KANSAS GAS AND ELECTRIC COMPANY

October 23, 1985

WILSON K. CADMAN
CHAIRMAN OF THE BOARD AND PRESIDENT

Mr W J Dircks
Executive Director-Operations
U S Nuclear Regulatory Commission
c/o Maryland National Bank Building
7735 Old Georgetown Road
Bethesda, Maryland 20555

KMLNRC 85-237
Re: Docket #STN 50-482
Subject: Rate Order Effect on Wolf Creek

Dear Bill:

We received a very disappointing rate order from the Kansas Corporation Commission concerning the Wolf Creek nuclear station on September 27, 1985. I am quite sure you are aware of this development due to the attendant national publicity. The purpose of this letter is to assure your office that Kansas Gas and Electric Company, as the licensee of the plant, fully understands its responsibilities to operate the plant in a safe and responsible way and in accordance with all NRC requirements.

While it will be necessary for us to reduce expenditure levels, such reductions will not be done in a manner that affects the safe operation of Wolf Creek. We will continue to maintain a staff of outstanding professionals and provide all resources necessary for operation there. I have attached for your information, and highlighted, several pages of the 15,000 page Wolf Creek rate case transcript and would call your attention to the highlighting on page 3,016. Before being dismissed from the stand you will note that one of the Commissioners (Henley) asked me for specific comments on the effects which could occur as a result of cuts to the rate request. Please note my statement, "It would be necessary to cut back on all programs with one exception, we would divert our entire resources to Wolf Creek to ensure absolute safe operation there. We can cut no corners at Wolf Creek." I have also attached several pages from the rate order and would call to your attention page 99, highlighted, and page 137, highlighted.

Any budgetary cuts at the plant have been placed in categories where economies can be achieved without affecting overall plant safety. Our nuclear staff will be pleased to discuss these activities with you should you so desire.

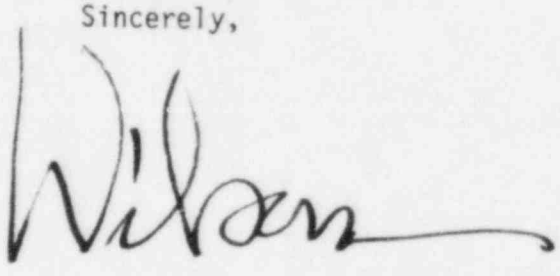
Mr W J Dircks
KMLNRC 85-237
October 23, 1985

As further assurance of our resolve, Bill, I would advise you of the following. We filed for re-hearing of the case on Monday, October 7, copy attached. You will observe we have pointed out 73 areas of deficiency in the order. The Commission has up to 70 days to act. In the event it would act unfavorably, we could take up to 30 days to prepare an appeal to the Kansas Court of Appeals. The actual time, of course, would be less. The Kansas Court of Appeals has 90 days to make a decision. Therefore, the maximum time for final review of the order would be 190 days, the minimum 110. This assumes the KCC would not require additional hearings.

During the week of October 7, along with members of our finance department and corporate planning group, I met personally with 74 security analysts and to a great extent on a one-to-one basis. During the week of October 13, we met with Duff & Phelps, a rating agency in Chicago, followed by three days in New York meeting with our investment bankers, commercial bankers, Standard & Poors, and others that have been involved in financing not only the Wolf Creek project, but other KG&E projects. We have instigated these sessions in order to share with them our financial projections and to assure them that while the KCC has left us with a challenging task, it is one that can be managed. I am pleased to report that the reaction from the investment community after numerous hours of discussion has been positive.

I hope I have left with you a definite impression that one, our resources are available and committed to the safe operation of Wolf Creek, and two, our financial situation, while challenging, is one that our studies and analyses indicate is manageable. I hope this explanation of our completed and proposed actions provides you with an insight into our plans and ability to cope with the actions of the Kansas Corporation Commission's order. Please do not hesitate to contact me for anything additional you need.

Sincerely,



WKC/jh
attachments

Their plants are dead. Wolf Creek is alive.

Q. One final question, has KG&E had any previous management experience in building an electric generation facility of any type?

MR. HAINES: That's been asked and answered.

CHAIRMAN LENNEN: Yes, it has. Sustain the objection.

MR. ANDERSON: No further questions.

THE WITNESS: Thank you, Mr. Anderson.

CHAIRMAN LENNEN: Do you anticipate extensive redirect?

MR. HAINES: I have no redirect.

CHAIRMAN LENNEN: Commissioner Henley has a question he wishes to pose.

COMMISSIONER HENLEY: Mr. Cadman, in Mr. Haines' opening statement, he made a statement to the effect, something to the effect that to adopt the Staff proposal in this case would put the company on the edge of bankruptcy. I'm not giving the exact words there, something to that effect. I'm wondering if you share that opinion, that if we were to adopt -- if this Commission were to adopt the Staff's proposal in this case, if you feel it would bankrupt your company?

THE WITNESS: Yes, I do share that opinion, Commissioner Henley.

COMMISSIONER HENLEY: And from reading your testimony, I gather, then, that you think anything short of -- you referred to it as the bear bones, the barest bones proposal, anything short of that would have a similar effect.

THE WITNESS: Yes, I believe that is a correct representation of my testimony.

COMMISSIONER HENLEY: If this Commission were to adopt the Staff proposal, what would be your first action as Chairman of KG&E?

THE WITNESS: After starting for the courthouse?

COMMISSIONER HENLEY: Yes, that's a given.

THE WITNESS: That might have been started, you know, in advance of that. Well, Commissioner, it would -- it would require a complete reassessment of what we are doing, what we would be able to do, what we could do to fulfill our requirements under our certificate of convenience and necessity, what we could do with the 100 plus cities and towns that we serve through franchises. It would be necessary to cut back on all programs with one exception, we would

divert our entire resources to Wolf Creek to ensure absolute safe operation there. We can cut no corners at Wolf Creek. All cuts would be made in personnel, in our ability to respond to storms, in our ability to be -- to provide reliable service, Wichita continues to be a good growth area. You know, I see reports that the population is not growing there as rapidly, say, as in Johnson County. I'm amazed at the level of construction and the necessity of our ability to be able to build into that, to supply new transmission facilities within the city. We would have to cut that to an absolute bear bone. Service would suffer; our customers would suffer. It would cause large layoffs. That would not -- that would be counter productive because that would cause a further deterioration of our ability to meet our obligations to the state and -- and to customers. It would be -- it would be -- it would create a very, very serious problem on the economic well-being of Southeast Kansas, its future, and it would have an impact on the State of Kansas.

COMMISSIONER HENLEY: If I were sitting out among the counsel table, I think your counsel

would probably say it was asked and answered, but I want to make certain that I understand you correctly and that is whether you're saying if this Commission were to adopt this Staff's proposal, you feel certain that KG&E would go into bankruptcy as a result of that or it's a possibility?

THE WITNESS: It would probably, saying bankruptcy, I'm sure you mean some form of reorganization under Chapter 11 as a beginning and there are no precedents for that and -- and I'm just not sure what the -- what the result might be there. I -- I do know that under -- and I'm not a lawyer except in this business these days, you have to become a sea lawyer, as I used to recall from the Navy, it would probably require considerable rate increase simply to satisfy the amount of lawyers that would be required to put together the Chapter 11 receivership, to ensure the debt of that receivership, that would be his first responsibility, as I understand it, to ensure and protect the interests of the -- of the -- of nonequity bond holders. I believe that would be the first step and without being completely

qualified on the subject, I think it would require a -- a considerable rate increase just to simply comply with the requirements of going into a Chapter 11 proceeding.

COMMISSIONER HENLEY: Thank you, Mr. Cadman.

THE WITNESS: Yes, sir.

CHAIRMAN LENNEN: I have just a couple of questions. My first one also would be objectionable if asked by counsel, and simply is in response to a comment regarding KG&E's residential rates which were properly characterized as being below the national average, the same is also true or has been, at least, since 1979, has it not, with respect to KG&E's industrial rates? I say that looking at an exhibit that was introduced on behalf of KG&E.

THE WITNESS: May I look at--(pause)

CHAIRMAN LENNEN: Certainly, it's KG&E Roen Schedule 2.

THE WITNESS: If I may, sir, I think I have one that I can--(pause)

CHAIRMAN LENNEN: Exhibit V-10.

THE WITNESS: The years again, please, Chairman?

ff is proposing the external fund method be employed by all the lf Creek partners.

13. The NRC has suggested five criteria for evaluating alternative financing mechanisms for nuclear decommissioning:

(a) degree of assurance that the funds will actually be available at the time of decommissioning,

(b) cost

(c) intergenerational equity - that the cost of decommissioning be spread equitably to all ratepayers throughout the life of the facility,

(d) flexibility - responsiveness to changes in the basic assumptions,

(e) adaptability - ability of the plan to adopt to different ownership and jurisdictional arrangements. See Wood, "Assuring the Availability of Funds for Decommissioning Nuclear Facilities," NRC Report, March, 1983.

14. In determining the appropriate funding mechanism to be employed, the testimony of the witnesses must be viewed in the context of the NRC criteria.

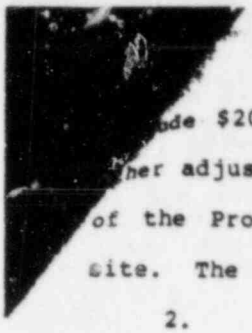
15. Applicant KG&E is, therefore, ordered to file tariffs to begin collecting its proportionate share of $140 million over a 30-year time frame for the purpose of physical decommissioning of the Wolf Creek Generating Station.

16. Applicant KG&E proposed, and staff agreed, that an external funding mechanism be created to manage and invest the decommissioning funds. Applicant KG&E is directed to immediately seek proposal, for an external funding mechanism and to submit a plan for Commission approval as soon as possible.

17. Consistent with testimony from the witnesses, the Commission will review the decommissioning component of this Order at least every three years.

VIII. WOLF CREEK O & M EXPENSE

1. Included in the application in this matter was applicant's share of the $64.9 million in Operations and Maintenance expenses projected for Wolf Creek, not including nuclear fuel expenses. In the common hearing portion of these proceedings, staff proposed two adjustments. The first was to



de $202,989 in EEI assessments for TMI cleanup costs. The her adjustment was to adjust out the salary and fringe benefits of the Project Director who no longer works on the Wolf Creek Site. The two adjustments totaled $588,564.

2. Applicant did not contest staff's adjustment and no specific adjustments were proposed by the parties. The Commission finds these adjustments appropriate and reasonable and accordingly adopts them. Applicant's share of these adjustments is $260,439. The Commission would expect staff to evaluate the actual O&M expenses in the permanent case to determine their reasonableness.

3. The Commission would make one additional observation with regard to operational and maintenance expenses of the Wolf Creek Generating Station. We have accepted the operating partner's estimate of these costs based on testimony that those sums are necessary and reasonable to insure the reliable and safe operation of the plant. We recognize that the decisions made today will place financial stress on the owners and particularly the operating partner KG&E. Under questioning by a Commissioner, Mr. Cadman stated that even under such an eventuality, no cutbacks would be made on the expenses which could affect the safe operation of Wolf Creek. The Commission agrees with Mr. Cadman that safe reliable operation of this nuclear plant is of utmost importance. We do not expect KG&E or the other owners to take any action which would raise concerns in this regard.

IX. WOLF CREEK DEPRECIATION RATE

1. Applicants in this case orignally requested a depreciation rate of 3.53 percent based on a forty-year life. The Applicants' witness, James Aikman, noted that remaining life depreciation was more appropriate than straight line rates but at the beginning of the assets life, there was no difference in the resulting rates. Staff recommended a straight line depreciation rate of 3.44 percent. As sponsored by witness Melinda Mosher,

service. In addition to minimizing its construction budget and general other expenses and rescheduling debt obligations, the Commission believes that certain specific actions are appropriate. These include elimination of its expensive television advertising campaign which appears to be primarily aimed at generating good will but seems to have the opposite effect, and reduction of its executive salaries. These items, while not substantial expenses in themselves, give an indication that company management does not recognize the seriousness of its financial condition. Elimination and reduction of these expenses would no doubt engender more goodwill than the advertising campaign itself and would indicate willingness to take necessary measures. We would emphasize, however, that reductions in these and other expenses should not affect the quality of service which the company provides. KG&E has in the past provided good service to its customers. In particular, the Commission would commend KG&E's efforts with its Project Deserve program and hopes that it will continue to promote and encourage participation in the program. Since we have made no significant adjustments to the company's requested levels for all of the system's operations and maintenance expenses, we expect good service to continue.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

1. Applicant is a public utility subject to the jurisdiction of this Commission under K.S.A. 66-117, which empowers the Commission to permit and authorize changes in Applicant's rates, charges and conditions of providing retail sale of electricity;

2. Applicant's existing rates for its electric service applicable to its Kansas jurisdictional operations will not permit applicant to earn a fair and reasonable return on its investment devoted to such service;

3. Each specific finding of fact made above is hereby adopted as an ultimate finding and conclusion of law by this Commission;

CONTROL NUMBER: 001128

NRR RECEIVED: 10/29/85

ACTION: DL, Thompson

PLEASE NOTE THE ATTACHED GREEN TICKET IS FOR APPROPRIATE ACTION. PLEASE REVIEW THIS ITEM AND DETERMINE WHETHER OR NOT YOUR DIVISION WILL TAKE ACTION. IF ACTION IS GOING TO BE TAKEN, WHAT IS AN APPROPRIATE DUE DATE? RETURN ONLY THIS COMPLETED COVER SHEET TO THE NRR MAILROOM, P-428 BY C.O.B. 10/30.

