

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

Received  
on

AUG 20 2013

by  
State Corporation Commission  
of Kansas

In the Matter of Westar Energy, Inc. and )  
Kansas Gas and Electric Company Seeking )  
Commission Approval for Tariff Revisions )  
to the Energy Efficiency Rider. )

Docket No. 14-WSEE-030-TAR

**PETITION FOR RECONSIDERATION OF PREHEARING OFFICER  
ORDER DENYING CURB'S PETITION TO INTERVENE AND SUBMITTAL  
OF ADDITIONAL FACTS SUPPORTING CURB'S PETITION TO INTERVENE**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and respectfully petitions the Corporation Commission of the State of the Kansas ("Commission") to reconsider the August 15, 2013, Prehearing Officer Order Denying CURB's Petition to Intervene. In addition, CURB submits additional facts supporting its request that the Commission enter an order granting CURB's intervention and full participation in the above-captioned proceeding. In support of its petition, CURB states and alleges as follows:

**I. PETITION FOR RECONSIDERATION.**

1. CURB seeks reconsideration of the August 15, 2013, Prehearing Officer Order Denying CURB's Petition to Intervene ("Prehearing Officer's Order") under K.S.A. 77-621(c) on the grounds that the order (1) constitutes agency action beyond the jurisdiction conferred by any

provision of law,<sup>1</sup> (2) erroneously interprets and applies the law,<sup>2</sup> and (3) constitutes an unlawful procedure or failure to follow prescribed procedure.<sup>3</sup>

2. First, CURB is entitled to intervene as a matter of right, not Commission discretion.

K.S.A. 66-1223 provides that:

The consumer counsel may do the following:

- (a) Represent residential and small commercial ratepayers before the state corporation commission;
- (b) function as *an official intervenor* in cases filed with the state corporation commission, including rate increase requests;
- (c) initiate actions before the state corporation commission;
- (d) represent residential and commercial ratepayers who file formal utility complaints with the state corporation commission;
- (e) intervene in formal complaint cases which would affect ratepayers; and
- (f) make application for a rehearing or seek judicial review of any order or decision of the state corporation commission.

3. The discretion under K.S.A. 66-1223 is given to the consumer counsel, not the Commission. CURB has therefore been statutorily qualified as an official intervenor by the Kansas legislature in cases filed with the Commission.

4. K.S.A. 77-521(a), which governs general interventions, provides:

77-521. Intervention. (a) The presiding officer *shall* grant a petition for intervention if:

- (1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least three business days before the hearing;
- (2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
- (3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

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<sup>1</sup> K.S.A. 77-621(c)(2).

<sup>2</sup> K.S.A. 77-621(c)(4).

<sup>3</sup> K.S.A. 77-621(c)(5).

The provisions of K.A.R. 82-1-225 (a) are nearly identical to the provisions of K.S.A. 77-521(a), and likewise provide that the presiding officer “shall” grant a petition to intervene if the above conditions are met.

5. CURB timely submitted its Petition to Intervene on July 16, 2013, three business days after Westar filed for approval of its Energy Efficiency Rider. In its Petition to Intervene, CURB stated the following facts demonstrating that CURB qualifies as an intervener under any provision of law *and* that CURB’s legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding:

- On July 11, 2013, Westar Energy, Inc. and Kansas Gas and Electric Company (“Westar”) filed an application with the Commission seeking approval for tariff revisions to Westar’s Energy Efficiency Rider.
- CURB’s Consumer Counsel has been given the discretion to intervene and represent the interests of Kansas residential and small commercial ratepayers in any utility proceeding before the Commission under K.S.A. 66-1223 *et seq.*
- CURB is composed of five volunteer consumer advocate members and is statutorily authorized to represent the interests of Kansas residential and small commercial ratepayers in utility proceedings.
- CURB is seeking to intervene in this docket to represent the interests of the residential and small commercial ratepayers, and that the rates paid and the service received by those customers will or may be affected by any Commission order or activity in this proceeding
- The representation of CURB’s interests in this proceeding by existing parties is or may be inadequate.
- The residential and small commercial ratepayers whose interests CURB represents will or may be bound by any Commission order or activity in this proceeding and will or may be adversely affected thereby.<sup>4</sup>

6. The provisions of K.S.A. 66-521(a)(3) do not apply to CURB because the legislature has statutorily determined that CURB is to function as the *official intervenor* for residential and small commercial ratepayers in cases filed with the Commission under K.S.A. 66-1223(a) and (b).

