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Utilities and Energy

M-1 Affordable Clean Energy Rule

On August 21, 2018, the U.S. Environmental Protection Agency (EPA) proposed the Affordable Clean Energy (ACE) rule. If adopted, the ACE rule would replace the 2015 Clean Power Plan (CPP) in establishing guidelines for states to address greenhouse gas (GHG) emissions from existing coal-fired electric generation Units (EGU). The EPA accepted comments on the proposed rule through October 31, 2018. The public hearing for the proposed rule was held on October 1, 2018.

Overview

According to the National Conference of State Legislatures, ACE would provide states with the flexibility to determine how to reduce GHG emissions; however, ACE proposes that states only be allowed to require actions within the fence line of their existing EGU. The CPP allowed states to take actions outside the fence line, such as adding more renewable energy or establishing emission trading systems.

The ACE rule has four components. First, the rule would define the “best system of emission reduction” for GHG emissions from existing power plants as on-site heat rate efficiency improvements. (*Note:* Heat rate is the amount of energy input required to generate one kilowatt-hour of electricity. The lower the heat rate, the more efficient the production.) Second, the EPA would provide a list of “candidate technologies” for states to choose from when developing their plan to improve an EGU’s heat rate efficiency. Third, it would update the EPA’s New Source Review (NSR) permitting program to incentivize efficiency improvements to existing power plants. Finally, the rule would make changes to the EPA’s implementation regulations to give states additional time and flexibility to develop state plans.

According to the EPA, the current NSR program requires industrial facilities to install modern pollution control equipment when constructed or when making a change that would increase emissions significantly. The proposed rule would give states the option to only require a NSR permit when a physical or operational change made to an existing EGU increases its hourly rate of pollutant emissions. According to the EPA, this change would mean “fewer sources will trigger major NSR under an hourly emissions increase.”

States would have three years from publication of the final ACE rule to submit a state action plan. The EPA would have up to one year to act on a state plan. If a plan is not approved or not submitted, the EPA would be allowed two years to issue a federal plan for the state.

Unlike the CPP, the ACE rule would not impose a total allowable GHG limit for states. In its regulatory analysis provided in Vol 83, No. 170 of *Federal Register*, the EPA acknowledges that when compared to the CPP, implementing the proposed rule is expected to increase emissions of carbon dioxide and increase the level of emissions of certain pollutants in the atmosphere that adversely affect human health. The EPA estimates 600 coal-fired EGU's at 300 facilities could be covered by the proposed rule.

History

On August 3, 2015, President Obama and the EPA announced the CPP, a federal rule to regulate reductions in carbon pollution from power plants. The ultimate goal of the CPP was to reduce U.S. carbon dioxide emissions by 32.0 percent from 2005 levels by 2030. On March 28, 2017, President Trump signed an Executive Order on Promoting Energy Independence and

Economic Growth, which called for the review of the CPP. On October 10, 2017, in response to the Executive Order, the EPA issued a notice of Proposed Rulemaking, proposing to repeal the CPP upon publication in the *Federal Register*.

Clean Power Plan—Litigation

Several petitions, some challenging the legality of the CPP and others supporting the rule, have been filed. The D.C. Circuit Court has consolidated all of the various filings for challenges under Section 111(d), dealing with new emissions limits for existing power plants into one proceeding, *West Virginia v. EPA*, D.C. Cir., No. 15-1363. On June 26, 2018, the Court on its own motion, ordered that the case remain in abeyance for 60 days and directed the EPA to continue to file status reports at 30-day intervals.

Additionally, the D.C. Circuit Court has consolidated all the various filings for challenges under Section 111(b), the “new source rule,” into one proceeding, *North Dakota v. EPA*, D.C. Cir., No 15-1381. On August 10, 2017, the D.C. Circuit Court ordered the proceedings be held until further order is issued and directed the EPA to file status reports at 90-day intervals. No further order has been issued.

Regional Greenhouse Gas Initiative

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among nine northeastern and mid-Atlantic states to reduce carbon dioxide emissions through a coordinated cap-and-trade program. RGGI is administered and implemented by a non-profit corporation, RGGI, Inc. The nine states currently participating are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. RGGI officially organized in 2003, but the first compliance period did not begin until January 1, 2009. RGGI participants adopted a Model Rule to guide their actions, namely, to set limits on in-state emissions, issue carbon allowances, and establish state participation for regional carbon allowance auctions. The program uses three-year compliance periods and establishes overall emissions budgets for each period. The fourth compliance period began January 1, 2018, and extends through December 31, 2020. RGGI distributes state allowances through quarterly auctions where bidders may submit multiple confidential bids for a specific quantity of allowances at a specific price. Proceeds from the auctions are then distributed among the states by RGGI, Inc. As of September 2018, cumulative auction proceeds reached \$3 billion. While 25 percent of proceeds must be reinvested into consumer benefit programs such as energy efficiency, renewable energy, and direct bill assistance, in practice, states reinvest virtually all of their proceeds. Power sector carbon emissions in participating states have declined 50.0 percent since 2005. Emissions were capped at 82.2 million short tons in 2018. The cap will decline 2.5 percent annually until 2020. On August 23, 2017, RGGI announced a program change implementing a 30.0 percent emissions cap reduction from 2020 levels. This goal is projected to be achieved by 2030.