☐ NO ACTION NECESSARY

☑ YES, ACTION

DUE DATE: 11/8 (per T. Novak)

ROUTING: DENTON/EISENHUT

PPAS

P. O'Connor, Wolf Creek PM

BEFORE THE CORPORATION COMMISSION
OF KANSAS

In the matter of a general investigation by the Commission of the projected costs and related matters of the Wolf Creek Nuclear Generation Facility at Burlington, Kansas	))))	Docket No. 120,924-U
In the matter of the application of Kansas Gas and Electric Company requesting proposed changes in its charges for electric service	))))	Docket No. 84-KG&E-197-R 142,098-U

APPLICATION FOR REHEARING

COMES NOW Kansas Gas and Electric Company (KG&E), and applies for a rehearing, pursuant to K.S.A. 66-1130 and K.A.R. 82-1-235(c)(2), (3) (except KG&E does not request oral argument), and (4), with regard to the September 27, 1985, Order entered herein (Order).

Specifically, KG&E contends the Order is unreasonable and unlawful for the following reasons.

1. THE COMMISSION'S FINDINGS OF IMPRUDENCE AT PARAGRAPH 3, PAGE 32; PARAGRAPH 11, PAGE 37; PARAGRAPH 12, PAGE 38; AND PARAGRAPH 8, PAGE 42, ARE UNLAWFUL.

A. The Commission has not defined the standard used to determine whether KG&E's actions were imprudent. KG&E has the right to know the standard under which it is being judged. Although the Commission indicated that it must consider the factors listed in K.S.A. 66-128g, these factors do not define prudence or set forth the standard to be used; they are merely tools that aid in the determination of prudence.

B. The Commission's findings do not comport with the commonly accepted definition of prudence. See, e.g., New England Power Co., 31 FERC ¶61047 at 61084 (1985). The Commission failed to evaluate KG&E's actions based on what KG&E knew or should have known at the time decisions were made; failed to presume good faith on the part of KG&E; failed to

avoid the use of hindsight; and failed to focus its inquiry on the decision process rather than the end result.

2. THE COMMISSION'S FINDINGS OF IMPRUDENCE AT PARAGRAPH 3, PAGE 32; PARAGRAPH 11, PAGE 37; PARAGRAPH 12, PAGE 38; AND PARAGRAPH 8, PAGE 42, ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission's findings are not based on any articulated standard of prudence. The Commission merely stated that KG&E's actions were imprudent without indicating how it came to that decision.

3. THE COMMISSION'S FINDINGS AT PARAGRAPH 5, PAGE 19 AND PARAGRAPH 5, PAGE 25 THAT THE "MONITORING ROLE" ADOPTED BY KG&E WAS INEFFICIENT, INEFFECTIVE AND INAPPROPRIATE ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission's findings are inconsistent with other findings by the Commission that the management performance in the initial stages of the project was reasonable and appropriate and that the Owners' selection of major contractors including Bechtel and Daniel, was appropriate. (Order at 18)

B. The Commission's findings fail to consider evidence at Tr. Vol. XXX, 9015-20 that selecting experienced contractors and relying on them is appropriate; that preplanning and mobilization were effective and timely; and that the first two years of construction were accomplished with good cost and schedule performance.

4. THE COMMISSION'S FINDINGS AT PARAGRAPH 5, PAGE 19 AND PARAGRAPHS 5 AND 6, PAGE 25 THAT KG&E'S "MONITORING ROLE" CONTRIBUTED TO POOR CONTRACTOR PERFORMANCE DURING CERTAIN PHASES OF THE PROJECT, LIMITED KG&E'S ABILITY TO CONTROL COSTS, RESULTED IN POOR PRODUCTIVITY, SCHEDULE DELAY AND INCREASED COSTS ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. There is no substantial competent evidence to support these findings.

B. There is no substantial competent evidence showing a causal link between the "monitoring role" and any increases in cost or schedule delays.

C. Assuming there is a causal link between the monitoring role and increased cost and schedule delays, there is no substantial competent evidence quantifying the amount of increased cost or schedule delays that resulted from the "monitoring role". The Commission bases its findings on the testimony of Messrs. Flaherty and Mitchell (hereinafter Touche Ross). Touche Ross, however, never quantified the effects of the alleged inappropriate management. Although Dr. Ponce de Leon (hereinafter PMA) submitted a report recommending disallowance for what he alleged were cost overruns, Touche Ross did not embrace or express any opinion about PMA's quantification and PMA did not base its suggested disallowance on the findings of Touche Ross.

5. THE COMMISSION'S FINDINGS AT PARAGRAPHS 5 AND 6, PAGE 25 THAT KG&E'S LEVEL OF CONCERN AND COMMITMENT WAS NOT SUFFICIENT TO ADMINISTER A COST-PLUS CONTRACT AND THAT THE LACK OF MANAGEMENT ATTENTION RESULTED IN SCHEDULE DELAYS AND INCREASED COSTS ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. There is no substantial competent evidence to support these findings.

B. There is no substantial competent evidence that establishes a causal link between any lack of concern or attention and a finding of increased costs or schedule delays.

C. Assuming a causal link between the alleged lack of concern or attention and schedule delays and increased costs exists, there is no substantial competent evidence quantifying the resulting schedule delays and increased costs.

6. THE COMMISSION'S FINDINGS AT PARAGRAPH 11, PAGES 37-38 THAT $17,341,858 OF DIRECT AND INDIRECT COSTS SHOULD BE EXCLUDED FROM A RETURN ON AND RECOVERY OF INVESTMENT IN WOLF CREEK ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission failed to consider evidence of cost savings achieved by KG&E in constructing Wolf Creek. KG&E presented evidence in Exhibit G-KGE-1 (CLH-1) at 10, 179, 215, 227, 273, 289, showing that substantial cost savings totalling approximately $369,672,000 were achieved in the construction of the plant. Such actions as participation in SNUPPS, the use of merit shop labor, the safety program, use of preassemblies, expedited start-up procedures, and shared spare parts resulted in cost savings. The Commission in its analysis of the cost of Wolf Creek did not attempt to quantify the amount of savings or give KG&E credit for the savings achieved.

B. The Commission's analysis of individual areas of cost increase at Wolf Creek is inconsistent with its failure to consider individual cost savings.

7. THE COMMISSION'S FINDING AT PARAGRAPH 3, PAGE 32 THAT THE OWNERS ACTED IMPRUDENTLY IN NOT DEVELOPING AND UTILIZING A COST TRACKING SYSTEM THAT WOULD PROVIDE DATA TO DOCUMENT AND QUANTIFY THE CAUSES OF COST INCREASES IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission failed to consider evidence that no such cost system exists. Staff witness Flaherty testified that cost accounting systems are not intended to provide the type of information desired by the Commission. (Tr. XVII, 4980) Witnesses for both KG&E and the Staff agreed that no project in the country has ever had such a cost system. (Tr. XLVI, 10518; XVII, 4981; II, 261) Staff witness Flaherty also stated that no project in the country has a better cost system than the one at Wolf Creek. (Tr. XVII, 4985) Therefore, it is improper to penalize KG&E for not having such a system in place.

B. There is no substantial competent evidence that the lack of the type of cost system described by the Commission in any way increased the cost of constructing Wolf Creek.

8. THE COMMISSION'S FINDING AT PARAGRAPH 3, PAGE 32 THAT THE FAILURE TO HAVE A

COST SYSTEM THAT WILL DOCUMENT THE CAUSES OF COST INCREASES IS IMPRUDENT IS UNLAWFUL.

The Commission's finding is based on a standard that improperly utilizes hindsight to evaluate KG&E's actions. It is impossible to anticipate all potential causes of cost increases. KG&E could not have foreseen the myriad regulatory changes that resulted from such occurrences as the incident at TMI. KG&E could not have had in place a cost system to gather the type of data that would quantify the effect of every regulatory change that affected the project. The perceived necessity to track and quantify changes resulting from regulatory change has arisen only recently. A finding that KG&E should have been tracking costs at the level of detail now described by the Commission is a retroactive requirement that involves the use of hindsight.

9. THE COMMISSION'S FINDING AT PARAGRAPH 11, PAGE 37 THAT A TOTAL OF 1,828,262 DIRECT MANHOURS WERE IMPRUDENTLY INCURRED IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

The Commission failed to consider the effect that regulatory change had on the cost of Wolf Creek. No witness in the proceedings challenged the fact that changes in the Nuclear Regulatory Commission's regulations governing construction of the plant caused costs to increase significantly. KG&E presented evidence that regulatory change accounted for 58% of the cost increase. (Tr. I, 156) Intervenor witness Komanoff testified that 60% of the increase in cost was due to regulatory change. (Tr. XXXIV, 10046-49) The Commission did not discuss the impact on costs of regulatory change anywhere in its Order.

10. THE COMMISSION'S FINDINGS AT PARAGRAPH 10, PAGE 35 THAT PMA USED SOUND METHODOLOGY IN ITS ANALYSIS OF THE COST INCREASES AT WOLF CREEK AND THAT PMA'S SUGGESTED DISALLOWANCES ARE REASONABLE, PROPER AND SUPPORTABLE ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

The Commission's findings are inconsistent with its rejection of over 45% of the manhours PMA recommended be disallowed because the Commission found that PMA's analysis contained numerous errors. The Commission, in its Order, detailed t.. ze pages of mistakes by PMA, totalling $44,609,000. This represents almost one-half of PMA's total suggested disallowance. It is unreasonable for the Commission to accept PMA's analysis when it has found that analysis so seriously flawed.

11. THE COMMISSION'S FINDING AT PARAGRAPH 11, PAGE 37 THAT PMA'S SUGGESTED DISALLOWANCE SHOULD BE REDUCED BY ONLY $44,602,200 IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

The Commission failed to consider evidence of numerous additional mistakes made by PMA. The Commission did not consider:

i. PMA's reversal of the unit rate for the installation of seismic and non-seismic pipe hangers that resulted in a disallowance of $4.8 million. (Tr. XIX, 5347 to 49, 5356 to 60, G-KGE-186 (CEL-4) at 9 to 11)

ii. PMA's improper disallowance of $1.06 million for manhours related to the time required to perform inspections mandated by the NF section of the ASME Code. (G-KGE-83; G-KGE-246; G-KGE-180 (CEL-4) at 15 to 17)

iii. PMA's failure to reconcile manhours related to increased tolerance requirements totalling $4.98 million because it was confused by KG&E's reconciliation effort. (Tr. XIX, 5432 to 33, G-KGE-180 (CEL-4) at 24 to 27)

iv. PMA erroneously disallowed manhours for material handling because PMA failed to recognize that the additional material required by regulatory change must be handled. This caused PMA to recommend disallowing manhours for this activity totalling $3.3 million. (Tr. XIX, 5439 to 44; G-KGE-180 (CEL-4) at 21 to 23)

v. PMA's failure to consider the increased complexity of the cable tray supports due to regulatory change that required more manhours for installation of the cable tray. As a result PMA recommended disallowance of $4.2 million. (Tr. XIX, 5473 to 79; G-KGE-180 (CEL-4) at 94 to 97)

12. THE COMMISSION'S FINDING AT PARAGRAPH 1, PAGE 31 THAT STATISTICAL DATA DO NOT PROVIDE PROOF OF THE QUALITY OF MANAGEMENT AT WOLF CREEK IS UNLAWFUL.

The Commission's finding is in contravention of K.S.A. 66-128g. In determining prudence, K.S.A. 66-128g requires the Commission to consider

> a. A comparison of the cost of . . . [Wolf Creek] with the cost of other facilities constructed within a reasonable time before or after . . . [Wolf Creek].
>
> b. A comparison of the cost overruns at . . . [Wolf Creek] with cost overruns at other facilities constructed within a reasonable time before or after . . . [Wolf Creek].

It is unlawful for the Commission to reject such comparisons presented by KG&E as evidence of its prudence.

