CASE NO. 12-107897-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CITIZENS' UTILITY RATEPAYER BOARD
Appellant,

v.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellee.

BRIEF OF APPELLANT
CITIZENS' UTILITY RATEPAYER BOARD

Appeal from the Kansas Corporation Commission
Honorable Mark Sievers, Chairman;
Ward Lloyd, Com., Thomas E. Wright, Com.
Docket No. 10-KCPE-415-RTS

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Dated: April 24, 2012

Oral Argument: 15 Minutes

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CITIZENS' UTILITY RATEPAYER BOARD Appellant	)	
vs.	)	Case No. 12-107897-A
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS Appellee.	)	

NATURE OF THE CASE

On December 17, 2009, Kansas City Power & Light Company ("KCPL") filed an Application for a rate increase with the Kansas Corporation Commission ("KCC" or "Commission"). In its Application, KCPL claimed a revenue deficiency of $55,225,000, which included a $2.1 million claim for rate case expense. Numerous parties, including the Appellant, the Citizens' Utility Ratepayer Board ("CURB"), intervened in the docket. CURB, which represents the interests of residential and small commercial ratepayers, made it clear during discovery and the 2010 hearing that while it did not oppose the $2.1 million rate case expense claim, it opposed recovery of any amount above the $2.1 million claim contained in the record. Subsequent to the 2010 hearing after the record closed but prior to the Commission's November 22, 2010, decision - KCPL submitted discovery responses to Commission Staff indicating it estimated its rate case expense to be $8.3 million. KCPL offered no supporting evidence into the record and did not seek to reopen the record to introduce additional rate case expense evidence.

On November 22, 2010, the KCC granted KCPL a revenue requirement increase of $21,846,202, including $5,669,712 in rate case expense. The $5,669,712 award included $4.5 million spent by KCPL for its own attorneys and consultants ("KCPL-only rate case expense") and $1.1 million in assessments from the Commission and CURB. The Commission relied upon the estimated costs and information contained in KCPL's discovery responses received after the record closed in determining the rate case expense award, even though the discovery responses were never offered or admitted into the record. On December 7, 2010, CURB and other parties filed petitions for reconsideration of the rate case expense award and other issues not addressed in this appeal.

On January 6, 2011, the Commission granted and denied aspects of the petitions for reconsideration filed by CURB and other parties. On January 21, 2011, CURB and KCPL filed petitions for reconsideration of the January 6, 2011, Order.

On February 21, 2011, the Commission granted reconsideration of its November 22, 2010, rate case expense award, opened the record to receive new evidence on rate case expense, directed KCPL and CURB to file evidence regarding rate case expense, allowed the parties to conduct discovery on rate case expense, and scheduled an evidentiary hearing for September 6-8, 2011. The Commission stated that it would "base its decision on rate case expense for this docket upon the evidence presented in this additional proceeding that is limited to this issue."

Prior to the September 6-8, 2011, hearing, KCPL increased its rate case expense claim yet again, to $9,033,136. On January 18, 2012, after months of discovery, pre-filed testimony, and a three-day hearing in September 2011, the Commission again awarded

$4.5 million in KCPL-only rate case expense – the same amount it had awarded in its November 22, 2010, Order.

On February 2, 2012, CURB filed its petition for reconsideration of the January 18, 2012 Order on rate case expense, urging the Commission to reconsider (1) its decision to grant KCPL rate case expense in excess of the uncontested $2.1 million claimed in the Application and (2) its decision to award $4.5 million for KCPL-only rate case expense, which was identical to the amount awarded in the Commission's November 22, 2010 Order. On March 5, 2012, the Commission denied CURB's request for reconsideration in a final order. CURB timely filed a petition for judicial review of the Commission's orders with this Court, which has exclusive jurisdiction under K.S.A. 66-118a(b) to hear appeals of decisions of the KCC arising from a rate hearing.

STATEMENT OF THE ISSUES

I. The Commission's decision to award $4.5 million in KCPL-only rate case expense is not supported by substantial competent evidence when viewed in light of the record as a whole, which included evidence the Commission specifically determined lacked the detail desired to calculate rate case expense, included block descriptions of work, and rendered impossible the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense.

II. The Commission's decision is otherwise unreasonable, arbitrary and capricious because it is contrary to specific findings made by the Commission and failed to adequately specify how the Commission arrived at the $4.5 million amount.

III. The Commission's decision results in an erroneous interpretation or application of law because the award is not supported by meticulous, contemporaneous time

records that reveal all hours for which compensation is requested and how those hours were allotted to specific tasks.

IV. The Commission's decision results in an erroneous interpretation or application of the law by failing to adequately specify how the Commission arrived at the $4.5 million amount.

STATEMENT OF FACTS

I. Original Rate Case

On December 17, 2009, KCPL filed an application with the Commission to increase customer rates in KCC Docket No. 10-KCPE-415-RTS, the fourth rate case filed in a regulatory plan approved by the Commission in Docket No. 04-KCPE-1025-GIE ("1025 Docket"). (R. 1 at 1-145; R. 2 at 1-347; R. 3 at 4). In its Application, KCPL claimed a revenue deficiency of $55,225,000, which included an adjustment for rate case expense of $2.1 million. (R. 3 at 3; R. 22 at 5, 85; R. 95 at 149).

CURB, the statutory representative of residential and small commercial customers of KCPL, intervened in the case. CURB did not oppose the $2.1 million rate case expense claim but explicitly opposed recovery of any amount above $2.1 million. (R. 87 at 159, 168; R. 90 at 37, 39-41; R. 62 at 117).

Over a month after the hearing concluded and the record was closed, KCPL submitted updated discovery responses to Commission Staff data requests 554 and 555, indicating that its rate case expense *estimate* had risen from $2.1 million to $8.3 million. (R. 87 at 162-163; R. 90 at 39-41; R. 95 at 140-141). KCPL did not amend its $2.1 million claim for rate case expense or offer any further evidence, nor did it seek to reopen the record to introduce additional rate case expense evidence prior to the discovery

deadline at the conclusion of the evidentiary hearing on September 2, 2010, when the record was closed. (R. 87 at 159-168; R. 95 at 149-151; R. 77 at 79-82; R. 76 at 235-236).

On November 22, 2010, the KCC granted KCPL a revenue requirement increase of $21,846,202, including $5,669,712 in rate case expense. The $5,669,712 award included $4.5 million spent by KCPL for its own attorneys and consultants ("KCPL-only rate case expense") and $1.1 million in assessments from the Commission and CURB. (R. 87 at 164, 168, 213).

In its November 22, 2010, Order, the Commission made the following findings:

> The attempt to determine rate case expense is *hampered by a lack of detailed information in the record.* Frequently, when a tribunal is called upon to review whether expenses incurred in a proceeding are reasonable, information is provided about the time and amount of services rendered, the general nature and character of the services revealed by the invoices, whether attorneys or consultants presented testimony or other tangible work product that was made a part of the record, the nature and importance of this litigation, and the degree of professional ability, skill, and experience called for and used during the course of the proceeding. KCPL and its experienced team of attorneys know these requirements and should have provided this information for the Commission's review. *Because that detailed information is not contained in this record, the Commission has considered denying recovery of all rate case expense in this proceeding.* Upon reflection, however, the Commission has concluded such a ruling would be improper. *Instead, the Commission will exercise its judgment to determine an amount of rate case expense that is prudent, just, and reasonable that KCPL will be allowed to recover from ratepayers as part of this proceeding.*
>
> To address this issue, the Commission reviewed KCPL's responses to Data Requests 554 and 555 inquiring about rate case expenses; these responses are made a part of the administrative record of this proceeding. KCPL submitted *summarized* total expenses to September 30, 2010, and *estimated* expenses until the end of this proceeding. The documentation to support these estimates *contains very little detailed information* that would enable the Commission to make an individualized review of charges by specific consultants and attorneys. In fact, documentation presented for some vendors, including law firms, provides nothing by which to determine total hours, hourly rates, subject matter addressed, etc.

Therefore, the Commission must rely upon its expertise in reviewing rate case expense costs to determine what expenses were prudent and are just and reasonable to recover from ratepayers.

In deciding to take this course, the Commission has concluded that the amount of rate case expense established in this Order for KCPL to recover from its ratepayers will be Interim Rate Relief. By allowing recovery of an amount through Interim Rate Relief, KCPL will recover rate case expense costs the Commission has determined are prudent as well as just and reasonable. But if parties contest this amount, further proceedings to evaluate rate case expense will occur in a separate docket. Several reasons support using Interim Rate Relief to recover rate case expense costs here. First, *because a detailed record is not available, the Commission is not able to evaluate specific amounts that should be allowed for each consultant or attorney*. Second, prior rate cases under the Regulatory Plan, such as Docket 09-246, have illustrated the difficulty in accurately predicting rate case expense while the proceeding is ongoing. Third, an Order must issue by November 22, 2010; time does not allow scheduling of discovery, briefing, and argument about rate case expense between filing of post-hearing briefs and the Order date. Fourth, by using Interim Rate Relief, the Commission will set rates that include rate case expense found to be prudent, just, and reasonable, but this decision is subject to challenge. Finally, this Order will set a specific amount of rate case expense for this docket, cutting off conjecture about future costs that are not known or measurable at this time.

In response to DRs 554 and 555, KCPL *estimated* total rate case expense will be $8,319,363. This includes *estimated* costs for the KCC and CURB totaling $1,169,712. KCPL has no control over costs incurred by the KCC and CURB and these charges will be removed in considering KCPL's rate case expense. Thus, the *estimated* rate case expense for KCPL costs only is $7,149,711. (R. 87 at 161-163 [citations omitted, emphasis added]).

...

The Commission has reviewed *estimates* from the numerous expert consultants KCPL used in this case. (R. 87 at 164 [emphasis added]).