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<sup>4</sup> CURB Petition to Intervene, ¶¶ 1-4, 6-7.

Nonetheless, the Prehearing Officer did not make a determination under K.S.A 66-521(a)(3) that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing CURB's intervention, nor found any basis in fact or law for denying CURB's intervention.

7. Instead, the Prehearing Officer denied CURB's intervention based upon a prior Commission order issued in another docket (Order on Jurisdiction and Standing, April 26, 2013, ¶ 9, Docket No. 13-MKEE-447-MIS, or "447 Order"),<sup>5</sup> where the Commission unlawfully purports to amend the statutory requirements for intervention contained in K.S.A. 77-521(a). By erroneously relying upon the 447 Order rather than the express provisions of K.S.A. 77-521(a), the Prehearing Officer's Order (1) constitutes agency action beyond the jurisdiction conferred by any provision of law,<sup>6</sup> (2) erroneously interprets and applies the law,<sup>7</sup> and (3) constitutes an unlawful procedure or failure to follow prescribed procedure.<sup>8</sup>

8. Specifically, the Prehearing Officer erroneously denied CURB's Petition to Intervene on the grounds that it "does not demonstrate a particular interest that is not represented by the other parties affected by the proceeding or identify the specific relief sought by intervention."<sup>9</sup> Neither of these requirements for intervention are contained in K.S.A. 77-521(a), nor did the Commission designate the 447 Order to be a precedential order or publish the order on the Commission's website as a precedential order as required by K.S.A. 77-415. As a result, the Prehearing Officer's denial exceeds the Commission's statutory jurisdiction, erroneously interprets and applies the law, and constitutes an unlawful procedure that fails to follow established law for intervention.

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<sup>5</sup> Prehearing Officer Order Denying CURB's Petition to Intervene, ¶ 4 (citing Order on Jurisdiction and Standing, April 26, 2013, ¶ 9, Docket No. 13-MKEE-447-MIS).

<sup>6</sup> K.S.A. 77-621(c)(2).

<sup>7</sup> K.S.A. 77-621(c)(4).

<sup>8</sup> K.S.A. 77-621(c)(5).

<sup>9</sup> Prehearing Officer Order Denying CURB's Petition to Intervene, ¶5.

9. Further, contrary to the finding by the Prehearing Officer, CURB's Petition to Intervene *did* "demonstrate the particular interest that is not represented by the other parties affected by the proceeding," by (1) *referencing CURB's statutory authority to intervene on behalf of residential and small commercial customers* under K.S.A. 66-1223 *et seq.*,<sup>10</sup> (2) stating that the *rates paid and the service received by those customers will or may be affected* by any Commission order or activity in this proceeding,<sup>11</sup> and (3) stating that *the representation of those interests in this proceeding by existing parties is inadequate*.<sup>12</sup>

10. Also contrary to the findings of the Prehearing Officer, CURB did identify the relief sought by intervention, by stating, "CURB is requesting permission to intervene in this docket to *represent the interests of the residential and small commercial ratepayers of Kansas*."<sup>13</sup> Of course, identifying the relief sought is *not* a valid requirement for intervention under K.S.A. 77-521(a). With respect to cases filed with the Commission, this is both understandable and reasonable since most parties, including Commission Staff, cannot reasonably identify the relief they seek until *after* the party has had the opportunity to conduct an investigation (including discovery requests) of the application filed by the utility. This, of course, requires that a party be allowed to intervene. To require otherwise would require complete speculation by intervenors, something one would hope the Commission would discourage rather than encourage with the unlawful requirement referenced by the Prehearing Officer. However, CURB clearly communicated its intent to represent the interests of residential and small commercial ratepayers in its Petition to Intervene in this docket, and CURB is the *official intervenor* authorized under K.S.A. 66-1223.

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<sup>10</sup> CURB Petition to Intervene, ¶¶ 1-2.

<sup>11</sup> *Id.*, at ¶ 4.

<sup>12</sup> *Id.*, at ¶ 6.

<sup>13</sup> *Id.*, at ¶ 4 (emphasis added).

