

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Joint Application)
of Westar Energy, Inc. and Kansas Gas)
and Electric Company for Recovery of)
Certain Costs Through Their RECA) Docket No. 19-WSEE-355-TAR

**PETITION FOR RECONSIDERATION OR CLARIFICATION OF
WESTAR ENERGY, INC. AND KANSAS GAS AND ELECTRIC COMPANY**

COME NOW Westar Energy, Inc. and Kansas Gas and Electric Company (collectively “Westar”) and, pursuant to K.A.R. 82-1-235, K.S.A. 66-118b and K.S.A. 77-529, respectfully petition for reconsideration or clarification of certain issues of fact and law concerning the Commission’s September 12, 2019 Order on Westar’s Application to Recover Certain Costs through its RECA related to the 8% Portion of Jeffrey Energy Center (“Order”) in the above-captioned matter. In support of its Petition, Westar states:

I. Introduction

1. On March 4, 2019, Westar Energy, Inc. and Kansas Gas and Electric Company (together as “Westar”) filed a Joint Application for recovery through its Retail Energy Cost Adjustment (“RECA”) of the lease expense and non-fuel operations and maintenance expense (NFOM) associated with its seven-month lease extension and subsequent purchase of an 8% interest in Jeffrey Energy Center (“JEC”). The lease extension and purchase of the 8% were the result of a settlement agreement Westar entered with Midwest Power Company (“MWP”) to resolve disputes between the two parties related to the 8% interest.¹

¹ Ives Direct, p. 15.

2. Testimony in the docket was filed by Westar, Commission Staff, Kansas Industrial Consumers Group, Inc., and the Citizens' Utility Ratepayer Board. An evidentiary hearing was held on July 16, 2019, and post-hearing briefs were filed by the parties.

3. The Commission issued its Order on Westar's Application to Recover Certain Costs through its RECA related to the 8% Portion of Jeffrey Energy Center on September 12, 2019 ("Order").

4. In its Order, the Commission denied Westar's Application for recovery of the lease payments for the seven month lease extension and the NFOM associated with the 8% interest, as well as fuel costs and future capital costs related to the 8% interest.² The Commission indicated that Westar should be allowed to operate the 8% interest as a merchant plant and authorized Westar to retain any wholesale sales directly attributable to the 8% portion of JEC.³

5. The Commission found that the Non-Unanimous Stipulation and Agreement ("NS&A") approved by the Commission in Docket No. 18-WSEE-328-RTS "controls the legal analysis in this case because the NS&A's provisions pertaining to the 8% lease payment and NFOM furnish the authorization and basis for Westar's requests in this Docket. All of the parties to this Docket agreed to the Commission-approved NS&A."⁴

6. Further, with respect to the concept of a "zero-cost transfer" that was contemplated by the NS&A, the Commission found:

As stated in the previous section, the Commission finds the NS&A is controlling in this case, and therefore, the Commission must analyze Westar's request in light of the relevant NS&A provisions. The Commission can decide one of Westar's options under the NS&A at the outset, namely, the zero-cost transfer of the 8% interest. Paragraph 29 of the NS&A states "[i]n the event that Westar

² Order, ¶ 63.

³ Order, ¶¶ 61 and 63.

⁴ Order, ¶ 17.

ends up negotiating a zero-cost transfer of ownership (defined as \$0 or \$1), Westar is automatically entitled to begin recovering actual NFOM expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval.” In that case, Westar does not need Commission approval to begin recovering these costs. The Commission rejects KIC's assertion that the zero-cost transfer provision simply shifted the burden to a party wanting to challenge the justness and reasonableness of Westar's rates should Westar have obtained a zero-cost transfer. The NS&A's “automatically entitled to begin recovering” language in paragraph 29 means that with a zero-cost transfer, Westar needs no Commission approval, and hence, has no burden to ward off a challenge. However, Westar did not obtain a zero-cost transfer, and thus, that option became moot.⁵

7. The Commission also determined that Westar’s decision to enter the settlement with MWP and acquire the 8% interest in JEC was not prudent, based in part on the Commission’s finding that Westar did not act in a timely manner to sufficiently explore other alternatives to the MWP settlement.⁶

II. Petition for Reconsideration

8. The Commission’s Order should be reconsidered because the decision is based on a determination of fact, made or implied in the Order, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole.

9. The Commission finding that Westar was impudent because it failed to act timely to explore alternatives to the MWP settlement is a determination not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole. The record does not support the conclusion that Westar did not act in a timely manner to explore other available alternatives. Indeed, no party in the docket alleged that Westar did not act timely to explore alternatives to the settlement with MWP and there is no evidence whatsoever in the

⁵ Order, ¶ 22.

