following parties who have waived receipt of follow-up hard copies:

RAY BERGMEIER, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
r.bergmeier@kcc.ks.gov

SAMUEL FEATHER, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
s.feather@kcc.ks.gov

HOLLY FISHER, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
h.fisher@kcc.ks.gov

RENEE K. BRAUN, CORPORATE PARALEGAL, SUPERVISOR
MID-KANSAS ELECTRIC COMPANY, LLC
301 WEST 13TH STREET
PO BOX 980
HAYS, KS 67601
rbraun@sunflower.net

DON GULLEY, VP, SENIOR MANAGER
REGULATORY RELATIONS AND BILLING
MID-KANSAS ELECTRIC COMPANY, LLC
301 WEST 13TH STREET
PO BOX 980
HAYS, KS 67601
dgulley@sunflower.net

L. DOW MORRIS, INTERIM GENERAL MANAGER
LANE-SCOTT ELECTRIC COOPERATIVE, INC.
PO BOX 758
DIGHTON, KS 67839-0758
dow.morris@lanescott.coop

MARK D. CALCARA, ATTORNEY
WATKINS CALCARA CHTD.
1321 MAIN STREET SUITE 300
PO DRAWER 1110
GREAT BEND, KS 67530
mcalcara@wcrf.com

LINDSAY SHEPARD, EXECUTIVE MANAGER CORPORATE COMPLIANCE &
ASSOCIATE GENERAL COUNSEL
SUNFLOWER ELECTRIC POWER CORPORATION
301 W. 13TH
PO BOX 1020 (67601-1020)
HAYS, KS 67601
lshepard@sunflower.net

GLENDA. CAFER, ATTORNEY
CAFER LAW OFFICE, L.L.C.
3321 SW 6TH STREET
TOPEKA, KS 66606
glenda@caferlaw.com

TERRI PEMBERTON, ATTORNEY
CAFER LAW OFFICE, L.L.C.
3321 SW 6TH STREET
TOPEKA, KS 66606
terri@caferlaw.com



Della Smith
Administrative Specialist