Approved 2-21-02
Date

MINUTES OF THE SENATE UTILITIES COMMITTEE.

The meeting was called to order by Chairperson Senator Stan Clark at 9:30 a.m. on February 6, 2002 in Room 231-N of the Capitol.

All members were present except:

Committee staff present: Bruce Kinzie, Revisor of Statutes
Raney Gilliland, Legislative Research
Emalene Correll, Legislative Research

Conferees appearing before the committee:
Stewart Lowry, Kansas Electric Cooperatives
Colin Hansen, Kansas Municipal Utilities
Kim Gulley, League of Kansas Municipalities
Jim Flaherty, Legal Counsel, Utilicorp United

Others attending:

Introduction of Bills

Steve Kearney representing Southwest Kansas Irrigation Association requested introduction of a bill establishing the rural Kansas self-help gas act.

Moved by Senator Emler, seconded by Senator Taddiken, request introduction of bill establishing the rural Kansas self-help gas act. Motion carried.

Mark Schreiber of Westar Energy provided draft moratorium language for a bill. (Attachment 1)

Moved by Senator Taddiken, seconded by Senator Emler, request introduction of bill with language as set forth in draft moratorium language attachment. Motion carried.

Steve Johnson of Kansas Gas Service presented a request for bill introduction on Termination of Service Rights for a Retailer of Natural Gas by a City. (Attachment 2)

Moved by Senator Barone, seconded by Senator Emler, request introduction of bill on Termination of Service Rights for a Retailer of Natural Gas by a City. Motion carried.

The Chairman opened the hearing on:

SB 480 - Retail electric suppliers; service rights in area annexed by city; procedures; compensation when service rights are terminated.

Proponents:

Stewart Lowry, Kansas Electric Cooperatives, noted **S.B. 480** addresses the question of who provides electric supply when a city annexes land and modifies one provision of the compensation formula that is applied when an existing utility is displaced by a decision of the city following a municipal annexation. He urged passage of **SB 480** as presented. (Attachment 3)

Colin Hansen, Kansas Municipal Utilities, presented his testimony favoring **SB 480** without change. (Attachment 4)

Kim Gulley of League of Kansas Municipalities, spoke in support of **SB 480** (Attachment 5)

MINUTES OF THE SENATE UTILITIES COMMITTEE at on February 6, 2002 in Room 231-N of the Capitol.

Written testimony was received from:

Leslie Kaufman, Kansas Farm Bureau (Attachment 6)
Joe Lieber, Kansas Cooperative Council (Attachment 7)
Doug Lawrence, Westar Energy (Attachment 8)
Whitney Damron, Empire District Electric Company (Attachment 9)

Opponents:

Jim Flaherty, Legal Counsel, Utilicorp United, noted that the inclusion of factors on "the rates of the suppliers", "economic impact on the suppliers" and the "impact on the customers of the suppliers" results in the validation of discriminatory pricing practices by the unregulated electric cooperatives which is contrary to Kansas and federal anti-trust and unfair competition laws. He addressed each of these concerns in more detail and suggested additional language should be included in the bill if the rate factors remain. (Attachment 10)

Chair closed the hearing on **SB 480** and opened for discussion.

Approval of minutes

Moved by Senator Emler, seconded by Senator Brownlee, approval of the minutes of the joint meetings of the Senate and House Utilities Committees held on January 15, 2002, January 16, 2002, January 23, 2002, January 24, 2002, January 28, 2002, January 29, 2002 and January 31, 2002. Motion carried

Next meeting of the Senate Utilities Committee will be on Monday, February 11, 2002.

Adjournment.

Respectfully submittted,

Ann McMorris
Secretary

Attachments - 10

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **FEBRUARY 6, 2002**

Name	Representing
	UtiliCorp United
	✓ ✓
JAMES G. FLAHERTY	✓ ✓
Nick Heiman	
Jack Glaves	Panbella - Wash. - Kinder Morgan
STUART LOWRY	KANSAS ELECTRIC COOPERATIVES
MARK SCHREIBER	Westar Energy
Mitch Damron	KS Gas Service
Galen E. Biery	KGS
	K G U
WALKER HENDRIX	CURB
Allen Miller	Prairie Land Electric Coop.
Don Wellings	DSTO Rural Electr. Coop
	Bluestem Elect. Coop.
	Kansas Electric Coops.
	KEC

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **FEBRUARY 6, 2002**

Name	Representing
Scott Schneider	GTBBA
Leslie Kaufman	KFB
Dan Campbell	MW Energy, Inc.