⁶ Order, ¶¶ 39-47.

record on that issue. Instead, the only evidence in the record demonstrates that Westar prudently explored all the alternatives available to it beginning in sufficient time before the expiration of the lease given the limited number of alternative options.⁷

10. The party challenging the prudence of a decision made by the utility has the burden of identifying and proving the alleged imprudence. “Presumption as used by the commission means a general disposition by the commission to view expenses incurred as reasonable. In a rate case . . . it would be burdensome to require a utility to justify every expenditure which is the basis of the request for rate relief. Therefore, unless an expense is challenged, the commission assumes it was reasonably incurred.”⁸ In other words, Westar would only have had the obligation to respond to the suggestion that it was imprudent by failing to timely act if such an allegation had been raised in testimony by a party in the docket. No such allegation was made so it is presumed that Westar acted timely to consider all options and it is improper for the Commission to rely on such an argument when making its decision regarding the prudence of Westar’s decision to enter the settlement with MWP.

11. Had this issue been raised in testimony, Westar would have had the opportunity in rebuttal testimony to demonstrate that (1) it could not have acted any sooner to pursue foreclosure against MWP because there would not have been a case or controversy giving it standing to file a foreclosure action until MWP failed to make a payment, (2) MWP would have had little interest in negotiating with Westar any sooner because it was not under any pressure until the lease

⁷ See, e.g., Grady Direct, pp. 4-5; Grady Rebuttal, pp. 14-15; Ives Rebuttal, pp. 3-4.

⁸ *Public Serv. Co.*, 50 P.U.R.4th 416, 427 (N.M. Pub. Util. Comm'n 1982); see also In the Matter of the Application of Kansas City Power & Light Company to Modify its Tariffs to Continue the Implementation of its Regulatory Plan, Docket No. 10-KCPE-415-RTS, *Order: 1) Addressing Prudence; 2) Approving Application, in part; & 3) Ruling on Pending Requests* (Nov. 22, 2010) (“the Commission concludes that Staff and CURB must prove, by the preponderance of the evidence, that KCPL, under K.S.A. 66-128g, imprudently incurred costs that should be excluded from the rate base”).

expiration got closer and beginning discussions over a year prior to the expiration was reasonable (3) because Westar employees deal with the power market on a daily basis, they were well aware of the value of the 8% interest in the market and of whether there was any potential for finding an alternative buyer for that interest and of whether there was any potential for arranging a new wholesale capacity sale from the 8% interest, (4) Westar's employees were monitoring the market conditions and the impact they had on decisions related to the 8% interest in JEC over an extended period of time and acted in a timely manner to resolve the dispute with MWP when it arose, and (5) MWP's parent company – KeyBank, one of the largest banks in the world – had every motivation and ability to pursue all potential buyers for the 8% interest in order to maximize the amount they received for the interest and absence evidence to the contrary, it is reasonable to assume this large, sophisticated entity did explore such options.

12. Therefore, Westar asks the Commission to reopen the record to take evidence on this issue so that the Commission can reconsider its finding that Westar acted imprudently on the basis that it did not timely act to consider and/or pursue available alternatives to the settlement with MWP. Because Westar did in fact act in a timely manner to pursue all available alternatives and selected the most reasonable option available, the Commission should find that Westar's decision to enter the settlement with MWP was in fact prudent and Westar should be entitled to the cost recovery requested in its Application. The Commission's ruling that Westar did not act in a timely manner is unsupported in the record.

III. Request for Clarification

13. In the event the Commission denies Westar's request for reconsideration, Westar seeks clarification with respect to the Commission's findings in its Order regarding the "zero-cost transfer" option, as discussed below. Westar did not request recovery of the \$3.7 million purchase

price for the 8% interest in its Application in this docket and had intended to address those capital costs at the time at which those costs could first be considered for inclusion in base retail rates – in its next general rate case. However, the Commission did make a finding with respect to Westar’s recovery of the capital costs in its Order.⁹ Accepting the Commission’s decision that the determination regarding recovery of the \$3.7 million should be made in this docket, Westar now seeks clarification with respect to the treatment of those costs.

14. As the Commission concluded in its Order, the NS&A governs Westar’s recovery of costs related to the 8% interest in JEC and, if Westar had been able to obtain the 8% interest in JEC for \$0 or \$1, Westar would be “automatically entitled to begin recovering actual NFOM expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval.”¹⁰

15. The effect of paragraph 29 in the NS&A, to which all parties to this docket agreed, is that Westar was authorized to automatically recover the NFOM and fuel expenses for the 8% interest if Westar was able to acquire that interest in a way that has virtually no impact (\$0 or \$1) on customers as far as the capital costs to acquire the interest. In other words, if customers were not required to pay for the purchase price in rates, Westar would not have the regulatory burden to justify recovery of the NFOM or fuel costs related to the 8% interest – recovery of those costs would be automatic under paragraph 29 of the NS&A.

