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Court of Appeals of **Kansas**.
WESTERN RESOURCES, INC., and **Kansas** Gas and
 Electric Company, Petitioner/Appellants,
 v.
 The **STATE CORPORATION COMMISSION** OF the
STATE OF KANSAS, Respondent/Appellee.
No. 88,013.

March 8, 2002.

Electric companies sought review of decision by **Kansas** Corporation Commission (KCC) in an electric rate proceeding instituted by the companies. The Court of Appeals, [Knudson, J.](#), held that: (1) substantial evidence supported decision to impute revenues of \$500 MWh for additional off-system wholesale sales of electricity resulting from new generation facilities; (2) decision to allow reduction of electric company's rate base for the unamortized gain on a previous sale of property was not improper; (3) substantial evidence supported determination of the appropriate depreciation rate for the companies' coal fire steam generating plants; and (4) substantial evidence supported determination of appropriate depreciation rate to be allocated to a nuclear power plant owned in part by electric companies.

Affirmed.

West Headnotes

[1] Public Utilities 317A 🔑194

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak194](#) k. Review and Determination in
 General. [Most Cited Cases](#)
 On appeal, the Kansas Corporation Commission's (KCC) findings are presumed valid, and its order may only be set aside if it is not supported by substantial competent evidence, is without foundation in fact, or is otherwise unreasonable, arbitrary, or capricious.

[2] Public Utilities 317A 🔑194

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak194](#) k. Review and Determination in
 General. [Most Cited Cases](#)
 On appeal, the court may not substitute its judgment for that of the Kansas Corporation Commission (KCC) even though there may be conflicting evidence of record which would support a contrary result.

[3] Public Utilities 317A 🔑194

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak194](#) k. Review and Determination in
 General. [Most Cited Cases](#)
 The Kansas Corporation Commission's (KCC) decisions involve complex problems of policy, accounting, economics, and other special knowledge to achieve just and reasonable utility rates; consequently, a court may not set aside a KCC order merely because the court would have arrived at a different conclusion had it been the trier of fact.

[4] Public Utilities 317A 🔑194

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak194](#) k. Review and Determination in
 General. [Most Cited Cases](#)
 The reviewing court may reverse or nullify a Kansas Corporation Commission (KCC) order only when the decision is so wide of the mark as to be outside the realm of fair debate.

[5] Public Utilities 317A 🔑165

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(B\)](#) Proceedings Before Commissions
[317Ak165](#) k. Evidence. [Most Cited Cases](#)
 Once testimony is admitted in a rate case, the Kansas

Corporation Commission (KCC) has discretion to weigh and accept or reject that testimony.

[6] Electricity 145 🔑11.3(6)

145 Electricity

145k11.3 Regulation of Charges

145k11.3(6) k. Proceedings Before Commissions.

Most Cited Cases

Substantial evidence supported decision by the Kansas Corporation Commission (KCC) to impute revenues to the electric companies for additional off-system wholesale sales of electricity resulting from new generation facilities brought on line during or shortly after the test year; the KCC decision was based in part on the electric companies' own representations to potential investors and analysts. [K.S.A. 66-128\(a\)](#).

[7] Public Utilities 317A 🔑167

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(B) Proceedings Before Commissions

317Ak167 k. Hearing and Rehearing. [Most Cited](#)

Cases

After a Kansas Corporation Commission (KCC) hearing has ended, a party may request, if good cause is shown, that the record of testimony be reopened. [Kan.Admin. Reg. 82-1-230\(1\)](#).

[8] Public Utilities 317A 🔑167

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(B) Proceedings Before Commissions

317Ak167 k. Hearing and Rehearing. [Most Cited](#)

Cases

When seeking to submit additional evidence in a petition before the Kansas Corporation Commission (KCC) for reconsideration, the additional evidence must have either been not available or not known to exist at the time of the hearing; in addition, the nature and purposes of the evidence must be briefly stated and cannot merely be cumulative. [Kan.Admin. Reg. 82-1-235\(c\)\(4\), \(d\)](#).

[9] Electricity 145 🔑11.3(6)

145 Electricity

145k11.3 Regulation of Charges

145k11.3(6) k. Proceedings Before Commissions.