...

The *estimated* expenses for housing attorneys, consultants, and KCPL employees during the Evidentiary Hearing were high considering the Company's proximity to the Commission's Offices. (R. 87 at 164 [emphasis added]).

...

KCPL *estimated* rate case expense attributable to legal services only exceeds $5 million in this case. Based upon its experience in rate case proceedings, the Commission finds this amount excessive, even accounting for the complex issues considered in this proceeding. In considering attorney fees, the Commission was

particularly struck by the *lack of detail* defining services performed by the numerous attorneys that made no appearance in this proceeding. Information was not provided that would have allowed the Commission to determine an appropriate hourly rate or number of hours expended by attorneys involved in this case. Invoices from some firms reflected charges for multiple attorneys working on multiple projects for KCPL with a portion attributed to this proceeding but no explanation about how that amount was determined. (R. 87 at 165 [emphasis added]).

...

The Commission found *estimated* charges for some legal services particularly disconcerting. (R. 87 at 166 [emphasis added]).

...

The Commission is also concerned that, based upon review of a small number of invoices, that errors exist in KCPL's estimate of costs. ... Although this is not a significant amount, the Commission is concerned other errors are contained in KCPL's statement of rate case expense." (R. 87 at 166).

...

Even though the issues were complex, the Commission finds it unreasonable to require ratepayers to be responsible for the entire rate case expense costs being sought by KCPL. The Commission is *particularly concerned* about requiring ratepayers to pay such high legal costs *when no opportunity is available to review the services rendered to evaluate whether law firms adjusted charges for duplication of services of multiple attorneys when setting their fees*. (R. 87 at 167-168 [emphasis added]).

Notwithstanding the above findings, the Commission concluded in its November 22, 2010, Order:

The Commission, in reviewing rate case expense costs, *can use its knowledge and experience from other rate cases to set an appropriate amount to be recovered from ratepayers*. Taking all factors into account, the Commission concludes that $4,500,000 is an appropriate amount for KCPL costs only to include as rate case expense costs that will be recovered from ratepayers. The rate case expense costs for the KCC and CURB will be added to this amount, resulting in a total rate case expense of $5,669,712. (R. 87 at 168 [emphasis added]).

On December 7, 2010, CURB and other parties filed petitions for reconsideration of the November 22, 2010, Order on many issues. (R. 88 at 51-73, 167; R. 89 at 1-21). With respect to the rate case expense issue, CURB sought reconsideration of the

Commission's decision to award rate case expense exceeding the $2.1 million claimed in the application and the record. Specifically, CURB argued that the award, based on summarized, estimated, and unsupported evidence that was never offered or admitted into the record, (1) was not based upon substantial competent evidence when viewed in light of the record as a whole, (2) erroneously interpreted or applied the law, (3) was otherwise unreasonable, arbitrary and capricious, and (4) denied CURB and other parties due process with respect to the rate case expense evidence submitted after the discovery deadline, after the evidentiary hearing had concluded, and after the record was closed. (R. 88 at 51-60).

On January 6, 2011, the Commission issued its Order on Petitions for Reconsideration and Clarification and Order *Nunc Pro Tunc.* (R. 90 at 1-76). The Commission's January 6, 2011, Order gave little credence to CURB's arguments that the Commission erred in relying upon the summarized, estimated, and unsupported rate case expense claims contained in KCPL's discovery responses that were never offered or admitted into the record:

> In the [November 22, 2010] Order, the Commission discussed its concerns about *lack of detail in the record.* The Commission faced a dilemma in trying to bring closure to this docket by the deadline for filing the Order while adhering to the long-standing policy that allowed recovery of rate case expense that was prudently incurred and just and reasonable. Rather than denying all rate case expense, the Commission chose to allow recovery of rate case expense it determined was prudently incurred by KCPL but to limit recovery to costs that were just and reasonable. In making its decision, the Commission *reviewed Data Requests about rate case expense,* work performed by KCPL's expert consultants as reflected in the evidence, and the skill and knowledge demonstrated by KCPL counsel. *The Commission directs Staff to file a copy of Data Requests 554 and 555 and Responses in this administrative record.* The Commission also took into account the length of the hearing, complexity of the issues, and other factors discussed in the Order. In determining an amount of just and reasonable rate case expense, the Commission exercised its discretion

> and relied upon its experience in setting rate case expense. The decision was based upon available information, was made after considering interests of all impacted by the issue and was made in good faith. The decision reached was reasonable, was based on evidence in the record, and was not arbitrary and capricious. (R. 90 at 40-41).

Inexplicably, the Commission modified its November 22, 2010, decision to treat the rate case expense award as interim rate relief subject to challenge, true-up and refund and determined the rate case expense award would be a final decision that would not be subject to true-up or refund. (R. 90 at 41-45, 69-70). The Commission's January 6, 2011, Order granted and denied other aspects of the petitions for reconsideration filed by numerous parties, none of which are germane to this appeal. (R. 90 at 1-75).

The Commission also ordered, *sua sponte*, that Commission Staff file KCPL's discovery responses to Staff data requests 554 and 555 in the record. (R. 90 at 40, 77, 82-89). The first time these discovery responses appear in the record is January 13, 2011, when they were filed by Staff after the Commission's *sua sponte* directive in the January 6, 2011, Order. (R. 90 at 76-77, 82-89; *See also,* R. 95 at 140-141).

On January 21, 2011, CURB filed its second petition for reconsideration regarding the portions of the Commission's January 6, 2011, Order (a) designating the $5,669,712 in rate case expense awarded in November 2010 as final agency action, and (b) the Commission's *sua sponte* directive for Commission Staff to file KCPL's responses to data requests 554 and 555 in the administrative record after the November 2010 Order was issued. (R. 90 at 113-126). CURB argued that the Commission's decision to designate the rate case award as final agency action permanently denied CURB and other parties their due process right to review, conduct discovery, present responding evidence, and cross-examine KCPL witnesses on the discovery responses relied upon by the

Commission even though they had never been offered or admitted into evidence. CURB urged the Commission to deny KCPL's request for rate case expense in excess of the $2.1 million claimed in the application on the grounds specified in CURB's first petition for reconsideration, including the fact that the new evidence was not in the record when the Commission awarded rate case expense. In the alternative, CURB requested that the Commission designate the entire revenue requirement, including rate case expense, as interim, non-final agency action subject to refund pending a full review and proceeding to determine the reasonableness and prudence of KCPL's revised rate case expense claim. (R. 90 at 115-118). CURB also argued that the Commission's *sua sponte* directive that Commission Staff file a copy of KCPL's discovery responses to Staff data requests 554 and 555 in the administrative record denied CURB and other parties their due process rights to review, conduct discovery, object to admission, present responding evidence, and cross-examine KCPL witnesses regarding the new evidence. (R. 90 at 119-122). KCPL also filed a petition for reconsideration of the January 21, 2011, Order. (R. 90 at 127-152).

On February 21, 2011, the Commission granted reconsideration of its November 22, 2010, rate case expense award, opened the record to receive new evidence on rate case expense, directed KCPL and CURB to file evidence regarding rate case expense, allowed the parties to conduct discovery on rate case expense, and scheduled an evidentiary hearing. (R. 91 at 21, 24, 28-31, 34). With respect to the rate case proceeding granted, the Commission stated:

> The Commission *will base its decision* on rate case expense for this docket *upon the evidence presented in this additional proceeding that is limited to this issue.* Thus, the *purpose of granting reconsideration and setting a hearing* as announced in this Order *is to allow development of a record*

> *that will provide the Commission with evidence needed to determine an appropriate adjustment for rate case expense that was prudently incurred by KCP&L and that is a just and reasonable amount to recover from KCP&L's ratepayers.* Based upon this review, the Commission may decide to grant a smaller or larger amount for rate case expense for this proceeding than decided in its November 22, 2010 Order.

(R. 91 at 31[emphasis added]).

II. 2011 Rate Case Expense Proceeding

A. Evidence at Hearing

After granting reconsideration of its rate case expense award, the Commission specified the level of information it would require to award rate case expense in the subsequent proceeding. On March 9, 2011, the Prehearing Officer directed KCPL to provide three levels of information for any rate case expense sought in this proceeding, including detailed information for each timekeeper. (R. 92 at 89-91; R. 104 at 79-80). The detailed information required by the Prehearing Officer, acknowledged and adopted by the Commission on June 24, 2011, included:

> Third, detailed information is required for each timekeeper, including (i) the hourly rate charged for that timekeeper, (ii) the number of hours worked by that timekeeper, (iii) dates these hours were worked, and (iv) a description of the work performed on those dates by the timekeeper. The Prehearing Officer specifically noted that billing statements submitted for attorneys providing legal service for this proceeding must comply with Rule 1.5 of the Kansas Rules of Professional Conduct. If billing statements include work done in dockets other than 10-415, an explanation should be given regarding what amount is requested as an expense in 10-415 and how that amount was determined, including a distinction of billing expenses for this docket and for an ongoing rate case proceeding with overlapping issues before the Missouri Public Service Commission. For expenses billed to 10-415 in billing statements, KCP&L must explain what expenses were included in capital costs or capitalized in different project costs and what expenses are requested as rate case expense. Information provided at the detailed level should add up to the amount requested in the vendor summary which in turn should equate to the

overall summary of rate case expense requested for this docket. (R. 95 at 16-19; *see also,* R. 92 at 90-91; R. 104 at 79-80).

KCPL again increased its rate case expense claim to over $9 million in the testimony and evidence submitted in response to the above directive from the Commission. (R. 95 at 142, 146, 153-154, 156-157; R. 93 at 1-2, 130-131). The $9 million rate case expense claim included $7.7 million in KCPL-only rate case expense. (R. 93 at 1-2; R. 95 at 142, 153-154).

