

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Mark Sievers, Chairman
 Ward Loyd
 Thomas E. Wright

In the Matter of the Notice and Application of)
Westar Energy, Inc. and Kansas Gas and)
Electric Company for Approval of Use of) Docket No: 11-WSEE-438-MIS
RECs to Satisfy the Renewable Energy)
Standards Act for 2011 and 2012.)

**ORDER APPROVING WESTAR'S REQUEST
TO USE RENEWABLE ENERGY CREDITS TO SATISFY THE RENEWABLE
ENERGY STANDARDS ACT FOR 2011 AND 2012**

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being duly advised in the premises, the Commission makes the following findings and conclusions:

I. Commission Authority

1. This proceeding involves an Application by Westar Energy, Inc. and Kansas Gas and Electric Company (Westar) seeking Commission approval for Westar to use renewable energy credits (RECs) to satisfy the requirements of the Renewable Energy Standards Act (RESA), K.S.A. 2010 Supp. 66-1256, *et seq.* and the Electric Utility Renewable Energy Standards (EURES), K.A.R. 82-16-1, *et seq.* for calendar years 2011 and 2012.¹ There are several requirements for affected utilities under the RESA and EURES that the Commission must ensure are achieved. The Application by Westar was suspended until August 7, 2011,

¹ The renewable portfolio requirements are calculated by calendar years. Any reference in this Order to a specific year refers to the calendar year.

which is a period of 240 days from the date the Application was made on December 10, 2010, pursuant to K.S.A. 66-117(c). Suspension Order, January 7, 2011.

2. Under the RESA, affected utilities are required “to generate or purchase electricity generated from renewable energy resources or purchase renewable energy credits” which shall constitute a portion of each affected utility’s peak demand. K.S.A. 2010 Supp. 66-1258(a). From the years 2011 through 2015, the net renewable generation capacity of the affected utility shall not be less than 10% of the affected utility’s peak demand, which is based on the average demand of the prior three years. K.S.A. 2010 Supp. 66-1258(a)(1). The portfolio requirement increases to 15% beginning in 2016 through 2019, and increases again to 20% beginning in 2020 and for each calendar year thereafter. K.S.A. 2010 Supp. 66-1258(a)(2) and (3). Each megawatt of eligible net renewable generation capacity that is installed in Kansas after January 1, 2000, shall be counted as 1.10 megawatts (MW) for the purposes of complying with the RESA. K.S.A. 2010 Supp. 66-1258(c). The Commission adopted rules and regulations, as required by the RESA, which became effective in November 2010, to guide utilities in complying with the RESA. K.A.R. 82-16-1, *et seq.*

3. RECs may be used to meet a portion of the portfolio requirement in 2011, 2016 and 2020, unless otherwise allowed by the Commission. K.S.A. 2010 Supp. 66-1258(a). A REC is defined as “a credit representing energy produced by renewable energy resources” that is approved by the Commission, and one of the renewable energy resources listed in the RESA includes capacity from wind. K.S.A. 2010 Supp. 66-1257(e) and (f)(1). Each REC may only be used once, and unused RECs are valid for up to two years from the date the associated electricity is generated. K.A.R. 82-16-6(c).

4. The Commission is allowed to assess penalties on affected utilities for failure to comply with the RESA. However, the Commission is not required to assess those penalties in 2011 and 2012 if the affected utility can show it has made a good faith effort to comply with the portfolio requirements of the RESA. K.S.A. 2010 Supp. 66-1261. Additionally, the Commission is not allowed to issue penalties on a utility if the utility shows that its total revenue requirement has increased by at least 1% as a result of its investment in renewable energy resources. K.S.A. 2010 Supp. 66-1260; K.S.A. 2010 Supp. 66-1261. The Commission is granted discretion to consider mitigating circumstances in imposing penalties. K.S.A. 2010 Supp. 66-1261(b).

II. Background

A. Westar's Application

5. As stated above, on December 10, 2010, Westar filed an Application seeking a Commission Order authorizing Westar to use RECs to satisfy the requirements of the RESA for years 2011 and 2012. Westar stated its current renewable energy capacity is 301 MW and that it is pursuing development rights for its other proposed wind farms in Kansas. Notice and Application, December 10, 2010, paragraphs 6, 8 (Application, ¶¶ 6, 8). This 301 MW is counted as 331 MW for purposes of the portfolio requirement, since Westar's eligible capacity was installed in Kansas after January 1, 2000, and is therefore credited at a rate of 1.10 MW per each megawatt. Application, ¶ 17; K.S.A. 2010 Supp. 66-1258(c).

