



CURBside News

NEWS FROM THE WATCHDOG FOR RESIDENTIAL AND SMALL COMMERCIAL CONSUMERS OF UTILITIES APRIL 2004

FCC Triennial Review Order Update

CURB has been engaged before the Kansas Corporation Commission (KCC) in proceedings required by the Federal Communications Commission's (FCC) Triennial Review Order, issued in August 2003.

The Triennial Review Order attempted to address how incumbent local exchange carriers (LECs) must provide competitors access to their unbundled network elements (UNEs), in light of the goals embodied in the Telecommunications Act of 1996, which include promotion of competition, deployment of advanced broadband services, and incentives for investment in facilities.

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit vacated key portions of the order.

On March 3, 2004, the KCC suspended the procedural schedule and additional rounds of testimony, and parties were asked to file comments discussing how to proceed in light of the D.C. Circuit decision.

(See Triennial Review on Page 2)

Midwest Energy Seeks Retro Recovery

On April 14, the KCC heard arguments on Midwest Energy's request to raise some of its customers' rates to recover \$1 million in fuel costs.

If Midwest's request is granted, customers in the company's "M" system would see an increase in their bills.

The "W" system customers, who are former Westar customers in west central Kansas who were acquired last year by Midwest, are protected from the increase by a rate moratorium that prevents Midwest from raising their rates for five years after the acquisition.

Midwest claims that the adoption of a new tariff at the time of acquisition is to blame for what it claims are \$1 million in unrecovered fuel costs. The Commission has granted the company permission to revise the tariff.

At issue currently is whether the Commission can grant Midwest permission to recover those allegedly unrecovered costs via the "M" system energy charge adjustment during the

(See Midwest on Page 5)

Ad Valorem Update

Longtime CURBside readers may recall that the KCC opened a docket almost six years ago to determine how the ad valorem refunds from the former Williams Gas Pipeline Central would be distributed.

The pipeline, now called Southern Star, exceeded price caps in place during the 1980s to cover its costs of ad valorem taxes in Kansas it paid on natural gas sold to retail customers. After much protracted litigation, it was determined that exceeding the price cap with the pass-through of the costs of ad valorem taxes was illegal.

Williams and several other pipelines that had done the same thing were ordered to refund the excess charges.

After a long court battle, some of the larger customers of Williams reached a settlement with Williams that reduced Williams' liability and allowed a portion of the money to flow to its customers.

The rest of the money has remained in limbo ever since, awaiting KCC action to approve a distribution plan.

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Ad Valorem

(Continued from Page 1)

Over one-and-a half years ago, CURB successfully negotiated an agreement with Dynegy, which now owns several former customers of Williams, in which Dynegy agreed to waive its claims as a successor-in-interest to a substantial portion of the refunds in favor of low-income utility assistance programs operated by the Salvation Army and the American Red Cross.

Additionally, Westar Energy, which had purchased gas from Williams and is also making claims to refunds, has agreed to dedicate any refunds it receives to a trust that will provide income for such assistance programs.

Recently, most of the remaining parties in the docket reached a settlement on a distribution plan that would ensure that a substantial amount of the refunds would be donated to the Salvation Army and American Red Cross. The charities stand to receive approximately \$300,000 each for their utility bill assistance programs under the proposed settlement. The parties filed a motion with the KCC to ask that it approve the plan and order Williams to distribute the refunds.

Unfortunately, the motion crossed in the mail with a KCC order that did not address the issues raised by the motion, and the Commission has yet to respond to the parties' proposed plan.

A prehearing is set for June 10 to address Staff's efforts to contact former Williams customers.

Six winters have come and gone without resolution of this docket. Let's hope another one doesn't go by before the money is distributed.

KCC Docket No. 99-GIMG-068-GIG

Triennial Review

(Continued from Page 1)

The KCC issued Order 17 on March 9, 2004, staying the procedural schedule indefinitely until such time as the courts or the FCC provide certainty to the state proceedings.

On March 31, 2004, the FCC Commissioners collectively urged telecommunications carriers to engage in good faith negotiations to reach commercially-acceptable agreements for unbundled network elements (UNEs).

