Approved 3-18-85
Date

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES.

The meeting was called to order by Sen. Bill Morris at
Chairperson

9:00 a.m./p.m. on March 5, 1985 in room 254-E of the Capitol.

All members were present except:

Senators Doyen and Francisco were excused.

Committee staff present:

Hank Avila - Research Department
Fred Carman - Revisor
Louise Cunningham, Secretary

Conferees appearing before the committee:

Sen. Norvell
Sen. Frey
Earnest Lehman, Electric Companies Association of Kansas
Bob Phillips, Kansas Electric Cooperatives, Inc.
Sgt. Bill Jacobs, Highway Patrol

HEARING ON S.B. 229 - Compensation for parallel generation contract services.

Sen. Norvell said this bill was drafted by request but he has found out it would be unconstitutional. He said he would withdraw it from consideration. A motion was made by Sen. Vidricksen and seconded by Sen. Hayden that S.B. 229 be reported adversely. Motion carried.

HEARING ON S.B.235 - Parallel generation service contracts.

Sen. Frey said this bill was introduced at the request of a constituent who is the owner of a wind generator. He receives a small amount from the electric company for excess power generated by his private generator. He had received a letter from the electric company that this amount would be substantially reduced. At the time the generator was put in the company was providing incentives for power but now they have plenty of capacity and so are taking away the incentives.

OPPONENTS:

Earnest L. Lehman, Electric Companies Association of Kansas, said it seems plausible and fair that the rates for energy purchased from customers should be the same as that sold to customers but that is not the case. Other factors have to be considered such as demand costs, which include building, owning and maintaining power plants, transmission lines and distribution equipment and having power sufficient to meet the customers' highest demand for service. A copy of his statement is attached. (Attachment 1).

Bob Phillips, Kansas Electric Cooperatives, said that customer-owned generation is regulated by federal law under the Public Utility Regulatory Policies Act of 1978. (PURPA). He said they were opposed to S.B. 235 and if it is passed they might appeal. This is not the right time to build more generation. Right now there are about 50 generators and there is no significant impact but if this is passed investors might be coming in from out of state. A copy of his statement is attached. (Attachment 2). He also submitted a Memorandum to Commissioners from Eva Powers, Don Marker and Alan Decker in re Cogeneration rate for facilities of less than 100 KW dated July 31, 1984. A copy is attached. (Attachment 3).

Sen. Frey requested that S.B. 235 be held over.

HEARING ON S.B. 318 - Concerning vehicles with gross weight in excess of that for which registered.

Sgt. Jacobs said the Highway Patrol requested this bill because some

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

people are hauling in excess of their registered gross wieght limitation because now it is lucrative for an owner/operator to under-register to save the cost of a higher weight limit registration. Increasing the fine would help stop this. A copy of his statement is attached. (Attachment 4).

A motion was made by Sen. Vidricksen and seconded by Sen. Hoferer to recommend S.B. 318 favorably for passage. Motion carried.

DISCUSSION ON S.B. 226 - Municipal utilities; protection of rate base for basic telephone service.

The committee discussed sending this bill to Ways and Means Committee because the time was so limited now and the bill is complicated and needs more hearings. The Chairman said perhaps a request could be made to leadership to re-assign the bill back to this committee.

DISCUSSION ON S.B. 118 - The Lemon Law

Sen. Frey said passage of this bill could weaken the present laws of Kansas which are among the toughest in the country. S.B. 118 is a weaker law and if the two laws are in conflict the courts would decide which one would take precedence. The Consumer Protection Law speaks to damages and breach of warranty. S.B. 118 only addresses damages, but does cover getting a refund of money after going back four times.

Fred Carman said there is a similar bill in the House and a subcommittee has been appointed in the House to address the same problems.

ACTION ON S.B. 245 - KCC jurisdiction of intrastate pipelines.

A motion was made by Sen. Walker and seconded by Sen. Thiessen to report S.B. 245 adversely. Motion carried.

Meeting was adjourned at 10:00 a.m.

