THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Thomas E. Wright, Chairman
Joseph F. Harkins
Ward Loyd

In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan	))))	Docket No. 10-KCPE-415-RTS

ORDER: 1) ADDRESSING PRUDENCE; 2) APPROVING APPLICATION, IN PART; & 3) RULING ON PENDING REQUESTS

The above captioned matter is before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being fully advised in all matters of record, the Commission makes the following findings of fact and conclusions of law:

I. BACKGROUND

A. General

On December 17, 2009, Kansas City Power & Light Co. (KCPL or the Company) filed the captioned Application for a rate change per K.S.A. 66-117 and K.A.R. 82-1-231. The current docket represents the fourth and final rate case in the series of four rate applications that were contemplated in the Stipulation and Agreement (1025 S&A or Regulatory Plan) that was approved by the Commission in Docket No. 04-KCPE-1025-GIE. The Regulatory Plan represented a collaborative effort and resulted in KCPL committing to make substantial investments in its electric infrastructure over a five-year period.

In the 1025 Docket, KCPL, the Commission, the Staff of the State Corporation Commission of the State of Kansas (Staff), the Citizens' Utility Ratepayer Board (CURB), and

A. Prudence

1. The Test for Determining Prudence

KCPL, Staff, CURB, and Empire filed briefs and presented argument on three prudence issues:

I. Does K.S.A. 66-128g, or other statute, set the legal standard for determining imprudence in this case given that none of the construction projects will generate nuclear power?

   A. If "yes," are there any statutory factors contained in that standard that can be legally excluded in determining imprudency and on what basis?

   B. If "no," then what legal standard should be used for determining imprudence, and what is its basis?

II. Can the specific legal standard developed above be applied to all types or categories of costs, (e.g. environmental upgrades) alleged as imprudent?

III. What party bears the burden of proof—Staff to prove imprudency or KCPL to prove prudence—and is either party entitled any presumptions or permitted to shift the burden?[30]

Of interest, some briefs indicated that K.S.A. 66-128g did not set the legal standard for determining prudence in this case; instead they offered, for example, a view that the term prudence used in this statutory scheme was "borne from the definition of the word 'prudence,' which . . . is essentially a negligence standard based upon accepted industry practice."[31] However, the language offered by the parties redefining prudence does not appear in the statutes, the Commission's Wolf Creek Order, or the *Kansas Gas & Electric* case interpreting those two authorities. In fact, the Wolf Creek Order specifically refers to K.S.A. 66-128g as a "statutory mandate" that ". . . also provides notice to the utilities of the general *standards* to be used."[32]

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[30] Order Approving Stipulation & Agreement and Addressing Scope of Final Rate Case, Docket No. 09-KCPE-246-RTS, ¶ 23, pp. 10-11 (Jul. 24, 2009).
[31] Staff Brief on Prudence Review and Legal Standards, Docket No. 04-KCPE-1025-GIE, p. 4 (Aug. 31, 2009).
[32] *In re Wolf Creek Nuclear Generating Facility,* Final Order, Docket No. 84-KG&E-197-RTS, p. 14 (Sept. 27, 1985).

We also note that parties split hairs over the terms "factor," "guideline," and "standard," which are used interchangeably in the Wolf Creek Order and the *Kansas Gas & Electric* case interpreting and affirming that Order. In our view that approach amounts to making a distinction without a difference when it comes to applying the express and specific mandate in K.S.A. 66-128g. Under a common ordinary meaning approach, factor is defined as a "cause that contributes to a particular result"; guideline is defined as "a statement of policy or procedure"; and standard as "an accepted measure of comparison for qualitative or quantitative value."[33] Candidly, we see K.S.A. 66-128g as a statute that has all of these definitions working within a self-contained and unambiguous framework.

Therefore, after reviewing all of the briefs and the arguments of the parties, the Commission concludes, as to Issue I and Issue II, that K.S.A. 66-128g, as interpreted by the Kansas Supreme Court in *Kansas Gas & Electric,* and within the context of K.S.A. 66-128 more generally, does apply to the non-nuclear construction projects referred to as Iatan I and Iatan II in this case.[34] That statute is "devoted to a recitation of the various factors to be considered by the Commission in making the determination of 'prudence' or lack thereof."[35] Some of the factors in that statute will bear on our decision more than others; however, the only factor we find clearly irrelevant is (a)(7), which addresses decommissioning, waste disposal, and clean up costs.

In reaching this conclusion, we see no ambiguity in the statutory scheme at issue here concerning prudence, nor has any party raised such a claim. K.S.A. 66-128g is unequivocal when it states that:

> [t]he factors which shall be considered by the commission in making the determination of "prudence" or lack thereof in determining the reasonable value of electric generating

[33] Black's Law Dictionary, p. 630 (8th Ed. 2004); Webster's II, New Riverside Dictionary, pp. 553, 1131.
[34] *See Kansas Gas & Electric*, 239 Kan. at 493 (discussing the Commission's role of assessing the "reasonable value of electric generating property.").
[35] *Kansas Gas & Electric*, 239 Kan. at 493.

> property, as contemplated by this act shall include *without limitation* the following [12 enumerated items.] (Emphasis added).[36]

Likewise, the Court in *Kansas Gas & Electric* was also clear, stating twice in the opinion that there was no need to look beyond the common, ordinary meaning of "prudence" or lack thereof, as used in the statutes. The Court said:

> [K.S.A. 66-128g(a)(12)], in effect, states that 'prudence or lack thereof' means as that term is commonly used. Black's Law Dictionary 1104 (5th ed. 1979) defines "prudence" as "carefulness, precaution, attentiveness and good judgment."[37]

And it later said:

> As noted heretofore in this opinion, the word 'prudence' has a common and ordinary meaning. The various factors listed in K.S.A. 66-128g(a) provide sufficient guidelines for determining prudence which obviates the need for a definition of the term.[38]

Based on the above, we reject the parties' attempts to inject an industry standard of prudence or a requirement for a causal link between the alleged imprudent act and an otherwise avoidable cost. We also reject the use of rewritten negligence standards. These points are not included in the express statutory "guidelines for determining prudence" as those are listed in K.S.A. 66-128g(a)(1-11); nor should they override the very basic definition pertaining to the catchall provision in (a)(12). Therefore, we shall review the evidence submitted on the prudence issue by applying 10 of the 11 factors in the statute, and then the catchall Factor 12, in a straight-forward, methodical manner. We will also rely on the "known and measurable" standard, a benchmark embedded in traditional ratemaking.[39]

As to Issue III, burden of proof, only Staff and CURB filed testimony challenging the prudence of KCPL's construction expenditures. Neither disputed an Order placing the burden of