The evidentiary hearing in the rate case expense proceeding was held September 6-8, 2011. (R. 100; R. 101; R. 102; R. 103).

The invoices submitted by KCPL on rate case expense consist of 2,500 to 3,000 pages in KCPL Exhibit 2 and KCPL's responses to Staff data requests 554 and 555. (R. 103 at 190-191).

KCPL's schedules and invoices contained only general descriptions without any detailed information regarding the work performed: [1] Weisensee summary schedules (R. 100 at 107-115; R. 93 at 140-141, 151-212; R. 94 at 1-82; R. 96 at 5-8; R. 95 at 34); Meyer Construction (R. 100 at 152-161; R. 124 at 4-11; R. 93 at 204); Pegasus Global Holdings (R. 100 at 161-164; R. 124 at 12-35; R. 94 at 52-63); SNR Denton (Sonnenschein) (R. 100 at 164-172; R. 124 at 36-41; R. 93 at 207-212); Management Application Consulting (R. 100 at 172-174; R. 124 at 42-54; R. 94 at 20-26); Global Prairie (R. 93 at 168; R. 100 at 176-182; R. 124 at 55-63); Black & Veatch (R. 100 at 180-181; R. 124 at 64-65; R. 126 at 0 [disc, *Black_and_Veatch.pdf*]; R. 94 at 1-6); J. Wilson & Associates (billed through Schiff Hardin) (R. 93 at 198-200; R. 100 at 236-237; R. 125 at 36-68; R. 126 at 0 [disc, *J_Wilson_and_Associates.pdf*, invoice dates

[1] More detailed descriptions of this evidence are contained at R. 104 at 10-20. Space did not permit a full description in Appellant's Brief.

04/30/2010, 05/31/2010, 06/30/2010, 07/31/2010, 08/31/2010]); NextSource (R. 103 at 202-207; R. 125 at 93; R. 94 at 27-51; R. 90 at 84); Financo (R. 94 at 7-10; R. 126 at 0 [disc, *FINANCO.pdf,* Invoice Dates 11/30/2009, 12/31/2009, 06/30/2010, 07/31/2010, 08/31/2010, 09/30/2010, 10/31/2010]); Siemens (R. 94 at 64-67; R. 126 at 0 [disc, *Siemens.pdf,* invoice dates 09/15/2009 and 10/20/2009]); Gannet Fleming (R. 94 at 11-19; R. 126 at 0 [disc, *Gannett_Fleming.pdf*]); Duane Morris (R. 93 at 155-162; R. 126 at 0 [disc, *Duane_Morris.pdf,* subcontractor Charles W. Whitney, invoice date 09/08/2010]); CCA. (R. 94 at 68-70; R. 126 at 0 [disc, *CCA.pdf*]); Towers Watson (R. 94 at 71-74; R. 126 at 0 [disc, *Towers_Watson.pdf,* page 1]); Morgan Lewis (R. 126 at 0 [disc, *Morgan_Lewis.pdf,* Invoice Date 05/25/2010]; R. 93 at 163-168); Steven Jones (R. 126 at 0 [disc, *Schiff_Hardin_July_1_2009_to_June_30_2010.pdf,* sub-contractor Steven Jones invoice nos. 2010-Schiff-002, and 2010-Schiff-003]; R. 93 at 201-202).

KCPL's invoices contained expenses for work on other matters improperly charged to this docket that were block billed: [2] SNR Denton (Sonnenschein) (R. 100 at 164-172; 228-229; R. 124 at 36-41; R. 25 at 22; R. 93 at 207); Morgan Lewis (R. 100 at 207-208; R. 124 at 131-135); Polsinelli (R. 100 at 208-221; R. 125 at 1-19; R. 98 at 30-32); Cafer (R. 100 at 221-227, 229-234; R. 125 at 20-21; 23-32); Schiff Hardin (R. 100 at 229-240; R. 125 at 23-35); Financo (R. 126 at 0 [disc, *FINANCO*, Invoice Date 11/30/2009]).

KCPL attorney and consultant travel expense invoices typically contained no detailed information: [3] Pegasus Global Holdings (R. 100 at 161-163; R. 124 at 12-35); SNR Denton (Sonnenschein) (R. 100 at 172; R. 124 at 37); Management Application

[2] *Id.*
[3] *Id.*

Consulting (R. 100 at 172-176; R. 124 at 43, 45); Meyer Construction (R. 126 at 0 [disc, *Schiff_Hardin_July_1_2009_to_June_30_2010.pdf,* sub-contractor Meyer Construction Consulting invoice nos. KCPL-46-KA-UNIT 2, KCPL-45-KA-UNIT 2, and KCPL-44-KA-UNIT 2]; R. 93 at 204; R. 100 at 152-161; R. 124 at 4-35); Jim Wilson & Associates (billed through Schiff Hardin) (R. 93 at 206; R. 100 at 236-237; R. 125 at 36-68; R. 126 at 0 [disc, *J_Wilson_and_Associates.pdf,* Invoice Dates 07/31/2010 and 08/31/2010]); Financo (R. 126 at 0 [disc, *FINANCO.pdf,* Invoice Date 08/31/2010]); Duane Morris (R. 126 at 0 [disc, *Duane_Morris.pdf,* Invoice Dates 08/10/2009, 09/14/2009, 11/03/2009, 01/08/2010, 07/08/2010, 09/08/2010, 09/30/2010]; R. 93 at 155-162); Steven Jones (billed through Schiff Hardin) (R. 126 at 0 [disc, *Schiff-Services_October_1_2010_to_January_31_2011.pdf,* subcontractor Steven Jones invoice nos. 2010-Schiff-007B, and 2010-Schiff-008]; R. 93 at 201).

KCPL witness John Weisensee admitted it would be *impossible* for the Commission to determine the exact amount of time spent by attorneys performing specific tasks because of the block billing practice by KCPL's attorneys. (R. 100 at 197-198, 228). Staff witness Jeffrey McClanahan testified that "Many examples of these potential duplicative efforts can be found," and that in light of the massive volume of time entries and multiple issues that qualify for closer scrutiny of possible duplication of efforts, the task was simply too great. (R. 96 at 9). At least 12 different attorneys reviewed Drabinski's testimony and prepared for cross examination with block billing time entries (R. 100 at 185-188; 191-197; R. 124 at 66-67; 78-85), and multiple attorneys and firms researched the prudence issue utilizing block billing. (R. 100 at 188-190; R. 124 at 68-74). Multiple attorneys submitted invoices with block billing for reviewing,

identifying and marking confidential designations related to Drabinski testimony (R. 100 at 190-197; R. 124 at 75-85), and multiple attorneys submitted invoices with block billing for drafting and preparing testimony for experienced employees and consultants of KCPL. (R. 100 at 198-203; R. 124 at 86-125).

KCPL-only rate case expense consisted of six law firms with 47 timekeepers charging over 16,000 hours and eight outside consulting firms with 46 timekeepers charging over 9,700 hours, for a total of over 25,000 attorney and consultant hours. (R. 95 at 9-10, 19, 156; R. 104 at 82, 146-150). The hourly rates charged by KCPL's attorneys and consultants ranged as high as $855 and $650 per hour, respectively. (R. 98 at 131-133; R. 95 at 156).

The total rate case expense incurred by CURB, representing residential and small commercial customers, was $188,051, using primarily one in-house attorney and three consultants (only two filed testimony). The total rate case expense incurred by Staff, using four in-house attorneys, one outside consultant, and in-house technical Staff, was $1,233,828.41 (which included expenses incurred by Commission Advisory Staff of $105,226). The amount spent by the Company for KCPL-only rate case expense was over forty times the amount spent by CURB, and over five times the amount spent by CURB and the Commission Staff combined, including KCC Advisory Counsel. (R. 95 at 163-164; R. 94 at 83-139).

The Commission Staff testified and argued that KCPL did not properly adhere to the Commission directive of providing detailed rate case expense data, and that KCP&L failed to provide sufficient detail of each timekeeper to provide the Commission with a sound basis to determine whether any duplication or unreasonable levels of service were

billed to the rate case expense that should be denied recovery from ratepayers. (R. 96 at 5-9; R. 103 at 213; R. 104 at 28-29).

With regard to the attorney detailed billings required by the Commission, Commission Staff found the "nature of the activity" *severely lacking* in KCP&L's filings. (R. 104 at 29). With respect to meeting the legal requirement for attorneys fees, Commission Staff found the required "meticulous, contemporaneous time records" *severely lacking* in KCPL's filings. (R. 104 at 29). Commission Staff found no documentation showing KCPL took any steps to avoid duplicative or excessive work and could find no substantive challenges to any billings presented to KCPL. (R. 104 at 30-31).

Commission Staff concluded its post-hearing brief with the following:

> Staff concludes by highlighting the fact that this is not a case where no duplication or waste was found after a full review of detailed billings and timekeeper summaries. *Quite the opposite*. The lack of evidence of distinct duplication and waste was the result of the essentially *impossible task of evaluating the vague and general summaries and billings* to determine any patterns or episodes of duplication or waste - particularly under the aforementioned standards applicable to this matter. (R. 104 at 31).

With respect to the rate case expense expended by the Company, Great Plains Energy/KCP&L President and Chief Operating Officer of William Downey testified that KCPL viewed the rate case as a "2 billion dollar bet the company investment," that it was "absolutely mission critical" to the Company to "explain, defend, and validate all the work we had done over the past 5 years...," and that he "would have erred in terms of effort and cost in terms of spending in that area ... because there was so much at risk for the Company." (R. 101 at 98-99, 126, 131).