Shortly after this announcement, SWB and Sage Telecom announced they had concluded a seven-year commercial agreement that provides that SWB will lease wholesale access to its network to Sage Telecom. Specific terms of the agreement were not released, but the companies disclosed that the prices will gradually rise over the life of the deal and the average monthly wholesale cost per line would likely be below \$25. The agreement will also allow Sage to offer data and Internet services.

The precise effect of the D.C. Circuit Court decision on consumers and small businesses is yet to be determined. Our concern at CURB is that the decision will result in less access to unbundled network elements for competitive local exchange carriers, which we believe will ultimately harm competition and consumers.

CURB also believes decisions on impairment without access to unbundled network elements should be made at the state level, not in Washington. Negotiated terms for access to UNEs will likely result in higher prices to consumers and small businesses as well. Further details on the D.C. Circuit decision can be found at our website at: <http://curb.kcc.state.ks.us>. Follow the Triennial Review order link.



Condolences

We offer our condolences to CURB Staffer Audrey Bosley, who lost her mother, Eleanor Baalman, last week after a long illness. Mrs. Baalman resided in Grinnell, Kansas.

We also offer condolences to the KCC's receptionist, JoAnn Flaming, whose husband, Marvin, died last week after a long illness. ♦

Upcoming Events

Wind Power Public Forum

The Wind and Prairie Task Force, which is a subcommittee of the State Energy Resources Coordination Council, is planning to hold two forums to give the public an opportunity to learn more about the issues concerning wind power development in rural Kansas, and to speak with task force members.

While Governor Sebelius initially charged the task force with developing a site approval process for wind farms that would allow wind generation to develop while protecting pristine tallgrass prairie and the beauty of the Flint Hills region, the charge has been broadened to consider the possible impacts of wind development throughout the State.

Because more transmission is available near population centers in eastern Kansas, and the Flint Hills offer desirable wind patterns for wind generation, many wind developers have set their sights on setting up wind farms in the Flint Hills.

Concerns in communities that may be affected by wind development led the task force to plan these informational forums in the Flint Hills area.

Manhattan will be the location of the April 28 forum, which will be held at the Fire Department Headquarters building at the corner of Dennison and Kimball. Out-of-towners are instructed to take Tuttle Creek Boulevard north from Hwy 177, and turn west on

Kimball Avenue towards the football stadium. The Fire Department Headquarters is on the right at Kimball and Denison streets.

The April 29 forum will be held in El Dorado, in a meeting room at Butler County Community College, which is approximately a half-mile south of U.S. Highway 254 on Haverhill Road.

Both forums will be held from 5:00 pm to 8:00 pm. Attendees can stop in at any time. ♦

Roundtable on RTO

The KCC has opened a docket to consider issues surrounding the emergence of regional transmission organizations (RTOs) and their potential affects on Kansas electric utilities.

The Federal Energy Regulatory Commission (FERC) has conditionally recognized the Southwest Power Pool (SPP) as this region's transmission organization.

FERC has promoted the development of RTOs to promote competition by facilitating fair and equitable transmission of electricity in the marketplace. A utility surrenders its operational control of its transmission facilities to the RTO, which controls the transmission facilities of several utilities in the region.

Ideally, having a neutral entity control a large section of the national energy grid will make the transfer of electricity from one utility to another

easier, and make the grid more efficient.

Having uniform pricing of transmission throughout a region would also make inter-utility transactions easier and prevent "pancaking." This is a term used to describe what happens when a power transfer is made across several transmission systems. Each owner charges a fee for the use of the transmission, and the fees add up, i.e., "pancake," which can add unnecessary costs to a transaction. An RTO system is intended to make fees more predictable and uniform throughout a region.

However, the KCC is concerned about the effects on jurisdictional utilities in Kansas if they surrender control over their transmission facilities to an RTO. It is also concerned whether Kansas law will permit members of the Commission to participate in the committee that will oversee the RTO, as FERC has proposed.

These and other concerns have prompted the Commission to schedule a roundtable to discuss issues and evidence concerning the possible participation of jurisdictional utilities in the RTO.

The roundtable will begin at the KCC on May 4 at 9:00 am, and is scheduled to end no later than 4:00 pm. Interested persons are invited to attend or submit comments. Those who wish to attend should call Mike Peters at the KCC by April 27. His phone is (785) 271-3181.