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[36] K.S.A. 66-128g(a).
[37] *Kansas Gas & Electric*, 239 Kan. at 495; Black's Law 8th Ed. defines prudent as "circumspect or judicious in one's dealings; cautious."
[38] *Kansas Gas & Electric*, 239 Kan. at 503.
[39] *E.g. Kansas Industrial Consumers v. Kansas Corp. Comm'n*, 30 Kan. App. 2d 332, 343 (2002); *Gas Service Co. v. Kansas Corp. Comm'n*, 4 Kan. App. 2d 623, 635-36 (1980).

proving imprudence on them, and neither alleged that the presumption in 66-128g(b) applies. That presumption is triggered when costs exceed 200% of the "original cost estimate." In its post-hearing brief, Staff claims in error that it only carries a seemingly lesser burden of persuasion and not the burden of proof.[40] However, Kansas law provides no distinction between those two burdens; it also provides that the requisite level of proof to satisfy the burden of proof is a preponderance of the evidence.[41] Therefore, the Commission concludes that Staff and CURB must prove, by the preponderance of the evidence, that KCPL, under K.S.A. 66-128g, imprudently incurred costs that should be excluded from the rate base. In other words, Staff's evidence of KCPL's imprudent actions must be of greater weight or more convincing than KCPL's evidence that it acted prudently, and Staff must show that its alleged facts of imprudent actions by KCPL are more probably true than not true.

2. The K.S.A. 66-128g(a) Factor Analysis

This analysis begins with a review of K.S.A. 66-128(c) which states:

> **Valuation of property for ratemaking; evaluation of efficiency or *prudence* of utility; exclusion of all or a portion of costs of excess capacity, when[.]** The [Commission] in *determining the reasonable value of property* [for ratemaking purposes] shall have the power to evaluate the efficiency or *prudence* of acquisition, construction, or operating practices of that utility. In the event the [Commission] determines that a portion of the costs of acquisition, construction or operation were incurred due in whole or in part to a lack of efficiency *or prudence*, or were incurred in the acquisition or construction of excess capacity, it shall have the power and authority to exclude all or a portion of those costs from the revenue requested by the utility.

K.S.A. 66-128g states:

> **Determination of 'prudence' in determining the reasonable value of electric generating property; factors to be considered; presumption of lack of prudence of costs in excess of 200% or 'original cost estimate'; definition of 'original cost estimate'; when costs exceeding 200% may be included.** (a) The factors which shall be considered by the commission in making the determination of "prudence" or lack

[40] *E.g.* Staff Post Hearing Brief at ¶ 33, p. 9.
[41] K.S.A. 60-401(d); *Ortega v. IBP, Inc.*, 255 Kan. 515, 518 (1994).

thereof in determining the reasonable value of electric property as contemplated by this act shall include without limitation the following: . . . [.]

K.S.A. 66-128g(a) then goes on to enumerate eleven specific factors, and one catch all provision for "any other fact, factor or relationship which may indicate prudence or lack thereof as that term is commonly used."[42] As indicated above, the common usage of the term "prudence" has been established by our Supreme Court as carefulness, precaution, attentiveness and good judgment. The Court, and the Commission in the Wolf Creek Order, both implicitly rejected using "hindsight," or in other words, "the perception of the nature and import of events *after* they have occurred."[43] We see no reason to deviate from statute, the Wolf Creek Order, or the *Kansas Gas & Electric* case in reaching our decision.

The evidence concerning the amount and level of costs that should be excluded from the rate base was highly contested by the three parties who prefiled testimony. First, KCPL built a strong and credible case in defense that its actions were not imprudent; its own expert, however, did testify that with respect to Iatan 2, KCPL should accept a $20.4 million ($5.1 million Kansas jurisdictional amount) imprudence disallowance due to the engagement of Welding Services, Inc., and the removal/readdition of an auxiliary boiler as described in Dr. Nielsen's testimony.[44]

Second, Staff argued for a $231 million ($57.7 million Kansas jurisdictional) disallowance. In our view, this claim hinges on a hindsight analysis, which is clearly prohibited. Staff's case was also fundamentally flawed because it starts with the premise that the project was 49% over the "original cost estimate" but never equates that term to the term "definitive cost estimate" as is done in the statutory scheme.[45]

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[42] K.S.A. 66-128g(a)(12).
[43] *Kansas Gas & Electric*, 239 Kan. at 503; *In re Wolf Creek Nuclear Generating Facility,* Final Order, Docket No. 84-KG&E-197-RTS, p. 14 (Sept. 27, 1985); Webster's II, New Riverside Dictionary, p. 583.
[44] Nielsen Rebuttal, p. 8, ln. 18 to p. 9, ln. 2.
[45] *See* K.S.A. 66-128g(b)(1).

Third, CURB presented a very limited analysis; it looked at what it believed to be the original cost estimate, compared it to the latest budgeted costs, and asserted that ratepayers should bear 25% of the cost overruns, and shareholders should bear the difference. CURB's prefiled disallowance amounted to $33.6 million.[46]

Considering the record as a whole, the Commission finds that KCPL's presentation of evidence on the statutory factors weighed greater in our decision than did Staff's and CURB's. The KCPL managers' own testimony about their own actions and what they directly observed and experienced during the construction and ongoing decision making process was credible and more convincing than Staff and CURB witnesses. On lengthy cross-examination, where we directly observed the KCPL witnesses testify, nothing occurred to undermine the truthfulness or accuracy of their direct or rebuttal testimony.

We also find that as to many of the factors individually and collectively, Staff simply did not meet its burden of proof and neither did CURB. The presentation of Staff's case suffered, as did its overall credibility, when it did not prefile testimony on four of the statutory prudence factors, despite being expressly ordered to do so.[47] Instead, through Staff witness Dr. Glass, rather than by motion, Staff "recommended" that the Commission delay consideration, until the abbreviated rate case,[48] of four factors numbered 1, 2, 5, and 9 of K.S.A. 66-128g(a). As to Factor 10, Dr. Glass also recommended that the Commission accept the evidence of Staff's expert witness Mr. Drabinski and determine that KCPL did not act in the general public interest when making certain management decisions related to the construction of Iatan Unit 2.[49]

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[46] Crane Direct, p. 32, ln. 17; pp. 36-39.
[47] Tr. Vol. 8, p. 1664; *see also* Procedural Order, Docket No. 10-KCPE-415-RTS, ¶ 20, p. 9 (Mar. 12, 2010).
[48] The request to file an abbreviated rate case is treated separately elsewhere in this Order.
[49] Glass Direct, p. 2, ln. 18; Tr. Vol. 8, pp. 1666-67.