13. THE COMMISSION'S FINDING AT PARAGRAPH 11, PAGES 37-38 THAT A TOTAL OF 1,828,262 MANHOURS WERE IMPRUDENTLY INCURRED AND ACCORDINGLY THAT $17,841,858 SHOULD BE EXCLUDED FROM A RETURN ON AND RECOVERY OF KG&E'S INVESTMENT IN WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

The Commission failed to consider evidence of KG&E's favorable performance in achieving a cost that is below the average cost of comparable plants in the industry. There is an overwhelming amount of evidence in this case that Wolf Creek's cost is below the average for the industry. KG&E presented a survey of nuclear plants by Charles L. Huston (G-KGE-1 (CLH-1 and 2) 7 to 11, 19 to 29) that shows Wolf Creek's cost is 18% less than average; a comparative analysis by Cresap McCormick and Pager (G-KGE-21) shows that Wolf Creek is 10.3 percent less than the average of the plants it analyzed (Tr. XXXII, 9766 to 67); and a statistical analysis by Dr. Fairchild (G-KGE-177) that shows Wolf Creek's cost is 11 to 13 percent less than would be expected considering the characteristics of the 43 nuclear plants he studied. Staff witness Flaherty testified that if four plants that have BWRs are added to the comparison

he performed, Wolf Creek's cost is less than average. (Tr. XVII, 4896) Finally, Intervenor witness Komanoff performed a statistical comparison that shows Wolf Creek's cost is 2 to 8 percent less than would be expected based on a sample of 29 contemporaneous nuuclear plants. It is unreasonable for the Commission to ignore the vast amount of evidence clearly showing a better than average cost performance at Wolf Creek.

14. THE COMMISSION'S FINDINGS AT PARAGRAPH 6, PAGE 33; PARAGRAPH 9, PAGE 34; PARAGRAPH 11, PAGE 37 THAT KG&E FAILED TO RELIABLY AND ACCURATELY ASSESS THE CAUSES FOR COST INCREASES ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission's findings imply that KG&E is responsible for proving the prudence of every manhour expended regardless of whether the manhours were challenged by the Staff. The Commission's findings ignore the presumption of prudence accorded utility expenditures and place the burden on KG&E to prove the prudence of those expenditures without a challenge by any party. The only witness in the case who specifically challenged KG&E's construction costs was PMA; and PMA did not challenge the prudence of all the manhours it recommended be disallowed. Of the total 4,036,723 manhours for which PMA recommended disallowance, only 320,797 were alleged to have been due to imprudence. A denomination by PMA that manhours were controllable or unreconciled does not constitute a challenge to the prudence of the costs incurred. In the absence of a challenge, KG&E only has the burden of proving the prudence of costs above 200% of the definitive estimate pursuant to K.S.A. 66-128g(2).

B. The Commission's findings also imply that the only method of proof that is acceptable is a detailed reconciliation of manhours. KG&E presented evidence in the Management Performance Evaluation (G-KGE-1 (CLH 1 and 2)) using three related approaches to determining the reasonableness of

costs incurred in constructing Wolf Creek to prove the prudence of costs incurred.

15. THE COMMISSION'S FINDING AT PARAGRAPH 8, PAGE 42 THAT THE COSTS ASSOCIATED WITH 14.5 MONTHS OF THE SCHEDULE SLIPPAGE SHOULD BE EXCLUDED AS IMPRUDENT IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. There is no substantial competent evidence that the delays were due to imprudence. PMA found that the schedule delays were "controllable." "Controllable" is not equivalent to "imprudent".

B. There is no substantial competent evidence of any specific imprudent management actions that caused delay on the project.

C. There is no substantial competent evidence establishing a causal link between any imprudent management actions that may have occurred and the resulting delay on the project.

D. The Commission erroneously interpreted the testimony of Staff regarding the method of determining schedule delays and failed to consider evidence showing that the entire schedule delay was justified. The Commission states that controllable slippage was disallowed after it was offset by mitigation or gains. (Order at 40) PMA, however, did not use that method to determine the schedule penalty. PMA calculated the schedule penalty by subtracting the largest amount of uncontrollable delay on any system from the total delay of the project. Staff witness Ponce de Leon stated that if the uncontrollable delay on any system was greater than 14.5 months, the schedule penalty would have been less. (Tr. XX, 5706) He further stated that if the uncontrollable delay had been equal to the total schedule delay that he calculated, he would have proposed no penalty. (Tr. XX, 5705) KG&E presented evidence that the entire delay was caused by uncontrollable regulatory changes. (Tr. XXXI, 9296 to 9302, G-KGE-175) Therefore, no schedule penalty is appropriate.

E. The Commission erroneously interpreted the testimony of Staff witness Ponce de Leon regarding quantification of the schedule delay and failed to consider evidence of a gain in the schedule during the start-up and power ascension phase of the project. The Commission stated that PMA found a "27 month difference in schedule duration to the point of fuel load." (Order at 39) The Commission calculated the controllable and uncontrollable portions of the 27 month delay as follows: "14.5 months were uncontrollable, 37 months controllable, 1 month unreconciled, and 23.5 months were mitigated." (Order at 40) The Commission applied the 23.5 month gain as an offset to the 38 month controllable and unreconciled delay and came up with a 14.5 month controllable delay. Id. The 14.5 month controllable delay and the 14.5 month uncontrollable delay found by the Commission together total 29 months, not 27 months. The Commission failed to give KG&E credit for the 2 months gain PMA calculated for the power ascension phase of the project. (PMA Schedule Report at 47, 48) As PMA noted, power ascension was originally expected to take 6 months and the expected duration in the February 1984 schedule was 4 months. Id. The additional two month gain should be subtracted from the 14.5 month uncontrollable schedule delay found by the Commission for which KG&E was penalized. Correction of this error reduces the penalty imposed by the Commission by $22,922,620.

F. The Commission's finding does not support the method of determining a fair return. Kansas Power & Light v. KCC, 5 Kan.App. 514, 528 (1981). In finding that Wolf Creek's schedule (one of the shortest in the industry) was 14.5 months longer than necessary, the Commission has imposed on KG&E a standard of perfection rather than one of prudence. As Staff's witness admitted, no comparable plant has loaded fuel as quickly as Wolf Creek actually did, and certainly not in the 77.5 month schedule that he recommended for the plant. (Tr. XX, 5686) If the Commission had used the standard of reason-

ableness that is proper in determining a fair return, no schedule penalty would have been imposed.

G. The Commission ignored evidence of the effect of regulatory change on Wolf Creek's schedule and erroneously concluded that regulatory change did not extend the schedule at Wolf Creek. KG&E presented evidence that design changes mandated by regulatory change prevented fuel load from occurring at Wolf Creek any earlier than it did. (G-KGE-175) The Commission, however, concluded that the exhibit does not show that the activities listed thereon were necessary for fuel load or that the activities could not have been completed by October 1984. (Order at 41) This finding is clearly in error. The exhibit shows that some of the design changes could not have been completed prior to March 1985. (G-KGE-175)

H. There is no substantial competent evidence to support the Commission's finding that construction on the design changes could have been completed 14.5 months sooner than October 1984 as PMA suggested. There is no evidence showing this because the design changes could not have been completed 14.5 months sooner than October 1984. The Commission's failure to recognize the effect on the schedule of design changes due to regulatory change is unreasonable.

I. The Commission relied on the erroneous conclusion at paragraph 4, page 40 that multiplying both 1980 and 1985 quantities by the same unit rate reasonably accounts for increases in the complexity of the installation of piping. Calculation of the additional time required to install additional quantities in the reactor coolant system using the same unit rate for both 1980 and 1985 quantities is incorrect. The calculation is based on the erroneous assumption that the unit rate to install the system remained constant over time. As regulatory changes are made, however, the time required to install pipe increases dramatically. Such things as more complex configurations, rework and less space in which to work cause the time required for installation to increase. KG&E

presented evidence of the effect on the unit rate of regulatory changes. (Tr. XXXI, 9302 to 05; Tr. XXX, 9132 to 33)

J. The Commission was inconsistent in its refusal to consider industry statistics for overall schedule performance but finding at paragraph 4, page 40 that the use of industry average unit rates to assess productivity is reasonable.

K. The Commission failed to adjust the amount of schedule delay for the number of manhours it reduced PMA's recommended disallowance in the piping area. PMA's computation of the controllable portion of the schedule was based on an analysis of the productivity experienced in the installation of the reactor coolant system piping. (G-Staff-77, Schedule Report at 32) PMA's calculation of the recommended disallowance of costs in the piping area was based on what it alleged was an excessive number of manhours expended. PMA recommended that 2,005,000 or 37% of the total 5,341,100 manhours be disallowed in the piping area. (G-Staff-77, Cost Report at II. 52) The Commission, however, reduced this disallowance by 1,309,651 manhours, allowing an additional 25% of the manhours. (Order at 35) This additional allowance should also be reflected in the calculation of the schedule penalty.

L. The Commission erroneously relied on a flawed analysis of schedule delays. PMA's analysis was performed by an inexperienced person and is mechanical, theoretical and unsupported by the facts.

16. THE COMMISSION'S FINDING AT PARAGRAPH 7, PAGE 41 THAT THERE IS NO SUBSTANTIAL EVIDENCE THAT PMA FAILED TO CONSIDER ALL ACTIVITIES THAT AFFECTED THE CRITICAL PATH IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

The Commission's finding is clearly erroneous. KG&E presented evidence that PMA failed to consider all activities that affected the critical path. (Tr. XXXI, 9300 to 02; G-KGE-175 (CLH-5, 6, and 7))

17. THE COMMISSION'S FINDING AT PARAGRAPH 8, PAGE 42 THAT THE COSTS ASSOCIATED WITH 14.5 MONTHS OF SCHEDULE DELAY SHOULD BE EXCLUDED AS IMPRUDENT IS UNLAWFUL.

The Commission refused to consider the industry comparisons for schedule performance as mandated by K.S.A. 66-128g.

18. THE COMMISSION'S FINDING AT PARAGRAPH 16, PAGE 44 THAT EXCLUSION OF AFUDC ASSOCIATED WITH THE CONTROLLABLE DELAY IS A REASONABLE METHOD OF QUANTIFYING THE COST OF DELAY IS UNLAWFUL.

There is no basis in K.S.A. 66-128 for disallowing costs associated with delay prior to the date of a finding of imprudence. K.S.A. 66-128e provides that the Commission may exclude carrying or finance charges incurred after the date of its finding of imprudence. The statute does not, however, provide for exclusion of such costs incurred prior to a finding of imprudence.

19. THE COMMISSION'S FINDING AT PARAGRAPH 16, PAGE 44 THAT EXCLUSION OF AFUDC ON INVESTMENT IN WOLF CREEK FOUND TO BE PRUDENT IS A PROPER REMEDY FOR DELAY IN CONSTRUCTION IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. Accrual of AFUDC results from the legislatively mandated public policy in Kansas that prohibits rate recognition of the value of CWIP.

B. There is no evidence that the AFUDC accrued as a result of delay is the result of imprudence.

20. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS UNLAWFUL BECAUSE IT VIOLATES CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

A. Although KG&E agrees with the Commission that despite the Commission's long-standing use of "original cost" rate making it is free to adopt a new approach to determine the reasonable value of utility property, the Commission's arbitrary application of its proposed "fair value" valuation

methodology to only Wolf Creek violates federal and Kansas constitutional due process requirements.

B. Lack of a fair hearing or an arbitrary result are two of the ways in which constitutional due process requirements can be violated as noted by the United States Supreme Court in Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942):

> The Constitution does not bind rate making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

KG&E has been deprived of a fair hearing as to the valuation methodology adopted by the Commission in that no party to the proceeding presented testimony or other evidence supporting the use of the per kilowatt cost of a coal plant, adjusted for the lower operating costs of Wolf Creek, for determining the value of Wolf Creek. In addition, the Commission's Order reaches the arbitrary result of applying its "fair value" methodology to Wolf Creek alone. Such action is unprecedented and unfair. Not only has the Commission failed to apply its "fair value" methodology to KG&E's other generating facilities, it arbitrarily and without explanation singled out Wolf Creek as the only current addition to KG&E's rate base subject to its "fair value" methodology.