B. January 18, 2012, Commission Order

On January 18, 2012, the Commission issued its decision on rate case expense following the September 6-8, 2011, hearing. The Commission noted the standard applicable to determining the reasonableness of rate case expense:

> When the Commission is called upon to determine the reasonableness of time billed and labor expended in litigating a case, the utility holds the information needed to support its request. The utility has the burden to prove that the hours billed are reasonable "by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." (footnote citing *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1250 (10th Cir. 1998), *Kansas Industrial Consumers v. Kansas Corporation Comm'n,* 36 Kan. App. 2d 83, 111-12, 138 P.3d 338 (2006) (the reviewing court will determine if substantial evidence in the record supports an agency's findings of appropriate attorney fees), February 21, 2011 Order, ¶¶ 21-22 and notes 36-38; November 22, 2010 Order, pp. 88-89.)

(R. 104 at 78).

After noting KCPL was given specific guidance and directed to provide three levels of information for any rate case expense sought in this proceeding, including detailed information for each timekeeper, the Commission made the following specific findings in the January 18, 2012, Order:

> [T]he Commission finds the evidence submitted in this proceeding *still lacked detail desired to calculate rate case expense.* For example, the description of work performed given by timekeepers was *almost always set out as block descriptions per day r*ather than breaking out time spent on specific issues; this rendered *impossible* any meaningful comparison of work to identify duplication of effort on issues. This lack of detail made it *impossible* to rationally analyze billings submitted by multiple attorneys from several different law firms. For some consultants, *essentially no description was made* that could be used to decipher what issues were being addressed by individual timekeepers. The lack of detail in descriptions made it *impossible* to determine whether the claimed work was actually performed in a competent manner and useful in the rate case, whether the company was prudent in incurring costs for each attorney or consultant, and whether it is just and reasonable to pass these costs

> through to ratepayers as rate case expense. (R. 104 at 80-81 [emphasis added]).
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> . . .
>
> Identifying duplication of attorney work among law firms is tedious and requires laborious review of invoices that was made *impossible* here because attorneys billed work using block descriptions rather than detailed descriptions of work efforts. (R. 104 at 101 [emphasis added]).
>
> . . .
>
> Billings by consultants present issues similar to the law firm billings. Invoices were inconsistent in their detail and it was *impossible* to determine the degree to which work effort was properly undertaken, duplication of work effort occurred, and any effort was made to review and manage billings by consultants. (R. 104 at 111[emphasis added]).
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> . . .
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> The Commission *does not know, and cannot know, how many undiscovered billing errors remain in the invoices presented.* What the Commission knows from its review of this record is that neither the law firms nor KCP&L made any billing adjustment to account for billing errors in attorney hours. And it is unreasonable to conclude that no billing errors were made by the 34 lawyers at six law firms billing a total of 12,395 hours. (R. 104 at 108 [emphasis added]).
>
> . . .
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> In this case, six law firms with 47 timekeepers (lawyers, consultants and paralegals) billed more than 16,000 hours toward this case. In addition to the law firms, eight outside consulting firms with a total of 46 individual timekeepers billed more than 9,700 hours. Thus, the total work effort of outside attorneys and consultants on behalf of KCP &L involved 90 individual timekeepers billing *more than 25,000 hours of legal and professional services* to the litigation portion of this regulatory proceeding. *These numbers shock the conscience of the Commission.* (R. 104 at 82 [emphasis added]).

The Commission noted in its January 18, 2012, Order that KCPL did not consider block billing problematic, and concluded that the testimony by KCPL witness Tim Rush that no duplication of billing occurred in this case "borders on stating a deliberate falsehood but will deem to be a sign of indifference." (R. 104 at 95).

The Commission utilized the lodestar calculation in determining an appropriate amount to award for rate case expense because so much of the rate case expense was

attributable to attorney fees. (R. 104 at 93). The Commission stated that consistently, "courts have required each lawyer for whom fees were sought to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks." (R. 104 at 93-94). The Commission "consistently encountered" problems with applying the lodestar analysis due to the practice of block billing by KCPL attorneys and consultants:

> A problem we consistently encountered in reviewing records submitted by KCP&L was the use of block billing. This was particularly problematic in trying to sort out what attorney work was duplicated, both within a law firm and amount attorneys at several law firms. We found block billing was used for time expended during a day even if multiple tasks were performed.
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> ...
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> Block billing was even used when work had to be billed to more than one jurisdiction or involved issues not included in this rate case proceeding. When block billing is use, the reviewer cannot decipher how much time is spent on a particular task, which is necessary to determine whether tasks are duplicated with respect to that activity.
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> ...
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> Attorneys clearly know how to record separate time for specific projects on a daily basis. Anne Callenbach of Polsinelli Shughart billed her daily time using a granular identification of tasks; on June 22, 2011, Callenbach billed a total of 7.90 hours by dividing her time into 5 separate notations. *Unfortunately, the Commission has found no other attorney invoices that follow this example.*

(R. 104 at 94-95 [citations omitted, emphasis added]).

In applying the lodestar analysis to attorney billings, the Commission denied rate case expense for services provided by the law firms of Duane Morris, Morgan Lewis, and SNR Denton, leaving the remaining three firms -- Polsinelli Shughart, Schiff Hardin, and the Cafer Law firm – and a beginning combined total of 11,487 attorney hours for its lodestar analysis. (R. 104 at 97-98). Because no firm adjusted for duplication of work, lost time, and coming up to speed, the Commission deducted 10% of the 5,298 Polsinelli Shughart hours, 30% of the Schiff Hardin hours, and 5% of the Cafer Law hours,

reducing the total attorney hours from 11,487 to 9,510. (R. 104 at 98-100). The Commission then adjusted an additional 310 hours for duplication related to working on Staff prudence witness Walter Drabinski's testimony during June 2010, reducing total adjusted attorney hours from 9,510 to 9,200. (R. 104 at 101-104). The Commission then deducted an additional 875 hours for unnecessary witness training, reducing total adjusted attorney hours from 9,200 to 8,325. (R. 104 at 104-107). Finally, the Commission deducted an additional 416 hours to account for billing errors, reducing total adjusted attorney hours from 8,325 to 7,909 under its lodestar calculation. (R. 104 at 107-108).

The Commission next concluded that it must determine a reasonable hourly rate to complete the lodestar calculation, and found that the range of $275, $285, and $300 per hour provided a range of appropriate attorney fees to consider in determining just and reasonable rate case expense. Using this range of attorney hourly rates times the 7,909 hours, the Commission concluded lodestar calculation resulted in reasonable attorney fees of $2,174,975, $2,254,065, and $2,372,700. However, the Commission did not indicate which of amounts it would use in its final KCPL-only rate case expense award. (R. 104 at 108-111).

For determining rate case expense for non-attorney consultants, the Commission indicated that, at a high level, using the percentages resulting from its lodestar analysis it used to adjust attorney fees (58%, 56.2%, and 53.8%) would result in a range of allowed rate case expenses for legal and consulting services between $2.92 million at $275 per hour to $3.21 million at $300 per hour. (R. 104 at 111-112).

The Commission next proceeded to address whether each outside consultants' expenses and found the following prudently incurred and just and reasonable to recover in rates: Black and Veatch, FINANCO, Inc., Gannett Fleming, Inc., Siemens Energy, Inc., and Towers Watson.

The Commission adjusted the expenses of the following consultants: Management Applications Consulting, Inc. (reduced by 10% to $100,118). The Commission concluded hiring Pegasus Global Holdings, Inc. to conduct an independent audit of the Iatan Project was prudent, but the work performed and billed after completing the independent study far exceeded the amount that was expected. The Order is unclear as to what adjustment, if any, the Commission made to the Pegasus billings. (R. 104 at 117-118).

The Commission denied expenses for the following consultants: Meyer Construction Consulting (R. 104 at 118-120); J. Wilson & Associates (R. 104 at 120-121); Steven Jones (R. 104 at 121); Schiff Hardin (R. 104 at 122-124); Global Prairie (R. 104 at 132).

It is unclear what the Commission did with respect to the expenses of Next Source: "Overall, the Commission finds KCP&L failed to presented (*sic*) evidence sufficient to show why such extensive use of NextSource was necessary and essential to presenting its case in this proceeding. We have taken this into account in setting the rate case expense in this proceeding." (R. 104 at 124-125).

It is also unclear exactly what the Commission determined with respect to Other Vendor Services (Kuhn & Wittenborn, Inc., XACT Data Discovery, XPEDX, Hampton Inn lodging expense, Miscellaneous Vendors, and Expense Reports): "In reaching our

decision, we took into account the total miscellaneous expenses KCP&L asked to be reimbursed by ratepayers. We find that the total amount of expenses requested is excessive based upon the evidence presented and that it is appropriate for KCP&L shareholders to bear the costs of such expenses *not covered by the rate case expense we award.*" (R. 104 at 125-127 [emphasis added]).

With respect to how KCPL monitored its rate case expense, the Commission stated, "The Commission finds the failure to develop and implement such a review process with regard to rate case expense supports our conclusion that not all rate case expense accumulated by KCP&L was prudently incurred." (R. 104 at 127-130).

Despite the above findings in the January 18, 2012, Order, the Commission awarded the identical amount of KCPL-only rate case expense, $4.5 million, as it awarded in its November 22, 2010, Order, and increased the amount of rate case expense related to Commission and CURB assessments, for a total rate case expense award of $5,922,832. (R. 104 at 70-71).

In the January 18, 2012, Order, the Commission made the following statement with regard to its award of $4.5 million in KCPL-only rate case expense: "The Commission is not persuaded that KCP&L has presented sufficient evidence to justify increasing the award of KCP&L-only rate case expense *above what the Commission originally approved in its November 22, 2010 Order*." (R. 104 at 70 [emphasis added).