11. The finding by the Prehearing Officer that “the simple recitation of boilerplate language in CURB’s Petition to Intervene does not satisfy the standards for intervention *announced* in the 447 docket” is likewise erroneous. “Boilerplate” is defined by Black’s Law Dictionary as:

Language which is used commonly in documents having a definite meaning in the same context without variation. Term used to describe standard language in a legal document that is identical in instruments of a like nature.<sup>14</sup>

12. Ignoring for a moment the fact that the Commission is without authority to alter the standards for intervention contained in K.S.A. 77-521(a), it is hardly unusual or surprising that CURB’s intervention petitions use boilerplate/standard language, just like the boilerplate/standard language commonly utilized in Commission orders and settlement agreements filed with the Commission. When appropriate, CURB uses boilerplate/standard language stating (1) CURB’s statutory authority to intervene and represent the interests of residential and small commercial ratepayers,<sup>15</sup> and (2) that the case may affect the rates paid by residential and small business ratepayers.<sup>16</sup> This is no different than when the Commission regularly uses boilerplate/standard language in its orders, such as language describing the number of days that parties have to petition the Commission for reconsideration<sup>17</sup> and stating the jurisdiction retained by the Commission following interim orders.<sup>18</sup> Likewise, CURB’s use of this standard language is no different than

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<sup>14</sup> Black’s Law Dictionary, Abridged Fifth Edition, p. 92 (1983).

<sup>15</sup> Petition to Intervene, ¶ 2 (“CURB’s Consumer Counsel has been given the discretion to intervene and represent the interests of Kansas residential and small commercial ratepayers in any utility proceeding before the Commission under K.S.A. 66-1223 *et seq.*”).

<sup>16</sup> Petition to Intervene, ¶4 “CURB is requesting permission to intervene in this docket to represent the interests of the residential and small commercial ratepayers in Kansas. The rates paid and the service received by those customers will or may be affected by any Commission order or activity in this proceeding.”

<sup>17</sup> Prehearing Officer Order Denying CURB’s Petition to Intervene, August 15, 2013, p. 3, Docket No. 14-WSEE-030-TAR (“Parties have 15 days from the date of electronic service of this Order to petition the Commission for reconsideration.”). *See also*, Order Assessing Costs, July 16, 2013, p. 2, Docket No. 14-WSEE-030-TAR; Order Assessing Costs, December 7, 2011, p. 2, Docket No. 12-MKEE-380-RTS.

<sup>18</sup> Prehearing Officer Order Denying CURB’s Petition to Intervene, August 15, 2013, p. 3, Docket No. 14-WSEE-030-TAR (“The Commission retains jurisdiction over the subject matter and the parties for purposes of entering such further

when parties (including Commission Staff) regularly use boilerplate/standard language in settlement agreements.<sup>19</sup> The use of boilerplate/standard language does not change the quality or nature of the facts described, as long as the facts described comply with the requirements of K.S.A. 77-521(a). If certain facts stated in CURB's intervention petitions remain the same from case to case, re-phrasing those same factual allegations would not change the nature of the facts alleged. However, re-phrasing those same facts simply because the Commission does not like the use of standard language would cause completely unnecessary rate case expense<sup>20</sup> with no resulting legal consequence.

13. CURB's Petition to Intervene fully complied with each requirement under K.S.A. 77-521(a). K.S.A. 77-521 states that a petition to intervene *shall* be granted if the petition states facts (1) demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding *or* that the petitioner *qualifies as an intervenor under any provision of law* and (2) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

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orders as it deems necessary.”). *See also*, Order Assessing Costs, July 16, 2013, p. 2, Docket No. 14-WSEE-030-TAR; Order Assessing Costs, December 7, 2011, p. 2, Docket No. 12-MKEE-380-RTS.

<sup>19</sup> *See* identical boilerplate/standard language used in: Joint Motion for Approval of Settlement Agreement, attached Settlement Agreement, May 21, 2012, ¶¶ 17-21, Docket No. 12-MKEE-380-RTS; Joint Motion for Approval of Settlement Agreement, attached Settlement Agreement, June 7, 2012, ¶¶ 12-16, Docket No. 12-MKEE-491-RTS.

<sup>20</sup> While the Commission Chairman has expressed concern about rate case expense in recent dockets, the attempts by the Chairman to keep CURB out of cases before the Commission is itself resulting in unnecessary rate case expense, especially when CURB's express statutory authority to intervene in cases as an *official intervenor* before the Commission under K.S.A. 66-1223 is clear and unambiguous and has been recognized by the Kansas Supreme Court. *See, Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 24 Kan. App.2d 63, 68, *rev. den.* 262 Kan. 959 (1997) *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)”).