C. The arguments put forward by the Commission to justify its application of a "fair value" valuation methodology to only Wolf Creek fail to overcome the constitutional deficiencies of its actions:

i. Even if K.S.A. 1984 Supp. 66-128g(a) were interpreted in accordance with the Commission's argument at pages 62, 63 and 87 of its Order, nothing in that statutory provision directs or authorizes the Commission to analyze only the "fair value" of additions to a utility's generating facilities.

ii. The Commission is not constrained, as it suggests at page 87, by its past reliance on "original cost" valuation. The Commission is directed by K.S.A. 1984 Supp. 66-128 to determine the reasonable value of all property used and required to be used in a utility's service to the public in Kansas. There is no statutory limitation preventing the Commission from changing valuation methodologies for all utility assets. But if K.S.A. 1984 Supp. 66-128 does bind the Commission to apply "original cost" valuation to the assets so valued in the past, then it also binds the Commission to follow "original cost" valuation for each addition to utility property. Moreover, the Commission's perceived inability to apply consistent valuation methodologies for all of KG&E's generating facilities, does little to explain the Commission's inconsistent use of "fair value" for Wolf Creek and "original cost" for other additions to rate base included in KG&E's request for rate relief.

iii. The fact that no evidence was presented as to the "fair value" of KG&E's other generating facilities does not justify the Commission's arbitrary application of a "fair value" valuation methodology to only Wolf Creek. KG&E was reasonably entitled to assume that the "original cost" valuation methodology employed by the Commission for at least the last 40 years would continue to be applied to all of KG&E's utility property, including Wolf Creek. Thus, the lack of evidence from KG&E is understandable and should serve only to provide the Commission with a basis for requesting the presentation of "fair value" evidence from KG&E and those advocating the change in valuation methodologies. Furthermore,

KG&E was reasonably entitled to assume that if the valuation methodology for its assets was going to be changed, that KG&E would be given notice of that change and that the valuation methodology adopted would be applied uniformly to all of KG&E's utility property, consistent with past Commission practice and regulatory practice across the country. No such notice was forthcoming from the Commission. In fact, the only suggestions of an alternative valuation methodology came in the form of proposals from witnesses Rosen and Komanoff that the Commission adopt life-cycle comparative economics to value Wolf Creek. The Commission properly rejected that proposed methodology. Finally, it is inconsistent and unfair for the Commission on the one hand to adopt a valuation methodology for Wolf Creek for which there is no evidentiary record and then decline to use that same valuation methodology for KG&E's other generating facilities, claiming a lack of evidence.

21. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS UNLAWFUL BECAUSE IT VIOLATES CONSTITUTIONAL EQUAL PROTECTION REQUIREMENTS.

The Constitution requires a rational relationship between the regulation imposed and a legitimate state interest. See, e.g., Railway Express Agency v. New York, 336 U.S. 106 (1949). Such a rational relationship is lacking for the Commission's valuation of Wolf Creek on a basis different from KG&E's other assets and on a basis different from the assets of other utilities operating in Kansas.

22. THE COMMISSION'S CONCLUSION AT PAGE 119 AND IN APPENDIX C THAT KG&E'S REVENUE DEFICIENCY AMOUNTS TO ONLY $166,653,463 IS UNLAWFUL BECAUSE IT IS A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

A. The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The requirements of the Fifth Amendment have been applied to the states through the Fourteenth Amendment.

B. Economic regulation of the rates charged by public utilities resulting in confiscation of private property devoted to public service is prohibited. See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968); Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 692 (1923).

C. The District of Columbia Circuit Court of Appeals recently reaffirmed that a utility's constitutional right that property not be taken without just compensation is secured through the "end result" test set out by the Supreme Court:

> After re-examining the issue, we are now persuaded that the end result test applies to both the calculation of the rate of return on invested assets and to the calculation of the proper rate base. As Judge Bazelon explained in Washington Gas Light Co. v. Baker, 188 F.2d 11(D.C. Cir. 1950), cert. denied, 340 U.S. 952, 71 S.Ct. 572, 95 L.Ed. 680 (1951), "the Commission may adopt any method of valuation for rate base purposes so long as the end result of the rate order 'cannot be said to be unjust and unreasonable.'" 188 F.2d at 18 (emphasis added), quoting Hope Natural Gas, 320 U.S. at 602, 64 S.Ct. at 287. Thus, no matter how the rate base is determined, "the 'total effect', 'impact' or 'end result' of the rate order" must satisfy the requirements of Hope Natural Gas. 188 F.2d at 14. Those requirements in turn demand that there be a "reasonable" balancing of consumer and investor interests.

Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 768 F.2d 1500, 1502 to 03 (D.C. Cir. 1985).

D. The Commission's Order fails to pass muster under the "end result" test since the rate relief granted falls outside the zone of reasonableness established by the Supreme Court. See, Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942); Permian Basin Area Rate Cases, 390

U.S. 747, 770 (1968). The Supreme Court stated in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944):

> [T]he return of the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Appendix C to the Commission's Order recognizes a revenue requirement deficiency of $166,653,000 based on required net operating income of $119,346,000 which produces an overall rate of return of only 5.878 percent on KG&E funds invested to serve the public of $2,030,344,000. After payment of interest on first mortgage bonds, bank loans, and other contractually established credit agreements, as well as, preferred stock dividends, that 5.878 overall rate of return translates into a return on common equity of at most 1 percent based on Schedule C-1 of the exhibit sponsored by Staff's witness Wess (B-Staff-20). A 1 percent or less return on common equity is confiscatory.

E. Even if recognition is given to the Commission's allowance, at page 94, of "some carrying costs associated with the debt and preferred stock" (estimated to be $14,468,769) and to all of the Staff adjustments to rate base accepted by the Commission in Appendix C, the return on common equity authorized by the Commission is still confiscatory.

23. THE COMMISSION'S CONCLUSION AT PAGE 119 AND IN APPENDIX C THAT KG&E'S REVENUE DEFICIENCY AMOUNTS TO ONLY $166,653,463 IS UNLAWFUL AND CONFISCATORY BECAUSE IT FAILS TO ALLOW KG&E TO FULLY RECOVER ITS PRUDENT INVESTMENT IN PUBLIC UTILITY PROPERTY.

A. A fundamental precept of public utility regulation is that utilities should fully recover their prudent expenditures through the rate making process. See, West Ohio

Gas Co. v. Public Utility Commission, 294 U.S. 63, 73 (1973); Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276, 289 (1923). Although the Commission would allow KG&E to recover, over Wolf Creek's life, depreciation charges based on its finding of KG&E's prudent investment in Wolf Creek, the Commission based its revenue deficiency calculation in Appendix C on its view of KG&E's prudent investment in rate base, minus $909,618,000 related to Wolf Creek. Because of inflation and the time value of money, the net result of the Commission's action concerning Wolf Creek is to prevent KG&E from fully recovering its prudent investment in Wolf Creek. In other words, because the Commission has failed to allow KG&E a full return on its full investment in Wolf Creek, the net present value of future revenue requirements to Wolf Creek will be inadequate for KG&E to fully recover its prudent investment.

B. The fact that KG&E may be allowed a return on its entire prudent investment in Wolf Creek at some future time is not justification for the Commission's current illegal actions.

24. THE COMMISSION'S FINDINGS AND CONCLUSIONS AS TO THE "ECONOMICS OF WOLF CREEK" AT PAGES 84 THROUGH 94 ARE UNLAWFUL AND CONFISCATORY BECAUSE THE COMMISSION HAS FAILED TO ADEQUATELY CONSIDER THE INTERESTS OF KG&E'S SHAREHOLDERS.

The requirements of Hope Natural Gas "demand that there be a 'reasonable' balancing of consumer and investor interests." Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 768 F.2d 1500, 1503 (D.C. Cir. 1985). As explained by Justice Douglas in Hope Natural Gas, 320 U.S. at 603, regulatory and judicial protection of the investor interests is important because

> the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view

> it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.

The Commission's findings and conclusions as to the "Economics of Wolf Creek" at pages 84 through 94 are devoid of a balanced consideration of the interests of KG&E's shareholders. That failure undermines the legality of those findings and conclusions.

25. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 89 THROUGH 93 LIMITING THE REASONABLE VALUE OF WOLF CREEK TO ONLY $1290 PER KILOWATT ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

A. While there are a variety of coal cost estimates in the record for consideration by the Commission, there is no evidence supporting the appropriateness of employing any per kilowatt cost of a coal unit as a surrogate for the cost of Wolf Creek. In addition, there is no evidence supporting the particular level of costs ultimately employed by the Commission.

B. Similarly, while there is evidence in the record concerning the 1984 costs of coal generation for KG&E, there is no evidence concerning the appropriate methodology for computing the differential costs of coal and nuclear generation, there is no evidence concerning the appropriate methodology for translating those differential costs into a per kilowatt value and there is no evidence concerning the appropriate costs to be used in such a calculation.

26. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION JUSTIFIED ITS ACTIONS, AT PAGES 62 THROUGH 63 AND 87, BASED ON A MISTAKEN INTERPRETATION OF K.S.A. 1984 SUPP. 66-128g.

A. The Commission's assertion, at page 62 of its Order, that K.S.A. 1984 Supp. 66-128g sets out factors for the Commission to consider to determine "prudence and the reasonable value of electric generating property" is incorrect. (Emphasis added.) The Commission's assertion, at page 63, that K.S.A. 1984 Supp. 66-128g "compels consideration of the economics of a plant in determining the reasonable value of a rate base addition and also provides notice to the utilities of the general standards to be used" is also incorrect. The plain language of K.S.A. 1984 Supp. 66-128g taken together with the statutory framework created by the other provisions of K.S.A. 66-128 refute the Commission's attempt to justify its "fair value" valuation methodology based on K.S.A. 1984 Supp. 66-128g.

3. For the purposes of "determining the reasonable value" of utility property under K.S.A. 66-128, the provisions of K.S.A. 1984 Supp. 66-128c permit the Commission "to exclude all or a portion of those costs of acquisition, construction or operation from the revenue requested by the utility" when those costs were incurred due to a lack of prudence. The factors enumerated in K.S.A. 1984 Supp. 66-128g are properly interpreted as providing guidelines for the Commission's prudence determination, not as setting up yet another methodology for valuing utility property. This interpretation is supported by K.S.A. 1984 Supp. 66-128g(a):

> The factors which shall be considered by the commission in making the determination of "prudence" or lack thereof in determining the reasonable value of electric generating property. . . .

Nothing in K.S.A. 1984 Supp. 66-128g or the other provisions of K.S.A. 66-128 suggests that the enumerated prudence factors authorize "fair value" rate making. The Commission's adoption of "fair value" rate making in reliance on those factors is thus unlawful.

27. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS FOUNDED ON AN INCONSISTENT, DISTORTED AND FACTUALLY UNSUPPORTED CHARACTERIZATION OF THE NATURE OF RETURNS TO INVESTORS IN REGULATED UTILITIES.

The Commission, at page 87, erroneously equates the return authorized for investors with a "reward". The return authorized should be the level of earnings adequate to maintain the financial integrity of the utility, to enable the utility to attract any needed capital investment and to provide a return on common equity commensurate with the returns on investments in other companies of corresponding risk. It therefore mischaracterizes the objectives of rate regulation to equate the proper rate of return with a "reward". That mischaracterization by the Commission further evidences the Commission's failure to properly balance the interests of investors and ratepayers.

28. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION'S RATIONALE FOR TREATING WOLF CREEK DISSIMILARLY FROM OTHER GENERATING FACILITIES IS LACKING IN FUNDAMENTAL FAIRNESS AND IS INCONSISTENT WITH ITS OTHER FINDINGS.

A. The Commission, at page 87, argues that it would not be proper to value KG&E's assets other than Wolf Creek above their book value under its view of "fair value" rate making. The arbitrariness and unfairness that results is self-evident. Where the Commission's "fair value" methodology results in a valuation of less than original cost, it would apply its methodology. But, it would not apply its methodology where a valuation in excess of original cost would result. Such a "what's mine is mine, what's yours we'll negotiate" approach to regulation is, in addition to being unfair, bad regulatory policy.

3. The Commission, at page 88, likewise notes that it "cannot envision that value [of Wolf Creek] as being greater than historical costs." This is inconsistent with its rationale for claiming book value marks the ceiling on valuation for KG&E's other generating facilities. The Commission, at page 87, explained its rationale as follows:

> If, as occurs in the unregulated industries, the utility assumed all risks that the "value" of a facility was less than historical costs, it might be appropriate for the rewards associated with a greater value to accrue to the utility.

The Commission's Wolf Creek valuation methodology treats Wolf Creek as a speculative investment and places the risk of loss attendant to speculative investments on KG&E without holding out an equivalent opportunity for speculative profits on Wolf Creek. At the same time, the Commission treats the balance of KG&E's utility property as secure, non-speculative investments -- subject neither to speculative loss nor gain -- which will be permitted to earn only the market return for secure and non-speculative investments.

29. THE COMMISSION'S APPLICATION OF A "FAIR VALUE" VALUATION METHODOLOGY TO ONLY WOLF CREEK AT PAGES 62 AND 87 THROUGH 93 AND IN APPENDIX C IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION ERRONEOUSLY ANALYZED PAST RATE MAKING TREATMENT OF KG&E'S GENERATING FACILITIES OTHER THAN WOLF CREEK AND ITS CONCLUSIONS ARE UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The Commission, at page 87, argues that KG&E's "other assets already included in rate base at original cost have, of course, already received a return which did not include risk sharing." The Commission fails to note, however, that the past limitation on the risk of loss was balanced against the denial of an opportunity to earn returns in excess of those calculated on the basis of an original cost rate base. In other words, for the Commission to impliedly argue that KG&E would have

earned something less in the past under "risk sharing" and that since KG&E was protected from that risk, the Commission need not now apply "fair value" rate making to all of KG&E's facilities, is unsupported and completely ignores the possibility that KG&E would have earned more in the past under "fair value" rate making and that a change to that methodology now for all of KG&E's assets only belatedly recognizes KG&E's suppressed earnings potential.