Draft Moratorium Language

Section 1. Prior to July 1, 2003, all municipalities in the state of Kansas shall refrain from enacting or enforcing any franchise or right-of-way ordinances or agreements pursuant to chapters 12 and 17 of the Kansas Statutes Annotated, home rule powers, or any other authority, and from modifying the implementation and enforcement of such ordinances and agreements, in a manner which substantially modifies the relationship between public utilities and municipalities as those relationships existed on January 1, 2002, except that municipalities may reach franchise or right-of-way ordinances or agreements with new public utilities on terms and conditions consistent with the original provisions of ordinances or agreements between municipalities and other public utilities in existence prior to December 31, 2001. Subsequent to the effective date of this act, representatives of municipalities and public utilities shall confer and shall provide to the joint committee on economic development at least three progress reports of their discussions prior to December 31, 2002.

Westar Energy™

MARK SCHREIBER
Senior Manager, Government Affairs

818 South Kansas Avenue / P.O. Box 889 / Topeka, Kansas 66601
Telephone: (785) 575-8369 / Fax: (785) 575-8119
Pager: (800) 862-0399 Pin 17307853 / Mobile: (785) 230-0897
Internet: mark_schreiber@wr.com

Senate Utilities Committee
February 6, 2002
Attachment 1-1

KANSAS GAS SERVICE
A DIVISION OF ONEOK

REQUEST FOR BILL INTRODUCTION

TO: The Honorable Stan Clark, Chairman
And Members Of The
Senate Committee on Utilities

FROM: Mr. Steve Johnson
Executive Director of Corporate Relations
Kansas Gas Service
7421 West 129th Street
Overland Park, Kansas 66213
(913) 319-8604 (913) 319-8606 (FAX)

RE: Request for Bill Introduction:

Termination of Service Rights for a Retailer of Natural Gas by a City.

DATE: February 6, 2002

Good morning Mr. Chairman and Members of the Senate Committee on Utilities. My name is Steve Johnson and I appear before you today on behalf of Kansas Gas Service to request introduction of a bill that would amend the compensation formula for natural gas distribution facilities in the event of termination of service authority by a city.

Attached to my cover page is draft language for a bill that would amend statutes regarding compensation to a retail natural gas supplier when its service rights are terminated by a city. Our bill draft is modeled after current statutory protections provided to retail electric suppliers.

Local distribution companies, such as Kansas Gas Service, make substantial investments in infrastructure that current statutory language does not clearly and adequately take into account in the rare instance of a termination of service authority by a city. In order to insure continued investment in natural gas distribution systems that will recognize these costs, Kansas Gas Service believes this legislation is an appropriate subject matter for consideration by this Committee and we look forward to the opportunity to work with the committee and all parties affected by this proposal in efforts to update this statutory subject matter.

Our proposal was drafted by Mr. Galen Biery, Assistant General Counsel for Kansas Gas Service, and he will be available this morning to answer any questions you might have at this time.

Thank you.

Attachment

PUBLIC UTILITIES - Termination of Franchise

Termination of service rights during period when a valid franchise is in effect; facilities to be acquired; compensation; formula.

(a) When the service rights of a retail natural gas supplier are terminated by a city during the period in which a valid franchise is in effect and the service rights are assumed by the terminating city, or an entity acting on behalf of or as an agent for the city, the governing body of the city shall acquire from the terminated supplier the parts of the local natural gas distribution system necessary to serve all customers within the previously franchised area and the terminated supplier shall sell the system to the governing body of such city for which it shall be fairly compensated. Such compensation shall be an amount mutually agreed upon by the affected parties or an amount determined by the following formula:

(1) The depreciated replacement cost for the gas utility facilities in the territory in which the service rights have been terminated. As used in this paragraph, "depreciated replacement cost" means the original installed cost of the facilities, adjusted to present value by utilizing a nationally recognized index of utility construction costs, less accumulated depreciation based on the book depreciation rates of the selling utility, as filed with and approved by the state corporation commission, which are in effect at the time of acquisition;

(2) the depreciated replacement costs of the remaining proportion of any take or pay contracts or participation agreements;

(3) the depreciated replacement cost for the gas utility facilities outside the affected territory used in providing service to the formerly franchised area. Such facilities shall include all compression, regulating, or transmission facilities throughout the terminated utility's integrated system, the value of which shall be determined by the depreciated replacement cost formula in paragraph (1) multiplied by the percentage of the terminated utility's total retail sales to customers in the affected area during the 12 months next preceding the effective date of the sale;