Westar Update:

A variety of events signal change of direction— but no early rebates

Westar has completed the sale of Protection One, its unregulated consumer alarm division, to Quadrangle Capital Partners L.P. The financial drain of Protection One's operation is widely viewed as the cause of Westar's financial decline over the last few years. With the sale of Protection One, Westar has eliminated virtually all of its non-utility business. Selling Protection One is expected to reduce the total debt on Westar's books by over \$500 million.

David Wittig and Doug Lake, Westar's former CEO and Executive V.P. respectively, have filed counter claims in a salary arbitration proceeding with Westar. Wittig and Lake are seeking \$110 Million and \$70 million in pay and benefits that they claim are owed to them pursuant to their employment contracts.

The Environmental Protection Agency is investigating whether projects and maintenance activities since the 1980's at Westar's coal-fired power plants were in compliance with the Clean Air Act's New Source Review requirements and New Source Performance Standards .

If the EPA requires Westar to update emission controls at Jeffery Energy Center or take other remedial action, the cost could be significant. Westar

will likely seek to recover any resulting costs from ratepayers.

In April, Westar issued approximately 12 million shares of stock, priced between \$20 to \$21 per share. Westar netted approximately \$240 million, which will be used to pay down debt.

Westar's Board of Directors has announced its intention to begin restoring Westar's dividend payout, which was cut as part of Westar's restructuring plan. A Westar news release states, "The Board intends in late 2004 to significantly increase the quarterly dividend payable in January 2005."

In reference to Westar's agreement to pay rebates to customers (\$10.5 million in May 2005 and \$10 million in January 2006), CURB's Dave Springe asked Jim Haines, Westar's CEO, whether consumers could also expect to see their rebates increased or be paid earlier.

The answer, in no uncertain terms, was NO!

The Commission, which had earlier suspended all remaining proceedings in the Westar case, called Westar officials in recently for a roundtable discussion to update the Commission on Westar's restructuring. The Commission sought guidance on reforms and policies that Westar has adopted regarding affiliate rules, cash management practices and corporate governance.

After a reassuring presentation by Jim Haines, KCC Chairman Brian Moline was quoted as saying the

investigation "was pretty much over."

Could this be the end????? Well, there is that little rate case Westar will file in 2005.

Welcome Steve Rarrick, New CURB Staffer

CURB is pleased to announce that Steve Rarrick joined our office in February 2003. He will represent CURB on telecommunication matters, advocating for consumers and small businesses before the KCC, the Kansas Legislature, and Kansas courts.

Prior to coming to CURB, Mr. Rarrick was the Deputy Attorney General for the Consumer Protection & Antitrust Division in the Office of the Kansas Attorney General from 1995 to 2003. In that capacity, he served as the principal advisor to the Attorney General on consumer protection issues and supervised all division activities, including investigation, litigation, and education. In addition, Mr. Rarrick introduced and testified in support of significant consumer protection legislation, including the Kansas no-call and slamming statutes.

Mr. Rarrick graduated cum laude from Washburn University School of Law in 1986, and received his B.A. in Business/Economics from George Fox College in Newberg, Oregon, in 1982, and an A.A. in Business Administration from Central College in McPherson, Kansas, in 1980, where he now serves on the Board of Trustees.

Midwest

(Continued from Page 1)

four months the tariff was effective.

This adjustment, known as an ECA, allows the company to pass through variations in fuel costs to its customers. If fuel costs increase, customer bills increase; if they decrease, so do customer bills. Midwest believes the tariff permits the company to use the year-end "true up" to rectify the alleged shortfall in revenues.

CURB and the KCC Staff are opposing the company's request. The prohibition against retroactive ratemaking precludes allowing Midwest to recover money "as if" another tariff had been adopted at the time of the Westar acquisition.

CURB and Staff also maintain that the company actually recovered the fuel costs at issue, but acknowledge that the company may have suffered a hit to its margin as a result of the tariff. The "true up" provision, however, does not allow for recovery of costs through the ECA that are not fuel-related.

Tariffs have the force of law and can only operate prospectively, and cannot be revised retroactively. Nor can the Commission allow the company to charge customers a higher rate to make up for revenues it perceived it lost under the tariff.