30. THE COMMISSION'S FINDING AT PARAGRAPH 16 ON PAGES 90 AND 91 THAT THE APPROPRIATE RANGE OF VALUE FOR WOLF CREEK, BEFORE ADJUSTMENT FOR LOWER OPERATING COSTS, IS ONLY $1150 TO $1250 PER KILOWATT IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH THE COMMISSION'S FINDING AT PAGE 56 THAT 327 MEGAWATTS OF KG&E'S OWNERSHIP INTEREST IN WOLF CREEK IS EXCESS CAPACITY AND BECAUSE IT RESULTS IN A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

The Commission rejected the $1500 per kilowatt cost of Sunflower Electric Cooperative's Holcomb plant as a surrogate for the original cost of Wolf Creek because "Holcomb did not benefit from the economies a larger unit would produce." This rationale is inconsistent with the Commission's penalization of KG&E through an excess capacity adjustment for Wolf Creek being too big. Certainly, if Wolf Creek is to be treated as if it were a smaller unit for rate making purposes, the Commission should be consistent and value Wolf Creek on the basis of a smaller unit. To do otherwise unfairly gives ratepayers the benefits of Wolf Creek's economies of scale without compensating the shareholders of KG&E who have invested in that economy of scale.

31. THE COMMISSION'S ORDER, IN ITS ENTIRETY, IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT MAKES NO LEGALLY SUFFICIENT FINDING THAT THE TOTAL EFFECT OR END RESULT OF THE ORDER WILL ALLOW KG&E REVENUE SUFFICIENT TO RECOVER OPERATING AND CAPITAL EXPENSES AND THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT SUCH A FINDING.

32. THE COMMISSION'S CONCLUSION AT PAGE 119 AND IN APPENDIX C THAT KG&E'S REVENUE DEFICIENCY AMOUNTS TO ONLY $166,653,463 IS UNLAWFUL BECAUSE IT FAILS TO SATISFY THE REQUIREMENT FOR JUST AND REASONABLE RATES IN K.S.A. 66-107, 110, 111, 113, AND 118d.

A. Pursuant to K.S.A. 66-107, 110, 111, 113, and 118d, KG&E's rates must be just and reasonable. As discussed elsewhere, the revenue deficiency recognized by the Commission results in confiscatory rates which fail, by definition, to be just and reasonable. But even if the revenue deficiency recognized by the Commission did not result in confiscatory rates, the resultant rates still fail to satisfy the statutory "just and reasonable" standard. The Kansas Court of Appeals in Kansas-Nebraska Natural Gas Co. v. Kansas Corporation Commission, 4 Kan.App.2d 674, 675, 610 P.2d 121 (1980), recognized that the standard of "reasonable" rates calls for rates higher than those measured solely against the constitutional prohibition against "confiscatory" rates:

> The statutory standard of K.S.A. 1979 Supp. 66-118d requiring "reasonable" utility rates is higher than the constitutional standard for due process. In other words, a rate cannot be confiscatory if it is reasonable.

B. By failing to provide KG&E with a return on its investments commensurate with returns on investments in other companies facing similar risks and by severely limiting KG&E's ability to pay a dividend to its equity owners and to maintain its credit and attract capital, the Commission's finding of a revenue deficiency of only $166,653,463 fails to result in reasonable rates.

33. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 131 AND 133 WITH RESPECT TO KG&E'S ENERGY COST ADJUSTMENT CLAUSE (ECA) ARE UNLAWFUL AND UNREASONABLE BECAUSE THEY RESULT IN A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION AND BECAUSE THEY ARE INCONSISTENT WITH THE COMMISSION'S RATE BASE TREATMENT OF WOLF CREEK.

KG&E's ECA tariff includes the full fuel savings associated with generation from KG&E's entire share of Wolf Creek. The Commission, at page 131, adopted KG&E's ECA tariff, as proposed. And, the rates put in effect by the Commission at page 133 recognize that there will be a reduction for the fuel savings associated with Wolf Creek. The Commission's findings with respect to the value of Wolf Creek and the portion of Wolf Creek which is used and required to be used do not support the Commission's determination that 100 percent of the fuel savings due to the operation of Wolf Creek should be passed on to ratepayers. Moreover, the Commission's adjustment to the value of the portion of Wolf Creek allowed in rate base is inadequate to obviate the inconsistency and unjust result of its determination with respect to the fuel savings from Wolf Creek.

34. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 84 AND 86 AS TO WOLF CREEK'S RELATIVE COST AND AT PAGE 92 AS TO THE USE OF ONLY $1290 PER KILOWATT TO VALUE WOLF CREEK ARE UNLAWFUL BECAUSE THEY CREATE AN OBSTACLE TO THE OBJECTIVES OF NUCLEAR SAFETY MANDATED BY CONGRESS AND IMPLEMENTED BY THE NUCLEAR REGULATORY COMMISSION AND ARE THUS PREEMPTED.

A. The Supreme Court, in Hines v. Davidowitz, 312 U.S. 52, 67 (1940), considered the validity of a state law in light of federal law touching the same subject and found that a state law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" would be invalid.

B. Since all of the evidence indicates that 58 to 60 percent of the cost increases of Wolf Creek relate to compliance with Nuclear Regulatory Commission mandated changes, the Commission's reduction of Wolf Creek's valuation from its original cost to only $1290 per kilowatt and its related statements that Wolf Creek is "extraordinarily expensive", that Wolf Creek has "exorbitant capital costs" and that it "represents unreasonably high capital costs" all serve to

create a chilling effect on the future capital expenditures necessary to fully comply with Nuclear Regulatory Commission requirements. This type of state action creates an obstruction to the accomplishment of Congress' objective of nuclear safety and intrudes in an area which is under the exclusive jurisdiction of the United States Nuclear Regulatory Commission and is thus preempted by federal law.

35. THE COMMISSION'S ADOPTION OF "RISK SHARING" PRINCIPLES AT PAGES 46 AND 80 AND ITS APPLICATION OF "RISK SHARING" AT PARAGRAPH 7 ON PAGES 51 AND 52 AND THROUGHOUT ITS FINDINGS AND CONCLUSIONS AT PAGES 84 THROUGH 94 ARE UNLAWFUL BECAUSE "RISK SHARING" IS NOT PROVIDED FOR IN THE STATUTORY PROVISIONS WHICH DEFINE THE SCOPE OF THE COMMISSION'S AUTHORITY AND BECAUSE THE COMMISSION NOWHERE DEFINES THE STANDARDS FOR ITS APPLICATION OF "RISK SHARING."

A. The Commission, at page 81, cites only K.S.A. 1984 Supp. 66-128g(a)(11) as statutory support for its adoption of "risk sharing". That statutory provision does not empower the Commission to employ "risk sharing" to lower the appropriate reserve margin for the KG&E system (page 52), to allow a return of Wolf Creek's costs through depreciation but no return on a substantial portion of KG&E's prudent investment (page 86), or to authorize a sharing of the economic consequences of Wolf Creek by valuing Wolf Creek at only $1290 per kilowatt (pages 87 through 94). Rather, K.S.A. 66-128g(a)(11) empowers the Commission only to consider the risks accepted during construction as part of its evaluation of prudence:

> (a) The factors which shall be considered by the commission in making the determination of "prudence" or lack thereof in determining the reasonable value of electric generating property, as contemplated by this act shall include with limitation the following:
>
> * * *
>
> (11) whether the utility accepted risks in the construction of the facility which were inappropriate to the general public interest to Kansas. . . .

The Commission's reliance on K.S.A. 1984 Supp. 66-128g(a)(11) as support for "risk sharing" as applied in its Order is thus unlawful.

B. The other reasons put forward by the Commission to justify its adoption and application of "risk sharing" fail to overcome the Commission's lack of statutory authority. For example, the Commission, at page 80, cites the testimony of Staff's witness Rosen as supporting "risk sharing". Dr. Rosen cannot, of course, confer the lacking statutory authority on the Commission.

36. THE COMMISSION'S CONCLUSION AT PARAGRAPH 9 ON PAGE 84 AS TO SHAREHOLDER "ASSUMPTION OF THE RISKS" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION FAILED TO RECOGNIZE AND CONSIDER IN ITS DISCUSSION THE EVIDENCE PRESENTED REGARDING THE RISKS AND COSTS OF NOT PROCEEDING WITH WOLF CREEK AS PART OF KG&E'S EFFORTS TO DIVERSIFY FUEL SOURCES.

A. Although the Commission notes the statutorily mandated obligation of utilities to provide service in its discussion and rejection of the competitive market analogy proposed by Drs. Sturgeon and Rosen, the Commission fails to mention the obligation to serve in its discussion of "risk sharing" beginning at paragraph 5 on page 80 and concluding at paragraph 9 on page 84. The obligation to serve brings with it the duty to evaluate and balance the risks of continuing with the construction of a generating facility and the risks of failing to do so or of choosing an alternative source of power. The Commission's discussion is almost entirely devoted to the risks of continuing Wolf Creek construction, with no attention paid to the evidence of the counterbalancing risks associated with other courses of action.

B. At pages 57 to 58 and 63 to 64 of its Order, KG&E's concerns about natural gas and fuel oil availability are recognized by the Commission. The Commission, however, failed to consider those concerns in its discussion of the risks of continuing with the construction of Wolf Creek.

C. Similarly, the risk of fuel price stability and escalation for oil, gas and coal must be considered by the Commission in evaluating the risks associated with continuing the construction of Wolf Creek. (See, e.g., G-KGE-21 (GIR-1), III-41, IV-43, IV-57, IV-63, IV-67 to 69.)

D. Significantly, the Commission's Order nowhere mentions KG&E's need to reduce its reliance on aged generating facilities. That need played a key role in KG&E s generation planning and the risks associated with a failure to reduce reliance on aged generating facilities must be considered to properly evaluate KG&E's decision to continue with and complete the construction of Wolf Creek. (See, e.g., Lucas, Tr. XII, 3104; Cadman, Tr. IX, 2537, Tr. XI, 2943; Roen, Tr. VII, 1906 to 07; In the Matter of Kansas Gas and Electric Co., Kansas City Power & Light Co., 5 NRC 301, 351 (1977).)

E. KG&E presented evidence which graphically depicts the potential impact on KG&E's ability to meet its obligation to serve from an inability to utilize gas generation and a failure to diversify fuel sources. (See, G-KGE-21 (GIR-1), IV-70 to 71, Exs. IV-29, 30, 31, 32, 33.) That evidence was not discussed in the Commission's evaluation of the risks of continuing construction of Wolf Creek.

37. THE COMMISSION'S CONCLUSION AT PAGE 81 THAT KG&E "DID NOT APPEAR TO SERIOUSLY CONSIDER THE POSSIBILITY OF CANCELLATION" OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT CONFLICTS WITH THE SUBSTANTIAL WEIGHT OF THE EVIDENCE PRESENTED.

In response to questioning by Commissioner Wright and others, Mr. Wilson Cadman testified extensively as to KG&E's decision process and its evaluation of the option to cancel Wolf Creek. (See, Tr. IX, 2648 to 49; see also, Tr. X, 2795 to 98; Tr. XI, 2982 to 90.) The Commission cites no contrary evidence in support of its conclusion.

38. THE COMMISSION'S CONCLUSION AT PAGE 74 THAT RATES RESULTING FROM THE TOTAL INCLUSION OF WOLF CREEK IN RATE BASE WOULD BE UNREASONABLY HIGH IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH KG&E'S REQUESTED RATE RELIEF WHICH WOULD PHASE-IN OVER FIVE YEARS THE REVENUE DEFICIENCY ASSOCIATED WITH THE TOTAL INCLUSION OF WOLF CREEK IN THE RATE BASE AND BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

39. THE COMMISSION'S CONCLUSION AT PAGE 75 AS TO THE RELATIVE LEVEL OF KG&E'S RATES IN COMPARISON WITH OTHER KANSAS UTILITIES AND WITH NATIONAL AVERAGES IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT HAS NO BEARING ON WHETHER KG&E'S RATES ARE REASONABLE, THE LEGAL STANDARD IN KANSAS.

The Commission, at page 75, concludes that KG&E's rates would be "above average" for Kansas and the nation. Simply finding that rates are or will be "above average" is not legally equivalent to determining whether those rates are unreasonable from the ratepayers' point of view any more than it was legally equivalent to determining, from the shareholders' point of view, that rates were unreasonable during all of the years when KG&E's rates were below the national average and the lowest in Kansas.

