SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Amendment No. 43 to

SCHEDULE 14D-9

Solicitation/Recommendation Statement Pursuant to
Section 14(d)(4) of the Securities Exchange Act of 1934

KANSAS CITY POWER & LIGHT COMPANY
(Name of Subject Company)

KANSAS CITY POWER & LIGHT COMPANY
(Name of Person Filing Statement)

Common Stock, no par value
(Title of Class of Securities)

485134100
(CUSIP Number of Class of Securities)

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to receive notice and communications on behalf
of the person filing statement)

Copy to:

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This statement amends and supplements the Solicitation/Recommendation Statement on Schedule 14D-9 of Kansas City Power & Light Company, a Missouri corporation ("KCPL"), filed with the Securities and Exchange Commission (the "Commission") on July 9, 1996, as amended, (the "Schedule 14D-9"), with respect to the exchange offer made by Western Resources, Inc., a Kansas corporation ("Western Resources"), to exchange Western Resources common stock, par value $5.00 per share, for all of the outstanding shares of KCPL common stock, no par value ("KCPL Common Stock"), on the terms and conditions set forth in the prospectus of Western Resources dated July 3, 1996 and the related Letter of Transmittal.

Capitalized terms used and not defined herein shall have the meanings assigned to such terms in the Schedule 14D-9.

Item 9. Material to be Filed as Exhibits.

The following Exhibits are filed herewith:

Exhibit 119	Postcard mailed to KCPL shareholders commencing October 7, 1996.
Exhibit 120	Notice of Intervention, Protest and Request For Hearing of the Kansas Corporation Commission, Docket No. EC96-30-000, filed with the Federal Energy Regulatory Commission (FERC) on September 30, 1996.

Exhibit 121 Kansas Corporation Commission Order on Motion to Approve Agreement, Docket No. 193,306-U 96-KG&E-100-RTS and Docket No. 193,307-U 96-WSRE-101-DRS, issued October 1, 1996.

SIGNATURE

After reasonable inquiry and to the best of her knowledge and belief, the undersigned certifies that the information set forth in this Statement is true, complete and correct.

KANSAS CITY POWER & LIGHT COMPANY

By: /s/Jeanie Sell Latz
Jeanie Sell Latz
Senior Vice President-Corporate Services

Dated: October 7, 1996

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Exhibit 119

[Text of postcard mailed to KCPL shareholders commencing October 7, 1996]

[front of postcard]

Q. Do I HAVE TO tender my KCPL shares to Western?

A. NO

We know you have questions.
Please call KCPL Investor Relations for answers:

1-800-245-5275

[back of postcard]

[KCPL logo] Kansas City Power & Light Co.
P.O. Box 418679
Kansas City, MO 64141-9679

Important information about your KCPL shares

Exhibit 120

FILED
OFFICE OF THE SECRETARY
96 SEP 30 PM 2:25
FEDERAL ENERGY
REGULATORY COMMISSION

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

WESTERN RESOURCES, INC.) DOCKET NO. EC96-30-000

NOTICE OF INTERVENTION, PROTEST AND REQUEST FOR HEARING
OF THE
KANSAS CORPORATION COMMISSION

Western Resources, Inc. ("Western") has filed in this docket an Application for Authorization and Approval of Merger under Section 203.

Pursuant to Rules 211, 212 and 214(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. secs. 385.211, 385.212 and 385.214(a)(2), the Kansas Corporation Commission ("KCC") hereby notices its intervention in this proceeding, protests the filing and requests a hearing.

Persons on whom communications concerning this proceeding should be served are:

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I. THE COMMISSION SHOULD DEFER ACTION ON THIS MERGER

A. THE COMMISSION SHOULD NOT TAKE ACTION UNTIL IT HAS ESTABLISHED GENERIC GUIDELINES FOR MERGERS

Many talk of the need to "replace the COMMONWEALTH standards." This description incorrectly assumes there is something there to replace. In fact, the COMMONWEALTH "standards" have become a mere list of the obvious subject areas: competition, coercion, and costs. They offer no guidance. They represent an empty vessel, filled afresh in each case with the idiosyncratic arguments made by the applicants at the time. The imperative now is not to modernize the COMMONWEALTH standards; rather, it is to have some MEANINGFUL standards.

The current spate of merger applications should come as little surprise. Of course, in general there is a need to recognize the strategic nature of competition. Yet more specifically, there is a need to recognize the strategic nature of structural change. The very hallmark of the electric industry restructuring is the change from agency regulation to market discipline of generation decisions. For this change to yield the expected net social benefits it is critical the resultant generation market be sufficiently competitive. It is important to recognize the advantages that merging now might yield in a future marketplace that does not have same type and degree of government oversight as the current marketplace. Put slightly differently, it is important to recognize how merging on the eve of restructuring might affect the ability of restructuring to ultimately reach a sufficiently competitive generation market.

In particular, we believe the Commission needs to provide more methodological guidance in at least the following areas:

a. the definition of relevant geographic markets, including the relationship between transmission pricing and geographic boundaries;

b. the calculation of market shares for a given marketplace;

c. the relation between transmission pricing and the ability to transact in surrounding, or distant markets;

d. the relation between the ability to transact in distant markets and concentration (or market shares) in the instant market;

c. guidelines on determining what level of post-merger concentration requires disapproval;

d. the analysis of entry barriers;

e. the role of the Department of Justice MERGER GUIDELINES; and

f. the effect of mergers on retail competition.

The assessment and applicability of any merger guidelines will depend upon what assumptions it makes concerning the organization of the restructured generation market. For example, whether a specific marketplace utilizes an ISO or not, has access to non-pancaked transmission tariffs will have a bearing on the applicability of certain merger guidelines. This suggests a need for the Commission to indicate how its merger guidelines are conditioned by structural assumptions, and it further suggests the merger guidelines be derived in the most comprehensive policy framework as possible. As the Commission reviews merger guidelines, the Commission should also recognize the complementary need for restructuring guidelines.

If the Commission does set this matter for hearing rather than deferring it, any approval should be conditioned on the outcome of any merger rule issued by the Commission vis-a-vis the pending Notice of Inquiry as well as restructuring related Orders. Any other approach may induce other companies to merger more rapidly than otherwise, to avoid any future Commission requirements. We expect that the Commission, the KCC and all other participants will learn a great deal from the Merger Notice of Inquiry and organizational restructuring processes. The benefit of this knowledge should be applied to this significant market event in Kansas.

B. THE COMMISSION SHOULD NOT TAKE ACTION UNTIL THE STATE COMMISSIONS HAVE ACTED

The Commission should defer any formal hearing, other than discovery procedures, until the State commissions act. This approach avoids the awkward, and potentially paralyzing, situation in which a state commission is simultaneously an advocate at FERC and a judge in the state proceeding. To protect the interest of Kansas consumers, the KCC must play an active role in the Commission's proceeding. That role is anticipated by the Section 203 of the Federal Power Act, which expressly requires merger applicants to serve copies of their application on affected state commissions. Because there are many overlapping or interconnected issues, it is difficult to take positions in the FERC case without prejudging certain issues in the state case. Our proposed procedure also would reduce the risk of inconsistent public interest determinations at the state and federal levels.

As with our suggestion on conditioning the merger on any outcome of the merger NOI and Commission restructuring guidelines (embodied in relevant Orders), this procedure should apply to any proposed merger, not only to that involving Western and Kansas City Power and Light Company ("KCPL").

C. THE COMMISSION SHOULD NOT TAKE ACTION UNTIL THERE IS SHAREHOLDER APPROVAL

1. THE ABSENCE OF SHAREHOLDER AGREEMENT MAKES THE RECORD INSUFFICIENT FOR SERIOUS EVALUATION

In determining whether a merger is consistent with the public interest, the Commission must look at real facts: facts about the costs and cost reductions associated with the combination. The absence of shareholder approval in this case makes all assertions about this merger speculative. Unless management teams from both companies are assessing the savings, distinguishing the feasible from the infeasible, separating actual from aspirational, the analysis is neither complete nor objective. What Mr. Flaherty, and Western, presents is a merger theory, not a merger plan.

In addition to the effect of the merger on overall costs, the Commission also must look at the effect of the merger on ratepayers. These effects remain indeterminate until there is shareholder approval from both companies.

It is no secret that in merger negotiations, the negotiating parties come to an internal understanding as to the level of possible cost reductions, and then proceed to divide those expected benefits up among five categories: shareholders of Company A, shareholders of Company B, ratepayers of Company A, ratepayers of Company B and management of the merged company. The outcome of these negotiations is based in part on the bargaining skills and leverage of each company. Then they present the outcome of these negotiations (which never involve either the ratepayers or the State commissions) to the public as a complete merger plan, the subject of "extensive negotiations," hinting strongly that regulatory alteration would "disrupt the deal."

In the case of a Western-KCPL arrangement, no such negotiations have taken place. The regulators do not have final information on the companies' proposal for dividing up the benefits. Thus the regulators could reach a decision on that division which KCP&L shareholders might well reject. The absence of information on what KCP&L shareholders would accept makes this merger proceeding a theoretical exercise. The public is not served by using scarce regulatory resources this way.