In our Order dated July 23, 2010, the Commission rejected Staff's recommendation to defer prudence issues until the abbreviated rate case, and gave four reasons for this decision. The Commission then concluded:

> Therefore, for all the foregoing reasons, Staff witness Glass shall be prepared to answer Commission questions as to the above factors and not assume questions regarding these factors will be deferred to a subsequent proceeding, whatever form we ultimately decide that proceeding takes. With that said, we also anticipate questioning Dr. Glass about factor # 10 concerning the public interest. We are however, mindful of the tight time constraints imposed by rejecting Dr. Glass' recommendation at this juncture, but the procedural posture of the case so dictates.[50]

The July 23, 2010 Order became final without any party asking for reconsideration. When Dr. Glass provided additional and amended direct testimony at hearing, KCPL objected.[51] KCPL was given an opportunity to recross Dr. Glass but did not do so.

On rebuttal, KCPL notes Staff's failure at times to cite properly and systematically to the record. Nevertheless, the Commission has been able to work through the omissions, and each of the factors will now be addressed in turn.

Factor 1: A comparison of the existing rates of the utility *with rates that would result if the entire cost of the facility were included in the rate base* for that facility.

Factor 2: A comparison of the rates of any other utility in the state which has no ownership interest in the facility under consideration with the *rates that would result if the entire cost of the facility were included in the rate base.*

Factor 1 and 2 have the italicized point of comparison in common. KCPL witness Chris Giles estimated the total net increase in revenue requirement attributable to the inclusion of Iatan 2 into the rate base is approximately $14 million, or 3.02% of the total revenue requirement. Dr. Glass' figure was higher--approximately $26.4 million, or 5.52%.[52] Mr. Giles' figure equates to an impact of approximately $2.50 per month on rates for residential rate payers, while Dr. Glass'

[50] Procedural Order, Docket No. 10-KCPE-415-RTS, ¶ 8, p. 3 (Jul. 23, 2010).
[51] Tr. Vol. 8, p. 1643, ln. 17 to p. 1646, ln. 1.
[52] Tr. Vol 8, pp. 1646-48; Hearing Exh. 87.

figure is approximately $5.00 per month. On cross-examination, Dr. Glass agreed the gross increase in revenue of $54 million was reasonable;[53] however, he testified that the difference in the net figures results from different assumptions in the modeling process.[54] Therefore, the Commission finds that Factor 1 does not indicate imprudence on the part of KCPL.

On Factor 2, KCPL witness Giles presented the only comparative evidence in the record. He testified that Westar North's average rates are $.0768 per kWh compared to KCPL's average of $.0878, with Iatan 2 included and that such an increase "is minimal and will have no discernable impact on the difference between KCPL and Westar North rates."[55] Neither Staff nor CURB in their briefs have cited to any evidence in the record that would detract from this testimony. Moreover, the Commission has reviewed the cross examination of Mr. Giles, especially that completed by CURB and finds nothing to impeach Mr. Giles' point on this issue. Therefore, the Commission finds that Factor 2 does not indicate imprudence on the part of KCPL.

Factor 3: A comparison of the final cost of the facility under consideration to the final cost of other facilities constructed within a reasonable time before or after construction of the facility under consideration.

Staff expert witness Walt Drabinski and KCPL witnesses Dr. Nielsen and Mr. Roberts presented testimony on this factor. It was established at hearing that neither party could strictly comply with the "final cost" mandate concerning Iatan 2 as those figures have not been established. Nevertheless, the cost figures used at hearing were presumed by the experts to be close enough to final and thereby yielded a meaningful analysis. The Commission agrees, but in the alternative, it can consider the analysis under the catchall factor of K.S.A. 66-128g(a)(12).

[53] Tr. Vol 8, p. 1644, ln. 24 to p. 1645, ln. 1.
[54] Exh. 86, 87; Tr. Vol. 8, pp. 1645-49.
[55] Tr. Vol. 2, p. 438.

Staff compared the cost of Iatan 2 to other coal-fired plants, and emphasized a comparison to one plant in the sample, Trimble County 2.[56] Based on this comparison, Staff seeks to establish "one of the bounding calculations to place Mr. Drabinski's proposed disallowance in perspective and support its reasonableness."[57] In essence, Staff would have the Commission find that since the difference in cost between Trimble County 2 and Iatan 2 is $497 million, as compared to the $231 million proposed whole plant imprudence disallowance by Mr. Drabinski, his disallowance must therefore be reasonable.

The Commission has considered all of the evidence by all the witnesses on this factor and in the weighing process we are not persuaded by Staff's approach and gave it little weight. KCPL's rebuttal witness presented more convincing and compelling reasons to view Iatan 2 costs as comparable to other similar coal plants constructed during the time frame, and we so find.[58] Furthermore, KCPL has cited to Drabinski's own adverse admission where he noted: "there are many differences between plants that ultimately justify differences in costs" and "it is difficult to get timely and accurate information and therefore all numbers must be looked at with some reservation."[59] This reservation in our view undercuts the impact of Drabinski's analysis on this point, particularly in terms of its accuracy. An equivocal reservation makes a "bounding calculation" meaningless; it places a ball park figure within a ball park. Further, such reservation together with its impact on the witness' persuasiveness supports our ultimate finding on this point, which is that this factor does not indicate imprudence on the part of KCPL.

[56] Drabinski Direct, pp. 144-47.
[57] Staff Proposed Findings of Fact and Conclusions of Law, ¶ 71, p. 26.
[58] Meyer Rebuttal, pp. 2-6.
[59] Drabinski Direct, p. 137, ln. 12-13.

Factor 4: A comparison of the original cost estimates made by the owners of the facility under consideration with the final cost of the facility.[60]

A major point of disagreement, upon which the prudence determination turns, is this: What set of numbers make up the "original cost estimate"? That question is the most crucial to the entire prudence analysis because we are being asked to use our delegated "power to evaluate" an allegation that there was a lack of prudence in constructing Iatan 2, and no one agrees on the starting point for the evaluation. CURB, Staff, and KCPL each argue for a different figure and a different point in time for the "original cost estimate." CURB claims that the Project Definition Report which supported the figure of $1.146 billion presented in the 1025 Resource Plan is the "original cost estimate" which should be compared to the final cost.

Staff claims that the original cost estimate should be $1.343 billion, the figure prepared in January of 2006, because it was developed from the 2004 Project Definition Report and includes the plant size scale up and other added significant components. Staff also characterizes this figure "as the first reasonable estimate."[61] Finally, KCPL claims the figure should be $1.685 billion because it is a "definitive estimate" and served as the control budget estimate for the project going forward.