Most Cited Cases

Decision of Kansas Corporation Commission (KCC) to refuse to consider a supplemental affidavit filed by electric companies upon petition for reconsideration was not improper; the electric companies showed no good cause to reopen the record of testimony, and the witness had already testified in the original proceeding and could have presented the testimony at that time. [Kan.Admin. Reg. 82-1-230\(1\), 82-1-235\(c\)\(4\), \(d\)](#).

[10] Public Utilities 317A 🔑129

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak129 k. Rate of Return. [Most Cited Cases](#)

There is an elusive range of reasonableness in calculating a fair rate of return for a public utility.

[11] Public Utilities 317A 🔑194

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission

317Ak194 k. Review and Determination in

General. [Most Cited Cases](#)

When reviewing a rate determination, a court can only concern itself with the question as to whether a rate is so unreasonably high as to be unlawful; the in-between point, where the rate is most fair to the utility and its customers, is a matter for the Kansas Corporation Commission's determination.

[12] Electricity 145 🔑11.3(6)

145 Electricity

145k11.3 Regulation of Charges

145k11.3(6) k. Proceedings Before Commissions.

Most Cited Cases

Substantial evidence supported decision by the Kansas Corporation Commission (KCC) to impute revenues to the electric companies for additional off-system wholesale sales of electricity at the price of \$500 MWh; the KCC based its finding on the testimony of three expert witnesses, and that determination was within a zone of reasonableness.

[13] Public Utilities 317A 🔑168

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(B\)](#) Proceedings Before Commissions

[317Ak168](#) k. Findings. [Most Cited Cases](#)

Where the Kansas Corporation Commission rules in a manner inconsistent with a previous decision, the law requires that the KCC explain its change in position.

[\[14\]](#) Estoppel 156 62.1

[156](#) Estoppel

[156III](#) Equitable Estoppel

[156III\(A\)](#) Nature and Essentials in General

[156k62](#) Estoppel Against Public, Government, or Public Officers

[156k62.1](#) k. In General. [Most Cited Cases](#)

(Formerly 15Ak502)

Generally, a regulatory body has authority to change positions on an issue if the new position is supported by substantial competent evidence; thus, parties may not reasonably rely on any prior order of the body to such an extent to invoke the doctrine of equitable estoppel.

[\[15\]](#) Electricity 145 11.3(2)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(2\)](#) k. Determination of Rate Base. [Most Cited Cases](#)

Decision by Kansas Corporation Commission (KCC) to allow a reduction of an electric company's rate base for the unamortized gain on a previous sale of property was consistent with the KCC's prior order authorizing the sale/leaseback transaction, and thus was not improper; the electric company's application for the sale/leaseback transaction proposed that the benefits from the disposition of the proceeds would be passed on to ratepayer, and KCC retained jurisdiction over the issues, and nothing in the subsequent order altered the previous order.

[\[16\]](#) Electricity 145 11.3(6)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions. [Most Cited Cases](#)

There was insufficient evidence to support electric company's contention that shareholders were deprived of the benefit from the proceeds from a sale/leaseback transaction due to a decision by Kansas Corporation Commission

(KCC) to allow a reduction of the electric company's rate base for the unamortized gain on the sale/leaseback transaction; the transaction was primarily a financing device designed to improve the company's financial situation, and electric company's use of the proceeds to buy back stock and redeem high coupon debt benefitted both rate-payers and shareholders.

[\[17\]](#) Electricity 145 11.3(6)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

Substantial evidence supported decision by the Kansas Corporation Commission (KCC) to allow a reduction of the electric company's rate base for the unamortized gain on the sale/leaseback transaction; expert testimony, discussing the electric company's ability to use the sale proceeds of \$300 million as cost-free capital for 14 years, more than supported the KCC's decision to reduce the rate base.

[\[18\]](#) Electricity 145 11.3(6)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

Substantial evidence supported the Kansas Corporation Commission's (KCC) rate base adjustment and related revenue adjustments pertaining to the acquisition premium paid by a power and light company to merge with electric company, which effectuated the KCC's intent of a 50-50 sharing of the merger savings between ratepayers and shareholders; KCC's cash flow analysis was consistent with the methodology employed by the expert witness, the KCC's order was not inconsistent with previous orders, and the decision did not constitute an unlawful taking of property.

[\[19\]](#) Electricity 145 11.3(6)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

Substantial evidence supported the Kansas Corporation Commission's (KCC) determination of the appropriate depreciation rate for the electric companies' coal fire steam

generating plants, despite conflicting expert testimony; neither expert's methodologies for determining depreciation were professionally untenable, the complex issues involving depreciation methodologies was clearly within the KCC's expertise, and the KCC's decision was reasonable.