SENATE LABOR, INDUSTRY & TOURISM COMMITTEE

Date 3-5-85 Place 254-E Time 9:00

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Ed Reinert	Topeka	Ks League Women Voters
SGT BILL JACOBS	TOPEKA	KANSAS HIGHWAY PATROL
Tom Whitaker	Topeka	Ks Motor Carriers Assn
Wayne E. Tarrington	Topeka	Kansas Motor Carriers Assn
ED DE SOIGNIE	TOPEKA	KDOT
Jerry Cooper	"	KG&E
Earnest A. Lehman	Wichita	KG&E
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COS. ASSOC. OF KS.
Richard D. Kready	"	KPL / Gas Service Co.
TREVA POTTER	"	NORTHERN NAT. GAS
KEVIN ROBERTSON	TOPEKA	KPL / GSC
Traci Mathis	—	Sen. Walker Intern
B.R. Phillips	Topeka	KEC
K. Lloyd	"	"
Everett Freeman	Topeka Ks	KCP&L
Ray D. Shenkel	Shawnee	KCP&L

SENATE BILL NO. 229
SENATE BILL NO. 235

STATEMENT OF EARNEST A. LEHMAN
MANAGER OF RATES, KANSAS GAS AND ELECTRIC COMPANY,
FOR THE ELECTRIC COMPANIES ASSOCIATION OF KANSAS

This statement is offered on behalf of Kansas' investor owned electric utilities who are members of the Electric Companies Association of Kansas (Association). These members include the Empire District Electric Company, Kansas City Power & Light Company, Kansas Gas and Electric Company, The Kansas Power and Light Company, and the Western Power Division of Centel, Inc. The Association opposes Senate Bill Nos. 229 and 235 because of the conflicts they would create with the Public Utility Regulatory Policies Act (PURPA), and with the general presumption that rates paid for electric service be fair and equitable. Senate Bill No. 235 additionally would result in the failure of electric utilities to comply with the metering accuracy requirements set by the Kansas Corporation Commission (KCC).

SB 229 would require that electric utilities purchase customer generated energy at the same retail rate that the utility would charge for the sale of energy to the customer. SB 235, by requiring a single meter where the customer has parallel generating equipment with a capacity of 20 kW or less, would also have the same effect.

On the surface it seems plausible and fair that the rates for energy purchased from and sold to the customer should be the same, but this is not the case. The reasons for the difference in value require a brief explanation of the three different types of costs (energy, demand, and

ATT. ①
3/5/85

customer costs) incurred in providing electric service. Energy costs are those that vary with the amount of kWh sales. These costs are principally fuel costs. Customer costs are those required to connect a customer with the electric utility and to do billing and recordkeeping for customers. They vary with the number of customers we serve. Demand costs are the costs of building, owning and maintaining power plants, transmission lines and distribution equipment that are used in common to serve large groups of customers. Demand costs are determined by the maximum level of service required at any one time, and the degree of service reliability and service convenience that our customers want.

Since our service obligation requires that we be able to meet changes in our customers' demand for service instantaneously and without interruption or inconvenience, we build and maintain power plants, transmission lines and distribution equipment sufficient to meet our customers' highest demand for service. That highest demand usually occurs during the summer. These demand costs continue through the year, even after the hottest days of summer have passed. The fact that customers can occasionally provide energy to the utility will not affect the utility's demand costs at all, unless the customer is capable of meeting the same service obligation as the electric utility. Demand costs and customer costs together account for the largest share of most electric bills. This is why electric utilities do not want to be automatically required to pay rates for customer generated energy that match the rates paid by the customer for utility generated energy. In effect, the utility would be paying the customer for demand costs that the utility continues to bear. Ultimately this means higher rates for other customers.

Besides being unfair, paying customers for demand costs that the utility does not avoid is directly contrary to the requirements of PURPA. The PURPA statute requires that the rate an electric utility pays for customer generated energy should not exceed the "incremental cost" of alternative electric energy. Regulations later issued to implement this part of PURPA provide that an electric utility should not pay more than its "avoided cost" for customer generated energy. It is left to the discretion of the KCC to determine what the avoided costs are.

The single meter requirement of SB 235 creates an additional problem involving meter accuracy. KG&E's Meter Department conducted some tests to determine the accuracy of meter readings when the meter runs backwards, as would be the case when the customer is selling energy to the utility. Though both of the meters tested were accurate to within .3% (the KCC standard is 2%) when run forward, the same meters running backward were only 97% accurate. A meter will typically be slower due to misalignment of some of the mechanical linkages inside the meter when run in reverse causing friction and greater metering error.

The Association requests that the authority to determine rates for payment for customer generated energy and customer metering arrangements be left to the discretion of the KCC.

Thank you.

(2)

STATEMENT

ON BEHALF OF

KANSAS ELECTRIC COOPERATIVES, INC.