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Utilities and Energy

M-2 Broadband Expansion

The federal government in conjunction with states, including Kansas, has engaged in multiple efforts over the past few decades to determine how to expand broadband access, particularly to rural America. The definition of “broadband” has evolved as multiple task forces and advisory committees, at the state and federal level, have grappled with the issue of broadband accessibility.

Federal Developments

The 1996 Telecommunications Act

With the enactment of the 1996 Telecommunications Act (Act), Congress comprehensively updated federal telecommunication law for the first time since the enactment of the Communications Act of 1934. The Act addresses five general areas: radio and television broadcasting; cable television; telephone services; Internet and online computer services; and telecommunications equipment manufacturing. The Act was signed into law by President Clinton, who stated the legislation “opens up competition between local telephone companies, long distance providers, and cable companies, and expands the reach of advanced telecommunications services to schools, libraries, and hospitals.”

The Act contains provisions that created the Federal Universal Service Fund (FUSF) (now known as the Connect America Fund (CAF)). The FUSF was created to provide support through four programs: High-Cost Support; Low-Income Support; Schools and Libraries Support; and Rural Health Care Support. The FUSF is funded by contributions from providers of telecommunications based on an assessment on their interstate and international end-user revenues.

Definitions

Following is a list of terms defined in the Act and codified in Title 47 of the *U.S. Code of Federal Regulations* (CFR).

Local exchange carrier (LEC). Any person engaged in the provision of telephone exchange service or exchange access. [47 CFR § 51.5]

Incumbent local exchange carrier (ILEC). With respect to an area, the local exchange carrier that:

- Provided telephone exchange service in such area on February 8, 1996, and was deemed to be a member of the exchange carrier association pursuant to 47 CFR § 69.601(b) on February 8, 1996; or
- Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member of the exchange carrier association. [47 CFR § 51.5]

Rural incumbent local exchange carrier. A carrier that meets the definitions of “rural telephone company” and “incumbent local exchange carrier.” [47 CFR § 51.5]

Rural telephone company. A LEC operating entity to the extent that such entity:

- Provides common carrier service to any local exchange carrier study area that does not include either:
 - Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
 - Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996. [47 CFR § 51.5]

Rate-of-return carrier. Any ILEC not subject to price cap regulation as defined in 47 CFR § 61.3. [47 CFR § 51.5]

Price cap regulation. A method of regulation of dominant carriers (a carrier found by the Federal

Communications Commission (FCC) to have market power (*i.e.*, power to control prices)) provided in 47 CFR §§ 61.41 through 61.49. [47 CFR § 61.3]

Frozen high-cost support. Beginning January 1, 2012, each price cap LEC and rate-of-return carrier affiliated with a price cap LEC receives a “baseline support amount” equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines for 2011, whichever is lower. Each price cap LEC and rate-of-return carrier affiliated with a price cap LEC receives a “monthly baseline support amount” equal to its baseline support amount divided by 12. [47 CFR § 54.312]

The National Broadband Plan (2010)

In early 2009, Congress directed the FCC to develop a National Broadband Plan (Plan) to ensure every American has “access to broadband capability.” Congress also required the Plan to include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”

The Plan states the government may influence broadband in the following four ways:

- Design policies to ensure robust competition and, as a result, maximize consumer welfare, innovation, and investment;
- Ensure efficient allocation and management of assets the government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry;
- Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; ensure that low-income Americans

can afford broadband; and, in addition, support efforts to boost adoption and utilization; and

- Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care, and government operations.

The Plan also recommended, as part of creating the CAF, supporting the provision of affordable broadband and voice with at least 4 megabits per second (Mbps) actual download speeds and shift up to \$15.5 billion over the next decade from the existing Universal Service Fund program to support broadband.

Connect America Fund (also known as the Federal Universal Service High-cost Program)

In 2011, the FCC issued a Reform Order (Order) creating the CAF to support broadband, create a Mobility Fund to support 3G or better wireless coverage, and expand the Lifeline Program to allow subsidies to be provided for broadband. The Order set performance goals for reform of the FUSF to include, among other things, ensuring universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; ensuring universal availability of modern networks capable of providing advanced mobile and broadband service; and ensuring rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation.

The Order provided CAF to be implemented in two phases, with the first phase deploying new broadband service to 37 states with \$115.0 million in public funding and tens of millions in private investment. To qualify for CAF Phase I support, a carrier had to provide broadband with actual speeds of 4 Mbps download and 1 Mbps upload and deploy broadband to at least one currently unserved location for each \$775 in additional high-cost support received. CenturyLink accepted \$35.0 million, none of

which was spent in Kansas. In the second round of Phase I funding, AT&T was approved for \$95.0 million, none designated for Kansas; CenturyLink was approved for nearly \$40.0 million, of which \$81,474 was designated to be spent in Kansas; and FairPoint Communications Missouri, Inc., was approved for \$2.9 million, of which \$91,612 was designated to be spent in Kansas.