The only possible response to this argument is that the Commission can review a merger without knowing the final arrangement is that the division of merger benefits, and merger risks, among the five categories is irrelevant to the public interest. We do not see how that can be so. The division of benefits has direct relevance to post-merger rates and cost levels.

The same argument applies to the analysis of competition. The potential to use the combined system anticompetitively requires collaboration among the two merging companies. Reduction in competition is a matter not only of structure but of behavior. Without a history of cooperation between the companies in the preparation of this merger, it is easy to underestimate the level of market power which the two companies could exercise on a combined basis.

2. SECTION 203 DOES NOT CONTEMPLATE APPLICATIONS BY ENTITLES OTHER THAN THOSE OWNING THE ASSETS

We also note that the Application requests certain authorizations the Commission is not authorized to grant. According to the Application (at 1-2), Western Resources requests that the Commission, among other things,

> (2) authorize KCPL to dispose of its jurisdictional assets and facilities by means of Western Resources gaining control of KCPL through the exchange of Western Resources' common stock for each share of KCPL common stock...."
>
> Western Resources also requests, to the extent necessary, approval for a change in control over the jurisdictional facilities of Northwest Power Marketing Company. L.L.C. (Northwest Power), KCPL's affiliated power marketer, in the context of the merger. These jurisdictional facilities consist of Northwest Power's rate schedule.

Section 203 does not authorize the Commission to "authorize" the disposition of facilities owned by an entity other than the public utility seeking approval. The language of Section 203 is clear: "No public utility shall ... dispose of the whole of its facilities ... without first having secured an order of the Commission authorizing it do so."

The entity required to "have secured" the order is the public utility which would dispose of its facilities.

We recognize the Commission addressed the issue of unsolicited takeovers in the KCP&L request to acquire KG&E in 1990. KANSAS CITY POWER & LIGHT COMPANY, 53 F.E.R.C. Section 61,097 (1990). But the Commission in that order focused on policy considerations without addressing the literal language of the statute.

We wish to stress, to the point of excess, that the KCC does not intend with this argument to suggest that unsolicited takeovers should receive any different statutory treatment than so-called consensual takeovers. We agree with all the arguments of regulatory neutrality set forth in the Commission's opinion in KCPL. But the Commission can achieve the goal of neutrality while adhering to the words of the statute.

The simple solution is to require that any merger must have shareholder approval. Shareholder approval is common to both a consensual and an unsolicited takeover. In this way the Commission is assured of reviewing a merger to which both parties are committed. It heeds the statutory language and assures a meaningful record.

Just as one company's noncooperation should not prejudice the suitor, it should not prejudice the public. The purpose of Section 203 is to require a full inquiry into the effect of a merger on the public interest. There can be no compromises of that statutory requirement.

II. IF THE COMMISSION DOES NOT DEFER ACTION, A HEARING IS NECESSARY

The Applicants have the burden of showing that the merger is consistent with the public interest. A merger is not consistent with the public interest if it is not an efficient transaction. Western therefore has the burden of proving that the merger transaction is an efficient one. The hearing must cover two major areas: competition and costs.

A. COMPETITION ISSUES

1. THE MARKET POWER ANALYSIS SHOULD CONSIDER THE ABSENCE OF SPECIFIC ARRANGEMENTS NECESSARY TO THE DEVELOPMENT OF A COMPETITIVE REGIONAL GENERATION MARKET

A. THE SIGNIFICANCE OF REGIONAL MARKET STRUCTURES

The Commission has an obligation to develop and implement policies that promote the efficient operation of regional generation markets. Efficient regional generation markets require efficient regional market structures. Only with an efficient regional market structure can the Commission expect the generation of electricity to be performed at minimum cost while maintaining system reliability. And only with an efficient regional market structure can the Commission expect optimal long run generation and transmission decisions, like location of new units and transmission lines and upgrades of existing facilities.

Because it will reduce the number of market participants, namely producers, this merger will affect the regional market. It may also affect the incentives for other utilities in the region to merge - and acting upon those incentives may further reduce the number of producers in the region. The direct and potential indirect reduction in independent producers resulting from this merger will affect the ease with which a competitive regional generation market can develop. Although the question formally before the Commission is whether this merger is "consistent with the public interest," the public interest analysis cannot be isolated from the market in which the merger is occurring. Nor can it be isolated from an analysis of the larger picture, that being the structural development of that market over time. In judging this merger, therefore, the Commission must ask this question: WILL THE PROPOSED MERGER FACILITATE THE OPERATION AND STRUCTURAL DEVELOPMENT OF A REGIONAL GENERATION MARKET THAT ACHIEVES THE ECONOMICALLY EFFICIENT GENERATION?

B. REGIONAL TRANSMISSION PRODUCTS ARE ESSENTIAL TO EFFECTIVE COMPETITION

The Commission should explore whether the merger should be conditioned on the existence of an efficiently priced tariff for the transmission of wholesale power in the region affected by the merger.

The practice of pancaking is inefficient and can be anticompetitive. It is inefficient because a transmission charge exceeding the (marginal) transmission cost can preclude efficient generation dispatch. It can be anticompetitive where the additional toll charge is sufficiently high to cause the wholesale customer to prefer the generation sold by the vertically integrated transmission owner rather than generation sold by a competitor of the transmission owner.

As noted above, the achievement of efficient regional generation markets requires efficient regional market structures. To facilitate the development of such structures, the Commission must move transmission pricing away from the point-to-point, "contract path" practice. The Commission instead must move towards the multiutility, regional network model of transmission pricing necessary to support an efficient regional generation market. A growing number of entities have come to a similar conclusion and are urging similar Commission action.

In response to arguments for regional transmission pricing, some transmission owners seeking merger approval have responded that the issue belongs in some other docket. SEE, E.G., UNION ELECTRIC-CENTRAL ILLINOIS PUBLIC SERVICE COMPANY merger proceeding, Docket No. EC96-7-000 (Applicants' answer to the Missouri Public Service Commission). Somewhat contradictorily, Union Electric and Central Illinois Public Service Company cite the reduction in pancaking as a reason to approve their merger (Transmittal Letter at 18-19):

> The benefit conferred upon other utility systems by granting access to the combined transmission system

> under a single postage stamp rate pursuant to the combination of UE and CIPS goes beyond the benefit these other systems would realize by virtue of separate compliance with the Open Access NOPR by UE and CIPS. This results from the fact that, due to the combination, these other systems will have to pay only one transmission rate in order to utilize both systems.

Western echoes this point. SEE Application at 27-28:

> Western Resources will offer transmission service over the merged system on a single-system, postage stamp rate basis, thereby eliminating the pancaking of rates for transactions which occur between or cross over what are currently Western Resources' and KCPL's individual service areas.

While the Commission continues to defer the question of regional transmission pricing, proposed mergers are rearranging the rational generation market. In an efficient merger market, individual utilities should seek the business combinations most likely to reduce costs - and prices - as required by competition. To be clear, when a merger results in cost reductions that are passed on in the form of equivalent price reductions, then it can be argued the merger itself is required to meet the existing competition. In that situation, merger decisions are fully conditioned by competitive forces. But when competitive forces are nascent or yet to be unleashed, as they currently are at the retail level, then business combinations that either preempt the development of, or reduce, potential competitive discipline must be carefully analyzed. In the absent of already developed full competition, tradeoffs between lower costs and the potential for less market discipline must be weighed. With a regional market flawed by pancaking, a flaw still tolerated by this Commission, it is difficult to know whether the business combinations which are alleged to reduce costs for the companies being combined are necessarily consistent with reduced costs for the region as a whole. With multiple, simultaneous mergers proposed in the region, the need to correct this flaw is becoming urgent.

The problem of pancaking is not ameliorated by assertions of comparability. It may well be that the transmission owner's use of its transmission system is subject to the same rules as the use by others. CF. DUQUESNE POWER & LIGHT, 71 F.E.R.C. para. 61,155 (1995) ("the PJM Companies do not rely on a single system rate when providing transmission service to one another and, therefore, are not required to offer a single system rate to third-party transmission customers"). The comparability of the treatment does not ensure the efficiency of the transactions. The comparability also disregards the significant fact of vertical integration. If, because of pancaking, both the transmission owner and its wholesale customers find the use of transmission too costly, they will use transmission service less. They will turn to local generation, owned by one of the very vertically integrated utilities whose transmission pricing practices have contributed to the pancaking problem. The Commission's goal of efficient, competitive generation markets, a goal we share, would go unfulfilled.

We do not want to create obstacles to efficient mergers. Nor do we want mergers that create obstacles to efficient competition. There cannot be efficient mergers if there are obstacles to the development of efficient regional market structures. A transmission policy which tolerates "point-to-point," "contract path" thinking rather than a regional network approach is such an obstacle. It is an obstacle which this Commission has the power and the obligation to address in this case.

C. THE COMMISSION SHOULD TAKE INTO ACCOUNT MOKAN'S APPARENT INTENT NOT TO FILE A SINGLE JOINT RATE AS REQUIRED BY ORDER NO. 888

Both Western and KCP&L are members of MOKAN. It is our understanding that he MOKAN utilities do not consider themselves obligated to create a single, non-pancaked regional tariff by December 31, 1996. Western Resources and KCP&L together have a large enough presence in MOKAN to obtain substantial agreement on a single tariff. However, neither has made efforts in this direction and, in fact appear to cooperating in the position that the MOKAN members are not obligated to file a single joint tariff.