BEFORE THE

SENATE TRANSPORTATION AND UTILITIES COMMITTEE

ON

SB 229 and SB 235

MARCH 5, 1985

The attached statement is submitted for your information and for inclusion in the Committee record.

ATT. (2)

Kansas Electric Coperative, Inc. is a statewide trade association with membership consisting of 36 rural electric cooperatives (two generation and transmission cooperatives and 34 distribution cooperatives) serving Kansas.

3/5/85

TESTIMONY BEFORE

SENATE TRANSPORTATION AND UTILITIES COMMITTEE

SB 229 and SB 235

MARCH 5, 1985

BY

BOB PHILLIPS

KANSAS ELECTRIC COOPERATIVES, INC.

Mr. Chairman and members of the Committee:

Senate Bill Nos. 229 and 235 both deal with interconnection and parallel operation of customer-owned generation with electric utilities. When a generator is operated in parallel with a utility system, any power which the customer generates at a particular moment, which exceeds his own load, flows into the utility's system. Under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and rules adopted by the Federal Energy Regulatory Commission ("FERC"), utilities are required to purchase this excess power from the customer. Under the federal law, customers must either generate power with a small power production facility (which uses biomass, waste, geothermal resources or renewable resources such as wind, water, or solar energy) or a cogeneration facility (which simultaneously produces both electrical power and useful thermal energy, such as heat or steam). Cogeneration and small power production interconnection terms and rates are governed by federal law because the utility purchases the power for resale in interstate commerce, which is a preempted activity.

Today, after seven years of proceedings before the state corporation commission, resulting in at least a half dozen KCC orders, two United States Supreme Court decisions and one Kansas Supreme Court interpretation of the law on this subject, we have ample guidance on the contractual and ratemaking issues related to cogeneration and small power production.

The basic thrust of PURPA is to encourage the development of small power production and cogeneration. The law requires that utilities deal with cogenerators and small power producers on a good faith basis and meet specific obligations:

1. Interconnect so as to automatically deliver and receive power to and from the facility, respectively;
2. purchase power from the facility at rates based on avoided costs; and
3. sell power to the facility at non-discriminatory, cost-based rates.

It is important to note that a cogenerator or small power producer is exempt from utility-type regulation. This means that the producer is not subject to regulatory scrutiny with regard to his costs, revenues, or rate of return. Rather, the rates which the producer collects are based upon the purchasing utility's avoided cost. The avoided cost is the incremental cost which the utility would incur if it supplied the same power from its own generating sources or through purchases from other wholesale power suppliers. While the intent of the federal law is to encourage cogeneration, the statutes specifically provide that cogenerators and small

power producers are not to be subsidized by other ratepayers. Utility payments to these producers may not exceed avoided costs and the producers are responsible for all reasonable costs of interconnection and parallel operation.

Under regulations adopted by the FERC, state regulatory commissions were required to hold hearings to establish terms, conditions, and rates for cogeneration and small power production activities. Following a complete investigation and two days of hearings, the KCC issued an order on April 28, 1982 establishing interconnection requirements and rates which electric utilities would pay for power generated by small power producers and cogenerators. In that order the Commission found that Kansas electric utilities had surplus capacity at the time and for the foreseeable future; nevertheless, the Commission proceeded to establish the rates based upon avoided energy costs plus a capacity credit. In the same decision the Commission also found that two meters would be used -- one for purchases and one for sales -- and specifically disallowed utilities charging the producer for the meter which records utility purchases.

It should be emphasized that the rate established by the Commission, which included a capacity credit, was substantially less than retail service rates.

On February 18, 1984 the Kansas Supreme Court issued a decision on an appeal brought by KCP&L, decisively overturning the Commission's rate. At page 5 the Kansas Court concluded:

"Simply stated, the United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA and the federal regulations, must apply the avoided-cost rule..."

The remainder of the Commission's previous order was left intact by the Court, including the provision requiring dual metering.

On October 15, 1984 the KCC issued a final order in response to the Supreme Court decision finding that all jurisdictional electric utilities should file tariffs reflecting full avoided fuel costs for purchases from cogenerators and small power producers. The Commission indicated that if it could be determined that a utility could avoid capacity costs by purchasing power from cogenerators and small power producers then a capacity payment should be made.

Senate Bill 229

We oppose Senate Bill 229 for the following reasons:

1. The bill would require electric utilities to purchase consumer generated power at rates which exceed avoided costs. Such a rate would be unlawful under the provisions of PURPA and the regulations adopted by FERC.
2. Any rate which a utility pays in excess of avoided costs results in the utility's ratepayers unfairly subsidizing the producer for power which the utility

could have generated itself or purchased from other sources at a lower cost.