The Commission rejects the figures for the "original cost estimate" offered by CURB and Staff, as neither party attempts to relate their figure or its basis to the controlling law. K.S.A. 66-128g(b) clearly states:

> ... As used in this act "original cost estimate" means:
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> (1) For property of an electric utility which has been constructed without obtaining an advance permit under K.S.A. 66-1,159 *et seq.*, and amendments thereto [which pertain to nuclear generation facilities], the "*definitive estimate*[.]" (Emphasis added.)

[60] The same limitation concerning "final cost" explained under Factor 3 applies here.
[61] Staff Post Hearing Brief, p. 11.

While the term "definitive estimate" is not defined by statute, KCPL expert witness Dr. Nielsen explained that he relied upon a cost estimate classification system presented by the Association for the Advancement of Cost Engineering (AACE).[62] Also, at hearing, Commissioner Harkins had KCPL witness Meyers identify specifically, on the timeline entered into evidence, the December 5, 2006 event captioned as follows:

> KCPL Management presents Control Budget Estimate to the Board of Directors for approval; . . . This is the "definitive cost estimate."[63]

This testimony connecting the CBE to the definitive estimate was never successfully challenged by any party. By proving the CBE was "the definitive cost estimate" KCPL clearly established that per statute the CBE was also the "original cost estimate." Moreover, KCPL established two additional points: First, CURB understood at the hearing on the 1025 Stipulation that the $1.3 billion figure was quite uncertain. It was understood that because a new plant was being built, nobody really knew what consumer rates would ultimately be.[64] Second, the 1025 Stipulation itself contemplated the future development of a "Cost Control System" that would identify and explain cost overruns during construction.[65] We placed great weight on this evidence, finding it more convincing than other evidence offered for selecting a different set of figures. Therefore, the Commission finds and concludes that KCPL's figure of $1.685 ($420.7 million Kansas jurisdictional) is the "original cost estimate" because it is the "definitive estimate."

In making this determination of the "original cost estimate," we considered and weighed all the other evidence in the whole record on this point, including for example, the various press releases, SEC reports, etc., and found them unpersuasive. Under Kansas law, a first estimate, no

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[62] Nielsen Rebuttal, p. 234, ln. 6-14, p. 235, ln. 9-16; *see also* Tr. Vol. 6, p. 1276, ln. 16 to p. 1277 ln. 20 (Mr. Meyers explains that the AACE classification system reflects the truism that "accuracy in the estimates [is] a function of the percent of engineering complete.").
[63] Tr. Vol. 6, pp. 1228-29; *see also* KCPL Post Hearing Brief, p. 9, n. 5.
[64] Evidentiary Hearing Exh. 50, pp.32-33.
[65] Appendix C.1.2, to S&A in Docket 04-KCPE-1025-GIE.

matter how many times it is published, cannot be the "original cost estimate" unless it is the definitive estimate. We also considered the plain, ordinary meaning of "definitive" used in the statute, which means "precisely outlining or defining" or "serving to define or specify precisely."[66] CURB's and Staff's figures are lacking in the precision and specificity that the statute contemplates and simply cannot serve as the baseline point of comparison for this imprudence factor.

Having now established the original cost estimate, it can be compared to the final estimated costs of the plant. The Commission finds that this comparison indicates that KCPL will have exceeded the "definitive estimate," which means the "original cost estimate," by 18%, or $288 million (whole plant).[67] Given the magnitude of the project, the timeline under which the project was constructed, and the range permitted for a definitive type of cost estimate,[68] the Commission finds that this factor does not indicate imprudence on the part of KCPL.

Factor 5: The ability of the owners of the facility under consideration to sell on the competitive wholesale or other market electrical power generated by such facility if the rates for such power were determined by inclusion of the entire cost of the facility in the rate base.

CURB, Staff, and KCPL are all in agreement with Staff witness Dr. Glass on this point. He testified that the actual cost of Iatan 2 does not have any effect on how the addition of Iatan Unit 2 will affect KCPL's ability to sell to the off-system sales market.[69] KCPL witness Giles also explained that this factor is not an issue.[70] Therefore, the Commission finds that this factor does not indicate imprudence on the part of KCPL.

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[66] Webster's II, New Riverside Dictionary, 357; Merriam-Webster online at www.merriamwebster.com.
[67] Tr. Vol. 3, p. 513.
[68] Nielsen Direct, pp. 234-38; *see also* AACE International Recommended Practice No. 18R-97, p. 6 (noting the range of accuracy for a definitive estimate to be -5 to + 15%).
[69] Tr. Vol. 7, p. 1651, ln. 7-18.
[70] Giles Direct, pp. 6-9.

In making this finding, the Commission carefully considered Staff's proposal for sharing the risk of recovering margins from off-system sales. In that proposal, Dr. Glass suggested a risk sharing mechanism that would result in reducing KCPL's revenue requirement by $6.0 million. The Commission, however, views that proposal as too speculative and more related to an excess capacity imprudence determination, a claim not before the Commission.[71] It also misses the mark of this Factor's plain meaning and the overall scheme contained in K.S.A. 66-128c and 66-128g. That scheme, applied to the Iatan projects, is designed to determine "the reasonable value of electric generating property" and determine whether a rate base disallowance for lack of prudence during construction is warranted. We therefore gave Staff's proposal no weight in making our determination on this point.

Factor 6: A comparison of any overruns in the construction cost of the facility under consideration with any cost overruns of any other electric generating facility constructed within a reasonable time before or after construction of the facility under consideration.

This factor involves comparing Iatan 2 to other plants and has some overlap with Factor 3, which was also a comparative analysis. The Commission would note, however, that this factor also implicates our finding under Factor 4. Simply put, the plain, ordinary meaning of "overrun" is to exceed a budget or estimate.[72] The Commission found under Factor 4 that the definitive estimate was exceeded by 18%. What is lacking in the record, however, is whether the other plants in the comparative analysis exceeded their original, or definitive cost estimates, and by how much. Thus, the Commission has nothing to compare to the 18% overrun figure. Since Staff and CURB have the burden to prove imprudence, the Commission finds, due to a failure of proof, that this factor does not indicate imprudence on the part of KCPL.

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[71] K.S.A. 66-128(c) allows the Commission to evaluate several types of cost exclusion claims. The Wolf Creek case, for example, addressed an excess capacity allegation.

[72] Dictionary.com, *available at* http://dictionary.reference.com/browse/overrun; *see also* Merriam Webster II, p. 840: "The amount by which actual costs exceed estimates."