[20] Public Utilities 317A 🔑194

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission

317Ak194 k. Review and Determination in

General. [Most Cited Cases](#)

Nothing can be gained by making a comparison of conflicting testimony upon review; the Kansas Corporation Commission (KCC) is the trier of facts, and the KCC has the expertise through its staff to sift and evaluate conflicting testimony.

[21] Administrative Law and Procedure 15A 🔑229

15A Administrative Law and Procedure

15AIII Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 k. Exhaustion of Administrative Remedies. [Most Cited Cases](#)

Administrative Law and Procedure 15A 🔑480.1

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(D) Hearings and Adjudications

15Ak480 Rehearing

15Ak480.1 k. In General. [Most Cited Cases](#)

The party seeking review of an agency's decision must file a petition for reconsideration stating the specific grounds upon which relief is requested. [K.S.A. 66-118b, 77-529\(a\).](#)

[22] Administrative Law and Procedure 15A 🔑229

15A Administrative Law and Procedure

15AIII Judicial Remedies Prior to or Pending Administrative Proceedings

15Ak229 k. Exhaustion of Administrative Remedies. [Most Cited Cases](#)

Failure to exhaust administrative remedies generally is a bar to judicial review of agency action.

[23] Administrative Law and Procedure 15A 🔑796

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak796 k. Law Questions in General. [Most](#)

[Cited Cases](#)

Whether a party is required to or has failed to exhaust required administrative remedies is a question of law over which appellate review is unlimited.

[24] Electricity 145 🔑11.3(7)

145 Electricity

145k11.3 Regulation of Charges

145k11.3(7) k. Judicial Review and Enforcement.

[Most Cited Cases](#)

Electric companies failed to preserve for review their argument that the Kansas Corporation Commission's (KCC) determination of the appropriate depreciation rate for the electric companies' coal fire steam generating plants was not supported by proper findings, by failing to set forth that ground in the companies' petition for reconsideration. [K.S.A. 66-118b, 77-529\(a\).](#)

[25] Public Utilities 317A 🔑168

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(B) Proceedings Before Commissions

317Ak168 k. Findings. [Most Cited Cases](#)

The Kansas Corporation Commission (KCC) is not required to render its findings of fact in minute detail; the findings must be specific enough to allow judicial review of the reasonableness of the order.

[26] Public Utilities 317A 🔑168

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(B) Proceedings Before Commissions

317Ak168 k. Findings. [Most Cited Cases](#)

Findings by the Kansas Corporation Commission (KCC) do not have to be stated with such particularity as to amount to a summation of all the evidence.

[27] Public Utilities 317A 🔑168

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(B\)](#) Proceedings Before Commissions

[317Ak168](#) k. Findings. [Most Cited Cases](#)

The Kansas Corporation Commission (KCC) is not generally required to explain why it did not accept every piece of evidence presented.

[\[28\]](#) **Administrative Law and Procedure 15A**  [753](#)

[15A](#) Administrative Law and Procedure

[15AV](#) Judicial Review of Administrative Decisions

[15AV\(D\)](#) Scope of Review in General

[15Ak753](#) k. Theory and Grounds of Administrative Decision. [Most Cited Cases](#)

An agency's findings will be upheld, though of less than ideal clarity, if the agency's path may reasonably be discerned.

[\[29\]](#) **Electricity 145**  [11.3\(6\)](#)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

The Kansas Corporation Commission's (KCC) determination of the appropriate depreciation rate for the electric companies' coal fire steam generating plants was supported by proper findings; there was ample evidence in the record to support the KCC's adoption of either expert's analysis, and more detailed findings would not have been of substantial assistance to the reviewing court.

[\[30\]](#) **Electricity 145**  [11.3\(6\)](#)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

There was insufficient evidence to support claim by electric companies that the life span of its coal fire steam generating plant should be based on the length of the electric companies' lease of the facility, rather than on the useful life of the facility; the electric company had the option to renew the lease or purchase the plant back at fair market value, and therefore the companies' interest in the plant did not automatically terminate at the end of the lease.

[\[31\]](#) **Electricity 145**  [11.3\(6\)](#)

[145](#) Electricity

[145k11.3](#) Regulation of Charges

[145k11.3\(6\)](#) k. Proceedings Before Commissions.