3. This measure would encourage the development of additional generating facilities at a time when most Kansas electric generating utilities do not need additional capacity.

Senate Bill 235

We oppose Senate Bill 235 for the following reasons:

1. The FERC specifically considered "net energy billing" or a "reverse the meter" approach as provided for in SB 235, and refused to mandate it for small producers leaving the decision to state regulatory commissions.
2. The proposal that utilities sell and purchase power with a single meter was considered by the KCC under its general investigation. Former Representative Keith Farrar specifically proposed that small cogeneration units (those with a capacity of less than 25 KW) be required to use only one meter. Nevertheless, the Commission found that two meters were appropriate and that the producer would pay for the cost of only one meter, that which records purchases from the utility.
3. Subsequent to the Commission's general investigation, in a separate complaint brought by Windcraft Energy Systems, Inc. v KP&L, (Docket No. 133,105-U, November 22, 1982), the KCC again found that a separate meter for power sold to the utility was

appropriate in order to provide safe and reliable service.

4. The provision in SB 235 which requires that the state corporation commission establish terms and conditions for a contract between the customer and the utility when there is a failure to agree on terms and conditions is unnecessary. The Commission has been empowered to carry out the requirements of PURPA, including settling of disputes, under K.S.A. 66-111 and 66-1,185. Further, the Commission has already exercised this jurisdiction on several occasions and reserved the right to do so under its generic orders issued in Docket No. 115,379-U.

Thank you for the opportunity to appear before you on these bills.

No. 55,844

KANSAS CITY POWER & LIGHT COMPANY,
Applicant-Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Richard C. (Pete) Loux, Chairman; Jane T. Roy and
Phillip R. Dick, Commissioners; and their respective
successors in Office as the constituent members of the
State Corporation Commission of the State of Kansas,
Respondents-Appellees.

SYLLABUS BY THE COURT

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. § 824a-3[1982]), and the regulations promulgated thereunder by the Federal Energy Regulatory Commission (FERC), have preempted the field in the area of cogeneration of electricity. The Kansas Corporation Commission, as a state regulatory agency, cannot require an electric utility to purchase electricity from a cogenerator at a rate greater than the federal regulated rate, which is based on the avoided cost to the utility, without first obtaining a waiver from FERC.

Appeal from Linn district court; LEIGHTON ARCHER FOSSEY, judge. Opinion filed February 18, 1984. Reversed.

Lowell L. Smithson, of Spencer, Fane, Britt & Browne, of Kansas City, Missouri, argued the cause, and Gardiner B. Davis, of the same firm, Richard M. Smith, of Smith & Winter-Smith, of Mound City, and Warren B. Wood, of Kansas City, Missouri, were with him on the briefs for the appellant.

Robert M. Fillmore, special assistant attorney general and assistant general counsel, argued the cause, and Brian J. Moline, general counsel, and Eva Powers, assistant general counsel, were with him on the brief for the appellee.

The opinion of the court was delivered by

PRAGER, J.:

This is an appeal by the Kansas City Power and Light Company (KCPL) from orders of the Kansas Corporation Commission (KCC) fixing rates to be charged under contracts designed to promote the development of cogeneration and small power production electrical facilities. The district court upheld the orders of the KCC, and this appeal followed. The issues raised in the case are somewhat technical and require an interpretation of certain federal statutes and regulations and also certain Kansas statutes controlling the operations of the KCC.

In order to better understand the present controversy, it would be helpful at the outset to discuss the subject of cogeneration and its historical background. In 1978, the Congress of the United States was concerned about the energy crisis and the rapid increases in the cost of electricity. It concluded that a national energy program should be developed to encourage the cogeneration of electricity, which involves the combined production of electrical power and useful thermal energy, such as heat or steam. By producing heat and electricity in one process, fuel consumption can be reduced by as much as one-half. In the field of cogeneration, small power production facilities are those which use biomass, waste, geothermal resources or renewable resources, such as wind, water, or solar energy, to produce electric power. In the course of this opinion, the term "cogenerator" will be used to refer to both cogenerators and small power producers.