40. THE COMMISSION'S FINDINGS AND CONCLUSIONS IN PARAGRAPH 3 ON PAGES 75 AND 76 ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THEY ARE BASED ON THE ERRONEOUS ASSUMPTION AT PAGE 75 THAT THE SCENARIO CONSIDERED "APPEARS TO RECOGNIZE NO NEED FOR ADDITIONAL CAPACITY WITHOUT WOLF CREEK UNTIL 1989."

The analysis presented by Mr. Andrews assumes KG&E would be required to purchase substantial amounts of power prior to the on-line date of the hypothetical coal unit in 1989. More importantly, however, the 1989 on-line date for the hypothetical coal unit is not representative of a lack of need for this capacity, but rather represents the lead time necessary to build that plant.

41. THE COMMISSION'S CONCLUSION IN PARAGRAPH 4 ON PAGE 76 AS TO KG&E'S ABILITY TO COMPETE IN THE WHOLESALE MARKET IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT FAILS TO CONSIDER EVIDENCE OF THE IMPACT OF GOVERNMENTAL ACTIONS ON KG&E'S PAST EFFORTS AND EVIDENCE RELATIVE TO PAST WHOLESALE AND PARTICIPATION POWER TRANSACTIONS.

A. Evidence has been presented regarding the negative impact that actions by the Commission (G-KGE-21 (GIR-1), IV-84 to 85, 98) and the Rural Electrification Administration (id. 80 to 83, 97) have had on KG&E's efforts to sell portions of its interest in Wolf Creek. No mention of those governmental actions is made in the Commission's discussion of KG&E's ability to sell power on the wholesale market.

B. Evidence was also presented as to KG&E's past success in selling in participation power from its units once they are in operation. (See, e.g., id. 78 to 79; see also, Roen, Tr. VIII, 2110 to 11.) The Commission fails to discuss these past transactions as they relate to KG&E's future ability to sell participation power from Wolf Creek.

42. THE COMMISSION'S FINDING IN PARAGRAPH 6 ON PAGES 76 AND 77 AS TO THE SCOPE OF THE ECONOMIC ANALYSIS PRESENTED BY KG&E REGARDING THE ECONOMIC IMPACT OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT FAILS TO CONSIDER EVIDENCE THAT THE AREA STUDIED IN THE ANALYSIS ACCOUNTS FOR A SIGNIFICANT PORTION OF KG&E'S SALES.

The Commission notes, at page 77, that:

> [T]he analysis contained in the CMP Report is limited to a small portion of the Kansas economy. The Wichita area economy is used as a surrogate for the KG&E service area. Little, if any, meaningful analysis of the impact on the agricultural sector is undertaken.

This discussion fails to consider the evidence presented that the Wichita area accounts for a significant portion of KG&E's sales (see, G-KGE-21 (GIR-2), V-1) in terms of both kilowatt-hours (66 percent) and revenues (68 percent).

43. THE COMMISSION'S FINDING AND CONCLUSION IN PARAGRAPH 6 ON PAGES 76 AND 77 AS TO THE GROWTH RATE EMPLOYED IN THE ECONOMIC ANALYSIS PRESENTED BY KG&E REGARDING THE ECONOMIC IMPACT OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT FAILS TO CONSIDER THE EVIDENCE PRESENTED SUPPORTING THE GROWTH RATE EMPLOYED IN THE ANALYSIS.

The economic impact analysis presented by KG&E employs an 8.9 percent growth rate for the Wichita economy. That growth rate is based on the recent 9.6 percent growth in a Kansas manufacturing index. (Andrews, Tr. VIII, 2300) The Commission makes no finding as to the reasonableness of the growth rate employed in light of that underlying data.

44. THE COMMISSION'S CONCLUSION AT PARAGRAPH 11 ON PAGE 78 AS TO THE ECONOMIC IMPACT OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE DISCUSSION, AT PAGES 74 THROUGH 78, UNDERLYING THAT CONCLUSION FAILS TO CONSIDER THE EVIDENCE PRESENTED ON BEHALF OF KG&E BY MR. ANDREWS (TR. B-8, 2777 to 2816; B-KGE-55) AND DR. CLEMENTE (TR. B-8, 2515 to 32; B-KGE-51).

45. THE COMMISSION'S ADOPTION, AT PAGE 92, OF ONLY $1290 PER KILOWATT AS THE VALUE OF WOLF CREEK IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT AMOUNTS TO HINDSIGHT REGULATION.

A. A judgment based on hindsight is neither appropriate, fair nor legally sound. Obviously, knowledge gained from subsequent events was not available at the time of the utility management's decisions and thus should not be the basis for judging those decisions. See, Wisconsin Telephone Co. v. Public Service Commission, 232 Wisc. 274, 287 N.W.2d 122, 167 (1937); cert. denied, 309 U.S. 657 (1940).

B. Under the guise of "valuing" Wolf Creek, the Commission has improperly employed hindsight regulation. This is evident from the Commission's discussion, at pages 58 through 94, of the economics of Wolf Creek. The Commission's primary focus and method of inquiry looks at Wolf Creek from

the perspective of what is known today in analyzing economic impacts, rate comparisons, risks and valuation. The testimony of Dr. Charles F. Phillips discussed the inadequacies of the use of hindsight with regard to the testimony of Drs. Rosen and Spurgeon. (Tr. XXVII, 7916 to 18) That discussion has equal applicability to the course of action followed by the Commission in its Order.

46. THE COMMISSION'S ADOPTION, AT PAGE 92, OF ONLY $1290 PER KILOWATT AS THE VALUE OF WOLF CREEK IS UNLAWFUL BECAUSE IT VIOLATES THE DEFINITION OF "EXCESS CAPACITY" FOUND IN K.S.A. 1984 SUPP. 66-128c.

A. "Excess capacity" is defined in K.S.A. 1984 Supp. 66-128c as follows:

> For the purposes of this act, "excess capacity" means any capacity in excess of the amount used and required to be used to provide adequate and reliable service to the public within the state of Kansas as determined by the commission.

The definition of "excess capacity" does not encompass the "economic excess capacity" inquiry conducted by the Commission.

B. That the Commission considers its valuation of Wolf Creek at $1290 per kilowatt as an "economic excess capacity" adjustment is evident from the Commission's statement in paragraph 24 on page 94:

> The physical and economic excess capacity exclusions are, however, ineligible for a return on investment.

(See also paragraph 2 on page 61.)

47. THE COMMISSION'S PHASE-IN OF THE $166,653,463 REVENUE DEFICIENCY, AS ADOPTED IN PARAGRAPHS 7 AND 8 ON PAGES 133 AND 134, IS UNLAWFUL BECAUSE IT VIOLATES THE STATUTORY AUTHORIZATION FOR PHASE-INS FOUND IN K.S.A. 1984 SUPP. 66-128b.

K.S.A. 1984 Supp. 66-128b, authorizes only the phase-in of "the reasonable value of property determined not

currently used and required to be used. . . ." The total revenue deficiency of $166,653,463 found by the Commission relates to property it has found to be currently "used and required to be used." By virtue of the fact that KG&E has volunteered to phase-in the portion of its revenue requirement above $144,912,250, the Commission is authorized to phase-in amounts above that level. Therefore, the total revenue deficiency, or, at a minimum the $144,912,250 requested by KG&E, should be recognized in current rates.

48. THE COMMISSION'S CONCLUSIONS AT PAGE 46 ACCEPTING DR. ROSEN'S CONCLUSION "THAT WOLF CREEK REPRESENTS EXCESSIVELY EXPENSIVE CAPACITY" AND AT PAGE 84 AS TO THE RELATIVE COST OF WOLF CREEK ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THEY ARE BASED ON INCONSISTENT FINDINGS AND BECAUSE THE COMMISSION HAS FAILED TO CONSIDER THE EVIDENCE BEFORE IT.

A. The Commission, at pages 46 and 47, explicitly rejects life-cycle cost analyses as the basis for its decision. Similarly, the Commission, at pages 61 and 62, specifically rejects the analyses presented by Dr. Rosen as the basis for valuing Wolf Creek. But, at the same time, the Commission inconsistently finds, at pages 61 and 62, that Dr. Rosen's analysis is adequate to evaluate the overall economics of Wolf Creek. There is no explanation of why an analysis which, at page 46 of its Order, is subject to such a degree of uncertainty that the Commission chooses to reject it, becomes "beneficial", at page 61 of its Order, and adequate to evaluate the overall economics of Wolf Creek, at page 62 of its Order.

B. Without discussion of the evidence showing the errors and unreliable nature of Dr. Rosen's assumptions and without discussion of the relative merit of the analyses put forward by witnesses for KG&E, the Commission found, at page 62, that "Dr. Rosen's assumptions for these various inputs were more reasonable and realistic than applicant's witnesses." This finding is unsupported by the evidence presented. Proper consideration of each of the deficiencies in Dr. Rosen's

analysis, as set out in KG&E's Brief at pages V-22 to V-59, can lead to only one conclusion -- Dr. Rosen's analysis is unacceptable for any purpose. Furthermore, Dr. Rosen's "consistency," which the Commission, at page 62, evidently perceives as sufficient reason for accepting Dr. Rosen's analysis, arguably means little more than Dr. Rosen's assumptions are consistently in error.

49. THE COMMISSION'S FINDING AT PAGE 56 "THAT 327 MEGAWATTS OF KG&E'S INTEREST IN WOLF CREEK ARE NOT REQUIRED TO BE USED IN ITS SERVICE TO THE PUBLIC WITHIN THE STATE OF KANSAS" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH ITS FINDINGS, AT PAGE 43, AND THE SUBSTANTIAL EVIDENCE PRESENTED AS TO THE OPERATION OF KG&E's SYSTEM WITH THE ADDITION OF WOLF CREEK.

A. At page 48, the Commission found Wolf Creek to be "used" on the basis of the following facts:

> With the exception of certain older gas units, each generating facility on the KG&E system, including Wolf Creek, will be employed in the near term to serve KG&E system energy requirements. (Emphasis added.)

In addition, the uncontroverted testimony of Mr. Lucas, KG&E's Manager of System Operations, points out that because of its low incremental operating cost, Wolf Creek will be the first unit committed to meet KG&E's system energy requirements. (Tr. XII, 3110) The Commission's findings set out above and the evidence presented by Mr. Lucas are therefore inconsistent with the Commission's finding that Wolf Creek represents 327 megawatts of excess capacity. If there is any excess capacity on the KG&E system, it is represented by those "certain older gas units" referred to by the Commission, not Wolf Creek.

B. The Commission, at pages 57 to 58 and 63 to 64, notes the fuel supply constraints which prompted KG&E's involvement in Wolf Creek. Since Wolf Creek was planned and constructed to replace the gas and oil-fired facilities subject to those fuel constraints, it is those units which comprise any excess capacity which may exist on the KG&E system.

C. Likewise, KG&E was also concerned with the need to replace aged facilities through its construction of Wolf Creek. (Lucas, Tr. XII, 3104; Cadman, Tr. IX, 2357, Tr. XI, 2943) Therefore, it is KG&E's aged facilities (which are also some of KG&E's gas and oil-fired facilities) which comprise any excess capacity which may exist on the KG&E system.

50. THE COMMISSION'S FINDING AT PAGE 56 "THAT 327 MEGAWATTS OF KG&E'S INTEREST IN WOLF CREEK ARE NOT REQUIRED TO BE USED IN ITS SERVICE TO THE PUBLIC WITHIN THE STATE OF KANSAS" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION FAILED TO CONSIDER THE EVIDENCE PRESENTED AS TO THE AGE OF CERTAIN OF KG&E'S GENERATING FACILITIES IN THE DETERMINATION OF KG&E'S AVAILABLE CAPACITY IN 1990.

By the year 1990 (the reference year employed by the Commission to evaluate the existence any excess capacity on KG&E's system), 503 megawatts of KG&E's present accredited capacity will be over 30 years old and 297 megawatts of that capacity will be over 35 years old. (See, Lucas, Tr. XII, 3104.) Other than the 46 megawatt adjustment to reflect the announced retirement of KG&E's Ripley station (a deduction of one-half of Ripley's capacity rating), the Commission's determination of available capacity unrealistically failed to consider or make any other allowance for the advanced age of a large portion of KG&E's generating capacity.

51. THE COMMISSION'S FINDING AT PAGE 56 "THAT 327 MEGAWATTS OF KG&E'S INTEREST IN WOLF CREEK ARE NOT REQUIRED TO BE USED IN ITS SERVICE TO THE PUBLIC WITHIN THE STATE OF KANSAS" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION ADOPTED A 20 PERCENT RESERVE REQUIREMENT WITHOUT CONSIDERING THE EVIDENCE PRESENTED IN SUPPORT OF A 22.5 PERCENT RESERVE REQUIREMENT AND BECAUSE THE COMMISSION'S USE OF A 20 PERCENT RESERVE REQUIREMENT IS INCONSISTENT WITH ITS OTHER FINDINGS.