In CAF Phase II, each incumbent price-cap carrier was asked to make a state-level commitment to provide affordable broadband to all high-cost locations in its service territory. In CAF Phase II funding, rate-of-return carriers receiving CAF support to offset lost intercarrier compensation (charges that one carrier pays to another carrier to originate, transport, and/or terminate telecommunications traffic) must offer broadband service with actual speeds of at least 4 Mbps download and 1 Mbps upload upon a customer's reasonable request. AT&T accepted \$18.9 million in support offered for Kansas; therefore, it will be required to deploy 10 Mbps/1 Mbps voice and broadband-capable services to at least 95.0 percent of the 35,375 eligible areas by the end of 2020. CenturyLink accepted \$16.5 million in support offered for Kansas; therefore, it will be required to deploy 10 Mbps/1 Mbps voice and broadband-capable services to at least 95.0 percent of the 29,018 eligible areas by the end of 2020. (*Note: Eligible areas include census blocks unserved by mobile broadband services, and carriers may not receive support for areas they have previously stated they plan to serve.*)

The areas for which price-cap carriers did not accept model-based support, as well as other areas, will be made available in the Phase II auction. FairPoint declined support; therefore, the 497 eligible locations in FairPoint's service area in Kansas will be included in the CAF II competitive bidding process. The competitive bidding process began in March 2018 and is scheduled to end in February 2019. More information on the CAF II auction can be found at <https://www.fcc.gov/auction/903>.

The 2011 Order also created the Remote Areas Fund (RAF), to be funded with a budget of at least \$100.0 million annually. The RAF's stated purpose is to ensure that people living in the most remote

areas of the nation, where the cost of providing broadband service is extremely high, can obtain service. The FCC plans to commence the RAF no later than one year after the commencement of the CAF Phase II auction. The RAF will employ technology-neutral rules.

Broadband Deployment Advisory Committee (2017)

On January 31, 2017, the FCC chairperson announced the formation of the Broadband Deployment Advisory Committee, to provide advice and recommendations for the FCC on how to accelerate the deployment of high-speed Internet access. The Committee is anticipated to meet for two years. The Committee has recommended, among other things, a model code for states titled The State Broadband Deployment Act. A full list of recommendations can be found at <https://www.fcc.gov/broadband-deployment-advisory-committee>.

Federal Communications Commission's Broadband Definitions

In 1999, the FCC determined that “advanced telecommunications capability” and “advanced services” and, in effect, “broadband” are services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kilobits per second. The FCC changed the definition of broadband in 2010 to minimum download speed of 4 Mbps and minimum upload speed of 1 Mbps. As part of its 2015 Broadband Progress Report, the FCC voted to change the definition of broadband by raising the minimum download speeds to 25 Mbps and the minimum upload speed to 3 Mbps, which triples the number of U.S. households without broadband access (as defined by the current definition).

Kansas Developments

Statutes

In 1996, the Kansas Legislature enacted a series of telecommunication-related statutes that, among other things, set forth a statewide policy and a definition of broadband (KSA 66-2001 *et seq.*).

Kansas statute declares it is the policy of the State to ensure every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price; ensure consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates; promote consumer access to a full range of telecommunications services, including advance telecommunications services that are comparable in urban and rural areas throughout the state; advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to Internet providers, and others; and protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience, and necessity.

Kansas law provides the following definitions:

- KSA 66-2005 defines “broadband network” to mean a connection that delivers services at speeds exceeding 200 kilobits per second in both directions; and
- KSA 66-1,187 defines broadband as the transmission of digital signals at rates equal to or greater than 1.5 Mbps.

The Kan-Ed Act defines “broadband technology-based video communication” to mean a class of communications technologies that may include switched ethernet services, DSL, cable modem, private line service, multiprotocol label switching based networks, managed or dedicated Internet technologies and other future technologies,

capable of supporting such applications (KSA 2018 Supp. 75-7222).

Task Forces and Committees

Kansas Broadband Advisory Task Force (2010)

In 2010, the Kansas Broadband Advisory Task Force (KBATF) was created by Governor Parkinson by Executive Order (EO) 10-08. The KBATF was charged with, among other things, developing recommendations for development and implementation of a broadband digital strategy to support statewide availability and adoption of broadband services consistent with the 2010 National Broadband Plan.

In 2015, Governor Brownback abolished the KBATF by EO 15-01.

Special Committee on Rural Broadband Services (2012)

The Special Committee was charged with examining how recent FCC changes to the FUSF and the Kansas Universal Service Fund would affect rural broadband, the accessibility of rural broadband services, and the progress and accuracy of mapping rural broadband service.

In its report to the 2013 Legislature, the Special Committee recommended, among other things, the standing committees on utilities should review short- and long-term planning and solutions for rural broadband, the Department of Commerce should report to the standing committees on utilities a broadband mapping update, and members of the Legislature should be provided an electronic notification when the updated broadband mapping is released.

Telecommunications Study Committee (2013)

The Telecommunications Study Committee was created by 2013 HB 2201. The Committee was created to study, among other things, the possibility of establishing a Kansas Broadband Fund. In its statutorily required annual report to the

2015 Legislature, the Committee recommended the Senate and House utilities committees review the definitions of broadband, telecommunications services, and telecommunications infrastructure with a focus on “future-proofing” those definitions to accommodate the rapid changes in technology.