(4) all reasonable and prudent costs of detaching the gas system facilities to be sold, including the reasonable costs of studies and inventories made to determine the facility's value and all reasonable and prudent costs of reintegrating the remaining gas system facilities of the retail gas supplier whose service rights are terminated;

(5) an amount equal to the net revenues received during the 12 months next preceding the date of termination of the service rights from the customers within the affected area of the retail gas supplier whose service rights are terminated. As used in this paragraph, "net revenues" means the total revenues received by the terminated utility for gas service within the affected area less franchise and sales taxes collected; the cost of gas recovered in the revenues; and labor, maintenance, administration, and insurance. This number shall be multiplied by the number of years remaining in any franchise contract; and

(6) an amount equal to the state and federal tax liability created by the taxable income pursuant to the provisions of this paragraph and paragraphs (1), (2), (3), (4), and (5) by the retail gas supplier whose service rights are terminated, calculated without regard to any tax deductions or benefits not related to the sale of assets covered herein.

(b) If the parties are unable to agree upon the amount of compensation to be paid pursuant to this act after 60 days following the date of termination of service rights, either party may apply to the district court having jurisdiction where any portion of the facilities is located for determination of compensation. Such determination shall be made by the court sitting without a jury.

Clause to be added to K.S.A. 12-811

Compensation of private retail natural gas supplier for certain natural gas system facilities acquired by city. In addition to the fair cash value of any plant and appurtenance thereto determined pursuant to K.S.A. 12-811, a retail natural gas supplier whose service rights have expired by reason of failure of the renewal of a valid franchise shall be entitled to compensation for all reasonable and prudent costs of detaching the gas system facilities to be sold and all reasonable and prudent costs of reintegrating the remaining gas system facilities of such retail gas supplies less the value of all gas system facilities replaced by the new facilities required for the reintegration of the remaining gas system facilities, plus an amount equal to the gross revenues received from the customers within the affected area during the 12 months next preceding the date of expiration of the most recent valid franchise, less taxes.

Senate Utilities Committee

Testimony of
Kansas Electric Cooperatives, Inc.

SB 480

Good morning, Mr. Chairman and members of the Committee. My name is Stuart Lowry and I am Corporate Counsel for Kansas Electric Cooperatives, the statewide association representing the interests of rural electric cooperatives in Kansas. I appear before you today to testify in support of Senate Bill 480. Also appearing with me today are Barry Hart, the Executive Vice President of Kansas Electric Cooperatives, Inc., and Jon Miles, Vice President of Governmental Affairs.

As some of you are aware, SB 480 amends certain provisions of the Retail Electric Suppliers Act, K.S.A. 66-1,170, et seq. The amendments contained in the bill are the product of negotiations by and among KEC (including KEPCo and Sunflower); Kansas Municipal Utilities; the League of Kansas Municipalities; Westar Energy; Kansas City, KS, Board of Public Utilities; Midwest Energy; Empire District Electric; Kansas City Power and Light; and UtiliCorp United. These utilities were directed to begin negotiations on changes to the Retail Electric Suppliers Act following a hearing of the Legislative Interim Utilities Committee on August 20, 2001. The utilities held four negotiating sessions and exchanged proposals via email between negotiating sessions. The end result of those negotiations is the bill you have before you today. This bill was recommended for favorable consideration in the report of the Interim Utilities Committee.

The bill addresses the question of who provides electric supply when a city annexes land. The bill establishes a procedure for the city and affected utilities to follow in determining who will provide electric service in the annexed area. Potentially, the service could be provided by

either a utility holding franchise in that city or by a utility holding a certificate of convenience issued by the Kansas Corporation Commission but no franchise at the time of the annexation. In choosing between the two electric suppliers, the city will use at least nine standards in its consideration, including but not limited to: 1) the public convenience and necessity; 2) the rates of the various suppliers; 3) the desires of the customers to be served; 4) the economic impact on the supplier; 5) the economic impact on the customer of the supplier; 6) the utility's operational ability to serve the annexed area; 7) avoiding the wasteful duplication of facilities; 8) avoiding unnecessary encumbrance on the landscape; and 9) preventing the waste of materials and natural resources. You will recognize some of these standards as being part of the original statement of purpose contained in the Retail Electric Suppliers Act. The bill also provides that a party aggrieved by any decision of the city in this process may appeal the decision to the district court in which the city is located.