In response to the energy crisis, the Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA) (Pub. L. No. 95-617). PURPA was enacted, in part, to remove three obstacles to cogeneration:

(1) Utilities were generally unwilling to purchase the power produced by cogenerators or at least to pay an appropriate rate;

(2) discriminatory high rates were sometimes charged for back-up service; and

(3) a cogenerator ran the risk of being considered a public utility and thus subject to state and federal regulations. Congress designed Section 210 of PURPA (16 U.S.C. § 824a-3 [1982]) to remove these barriers to the development of cogeneration. PURPA required that electric utilities purchase electric energy from cogenerators and provide back-up power on a nondiscriminatory basis. Section 210 directed the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration. Section 210 of PURPA further provided that the rates established by FERC for the purchase of electricity (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest; and (2) shall not discriminate against qualifying co-generators or qualifying small power producers. It also provided, in substance, that no rule setting rates for purchases of electrical energy from cogeneration facilities "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." The term "incremental cost" is defined in the act as the cost to the electric utility of the electric energy which, but for the purchase from the cogenerator, such utility would generate or purchase from another source. Incremental cost is referred to as "avoided cost." PURPA also provided that each state regulatory authority shall, after notice and a public hearing, implement the rules promulgated by FERC. FERC is given the authority to enforce the requirements of PURPA against any state regulatory authority.

Pursuant to the authority granted by PURPA, FERC adopted rules and regulations pertaining to cogeneration and small power

production (18 C.F.R., Part 292 [1983]). These regulations required the rates for the purchase of electricity from federal qualifying cogeneration facilities to be based on "avoided cost," which is defined as the incremental cost which the utility would incur if it supplied the power itself or purchased it from another source. "Avoided cost" was thus established as the maximum rate. Regulation 18 C.F.R. 292.304 (1983) provided that a rate for cogeneration purchases may be less than the avoided cost, if the state regulatory authority determines that a lower rate is consistent with the regulations and is sufficient to encourage cogeneration and small power production. Section 292.403 authorizes a state regulatory authority, after public notice, to apply to FERC for a waiver from the application of certain regulations. FERC is given the power to grant a waiver, if an applicant demonstrates that compliance with any requirements of the regulations is not necessary to encourage cogeneration and is not otherwise required under Section 210 of PURPA.

In 1979, the Kansas legislature, recognizing the need for energy conservation and cogeneration, responded to PURPA by enacting K.S.A. 66-1,185 which gave the KCC such jurisdiction as is required to provide compliance with and carry out the requirements of PURPA and the rules and regulations adopted by FERC pursuant to the act. It directed the KCC to adopt such rules and regulations deemed necessary for such purpose including those needed for the establishment of necessary fees.

The 1979 Kansas legislature also enacted K.S.A. 66-1,184 which required every electric utility to enter into a contract for parallel generation service with a customer upon request of the customer. Under this statute, if the parties cannot agree on the terms of the contract, the KCC is given jurisdiction to settle any

dispute. K.S.A. 66-1,184 has been referred to as the Parallel Generation statute. We, thus, have in Kansas statutes granting to the KCC authority to implement PURPA and the federal regulations and also to proceed independently under the Kansas Parallel Generation statute.

Following the enactment of PURPA and the adoption of the federal regulations, the constitutionality of PURPA was challenged in a federal district court in Mississippi. It found certain portions of PURPA, including Section 210, to be unconstitutional. That decision was appealed to the United States Supreme Court which reversed, holding that Section 210 of PURPA was within the power of Congress under the Commerce Clause of the United States Constitution The court further held that Section 210 of PURPA did not trench on state sovereignty in violation of the Tenth Amendment, FERC v. Mississippi, 456 U.S. 742, 72 L.Ed. 2d 532, 102 S.Ct. 2126 (1982). The FERC full-avoided cost and interconnection rules were also attacked in a petition filed in the United States Court of Appeals for the District of Columbia which held both rules to be invalid. On certiorari, the United States Supreme Court reversed, holding that FERC did not act arbitrarily or capriciously in promulgating the full-avoided-cost rule or exceed its authority in promulgating the interconnection rule. American Paper Inst. v. American Elec. Power, ____U.S._____, 76 L.Ed. 2d 22, 103 S.Ct. 1921 (1983).