Statewide Broadband Expansion Task Force (2018)

Senate Sub. for HB 2701 (2018) created the Statewide Broadband Expansion Task Force. The mission of the Task Force is as follows:

- Work collaboratively to develop an approach that includes, but is not limited to, the development of criteria for the creation of a statewide map for defining and evaluating the broadband needs of Kansas citizens, business, industries, institutions, and organizations;
- Identify and document risks, issues, and constraints associated with a statewide broadband expansion project and to develop any corresponding risk mitigation strategies where appropriate;
- Consider any recent actions by the FCC relating to broadband services;
- Identify opportunities and potential funding sources to:
 - Expand broadband infrastructure and increase statewide access to broadband services;
 - Remove barriers that may hinder deployment of broadband infrastructure or access to broadband services; and
 - Consider options for the deployment of new advanced communication technologies;
- Develop criteria for prioritizing the expansion of broadband services across Kansas;
- Review current law and regulations concerning access to the public right-of-way for public utilities and make corresponding recommendations for

any changes necessary to encourage broadband deployment; and

- Propose future activities and documentation required to complete the statewide broadband expansion plan, including an upgradeable, functional map of the state of available broadband service, as well as including which technologies should be deployed and the methods to finance broadband expansion.

The Task Force is required to submit a progress report to the Legislature by January 15, 2019, and a final report by January 15, 2020. The Task Force has not convened as of October 2018.

Mapping

In 2018, Kansas was awarded a \$300,000 grant to complete a statewide broadband mapping project. Connected Nation, a nonprofit organization that works with states to develop tools, resources, and methods to implement solutions to their broadband and digital technology gaps, in partnership with the Governor's Office, will prepare a statewide broadband map of wireline and wireless coverage to be provided to the Statewide Broadband Expansion Planning Task Force. The map will be created by collecting data in collaboration with the Kansas broadband service providers and will also be available to the public.

Legislation

In addition to Senate Sub. for HB 2701, at least nine bills addressing the expansion or definition of broadband have been introduced in the past four years. Two bills that were discussed in committees during the 2018 Session are summarized below.

HB 2451 (2018)

HB 2451 would have created the Statewide Broadband Deployment Authorization Act

to encourage deployment of advanced telecommunications capability throughout rural Kansas by promoting competition in the local telecommunications market and removing barriers to infrastructure investment. The bill would have defined terms associated with the rural broadband service and the process to be followed by an entity or person who seeks authorization to provide service, authorized by the Kansas Corporation Commission. The bill was referred to the House Committee on Energy, Utilities and Telecommunications. The Committee held a hearing on the bill but took no further action.

HB 2473 (2018)

HB 2473 would have created various tax incentives for providers of broadband and broadband deployment in rural areas. The bill would have created an income tax credit, deduction from Kansas adjusted gross income, an adjustment for calculating federal adjusted gross income, and exemptions from sales tax. The bill also would have defined broadband to mean at least 25 Mbps download and at least 3 Mbps upload, which would have brought Kansas' definition in line with the FCC's current definition. The bill was referred to the House Committee on Taxation, where it died without a hearing. However, the bill was discussed during a broadband informational hearing in the Senate Committee on Utilities.

Other States

Forty-three states and the District of Columbia have at least one statute related to broadband technology. While some states merely provide definitions of broadband for various purposes, states have also endeavored to expand access to high-speed Internet through broadband technology and to improve existing broadband service. For additional information about other states, please see the memorandum at <http://www.kslegresearch.org/KLRD-web/Utilities&Energy.html>.

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Utilities and Energy

M-3 Electric Utility Regulation and Ratemaking

Overview of Electric Utility Structure in Kansas

Three types of electric utilities exist in Kansas: investor-owned, cooperative, and municipal. Investor-owned utilities (IOUs) are those in which shareholders provide the capital for operation and maintenance of electric service. Westar Energy, Kansas City Power & Light (KCP&L), and Empire District Electric are the three IOUs in Kansas. (Note: The Kansas Corporation Commission (KCC) approved a merger of Westar Energy and Great Plains Energy, Inc. (parent company of KCP&L) on May 24, 2018, creating a new company called Eergy Energy, Inc. For the purposes of this article, the companies will be referenced as Westar and KCP&L.) Cooperatives generally exist in rural areas where the customers own the company that provides their electric service. There are 32 cooperatives currently operating in Kansas. Finally, 118 municipalities provide electric service for their citizens.

The following electric companies are regulated by the KCC: KCP&L, Westar, Empire District Electric, and Southern Pioneer. Cooperatives and municipalities are outside of the KCC jurisdiction pursuant to KSA 66-104b and KSA 66-104f, respectively, though KCC may have jurisdiction over these entities in certain limited circumstances.

Electric utilities under the jurisdiction of the KCC must receive KCC approval to change their rates or terms of service. The KCC's role, according to KSA 66-101 *et seq.*, is to establish rates that are just and reasonable while ensuring efficient and sufficient service from the utility. In addition to setting rates, the KCC has the authority to regulate:

- Structure of the retail market for sales of electricity;
- Permitting and siting of transmission and generation;
- Transmission of bundled retail electricity (service in which all aspects of energy production, *i.e.*, generation, transmission, and distribution, are provided by one entity);
- Mergers and acquisition activity; and
- Other various public policies relating to regulated entities.