The bill also modifies one provision of the compensation formula that is applied when an existing utility is displaced by a decision of the city following a municipal annexation. The compensation formula would be changed to provide for a payment of two times the gross revenues attributable to the customers in the terminated territory during the twelve months preceding the date of transfer of service. Similar changes in this compensation formula are included in K.S.A. 66-1176b, which addresses the termination of service rights by a city when a franchise is in effect.

KEC supports this bill. It benefits electric suppliers to be able to utilize known standards in negotiating municipal franchises and it benefits cities if multiple suppliers sharpen their pencils to secure the ability to serve within a city. The judicial review procedure encourages all

parties to act in good faith and to make reasonable decisions based on the proposals presented. The proposed amendments do not prohibit or even discourage municipal annexation.

The parties to the negotiation are in agreement with the bill presented to you with two exceptions: KCP&L remains neutral on the bill, and UtiliCorp opposed a few provisions. As with any negotiations, each party perhaps gave up something dear to them and perhaps gained something in return. But the parties have done as the Interim Utilities Committee directed and have fashioned a compromise. It is our hope that this committee will see fit to approve that compromise and will pass Senate Bill 480 as presented.

I will be happy to stand for any questions that you may have.

kansasmunicipalutilities

Testimony before the

Senate Utilities Committee

February 6, 2002

Colin Hansen
Executive Director
Kansas Municipal Utilities

Senate Bill 480 – Retail Electric Suppliers Land Annexation Act

On August 20, 2001, Kansas Municipal Utilities (KMU) testified before the Interim Special Committee on Utilities that the modification of existing municipal annexation statutes would be a mistake. As we pointed out last summer, current service territory provisions were developed through a consensus process whereby the only opportunity for the natural growth of municipal electric utilities is through the annexation process.

We also illustrated that these laws, enacted in 1976, have not harmed the rural electric cooperatives (RECs) or investor-owned utilities (IOUs). The total number of customers served by RECs grew by 26.0% between 1980 and 1999. The IOUs grew 29.1% during that same period. Meanwhile, municipal electric utilities grew at only a 4.1% rate.

During that same interim session hearing, KMU agreed to meet with other stakeholders in the electric industry to discuss the concerns of the cooperatives and genuinely search for a compromise solution. After several meetings, the group settled upon legislation that each entity could take to its governing body. That compromise language is provided in SB 480.

The governing body of Kansas Municipal Utilities is a board of directors made up of 26 city managers, utility superintendents, and policymakers from the association's 154 member communities. After lengthy deliberation – particularly concerning the bill's compensation language – the board agreed to the compromise language struck in the meetings. KMU supports SB 480.

Municipal electric utilities are making a significant sacrifice in their support of this bill. We consider the addition of both a notification provision and factors of consideration in selecting the supplier to a newly annexed area to be a just and reasonable response to valid REC concerns. The compensation provision, by which a municipal electric utility would now double its payment to the annexed supplier for the utility's existing customers, was more difficult to accept. However, the KMU board accepted the language and hopes this bill will solve for good the persistently thorny issue of electric service territory, so that we might move on in a spirit of cooperation with the other sectors of the electric industry.

KMU supports the negotiated agreement reflected in SB 480. As a consensus process, we would oppose attempts to significantly modify the intent of the legislation as agreed to by the industry stakeholder group.

421 N. Main, Suite 3 • McPherson, KS 67460-3434 • 620.241.1423 p
email - kmu@kmunet.org • www.kmunet.org

Senate Utilities Committee
February 6, 2002
Attachment 4-1

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

To: Senate Utilities Committee
From: Kim Gulley, Director of Policy Development & Communications
Date: February 6, 2002
Re: Support for SB 480

Thank you for allowing me to appear on behalf of the League of Kansas Municipalities and our member cities. We are happy to appear today in support of SB 480.

This is a compromise piece of legislation introduced at the request of the rural electric cooperatives in Kansas. During the interim session, the coops expressed concern over city franchise issues as they related to certain annexations. We were given the opportunity by the interim committee Chairman to sit down and discuss these issues. Representatives of cities met with representatives from the coops and other members of the electric industry over several months to discuss these issues.

I believe that those discussions were very important in helping all of us who participated to better understand each other's concerns. As a direct result of those informal discussions, we were able to reach agreement on the compromise piece of legislation that you have before you today. I am also pleased to report that the League Governing Body considered this proposal on two separate occasions during our policy process last fall, and endorsed its provisions.

We believe that section 1 of the bill, which sets out a new administrative procedure when a city annexes land within the certified territory of a retail electric supplier, will serve as a road map for such annexation. It is our intent and hope that this process will prove to be both understandable and fair for all parties involved.