Consistent with our views on regional transmission pricing generally, we are asking the Commission not to treat this merger as consistent with the public interest until both utilities indicate their intention to work to have filed a joint, non-pancaked tariff at FERC; alternatively, the Commission can remove this ambiguity by stating directly (and redundantly) what it stated in Order No. 888: MOKAN has to file a single, joint, non-pancaked tariff.

D. RELATED MATTERS

There is much discussion in the industry today about new types of regional market mechanisms. The Commission has raised such issues in its docket concerning alternative power pooling methods. In addition, its new transmission rule discusses the concept of the independent-system operator.

Regulatory actions which encourage efficient regional market mechanisms can reduce the potential for market power arising from a merger. While the preceding subsection has emphasized methods of regional transmission pricing, we do not mean to preclude exploration of additional regulatory actions which can encourage efficient regional markets. The Commissions analysis of this merger, and of methods of mitigating any market power, therefore should explore whether actions in addition to appropriate transmission pricing are necessary to ensure that the proposed merger makes the regional market more efficient.

2. THE COMMISSION MUST INVESTIGATE THE MERGED COMPANY'S ABILITY TO MAKE STRATEGIC USE OF TRANSMISSION CONSTRAINTS

Mr. Jackson asserts that there are no actions Western Resources could take, either individually or in concert with other joint owners of these transmission facilities, to limit the transmission capacity of these facilities. He states that "[t]he capacity and the power flows on these facilities are based on the laws of physics. However, unscheduled loop and parallel path flows may limit the available capacity of these facilities from time to time." Jackson Testimony at 6.

The Commission has rejected the view that transmission constraints can never be the result of transmission owner actions. In its hearing order on the NSP-WEPCO merger, 74 FERC Section 61,069 (1996), the Commission stated its concern about how transmission constraints may affect the analysis of market power even with nondiscriminatory open access transmission tariffs in place:

> We are concerned about how transmission constraints affect the bounds of the relevant markets within which a wholesale seller's market power will be analyzed. We also are concerned about the possibility that the combination of such transmission constraints and strategically located generation facilities owned by the wholesale seller may result in market power in more localized markets.

The Applicants assert that Dr. Spann's market analysis took considered constraints. It is not clear, however, what level of trading he assumed: the level of trading in the pancaked STATUS QUO, or the level of trading which would exist if present pancaking were eliminated and replaced with an economically efficient, single regional tariff. Elimination of intraregional pancaking likely would induce more trading, and possibly more constraints.

3. THE MARKET POWER REVIEW SHOULD CONSIDER A VARIETY OF TRANSMISSION PRICING SCENARIOS

Western promises to file a joint transmission tariff for service over the combined company, but has not done so. It argues that because its filing will satisfy Order No. 888, the Commission can consider and approve this merger, conditioned on the future filing of that tariff. The Commission should decline this invitation, for two reasons.

First, the notion that any market power problems caused by the merger are automatically erased by compliance with a standard transmission filing is not correct. Market power is unique to each merger. The Commission has taken a "once size fits all" approach to transmission access in order to eliminate undue discrimination on an expedited basis. Moreover, it is true that the Commission began a practice of requiring each merger to have a transmission tariff and of not always looking under the market power hood once the tariff was provided. But more recently, the Commission correctly has recognized that transmission tariffs alone do not eliminate market power. There may be issues of constraints, either natural or management-made, requiring case-by-case scrutiny. Therefore it is not obvious that any pro forma tariff would eliminate consequences unique to this merger. The premise of Western's procedural proposal -- approve the merger now subject to later approval of transmission tariffs -- is inconsistent with this reasoning.

The analysis also assumes use of the Commission's pro forma tariffs under Order No. 888. That approach to transmission is unlikely to be permanent. The Commission is examining alternatives like capacity reservation tariffs. The applicant therefore should perform a market power analysis under a variety of assumptions about transmission pricing. This type of analysis will give the Commission more guidance as to what conditions to impose.

Second, Western previously has filed deficient transmission tariffs that disregarded explicit Commission requirements, leading to unnecessary refilings and waste of regulatory resources, including the limited resources of the KCC. The Commission should provide an inducement to discourage such errors this time. The best inducement is not to consider this proposed merger until a proposed tariff consistent with Order No. 888 has been provided.

4. THE COMMISSION MUST LOOK CLOSELY AT WESTERN'S DEFINITIONS OF THE GEOGRAPHIC AND PRODUCT MARKETS

A. PRODUCT MARKET

Dr. Spann says that the relevant product market is "wholesale power." Spann at p. 12 1.12. He present market share data for both "total generating capacity" and "uncommitted generating capacity."

Given the variety of power supply products which are important to competitors, this approach is very imprecise. The Department of Justice MERGER GUIDELINES, Section 1.11, define a relevant product market as THE MOST NARROW set of products which, if controlled by a single seller, the seller could profitably impose a significant, nontransitory price increase above the levels that would prevail under competition. "Wholesale power" is not a narrow category. There are many narrower subcategories, such as nonfirm energy, short-term capacity, and emergency energy.

B. GEOGRAPHIC MARKET

Dr. Spann says that the relevant geographic market is "the SPP plus utilities not in the SPP that are directly interconnected with one or both of the merging companies." Spann at p. 12 1.17-18. He describes this as "the area where the merging companies are sellers of power and/or where competitors of the merging companies are located." ID. at p. 12 1.21-p. 13 1.1. SPP does not have a single transmission rate. (In fact Western, in 2 years of SPP discussions, has taken no action to increase the possibility of a single transmission rate.) Transactions with SPP members who are not directly interconnected would require the payment of pancaked transmission charges. This result favors generation owned by those controlling transmission and generation, such as the merging companies.

Separately, Dr. Spann defines the geographic markets using what he described as the Commission's "Tier 1" analysis. This approach disregards important determinants of geographic markets like patterns of generating costs, and opportunity costs for power sales. More specifically,

With respect to opportunity cost, a seller with capacity or energy which Dr. Spann assumes would be sold into the market which he is analyzing might find it more profitable to sell that capacity or energy elsewhere, into markets with higher avoided costs. If the seller did make the sale into these other markets, the capacity or energy which Dr. Spann counted in the market under analysis would not be available.

5. THE COMMISSION SHOULD UPDATE ITS MARKET POWER ANALYSIS IN OTHER WAYS

A. THE COMMISSION SHOULD REVIEW ALL MARKETS AFFECTED BY THE MERGER

Order No. 888 requires transmission owners to offer various transmission-related services on an unbundled basis to wholesale customers. This requirement, even when accompanied by a proper review of market power in the generation market, does not by itself prevent the accumulation of market power in the various unbundled markets. For each of these other markets, a separate review of market power, including concentration and entry barriers, should be required. At least the following markets should be evaluated:

1. Existing Generation
2. New Generation
3. Ancillary Services Related to Generation
4. Transmission
5. Ancillary Services Related to Transmission
6. Retail Aggregation and Sales
7. Physical Distribution
8. Ancillary Services Related to Retail Service

B. THE COMMISSION SHOULD REVIEW ENTRY BARRIERS

In past mergers, the Commission's market structure analysis has focused primarily on generation market shares. The Commission has not investigated entry barriers because it has assumed there are no entry barriers to new generation. The Commission should question that assumption before applying it to this case. In particular, the Commission must take care not to make judgments on the basis of "pre-merger entry conditions when mergers alter those conditions." J. W. Wilson, "Merger Policy Guidelines For The Electric Power Industry." THE ELECTRIC JOURNAL 2021 (January/February 1996).

Many features of the regulatory landscape were erected to establish a particular industry structure: vertically integrated utilities with exclusive territories and exclusive dispatch control within those territories. The efficiency of that structure is being questioned by all regulators. It is possible that features of regulation can act as entry barriers to competitors who are not vertically integrated or who lack exclusive territories.

The Commission should not assume that such barriers do not exist. At hearing the Applicants should have an opportunity to show that there are no entry barriers in any of the markets affected by the merger.

C. THE ANALYSIS OF THE PROPOSED MERGER SHOULD TAKE INTO ACCOUNT OTHER MERGERS IN THE REGION

There are pending mergers involving Northern States Power and Wisconsin Electric Power, Wisconsin Power & Light and several Iowa utilities, and Union Electric and Central Illinois Public Service Company. These mergers affect relations within MAIN and MAPP; the first one involves both MAIN and MAPP. The product of a Western-KCP&L merger certainly would be an important player within both MAIN and MAPP, selling into and buying from entities within those areas. More mergers in the region may be proposed before the instant merger is fully processed.

Each of these mergers affects conditions under which another merger might occur. Merger A-B may alter the boundaries of the market in which merger C-D is taking place. The HHI index for a market in which merger C-D occurs may be different depending on whether merger A-B occurs. The transmission constraints in the market in which merger C-D occurs may be different if the new economy transactions associated with merger A-B occur. The effect of mergers in or near the same relevant market therefore must be evaluated simultaneously. SEE A. Kahn, THE ECONOMICS OF REGULATION Vol. II at 88 (1988 ed.) (quoting criticisms of Interstate Commerce Commission for its case-by-case approach to railroad mergers in the 1960's; "where several mergers are pending in one area, the cases inexorably shade into each other requiring a rearrangement of competition on a regional basis").