A. In one sentence, at page 51, the Commission notes that KG&E presented evidence supporting a 22.5 percent reserve margin. The Commission then discusses Dr. Rosen's proposed

reserve margin without mentioning why Dr. Rosen's proposal is accepted or why KG&E's evidence is rejected and without any discussion of the validity of Dr. Rosen's reserve margin analysis in light of the inadequacies pointed out by Mr. Limmer in his rebuttal testimony. (See, KG&E's Brief at pages V-36 to 38.)

B. The Commission, at page 54, finds that a reserve requirement in excess of 20 percent should be justified from an economic perspective. The Commission, at page 92, values all of KG&E's interest in Wolf Creek at only $1290 per kilowatt, thereby economically justifying a reserve requirement greater than that used by the Commission in determining the level of "excess capacity" on the KG&E system.

52. THE COMMISSION'S LIMITATION OF ITS FINDING AT PAGE 58 "THAT FROM AN EARLY TO MID-1970's PERSPECTIVE, LEGITIMATE CONCERNS ABOUT GAS AND OIL FUEL AVAILABILITY REASONABLY AND APPROPRIATELY PROMPTED THE CONSTRUCTION BY KG&E OF ADDITIONAL GENERATING FACILITIES" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT FAILS TO PROPERLY RECOGNIZE THE UNREBUTTED EVIDENCE OF KG&E'S CONCERNS ABOUT FUEL AVAILABILITY BEYOND THE MID-1970's AND THE UNREBUTTED EVIDENCE OF KG&E'S CONCERNS ABOUT FUEL PRICE STABILITY.

A. At page 64, the Commission notes that

> KG&E contends that even though the Fuel Use Act was amended in 1981 to remove restrictions on existing generation plants, it is still obligated to reduce dependence on natural gas by 50%.

KG&E's "contention" and its continuing concern over fuel availability are supported by the evidence before the Commission. (See, e.g., Roen, Tr. VII, 1947 to 48; Cadman, Tr. X, 2754; G-KGE-21 (GIR-1), IV-74; G-KGE-156.) Indeed, the Commission itself has recognized a continuing concern over gas supplies. (See, G-KGE-21 (GIR-1), III-66, citing 49 Fed. Reg. 32,972 (August 17, 1984).) The Commission cites no reason or evidence justifying the limitation of its finding to only a

"mid-1970's" perspective. In light of the evidence presented, the Commission's finding should be amended to reflect KG&E's and the Commission's continuing concern with the availability of gas and oil fuel.

B. KG&E's concern over gas and oil is not limited to its availability but extends to the long-term price of those fuels. (See, KG&E's Brief at page III-1 to 8.) The evidence presented by KG&E supports those concerns. (See, id.) The Commission cites no reason or evidence justifying its failure to include KG&E's concern over fuel prices in its finding. In light of the evidence presented, the Commission's finding should be amended to reflect KG&E's continuing concern with the long-term price of gas and oil.

53. THE COMMISSION'S CONCLUSIONS IN PARAGRAPH 5 ON PAGE 65 AS TO KG&E'S 1976, 1978, 1979 AND 1980 ECONOMIC COMPARISONS OF NUCLEAR AND COAL GENERATION AND ITS FINDING IN PARAGRAPH 20 ON PAGE 74 ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION IMPROPERLY EMPLOYED HINDSIGHT IN ITS EVALUATION OF KG&E'S ASSUMPTIONS AND THE COMMISSION FAILED TO CONSIDER THE EVIDENCE PRESENTED.

A. The assumptions and methodology employed by KG&E in its economic comparisons of nuclear and coal generation were reasonable in light of contemporaneous standards, as confirmed by EBASCO in its 1980 report and as again confirmed by Cresap, McCormick and Paget in this proceeding. It is only with the use of hindsight that the Commission can find fault with KG&E's analyses:

i. KG&E's use of equivalent operating and maintenance costs for nuclear and coal generation conforms with the assumptions employed in the Wolf Creek construction permit proceeding by the Atomic Safety and Licensing Board's Staff and was found to be reasonable by EBASCO. For the Commission to now fault KG&E for that assumption surely involves the use of hindsight.

ii. KG&E evaluated a number of nuclear and coal capacity factor scenarios, but employed a 67 percent nuclear capacity factor and 60 percent coal capacity factor as its base case in its 1976, 1978, 1979, and 1980 analyses. Both EBASCO and the Commission confirmed the reasonableness of a 67 percent nuclear capacity factor in 1980. In light of the Commission's finding in 1980, the Commission's finding in this proceeding as to the nuclear capacity factor employed by KG&E can only be explained by hindsight.

iii. KG&E did not "ignore" capital additions in its analyses as asserted by the Commission at page 65. Rather, KG&E reasonably assumed the capital additions to nuclear and coal plants would be essentially equivalent. Therefore, it was unnecessary to include capital additions in the comparative analyses. The Commission Staff's witness Rosen confirmed that during the time frame of KG&E's analysis, capital additions were not generally included in the comparative economic studies performed by utilities. Thus, it is only with hindsight that the Commission can find fault with KG&E's capital additions assumption.

iv. KG&E did not "ignore" decommissioning in its analyses as asserted by the Commission at page 65. Decommissioning costs were not included in the analyses because of uncertainty as to their amount and in light of their immateriality as determined from generic decommissioning estimates. In 1980, the Commission agreed that the cost and method of decommissioning were uncertain. In light of that acknowlegment and the 1980 finding by EBASCO that KG&E's exclusion of decommissioning costs was reasonable, the Commission has improperly applied hindsight to find fault with KG&E's decommissioning assumptions.

3. The Commission, at page 65, apparently views the one page format and 10-year time frame of KG&E's 1976, 1978, 1979, and 1980 levelized bus bar cost analyses to be weaknesses. Such a view is unsupported by the evidence presented.

The one page format was simply a memorialization of the underlying analysis and study. (Cadman, Tr. X, 2695; Roen, Tr. VI, 1691) Thus, it is improper to draw any conclusions as to the quality of KG&E's analysis merely on the basis of the presentation format. The 10-year time frame is also reasonable. As explained by both Mr. Roen (Tr. VI, 1689 to 90, Tr. VII, 1804) and Mr. Lucas (Tr. XII, 3134 to 39), it was unnecessary to depict a longer period of time since it was reasonable to expect the advantages of Wolf Creek to grow over time. This concept appears to be accepted by the Commission at pages 75 and 76 of its Order. Therefore, it is improper and inconsistent for the Commission to characterize the 10-year time frame as a weakness.

C. The Commission, at page 85, also criticizes KG&E's comparative economic analyzes for failing to consider the need for capacity. That criticism is unfounded. As pointed out by Mr. Roen (Tr. VI, 1713 to 14), capacity need assessment was not the purpose of those analyses. The need for capacity is a separate concern, evaluated as part of the capacity planning process along with the comparative economic analyses and other decision inputs. (See, G-KGE-21 (GIR-1), IV-50 to 98.) The Commission obviously failed to consider Mr. Roen's testimony.

54. THE COMMISSION'S FINDING AND CONCLUSION AT PAGE 84 THAT "CERTAINLY BY THE END OF 1981, APPLICANTS SHOULD HAVE BEEN ACUTELY AWARE THAT THE CAPITAL COSTS OF WOLF CREEK WERE BECOMING UNREASONABLY HIGH AND THAT THE OVERALL ECONOMIC BENEFITS WERE SUBJECT TO SERIOUS QUESTION" IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION FAILED TO CONSIDER THE EVIDENCE PRESENTED AND IT IS INCONSISTENT WITH THE COMMISSION'S FINDING AND CONCLUSION AT PAGE 86.

A. The Commission, at pages 59 and 60, cites the testimony of Dr. Rosen and Mr. Komanoff that Wolf Creek should have been cancelled in 1981 or 1979, respectively. The Commission nowhere considers the testimony and analyses

presented by Mr. Roen (see, Tr. XXIX, 8691 to 96; G-KGE-166 (GIR-3)) and Dr. Backus (see, Tr. XXIX, 8762 to 75; G-KGE-167) supporting a contrary conclusion. Likewise, the Commission fails to address the testimony of Dr. Backus (id.) pointing out the deficiencies in Dr. Rosen's retrospective analysis; the cross-examination of Dr. Rosen pointing out his use of hindsight (see, e.g., G-KGE-137; Tr. XXIV, 7101 to 03; Tr. XXV, 7247 to 52); and, the cross-examination of Mr. Komanoff pointing out the unreasonableness of the replacement capacity assumption underlying his analysis. (See, Tr. XXXIV, 10081 to 90.)

8. The Commission, at page 86, finds that it could not "conclude with the absolute certainty" necessary to find that Wolf Creek should have been cancelled. Given the Commission's uncertainty on page 86, it was inconsistent and improper for the Commission to find that the costs of Wolf Creek were becoming unreasonably high by 1981.

55. THE COMMISSION'S FINDING AND CONCLUSION AT PAGE 86 THAT "IN VIEW OF THE FACT THAT THE DECISION TO CONSTRUCT AND BUILD WOLF CREEK WAS NOT SUPPORTED BY A NEED FOR PHYSICAL CAPACITY, A PHYSICAL EXCESS CAPACITY ADJUSTMENT IS UNDENIABLY APPROPRIATE" IS ARBITARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT FAILS TO CONSIDER THE EVIDENCE PRESENTED AS TO THE PURPOSES FOR WOLF CREEK'S CONSTRUCTION.

Because of fuel availability and price uncertainty, KG&E's capacity planners had to and did consider the possibility that certain KG&E generating facilities would be unavailable to provide energy. (See, G-KGE-21 (GIR-1), IV-70 to 71, Exs. IV-29, 30, 31, 32, 33.) The Commission's physical excess capacity finding fails to consider the evidence of KG&E's concerns over its physical ability to supply energy. Wolf Creek was constructed to meet KG&E's need to supply energy not just to supply capacity. The distinction between the need to supply energy (the ability to supply generation over a period of time) and the need to supply capacity (the ability to

meet peak demand) must be recognized by the Commission in order for it to properly evaluate whether Wolf Creek is "required to be used." The Commission must also consider the evidence of the increased reliability Wolf Creek brings to the KG&E system (see, e.g., Lucas, Tr. XII, 3106, 3110, 3158) in order to evaluate whether Wolf Creek is "required to be used."

56. THE COMMISSION'S FINDING AT PAGE 92 THAT THE GENERATION COST SAVINGS FROM WOLF CREEK IS ONLY $77 TO $102 PER KILOWATT IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION'S ORDER DENIES KG&E DUE PROCESS BY FAILING TO DESCRIBE THE METHOD OF CALCULATION, THE GENERATION COST SAVINGS ARE UNREASONABLY LOW AND THE METHOD OF REFLECTING GENERATION COST SAVINGS IS INCONSISTENT WITH THE COMMISSION'S TREATMENT OF THE FUEL SAVINGS FROM WOLF CREEK IN KG&E'S ECA TARIFF.

A. Although the Commission discloses, at pages 91 and 92, the data underlying its computation of the generation cost savings resultant from Wolf Creek, the methodology employed to compute the generation cost savings adopted by the Commission in valuing Wolf Creek is not apparent from the order and is impossible to replicate. Furthermore, despite several requests during the brief period permitted for the preparation of this Application, KG&E has been unable to obtain from the Commission's Staff any assistance in determining how the generation cost savings were derived. As a result, KG&E has been deprived of its right to due process.

B. Although KG&E cannot replicate the Commission's computation of Wolf Creek's generation cost savings, it appears from the low dollar amount of the per kilowatt adjustment adopted by the Commission that the Commission is only considering one year of generation cost savings. If this is in fact the case, then the Commission has grossly undervalued Wolf Creek given the stated objectives of its valuation methodology.

C. Moreover, if the generation cost savings adjustment represents only one year of savings, then the

Commission's treatment of those savings is inconsistent with the full flow through to ratepayers of Wolf Creek's fuel savings in the ECA tariff since stockholders would recover far less than the full generation cost savings in any given year.

57. THE COMMISSION'S ADJUSTMENTS TO RATE BASE IN APPENDIX C FOR "EXCESS CAPACITY" AND "ECONOMIC REVALUATION OF NUCLEAR PLANT" ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THEY ARE INCONSISTENT WITH THE "ORIGINAL COST" DEPRECIATION RESERVE WHICH REDUCES RATE BASE AND THUS LEAD TO UNREASONABLE RESULTS AND A CONFISCATION OF KG&E'S PROPERTY WITHOUT JUST COMPENSATION.