On February 2, 2012, CURB filed its Petition for Reconsideration of Order on Rate Case Expense, urging the Commission to reconsider its decision granting KCPL rate case expense in excess of the uncontested $2.1 million claimed in the Application and its decision awarding $4.5 million for KCPL-only rate case expense identical to the amount

awarded in the Commission's November 22, 2010 Order. CURB argued the Commission's February 2, 2012 decision awarding KCPL rate case expense in excess of the uncontested $2.1 million claimed in the Application and awarding the identical $4.5 million in KCPL-only rate case expense was erroneous, arbitrary and capricious, and not based on substantial competent evidence. (R. 104 at 210-218).

On March 5, 2012, the Commission denied CURB's request for reconsideration in a final order. (R. 104 at 252-265). On April 4, 2012, CURB filed its petition for judicial review of the Commission's order with this court, which has exclusive jurisdiction under K.S.A. 66-118a(b) to hear appeals of decisions of the KCC arising from a rate hearing.

ARGUMENTS AND AUTHORITIES

I. Standard of Review

CURB seeks a determination under K.S.A. 77-621 that the Commission's award of $4.5 million for KCPL-only rate case expense is not supported by substantial competent evidence when viewed in light of the record as a whole, is otherwise unreasonable, arbitrary and capricious, and results in an erroneous interpretation or application of law.

Under K.S.A. 66-118c, appeals of decisions from the KCC are governed by the Act for Judicial Review and Civil Enforcement of Agency Actions ("KJRA"), K.S.A. 77-601 *et. seq.* K.S.A. 77-621 sets forth the scope of review of administrative decisions. The relevant provisions of K.S.A. 77-621 applicable to this appeal include:

> (c) The Court shall grant relief only if it determines any one or more of the following:
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> ...
>
> (4) the agency has erroneously interpreted or applied the law;

. . .

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by 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; or

(8) the agency action is otherwise unreasonable, arbitrary, or capricious.

(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 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.

The scope of review of administrative action under the Kansas Judicial Review Act ("KJRA") related to determinations of fact was recently discussed in *Kotnour v. City of Overland Park,* 43 Kan.App.2d 833, 233 P.3d 299 (2010):

> Under K.S.A.2009 Supp. 77–621(c)(7) of the KJRA, an appellate court reviews questions of fact, in light of the record as a whole, to determine whether an agency's findings are supported to the appropriate standard of proof by substantial evidence. An appellate court shall grant relief if it determines that "the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole." K.S.A.2009 Supp. 77–6231(c)(7). (*sic*) [4]
>
> K.S.A.2009 Supp. 77–621(d) further defines an appellate court's task in reviewing questions of fact, "in light of the record as a whole," as follows:
>
> " '[I]n 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

[4] The statutory citation should read, "66-621(c)(7)"

> cited by any party that detracts from such finding as well as all of the relevant evidence in the record, complied 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 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."
>
> Thus, K.S.A.2009 Supp. 77–621(d) defines "in light of the record as a whole" to include the evidence both supporting and detracting from an agency's finding. Moreover, under K.S.A.2009 Supp. 77–621(d), this court must consider the credibility determination that the hearing officer made "who personally observed the demeanor of the witness." If the agency head, here the Board, does not agree with those credibility determinations, the agency should give its reasons for disagreeing. This court must consider the agency's explanation as to why the relevant evidence in the record supports its material factual findings. For this court to fairly consider an agency's position should it disagree with a hearing officer's credibility determination, an explanation of the agency's differing opinion is generally needed. Although the statute does not define the term *"substantial evidence," case law has long stated that it is such evidence as a reasonable person might accept as being sufficient to support a conclusion. Herrera–Gallegos,* 42 Kan.App.2d at 363, 212 P.3d 239.
>
> Further explaining how the "in light of the record as a whole" standard is to be applied, Judge Steve Leben in *Herrera–Gallegos* states as follows:
>
> "The amended statute [K.S.A.2009 Supp. 77–621] finally reminds us that we do not reweigh the evidence or engage in de novo review, in which we would give no deference to the administrative agency's factual findings. Indeed, the administrative process is set up to allow an agency and its officials to gain expertise in a particular field, thus allowing the application of that expertise in the fact-finding process. But we *must now consider all of the evidence—including evidence that detracts from an agency's factual findings—when we assess whether the evidence is substantial enough to support those findings.* Thus, the appellate court now must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion." 42 Kan.App.2d at 363, 212 P.3d 239.

43 Kan.App.2d at 836-37 (emphasis added). The revised standard of review of an agency's factual determination made by the Kansas Legislature was effective July 1,

2009, prior to the agency action at issue in this appeal. *Redd v. Kansas Truck Center,* 291 Kan. 176, 182-83, 239 P.3d 66 (2010).

In *Katz v. Kansas Dept. of Revenue*, 45 Kan.App.2d 877, 256 P.3d 876 (2011), the Court discusses whether the standards for determining whether agency action is unreasonable, arbitrary, or capricious, or in error because the agency erroneously interpreted or applied the law:

> "An administrative action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate. Whether an action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the [agency]." *Board of Johnson County Comm'rs v. City of Olathe,* 263 Kan. 667, Syl. ¶ 3, 952 P.2d 1302 (1998).
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> ...
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> "The arbitrary or capricious test relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching a determination or whether the agency's action is without foundation in fact." *Sokol v. Kansas Dept. of SRS,* 267 Kan. 740, Syl. ¶ 2, 981 P.2d 1172 (1999).
>
> ...
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> K.S.A. 77–621(c)(4) allows the administrative hearing officer and the district court to consider whether the administrative action was in error because "the agency has erroneously interpreted or applied the law." Kansas law provides that "[a]n appellate court's review of an agency's statutory interpretation is unlimited, with no deference being given to the agency's interpretation." *Powell,* 290 Kan. 564, Syl. ¶ 3, 232 P.3d 856.

45 Kan.App.2d at 887-889.

Examining whether agency action is arbitrary and capricious was discussed in *Wright v. Kansas State Bd. of Educ.,* 46 Kan.App.2d 1046, 268 P.3d 1231 (2012):

> An agency action is arbitrary and capricious if it is unreasonable or without foundation in fact. *Chesbro v. Board of Douglas County Comm'rs,* 39 Kan.App.2d 954, 970, 186 P.3d 829, *rev. denied* 286 Kan. 1176 (2008). A rebuttable presumption of validity attaches to all actions of an administrative agency, and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency's actions. *Connelly v.*

> *Kansas Highway Patrol,* 271 Kan. 944, 965, 26 P.3d 1246 (2001), *cert. denied* 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 698 (2002). Our Supreme Court " ' "has defined arbitrary to mean 'without adequate determining principles ... not done or acting according to reason or judgment;' ... [and] capricious as 'changing apparently without regard to any laws.' [Citations omitted.]" ' " *Dillon Stores v. Board of Sedgwick County Comm'rs,* 259 Kan. 295, 299, 912 P.2d 170 (1996).

46 Kan.App.2d at 1059.

The distinction between substantial evidence test for reviewing an agency decision, and the test for action that is otherwise unreasonable or arbitrary and capricious was discussed in *In re Protests of Oakhill Land Co.* 46 Kan.App.2d 1105, 269 P.3d 876 (2012):

> When a party claims that an agency's decision isn't supported by substantial evidence, we must consider all the evidence—including evidence contrary to the agency's decision—in our review. See K.S.A. 2010 Supp. 77–621(c)(7); K.S.A. 2010 Supp. 77–621(d). To uphold that decision, the evidence in support of it must be substantial, meaning that a reasonable person could accept it as being sufficient to support the conclusion reached. See *Herrera–Gallegos v. H & H Delivery Service, Inc.,* 42 Kan.App.2d 360, 362–63, 212 P.3d 239 (2009). Sometimes, part of the evidence may have been so undermined by cross-examination or other evidence that a reasonable person would no longer accept it as sufficient to support the agency's conclusion. 42 Kan.App.2d at 363, 212 P.3d 239. In such cases, we essentially filter out that evidence and determine whether what remains is enough for a reasonable person to accept the agency's factual findings and conclusions. See *Abdi v. Tyson Fresh Meats, Inc.,* No. 104,132, 2011 WL 3444330, at *3 (Kan.App.2011) (unpublished opinion).
>
> The landowners' claim that the decision should be set aside under K.S.A. 2010 Supp. 77–621(c)(8) as otherwise unreasonable or arbitrary is, on our facts, really just another claim that the evidence supported another conclusion. As the landowners phrased it in their appellate brief, the agricultural classification was "not based on the substantial evidence contained in the record as a whole, and is *therefore* arbitrary and capricious." (Emphasis added.) Although the landowners correctly cite to some cases that indicate that a decision not supported by substantial evidence is arbitrary, such language improperly conflates the separate tests set out in K.S.A. 2010 Supp. 77–621(c)(7)—the substantial-evidence test—and in K.S.A. 2010 Supp. 77–621(c)(8)—the test for action that is "otherwise unreasonable" or arbitrary and capricious.

> These tests mean different things. A challenge under K.S.A. 2010 Supp. 77–621(c)(8) attacks the quality of the agency's reasoning. See *Kansas Dept. of Revenue v. Powell,* 290 Kan. 564, 569, 232 P.3d 856 (2010) (stating that agency may have acted arbitrarily when it fails to properly consider factors courts require it to consider to guide its discretionary decision); *Wheatland Electric Cooperative,* 46 Kan.App.2d 746, Syl. ¶ 5, 265 P.3d 1194 (providing factors to consider when determining whether agency acted within its discretion); Gellhorn & Levin, Administrative Law and Process in a Nutshell, p. 103 (5th ed. 2006) ("[T]he emphasis in arbitrariness review [is on] the *quality of an agency's reasoning.*"). Although review must give proper deference to the agency, its conclusion may be set aside—even if supported by substantial evidence—if based on faulty reasoning. A challenge under K.S.A. 2010 Supp. 77–621(c)(7) attacks the quality of the agency's fact-finding, and the agency's conclusion may be set aside if it is based on factual findings that are not supported by substantial evidence.