Factor 8: Inappropriate or poor management decisions in construction or operation of the facility being considered.[73]

Staff's case for imprudence did not adequately apply K.S.A. 66-128c and the K.S.A. 66-128g factors. Instead, Staff heavily skewed its case toward proving a general prudence standard it defines as:

> whether the decisions were made in a reasonable manner in light of industry standards, conditions, and circumstances that were known or reasonably should have been known at the time the decisions were made, without the use of hindsight.[74]

It did this by placing the bulk of Staff witness Drabinski's testimony under the catchall Factor 12 provision of K.S.A. 66-128g. For Factor 8 purposes, Staff asks the Commission to "undertake a similar analysis [to that] regarding the general prudence standard."[75]

KCPL, which does not carry the burden on imprudence, asks the Commission to use essentially the same general prudence standard. It also asks us to consider that:

> [d]ecisions are deemed to be prudent, regardless of the outcome of such decisions, if the decision-making process was sound.[76]

KCPL also asks the Commission to find that KCPL put proper tools in place to ensure that KCPL's management could make decisions based upon the available data. Though KCPL disagrees, its own expert determined that there were two imprudent management decisions concerning the construction of Iatan 2: 1) the engagement of Welding Services, Inc. with an associated disallowance of $12,714,596; and 2) KCPL's removal and readdition of an auxiliary boiler to the Iatan 2 project, with an associated disallowance of $7,754,454.[77] The total exclusion for lack of prudence recommended by KCPL expert witness Dr. Nielsen is

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[73] The Commission has omitted a discussion of Factor 7, which relates to the treatment of nuclear waste. Although the K.S.A. 66-128g factors are not permissive, an analysis under this factor is irrelevant and does not materially contribute to our findings of prudence or lack thereof in the construction of Iatan.
[74] Staff Post Hearing Brief, ¶ 37, p. 12.
[75] Staff Proposed Findings of Fact, ¶ 77, p. 29.
[76] KCPL Post Hearing Brief, ¶ 247, p. 102.
[77] Nielsen Rebuttal, pp. 8-9.

$20,469,050 (whole plant), or $5,110,791 for the Kansas jurisdictional portion. In other words, according to Dr. Nielsen, $5,110,791 should be deducted from the costs of Iatan 2 when determining the reasonable value that should go into rate base.

Analytically, the Commission sees a defect in placing a general prudence standard, derived from a statutory catchall provision, on the same footing as the collective 11 factors listed in that same framework. As explained above, Kansas Supreme Court precedent already defines "prudence" as carefulness, precaution, attentiveness, and good judgment; it also tells us that K.S.A. 66-128g is devoted to a recitation of the factors we are to consider in determining prudence, or in this case a lack thereof, as a basis for deducting those imprudent construction costs from the rate base.[78]

Therefore, we conclude that Factor 8, by its language, is properly analyzed by identifying precise management decisions in the construction or operation of Iatan 2 that were either "inappropriate" or "poor." After these decisions are identified, they must be reviewed, without the benefit of hindsight, to determine whether these decisions are imprudent due to a lack of carefulness, precaution, attentiveness, and good judgment—the words used by the Kansas Supreme Court.

From the parties' proposed findings and conclusions, they do not agree as to which particular management decisions comprise this universe. Moreover, Staff's statements in its brief lack the requisite precision at times for us to determine what "management decisions" are at issue. Further, some decisions alleged as "inappropriate or poor" are not linked to the presentation of various "management decisions" embedded in Drabinski's report. Therefore, we decline to place much weight on Drabinski's analysis. Dr. Nielsen, on the other hand, was much

[78] *See Kansas Gas & Electric,* 239 Kan. at 495, 500-01 (explaining what the Commission is to consider; defining prudence; and noting the "Deduction of Imprudent Construction Costs from the Rate Base.")

more specific in identifying "inappropriate" or "poor" decisions and his approach to that task was more convincing and due greater weight. Therefore, we find that as to decisions, "[w]hat decision was made; when was the decision made; how was the decision made; [and] was the decision reviewed and assumptions and circumstances changed" are elements that define the "decision" being scrutinized.[79]

We turn now to indicate that we have extensively reviewed and considered the management decisions as they were presented in the following places: 1) Staff's Brief, under the heading: "Some of KCPL's actions and decisions in the construction of Iatan Unit 2 were imprudent"; 2) Drabinski's Direct Testimony on pages 28-34 alleging that during the period of 2005 to mid 2007, KCPL made "inappropriate decisions and did not provide adequate control of the Iatan project"; and 3) KCPL's rebuttal brief on p. 36, paragraph 57. We also considered Staff witness Drabinski's entire testimony, the testimony of KCPL, and all the evidence and testimony from the hearing. Based on this review we find that:

i. KCPL did not have the option in 2005 of entering into an EPC contract for the balance of Plant work on Iatan at a 12% premium. Mr. Giles and Mr. Downey testified at length concerning the contracting strategy choices KCPL had available, and each highlighted how Mr. Drabinski ignored the actual circumstances KCPL encountered.[80] Even Drabinski admitted that it was Staff counsel, and not he who stated an EPC contractor was available.[81] Moreover, we find Mr. Downey's testimony under cross-examination by Staff Counsel persuasive on this point and give it great weight:

[Mr. Smith]: Do you recall the statement that one EPC contractor in particular said that they would do it for 12 to 15% premium based on market conditions?

[79] Nielsen Direct, Docket No. 09-KCPE-246-RTS, p. 18, ln. 1-3 (Feb. 23, 2009).
[80] See Tr. Vol. 3, pp. 778-780; Downey Direct, pp. 5-6, 10, 13; Downey Rebuttal, pp. 7-13, 27-28; Giles Rebuttal, pp. 15-22; Giles Rebuttal, pp. 29-30, 42-48, 50-59.
[81] Tr. Vol. 7, p. 1446, ln. 23 to p. 1448, ln. 2.

[Mr. Downey]: Yes, and that—yes, I did.

[Mr. Smith]: Okay, so why did KCPL decide to go with an owner managed project?