[Most Cited Cases](#)

Substantial evidence supported Kansas Corporation Commission's (KCC) determination of the appropriate depreciation rate to be allocated to a nuclear power plant owned in part by electric companies, which assumed that the owners would apply for an obtain a 20-year extension of their operating license; there was no indication the license would be denied, a contrary decision would result in over-depreciation of the plant, and there was no requirement that the KCC impose the same depreciation rate for the electric companies as it did for the plant's co-owners, whose rate case occurred at a significantly different time.

****165 *348** *Syllabus by the Court*

1. On appeal, the findings of the Kansas Corporation Commission are presumed valid, and its order may only be set aside if not supported by substantial competent evidence, is without foundation in fact, or is otherwise unreasonable, arbitrary, or capricious.
2. Once testimony is admitted in a rate case, the Kansas Corporation Commission has discretion to weigh and accept or reject that testimony. On appeal, the court may not substitute its judgment for that of the agency even though there may be conflicting evidence of record which would support a contrary result.
3. Courts recognize the decisions of the Kansas Corporation Commission (KCC) involve complex problems of policy, accounting, economics, and other special knowledge to achieve just and reasonable utility rates. Consequently, a court may not set aside an order of the KCC merely because the court would have arrived at a different conclusion had it been the trier of fact.
4. A court may reverse or nullify a Kansas Corporation Commission order only when the decision is so wide of the mark as to be outside the realm of fair debate.
5. After a Kansas Corporation Commission hearing has ended, a party may request, if good cause is shown, that the record of testimony be reopened. When seeking to submit additional evidence in a petition for reconsideration, the additional evidence must have either been not available or not known to exist at the time of the hearing. In addition, the nature and purposes of the evidence must be briefly stated and cannot merely be cumulative.

6. There is an elusive range of reasonableness in calculating a fair rate of return for a public utility. A court can only concern itself with the question as to whether a rate is so unreasonably high as to be unlawful. The in-between point, where the rate is most fair to the utility and its customers, is a matter for the Kansas Corporation Commission's determination.

*349 7. Where the Kansas Corporation Commission rules in a manner inconsistent with a previous decision, the law requires that the commission explain its change in position.

8. Failure to exhaust administrative remedies generally is a bar to judicial review of agency action.

9. The Kansas Corporation Commission's (KCC) findings of fact must be specific enough to allow judicial review of the reasonableness of a final order. However, the KCC is not required to explain why it did not accept every piece of evidence presented.

10. Under the facts of this case, the **Kansas** Corporation Commission acted within its statutory authority, and there exists substantial competent evidence to support its findings and decisions to achieve just and reasonable utility rates.

166 [Martin J. Bregman](#), executive director, Law, of **Western Resources, Inc., of Topeka; [Michael Lennen](#), of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita; and [James M. Fischer](#), of Fischer & Dority, P.C., of Jefferson City, Missouri, for appellants.

Caroline Ong, advisory counsel, and [Susan B. Cunningham](#), general counsel, of the Kansas Corporation Commission, for appellee.

Walker Hendrix and Niki Christopher, for intervenor Citizens' Utility Ratepayer Board.

[Kirk T. May](#) and [Matthew T. Geiger](#), of Rouse Hendricks German May PC, of Kansas City, Missouri, for intervenor The Goodyear Tire & Rubber Company.

[Sarah J. Loquist](#) and [Thomas R. Powell](#), of Hinkle Elkouri Law Firm L.L.C., of Wichita, for intervenor Unified School District No. 259.

David J. Roberts and [James P. Zakoura](#), of Smithyman & Zakoura, Chartered, of Overland Park, for intervenor

Kansas Industrial Consumers.

[Timothy E. McKee](#), of Triplett, Woolf & Garretson, LLC, of Wichita, [Greg D. Ottinger](#), of Duncan & Allen, of Washington, D.C., [Gary E. Rebenstorf](#), city attorney, and [Joe Allen Lang](#), first assistant city attorney, for intervenor City of Wichita.

*350 [Kevin M. Fowler](#) and [John C. Frieden](#), of Frieden, Haynes & Forbes, of Topeka, for intervenor City of Topeka.

Before [RULON](#), C.J., [LEWIS](#) and [KNUDSON](#), JJ.

[KNUDSON](#), J.