Section 2 of the bill does not have a direct effect on non-MEU cities. In the case of a city that does not own its own electric utility, the compensation due under this section would be paid by the electric utility which receives the franchise for the annexed area. The cities in Kansas that do own an electric utility would be affected by this portion of the bill. The League Governing Body deferred to the judgment of the member cities of Kansas Municipal Utilities in this area. It is our understanding that KMU has signed off on this portion of the bill.

The League appreciates the opportunity to sit down with the parties concerned in this area to work out a compromise. As with any compromise, there was a give and take. Therefore, any alterations to the compromise at this point could jeopardize the support of individual organizations or companies. We, therefore, urge your support and favorable action for SB 480 as written and without amendment.

Senate Utilities Committee
February 6, 2002
Attachment 5-1

Kansas Farm Bureau
2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785.587.6000 • Fax 785.587.6914 • www.kfb.org
800 S.W. Jackson, Suite 817, Topeka, Kansas 66612 • 785.234.4535 • Fax 785.234.0278

PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON UTILITIES

RE: SB 480 – regarding the annexation of retail electric service territory by a municipality.

February 6, 2002
Topeka, Kansas

Presented by:
Leslie J. Kaufman, Associate Director
Public Policy Division
Kansas Farm Bureau

Chairman Clark and members of the Committee, thank you for the opportunity to comment on SB 480. I am Leslie Kaufman and I serve KFB as the Associate Director of Public Policy. We support the concept of establishing a mechanism to provide retail electric suppliers, particularly rural electric cooperatives, the opportunity to maintain service territory despite geographical annexation by a municipality.

The rural electric cooperative is an essential service provider to many areas of the state. Historically, the REC brought electric power to many areas where other providers were slow to enter the market. As such, the local REC has played in important role in rural Kansas.

The ability to maintain service territory is vitally important to the ongoing operation of cooperatives. When service area is removed from the REC's territory, costs are spread over a smaller population.

American Farm Bureau Policy states, *"Public utilities and cooperatives should not be required to give up territories in established service areas when municipalities expand into those areas through annexation."* As we understand it, SB 480 replaces the current procedures related to annexation with a process that should help insure the current retail electric supplier (cooperative) has a greater opportunity to be retained as the service provider in an area that has been annexed by the municipality.

Although our policy would seek to prevent involuntary loss of service territory all together, the system proposed in SB 480 is superior to the current one. As such, we encourage the Committee to act favorably on this measure. Thank you.

Kansas Farm Bureau represents grassroots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.

Testimony on SB 480
Senate Utilities Committee
February 6, 2002
Prepared by Joe Lieber
Kansas Cooperative Council

Mr. Chairman and members of the committee, I'm Joe Lieber, President of the Kansas Cooperative Council. The Council has a membership of over 200 cooperative businesses, who have a combined membership of nearly 200,000 Kansans. Twenty one of our members are electric cooperatives.

The Council supports SB 480.

It is our understanding that the electric utilities met last fall and worked out a compromise to resolve the annexation and territory issue. The language in SB 480 is a result of that compromise.

The Kansas Cooperative Council feels that is important, not only to Kansas Cooperatives, but to all rural Kansans that SB 480 be passed as proposed.

Thank you.

Westar Energy™

Written testimony provided to the
House Utilities Committee
By
Doug Lawrence, Vice President, Public Affairs
Westar Energy
February 6, 2002

Westar Energy supports Senate Bill 480. As part of this summer's interim study of the territory issue involving annexations under the Retail Electric Supplier's Act, Westar Energy participated in a series of negotiations involving the Kansas Electric Cooperatives, the League of Municipalities, Kansas Municipal Utilities and many of the state's investor-owned utilities.

At the start of this process, there was a great deal of skepticism that a compromise could be worked out on this controversial subject. Indeed, previous legislative considerations of the territory issue RESA have been difficult at best.

All parties worked diligently on a compromise in an atmosphere of cooperation. Special credit for a successful compromise should be given to the League of Municipalities, the KEC and KMU.

As with any compromise, everyone has something to dislike in this legislative package. Ultimately the bill represents a fair solution to a nagging problem. In the spirit of the extraordinary effort necessary to bring you this legislation, Westar Energy brings its support and encourages you to approve this legislation.