[Mr. Downey]: Well, I think that, that conversation sounds nice and I would refer to it as sales talk in the early phases of pulsing the market. When we really pressed people with regard to their willingness to do an EPC and the associated thing is at a fixed price with a schedule, we didn't have any takers at all and particularly Black & Veatch who we really thought was a hope for an EPC full wrap when we really got down to it, they said, well, you have to sole source with us. We can't give you a price estimate for at least a year and we certainly can't guarantee a fixed price and we can't guarantee a schedule and it's probably gonna be maybe not 2010 but maybe 2011 or 2012. So, yeah, there was a lot of sales talk in the beginning, but when you got right down and start talking to these people, the terms and conditions changed dramatically and we saw no viable response from any of those contractors.[82]

ii. We further find that parts of Dr. Nielsen's Direct Testimony on prudent decision making was more persuasive, and all of the testimony went unchallenged by Staff at hearing. The following points that Dr. Nielsen made adequately established flaws in Mr. Drabinski's analysis concerning this factor. Therefore, we more specifically find that:

a) Mr. Drabinski applied an erroneous standard for prudence review in part because of the holistic approach he used.

b) Mr. Drabinski finds imprudence as a consequence of the results attained rather than evaluating decisions and the decision making process, connecting the allegations, and then quantifying the impact.

c) Mr. Drabinski improperly employed hindsight rather than evaluating management decisions at the time.

d) Mr. Drabinski's use of internal audits to criticize KCPL's decisions ignore the fact that the process of conducting on-going internal audits during a complex construction project is considered part of the prudent management decision making process.[83]

[82] Tr. Vol. 4, p. 779, ln. 10 to p. 780, ln. 9.
[83] Nielsen Rebuttal, pp. 9-10.

iii. Notwithstanding KCPL's reservations, and based on Dr. Nielsen's testimony, we find that the decisions concerning the Welding Services, Inc. contract and the auxiliary boiler demonstrate a lack of carefulness, precaution, attentiveness, and good judgment.[84]

Dr. Nielsen correctly identified the precise decisions lacking prudence, when they were made, how they were made, and did not employ hindsight, change assumptions, or recast the circumstances surrounding the decision. Furthermore, the proposed disallowance was not challenged by CURB and Staff, and KCPL's arguments challenging its own witness are not compelling. Therefore, the Commission concludes that these two management decisions made in constructing Iatan Unit 2 stemmed from a lack of prudence. These decisions lacked carefulness, precaution, attentiveness and good judgment. Therefore, the costs identified by Dr. Nielsen should not be included in the rate base.

iv. KCPL had the proper tools in place to ensure that KCPL's management could make decisions based on available data.

The control budget estimate and the reforecasting process demonstrate KCPL was effectively managing costs. The fact that the project was over budget by only 18% indicates that these tools, among others such as the internal audits, are the best evidence of this effectiveness during the relevant periods. Moreover, KCPL reported at least quarterly to Staff, CURB and other interested parties and prepared extensive reports to communicate the project's status in all material respects. This reporting process clearly was contemplated by the 1025 Regulatory Plan.[85] If parties, especially Staff, had concerns about KCPL's overall strategy, its management decisions, or project problems, etc., then those concerns should have been presented to the

[84] Nielsen Rebuttal, p. 8, ln. 18-21; p. 241, ln. 1 to p. 247, ln. 11.
[85] 04-KCPE-1025-GIE, Stipulation and Agreement, § B.1, p. 9, Appendix C, ¶ I.2, p. 8.

Commission in a timely manner.[86] The 1025 docket, which remained open during the entire regulatory period, was suited for this and other reporting purposes.

Factor 9: Whether the inclusion of all or any part of the cost of construction of the facility under consideration, and the resulting rates of the utility therefrom, would have an adverse economic impact upon the people of Kansas.

Staff and KCPL concur about the negligible impact on the Kansas economy. Staff stated a potential concern regarding specific industries or companies in Johnson County; however, the witness admitted that he did not perform a study about these concerns. Since Staff and CURB held the burden to prove imprudence, the Commission finds that due to a failure of proof, this factor does not indicate imprudence on the part of KCPL. The record is devoid of evidence showing an adverse economic impact on the people of Kansas.

Factor 10: Whether KCPL acted in the general public interest in management decisions in the acquisition, *construction* or operation of the facility.

Staff claims that KCPL did not act in the public interest in making management decisions during the *construction* of the Iatan project; acquisition or operation is not at issue. Staff maintains this factor is satisfied by its other evidence on lack of prudence. Staff presented that evidence in support of its claim that the management decisions by KCPL "caused the Iatan 2 project to unreasonably exceed the original cost estimate . . .[.]"[87] KCPL disagrees with Staff's position and asks the Commission to find that it did act in the public interest.

The Commission finds that Staff's presentation of evidence on this point was limited to Staff witness Dr. Glass. He did not do a prudence audit or evaluate KCPL's management decisions concerning the Iatan project.[88] Instead, Dr. Glass relied completely on the testimony of Mr. Drabinski and his evaluations of KCPL's management decisions. The Commission further

[86] 04-KCPE-1025-GIE, Stipulation and Agreement, § B.3.g., pp. 11-12.
[87] Staff Post Hearing Brief, p. 73, ¶ 251.
[88] Tr. Vol. 8, p. 1665

finds that Dr. Glass' testimony on this factor is unacceptable for two reasons. First, he admitted that his conclusion on this factor "stands or falls on [Mr. Drabinski's] testimony—on his analysis."[89] We previously found under Factor 8, that Mr. Drabinski's testimony was flawed. Second, Staff erred on the point of law which equates the "original cost estimate" to the "definitive cost estimate." As explained elsewhere, we concluded that Staff used the wrong estimate as the starting point for its entire imprudence analysis. This resulted in an overreaching claim that the cost overrun was nearly 49% when it is closer to 18%. This error also undermines Staff's main premise that Iatan 2 "unreasonably" exceeded original costs, and precludes a finding that KCPL did not act in the public interest.

Further, and more broadly, the "public interest" concept in this imprudence analysis can be simply defined as the general welfare of the public that warrants recognition and protection and justifies government regulation.[90] The "public interest" has also been evaluated by this Commission under either a net-benefit or net-detriment standard.[91]

KCPL witness Giles testified that management made a number of decisions benefiting the public interest. KCPL considered customer needs by: i) adding capacity without adding harmful emissions; ii) maintaining a low overall cost of the Iatan 2 project given market conditions; and, iii) providing the customers with confidence in the company's ability to meet the project's schedule.[92] Staff also admits that Kansas customers benefit from KCPL's construction and ownership of Iatan 2, but did not analyze the benefits due to time constraints.[93]

We also find the record devoid of any evidence concerning detriments to the public interest. KCPL gave ongoing, written, detailed quarterly reports to Staff and CURB during the

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[89] Tr. Vol. 8, p. 1666.
[90] Black's Law Dictionary, 8th Ed., p. 1266.
[91] *See, e.g.*, Order Approving Unanimous Settlement Agreement, Docket. No. 08-KMOE-028-COC (Aug. 12, 2008).
[92] Giles Rebuttal, p. 27.
[93] Tr. Vol. 8, p. 1679.

construction of the project. For the first time, these reports were presented to the Commission during the evidentiary hearing. Many of these reports detail management decisions proposed, taken, completed, or underway. At no time did Staff or CURB, or any other intervenor, bring any concerns to the Commission about a lack of prudence in the *construction* of the facility until the 246 docket. And even then, there was never a claim that the general welfare of the public was in jeopardy. Therefore, the Commission concludes that this factor does not demonstrate imprudence on the part of KCPL.