Adjustments 9 and 10 on Appendix C, page 3 of 3, remove a total of $909,618,000 from KG&E's rate base in accordance with the Commission's excess capacity and Wolf Creek valuation findings. The Commission, however, makes no adjustment to the "original cost" depreciation reserve which is included as an offset to rate base for the depreciation of KG&E's entire, prudent investment in Wolf Creek. The outcome of this inconsistency is obvious -- it is only a matter of a few years before the "original cost" depreciation reserve exceeds first the "fair value" rate base of Wolf Creek and ultimately KG&E's total rate base, creating a "negative rate base." Such a result is surely unintended. If, however, the Commission intends for this to occur, it amounts to a confiscation of KG&E's investment in utility property since a "negative rate base" would deprive KG&E of any return on its investment.

58. THE COMMISSION'S ADOPTION, AT PAGE 92, OF ONLY $1290 PER KILOWATT AS THE VALUE OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH THE COMMISSION'S FINDINGS AT PAGE 84 THAT, AT LEAST PRIOR TO 1981, KG&E'S DECISIONS TO BUILD AND CONTINUE WITH THE CONSTRUCTION OF WOLF CREEK WERE PRUDENT SINCE THE $1290 PER KILOWATT SIMPLY ASSUMES WOLF CREEK TURNED INTO A COAL FIRED UNIT WITHOUT RECOGNITION OF THE COSTS INCURRED IN EFFECTUATING THE DECISION TO CONSTRUCT WOLF CREEK.

59. THE COMMISSION'S ADOPTION, AT PAGE 92, OF ONLY $1290 PER KILOWATT AS THE VALUE OF WOLF CREEK IS ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH THE COMMISSION'S FINDING OF EXCESS CAPACITY.

Throughout its findings (see, e.g., pages 78 and 84), the Commission justifies its use of a "fair value" valuation methodology because the rates resulting from "full inclusion" of Wolf Creek in rate base would, in the Commission's view, be too high. As a result of its finding that 327 megawatts of KG&E's interest in Wolf Creek represents excess capacity, Wolf Creek will not be fully included in rate base. The Commission fails to account for its excess capacity finding in its valuation of Wolf Creek.

60. THE COMMISSION' DETERMINATION THAT KG&E'S SPACE HEATING RATE SHOULD BE INCREASED IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS INCONSISTENT WITH THE COMMISSION'S DECISION NOT TO INCREASE KCPL'S LOWER SPACE HEATING RATE.

On page 128 of its Order the Commission increased the current electric space heating customer's seasonal energy block charge of 4.62 cents per kilowatthour by the same proportionate increase as other residential customers, despite KG&E's request that it remain the same. In Docket No. 142,099-U, at page 127, the Commission retained KCPL's current space heat rates ranging from 3.74 cents per kWh to 3.81 cents per kWh. The Staff, whose recommendation the Commission adopted in both instances, recognized that KCPL's existing space heating rate is price competitive with some alternative fuels. (Docket No. 142,099 at page 127) It is unreasonable and inconsistent to raise KG&E's space heating rate, which is already higher than KCPL's and keep KCPL's the same in light of that information and the Commission's determination in both cases that there was no persuasive evidence to support increasing the space heating rate to cover fully embedded costs.

61. THE COMMISSION'S FINDING AND CONLUSIONS AT PAGE 119 THAT 11.99% IS A FAIR AND REASONABLE RATE OF RETURN ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE.

A. The Commission, at page 118, misstates the law relating to the constitutionality of the rate of return by deciding the fair and reasonable rate of return based on prudent investment theory and not on the constitutionality mandated "end result" test of Hope, supra.

B. The rate of return of 11.99% will cause a downgrading in KG&E's bonds from their present rating and will, as a result, make it impossible for KG&E to attract capital on favorable terms and maintain its financial integrity. (Abrams, Tr. B-8, 2657)

C. The rate of return of 11.99% was admittedly improper unless the full rate base valuation requested by KG&E for Wolf Creek was allowed and it was not allowed. (Avera, Tr. B-3, 261 to 262)

D. The rate of return of 11.99% was based on a return on equity of 15.5% which was founded on data before KG&E became a riskier investment as a result of both the Staff recommendation and the Commission's Order.

62. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGE 136 AND 137 ARE UNLAWFUL, ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT ACKNOWLEDGES WEAKNESSES IN STAFF'S ARGUMENT THAT $181,000,000 WILL ASSURE KG&E'S VIABILITY AND THEN ADOPTS A LOWER REVENUE REQUIREMENT.

63. THE COMMISSION'S FINDING AT PAGE 56 THAT 327 MEGAWATTS OF KG&E'S OWNERSHIP INTEREST IN WOLF CREEK REPRESENTS "EXCESS CAPACITY" IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS IN DIRECT CONFLICT WITH THE ATOMIC SAFETY AND LICENSING BOARD'S FINDINGS REGARDING KG&E'S NEED FOR POWER AND IS THUS PREEMPTED.

64. THE COMMISSION'S FINDING AND CONCLUSION AT PAGE 84 AS TO KG&E'S DECISION TO

CONTINUE CONSTRUCTION OF WOLF CREEK AFTER 1981 IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND BECAUSE THE COMMISSION FAILED TO CONSIDER THE EVIDENCE PRESENTED CONCERNING KG&E'S DECISION MAKING PROCESS AND THE FACTORS WHICH INFLUENCED KG&E'S DECISIONS. (SEE, KG&E'S BRIEF AT PAGES III-3 to 46.)

65. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 84 THROUGH 94 ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THEY FAIL TO CONTAIN A CONCISE AND SPECIFIC STATEMENT OF THE RELEVANT LAW AND BASIC FACTS AS REQUIRED BY K.A.R. 82-1-232(a)(3) IN ITS FINDINGS AS TO THE APPROPRIATENESS AND RELEVANCE TO KG&E OF THE COMMISSION'S CONSIDERATION, AT PAGES 66 TO 74, OF EVIDENCE RELATING TO THE CAPACITY PLANNING OF KCPL AND KEPCO.

66. THE COMMISSION'S ADOPTION OF "RISK SHARING" PRINCIPLES AT PAGES 46 AND 80 AND ITS APPLICATION OF "RISK SHARING" AT PARAGRAPH 7 ON PAGES 51 AND 52 AND THROUGHOUT ITS FINDINGS AND CONCLUSIONS AT PAGES 84 THROUGH 94 ARE ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE THE COMMISSION HAS FAILED TO ALLOCATE ANY OF THE "RISK" TO RATEPAYERS.

67. THE COMMISSION'S ORDER AT PARAGRAPH 25 ON PAGE 94 ALLOWING THE ACCRUAL OF ONLY DEBT AND PREFERRED STOCK CARRYING CHARGES ON THE PORTION OF WOLF CREEK EXCLUDED FROM KG&E'S RATE BASE AS EXCESS CAPACITY WHICH THE COMMISSION VALUES AT ONLY $1290 PER KILOWATT IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE BECAUSE IT DENIES KG&E THE RECOVERY OF ITS FULL CARRYING COSTS OF DEBT AND PREFERRED STOCK AND A RETURN ON COMMON EQUITY FOR FUNDS PRUDENTLY INVESTED IN PROPERTY WHICH THE COMMISSION HAS FOUND TO BE IN PUBLIC USE, THUS RESULTING IN A TAKING OF PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION AND A VIOLATION OF THE KANSAS REQUIREMENT OF JUST AND REASONABLE RATES, AND BECAUSE THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE SUPPORTING SUCH A LIMITATION.

68. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 89 THROUGH 93 THAT $1290 PER KILOWATT IS A REASONABLE VALUE FOR WOLF CREEK ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE AS WELL AS CONTRARY TO

SOUND PUBLIC POLICY IN THAT SUCH FINDINGS AND CONCLUSIONS IGNORE THE CONSIDERABLE IMPACT UPON THE ORIGINAL COST OF WOLF CREEK OF THE PUBLIC POLICY IN KANSAS WHICH SUBSTANTIALLY DENIES RATE RECOGNITION OF THE VALUE OF CONSTRUCTION WORK IN PROGRESS.

Nearly one-third of KG&E's investment in Wolf Creek is due to the capitalization of carrying charges incurred while Wolf Creek was under construction. But for the policy of the State of Kansas, as first set down in a 1978 amendment to K.S.A. 1984 Supp. 66-128, it would have been within the Commission's discretion to permit rate recognition of the value of Wolf Creek while it was under construction, two interrelated consequences of which would have been the reduction of Wolf Creek's original cost by nearly one-third and an attendant reduction in the one time rate impact of Wolf Creek. It is unlawful and unreasonable for the Commission to ignore the impact of such state policy on the original cost of Wolf Creek and, further, at least in part on the basis of such impact, to find and conclude that the original cost of Wolf Creek (which includes carrying charges during construction) is excessive and exorbitant and would have an unreasonable impact upon rates. Such findings and conclusions are particularly unreasonable in view of KG&E's voluntary proposal to phase-in the rate impact of Wolf Creek.

69. THE COMMISSION'S FINDINGS AND CONCLUSIONS AT PAGES 89 THROUGH 93 THAT $1290 PER KILOWATT IS A REASONABLE VALUE FOR WOLF CREEK ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS AND, THEREFORE, UNREASONABLE AS WELL AS CONTRARY TO SOUND PUBLIC POLICY IN THAT SUCH FINDINGS AND CONCLUSIONS IGNORE THE CONSIDERABLE IMPACT UPON THE ORIGINAL COST OF WOLF CREEK OF THE COST OF CONSTRUCTING WOLF CREEK IN COMPLIANCE WITH THE REGULATIONS AND OTHER REQUIREMENTS OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION.

KG&E presented evidence that regulatory change accounted for 58 percent of the cost increase for Wolf Creek. (Tr. I, 156) Intervenor witness Komanoff testified that 60

percent of the increase in cost was due to regulatory change. (Tr. XXXIV, 10046 to 49) There was no evidence submitted by any party which contradicted KG&E's or Komanoff's findings with respect to the cost impact of regulatory change. It is unlawful and unreasonable as well as contrary to sound public policy for the Commission to reduce the value of Wolf Creek to be recognized in rates to the extent that such value is a product of KG&E's compliance with the regulations and requirements of the United States Nuclear Regulatory Commission. It is fundamentally unfair for one arm of the sovereign to impose a penalty which at least in part is based on the impact of costs which have been imposed by another arm of the sovereign.

70. THE COMMISSION SHOULD GRANT REHEARING TO RECEIVE NEW EVIDENCE AS TO THE IMPACT OF THE COMMISSION'S ORDER ON KG&E'S INVESTORS.

Because there was no way of knowing that the Commission would adopt a completely novel rate making methodology with regard to Wolf Creek, KG&E has been deprived of an opportunity to present evidence that the rate making methodology adopted results in rates which are confiscatory and unreasonable.

71. THE COMMISSION SHOULD GRANT REHEARING TO RECEIVE NEW EVIDENCE AS TO THE PROPER RATE OF RETURN FOR KG&E IN LIGHT OF THE INCREASED RISKS RESULTANT FROM THE COMMISSION'S ORDER.

72. THE COMMISSION SHOULD GRANT REHEARING TO RECEIVE NEW EVIDENCE OF THE EFFECT ON THE QUANTIFICATION OF THE SCHEDULE DISALLOWANCE OF THE COMMISSION'S REDUCTION OF PMA'S MANHOUR SUGGESTED DISALLOWANCE.

As noted above, to be consistent the Commission must adjust its schedule penalty for the reductions in the manhour disallowance suggested by PMA. KG&E could not present evidence of the effect on the schedule penalty of the reduction in manhour disallowance because no adjustment in the suggested manhour disallowance had been made prior to the Commission's Order.

73. THE COMMISSION SHOULD GRANT REHEARING TO RECEIVE NEW EVIDENCE OF KG&E'S SCHEDULE PERFORMANCE DURING POWER ASCENSION.

KG&E could not present evidence of its spectacular schedule performance during power ascension because power ascension was achieved after the hearings in this case commenced. The Commission must take into account the performance in achieving commercial operation in a period of time that is one of the shortest ever achieved in the nuclear industry, and should reduce the schedule penalty imposed on KG&E accordingly.

CONCLUSION

Based on the foregoing, KG&E requests a rehearing, pursuant to K.S.A. 66-118b and K.A.R. 82-1-235(c)(2), (3) (except KG&E does not request oral argument), and (4), with regard to the Commission's September 27, 1985 Order in Docket No. 120,924-U and 84-KG&E-197-R 142,098-U. Although KG&E does not request an oral argument, KG&E will participate in such argument if the Commission finds such to be of assistance in its dispositon of this Application.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Application for Rehearing, in the captioned cases was deposited in the United States mail, postage prepaid, on October 7, 1985, addressed as follows:

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