14. CURB's Petition to Intervene stated facts demonstrating that CURB *qualifies as an intervenor* under provision of law,<sup>21</sup> by citing the provisions of K.S.A. 66-1223 which authorize CURB to intervene as *an official intervenor* in cases before the Commission to represent residential and small commercial ratepayers before the Commission.<sup>22</sup> Further, CURB'S Petition to Intervene likewise demonstrated that the legal rights, duties, privileges, immunities or other legal interests of residential and small business ratepayers may be substantially affected by the proceeding<sup>23</sup> by stating that *the rates paid and the service received by residential and small business customers will or may be affected* by any Commission order or activity in this proceeding<sup>24</sup> and that *the representation of those interests in this proceeding by existing parties is inadequate*.<sup>25</sup>

15. Moreover, CURB has been granted intervention and full participation in prior energy efficiency rider dockets, based on virtually identical petitions to intervene.<sup>26</sup> As a result, the Prehearing Officer's denial of intervention to CURB constitutes an unlawful procedure and has failed to follow prescribed procedure.<sup>27</sup>

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<sup>21</sup> K.S.A. 77-521(a)(2).

<sup>22</sup> CURB Petition to Intervene, ¶¶ 1-4, 6-7.

<sup>23</sup> K.S.A. 77-521(a)(2).

<sup>24</sup> CURB Petition to Intervene, at ¶ 4.

<sup>25</sup> *Id.*, at ¶ 6.

<sup>26</sup> *See*, Suspension Order and Order Granting the Citizens' Utility Ratepayer Board's Petition to Intervene, April 17, 2013, ¶¶ 5-8, 13-KCPE-584-TAR; Order Granting Intervention to Citizens' Utility Ratepayer Board, October 15, 2012, 13-EPDE-209-TAR; Order Granting Petition to Intervene, September 19, 2012, 13-WSEE-033-TAR; Order Granting Intervention to Citizens' Utility Ratepayer Board, May 30, 2012, 12-KCPE-729-TAR; Order Granting Petition for Intervention, September 16, 2011, 12-EPDE-141-TAR; Order Granting Petition for Intervention, August 16, 2011, 12-WSEE-063-TAR; Order Designating Prehearing Officer and Granting Intervention to the Citizens' Utility Ratepayer Board, May 25, 2011, ¶¶ 1-6, 11-KCPE-665-TAR; Order Granting Intervention for the Citizens' Utility Ratepayer Board, August 20, 2010, 11-WSEE-032-TAR; Order Granting CURB Intervention, May 10, 2010, 10-KCPE-636-TAR; Order Granting Intervention to Citizens' Utility Ratepayer Board, September 10, 2010, 10-WSEE-141-TAR; Order Granting Intervention to Citizens' Utility Ratepayer Board, May 4, 2009, 09-KCPE-770-TAR; Order, June 13, 2008, ¶ 10, 08-KCPE-802-TAR.

<sup>27</sup> K.S.A. 77-621(c)(5).

16. CURB's Petition to Intervene fully satisfies each of the requirements of K.S.A. 77-521(a). CURB is the statutory *official intervenor* designated by the Kansas legislature to represent residential and small commercial ratepayers in cases filed with the Commission. The Prehearing Officer did not make a determination that the interests of justice and the orderly and prompt conduct of the proceedings would be impaired by allowing CURB's intervention, nor did the Prehearing Officer find any other basis in fact or law for denial of CURB's intervention. As a result, the Commission should reconsider the Prehearing Officer's Order and grant CURB full intervention and participation in this docket.

17. Below, CURB submits additional facts demonstrating CURB's intervention should be granted.

## **II. ADDITIONAL FACTS DEMONSTRATING CURB'S INTERVENTION SHOULD BE GRANTED.**

18. On July 11, 2013, Westar filed an application with the Commission seeking approval of tariff revisions to Westar's Energy Efficiency Rider. This Rider will permit recovery of costs associated with Westar's various energy efficiency programs.<sup>28</sup>

19. CURB is composed of five volunteer consumer advocate members and is statutorily authorized to represent the interests of Kansas residential and small commercial ratepayers in utility proceedings.<sup>29</sup>

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<sup>28</sup> Tariff for Westar Energy, Inc. and Kansas Gas & Electric Co., d/b/a/ Westar Energy, July 11, 2013. The individual energy efficiency filings include: Energy Efficiency Education Program, Docket No. 09-WSEE-986-ACT; Building Operator Certification Program, Docket No. 09-WSEE-738-MIS; WattSaver Air Conditioner Cycling Program, Docket No. 09-WSEE-636-TAR; Energy Efficiency Demand Response Program, Docket No. 10-WSEE-141-TAR; SimpleSavings Program Rider, Docket No. 10-WSEE-775-TAR.

<sup>29</sup> K.S.A. 66-1222; K.S.A. 66-1223.