Factor 11: Whether the utility accepted risks in the construction of the facility which were inappropriate to the general public interest to Kansas.

Staff's claim that this factor demonstrates imprudence also fails. It relies on its previous contention concerning the EPC versus multi-prime decision and its figure for the "original cost estimate." As established elsewhere, the decision to proceed with a multi-prime strategy can only be faulted by employing hindsight or assuming that KCPL had a choice that it did not have; and the figure used by Staff is incorrect as a matter of law. Therefore, we find here that KCPL did not take risks that jeopardized the public interest. It is factually undisputed that KCPL executed the Regulatory Plan and constructed Iatan 2 in a difficult economic environment. We find that KCPL knew the risks Iatan 2 represented to its customers, took steps to mitigate those risks, and developed tools for further mitigating, reporting and managing those risks.[94] Therefore, the Commission concludes that this factor does not demonstrate imprudence on the part of KCPL.

Factor 12: Any other fact, factor, or relationship which may indicate prudence or lack thereof as that term is commonly used.

Under this non-exclusive factor, the Commission finds it appropriate to address only two additional points raised by the parties. These points fairly fall under the catchall provision, and

[94]Giles Rebuttal, p. 27.

did bear on our decision. First, Drabinski's "holistic" analysis is severely undermined when his starting point for the cost overruns is corrected from a claim of being 49% over budget to about 18%, which is well within reasonableness for definitive cost estimates. Moreover, much of Mr. Drabinski's analysis builds on his perception that there was an imprudent decision to contract using a multi-prime rather than an EPC approach.[95] As established elsewhere, we found that KCPL did not have that option. Therefore, the Commission concludes that the "holistic" approach used by Staff's expert, which resulted in many attempts to "assess reasonable percentage disallowances," is prone to being speculative and arbitrary. Not only is the method far afield from a reasoned, auditable methodology, we agree with KCPL that it runs afoul of standards articulated by our Courts for expert testimony.[96]

Second, the Commission's experience and its findings with regard to the disallowance for imprudence made in the Wolf Creek case are instructive.[97] There, the Commission reviewed why the plant was completed more than 2.5 years late and at a cost nearly three times greater than the definitive estimate. The amount disallowed, and upheld on appeal, was 13.71% of the cost overruns, or 10% of the total project costs.[98] Here, where the project is completed essentially on time, and at a cost of about 18% greater than the definitive estimate, Staff seeks to disallow 76% of the overrun, which equates to approximately 12% of the total project costs.[99] The Commission finds and concludes that the scenario in this case, when compared to what occurred in Wolf Creek, does not suggest imprudence, or a lack of "carefulness, precaution,

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[95] Staff Post Hearing Brief, pp. 9-10 ("KCPL shareholders should be responsible for costs resulting from imprudent actions on the part of KCPL that extend from the inception of the project at the conceptual level through completion of the project.")
[96] *See Kuxhausen v. Tillman Partners, L.P.*, Case No. 98442 (Kan. Sup. Ct., decided October 15, 2010) (rejecting expert testimony based on speculation); *State v. Pappen*, 274 Kan. 149, 159 (2002) (expert must have factual basis for his or her opinions in order to separate them from speculation); *State v. Struzik*, 269 Kan. 95 (2000) (facts underlying expert's opinion and conclusions should be reasonably accurate, not based on guess or conjecture).
[97] KCPL Post Hearing Brief, ¶¶ 131-33, p. 57, and all the evidence cited therein.
[98] *Kansas Gas & Electric*, 239 Kan. at 499 (disallowing $183 million or about 10%).
[99] *See* KCPL Post Hearing Brief, p. 58 (Summary Chart).

attentiveness and good judgment."[100] Wolf Creek also instructs that the proper analysis for imprudence begins with the definitive estimate.[101]

While we considered all the points raised by the parties, and all the supporting and detracting evidence related thereto cited by the parties, those not mentioned here or elsewhere in the factor analysis simply did not carry decisive weight, especially when considered with what we have mentioned above. We also afforded no weight to the two step approach advocated by KCPL in making our determination regarding prudence or lack thereof. That strict causation approach, as a matter of policy, would restrict the Commission's discretion, as granted by the legislature, to employ different ratemaking formulas.[102] It is also without support in K.S.A. 66-128g and *Kansas Gas & Electric.*

After considering all of the factors under K.S.A. 66-128g, we conclude that there was a lack of prudence only with respect to those amounts identified by Dr. Nielsen. We also conclude that Staff's and CURB's respective cases alleging a lack of prudence by KCPL were incomplete and irrelevant. As such, they failed to carry their burden of proof, failed to support their conclusions, and therefore we have a right to reject this evidence under *Kansas Gas & Electric.*[103] Therefore, the reasonable value of the Iatan 2 plant shall be set at $277,690,764 on a Kansas jurisdictional basis, after deducting the $5,110,791 disallowance for lack of prudence.[104]

3. Other Major Imprudence Arguments

CURB witness Andrea Crane analyzed imprudence by comparing the figure submitted for Iatan 2 in the 1025 Regulatory Plan with the final cost of the project. She then arrived at a

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[100] The definition used by the Kansas Supreme Court in *Kansas Gas & Electric*, 239 Kan. at 495.
[101] *In re Wolf Creek Nuclear Generating Facility,* Final Order, Docket No. 84-KG&E-197-RTS, p. 81 (Sept. 27, 1985).
[102] See *Kansas Gas & Electric*, 239 Kan. at 496 (citing authority).
[103] *Kansas Gas & Electric*, 239 Kan. at 503.
[104] Computations based on figures from Confidential GDR-7 and GDR-8.

figure to exclude from the rate base by reasoning that the approved 1025 S&A constituted a regulatory compact between KCPL and its customers. According to Ms. Crane, KCPL violated that compact when it incurred costs beyond that initial 1025 figure and did not seek further regulatory approval.

We concluded elsewhere in this Order that the "original cost estimate" is defined by statute as the definitive estimate. We also found that the definitive estimate was $1.685 billion, rendered in December of 2006, and served as the Control Budget Estimate. And finally, we found that KCPL gave detailed quarterly reports to the parties, none of whom brought any claims, including that for compact breach to the Commission. Therefore, we conclude that CURB's argument lacks merit.