Consistent with the Commission's recognition that generic approaches are necessary, the Commission should require specific evidence from the Applicant on how its merger would interact with these other events.

B. COST ISSUES

1. MR. FLAHERTY'S ASSERTIONS ARE TOO GENERAL TO BE ACCEPTED AT FACE VALUE

Mr. Flaherty's assertions of cost reductions are not the product of an internal corporate plan for, as Mr. Norman has stated (at 13), no such plan exists. The numbers on savings appear to be based on Mr. Flaherty's standard model. Whether the results of that model can be implemented in practice is unknown, as he offers no evidence from other companies who have relied on, and then tried to achieve, those numbers. He has not discussed their achievabiilty with anyone from KCP&L, whose cooperation will be essential.

In fact, Mr. Flaherty acknowledges (at 12) that whether the asserted cost savings will be permanent depends on "how management ultimately operates the combined entity." The Commission cannot be indifferent to the cost-benefit analysis, just because the particular corporate strategy chosen by the Applicant precludes them from offering any proof. One does not count on the savings obtained from walking on the moon until one has designed a vehicle for getting there.

2. MR. GRENNAK'S ASSERTIONS OF THE BENEFITS OF JOINT DISPATCH SHOULD NOT BE ACCEPTED ABSENT A SHOWING THAT THEY ARE UNACHIEVABLE ABSENT A MERGER

Mr. Grennak (at 15-16) describes the benefits of joint dispatch which would be produced by the merger. Joint dispatch can be accomplished without a merger. The dozens of unaffiliated utilities in the New England Power Pool do so. The three major utilities in California, upon formation of the proposed Power Exchange, will achieve many of the benefits of joint dispatch without a merger. If there are savings available from joint dispatch, Had KCP&L and Western as a member of prudent utility practice should be achieving them without a merger. If they had, these asserted savings could not be attributed to the merger.

Nothing about the joint dispatch described in Mr. Grennak's testimony suggests that it can be achieved only through merger. In fact, as Mr. Grennak points out the two companies do a great deal of joint operation and planning through their joint ownership of major power plants and participation in MOKAN and SPP.

These asserted savings should not be accepted absent a showing that they are unachievable without a merger.

3. MR. GRENNAK'S ASSERTIONS OF THE BENEFITS FROM LOAD DIVERSITY SHOULD NOT BE ACCEPTED ABSENT A SHOWING THAT THEY ARE UNACHIEVABLE ABSENT A MERGER.

Mr. Grennak (at 17-18) describes the diversity of load between the two companies, and argues that these benefits can be realized by the merger.

Load diversity, as the name implies, arises from the characteristics of the load, not the skills of the company. Economies from load diversity are exploited when those who serve the load create an institution to exploit them. A merger is only one example. A competitive market is another. In a fully competitive market, one with non-pancaked transmission pricing and low entry barriers to new generation, the benefits of diversity are available without a merger.

A Poolco-type arrangement or a Power Exchange also could realize all the potential gains from diversity without eliminating a competitor from the market.

In short, the benefits of load diversity can be achieved in a variety of ways, depending on the decisions of those who control the load. Mr. Grennak describes only that method which is consistent with his company's strategic objective: merging with KCP&L. More objective testimony would have described all the methods and evaluated their advantages and disadvantages.

More fundamentally, Western has declined to pursue the other means. Its failure to pursue diversity efficiencies for its ratepayers, except through the merger strategy designed to achieve Mr. Hayes' objective of being one of the 15 largest utilities, implies that Mr. Hayes places that strategic objective ahead of the ratepayer objective of maximizing diversity gains.

Mr. Grennak identifies a magnitude of diversity which, if realized can reduce peak by 1%. A merger is not necessary to obtain a 1% decrease in peak. If there is economic justification for this merger, it should come from some other source.

For all these reasons, the Commission should not automatically attribute diversity gains to the merger.

4. MR. GREENAK'S ASSERTIONS OF THE BENEFITS FROM FUELS PROCUREMENT SHOULD NOT BE ACCEPTED ABSENT A SHOWING THAT THEY ARE UNACHIEVABLE ABSENT A MERGER

Mr. Grennak argues (at 16-17) that Western could reduce its coal costs by utilizing some of KCP&L's "capabilities in fuel procurement." The implication is that Western's performance in this area is not optimal. This is news to the KCC, and not entirely consistent with Mr. Hayes' praise for his own management. If there is subpar performance at Western in any area, it should be improved as a consequence of the company's public service obligation. The improvement should not be attributed to the merger if it is a matter of management improvement.

Alternatively, Western could replace those managers responsible for achieving below KCP&L's standards and contract with KCP&L to manage fuel purchases. These benefits are not dependent on a merger which eliminates competitors from the market. If Western has tried and met resistance, it should inform the KCC so that it can use its statutory authority to ensure that all public utilities in Kansas are operating efficiently for the benefit of Kansas ratepayers. If no response is forthcoming we will assume Western has made no attempt. Whether Western's failure to make such an attempt is consistent with the public interest which Western argues will be advanced by the merger will have to be addressed by both jurisdictions.

5. THE COMMISSION SHOULD NOT CREDIT BENEFITS ATTRIBUTED TO THE ELIMINATION OF PANCAKING

Western asserts there will be cost reductions in the region arising from its filing of a single tariff, replacing the present pancaking between KCP&L and Western.

The Commission should not credit these savings because elimination of pancaking should be occurring without the merger, as a matter of prudent utility practice. Moreover, Western has not been an advocate of eliminating pancaking. It is not consistent with effective competition, logic or good faith to advocate elimination of pancaking with respect to merger targets, but to oppose or be indifferent to elimination of pancaking with respect to competitors.

By failing to act to eliminate pancaking elsewhere in the region (including taking no action on the Western-KCP&L pancaking until this merger application), Western Resources is denying its targeted stakeholders -- customers of Western, customers of KCP&L, and shareholders of KCP&L -- of the benefits of the elimination of pancaking unless KCP&L agree to merger and the regulators approve the merger. Coercion would be a strong term to describe this discriminatory behavior, but it is not behavior consistent with the public interest, and certainly the claimed benefits should not be counted.

6. SUMMARY

In the area of merger savings, the Commission has invited and tolerated "generalizations" rather than hard facts. SEE PACIFICORP-UTAH POWER & LIGHT MERGER, 45 F.E.R.C. para. 61,095 at p. 61,298 (1988) (requiring only "A MORE GENERALIZED INQUIRY and cross examination regarding the TYPES OF SAVINGS AND EFFICIENCIES that MIGHT BE ACHIEVED through merger") (emphasis added).

The Commission should develop objective, empirical tests for the major categories of savings, and their magnitude, which can legitimately be attributable to mergers. Conversely, the Commission should determine what types savings, such as from coordination, should be achievable in wholesale markets without merging. This set of findings should be based on close review of mergers which already have taken place. These tests should apply to all mergers.

The analysis should cover all costs, not just wholesale costs. Section 203 requires a finding that the merger is "consistent with the public interest." The public interest includes the interest of all customers, not only wholesale customers. The wholesale-retail distinction made by Congress in Section 205 was not made in Section 203.

CONCLUSION

WHEREFORE, for the foregoing reasons, the KCC respectfully requests the Commission to defer action on this Application; or, in the alternative, set this matter for hearing.

Respectfully submitted,

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September 27, 1996

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 1996, I served the foregoing document on the parties listed on the official service list in this proceeding, by first class mail or equivalent method of service.

/s/John McNish
John McNish

Exhibit 121

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Timothy E. McKee, Chair
Susan M. Seltsam
John Wine

In the matter of the Application of Kansas Gas & Electric Company for Approval to Accelerate the Depreciation of the Wolf Creek Generating Station, Extend the Depreciation Lives of Its Non-Nuclear Generation, Transmission and Distribution Assets, and Make Certain Reductions in Its Charges for Electric Service.	Docket No. 193,306-U 96-KG&E-100-RTS
In the Matter of the Application of Western Resources, Inc. to Make Changes in the Depreciable Lives of its Electric Generation, Transmission and Distribution Assets and its Computer Related Equipment.	Docket No. 193,307-7 96-WSRE-101-DRS

ORDER ON MOTION TO APPROVE AGREEMENT

Now the above-captioned matters come on before the State Corporation Commission of the State of Kansas ("Commission") upon a Motion to Approve Agreement. This Motion to Approve Agreement was filed by Western Resources, Inc. ("Western"), Staff of the State Corporation Commission ("Staff"), the Citizens' Utility Ratepayer Board ("CURB"), and the City of Wichita, Kansas, (collectively referred to herein as "Joint Movants"). On August 27, 1996, and September 4-5, 1996, the Commission conducted an evidentiary hearing upon the subject motion. After hearing the evidence presented, and being otherwise fully advised in the premises, the Commission finds and concludes:

I. PROCEDURAL BACKGROUND

1. On August 17, 1995, Western, on behalf of its KPL Electric Division ("KPL") and Kansas Gas and Electric Company ("KGE") (collectively referred to as "Applicants"), filed Applications, which were docketed as the above-captioned cases, seeking certain depreciation changes and authority to implement an annual $8.7 million rate decrease for KGE electric customers for a period of seven (7) years.