20. CURB is the statutory “*official intervenor*” designated by the Kansas legislature in cases filed with the Commission under Kansas statutes, a fact recognized by the Kansas Supreme Court.<sup>30</sup> CURB has specific statutory authority 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...”<sup>31</sup> No other party to this proceeding is authorized to represent residential and small commercial ratepayers before the Commission or to function as “an official intervenor” in cases filed with the Commission. While Commission Staff may have authority to investigate, evaluate, testify and offer exhibits on behalf of the *general public* pursuant to a definition contained in a Commission regulation,<sup>32</sup> Staff does not represent residential and small commercial ratepayers and is expressly denied the right to appeal Commission orders.<sup>33</sup>

21. CURB has been granted express statutory authority to seek judicial review of Commission orders and decisions on behalf of residential and small commercial ratepayers.<sup>34</sup> No other party to this proceeding is authorized to seek judicial review of Commission orders and decisions on behalf of residential and small commercial ratepayers.

22. CURB’s statutory authority referenced above provides specific authority and reflects the intent of the Legislature that CURB should participate in cases filed with the Commission. This

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<sup>30</sup> 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). 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)”).

<sup>31</sup> K.S.A. 66-1223(a) and (b).

<sup>32</sup> Staff’s authority to represent the general public is not specifically authorized by statute, but merely referenced in the definition section of Commission regulations. 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*.”).

<sup>33</sup> K.A.R. 82-1-204(i)(3).

<sup>34</sup> K.S.A. 66-1223(f).

fulfills the requirement under K.S.A. 77-521(a)(2) because CURB “*qualifies as an intervener under any provision of law.*”

23. CURB requests intervention in this docket to represent the interests of the residential and small commercial ratepayers pursuant to its statutory authority under K.S.A. 66-1223. The rates paid and the service received by those customers could be substantially affected by any Commission order or activity in this proceeding, and representation of CURB’s interests in this proceeding by existing parties is inadequate. The residential and small commercial ratepayers whose interests CURB represents will be bound by any Commission order or activity in this proceeding and will be adversely affected thereby. This fulfills the alternative requirement under K.S.A. 77-521(a)(2) because CURB’s petition “states facts demonstrating that the petitioner’s legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding.”

24. CURB has a substantial and vital interest in the outcome of this proceeding which cannot be adequately represented by any other party. The interests of justice and the orderly and prompt conduct of these proceedings will not be impaired by allowing CURB’s intervention.

25. As a result, CURB again requests that the Commission grant CURB’s Petition to Intervene and participate fully in this docket, including but not limited to the right to conduct discovery, file pleadings, present oral argument, and fully participate in any hearings.

26. In addition to undersigned counsel, CURB requests that the Commission please include the following CURB representatives with all electronic notices, pleadings, and correspondence regarding this Application as follows:

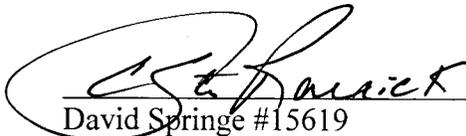
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### III. CONCLUSION.

27. WHEREFORE, CURB respectfully requests the Commission reconsider the August 15, 2013, Prehearing Officer's Order and enter an order granting CURB's petition for intervention in this docket.

Respectfully submitted,



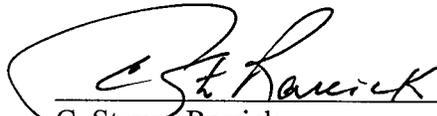
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VERIFICATION

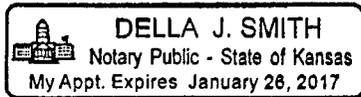
STATE OF KANSAS )  
 ) ss:  
COUNTY OF SHAWNEE )

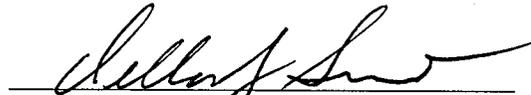
I, Steve Rarrick, of lawful age and being first duly sworn upon his oath, states:

That he is an attorney for the above named petitioner; that he has read the above and foregoing Intervention, 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 20<sup>th</sup> day of August, 2013.



  
Notary Public

My Commission expires: 01-26-2017.

**CERTIFICATE OF SERVICE**

14-WSEE-030-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 20<sup>th</sup> day of August, 2013:

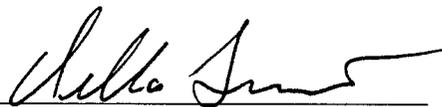
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Administrative Specialist