HISNC also weighed in on the lack of prudence issue. However, they did not conduct discovery regarding that issue, or file any testimony. In any event, and as a threshold matter, HISNC makes the same mistake as Staff and CURB concerning the definitive estimate. Moreover, HISNC's attempt to cast the 1025 S&A as a cap of some sort is unreasonable. While it might have been prudent for Staff, or other parties, to negotiate a cap at the time they entered into the S&A, a "cap" simply cannot be read into the 1025 S&A or otherwise imposed at this time. Therefore, HISNC's argument lacks merit.

The final party to weigh in on the lack of prudence issue is Empire. Empire, a part owner of Iatan 2, recently settled its rate case by a unanimous settlement agreement approved by the Commission. In that settlement, the parties agreed to review the Iatan 1 and Iatan 2 prudence issues, to the extent raised by Empire, in an abbreviated rate case.[105] Therefore, the Commission makes no finding in this docket that would undermine or conflict with that approved settlement.

[105] Order Approving Stipulation & Agreement, Docket No. 10-EPDE-314-RTS, ¶¶ 74-78 (June 23, 2010).

4. Staff's Proposed Disallowance for Iatan Unit 1 AQCS and Iatan Common Plant

Staff's disallowance has two components: The first amount is a $4.7 million (Kansas jurisdictional) imprudence disallowance which comes from the cap agreed to in 09-KCPE-246-RTS; the second amount is a $2.8 million (Kansas jurisdictional) imprudence disallowance stemming from approximately $56 million in potential costs that had not been submitted for recovery in the 246 docket. A full explanation concerning the treatment and review of these figures is covered in ¶¶'s 20-22 of the 246 S&A attached.[106]

As to the $4.7 million figure, the Commission finds that KCPL chose not to challenge three of the R&O packages and therefore does not contest an imprudence adjustment in the amount of $1,016,541 (Kansas jurisdictional, including AFUDC).[107] Therefore the Commission concludes that this amount shall be excluded from the rate base.

As to the $3.6 million amount remaining, KCPL argues that there is a $500,000 mathematical error, that its actions related to that amount were prudent and reasonable, and that Staff has failed to carry its burden to prove imprudence.[108] As to this remaining amount, the Commission finds and concludes that Staff failed to carry its burden. Mr. Drabinski conducted his review of the Iatan project under general legal principles developed with the assistance of Staff legal counsel.[109] The list of those principles contains only five factors, omitting the seven other factors in K.S.A. 66-128g(a). He applied these "prudence standards" for example, by asking "whether a knowledgeable person in the industry would have made the same or similar

[106] Order Approving Stipulation & Agreement, Docket No. 09-KCPE-246-RTS, ¶¶ 20-22, pp. 9-19 (Jul. 24, 2009); *available at* http://kcc.ks.gov/scan/200907/20090724143741.pdf; also attached to this Order as Exhibit II.
[107] KCPL Brief, ¶ 262 (citing Giles Direct, Schedule CBG2010-2 (246 Rebuttal).
[108] KCPL Brief, 107, ¶ 261-62.
[109] Drabinski Direct, Docket No. 09-KCPE-246-RTS, pp. 4-8.

decisions with the information and resources available at the time."[110] He also used the same broad brush percentage disallowance on one of the deductions which we found elsewhere to be problematic, and have disapproved.

Unfortunately, as a party, Staff agreed in the 246 S&A to a provision precluding it from offering additional testimony or modifying its prefiled testimony filed in that docket.[111] It also agreed with KCPL and CURB and asked the Commission to defer its ruling on the prudence standard issues briefed by the parties until this docket.[112] These agreements, though not binding on the Commission, placed us in a difficult position: Without essential evidence, and no acquiescence by KCPL as to these amounts, the Commission concludes that Staff's claim for a disallowance amount beyond the $1,016,541 figure not contested above, fails for lack of proof.

With regard to the $2.8 million sum Staff recommends for exclusion, the Commission finds that the 246 S&A also permitted Staff to conduct a prudence review of an additional $56 million in costs within the context of this 415 docket.[113] Staff also agreed to cap any proposed disallowance at $2.8 million. The Commission finds, however, that Staff failed to include this amount in its schedules at hearing.[114] The Commission agrees with KCPL and finds that this adjustment appears for the first time in Staff's Brief. We also find that KCPL has not had a chance to rebut this amount, or cross-examine a witness. Moreover, we have no idea what prudence standard Staff used to justify this amount – the standard applied in 246 or that in 415. Therefore, it would be inappropriate to accept this adjustment under these procedural

[110] Drabinski Direct, Docket No. 09-KCPE-246-RTS, pp. 5-6.
[111] S&A, Docket No. 09-KCPE-246-RTS, ¶ 20.
[112] See KCPL Rebuttal Brief, Docket No. 04-KCPE-1025-GIE, p. 28 (Sept. 10, 2009)(expressing concern about effect of early ruling).
[113] S&A, Docket No. 09-KCPE-246-RTS, p. 7, ¶ 22 (June 18, 2009).
[114] See Rohrer Direct, Schedule GDR-7; Hearing Exhibit No. 64, Schedule A-4, Staff Adjustment No. 7.

circumstances, and thus we conclude that the $2.8 million proposed exclusion fails for lack of proof.

B. Revenue Requirement: Capital Issues

The determination of KCPL's overall rate of return is one of the major components of a rate case, and we have very broad discretion—and are due great deference—in setting that figure. In fact,

> there is an elusive range of reasonableness in calculating a fair rate of return. A [reviewing] court can only concern itself with the question as to whether a rate is so unreasonably low or so unreasonably high as to be unlawful. The in-between point, where the rate is most fair to the utility and its customers, is a matter for [our] determination.[115]

The overall rate of return has three elements: return on equity (ROE), cost of debt and capital structure. The level of return, including the ROE, is one of the principal factors in determining whether rates are just and reasonable.[116]

As a specialized decision making body, the statutory authorization to establish "just and reasonable" rates implies flexibility in exercising our complicated regulatory function.[117] That same statutory authorization was not intended to confine the boundary of our regulatory discretion to an absolute or mathematical formula, but rather it was intended to confer power to make and apply policy concerning the appropriate prices charged to utility customers and returns on capital to utility investors in accord with constitutional protections applicable to both interests.[118] Thus, the Kansas courts have always held that our goal is to fix rates within a "zone

[115] *Southwestern Bell Tel. Co. v. KCC*, 192 Kan. 39, Syllabus ¶ 17 (1963).
[116] *Kansas Gas and Electric*, 239 Kan. at 501.
[117] *Kansas Gas and Electric*, 239 Kan. at 512 (construing K.S.A. 66-101b).
[118] *Kansas Gas and Electric*, 239 Kan. at 488-91.