2. On December 19, 1995, the Commission entered an Order Setting Hearing and Procedural Schedule, ordering that public hearings for the purpose of receiving public comments from the Applicants' customers with regard to the proposed rate changes be

scheduled for January 24, 1996 in Topeka, Kansas; January 25, 1996 in Salina, Kansas; January 31, 1996 in Independence, Kansas; and January 31, 1996 in Wichita, Kansas. In that Order, the Commission directed the Applicants to provide notice of the Applications and hearings by first class mailing to all of their customers by mailing notice which was attached to the Order. The notice provided an explanation of the proposed rate changes contemplated by the Applications then pending before the Commission. The position taken by Staff at the public hearings was that Applicants' electric operations were over-earning and may recommend reductions for KPL and KGE customers. (Cowger, Tr. 27).

3. On April 5, 1996, Western filed a Motion to Amend, Motion to Consolidate and Motion for Interim Relief, seeking to amend its rate plan by including the Regulatory Plan as set forth in Western's Merger Docket and to consolidate the pending Applications with its Merger Docket. On April 19, 1996 the Commission allowed the amendment and consolidation. The Commission also implemented an interim rate decrease of $8.7 million.

4. On May 22, 1996, Staff and CURB filed testimony pursuant to the December 19, 1995 procedural order. Staff recommended to the Commission that Applicants' rates be reduced to yield annual revenue reductions for KPL and KGE in the amount of $46,548,371 and $58,499,615, respectively, based on a cost of service analysis for the test year ending January 31, 1995. (Direct Prefiled Testimony of Ann Diggs, pp.5-6.)

5. On May 22, 1996, Applicants filed a Motion to Amend their Applications seeking permission to sever the depreciation issues and to file cost of service studies. Western did not originally contemplate filing cost of service testimony but was made aware that Staff and at least some Intervenors would file cost of service testimony. Western believed that under such circumstances, it would be best to file its cost of service studies in order to proceed in an orderly and conventional fashion.

6. On June 14, 1996, the Commission grated Applicants' Motion to Amend their Applications as requested, changing the case into a more traditional cost of service rate case. The Commission recognized that the Amended Applications constituted a

substantial alteration of the facts used as the basis for the requested relief and thereby restarted the 240-day time period mandated by K.S.A. 1995 Supp. 66-117(b).

7. On August 9, 1996, Joint Movants filed their Motion to Approve Agreement and requested that the matter be set for hearing.

8. On August 15, 1996, the Commission issued a procedural order setting the Motion to Approve Agreement for hearing on August 27, 1996, at 9:30 a.m. On August 27, 1996, the Commission commenced the hearing on the Motion to approve Agreement which was continued to September 4 and 5, 1996. The Commission allowed the parties to submit written briefs either opposing or supporting the agreement.

II. PROPOSED SETTLEMENT

A. TERMS OF THE AGREEMENT

9. Under the proposed settlement, Western agreed to decrease KGE and KPL electric rates by a total of $64.7 million. The rate reduction would be implemented on a staggered basis beginning with a $37.3 million annual rate reduction for KGE customers and a $8.7 million rate reduction for KPL customers upon final order of these docketed cases. The current $8.7 million rate reduction would be included in the total rate reduction and would become final. On January 1, 1998, a $10 million rate reduction would be implemented for KGE customers. This $10 million rate reduction would be removed from Western's Regulatory Plan proposed in the Merger Docket(1).

10. Also, under the proposed settlement, the depreciation proposals including the accelerated depreciation plan contained in the original Applications may be submitted by any Movant to the Commission for consideration and decision, recognizing that the depreciation proposals may be subject to additional findings of the Commission in the Restructuring Docket(2) and subsequent legislative action. The Joint Movants retained the right to establish their respective positions on the depreciation proposals. Further, the agreed rate reductions, as described above, are not affected by any depreciation proposals approved or modified by the Commission.

11. The proposed settlement established a five-year incentive mechanism such that all annual regulated earnings in excess of 12.00% regulatory return on equity ("ROE") will be returned in the following year as an annual rebate to KGE customers. The

computation of the actual ROE will incorporate post-1970 investment tax credits ("ITC") and KPL/KGE merger savings, as defined by the settlement agreement. The actual ROE will be calculated by combining KPL electric and KGE electric operations. The Joint Movants reserved the issues of whether the accelerated depreciation and the depreciation reduction of transmission and distribution ("T & D") facilities and non-nuclear generating plants will be incorporated into the rebate computation and whether Western's gas operations should be included in the rebate computation for the Commission to consider and determine. The Joint Movants acknowledge that the incentive mechanism and associated reporting requirements must be further defined before implementation.

12. Under the settlement proposals, the KPL/KGE annual merger savings will be fixed at $40 million. This amount will be allocated among the jurisdictions according to the testimony of Western's witness Kelly Harrison in these docketed cases. The Joint Movants acknowledge that in the event generation is spun off pursuant to any restructuring order or legislative initiative, the allocation to generation is reserved for Commission consideration and determination.

13. The regulated earnings under the proposed settlement will be adjusted to reflect the amortization of the Acquisition Premium ("AP"), authorized by the Commission in the KGE/KPL merger, based on the agreed level of merger savings, as described above. The shareholder allocable share of merger savings in excess of the Commission authorized AP amortization ($12,951,970) shall be imputed as an operating expense in calculating Western's regulated earnings. Absent the generation restructuring referenced above, the level of imputed expense would be $13,524,015 ($40,000,000 minus $12,951,970 divided by 2).

14. Under the settlement agreement, the incentive plan and electric rates will remain in place for five (5) years subject to changes necessary to reflect the effect of laws and/or edicts, or other material changes in circumstances which have a substantial net impact upon Western's utility operations or revenues. Western will file cost of service for electric operations at the end of the five year period.

15. Finally, all issues not resolved by the settlement agreement would be subject to resolution through further

negotiations or hearing. The Joint Movants agree that if the Commission approves the proposed agreement, in part or with additional conditions, the Joint Movants shall have the opportunity to accept the partial approval of the conditions or reject them and proceed with hearing on all issues.

B. STANDARD OF REVIEW OF SETTLEMENT AGREEMENTS

16. The acceptance by the Commission of a settlement offer must constitute a reasoned decision supported by substantial competent evidence which is also subject to the requirements of KAPA that agency actions not be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Southwest Kan. Royalty Owners Ass'n. v. Kansas Corporation Comm'n, 244 Kan. 157, 165, 769 P.2d 1 (1989). See also, K.S.A. 77-621(c) (1989).

17. The Commission retains the responsibility of making independent judgment as to whether the settlement agreement constitutes a reasonable remedy or resolution of the issues. With respect to trial courts, the Kansas Supreme Court has stated:

> ". . . parties may not by stipulation invest a court with jurisdiction over the subject matter of a cause which it would not otherwise have had. And clearly, the parties to an action may not stipulate for the determination thereof by the trial court in a manner contrary to the statutes and rules of a court. It is also established that matters affecting public interest cannot be made the subject of stipulation so as to control the court's action in respect to such matters." In re: Petition of City of Shawnee for Annexation of Land, 236 Kan. 1, 16-17, 687 P.2d 603 (1984), citing 73 Am. Jur. 2d Stipulations, sec. 1, 4 and 5.

Like a trial court dealing with matters affecting public interest, the Commission is not controlled by stipulations, settlement offers or other agreements because the question of whether utility rates are reasonable is a question of law.

18. The disposition of any proceeding before the Commission vis-a-vis through settlement negotiations or the hearing process must be reasonable and not so wide of the mark as to be outside the realm of fair debate. Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n, 242 Kan. 470, 474, 749 P.2d 21 (1989). In determining the reasonableness of a proceeding's disposition authorized by the Commission, the Kansas Supreme Court has stated:

> [T]he KCC is not bound to use any particular formula, or combination of formulae, in valuing a public utility's property for rate making purposes. Any evidence having a bearing or combination of formulae that it may believe necessary for arriving at a reasonable basis for rate-making purposes. Kansas Gas & Electric v. State Corporation Commission, 239 Kan. 483, 501-02 720 P.2d 1063 (1986) citing Southwestern Bell Tel. Co. v. State

Corporation Commission, 192 Kan. 39, 385 P.2d 515 (1963).

Further, in Southwestern Bell Tel. Co. v. State Corporation Commission, 192 Kan. 39, 385 P.2d 515 (1963), the Kansas Supreme Court recognized that there was an "elusive range of reasonableness," for any Commission determination and remarked that:

> It cannot be assumed that the Commission in establishing a rate has fixed it to the exact degree of definiteness. At some point a rate of return becomes so low as to be unreasonable to the Company as a matter of law. At some point a rate of return becomes so high as to be unreasonable to the consumers as a matter of law. It is only at the high and low point that a court can interfere. It is the responsibility of the Commission to fix the rate somewhere between the high and low point which it believes, under all circumstances, to be fair to both the Company and consumer. Southwestern Bell, at 85.