6. Westar stated that to meet the requirements of the RESA for 2011 and 2012, it is required to have net renewable generation capacity of 497 MW,² which is 10% of Westar's

² Staff stated that the renewable capacity needed for compliance is 453 MW for 2011 and 455 MW for 2012, compared to Westar's calculated 497 MW for both years. Westar's calculations are based on the system peak load, but the RESA and the Commission's regulations require it to be based on retail peak load. This Order is based on Staff's figures to comply with the RESA and regulations.

three-year average peak of 4,973 for 2008, 2009, and 2010. Application, ¶ 16. Westar stated it needs a minimum of 151 MW in additional renewable capacity to comply with the RESA, which would equal 166 MW after the 1.10 MW adjustment is made for resources installed in Kansas after January 1, 2000. Application, ¶ 17.

B. Staff's Report & Recommendation

7. The Commission's Staff (Staff) examined Westar's Application and recommended the Commission either:

- 1) Approve Westar's request to use RECs obtained through existing Westar renewable generation to satisfy the RESA requirements, and restrict the approval to only calendar years 2011 and 2012; or, in the alternative,
- 2) Waive the penalties for failure to comply with the 2011 requirement under the RESA, and find that Westar has made a good faith effort to comply.

Staff Report and Recommendation, February 25, 2011, page 7 (Staff Report, p. 7). Staff calculated that Westar will require renewable capacity of 453 MW in 2011 and 455 MW in 2012 to meet the portfolio requirement of the RESA, and confirmed that Westar currently has 331 MW of renewable capacity after accounting for the 1.10 MW credit. Staff Report, p. 4. Staff calculated that Westar needs an additional 121.8 MW in 2011 and 123.8 MW in 2012 to comply.
Id.

8. Staff stated that Westar requested use of RECs obtained through Westar's own existing renewable generation to satisfy the RESA requirements. Staff Report, pp. 1-2. Staff expressed its concern with the policy implications of allowing a utility to accumulate excess renewable capacity in the form of RECs for later use to satisfy the portfolio requirement, and stated that no specific language existed in the RESA to allow those utilities to use excess RECs obtained from its existing renewable generation to comply. Staff Report, p. 5. Staff argued that

it was not the Legislature's intent to allow utilities to use RECs obtained through utility-owned generation to meet the portfolio requirements. *Id.* Staff also stated that, "for all practical purposes, allowing a utility to use previously generated RECs to assist in RES compliance for calendar years 2011 and 2012 is no different than granting the utility a waiver of penalties." Staff Report, pp. 5-6.

9. As stated above, Staff recommended the Commission either approve Westar's request to use RECs to satisfy the requirement, or grant a waiver of penalties for 2011 and 2012. Staff stated that Westar has shown a good faith effort to comply with the portfolio requirement. Staff stated this good faith effort was evidenced by Westar holding an existing renewable energy capacity of 301 MW, making efforts to secure additional renewable energy capacity which it chose not to pursue due to unattractive terms to it and its customers, securing additional wind capacity from its proposed wind farms, and participating in a joint venture through Prairie Wind Transmission, LLC to construct transmission infrastructure in Kansas. Staff Report, p. 6.

C. CURB's Response

10. The Citizens' Utility Ratepayer Board (CURB) was granted intervention in this docket on January 19, 2011. CURB filed a Response to Staff's Report, and took exception to Staff's interpretation of the Legislature's intent in crafting the RESA. CURB's Response to Staff Report and Recommendation, March 22, 2011, page 1 (CURB Response, p. 1). CURB stated Staff's interpretation may penalize affected utilities that made voluntary investments in wind generation prior to the enactment of the RESA, and may also penalize ratepayers who have paid for wind power for years "by denying them the benefit of utilizing the native-grown RECs to meet the RES standards." *Id.* CURB argued that Staff's interpretation that the Legislature did

not intend for utilities to utilize accumulated RECs is unsupported, and no language in the statute limits the use of a utility's own RECs to meet the standard. CURB Response, pp. 2-3.

11. CURB further stated that the RESA does not specify that RECs must be credits produced by out-of-state utilities or by utilities other than the utility that is using them to comply. CURB Response, p. 3. CURB argued that the Legislature's intent was to encourage construction of more renewable energy generation facilities in Kansas, not to penalize the utilities that have already begun to do so voluntarily. CURB Response, p. 7.

12. CURB acknowledged Staff's concern that utilities could "game" the system by using their own RECs to comply with the portfolio requirements. CURB pointed out that the Commission is empowered to disallow future reliance on RECs to fulfill the portfolio requirement if the utility takes advantage of the Commission's discretion to allow RECs to count toward compliance. CURB Response, pp. 7-8. CURB urged the Commission to permit utilities to utilize self-generated RECs to meet a portion of the RESA standard in years where the statute permits such use. CURB Response, p. 9.