Western Resources, Inc. (WRI) and **Kansas Gas and Electric Company** (KGE) filed this joint petition for judicial review from a final order of the **Kansas** Corporation Commission (KCC) in an electric rate proceeding instituted by the utilities.

Jurisdiction is conferred upon this court under [K.S.A.2001 Supp. 66-118a\(b\)](#) and in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), [K.S.A. 77-601 et seq.](#) In a separate but related appeal, KIC also filed a petition for judicial review from the KCC's order. See *Kansas Industrial Consumers v. Kansas Corporation Comm'n*, No. 88,012, filed March 8, 2002, --- Kan. ----, 42 P.3d 110 (2002).

On appeal, WRI and KGE contend the KCC erroneously interpreted or applied the law, the KCC's order was not supported by substantial competent evidence, and its decision was otherwise unreasonable, arbitrary, or capricious. We conclude the KCC acted within its authority, and there exists substantial competent evidence to support its findings and decisions to achieve just and reasonable utility rates.

The KCC Proceedings

In November 2000, WRI filed an application with the KCC seeking an approximate \$92,000,000 rate increase for its electric service division. On the same date, KGE, a wholly owned subsidiary of WRI, also filed an application with the KCC for a rate increase of almost \$58,000,000. Both applications were consolidated into the same agency docket, 01-WSRE-436-RTS.

30 Kan.App.2d 348, 42 P.3d 162, Util. L. Rep. P 26,813
(Cite as: 30 Kan.App.2d 348, 42 P.3d 162)

Various parties intervened in the proceedings before the KCC. The intervenors included Citizens' Utility Ratepayers Board (CURB), Kansas Industrial Consumers (KIC), City of Wichita, City of Topeka, Unified School District No. 259 (U.S.D.259), Midwest Energy, Inc., Empire District Electric Company (Empire), Kansas Municipal Energy Agency, The Goodyear Tire & Rubber Company (Goodyear), ONEOK, Inc. d/b/a Kansas Gas Service Company, and Southcentral Municipal Energy Agency.

*351 The KCC held evidentiary hearings on the applications from May 17, 2001, through June 4, 2001. Subsequently, all parties had the opportunity to file post-hearing trial briefs and reply briefs.

On July 25, 2001, the KCC issued a decision on the rate applications. Its order dealt with a wide variety of issues pertaining to the revenue requirements of WRI and KGE. The KCC ordered a decrease of KGE's revenue requirement by over \$41,000,000 and increased WRI's revenue requirement by **167 \$18,470,583. Timely petitions for reconsideration attacking various portions of the initial order were filed by KIC, the KCC Staff, WRI and KGE, and the City of Wichita.

On September 5, 2001, the KCC issued its order on reconsideration. In this order, the KCC made various adjustments with respect to certain issues and clarified other points. The end result was a determination that WRI had an increased revenue requirement of \$25,401,336 and KGE had a decrease in its revenue requirement of \$41,062,598.

Timely petitions for reconsideration were filed from the order on reconsideration by KIC, WRI and KGE, and Goodyear. The petitions for reconsideration were denied in the KCC's final order of October 11, 2001. WRI and KGE filed this joint petition for judicial review.

Standard of Review

Pursuant to [K.S.A. 66-118c](#), this court reviews an order of the KCC under the KJRA. In their brief, WRI and KGE contend the KCC erroneously interpreted or applied the law, the KCC's order was not supported by substantial evidence, and the KCC's decision was otherwise unreasonable, arbitrary, or capricious. Those claims of error are consistent with the jurisdictional grant of the KJRA. See [K.S.A. 77-621](#).

[1] On appeal, the KCC's findings are presumed valid, and

its order may only be set aside if it is not supported by substantial competent evidence, is without foundation in fact, or is otherwise unreasonable, arbitrary, or capricious. [Williams Natural Gas Co. v. Kansas Corporation Comm'n](#), 22 Kan.App.2d 326, 334-35, 916 P.2d 52, rev. denied 260 Kan. 1002 (1996).

[2][3][4] *352 The legislature has vested the KCC with broad discretion in weighing the competing interests involved in setting public utility rates. Because discretion is delegated to the KCC, the courts do not have authority to substitute their judgment for that of the KCC. The courts also have recognized that the KCC's decisions involve complex problems of policy, accounting, economics, and other special knowledge to achieve just and reasonable utility rates. Consequently, a court may not set aside a KCC order merely because the court would have arrived at a different conclusion had it been the trier of fact. The court may reverse or nullify a KCC order only when the decision “ ‘is so wide of the mark as to be outside the realm of fair debate.’ ” * [Williams Natural Gas Co.](#), 22 Kan.App.2d at 335, 916 P.2d 52 (quoting [Kansas Gas & Electric Co. v. Kansas Corporation Comm'n](#), 239 Kan. 483, 497, 720 P.2d 1063 [1986]).