The Commission gave no indication when its decision might be expected. We will keep you posted. ♦

Docket Nos. 04-MDWE-487-ECA & 04-MDWE-642-ECA

CURB Wins Collateral Battle with Aquila

CURB won a key battle with Aquila in February when the Commission issued an order denying the company permission to use its Kansas utility assets as collateral on a multi-million dollar term loan.

Aquila admitted that it intended to allow its non-utility affiliates to have access to the loan proceeds. CURB argued that putting utility assets in jeopardy to provide working capital to unregulated affiliates would have unfairly put ratepayers in the position of backing up non-utility activities. Of particular concern is Aquila's overall financial condition, which has been substantially harmed by the financial difficulties of several of its subsidiaries.

Aquila had already collateralized sufficient utility assets in other states to provide the necessary collateral for the loan, but insisted more was needed. Several other states had rejected Aquila's bid to use utility assets by the time its request was considered by the KCC.

The Commission agreed with CURB that the proposal entailed undue risk to ratepayers, and agreed that Aquila had failed to establish the necessity for over-collateralizing the loan. Furthermore, the Commission ordered Aquila to provide additional information as a result of questions raised in the course of its investigation.

This docket will remain open, as the KCC Staff and CURB continue to monitor Aquila's efforts to regain financial health.

KCC Docket No. 02-UTCG-701-GIG

CURB asks KCC to reconsider winback order

On April 19, 2004, CURB filed a Petition to Reconsider with the KCC, asking the Commission to reconsider the sunset (July 1, 2005) on the thirty-day restriction on winback offerings contained in the Commission's April 2, 2004, Order.

In March 2002, a docket was opened to investigate whether local exchange carriers (LECs) should be allowed to offer winback or retention promotions.

Later, the docket was expanded to include the investigation of win offers by LECs as well.

Win, winback, and retention offerings by LECs are promotions aimed at 1) persuading customers of another carrier to switch their local service to the LEC (win), 2) persuading former customers of the LEC who have already switched their local service to another carrier to switch back to the LEC (winback), and 3) retaining current customers who may be considering going to another carrier (retention).

CURB intervened in this docket because while these offerings may benefit some customers in the short run, they

(See Winback on Page 6)

Winback

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may be discriminatory (similarly-situated consumers may not be eligible for the discounted rate), and overly aggressive offerings of these types could be detrimental to the growth of competition.

The Commission banned the win and retention offerings being made by Southwestern Bell Telephone (SWBT), but ordered the following regarding winback offerings:

- ILECs may offer short-term promotional offerings as long as the offerings are made available in a nondiscriminatory manner to all customers throughout an exchange or group of exchanges.

- ILECs cannot directly solicit winback customers until 30 days after the end user's service has been converted to the competitive Local Exchange Carrier (CLEC).

- The 30-day restriction on solicitation of winback customers expires on July 1, 2005, unless the Commission takes further action to extend it.

In support of its Petition to Reconsider, CURB pointed out that the Commission specifically determined that the telecommunications market in Kansas is just developing and that SWBT has the dominant market power. CURB noted that no evidence was presented indicating that SWBT's dominant market position will decrease or that the market will become more competitive in any material respect on or before July 1, 2005, to justify the sunset provision contained in the Commission's Order.

CURB argued that an order of the Commission should be set aside when it is not supported by substantial competent evidence, is without foundation in

fact, or is otherwise unreasonable, arbitrary, or capricious.

CURB suggested that the Commission rescind the sunset provision and replace it with a scheduled review of the local telecommunications market in July 2005, to determine whether the thirty-day restriction on winback offerings should be continued or modified at that time.

KCC Docket No. 03-GIMT-678-GIT

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Examine Your Long Distance Bills Carefully for Errors

CURB was recently advised by the Indiana Office of Utility Consumer Counselor (OUCC) that an AT&T billing system malfunction has resulted in erroneous charges to at least 12,000 Hoosiers and consumers nationwide.

CURB encourages all consumers to carefully check their telephone bills. The mistake affected both AT&T customers and consumers using other telecommunications providers.

AT&T advises the OUCC that it is reviewing its records, informing affected consumers via letter in the coming weeks and providing automatic credits or refunds.