III. Findings and Conclusions

13. In its Application, Westar requested the Commission approve the use of the RECs Westar has generated and accumulated through its existing renewable generation to help it comply with the 10% portfolio requirement in 2011 and 2012. Based upon a review of the record as a whole in this proceeding, the Commission finds that Westar's proposal to use RECs as a portion of its net renewable generation capacity to satisfy the 10% portfolio requirement in 2011 and 2012 is reasonable, and approves of such.

14. The Commission agrees with CURB's interpretation of the RESA. In the Commission's view, the plain language of the RESA does not limit RECs in the manner that is

the cause of Staff's concern. The Kansas Supreme Court has addressed the issue of statutory construction, and has held that it is presumed the Legislature expressed its intent through the statutory language. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676, 678 (2009). "When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute." *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 521, 154 P.3d 494, 504 (2007) (citations omitted).

15. The Commission acknowledges the concern expressed by Staff that utilities could "bank" RECs for use in later years. However, the Commission, as noted by CURB, has been delegated authority by the Legislature to enforce the requirements of the RESA; if a utility is not complying with the RESA, the Commission is authorized to assess penalties upon such utility. Further, the Commission, upon its reading of the plain language of the statute, does not find that the Legislature disallowed the use of RECs accumulated through utility-owned generation. As stated above in the *Casco* case, the Commission cannot read into the statute that which is not contained in the statute's plain language. If the Legislature intended to limit use of RECs to those produced by out-of-state utilities or utilities other than the utility that is using them to meet a portion of the requirement in the RESA, the Legislature could have added such language into the statute. The Commission therefore finds that it is appropriate and reasonable for Westar to use RECs that it has accumulated to satisfy the renewable portfolio requirements of the RESA in 2011 and 2012.

16. The RESA states that: "Renewable energy credits may only be used to meet a portion of portfolio requirements for the years 2011, 2016 and 2020, unless otherwise allowed by

the Commission.” K.S.A. 2010 Supp. 66-1258(a) (emphasis added). The Legislature specifically gave the Commission authority to otherwise allow for the use of RECs to meet portfolio requirements of affected utilities. Rules and regulations adopted by the Commission further define the parameters of the RESA, and allow capacity from RECs to meet the RESA requirements in years other than 2011, 2016, and 2010, so long as the affected utility provides information explaining why it was unable to or did not acquire other renewable energy resources to meet the portfolio requirements. K.A.R. 82-16-2(b)(7). The Commission by this Order finds that an affected utility subject to the portfolio requirements may be allowed to use RECs in years other than those specifically referenced in the RESA, so long as the utility submits an annual report detailing the utility’s compliance with the portfolio requirements established by the RESA, in accordance with K.A.R. 82-16-2, and the Commission approves of the use of the RECs.

17. This Order is designated by this Commission as precedent that may be used as precedent in any subsequent adjudication. *See* K.S.A. 2010 Supp. 77-415, as amended by 2011 House Bill No. 2027.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission finds that, based upon a review of the record as a whole in this proceeding, Westar’s proposal to use RECs as a portion of its net renewable generation capacity to satisfy the 10% portfolio requirement in 2011 and 2012 is reasonable, and approves of such.

B. The Commission finds that affected utilities may be allowed to use RECs in years other than those specifically referenced in the RESA, so long as the utility submits an annual report detailing the utility’s compliance with the portfolio requirements established by the

RESA, in accordance with K.A.R. 82-16-2, and the Commission approves of the use of the RECs.

C. The Commission designates this Order as precedent that may be used as precedent in any subsequent adjudication.

D. Parties have 15 days, plus three days if service of this Order is by mail, from the date of service of this Order in which to petition the Commission for reconsideration. K.S.A. 66-118b; K.S.A. 2010 Supp. 77-529(a)(1).

E. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order, or orders, as it may deem necessary and proper.

BY THE COMMISSION IT IS SO ORDERED.

Sievers, Chairman; Loyd, Commissioner; Wright, Commissioner

Dated: AUG 01 2011



ORDER MAILED AUG 02 2011

Patrice Petersen-Klein
Executive Director

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PLEASE FORWARD THE ATTACHED DOCUMENT (S) ISSUED IN THE ABOVE-REFERENCED DOCKET TO THE FOLLOWING:

NAME AND ADDRESS	NO. CERT. COPIES	NO. PLAIN COPIES
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ORDER MAILED AUG 02 2011

The Docket Room hereby certified that on this _____ day of _____, 20_____, it caused a true and correct copy of the attached ORDER to be deposited in the United States Mail, postage prepaid, and addressed to the above persons.