Ratemaking

In determining an appropriate rate for a regulated electric utility, the KCC must first determine the utility's annual revenue requirement considering five factors:

- The cost of capital invested in assets (also called a rate of return) that reflects the actual cost of debt and a reasonable return or profit the utility has an opportunity to earn on shareholders' equity;
- The total investment, or rate base, upon which a return will be earned;
- The accumulated and ongoing depreciation of plant(s) and equipment;
- The company's reasonable and prudent operating expenses; and
- Income taxes.

After determining the revenue requirement, the KCC must design rates that will collect the utility's revenue requirement from the utility's customers in an efficient and equitable manner.

Process

Application. The process of ratemaking begins when the utility files an application to change its rates, including details of the proposal, prepared testimony, and supporting data. In most cases, the KCC is allowed 240 days from the filing date to make its decision. However, the time limit can be waived under certain circumstances.

Review. In its review of the application, KCC staff, composed of accountants, economists, financial analysts, and engineers, reviews the utility's books and records. This review can take several months to complete. Staff then provides a non-binding recommendation to the three-member Commission. Interested parties, such as consumer groups or industrial customers, may also file recommendations in the case. The Citizens Utility Ratepayer Board (CURB) is the State-appointed representative of residential and small commercial ratepayers in rate cases before the KCC.

Public hearing. A public hearing is not required by law, but it is generally held in significant rate cases. The hearing provides an opportunity for the public to learn more about a utility company's proposal and speak before the KCC to express their views on the case. The public may also submit comments online *via* the KCC's website or in an e-mail or letter during the designated comment period.

Evidentiary hearing. The facts of a rate case are presented during a formal evidentiary hearing. Expert witnesses may testify and answer questions based on their written testimony submitted by the utility, KCC staff, CURB, and other parties to the case. The three members of the Commission read the written testimony, review the exhibits, hear the cross-examination, and may ask the witnesses questions as they weigh the evidence in the case.

Reviewing the record. Commissioners review the record, the facts of the case, and legal briefs to make their decision. The KCC will authorize rate changes that are just and reasonable and in the public interest. By law, the company must be allowed the opportunity to make enough money to meet reasonable expenses, pay interest on debts, and provide a reasonable return to stockholders.

Decision. When a decision is made, the KCC announces it through a written order that is approved in an open business meeting. That order is subject to appellate court review, which may be initiated by any party, with the exception of KCC staff, who has filed a timely request for reconsideration.

Additional information on ratemaking may be found at <http://www.kcc.state.ks.us/electric/how-rates-are-set>.

Recent Developments in Ratemaking

In the 2018 Legislative Session, the Kansas Senate introduced a concurrent resolution (SCR 1612) urging the KCC to lower electric rates to regionally competitive levels. Proponents of the concurrent resolution stated electric rates in Kansas are much higher than those in surrounding

states. Opponents stated the resolution was unnecessary as rate reductions would be realized through a pending merger of Westar and KCP&L. The resolution passed the Senate Committee of the Whole but died in the House Committee on Energy, Utilities and Telecommunications.

In September 2018, the KCC approved a \$66.0 million rate cut for electric customers of Westar, resulting in a decrease of \$3.80 per month for the average residential customer.

Additional Regulators of Electricity

In addition to the KCC, several other entities have regulatory power over the generation, transmission, and distribution of electricity in Kansas.

Kansas Department of Health and Environment (KDHE). KDHE regulates electric generating units (EGUs) pursuant to KSA 65-3001 *et seq.*, the Kansas Air Quality Act. Specifically, KSA 65-3031 provides the Secretary of Health and Environment, in accordance with the requirements of the Environmental Protection Agency's (EPA's) rule on *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, may develop and submit to the EPA a state plan for compliance with the regulation of carbon dioxide from any affected or existing EGUs. The Secretary may implement such standards through flexible regulatory mechanisms, including the averaging of emissions, emissions trading, or other alternative implementation measures that the Secretary determines to be in the interest of Kansas.

Environmental Protection Agency. Amendments to the federal Clean Air Act in 1970 established comprehensive regulations for stationary sources of air pollutants such as fossil-fuel burning power plants throughout the United States; the EPA began regulating greenhouse gases emitted by power plants in 2011. President Obama proposed the Clean Power Plan (CPP) rule in 2015, which aimed to reduce carbon dioxide emissions from electrical power generation by 32.0 percent by 2030, relative to 2005 levels. On

August 21, 2018, President Trump proposed the Affordable Clean Energy (ACE) rule, which would establish emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired EGUs. If adopted, ACE would replace the CPP. The ACE rule is discussed in article [M-1 Affordable Clean Energy Rule](#) of this Briefing Book.

Federal Energy Regulatory Commission (FERC). FERC has jurisdiction over electricity in Kansas as it relates to:

- Wholesale sales of electricity;
- Reliability of large interconnected electrical systems made up of generation and transmission facilities and their control systems, often referred to as the “bulk power system” or electrical grid;
- Transmission of unbundled electricity, which provides for independent accounting for separate operations such as generation, transmission, and distribution;
- Allocation of costs for interstate electric transmission;
- Licensure of non-federal hydroelectric power;
- Capacity requirements for regional transmission organizations;
- Mergers and acquisitions activity; and
- Market manipulation enforcement.