While AT&T's billing error is unusual, it highlights the need for consumers to read their utility bills carefully each month and to promptly address any concerns with their utility service providers.

The erroneous telephone charges apparently began in January 2004, when AT&T started assessing a \$3.95 monthly recurring charge to its long distance Basic Rate plan customers. This charge is appropriate for customers on the company's Basic Rate plan. AT&T notified those customers of the upcoming changes via direct mail in November 2003.

However, because of an AT&T billing system error, the \$3.95 "monthly service charge" has also appeared on other customer bills, including those of:

- AT&T customers who use the company's other long distance calling plans, and

- Consumers who have not chosen AT&T as their long distance provider.

The mistaken billing may also reflect the following erroneous charges, in addition to the \$3.95 charge:

- A 99-cent regulatory assessment fee,
- A \$2.49 bill statement fee (if billed through the local phone company),
- A \$10 reconnection charge (if sent to a non-AT&T customer), and
- A Universal Connectivity Charge of 8.7%, in addition to any applicable taxes.

The erroneous charges have appeared both as AT&T long distance charges on consumers' local telephone bills and on AT&T bills sent to directly to consumers. AT&T reports that the billing system malfunction – which affected consumers across the nation – was fixed prior to the distribution of April bills.

Consumers who identify any of these errors on their bills and who have not received an automatic credit or refund by June may contact AT&T in any of the following ways:

- Website: <http://www.att.com/contact/>
- Toll-free: 1-800-222-0300
- Mail: AT&T, PO Box 944080, Maitland, FL 32794-4080
- Live, online discussion: Available to AT&T local service customers at: [http://www.usa.att.com/localhelp/chat/chat filter.html](http://www.usa.att.com/localhelp/chat/chat%20filter.html)

Consumers who have contacted the company and are not satisfied with the resolution may contact the KCC's Consumer Protection Office toll free at 1-800-662-0027. In Topeka, the number is 271-3140.

State Consumer Advocates Ask FCC to Ban Misleading Phone Bill Surcharges

On Tuesday, March 30, 2004, the National Association of State Utility Consumer Advocates (NASUCA), which represents 43 state agencies including CURB, filed a petition with the Federal Communications Commission (FCC) seeking a ban of misleading phone bill surcharges. NASUCA's petition includes the following claims:

"In the last few years, wireline and wireless carriers have concocted line item charges, fees, and surcharges, purporting to recover all manner of "regulatory," "administrative," or "government-mandated" costs, but which do nothing more than soak consumers for the carriers' ordinary operating costs ... Though the carriers' monthly line items differ in terms of what they are called and what the carriers claim to recover through the charges, they are alike in many respects. All are misleading; some are downright deceptive."

NASUCA's petition seeks a rule change by the FCC, arguing that these expenses are simply a cost of doing business and should therefore be reflected in the per-minute calling rate or overall monthly fee a company advertises, rather than being tacked on as a fee purportedly beyond the carrier's control.

(See *Misleading Bills* on Page 8)

Misleading Bills *(Continued from Page 7)*

In commenting on this problem, CURB Consumer Counsel David Springe said, "If a company is going to advertise its service as costing \$29 a month, or 10 cents a minute, the service should be provided at the price advertised, not at that price *plus* numerous add-on fees not disclosed to the consumer at the time of the sale."

Springe also notes that consumer advocates are not interested in forcing the companies to improve disclosure about the fees.

"Better descriptions or better labeling won't help," he said, "It is the line items themselves that must be eliminated. Companies can recover these costs in the prices they charge for their services, which would allow consumers to accurately comparison-shop."

Kids Learn From the Energy Hog

A fun way to teach kids about saving energy was introduced to Kansans last week.

The Energy Hog website features interactive computer games that teach kids about saving energy around their homes and schools.

The Energy Hog made his debut in person at the KCC a few weeks ago, and spent some time up at the statehouse in Topeka meeting with kids (see photo) and Governor Sebelius.

To play the games with the Energy Hog, you and your kids can log on to www.energyhog.org.



The Energy Hog and KCC's Jim Ploger with Topeka kids.

Don't forget to visit CURB's new website: <http://curb.kcc.state.ks.us/>

CURBSIDE

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