American Paper Inst. is important in considering the issues in the present case, because, in the course of the opinion, Justice Marshall discusses the avoided-cost rule and the power of a state regulatory authority to depart from that rule in setting rates in cogeneration contracts. In the opinion, we find the following language:

> "It bears emphasizing that the full-avoided-cost rule is not as inflexible as might appear at first glance. First, any state regulatory authority and any nonregulated

> utility may apply to the Commission for a waiver of the rule. A waiver may be granted if the applicant demonstrates that a full-avoided-cost rate is unnecessary to encourage cogeneration and small power production. 18 CFR 292.403 (1982). Second, a qualifying facility and a utility may negotiate a contract setting a price that is lower than a full-avoided-cost rate. 18 CRF 202.301(b)(1) (1982). Because the full-avoided-cost rule is subject to revision by the Commission as it obtains experience with the effects of the rule, it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate. _The Commission's rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement._"
> p. 35. (Emphasis supplied.)

Simply stated, the United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA and the federal regulations, _must_ apply the avoided-cost rule in the absence of a waiver granted by FERC or a specific contractual agreement setting a price that is lower than the avoided-cost rate.

On June 21, 1978, the KCC initiated an investigation of electric utilities pricing. On February 6, 1981, the KCC extended the investigation to include cogeneration and small power production. At the commission's direction, numerous public utilities including KCPL and other parties presented testimony at a hearing on this phase of the investigation. On April 28, 1982, the KCC issued its order on cogeneration and small power production as a result of those hearings. At the time the order was entered, the KCC had knowledge of _FERC v. Mississippi_ challenging the constitutionality of PURPA, and _American Paper Inst. v. American Elec. Power,_ which questioned the validity of the FERC regulations. The KCC stated in its order that it had decided to proceed with cogeneration in accordance with the Congressional intent expressed in PURPA, but would primarily

rely on state law. The primary concern of the KCC at this hearing was to consider the rate to be paid to cogenerators for their power and the kind of data needed to determine those rates. The KCC, in its written order, recognized that, under FERC rules, the rate to be paid for cogeneration was to be based upon avoided cost. It stated, however, that it was impossible to determine a rate based upon avoided cost and refused to do so. It then proceeded to exercise its power under state law and determined rates on a different basis than avoided cost.

KCPL filed an application for rehearing, contending that the commission lacked jurisdiction to enter its original order and that the original order unconstitutionally deprived KCPL of its constitutional rights and property rights. A rehearing was held, and on November 5, 1982, the KCC issued its order on rehearing which generally affirmed the commission's original order of April 1982, except for matters which are not of concern on this appeal. KCPL then brought this action in the district court of Linn County for a review of the orders of the KCC. On May 12, 1983, the district court entered judgment upholding the KCC orders as within the KCC's jurisdiction, as lawful and not arbitrary or capricious, and not contrary to the state or federal constitutions. KCPL filed a timely appeal to the appellate courts.

On the appeal, KCPL raises several issues. It contends (1) that the KCC in its order acted beyond its statutory authority; (2) that the KCC orders are unlawful, arbitrary, and capricious; (3) that the KCC violated the KCPL's freedom to contract under the state and federal constitutions; and (4) that the KCC's order results in a taking of KCPL's property without just compensation.

The record shows that, during the course of the proceedings before the KCC, counsel for the utility companies and the staff of

the KCC were in agreement that cogenerators should be paid at a rate based upon a utility's avoided cost as provided in the FERC regulations. In the order on rehearing, the KCC noted that its own staff had argued in its brief that Congress has preempted inconsistent state action and, that, even if it had not, the FERC rules were appropriate and that the KCC should refrain from additional regulation on this issue. The KCC then adopted a position that it was not preempted from acting under the state statutes and that it could proceed to determine rates on a basis other than a utility's avoided cost. At the time these orders were made, the KCC did not have the guidance of the United States Supreme Court in American Paper Inst. v. American Elec. Power, which is discussed above and which was not decided until May 16, 1983.

We have considered the record in the case and the briefs of counsel and have concluded that this case should be determined on the basis that the orders of the KCC setting rates for co-generation not based on a utility's avoided cost were unlawful, since they were in violation of PURPA and the FERC regulations discussed above. We find that federal law has preempted the field in the area of cogeneration, and that the KCC, a state regulatory authority, cannot require KCPL to purchase electricity from cogenerators at a rate greater than the federal regulated rate based on avoide cost. The Congress of the United States established a national policy of developing alternate energy sources to combat the national energy crisis. The federal government has under its supervision activities in the energy field, including cogeneration, designed to benefit the nation as a whole. Where a state regulatory authority acts to the contrary, it must fail. The requirements of PURPA and the FERC regulations preclude or preempt state action not in

compliance therewith unless a waiver is obtained. The FERC regulations (18 C.F.R. § 292.403[1983]) provide for a federal waiver of the avoided-cost requirement. In this case, no waiver has been obtained from FERC by KCC. Here the KCC admits that the regulations established for cogeneration contracts provide for a rate which exceeds avoided cost. The KCC orders thus conflict and violate the federal statute and regulations, and hence are unlawful.