North American Electric Reliability Corporation (NERC). The federal Energy Policy Act of 2005 provided for the creation of a federal electric reliability organization to develop mandatory reliability standards for the bulk power system in the United States. In 2007, FERC granted NERC the legal authority to enforce those reliability standards. NERC oversees the nine regional reliability entities that comprise the interconnected power system in the United States, Canada, and Mexico. Other responsibilities of the NERC include assessing adequacy of resources and providing education and training opportunities as part of an accreditation program to ensure power system operators remain qualified and proficient.

Southwest Power Pool (SPP). SPP is a regional transmission organization (RTO) mandated by FERC to ensure reliable supplies of power, adequate transmission infrastructure, and a competitive wholesale electricity market. To meet those mandates, SPP oversees the bulk power system and wholesale power market in the central United States on behalf of utilities and transmission companies in 14 states composed of Kansas, Arkansas, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

State Legislation Relating to Utility Regulation

The Kansas Legislature has passed several bills related to the regulation of electric utilities over the years. Examples of such legislation follow.

HB 2047 (1976)

With the enactment of the Retail Electric Suppliers Act (RESA) in 1976, the state was divided into electric service territories. RESA provides that “within each such territory, only one retail electric supplier shall provide retail electric service, and any such territory established for a retail electric supplier pursuant to this section shall be certified to such retail electric supplier by the [KCC] and such area shall be provided retail electric service exclusively by such supplier.”

HB 2263 (2005)

The 2005 Legislature passed the Kansas Electric Transmission Authority Act, creating the Kansas Electric Transmission Authority (KETA). The purpose of KETA was to further ensure reliable operation of the integrated electrical transmission system, diversify and expand the state’s economy, and facilitate the consumption of Kansas energy through improvements in the state’s electric transmission infrastructure. KETA fulfilled that purpose through building electric transmission facilities or by facilitating the construction, upgrade, and repair of third party transmission facilities. The 2016 Legislature repealed the

statutes authorizing KETA and abolished its funds in SB 318.

Senate Sub. for HB 2369 (2009)

The 2009 Legislature passed the Renewable Energy Standards Act (Act) that requires electric public utilities, except municipally owned electric utilities, to generate or purchase specified amounts of electricity generated from renewable resources. The 2015 Legislature amended the Act by making it a voluntary goal for affected utilities to achieve net renewable generation capacity equal to at least 20.0 percent of the utility’s peak demand by the year 2020 rather than a mandatory requirement with the enactment of House Sub. for SB 91.

HB 2233 (2015)

The 2015 Legislature passed HB 2233, which established the procedure for developing and submitting a state plan to the EPA to comply with the proposed federal CPP rule. In response to the U.S. Supreme Court’s issuance of a stay on litigation related to the CPP rule on February 9, 2016, the 2016 Legislature suspended all state agency activities, studies, and investigations in furtherance of the preparation of the submission of a final state plan pursuant to the CPP rule in SB 318.

Sub. for SB 323 (2018)

The 2018 Legislature amended law related to Kansas municipal energy agencies (MEAs), the oversight of electric cooperatives by KCC, and retail electric suppliers with the enactment of Sub. for SB 323.

MEAs. The bill requires MEAs to file for a certificate for transmission rights for any electric facilities used to transmit electricity constructed in the certificated territory of a retail electric supplier. Under continuing law, MEAs are authorized to operate as public utilities without obtaining a certificate of public convenience (certificate requirements described in KSA 66-131). The bill also provides a MEA is allowed to elect to be exempt from the jurisdiction, regulation,

supervision, and control of the KCC by having an election of its voting members, not more often than once every two years, by complying with specified requirements as listed in the bill.

Oversight of electric cooperatives. The bill allows the KCC's oversight role of electric cooperatives to be limited as it relates to charges or fees for transmission services that are recovered through an open access transmission tariff of an RTO and that has its rates approved by FERC.

Retail electric suppliers. When a municipality proposes to annex land located within the certified territory of a retail electric supplier, the municipality is required to provide notice to the

retail electric supplier no less than 30 days prior to the municipality making a selection for a franchise agreement. When a municipality is making a franchise agreement selection, it is required by continuing law to consider certain factors. The bill adds two factors for a municipality to consider: 1) proposals from any retail electric supplier holding a certificate in the annexed area; and 2) whether the selection is in the public interest as it relates to all the factors considered by the municipality.

For a comprehensive summary of bills related to the regulation of electricity in Kansas, see the memorandum entitled "1998 through 2018 Bills Impacting Energy Production and Transportation of Energy" located on the Kansas Legislative Research Department's website.

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M-1
**Affordable Clean
Energy Rule**

M-2
**Broadband
Expansion**

M-3
**Electric Utility
Regulation and
Ratemaking**

M-4
**Small Wireless
Facility Siting**

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Utilities and Energy

M-4 Small Wireless Facility Siting

The fifth generation of mobile communication network, referred to as 5G, will be deployed primarily through a network of small wireless antennas. With each new generation of wireless networks, cellular and internet connection speed has improved. 5G is projected to increase connection speed, possibly enabling speed ten times faster than current 4G networks. It is also projected to increase connectivity and capacity, allowing more people to communicate using their devices at the same time. In an effort to accelerate deployment of next generation cellular technology, the Federal Communications Commission (FCC) approved a *Declaratory Ruling and Third Report and Order* (Report) addressing 5G siting in the United States on September 26, 2018. This article reviews certain sections of the Report and addresses how the Report may impact Kansas law.