16. Therefore, Westar seeks clarification from the Commission that if Westar were to commit to never seek recovery from customers of the \$3.7 million acquisition price or the \$4.83 million in lease payments for the seven-month lease extension – such that customers experience

⁹ Order, Ordering Paragraph B, p. 31.

¹⁰ Order, ¶ 22; NS&A, ¶ 29.

the equivalent of a zero-cost transfer – this would allow Westar to qualify for automatic recovery of the fuel and NFOM costs related to the 8% under paragraph 29 of the NS&A.

17. By agreeing never to seek recovery of the purchase price or lease expense, Westar would be meeting precisely the intent of paragraph 29 of the NS&A by obtaining the 8% interest in JEC at no cost to customers. Under this scenario, the impact to customers would be identical to the impact contemplated under paragraph 29 of the NS&A.

18. If the Commission provides the clarification requested by Westar in this pleading, Westar commits that it will not at any time seek recovery of the \$3.7 million purchase price for the 8% interest in JEC or the \$4.83 million in lease payments for the seven-month lease extension. If the requested clarification is provided, Westar would begin recovery of the fuel and NFOM costs related to the 8% through its RECA as contemplated by paragraph 29 of the NS&A. In addition, under this circumstance, the Commission’s finding that Westar be allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC would no longer be effective.

WHEREFORE, Westar respectfully requests that the Commission (1) reconsider its finding that Westar was imprudent because it did not timely consider alternatives to the MWP settlement because such a finding is not supported by the record and find that Westar’s decision to enter the settlement with MWP was in fact prudent and Westar should be entitled to the cost recovery requested in its Application or, in the alternative, set the matter of the timeliness of Westar’s action for hearing in this Docket or (2) issue an order clarifying that if Westar commits that it will not at any time request recovery of the \$3.7 million purchase price for the 8% interest in JEC or the \$4.83 million in lease payments for the seven-month lease extension, then Westar’s acquisition of the 8% interest in JEC would qualify as a “zero-cost transfer” under paragraph 29

of the NS&A and Westar would be permitted to automatically recover the fuel and NFOM costs associated with the 8% interest in JEC.

Respectfully submitted,

/s/ Cathryn J. Dinges
Cathryn J. Dinges (#20848)
Corporate Counsel
818 South Kansas Avenue
Topeka, Kansas 66612
Telephone: (785) 575-8344
Fax: (785) 575-8136
Cathy.Dinges@evergy.com

**Counsel for Westar Energy, Inc. and
Kansas Gas and Electric Company**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed, this ___st day of September, 2019, to the following counsel of record:

JOSEPH R. ASTRAB
CITIZENS' UTILITY RATEPAYER
BOARD
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604
j.astrab@curb.kansas.gov

TODD E. LOVE, ATTORNEY
CITIZENS' UTILITY RATEPAYER
BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
t.love@curb.kansas.gov

DAVID W. NICKEL, CONSUMER
COUNSEL
CITIZENS' UTILITY RATEPAYER
BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
D.NICKEL@CURB.KANSAS.GOV

SHONDA RABB
CITIZENS' UTILITY RATEPAYER
BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
s.rabb@curb.kansas.gov

DELLA SMITH
CITIZENS' UTILITY RATEPAYER
BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
d.smith@curb.kansas.gov

COLE BAILEY, LITIGATION COUNSEL
KANSAS CORPORATION
COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
c.bailey@kcc.ks.gov

MICHAEL DUENES, ASSISTANT
GENERAL COUNSEL
KANSAS CORPORATION
COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
m.duenes@kcc.ks.gov

ANDREW J. FRENCH, ATTORNEY AT
LAW
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH ST STE 750
OVERLAND PARK, KS 66210-2362
andrew@smizak-law.com

JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH ST STE 750
OVERLAND PARK, KS 66210-2362
jim@smizak-law.com

TOM POWELL, General Counsel-USD 259
TOM POWELL
903 S. Edgemoor
Wichita, KS 67218
tpowell@usd259.net

AMY FELLOWS CLINE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON,
LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
amycline@twgfirm.com

TIMOTHY E. MCKEE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON,
LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
TEMCKEE@TWGFIRM.COM

DAVID L. WOODSMALL
WOODSMALL LAW OFFICE
308 E HIGH ST STE 204
JEFFERSON CITY, MO 65101
david.woodsmall@woodsmalllaw.com

/s/ Cathryn J. Dinges