46 Kan.App.2d at 1114-15.

The appellate review of the record as a whole under the KJRA was discussed recently in *In the Matter of the Equalization Appeal of PRIEB PROPERTIES, L.L.C.,* ___ Kan.App.3d ___, ___ P.3d ___ (No 105,298), 2012 WL 892183 (2012):

> For purposes of our review of fact findings express or implied, our review of the record as a whole means that
>
> "the adequacy of the evidence in the record before [us] 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 ... cited by any party that supports such finding, including determinations of veracity by the presiding officer...."
>
> We do not, however, reweigh the evidence or engage in de novo review. K.S.A.2010 Supp. 77–621(d).

2012 WL 892183, at 6.

However, the Commission's latitude in weighing the facts is not boundless: "Not only must an agency's decreed result be within the scope of its lawful authority, but also the process by which it reaches that result must be logical and rational." *Home*

Telephone Co. v. Kansas Corporation Comm'n, 31 Kan.App.2d 1002, 1012 (2003), citing *Allentown Mack Sales Service, Inc. v. NLRB,* 522 U.S. 359, 374, 139 L.Ed.2d 797, 188 S.Ct. 818 (1998).

> Reasoned decision making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision making the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.

31 Kan.App.2d at 1012-13 (citing *Allentown,* 522 U.S. at 375).

CURB has the burden of proving the invalidity of the Commission's actions on appeal. K.S.A. 77–621(a)(1). *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n,* 28 Kan.App.2d 313, 315, 16 P.3d 319 (2000), *rev. denied* 271 Kan. 1035 (2001). However, the burden of proof to establish rate case expense is known and measurable is with the utility. *Greely Gas Company v. State Corp. Comm'n,* 15 Kan. App.2d 285, 288, 807 P.2d 167 (1991); *Home Telephone Co. v. Kansas Corporation Comm'n,* 31 Kan. App.2d 1002, 1005, 76 P.3d 1071 (2003). The utility also bears the burden of proof to establish rate case expenses are prudently incurred by the utility. *Kansas Industrial Consumers v. Kansas Corporation Comm'n,* 36 Kan. App.2d 83, 111, 138 P.3d 338 (2006); *Home Telephone*, 31 Kan. App.2d at 1015.

With respect to rate case expense and attorneys fees, the utility has the burden to prove that the hours billed are reasonable "by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1250 (10th Cir. 1998). "Fees which are not supported by 'meticulous, contemporaneous time records' that show the specific tasks

being billed should not be allowed." *Davis v. Miller,* 269 Kan. 732, 748-751, 7 P.3d 1223 (2000).

A utility is not entitled to recover every expense incurred by the Company in establishing rates, *Columbus Telephone Co. v. Kansas Corporation Comm'n,* 31 Kan. App. 2d 828, 835-36, 75 P.3d 257 (2003), and the Commission is permitted to deny duplicative expenses. *Sheila A. v. Whiteman,* 259 Kan. 549, 568-69, 913 P.2d 181 (1996).

In determining rate case expense, the Commission should balance the interest of all concerned parties, including investors vs. ratepayers, present ratepayers vs. future ratepayers, and the public interest. *Kansas Gas & Electric v. Kansas Corporation Comm'n,* 239 Kan. 483, 489-491, 720 P.2d 1063 (1986).

II. Arguments on the Issues and Relevant Authorities

CURB seeks a determination under K.S.A. 77-621 that the KCC's order is not supported by substantial competent evidence when viewed in light of the record as a whole, is otherwise unreasonable, arbitrary and capricious, and results in an erroneous interpretation or application of law for the reasons specified below.

A. The Commission's decision to award $4.5 million in KCPL-only rate case expense is not supported by substantial competent evidence when viewed in light of the record as a whole, which included evidence the Commission specifically determined lacked the detail desired to calculate rate case expense, included block descriptions of work, and rendered impossible the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense.

The standard of review applicable to this issue is under K.S.A. 77-621(c)(7) and the authorities cited in the Standard of Review section, *supra.* The issues raised by

CURB are located at (R. 79 at 72-73; R. 88 at 51-59; R. 90 at 113-122; R. 104 at 1-25, 210-218, 234-246), and were ruled upon by the Commission at (R. 87 at 159-168; R. 90 at 39-45; R. 91 at 21-23, 28-38; R. 104 at 67-150, 252-265).

The Commission's decision to award $4.5 million in KCPL-only rate case expense is not supported by substantial competent evidence when viewed in light of the record as a whole. CURB is not asking this Court to reweigh the evidence or engage in a *de novo* review, but instead determine whether the Commission's award of $4.5 million is "supported by the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole" K.S.A. 77-621(c)(7). The Commission's own findings with respect to the record as a whole ("all of the relevant evidence in the record." K.S.A. 77–621(d)), do not support its award of $4.5 million in KCPL-only rate case expense.

Both of the Commission orders awarding $4.5 million in KCPL-only rate case expense (November 22, 2010, and January 18, 2012), found a lack of the required detail in the record to determine reasonable and prudent rate case expense (R. 87 at 161-163, 165; R. 90 at 40; R. 104 at 80). KCPL's failure to provide the detailed information in the subsequent rate case expense proceeding leading to the January 18, 2012, Order is inexcusable because the Commission gave KCPL clear guidance regarding the level of detail required to recover rate case expense. (R. 92 at 89-91; R. 95 at 16-19).

The Commission determined that the evidence submitted by KCPL lacked the detail required to calculate rate case expense, making it *impossible* for the Commission to rationally analyze the billings. (R. 87 at 161-163, 165, R. 90 at 40-41; R. 100 at 197-198, 228; R. 104 at 80-81, 101, 108, 111). The record demonstrates that the block-billing

practice was utilized by all but one (R. 104 at 94-95) of the attorneys retained by KCPL (R. 96 at 9; R. 100 at 185-203; R. 124 at 66-74, 75-125), a problem that the Commission found "particularly problematic" (R. 104 at 94-95). KCPL witness Weisensee admitted the block billing issue would make it impossible for the Commission to determine the exact amount of time spent by attorneys on specific tasks. (R. 100 at 197-198, 228).

The deficiencies in the rate case expense evidence submitted by KCPL in the record as a whole were so pervasive that the Commission made multiple findings that KCPL's evidence made it:

- *impossible* to make meaningful comparison of work to identify duplication of effort on issues (R. 104 at 80, 101);
- *impossible* to rationally analyze billings by multiple attorneys from different law firms (R. 104 at 80);
- *impossible* to determine whether the claimed work was actually performed competently and useful in the rate case (R. 104 at 80-81);;
- *impossible* to determine whether the company was prudent in incurring costs for each attorney or consultant (*Id.)*;
- *impossible* to determine whether it was just and reasonable to pass these costs through to ratepayers as rate case expense (*Id.)*; and
- *impossible* to determine the degree to which work effort was properly undertaken, duplication of work effort occurred, and any effort was made to review and manage billings by consultants (R. 104 at 111).

The Commission found the block billing problem so serious that it described the testimony by KCPL witness Tim Rush as follows: "Rush testified that no duplication of

billing occurred in this case, which we find borders on stating a deliberate falsehood but will deem to be a sign of indifference." (R. 104 at 95).

The utility has the burden to bring forward substantial evidence of costs in a rate case, and substantial evidence is "such evidence as a reasonable person might accept as being sufficient to support a conclusion." *Herrera–Gallegos v. H & H Delivery Service, Inc.,* 42 Kan.App.2d 360, 363, 212 P.3d 239 (2009).

In this case, KCPL failed to provide substantial evidence of its rate case expense. The evidence provided by KCPL, aptly described by the Commission Chairman as a "chaotic mess" (R. 100 at 11), hardly qualifies as "substantial evidence" that a reasonable person might accept as being sufficient to support the Commission's $4.5 million KCPL-only rate case expense award, in light of the "appropriate standard of proof." K.S.A. 77-621(c)(7).

The appropriate standard of proof for rate case expense is that "[f]ees which are not supported by 'meticulous, contemporaneous time records' that show the specific tasks being billed should not be allowed." *Davis v. Miller*, 269 Kan. at 748-751.

Incongruously, after determining that the evidence submitted by KCPL rendered *impossible* the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense, the Commission awarded KCPL $4.5 million in KCPL-only rate case expense – the same amount it had awarded in its November 22, 2010, Order. In attempting to do that which it had declared *impossible,* the Commission ignored its own findings about the evidence in the record.

The Commission's decision must not only be within the scope of its lawful authority, but also the process by which it reaches that result must be logical and rational." *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan.App.2d at 1012.

> Reasoned decision making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision making the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.

31 Kan.App.2d at 1012-13.

It is simply not logical and rationale, nor is it reasoned decision making, for the Commission to award $4.5 million in KCPL-only rate case expense after specifically concluding that the evidence submitted by KCPL rendered *impossible* the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense. KCPL's fees were not supported by "meticulous, contemporaneous time records" that show the specific tasks being billed, and should therefore not be allowed. *Davis v. Miller*, 269 Kan. at 748-751.

The Commission's $4.5 million KCPL-only rate case award must be reversed as it is not based on substantial competent evidence when viewed in light of the record as a whole *and* the Commission's own findings. The matter should be remanded to the KCC with specific directions to deny KCPL-only rate case expense in excess of the uncontested $2.1 million amount and to order the appropriate refunds to ratepayers.

B. The Commission's decision is otherwise unreasonable, arbitrary and capricious because it is contrary to specific findings made by the Commission and failed to adequately specify how the Commission arrived at the $4.5 million amount.