Senate Utilities Committee
February 6, 2002
Attachment 8

818 South Kansas Avenue / P.O. Box 889 / Topeka, Kansas 66601
Office Telephone: (785) 575-6300

WHITNEY B. DAMRON, P.A.
800 SW JACKSON STREET, SUITE 1100
TOPEKA, KANSAS 66612-2205
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E-MAIL: WBDAMRON@aol.com

SUBMITTED TESTIMONY

TO: The Honorable Stan Clark, Chairman
And Members Of The
Senate Committee on Utilities

FROM: Whitney Damron
One Behalf Of
The Empire District Electric Company

RE: SB 480 – An Act Concerning Retail Electric Suppliers.

DATE: February 6, 2002

Mr. Chairman and Members of the Senate Committee on Utilities:

On behalf of The Empire District Electric Company, I am pleased to submit this testimony to the Committee today in support of SB 480 that amends the procedures and the compensation rate for electric service providers in cases where a city annexes land that affects existing service provider territories.

Empire has tracked this issue since the 2001 interim committee process and was invited to participate with the Kansas Electric Cooperatives and other electric service providers during the summer and fall of 2001 in a deliberative process designed to work out differences among the parties. Empire participated in these meetings and is supportive of the final work product embodied in SB 480.

By way of information, Empire is a Kansas Corporation headquartered in Joplin, Missouri. The Company has approximately 10,000 customers in far southeast Kansas, with a total of 150,000 customers in Missouri, Arkansas, Oklahoma and Kansas. Empire is traded on the New York Stock Exchange under the ticker symbol "EDE".

Thank you.

TESTIMONY OF JAMES G. FLAHERTY
ON BEHALF OF UTILICORP UNITED INC.
BEFORE THE SENATE UTILITIES COMMITTEE
IN OPPOSITION TO SENATE BILL 480

I. INTRODUCTION

My name is Jim Flaherty. I am an attorney from Ottawa, Kansas. I represent UtiliCorp United, Inc., (UtiliCorp) before the Kansas Corporation Commission (Commission). I appear today on behalf of UtiliCorp in opposition to Senate Bill 480.

This past fall and winter an industry task force met to address concerns raised by the Rural Electric Cooperatives (REC) regarding the Retail Electric Suppliers Act (RESA). UtiliCorp fully participated in that task force. REC claimed that there were deficiencies in the process set forth in RESA relating to a city's selection of a retail electric supplier in an area annexed by the city. REC proposed several factors which it wanted the city to consider in its selection process. One of the factors was the "rates of the suppliers" which were requesting to serve the annexed area. Other factors included the "economic impact on the suppliers" and the "impact on the customers of the suppliers." UtiliCorp opposes the inclusion of these three factors because they will have the effect of sanctioning unfair competition between the unregulated electric cooperatives and the regulated investor owned electric utilities. The inclusion of these factors also results in the validation of discriminatory pricing practices by the unregulated electric cooperatives, which is contrary to Kansas and federal anti-trust and unfair competition laws. I would like to address each of these concerns in more detail. I would also like to suggest a modification to the bill, which would address these concerns.

II. UNFAIR COMPETITION

Under current law, the electric rates charged by rural electric cooperatives are not regulated

by the Commission. This means that rural electric cooperatives in Kansas can change their rates at any time without the approval from the Commission. It also means that rural electric cooperatives do not have to charge similarly situated customers the same rate.

The electric rates charged by investor owned electric suppliers, on the other hand, are fully regulated by the Commission. This means that companies like UtiliCorp can only change their rates after receiving permission from the Commission. It also means that companies like UtiliCorp are prohibited from charging similarly situated customers different rates.

In most cases, the fact that electric cooperative rates are unregulated and investor owned utility rates are regulated is not a problem. This is because RESA has precluded competition for service territory between the unregulated cooperatives and the regulated investor owned utilities. However, from time to time cities and towns in Kansas, which are served by investor owned utilities like UtiliCorp will annex territory, which is certificated to a rural electric cooperative. This situation often results in a dispute as to whether the investor owned utility or the rural electric cooperative should be selected by the city or town to serve the customers in the annexed territory. Routinely, under the current law, the cities and towns have selected the investor owned utility, which is serving the other portions of the city or town, to serve the annexed territory. Typically, selection of the incumbent utility is done to promote consistent service and rates throughout the entire city, including the newly annexed areas of the city.

The proposed bill would require cities and towns to consider the electric rates of the rural electric cooperative and the investor owned utility in determining which company should serve the annexed area. Although the current law does not preclude the cities and towns from considering the rates of the electric suppliers in selecting a supplier to serve the annexed territory, the current law does

not require cities and towns to consider electric rates of the suppliers. UtiliCorp objects to the inclusion of this factor because it will result in the sanctioning of unfair competition between the electric cooperative and the investor owned utility.