FCC Declaratory Ruling and Third Report and Order Overview

The FCC states the purpose of the Report is to:

- Clarify the scope and meaning of the “effective prohibition” standards set forth in Sections 253 and 332(c)(7) of the Telecommunications Act of 1996 (Act) as they apply to state and local regulation of wireless infrastructure deployment;
- Conclude Sections 253 and 332(c)(7) limit state and local governments to charging fees that allow for cost recovery only for processing applications and managing structures in rights-of-way;
- Identify specific fee levels for small wireless facility deployments that comply with the relevant standard;
- Provide guidance on certain state and local non-fee requirements, including aesthetic and undergrounding requirements;
- Establish new “shot clocks” for small wireless facilities (“shot clocks” refers to timeliness for a municipality to review small wireless facility applications);
- Codify existing shot clocks for non-small wireless facility deployments established by the *2009 Declaratory Ruling* (not discussed in this article);

- Clarify all state and local government authorizations necessary to deploy personal wireless service infrastructure are subject to these shot clocks; and
- Establish that a failure to act within the new small wireless facility shot clocks constitutes a presumptive prohibition on the provision of services, and set the expectation that local governments shall provide all required authorizations without further delay.

The FCC states its intent is to “promote the timely build out of new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public.” Further, the FCC states, “America is in a transition to the next generation of wireless service,” and this action “is the next step in the FCC’s ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services.” The Report was published in the *Federal Register* on October 1, 2018, and will be in effect 90 days after publication.

According to the National Conference of State Legislatures (NCSL), the Report places new limits on local wireless infrastructure siting review and has the potential to preempt the 20 states, including Kansas, that have enacted small cell legislation.

Standard for Determining Effective Prohibition of Service

One of the expressed purposes of the Report is the intent to clarify the FCC’s interpretation of the term “effective prohibition,” found in Sections 253 and 332(c)(7) of the Act. Paragraph 37 of the Report states that effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of the variety of activities related to its provision of a covered service. This would include both inhibiting additional services or improving existing ones.

Fees

Another purpose of the Report is intended to resolve confusion regarding limits on state and local fees. Paragraph 50 of the Report states right-of-way access fees and fees for the use of government property in the right-of-way, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of small wireless facilities inside and outside the right-of-way, violates Sections 253 and 332(c)(7) of the Act unless the following conditions are met:

- The fees are a reasonable approximation of the state or local governments costs;
- Only objectively reasonable costs are factored into those fees; and
- The fees are no higher than the fees charged to similarly situated competitors in similar situations.

Paragraph 79 of the Report prescribes the following fee structure that the FCC believes would not violate Sections 253 and 332(c)(7) of the Act:

- \$500 for a single up-front application that includes up to five small wireless facilities with an additional \$100 for each additional facility; and
- \$270 annually per small wireless facility for all recurring fees.

Aesthetic Requirements

The Report also uses the FCC’s interpretation of Sections 253 and 332(c)(7) of the Act to provide guidance on certain potential regulations imposed by local governments.

Regarding aesthetic regulations, the FCC clarifies in Paragraph 86 of the Report that requirements must meet the following three criteria to be permissible under the Act:

- Be reasonable;
- Be no more burdensome than those applied to other types of infrastructure deployments; and
- Be objective and published in advance.

Paragraph 90 of the Report indicates some jurisdictions have adopted blanket ordinances or regulations requiring all wireless facilities to be deployed under ground, some for aesthetic reasons. The FCC clarifies this would amount to an effective prohibition due to the characteristics of wireless signals and violate Sections 253 and 332(c)(7) of the Act.

Minimum spacing requirements are addressed in Paragraph 91 of the Report. The FCC clarifies spacing requirements that prevent providers from replacing preexisting facilities or collocating equipment would be unreasonable. An example of this would include requiring facilities be sited a certain minimum distance away from other facilities.

Review Deadlines and Remedies

Paragraph 105 of the Report establishes the following new shot clocks or timelines for a municipality to review small wireless facility applications:

- 60 days for an application for collocation of small wireless facilities on preexisting structures; and
- 90 days for an application for new construction of small wireless facilities.

In Paragraph 113 of the Report, the FCC indicates that because small wireless facilities are likely to be deployed in large numbers as part of a system to cover a particular area, it anticipates some providers will submit batched applications. “Batched” is defined as multiple separate applications filed at the same time, each for one or more sites or a single application covering multiple sites. As a result, the FCC states in Paragraph 114, with regard to the new shot clocks, these types of applications should follow the same rules as if the applications were filed separately. In addition, if an application contains both sites for collocation and new construction, then it should adhere to the longer 90-day shot clock.