The standard of review applicable to this issue is under K.S.A. 77-621(c)(8) and the authorities cited in the Standard of Review section, *supra.* The issues raised by CURB are located at (R. 79 at 72-73; R. 88 at 51-59; R. 90 at 113-122; R. 104 at 1-25, 210-218, 234-246), and were ruled upon by the Commission at (R. 87 at 159-168; R. 90 at 39-45; R. 91 at 21-23, 28-38; R. 104 at 67-150, 252-265).

The Commission's decision to award $4.5 million in KCPL-only rate case expense is otherwise unreasonable, arbitrary and capricious because it is contrary to specific findings made by the Commission and failed to adequately specify how the Commission arrived at the $4.5 million amount.

Agency action is unreasonable when it is so arbitrary that it can be described as being "taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate. Whether an action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the [agency]." *Board of Johnson County Comm'rs v. City of Olathe,* 263 Kan. 667, Syl. ¶ 3, 952 P.2d 1302 (1998).

An agency action is arbitrary and capricious if it is unreasonable or without foundation in fact. *Wright v. Kansas State Bd. of Educ.,* 46 Kan.App.2d at 1059. Arbitrary has been defined as action taken without adequate determining principles or not done or acting according to reason or judgment, and capricious has been defined as changing apparently without regard to any laws. *Id.*

As discussed at length above, the Commission determined that the evidence submitted by KCPL lacked the detail required to calculate rate case expense, making it *impossible* for the Commission to rationally analyze the billings. (R. 87 at 161-163, 165, R. 90 at 40-41; R. 96 at 9; R. 100 at 185-203, 228; R. 104 at 80-81, 94-95, 101, 108, 111; R. 124 at 66-74, 75-125).

Instead of disallowing the rate case expense as required by *Davis v. Miller* ("Fees which are not supported by 'meticulous, contemporaneous time records' that show the specific tasks being billed *should not be allowed.*") , the Commission attempted to apply lodestar analysis even though it had determined the evidence rendered impossible the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense. (R. 104 at 80-81, 101, 108, 111). The Commission's decision is unreasonable, arbitrary, and capricious.

The Commission's January 18, 2012, Order also fails to adequately show how the Commission calculated and arrived at the identical amount ($4.5 million) of KCPL-only rate case expense it previously awarded in its November 22, 2010, Order. While the Commission explained some of its reductions from the Company's overall claim, the Commission failed to articulate how it ultimately arrived at the identical $4.5 million amount of KCPL-only rate case expense awarded in the November 22, 2010 Order.

The Commission's February 21, 2011, Order granted reconsideration of its November 22, 2010, rate case expense award, opened the record to receive new evidence on rate case expense, directed KCPL and CURB to file evidence regarding rate case expense, allowed the parties to conduct discovery on rate case expense, and scheduled an evidentiary hearing. (R. 91 at 21). The Commission stated that it would "base its

decision on rate case expense for this docket upon the evidence presented in this additional proceeding that is limited to this issue." (R. 91 at 31).

Instead, after months of discovery, pre-filed testimony, and a three-day contested hearing, the Commission arrived at the identical $4.5 million amount of KCPL-only rate case expense it awarded in November 2010. While the Commission attempts to justify its award by referencing its attempted use of the lodestar approach (R. 104 at 93-132, 259), courts utilizing the lodestar method *require* each lawyer for whom fees are sought to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks. (R. 104 at 93-94, 95, 214-215). *Case v. Unified Sch. Dist. No. 233,* 157 F.3d 1243, 1250 (10th Cir. 1998).

Here, the Commission's findings clearly establish that KCPL failed to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks, despite the fact the Prehearing Officer and the Commission ordered KCPL to provide this level of detail. Because meticulous, contemporaneous time records are necessary, it is easy to see why the Commission "consistently encountered" difficulty in applying the lodestar approach due to the block-billing practice utilized by all but one of the 40-plus attorneys retained by KCPL. (R. 104 at 94). The Commission found this "particularly problematic" in trying to sort out what attorney work was duplicated, both within a law firm and among attorneys at several law firms. (R. 104 at 94). The Commission found block billing used for time expended for entire days even when multiple tasks were performed and when work had to be billed for more than one jurisdiction or involved issues not included in this rate case proceeding. (R. 104 at 94). The Commission even noted that when block billing is used, "the reviewer *cannot*

decipher how much time is spent on a particular task, which is necessary to determine whether tasks are duplicated with respect to that activity." (R. 104 at 94). Yet the Commission's rate case expense award attempted to do exactly that which it concluded was impossible.

Multiplying a range of attorney hourly rates ($275 to $300) times the adjusted 7,909 attorney hours the Commission calculated using a lodestar calculation resulted in three potential reasonable attorney fees amounts: $2,174,975, $2,254,065, and $2,372,700. However, the Commission did not indicate which of these amounts it ultimately arriving at its final KCPL-only rate case expense award. (R. 104 at 108-111).

The Commission's analysis of consultant fees was even less precise, as it is unclear how the Commission went from the $2.174 to $2.372 million range for attorney fees to the $4.5 million in KCPL-only rate case expense award. (R. 104 at 108-111).

The Commission initially computed a "high level" calculation of legal and consultant fees using the percentages resulting from its attorney fee lodestar analysis (58%, 56.2%, and 53.8%), resulting in a range of allowed rate case expenses for legal and consulting services between $2.92 million to $3.21 million. (R. 104 at 111-112). Again, the Commission did not indicate whether it utilized this "high level" calculation in arriving at the $4.5 million award.

Next, the Commission attempted to analyze whether each outside consultants' expenses were prudently incurred and just and reasonable to recover in rates. The Commission approved some in their entirety (and Veatch, FINANCO, Inc., Gannett Fleming, Inc., Siemens Energy, Inc., and Towers Watson), denied some in their entirety (Meyer Construction Consulting, J. Wilson & Associates, Steven Jones. Schiff Hardin,

and Global Prairie), and denied one in part (Management Applications Consulting, Inc.). (R. 104 at 111-124).

However, while the Commission discussed several other consultants' expenses it did not specify what amount it concluded should be approved or denied (Global Holdings, Inc., Pegasus Global, NextSource, Kuhn & Wittenborn, XACT, XPEDX, Hampton Inn, Miscellaneous Vendors, and "Expense Reports."). (R. 104 at 117-118, 124-127). With respect to these consultants and vendors, the Commission made vague comments that gave no indication on what was included and what excluded from the $4.5 million award:

> Overall, the Commission finds KCP&L failed to presented (*sic*) evidence sufficient to show why such extensive use of NextSource was necessary and essential to presenting its case in this proceeding. We have taken this into account in setting the rate case expense in this proceeding." (R. 104 at 124-125). "In reaching our decision, we took into account the total miscellaneous expenses KCP&L asked to be reimbursed by ratepayers. We find that the total amount of expenses requested is excessive based upon the evidence presented and that it is appropriate for KCP&L shareholders to bear the costs of such expenses *not covered by the rate case expense we award."* (R. 104 at 125-127 [emphasis added]).

How the Commission arrived at the $4.5 million is anyone's guess. CURB sought reconsideration on this issue, but the Commission refused to clarify how it arrived at the $4.5 million award. By refusing to adequately specify how the Commission arrived at the $4.5 million amount (R. 104 at 215-217, 259-260), it would appear that the Commission simply decided to revert to the $4.5 million awarded in its November 22, 2010, Order, where the Commission chose to "*exercise its judgment*" to determine the rate case expense award because the required detailed information ("meticulous, contemporaneous time records") was not in the record (R. 87 at 162). (R. 90 at 76-77, 82-89; *See also,* R. 95 at 140-141). Since KCPL failed to provide the detailed

information required by the Commission and Kansas law (meticulous, contemporaneous time records), it appears the Commission reverted to its previous position that it couldn't deny rate case expense entirely (or anything above the *uncontested* $2.1 million amount) so it would "exercise its judgment" to arrive at a rate case expense award.

In reviewing the Commission's January 18, 2012, Order, it is simply impossible to determine how the Commission arrived, for the second time, at the identical $4.5 million amount of KCPL-only rate case expense it awarded in November 2010. The ranges of attorneys fees reached under the Commission's attempt to apply a lodestar analysis and the Commission's ambiguous discussion regarding the remaining consultant fees and expenses simply does not quantify how the Commission arrived at $4.5 million for the second time.

The Commission's $4.5 million KCPL-only rate case award must be reversed as it is otherwise unreasonable, arbitrary and capricious because it is contrary to specific factual findings made by the Commission and the Commission failed to specify how it arrived at the $4.5 million amount. The matter should be remanded to the KCC with specific directions to deny KCPL-only rate case expense in excess of the uncontested $2.1 million claim and to order the appropriate refunds to ratepayers.

C. The Commission's decision results in an erroneous interpretation or application of law because the award is not supported by meticulous, contemporaneous time records that reveal all hours for which compensation is requested and how those hours were allotted to specific tasks.

The standard of review applicable to this issue is under K.S.A. 77-621(c)(4) and the authorities cited in the Standard of Review section, *supra.* The issues raised by CURB are located at (R. 79 at 72-73; R. 88 at 51-59; R. 90 at 113-122; R. 104 at 1-25,

210-218, 234-246), and were ruled upon by the Commission at (R. 87 at 159-168; R. 90 at 39-45; R. 91 at 21-23, 28-38; R. 104 at 67-150, 252-265).

The Commission's award of $4.5 million results in an erroneous interpretation or application of law because the award is not supported by meticulous, contemporaneous time records. The Kansas Supreme Court has addressed the reasonableness of attorney fees under Rule 1.5 and held that "[f]ees which are not supported by 'meticulous, contemporaneous time records' that show the specific tasks being billed should not be allowed." *Davis v. Miller*, 269 Kan. at 748-751.