C. COMMISSION FAVORS SETTLEMENT

19. The Commission looks with favor on settlement agreements made in compromise of controversies, entered into intelligently and in good faith, particularly when the controversy involves complex litigation requiring extensive time and expense to litigate. A settlement of issues, all of part, with or without unanimous agreement, will be entertained and considered by this Commission. In the context of a regulatory proceeding, there is no requirement that there be unanimous support, or some specific level of support, of participating parties before a contested settlement may be approved. See, for example, City of Somerville v. Public Utility Commission, 865 S.W. 557, 560 (Tex. Ct. App. 1993). There is no point in resolving controversies over the exact number of supporters and nonsupporters of the settlement agreement, or the percentage of refunds/rate reductions each group represents. When the Commission approves a contested settlement, it is effectively adopting that settlement as its own independent resolution of the matter at issue. Mobil Oil Corp. v. FPC, 417, U.S. 283, 94 S.Ct. 2328, 41 L.Ed 2d 72 (1974).

III. COMMENTS

A. COMMENTS SUPPORTING THE SETTLEMENT

20. Staff supported settlement submitting that the rate decrease allowed for a dramatic reduction in the electric rate disparity between KGE and KPL service territories. In support of the settlement agreement, Staff presented the testimony of James Proctor. Mr. Proctor sponsored Staff's Exhibit 1, a copy of the settlement agreement, which incorporated by reference the prefiled testimony of Kelly Harrison for purposes of determining allocation of the merger savings among jurisdictions. Mr.

Proctor also sponsored Staff's Exhibit 2, a schedule reconciling the revenue requirement reflected in Staff's prefiled testimony with Staff's settlement position. Mr. Proctor also sponsored Staff's Amended Exhibit 2, a revised schedule reconciling the revenue requirement reflected in Staff's prefiled testimony with Staff's settlement position after discovery of a $32.2 million tax error. Both Staff's Exhibit 2 and Staff's Amended Exhibit 2 incorporated by reference the prefiled testimony of Staff which addressed all rate-making issues subject to these proceedings. Staff's revised cost of service calculations show Western's revenue excess, based upon the sum of KGE and KPL individual revenue excesses of $74 million and $39 million, respectively, to equal approximately $113 million with a corresponding 10.5% return on equity. Staff also submitted that the incentive mechanism proposed in the settlement agreement provided a means of ensuring stable or declining rates (should Western earn in excess of the 12% rate of return on equity) for a period of five (5) years and afforded further opportunity to reduce the rate disparity between the KGE and KPL service territories. Staff recognized that all terms of the incentive mechanism had not been fully defined but that such issues were reserved for the Commission to determine at a later proceeding.

21. Western supported the settlement agreement submitting that the record, taken as a whole, is sufficient upon which to base a finding that the settlement agreement among Joint Movants is just and reasonable. In support of the settlement, Western offered the testimony of James Martin. Mr. Martin provided Western's analysis in reaching a settlement agreement with the other Joint Movants. Mr. Martin testified that a return on equity in the range of 11.33% to 11.45% or somewhere in that range would be reasonable given the incentive mechanism to share earnings in excess of 12%. (Martin, Tr. 146). Mr. Martin maintained this position after the discovery that Staff did not fully recognize the effects of an increased tax deferral in their prefiled testimony. In recognition of the omission and in response to Staff's Amended Exhibit 2, Mr. Martin sponsored Western's Exhibit 1 to show that the settlement agreement fell within his stated range of reasonable return on equity. Western entered into the settlement agreement assuming Staff would not likely win 100% of its proposed adjustments and assuming the Commission would not

likely accept a return on equity of 10.5%, as recommended by Staff. (Martin, Tr. 146, 211-212). In essence, Western reasoned that a higher return on equity in the range of Western's recommended return on equity and the elimination of one or more of Staff's pro forma adjustments would lead to a revenue requirement in the range proposed by the settlement. (Martin, Tr. 213). And finally, in its Brief in Support of Settlement, Western stated that "the issue regarding accelerated depreciation is left for further settlement or hearing," but that resolution of the issue was not ripe, at this time, for a Commission decision. (Brief of Western Resources, Inc. and Kansas Gas and Electric Company in Support of Settlement, at 18).

22. The City of Wichita joined in the support of the settlement agreement submitting that the level and allocation of the rate reductions take significant steps toward eliminating the rate disparity that currently exists between the KPL and KGE service territories. The City of Wichita noted that none of the parties opposing the settlement agreement had undertaken any independent cost of service analysis in their prefiled testimony. The City of Wichita believed that the settlement agreement represented a fair compromise given the compounding and time value of achieving rate reductions sooner than the originally filed plan. The City of Wichita also submitted that it intends to work with Western on the pending proposal to accelerate depreciation of the Wolf Creek nuclear facilities which will lower the company's rate base in plant helping it become a more competitive resource for the benefit of both consumers and Western.

23. CURB also joined in support of the settlement agreement with the understanding that the accelerated depreciation issues associated with the Wolf Creek nuclear facilities would be submitted to the Commission for consideration. CURB believed that the return on equity contained in the settlement agreement may be higher than they thought appropriate in absence of the accelerated depreciation proposal. CURB submitted that Western's proposed accelerated depreciation would offset such a return. Clearly, CURB was aware that the Commission may approve, reject or modify the accelerated depreciation proposal and was equally aware that the Commission is setting rates notwithstanding the accelerated depreciation proposal. CURB further submitted that additional write down of Wolf Creek nuclear facilities would

mitigate against potentially stranded investment associated with the facility in the advent of a deregulated generation market.

B. COMMENTS IN OPPOSITION OF SETTLEMENT

24. Farmland Industries, Inc. ("Farmland") opposed the settlement agreement contending INTER ALIA that the settlement agreement discriminates against classes of customers within the KGE system as well as within the KPL system. Farmland is both a KPL and KGE customer. With respect to the KGE system, Western provides service to Farmland under special contract not pursuant to their published general tariffs and schedules. With respect to the KPL system, Farmland submitted that KPL customers are being forced to bear the burden of KGE costs. The Commission recognizes that special contracts were negotiated by large users of electricity to fall outside the scope of the general tariff and schedules existing for the KGE system. Special contracts were allowed, in part, to avoid substantial load loss on the KGE system due to the construction and operation of privately owned electric cogeneration and thus lawful under applicable Kansas law. K.S.A. 1995 Supp. 66-117. However, the literal language of the statute places special contracts in a different category from the general tariff and schedules published by a utility company. The Commission will not re-write the special contract between Farmland and KGE. Farmland cannot complain that the published tariffs and schedules were modified. Farmland should have anticipated for such changes and included a contingency clause tying their special contract to the published tariffs and schedules. These are the risks assumed by Farmland and other similarly situated businesses when entering into special contracts. With respect to the KPL system, KPL customers are not burdened by the costs created by KGE customers. At the hearing, Staff witness James Proctor testified concerning the revised schedules contained in Staff's Amended Exhibit 2. The revised schedule shows that the company is over-earning in excess of $73 million. However, the allocated rate reduction proposed by the settlement to KGE customers is $56 million. Factually, it is an inaccurate statement to suggest that the KPL customers are burdened by the KGE customers under the proposed settlement. Furthermore, the Commission agrees with Western and Staff in that the rate disparity between KGE customers and KPL customers should be reduced or eliminated. KGE rates are substantially higher

than those of KPL and lie well above regional average. (Martin, Tr. 147; Proctor, Tr. 101).

25. The Kansas Industrial Consumers ("KIC") opposed the settlement arguing INTER ALIA that the settlement should be rejected because it lacked specificity. On behalf of KIC, Nicholas Phillips testified that the rate base, return on equity and operating expenses were not identified. However, Staff witness James Proctor characterized the settlement as a "black box settlement." (Proctor, Tr. 197). There was not a specific determination by the Joint Movants of the items which comprised the revenue requirement such as rate base, operating income and rate of return. (Proctor, Tr. 197). In SERIOUSLY contested proceedings, the rate base, fair rate of return and reasonable operating expenses must be determined. Southwestern Bell Tel. Co. v. State Corp. Comm., 192 Kan. 39, 46-47, 386 P.2d 515 (1963). Here, however, Mr. Phillips, testifying on behalf of KIC, candidly admitted that he had not filed any prefiled testimony nor had Mr. Phillips prepared any independent cost of service analysis wherein a revenue requirement was determined. (Phillips, Tr. 442). In fact, none of the nonsupporters of the agreement had prefiled any testimony concerning the cost of service issues nor had any of the nonsupporters conducted an independent cost of service analysis. (Phillips, Tr. 442; Harpster, Tr. 406-407).

26. The Kansas Pipeline Partnership ("KPP") moved to dismiss the settlement on grounds INTER ALIA that the settlement agreement was based upon a material error of fact. Mr. Gary Harpster, testifying on behalf of KPP, noted that Western included Wolf Creek accelerated depreciation in original data submitted to Staff. Western's adjustment increased depreciation $50 million and decreased deferred income taxes by $14.3 million. (Harpster, Tr. 392). However, Western's adjustment did not have any actual income tax effect to the test year period. (Harpster, Tr. 392-393). However, Staff reversed the accelerated depreciation and correspondingly increased deferred income tax. Then, Staff unnecessarily took an additional step to increase actual current income tax expense for the test period. This additional step resulted in Staff underestimating KGE's adjusted operating income by $19.4 million for the test period. Applying the appropriate tax conversion factor, Staff's recommended revenue reduction of $105 million was understated by

approximately $32.2 million. (Harpster, Tr. 393-394). Recognizing the error, Staff introduced Staff's Amended Exhibit 2 which revised the revenue excess attributed to the KGE system to show a total of $73,964,496. (Staff Amended Exhibit 2; Proctor, Tr. 188-190). The tax error and the attempt to reconcile the error with the settlement agreement goes to the reasonableness of the settlement agreement and to the merits of the Joint Movant's Motion to Approve Agreement. It would not be appropriate for the Commission to dismiss the motion on such grounds asserted by KPP.