Since this case was argued on the appeal, counsel for the KCPL has provided the court with a copy of Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, et al., ____App.Div.2d____, ____N.Y.S. 2d _____(No. 44,910 decided December 30, 1983), by the appellate division of the Supreme Court of New York. That case holds, without equivocation, that PURPA and the federal regulations have preempted the area of cogeneratio and that New York rules and regulations cannot lawfully require public utilities to purchase electricity from a cogenerator at a rate greater than a rate based upon avoided cost. The New York court relied in part on American Paper Inst. v. American Elec. Power, discussed above.

In view of our determination that the orders of the KCC are unlawful, since they violate the mandatory rate provisions of the federal statute and regulations, we do not deem it necessary to consider the other points raised by KCPL on the appeal. As noted above, in FERC v. Mississippi, PURPA and the FERC regulations issued thereunder were held to be within the power of Congress under the commerce clause and, further, that they do not trench on state sovereignty in violation of the Tenth Amendment. Since we have found that the challenged orders of the KCC are unlawful as a violation of federal law, that determines this case.

The judgment of the district court is reversed and the orders of the KCC are set aside as unlawful for the reasons stated in the opinion.

The Commission has accordingly revised paragraph (c) to require each State regulatory authority or nonregulated electric utility to cause to be put into effect standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less. The revised rule requires that standard rates for purchases equal the purchasing utility's avoided cost pursuant to paragraphs (a), (b), and (e).

Several commenters noted that standard rates for purchases can also be usefully applied to larger facilities. The Commission believes that the establishment of standard rates for purchases can significantly encourage cogeneration and small power production, provided that these standard rates accurately reflect the costs that the utility can avoid as a result of such purchases. Accordingly, the Commission has added subparagraph (2) which permits, but does not require, State regulatory authorities and nonregulated electric utilities to put into effect a standard rate for purchases from qualifying facilities with a design capacity greater than 100 kilowatts. These rates must equal avoided cost pursuant to paragraphs (a), (b), and (e).

Many commenters at the Commission's public hearings and in written comments recommended that the Commission should require the establishment of "net energy billing" for small qualifying facilities. Under this billing method, the output

from a qualifying facility reverses the electric meter used to measure sales from the electric utility to the qualifying facility. The Commission believes that this billing method may be an appropriate way of approximating avoided cost in some circumstances, but does not believe that this is the only practical or appropriate method to establish rates for small qualifying facilities. The Commission observes that net energy billing is likely to be appropriate when the retail rates are marginal cost-based, time-of-day rates. Accordingly, the Commission will leave to the State regulatory authorities and the nonregulated electric utilities the determination as to whether to institute net energy billing.

Paragraph (c)(3)(i) provides that standard rates for purchase should take into account the factors set forth in paragraph (e). These factors relate to the quality of power from the qualifying facility, and its ability to fit into the purchasing utility's generating mix.

Paragraph (e)(vi) is of particular significance for facilities of 100 kW or less. This paragraph provides that rates for purchase shall take into account "the individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system. . .". Several commenters presented persuasive evidence showing that an effective amount of capacity may be provided by dispersed

(3)

MEMORANDUM

TO: COMMISSIONERS

FROM: EVA POWERS, DON MARKER, ALAN DECKER E.P.

RE: COGENERATION RATE FOR FACILITIES OF LESS THAN 100 KW

DATE: JULY 31, 1984

THE KANSAS SUPREME COURT FOUND THAT THE RATE PAID TO COGENERATORS AND SMALL POWER PRODUCERS, WITH A CAPACITY OF LESS THAN 100 KW, PURSUANT TO TARIFFS FILED WITH THE COMMISSION WAS UNLAWFUL BECAUSE IT EXCEEDED AVOIDED COST. THE TARIFFS WERE FILED TO COMPLY WITH COMMISSION ORDERS. STAFF HAS EXAMINED THE RECORD IN THIS MATTER AND RECOMMENDS THAT THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ESTABLISH A LAWFUL RATE WITHOUT REOPENING THIS MATTER AND HOLDING HEARINGS. AN ORDER NEEDS TO BE ISSUED. THE PORTION OF THE RATE PAID WHICH WAS FOUND UNLAWFUL IS THE CAPACITY CREDIT. SINCE THE COMMISSION STATED THAT "KANSAS ELECTRIC UTILITIES HAVE SURPLUS CAPACITY AT THIS TIME AND FOR THE FORESEEABLE FUTURE" THE CAPACITY CREDIT WAS FOUND TO EXCEED AVOIDED COST. THIS DETERMINATION WOULD CLEARLY ONLY BE APPLICABLE TO UTILITIES WHICH IN FACT ARE IN AN EXCESS CAPACITY SITUATION.