These shot clocks are being established under the FCC interpretation of Section 332 of the Act. The FCC notes these shot clocks are similar to shot

clocks adopted in a Declaratory Ruling issued by the FCC in 2009 for non-small cell wireless facilities (which have been further clarified by the Report, but are not addressed in this article). The FCC notes the 2009 shot clocks were affirmed by the Fifth Circuit and the Supreme Court in *City of Arlington v. FCC* in 2013.

Section B Paragraphs 116 through 131 of the Report clarify that failure to adhere to the small wireless facility shot clock deadlines is considered a presumptive prohibition of service, violating Section 332 of the Act, and an applicant would be able to seek relief in court through a preliminary or permanent injunction.

Kansas Law

Kansas is one of 20 states to enact legislation dealing with the siting of small cell wireless facilities. Senate Sub. for HB 2131 (2016) established application processes, limitations, and construction procedure for operating and maintaining equipment in the public right-of-way.

Kansas Fees

Under KSA 66-2019, authorities cannot charge an application fee, consulting fee, or other fee associated with the submission, review, processing, and approval of an application that is not required for other wireless infrastructure providers or wireline telecommunications or broadband providers in their jurisdiction.

Further, the law directs an authority (defined as any governing body, board, agency, office, or commission of a city, county, or the state that is authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application) can only assess fees for the actual costs relating to granting or processing an application that are directly incurred. This portion is in line with what is required by the FCC Report.

Kansas law also limits the amount an authority can receive from application charges and fees to:

- \$500 for a collocation application that is not a substantial modification, small

cell facility application, or distributed antenna system application; or

- \$2,000 for an application for a new wireless support structure or for a collocation application that is a substantial modification of a wireless support structure.

As noted above, the Report allows for a maximum application fee of \$500 for the first five sites and \$100 for every site thereafter. There is no distinction between collocated sites and new support structures in the Report.

Kansas law also allows for small cell network applications with no greater than 25 individual facilities of similar design within a jurisdiction of a single authority to file a consolidated application and receive a single permit for the installation, construction, maintenance, and repair of the network instead of filing separate applications for each.

An authority also has the ability to enter into a lease with an applicant for the use of public lands, buildings, and facilities. The lease must be at market rate and at least ten years in duration, unless otherwise agreed to by both the applicant and the authority. Charges for placement of wireless facilities on public lands, if the authority chooses to charge, are required to be competitively neutral and not unreasonable, discriminatory, or in violation of existing federal or state law. The FCC's Report suggests that a reoccurring fee of no more than \$270 per facility would be acceptable when determining if such a fee creates an "effective prohibition" under the Act.

Kansas Application Review Process

Similar to the Report, KSA 66-2019 establishes a shot clock for review and issuance of a final decision for small cell network applications by an authority. Kansas law requires local authorities to adhere to the following time lines:

- Review and issue a final decision for consolidated applications for small cell networks containing no more than 25

individual and similar small cell facilities within 60 calendar days;

- Review and issue a final decision for applications for substantial modification to an existing wireless support structure within 90 calendar days; and
- Review and issue a final decision for applications for a new wireless support structure within 150 calendar days.

With regard to modified and new wireless structures, if an authority fails to act within the required time the application is considered approved.

The shot clocks in Kansas law are several weeks longer than what is mandated by the Report, depending on how a wireless provider wants to install a small cell network. However, Kansas law eliminates the need for a provider to seek relief through a court injunction if an application is not reviewed by the deadline, because it is deemed approved at the end of the shot clock period.

Kansas Aesthetic Requirements

Kansas law states that an authority has the right to prohibit the use or occupation of a specific portion of the public right-of-way due to reasonable public interest necessitated by public health, safety, and welfare so long as such interest is exercised in a competitively neutral manner and is not unreasonable or discriminatory. Kansas law further states a wireless services provider or wireless infrastructure provider, subject to an application, shall have the right to construct, maintain, and operate wireless support structures, utility poles, small cell wireless facilities or distributed antenna systems along, across, upon, under, or above the public right-of-way. (*Note: the limitation of access for aesthetic reasons is not expressly stated in statute.*) The authority must be competitively neutral with regard to other users of the public right-of-way, may not be unreasonable or discriminatory, and may not violate any applicable state or federal law, rule, or regulation.

Comparison of Certain Requirements for Siting of Small Wireless Facilities		
Requirement	FCC Report	KSA 66-2019
Co-location Application Fee	\$500 for first five facilities, \$100 for each beyond initial five	\$500 for non-substantial modification to existing structure. \$2,000 for substantial modification
New Structure Application Fee	\$500 for the first five facilities, \$100 for each beyond initial five	\$2,000
Batched Application Fee	\$500 for the first five facilities, \$100 for each beyond initial five	\$500 or \$2,000 depending on application. Can only be applied for by a network with 25 or fewer individual facilities
Co-location Application Review	60 days	90 days
New Structure Application Review	90 days	150 days
Batched Application Review	90 or 150 days depending on if the application requires construction of a new wireless support structure	60 calendar days for networks with 25 or fewer individual facilities

Response

In response to the Report, NCSL and the National Governors Association sent a joint letter to express their concerns regarding the preemptive nature of the ruling for the 20 states that have worked with the industry and localities to address small cell wireless facility siting. They also indicated the ruling may compromise the traditional authority of state and local governments.

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