IV. DISCUSSION

A. JURISDICTION

27. The customers in the KGE and KPL service territories received notice of the Applications filed herein through inserts in their billings and through publication in accordance with Kansas statutes and orders of the Commission. The Application, as originally filed, contained depreciation proposals including, in particular, the proposal to accelerate the depreciation of the Wolf Creek generating facilities. As the result of its investigation, Staff believed that Western was over-earning and sought to have this issue reviewed and examined by the Commission. These investigative efforts eventually changed the proceedings into a more traditional cost of service rate case. However, the accelerated depreciation proposals remained within the case. The notice is not defective simply because the case evolved from an accelerated depreciation proposal into a more traditional cost of service rate case. Moreover, the notice requirements of K.A.R. 82-1-231 are not applicable. These proceedings involve a substantial DECREASE in electric rates not a substantial INCREASE. K.A.R. 82-1-231 applies only to major INCREASE in electric rates. Furthermore, adequate notice of hearing was given to the parties consistent with K.S.A. 77-518. In addition, the proceedings were continued for eight (8) days allowing the parties opposing the settlement agreement additional time in which to prepare. The parties opposing the settlement agreement have confused their substantive due process right to a meaningful opportunity to be heard with a lack of evidentiary support. None of the parties opposing settlement proffered any evidence of the appropriate revenue requirements. KPP's and KIC's witnesses candidly admitted that they did not prefile any testimony pertaining to the cost of service nor had they compiled

an independent cost of service analysis. (Harpster, Tr. 406-407; Phillips, Tr. 442). Thus, the Commission has jurisdiction of the parties and jurisdiction to hear and consider the subject matter pursuant to K.S.A. 66-117 and 66-101.

B. THE PROPOSED TOTAL REVENUE REFUNDS IS NOT REASONABLE UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HEREIN.

28. The Commission must determine whether the rate reductions proposed by the settlement agreement are reasonable notwithstanding any accelerated depreciation proposal that may be approved, denied or modified. To be reasonable, the determination must be based upon substantial evidence. The Commission emphasizes that it is not prejudging any issue. The decision made herein is based upon the evidence, as outlined above.

29. Staff presented evidence starting with total revenue requirement of approximately $105 million. See Staff's Exhibit 2. Staff evaluated the strengths and weaknesses of their cost of service analysis to show a potential litigation outcome of approximately $81.4 million. (Proctor, Tr. 126-127; Staff Exhibit 2). Then by using a range of return on equity from 10.5% to 12.0%, Staff opined that the proposed rate reductions were reasonable given the range of possible litigation outcomes prompted by the range of return on equity. (Proctor, Tr. 129-130). Western also entered into the settlement agreement assuming the Commission is not likely to accept 100% of Staff's proposed adjustments and assuming the Commission would not likely accept a return on equity of 10.5%, as recommended by Staff. (Martin, Tr. 211-213). In essence, Western reasoned that a higher return on equity in the range of Western's recommended return on equity and the elimination of one or more of Staff's pro forma adjustments would lead to a revenue requirement in the range proposed by the settlement. Theoretically, all settlements involve this process of weighing the strengths and weaknesses of a case. Here, however, the underlying basis of this analysis was inaccurate and appears to have been concluded on a material error of fact.

30. During the hearing, a $32.2 million error was discovered. The nature of the error is a computational error that was inadvertently not carried through Staff schedules properly. Staff acknowledged the oversight and revised the revenue requirement excess from $81 million to $113.7 million. (Proctor,

Tr. 172-173; Staff's Amended Exhibit 2). Western, through the testimony of James Martin, attempted to minimize the significance of the error by changing two assumptions which had been the basis of the settlement agreement. First, Western re-evaluated the relative strengths and weaknesses of Staff's proposed adjustments, as contained in Staff's prefiled testimony, and submitted that other adjustments were vulnerable to attack by Western. Specifically, Mr. Martin identified the fuel repricing adjustment as an adjustment that would be strongly contested and that, if the Commission ruled in favor of Western, the total rate impact would be reduced by a total of $26.1 million. (Martin, Tr. 212). Secondly, Western submitted it would be foreseeable that the Commission would set a return on equity higher than 10.5% as reflected in Staff's prefiled testimony. Using these assumptions, Mr. Martin sponsored Western's Exhibit 1 showing various rates of return on equity at an associated revenue requirement excess.

31. Mr. Martin initially testified (before the discovery of the tax computation error) that a reasonable return on equity would fall in the neighborhood of 11.33% to 11.45% (Martin, Tr. 146). However KIC, through the testimony of Mr. Phillips, submitted that, considering the tax error, the settlement would produce a return on equity of 13.41%, assuming Staff wins all of their proposed adjustments and based upon Staff's original schedules. (Phillips, Tr. 432). The size of the tax computational error is substantial and return on equity implicated by the tax error cannot be ignored.

32. The Commission is concerned about the magnitude of this tax error in relation to Staff's proposed adjustments and the negotiating position of the parties had they known about the tax error. Staff's own witness, James Proctor, at best, could only opine that the settlement agreement was "probably reasonable." (Proctor, Tr. 200). The Commission believes that had the parties known about the error before entering into settlement negotiations, they would have likely arrived at a different result. In contested matters, given the risks and rewards of not knowing the outcome litigation will render, the parties may divide evenly those risks and rewards. Here, given the magnitude of the computational error and the timing of the discovery of the error, the simple re-evaluation of the strengths and weaknesses

of the respective adjustments fails to properly account for the rate impact associated with the tax error. Under the facts and circumstances presented herein, the Commission is not convinced that the recommended revenue requirement excess of $64.7 million is reasonable.

C. THE INCENTIVE MECHANISM IS REASONABLE.

33. the Settlement agreement contains a five year incentive mechanism. Under the terms of the proposed incentive mechanism, customers of KGE will receive an annual rebate equal to 50% of Western's regulated earnings above a 12% return on equity. Western's shareholders will keep the other 50% of Western's regulated earnings above a 12% return on equity. Staff testified that incentive regulation encourages a regulated company to implement management practices to decrease costs and become more efficient without the risk of being called in for a rate review. (Proctor, Tr. 85). Under incentive regulation, the regulated company is compensated for efficiency gains while customers are likely made no worse off and maybe better off if sharing occurs. (Proctor, Tr. 86). Incentive regulation should also decrease The cost of regulation because fewer rate cases are necessary since customers receive the benefit of company efficiency gains through periodic rebates. (Proctor, Tr. 87). Staff also testified that under the proposed incentive plan, the risk to customers is minimized since customers share in any efficiency gains made by Western, but the plan does not grant Western the authority to file for a rate increase when earnings fall below a predetermined level. (Proctor, Tr. 92). Western testified that it believes incentive regulation is good for customers and the company, particularly as we head into a more competitive marketplace, and the ability to retain part of the savings through efficiencies is a critical incentive for utilities to work their hardest on behalf of shareholders and customers. (Martin, Tr. 151).

34. The Commission believes that as the regulated companies over which the Commission has jurisdiction face changing industry structures and potential new competition, the Commission must also adapt its traditional methods of regulation to allow flexibility and incentive for efficient behavior. The adoption of an incentive mechanism, as contemplated in the settlement agreement, furthers that goal. The incentive mechanism proposed in the settlement agreement is merely an outline. The settlement agreement contemplates further proceedings will be convened where

parties can develop, and the Commission can issue findings regarding the specific mechanics of how the incentive mechanism will operate. The Commission would be an active participant in such proceedings. With no incentive mechanism, Western has the potential to keep 100% of all regulated earnings, even those above the 12% return on equity level. It is not logical to argue that allowing Western to keep 100% of all regulated earnings is more reasonable than providing a mechanism where Western must potentially share some portion of its regulated earnings above a certain level. Furthermore, Western's earnings will be reviewed on an annual basis during the period the incentive mechanism is in effect. Without the incentive mechanism, this review would not be possible. Therefore, the Commission would be disposed to approve such an incentive mechanism in theory.

35. The settlement agreement sets the level of merger savings from the KPL/KGE merger at $40 million per year. A fixed level of merger savings is desirable in order to simplify the annual calculation of return on equity under the incentive plan. (Martin, Tr. 154; Proctor, Tr. 97). It is also desirable because as the date of the merger becomes more remote, tracking savings attributable to the merger becomes more difficult. (Martin, Tr. 153; Proctor, Tr. 97). Furthermore, Western examined the merger savings and believed the annual merger savings could be justified at a level from $53 million to $60 million. (Martin, Tr. 153-154). Staff estimated the merger savings to be $26 million; however this estimate did not account for the impact of customer growth and productivity. (Proctor, Tr. 98). Staff believes that accounting for customer growth and productivity is not consistent with a prior Commission order, but the concept has merit and the Commission may decide to approve these adjustments after considering the evidence. (Proctor, Tr. 98). The amount of merger savings, assumed for purposes of this proposed settlement agreement, is a reasonable compromise based upon the evidence presented at the hearing.