In the January 18, 2012 Order, the Commission correctly specified the standard by which rate case expense should be determined:

> The utility has the burden to prove that the hours billed are reasonable 'by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.' (R. 104 at 78 [citations omitted]).
>
> Consistently, those courts required each lawyer for whom fees were sought to provide meticulous, contemporaneous time records documenting the time allotted to specific tasks. (R. 104 at 93-94).

Furthermore, the Commission gave KCPL advance notice that it required detailed information for each timekeeper, including (i) the hourly rate charged for that timekeeper, (ii) the number of hours worked by that timekeeper, (iii) dates these hours were worked, and (iv) a description of the work performed on those dates by the timekeeper. (R. 104 at 79-80; R. 92 at 90-91).

Finally, the Commission determined that the evidence submitted by KCPL lacked the detail required to calculate rate case expense, and this lack of detail made it

impossible for the Commission to rationally analyze the billings. (R. 87 at 161-163, 65, R. 90 at 40-41; R. 100 at 197-198, 228; R. 104 at 80-81, 101, 108, 111).

Despite (1) providing KCPL advance notification of its obligation to provide detailed information, (2) correctly specifying the required standard requiring "meticulous, contemporaneous time records," and (3) concluding that KCPL failed to provide the detailed time records as required, the Commission erroneous applied the law by failing to disallow the rate case expense as required by the *Davis v. Miller* decision ("Fees which are not supported by 'meticulous, contemporaneous time records' that show the specific tasks being billed *should not be allowed.*"). Instead of disallowing the rate case expense as required by *Davis v. Miller*, the Commission attempted to utilize a lodestar analysis even though it had determined the evidence rendered impossible the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense. (R. 104 at 80-81, 101, 108, 111).

In its original November 22, 2010, Order, the Commission awarded $4.5 million in KCPL-only rate case expense even though the Commission determined there wasn't adequate evidence, but the Commission attempted to justify its erroneous decision by stating it would nonetheless *exercise its judgment to determine a prudent, just, and reasonable amount of rate case expense.*

> *Because that detailed information is not contained in this record,* the Commission has *considered denying recovery of all rate case expense* in this proceeding. Upon reflection, however, the Commission has concluded such a ruling would be improper. *Instead, the Commission will exercise its judgment to determine an amount of rate case expense* that is prudent, just, and reasonable that KCPL will be allowed to recover from ratepayers as part of this proceeding. (R. 87 at 162 [emphasis added]).

The Commission reconsidered its November 2010 decision, arguably because it became clear from CURB's petitions for reconsideration that it was an erroneous interpretation or application of the law. Now, after granting reconsideration and declaring that it would "base its decision on rate case expense for this docket upon the evidence presented in this additional proceeding" (R. 91 at 31), the Commission has again determined the lack of detail in the record rendered *impossible* the comparisons, analysis, and determinations necessary to determine just and reasonable rate case expense.

The problem is, the Commission erroneously awarded $4.5 million in KCPL-only rate case expense for the second time, an amount unsupported in the November 22, 2010, Order *and* now unsupported in the January 18, 2012, Order. By "exercising its judgment," the Commission has again attempted to do what it says is *impossible – perform the necessary* comparisons, analysis, and determinations from a deficient record to determine just and reasonable rate case expense.

As discussed above in detail, the Commission's January 18, 2012, Order fails to adequately specify how it calculated the identical amount ($4.5 million) of KCPL-only rate case expense it previously awarded in its November 22, 2010, Order. In the Commission's January 18, 2012, Order, the Commission attempts again to *exercise its judgment to determine an amount of rate case expense* because the required detailed information ("meticulous, contemporaneous time records") was not in the record. Careful scrutiny of the of the January 18, 2012, Order fails to reveal exactly how the Commission arrived at the identical $4.5 million in KCPL-only rate case expense, an

error the Commission refused to clarify in its March 4, 2012, Order. (R. 104 at 215-217, 259-260).

The Commission's award of rate case expense in excess of the uncontested $2.1 million amount should therefore be reversed as it is the result of an erroneous interpretation or application of law because the award is not supported by meticulous, contemporaneous time records that reveal all hours for which compensation is requested and how those hours were allotted to specific tasks. The matter should be remanded to the KCC with specific directions to deny KCPL-only rate case expense in excess of the uncontested $2.1 million amount and to order the appropriate refunds to ratepayers.

D. The Commission's decision results in an erroneous interpretation or application of the law by failing to adequately specify how the Commission arrived at the $4.5 million amount.

The standard of review applicable to this issue is under K.S.A. 77-621(c)(4) and the authorities cited in the Standard of Review section, *supra.* The issues raised by CURB are located at (R. 79 at 72-73; R. 88 at 51-59; R. 90 at 113-122; R. 104 at 1-25, 210-218, 234-246), and were ruled upon by the Commission at (R. 87 at 159-168; R. 90 at 39-45; R. 91 at 21-23, 28-38; R. 104 at 67-150, 252-265).

The Commission's January 18, 2012, Order results in an erroneous interpretation or application of law by failing to adequately specify how it calculated the identical amount ($4.5 million) of KCPL-only rate case expense it previously awarded in its November 22, 2010, Order. As discussed in detail above, while the Commission explained some of its reductions from the Company's overall claim, the Commission failed to articulate how it ultimately arrived at the identical $4.5 million amount of KCPL-only rate case expense awarded in the November 22, 2010 Order.

When the Commission granted reconsideration of its November 22, 2010, rate case expense award, it indicated that it would "base its decision on rate case expense for this docket upon the evidence presented in this additional proceeding that is limited to this issue." (R. 91 at 31). However, after months of discovery, pre-filed testimony, and a three-day contested hearing, the Commission arrived at the identical $4.5 million amount of KCPL-only rate case expense it awarded in November 2010, yet left the parties with no way of ascertaining how it arrived at that amount.

It is impossible to ascertain how the Commission arrived at the $4.5 million KCPL-only rate case expense award, with only a range of attorney fees amounts ($2,174,975, $2,254,065, and $2,372,700), and vague statements about the consultant fees that may or may not have been denied. By refusing to adequately specify how the Commission arrived at the $4.5 million amount in response to CURB's February 2, 2012, petition for reconsideration (R. 104 at 215-217, 259-260), one is left with the impression that the Commission simply reverted to the $4.5 million awarded in its November 22, 2010, Order, arrived at by the Commission *exercising its judgment* because the required detailed information ("meticulous, contemporaneous time records") was not in the record (R. 87 at 162).

Equally important, the Commission appears to have relied upon a different, new, and undisclosed legal standard for determining the rate case expense award: "The Commission is not persuaded that KCP&L has presented sufficient evidence *to justify increasing the award of KCP&L-only rate case expense above what the Commission originally approved* in its November 22, 2010 Order." (R. 104 at 70 [emphasis added]).

This is clearly erroneous and contrary to the Commission's February 21, 2011, Order, which specified that the KCC would:

> Taking into account the many factors that must be considered in determining an appropriate rate case expense, the Commission recognizes that an appropriate amount of rate case expense for this proceeding may well exceed $2.1 million. *However, the Commission will not prejudge this issue.* CURB will be allowed to examine any evidence offered by KCP&L on rate case expense.
>
> . . .
>
> The Commission *will base its decision on rate case expense for this docket upon the evidence presented in this additional proceeding that is limited to this issue*. Thus, the *purpose of granting reconsideration and setting a hearing as announced in this Order is to allow development of a record that will provide the Commission with evidence needed to determine an appropriate adjustment for rate case expense* that was prudently incurred by KCP&L and that is a just and reasonable amount to recover from KCP&L's ratepayers. *Based upon this review, the Commission may decide to grant a smaller or larger amount for rate case expense for this proceeding than decided in its November 22, 2010 Order*. (R. 91 at 21, 31 [emphasis added]).

The Commission's January 18, 2012, Order appears to declare that the November 22, 2012, award of $4.5 million was some sort of benchmark that the parties had the burden to prove should be changed, up or down. That is *not* what the Commission ordered in the February 21, 2011, Order, quoted above. The Commission clearly and expressly declared it would "*not prejudge this issue*" and would "*base its decision on rate case expense for this docket upon the evidence presented in this additional proceeding.*" At no time did the Commission advise the parties that they would be required to bear a burden to persuade the Commission to grant more or less than the awarded in November 2010, which is an erroneous interpretation or application of the law, as the entire burden of proving rate case expense was on KCPL, not CURB.

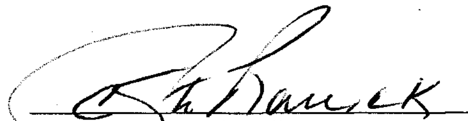
The Commission's award of rate case expense in excess of the uncontested $2.1 million amount should therefore be reversed because the decision results in an erroneous

interpretation or application of the law by failing to adequately specify how the Commission arrived at the $4.5 million amount. The matter should be remanded to the KCC with specific directions to deny KCPL-only rate case expense in excess of the uncontested $2.1 million amount and to order the appropriate refunds to ratepayers.

REQUEST FOR RELIEF

Pursuant to K.S.A. 77-621, CURB respectfully requests that this Court reverse the portions of the KCC Orders awarding $4.5 million in KCPL-only rate case expense, remand this matter to the KCC with specific directions to deny KCPL-only rate case expense in excess of the uncontested $2.1 million amount, order the appropriate refunds, and for such other relief as may be necessary or appropriate, whether mandatory, injunctive, declaratory, temporary or permanent, equitable or legal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that two true and correct copies of the above and foregoing document were placed in the United States mail, postage prepaid, or hand-delivered this 24th day of April, 2012, to the following:

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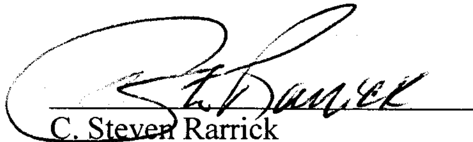

C. Steven Rarrick