THE FACILITIES WITH A CAPACITY OF LESS THAN 100 KW ARE PRIMARILY WIND GENERATORS. THEY CANNOT BE RELIED ON TO PROVIDE POWER AT THE TIME THE UTILITY MOST NEEDS IT, SINCE THEIR OUTPUT IS CONTROLLED BY THE WIND. THE TARIFF WOULD APPLY PRIMARILY TO

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WIND-MILLS SINCE FEW OTHER FACILITIES HAVE A CAPACITY OF LESS THAN 100 KW. ALL FACILITIES MAY NEGOTIATE WITH THE UTILITY FOR A RATE. THEY ARE NOT BOUND BY THE TARIFF PAYMENT. IF IT CAN BE SHOWN THAT A UTILITY IN FACT CAN AVOID CAPACITY COSTS (THIS COULD BE THE CASE WITH DISTRIBUTION UTILITIES PARTICULARLY WITH LARGER COGENERATION FACILITIES) THEN A CAPACITY PAYMENT SHOULD BE MADE BECAUSE IT THEN IN FACT IS A PART OF THE AVOIDED COST. IT IS IN STAFF'S OPINION NOT PRACTICABLE TO GENERICALLY DETERMINE A CAPACITY CREDIT. IT MUST BE DONE ON AN INDIVIDUAL FACILITY BASIS. ALL AGREEMENTS REACHED BETWEEN COGENERATORS AND UTILITIES SHOULD BE REVIEWED BY STAFF TO ASCERTAIN THAT THEY ARE NOT CONTRARY TO THE PUBLIC INTEREST.

THE PRESENT FUEL COST PAYMENT CONSISTS OF THE ECA BASE AND ECA ADJUSTMENT AVERAGED FOR THE MONTH. (FOR DISTRIBUTION COOPS THE ECA BASE OF THE POWER SUPPLIER PLUS THE ECA IS USED.) IF TIME-DIFFERENTIATED METERS WERE INSTALLED THE PRODUCER COULD BE PAYED ON THAT BASIS. SUCH METERING EQUIPMENT IS, HOWEVER, EXPENSIVE. STAFF RECOMMENDS THAT ANY CUSTOMER WHO IS WILLING TO PURCHASE A TIME-DIFFERENTIATED METER SHOULD BE ALLOWED TO BE PAID FOR THE FUEL COSTS AVOIDED BY THE UTILITY AT THE TIME WHEN THE COGENERATOR PROVIDED POWER. THIS SHOULD BE TRUE AVOIDED COST. STAFF RECOMMENDS THAT AN ORDER BE ISSUED IN WHICH THE UTILITIES BE INFORMED THAT THEY MAY REFILE THEIR COGENERATION TARIFFS PROVIDING FOR PAYMENT OF FUEL COST ONLY AND INCLUDING THE PROVISION FOR USE OF A TIME DIFFERENTIATED METER. ONE FILING, WHICH DELETES THE CAPACITY CREDIT, HAS BEEN RECEIVED AND NEEDS TO BE ACTED ON SHORTLY. PLEASE LET US KNOW IF YOU HAVE ANY QUESTIONS.

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SUMMARY OF TESTIMONY

Before the Senate Transportation and Utilities Committee

SENATE BILL 318

Presented by the Kansas Highway Patrol
(Sergeant William A. Jacobs)

March 5, 1985

The Patrol requested introduction of Senate Bill 318 and urges favorable consideration of the bill.

The bill concept is simply to require persons who are hauling weight in excess of their registered gross weight limitation to properly register their vehicles for the proper classification needed for their particular needs.

The bill as written would require the owner or operator of a vehicle in violation of their maximum gross weight to pay the difference in the cost of their registered weight and the weight at which they were actually operating plus an additional $75.00 fine. The fine is intended to be a deterrent to violation of the registration laws and an incentive to voluntary compliance. It would make it less lucrative for an owner/operator to intentionally under-register their maximum gross weight limitation to save the cost of a higher weight limit.

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