36. The settlement agreement predetermines that all rebates generated under the incentive mechanism will be passed to the KGE customers. The Commission can appreciate the Joint Movants' recognition of the rate disparity existing between KGE and KPL customers. However, the Commission believes that the allocation of rebates between Western's KPL and KGE divisions is a matter

that should be decided at a later date in conjunction with the proceeding to develop the specific mechanics of the incentive mechanism.

D. THE CORPORATE STRUCTURE DOES NOT NEED TO BE CHANGED.

37. KGE is a wholly owned subsidiary of Western. Western has maintained a separate corporate existence presumably for purposes of tax accounting and financing. However, the KGE and KPL electric systems are operated on an integrated basis. There is apparent justification for requiring Western to submit rate proposals on a stand alone basis as well as on a combined basis. See, e.g., Kansas Power and Light Company and Kansas Gas and Electric Company, 56 FERC Section 61,356, at 62,377-78 (1991). Such treatment by Western of the KGE and KPL electric systems would represent a significant step toward addressing the rate disparity between KGE and KPL customers while, quite conceivably, allowing the company to effectively become more competitive in a changing electric industry.

E. THE ACCELERATED DEPRECIATION PROPOSAL IS RESERVED FOR FURTHER PROCEEDINGS.

38. Mr. Martin also testified that Western had filed the subject Applications anticipating that the Commission would authorize Western to accelerate the depreciation of Wolf Creek. The additional depreciation expense would lower Western's rate base which would, in turn, permit Western to price its electricity more competitively in a restructured electric industry. Mr. Martin stated that when Western implemented the $8.7 million interim rate reduction, Western was not implementing rates based upon their accelerated depreciation proposal. (Martin, Tr. 329). Mr. Martin also stated he had no knowledge as to whether Western intended to abandon its proposed accelerated depreciation proposal given the negotiated rate reduction. (Martin, Tr. at 332).

39. The City of Wichita and CURB believes that the opportunity to argue the accelerated depreciation proposal has value. Mr. Martin's testimony does not establish that the company is withdrawing its proposal. Furthermore, the company submitted in its brief that the issue is left for further settlement or hearing. From a policy perspective, a utility company like Western should be allowed to respond to changes in the electric industry. The Commission recognizes that public utility regulators must also be in a position to respond to changes in

the electric industry. As of the date of this Order, the accelerated depreciation proposal is reserved for further proceedings in these dockets. It is for the commission to weigh the impact of such proposals on the company, market and customers and if necessary to call the issue before it for resolution if Western fails to do so.

F. RE-SUBMISSION OF SETTLEMENT AGREEMENT

40. The Commission is not reviewing or deciding individual adjustments. Western's prefiled testimony pertaining to such adjustments was not admitted or incorporated by reference into any exhibit for the Commission to consider. The Commission wants to emphasize it is not prejudging the merits of any particular adjustment but merely assessing the reasonableness of the proposed settlement agreement given the evidentiary restraints presented by the record as it now exists. The Commission is providing some guidelines and principles which may be helpful if the parties re-submit a settlement agreement. If a settlement agreement is resubmitted consistent with the guidelines and principles outlined herein, the Commission could find such a settlement agreement reasonable based upon the evidentiary record presented to the Commission at the hearing held on August 27, 1996 and September 4-5, 1996.

41. The Commission finds that this record, taken as a whole, could support a settlement in the range of $71.5 million to $96.9 million revenue requirement excess. In arriving at this range, the Commission reviewed the assumptions of the parties placed on the record. First, assuming the Staff would win all of its adjustments less those conceded in KCC Staff Exhibit 2 and Amended Exhibit 2, and applying a return on equity in the range of 11.5%, as suggested by Western, to be reasonable the revenue requirement excess would be approximately $96.9 million dollars. (See KIC Exhibit 1). The Commission believes that the record fully supports, assuming a range of numbers favorable to each party, that $96.9 million represents the high end of a range of reasonableness for settlement purposes based on the record before us. Western argues that it is not reasonable to assume that Staff would win 100% of its adjustments in a contested hearing. The Commission in general cannot argue with this assertion. From the record the Commission can ascertain that Staff believes approximately $26.6 million of its prefiled adjustments are at

risk. (See KCC Staff Amended Exhibit 2) and that Western, as an example, identifies an additional adjustment that would lower Staff's revenue excess by $11.6 million for KGE and by $13.8 million for KPL. (Martin, Tr. 212). Western's assertion that this adjustment would be decided in Western's favor was strongly contested by parties opposing this settlement. The Commission is limited by the record from determining which adjustments Western may or may not win in a contested hearing. However, for purposes of developing a reasonable range for settlement purposes based upon the record now before the Commission and assuming that the contested adjustment is decided in Western's favor, and further assuming a return on equity in the range of 11.5%, suggested by Western, to be reasonable, the Commission believes a revenue requirement excess figure of approximately $71.5 million dollars represents the low end of a reasonable range for settlement purposes. The Commission believes the above analysis is supported by the facts in the record and represents a reasonable range for settlement purposes.

42. The settlement agreement proposed to implement the rate reductions on a staggered basis. The delay in implementing the rate reductions is not unreasonable given the magnitude of the overall rate reductions contemplated by this order. However, the settlement agreement refers to the date of implementation as the date of the final order. If there is an appeal or even petitions for reconsideration, the date the final order becomes effective may be uncertain. To avoid this uncertainty, a specific date certain should be stated in any agreement.

43. The rebate allocation between KPL and KGE electric, as contemplated by the 5-year incentive mechanism, should be reserved for the Commission to determine at a later proceeding. In the later proceedings, the Commission can examine in more detail the fairness and reasonableness of the rebate allocation between the KPL and KGE customers.

44. Paragraph H of the settlement agreement applies to the incentive plan and the settled electric rates. The enforcement of the provision is unclear. The Commission believes that this provision should not only be available to the company but also to the Commission. If, for example, the electric industry is restructured, the Commission intends to retain the right to revisit the incentive plan as well as any other provision of the settlement agreement. Furthermore, it should be made clear that

any requested changes must be made for good cause shown and be the result of events outside the discretion of Western.

V. PROCEDURAL SCHEDULE

45. The procedural schedule should be resumed and modified as follows:

A. The deadline for Joint Movants to re-submit a settlement agreement consistent with the principles outlined hereinabove is October 8, 1996.

B. The deadline for Staff and Intervenors to prefile responsive direct testimony to Western and KGE's amended application and supplemental direct testimony is October 14, 1996.

C. The deadline for Western and KGE to file rebuttal/responsive testimony to Staff and Intervenors' previously filed testimony is October 21, 1996.

D. The deadline for service of data requests is October 25, 1996.

E. The hearing on these dockets (193,306-U and 193,307-U) is set for October 29, 1996 at 9:00 a.m. at the Kansas Corporation Commission, First Floor Hearing Room, 1500 S.W. Arrowhead Road, Topeka, Kansas.

F. If the parties re-submit a settlement agreement, the Commission will consider modification of the procedural schedule adopted above.

VI INTERVENTION

46. On September 13, 1996, the Board of County Commissioners of Jefferson County, Kansas ("Jefferson County") filed a Motion to Intervene and Submit Comments. Jefferson County is a governmental unit having a similar interest to that of the City of Wichita. Under these facts and circumstances, the motion to intervene is granted. However, the Commission notes that notice was provided by publication and billing inserts. The failure of Jefferson County to respond in a more timely manner is the sole responsibility of Jefferson County. Moreover, Jefferson County will not be allowed to delay or extend any of the procedural deadlines established by the Commission by reason of their late intervention.

IT IS, THEREFORE, BY THE COMMISSION, CONSIDERED AND ORDERED that:

1. The motion to dismiss these proceedings of Kansas Pipeline Partnership is denied.

2. For the reasons more fully discussed herein, the proposed settlement agreement, as contained in Staff's Exhibit 1, is not

approved.

3. Without further hearing or other evidentiary proceedings, the parties may re-submit a settlement agreement consistent with the principles announced herein for approval.

4. The procedural schedule outlined herein is adopted.

5. The motion to intervene filed by Board of County Commissioners of Jefferson County is granted.

BY THE COMMISSION IT IS SO ORDERED.

McKee, Chr.; Seltsam, Com.; Wine, Com.

Dated: Oct 01 1996

/s/Judith McConnell
JUDITH McCONNELL
EXECUTIVE DIRECTOR

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ORDER MAILED
OCT 01 1996
/s/Judith McConnell
Executive Director

1/ Docket No. 194,661-U (96-KCPE-527-MER), In the Matter of the Application of Western Resoruces, Inc., for Approval of its Proposal to Merge with Kansas City Power & Light Company, and for Other Related Relief.

2/ Docket No. 193,390-U (96-GIME-371-GIE), In the Matter of a General Investigation into the Restructuring of the Electric Industry in the State of Kansas.