Because a rural electric cooperative's rates are unregulated, and the cooperatives are not required by law to charge similarly situated customers the same rates, there is nothing to preclude the cooperative from reducing rates for customers in the annexed territory below what it charges its other customers in the surrounding area in order to successfully obtain the franchise from the city to serve the annexed territory.

Because the investor owned utility's rates are regulated by the Commission, and the investor owned utility is precluded by law from charging similarly situated customers different rates, it is unable to reduce rates for customers in the annexed territory below what it charges its other customers in the area in order to compete against the rural electric cooperative for the franchise in the annexed territory. This is what causes the unfair competition to occur in the annexed area.

Let me give an example. Let's assume the City of Liberal, Kansas desires to annex some land. UtiliCorp currently has a franchise to serve the City of Liberal. The annexed land is currently certificated to CMS rural electric cooperative. CMS serves in Seward County, but CMS does not have a franchise from Liberal, and therefore, under the current law, is required to obtain a franchise from Liberal in order to serve customers in the annexed territory. If both UtiliCorp and CMS had rates which were regulated by the Commission, and were both required by law to charge all similarly situated customers on their systems the same rates, which is the way it was when RESA was enacted, then there is a level playing field and no concern over unfair competition. However, because UtiliCorp's rates are regulated, and UtiliCorp is precluded by law from charging customers in one part

of Liberal one rate and customers in the newly annexed areas of Liberal a reduced rate, it is unable to fairly compete with CMS because CMS' rates are unregulated, and CMS is not precluded by law from charging customers located immediately adjacent to Liberal one rate and customers in the newly annexed areas of Liberal a reduced rate.

By requiring a city or town to specifically consider the rates of electric suppliers, the proposed legislation is sanctioning use of discriminatory rates by rural electric cooperatives in annexed territories and is promoting unfair competition.

III. INCLUSION OF RATE FACTOR PERMITS DISCRIMINATORY PRICING WHICH IS INCONSISTENT WITH EXISTING KANSAS AND FEDERAL ANTI-TRUST AND UNFAIR COMPETITION LAWS

Under applicable Kansas and federal anti-trust and unfair competition laws, it is not permissible to offer a commodity, which would include the sale of electricity, for a lower price in one community than what is charged in another community for the purpose of limiting or destroying competition. K.S.A. 2001 Supp. 50-149 provides that any person engaged in the distribution or sale of a commodity that intentionally, for the purpose of destroying competition sells the commodity for a lower price in one Kansas community than another is guilty of unfair competition. K.S.A. 2001 Supp. 50-149 does not apply to companies that are regulated. If the rural electric cooperatives lowers or reduces electric rates in the annexed territory in an attempt to obtain monopoly service rights in a newly annexed service territory, whereby customers in the annexed area are charged a rate which is lower than the rate the cooperative is charging customers in the area adjacent to the annexed area, then the rural electric cooperative is in violation of Kansas discriminatory pricing laws.

Pricing discrimination and attempted monopolization are also prohibited under the federal

Clayton and Sherman Acts. The Clayton Act generally prohibits price discrimination in the sale of a commodity that has the effect of substantially reducing competition. The Sherman Act prohibits predatory pricing.

Inclusion of the rate factor in the proposed bill will have the effect of sanctioning unfair competition and discriminatory pricing which is inconsistent with current state and federal anti-trust and unfair competition laws. For these reasons, UtiliCorp is opposed to the bill if those factors remain in the bill.

IV. ADDITIONAL LANGUAGE SHOULD BE INCLUDED IN BILL IF RATE FACTORS REMAIN IN THE BILL

Not only are the rural electric cooperatives' rates unregulated by the Commission, it has proven very difficult, if not impossible, even for a member of the cooperative, to obtain a publication of the rates charged by the cooperative. Access to the cooperatives' rates is restricted. Investor owned utilities' rates, on the other hand, are published and on file with the Commission. Access to those rates is universal. Obviously, the fact that the cooperatives' rates are not available to the public, while the investor owned utilities' rates are available to the public, also promotes unfair competition. It also makes it very difficult to determine if the cooperative is violating discriminatory pricing laws in order to obtain a monopoly in the annexed territory.

If the rate factors remain in the bill, UtiliCorp would respectfully request that the following provisions also be added to the bill to assure that discriminatory pricing laws are not violated:

(1) The bill should include a provision which requires the electric rates proposed by an retail electric supplier to be charged in the annexed area and the electric rates currently charged by that supplier to customers in adjacent areas be published in the official county

newspaper in which the annexed area is located at some point during the negotiation process with the city.