Imputation of Off-System Sales Revenues

WRI and KGE first challenge the KCC's decision to impute revenues to the companies for additional off-system wholesale sales of electricity as a result of new generation facilities brought on line during or shortly after the test year. WRI and KGE contend the revenues attributed to those facilities were speculative and contrary to the record. WRI and KGE also contend the KCC's decision was not based upon substantial competent evidence and post-hearing evidence proffered by the applicants was improperly rejected.

The test year adopted by the KCC ended on September 30, 2000. In their applications, WRI and KGE requested that the KCC include in their rate base costs relating to new generation facilities incurred outside of the test year. The new facilities included three combustion turbine peaking units at the Gordon Evans site and a Purchase Power Agreement (PPA) under which WRI could purchase 200 megawatts of capacity from Westar Generating, Inc.'s State Line facility; Westar is a wholly owned subsidiary of WRI. These new facilities created about 514 megawatts of new capacity for WRI retail customers. Two of the three Gordon Evans units went into service during the test year; the third unit went into service in June 2001. Westar's State

Line plant went into commercial service in June 2001. The KCC determined the increased *353 capacity for WRI was a necessary and prudent investment and included the costs in WRI's rate base.

The above adjustment to rate base required the KCC to also consider whether the additional generation capacity would likely increase retail and off-system wholesale **168 sales. The KCC agreed with WRI and KGE that the increase in retail customers was not sufficiently quantified. Next, the KCC noted the steady increase of wholesale sales in recent years and the marketing projections made by WRI and KGE to the financial analysts on Wall Street. Ultimately, the KCC added an additional \$19,191,165 in revenue from off-system sales. The KCC's determination was based upon evidence that there would be 28,000 megawatt hours (MWh) available for off-system sales at \$750 per MWh.

WRI and KGE challenged this adjustment in their petition for reconsideration. In their petition, WRI and KGE asked the KCC to consider additional evidence in the form of an affidavit with calculations from a WRI manager, Shane Mathis. In its subsequent order, the KCC declined to accept Mathis' affidavit, noting WRI and KGE had the opportunity to provide the information in a timely fashion as prefiled rebuttal evidence or during the hearing. The KCC also found that the determination there would be additional off-system sales was not speculative. However, the KCC did agree, "based on its familiarity with market condi-

tions," the \$750 per MWh was too high and reduced the adjustment to \$12,794,600 based on a price of \$500 per MWh. WRI and KGE filed a timely petition for reconsideration from this order that was denied by the KCC.

The KCC is to determine the reasonable value of property owned by a public utility which is used and required in its public operations. [K.S.A.2001 Supp. 66-128\(a\)](#). Generally, property which has not been completed and dedicated to commercial service is not considered used and useful; however, the KCC has discretion to include the cost of uncompleted property in several circumstances. [K.S.A.2001 Supp. 66-128\(b\)\(2\)](#). Moreover, we have previously recognized the KCC has discretion to include in rate calculations any costs and revenues not part of the test year if the changes are known and measurable. *354 [Gas Service Co. v. Kansas Corporation Commission, 4 Kan.App.2d 623, 635-36, 609 P.2d 1157, rev. denied 228 Kan. 806 \(1980\)](#).

WRI and KGE contend the price finally adopted by the KCC-\$500 per MWh-was several times greater than the prices actually received by the utilities for off-systems sales during the test year and, therefore, was speculative and unsupported by the record.

Various witnesses testified about the off-system sales issue with, predictably, a wide variety of proposals.

<u>Witness</u>	<u>Sponsor</u>	<u>Projected Sales</u>	<u>Price/MWh</u>	<u>\$ Sales</u>	<u>Margin</u>
A. Crane	CURB	28,000 MWh	\$750	\$21M	-
T. Corrigan	Wichita	435,000 MWh	\$ 31.02 (net)	\$30M	\$13.5M
Ed Bodmer	Topeka	-	-	-	\$11M
Leslie Morgan	WRI/KGE	(Unspecified)	\$ 7.49 (net)	-	-