(2) The bill should include a provision that requires that the electric rates offered in the newly annexed service area cannot differ materially from the electric rates offered by the retail electric supplier to customers in adjacent areas for similar service.

(3) Rural electric cooperatives seeking a franchise in any annexed territory should be required to publish all of its rates for electric service at least once every year, and whenever those rates changed, in the official county newspaper in which the annexed area is located.

V. CONCLUSION

For the reasons which I have outlined in this testimony, UtiliCorp opposes this bill and would request that it not be passed by this Committee. I would be happy to address any questions concerning this testimony and UtiliCorp's opposition to this bill.

ture whatever, each day of its continuance shall be deemed a separate offense.

History: L. 1887, ch. 175, § 1; R.S. 1923, 50-136; L. 2000, ch. 136, § 17; July 1.

50-137. Same; damages to persons injured by such actions. In case any grain dealer or dealers or any person or persons subject to the provisions of this act, shall do or cause to be done or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such grain dealer or grain dealers or any other person or persons shall be liable to the person or persons injured thereby to the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with reasonable attorney fees, to be fixed by the court in every case of recovery, which attorney fees shall be taxed and collected as a part of the costs in the case.

History: L. 1887, ch. 175, § 2; R.S. 1923, 50-137; L. 2000, ch. 136, § 18; July 1.

50-138.

History: L. 1887, ch. 175, § 3; R.S. 1923, 50-138; Repealed, L. 2000, ch. 136, § 28; July 1.

50-139. Actions brought under act; brought pursuant to chapter 60. All actions brought to enforce this act shall be brought pursuant to chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

History: L. 1907, ch. 259, § 1; R.S. 1923, 50-139; L. 2000, ch. 136, § 19; July 1.

50-140 to 50-144.

History: L. 1907, ch. 259, §§ 2 to 6; R.S. 1923, §§ 50-140 to 50-144; Repealed, L. 2000, ch. 136, § 28; July 1.

50-145.

History: L. 1909, ch. 261, § 1; R.S. 1923, 50-145; Repealed, L. 2000, ch. 136, § 28; July 1.

50-146.

History: L. 1909, ch. 261, § 2; R.S. 1923, 50-146; Repealed, L. 2000, ch. 136, § 28; July 1.

50-148. Trade and person defined. As used in this act: (a) "Trade" means the business of buying or selling any commodity of general use within the state; and

(b) "person" or "persons" includes individuals, corporations, limited liability companies, general partnerships, limited partnerships, firms, companies, voluntary associations and other associations or business entities, existing under or authorized by the state of Kansas, or the laws of any other state, territory, or foreign country. The provisions of this act shall not apply to persons whose business is under the supervision and control of the state corporation commission or the banking department.

History: L. 1915, ch. 368, § 1; R.S. 1923, 50-148; L. 2000, ch. 136, § 20; July 1.

50-149. Unfair discriminations. Any person, foreign or domestic, doing business in the state of Kansas, and engaged in the production, manufacture, distribution, sale or purchase of any commodity in general use, that shall intentionally for the purpose of destroying competition, discriminate between the different sections, communities, or cities of this state, by buying at a higher rate or selling at a lower rate, any such commodity, in one section, community or city, or any portion thereof, than is charged or paid for such commodity in other section, community, or city, after equalizing the distance from the point of production to the factory, for distribution, and freight rates therefrom, shall be in violation with the provisions of this act.

History: L. 1915, ch. 368, § 2; R.S. 1923, 50-149; L. 2000, ch. 136, § 21; July 1.

CASE ANNOTATIONS

2. Whether state law recognizes an implied private cause of action for unfair discrimination in trade discussed. Cease v. Safelite Glass Corp., 911 F.Supp. 477, 479 (1995).

50-150 to 50-152.

History: L. 1915, ch. 368, §§ 3 to 5; R.S. 1923, 50-150 to 50-152; Repealed, L. 2000, ch. 136, § 28; July 1.

CASE ANNOTATIONS

1. Whether state law recognizes an implied private cause of action for unfair discrimination in trade discussed. Cease v. Safelite Glass Corp., 911 F.Supp. 477, 480 (1995).

50-153. Attorney general powers and duties; enforcement of act. (a) Whenever the attorney general has reason to believe that any provision of this act has been violated or that any announced conduct of two or more business entities, announced by an authorized agent of one such business entity in which the combined annual gross sales of such business entities involved exceed $500,000,000, will substantially lessen competition or tend to create a monopoly in violation of this act, the attorney general, or any dep-

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