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 Approval to Make Certain Changes in their Charges for Electric Services.	))))	Docket No. 18-WSEE-328-RTS

SIERRA CLUB AND VOTE SOLAR'S
REPLY IN SUPPORT OF THEIR PETITION FOR RECONSIDERATION

Pursuant to K.A.R. 82-1-218(d), Sierra Club and Vote Solar respectfully submit this Reply to the responses to their Petition for Reconsideration filed by Westar Energy, Inc. and Kansas Gas and Electric Company (collectively, "Westar" or "Company"), the State Corporation Commission of the State of Kansas's ("Commission") Staff, and the Kansas Industrial Consumers Group, Inc. ("KIC"). In support of this Reply, Sierra Club and Vote Solar state as follows:

1. On October 12, 2018, Sierra Club and Vote Solar petitioned for reconsideration of the Commission's September 27, 2018 Order ("Order") Approving Non-Unanimous Stipulation and Agreement ("S&A"). In their Petition for Reconsideration, Sierra Club and Vote Solar demonstrated that the Commission's decision cannot stand because the S&A's revenue reduction allocation and Residential-Distributed Generation ("RS-DG") tariff are not supported by substantial, competent evidence, the RS-DG rate violates state and federal law, and the RS-DG rate is not in the public interest.

2. On October 22, 2018, Westar, Staff, and KIC filed responses to the Petition for Reconsideration.

3. In this Reply, Sierra Club and Vote Solar respond to some of the arguments made by Westar, Staff, and KIC. Sierra Club and Vote Solar continue to rely on their Petition for

Reconsideration for the reasons set forth therein and do not acquiesce to any points raised by Westar, Staff, and KIC that are not addressed in this Reply.

I. The S&A's Allocation of the $66 Million Reduction in Westar's Revenue Requirement and the RS-DG Tariff Are Not Supported by Substantial, Competent Evidence.

4. In their responses, Westar, Staff, and KIC defend the allocation of the negotiated $66 million revenue reduction by asserting that the Commission does not have to adopt a particular class cost of service study ("CCOSS") in the record or the results of any such CCOSS;[1] the allocation reflects a compromise among the parties to the S&A;[2] and the allocation is supported by Staff witness Dr. Glass's testimony and based on Staff's CCOSS.[3] These responses are unconvincing.

5. While the Commission does not have to strictly adhere to a CCOSS for all allocations (or rate designs), the settlement provisions approved, including revenue allocation, must be supported by substantial evidence.[4] There is no factual basis in the record for the disparate allocations of the revenue requirement reduction between classes.[5]

6. The fact that the revenue allocation numbers represent a "compromise"—as all three responding parties highlight—is not an evidentiary basis demonstrating that the allocation is a just, reasonable, non-preferential, and non-discriminatory rate that is based on substantial, competent evidence in the record. As Sierra Club and Vote Solar demonstrated, the evidence

[1] Response of Westar to Sierra Club and Vote Solar's Petition for Reconsideration ¶ 5 (Oct. 22, 2018) ("Westar Response"); KIC Response to Sierra Club and Vote Solar's Petition for Reconsideration ¶ 13 (Oct. 22, 2018) ("KIC Response").
[2] Staff's Response to Sierra Club and Vote Solar's Petition for Reconsideration ¶ 10 (Oct. 22, 2018) ("Staff Response"); KIC Response ¶¶ 13, 18; Westar Response ¶ 5.
[3] Westar Response ¶ 6; Staff Response ¶ 10. The other two paragraphs in Staff's response that purportedly defend the allocation of the revenue requirement reduction do not address the allocation. *See* Staff Response ¶¶ 8-9.
[4] *See* K.S.A. 77-621(c).
[5] Sierra Club, Vote Solar, and Climate and Energy Project's Post-Hearing Brief, pp. 3-5 (Aug. 24, 2018) ("SC-VS-CEP Post-Hearing Brief").

that is actually in the record does not support the approved allocations that are neither equivalent between classes, nor proportionate to any over or under collection in current rates.[6]

7. Westar and Staff point to page 6 of Dr. Glass's testimony in support of the S&A.[7] But the two sentences of Dr. Glass's testimony that they reference—stating that the allocations started with an equal percentage decrease, which was then increased for certain classes and reduced for others—is not substantial evidence because there is no record basis that either the initial, equal allocation, nor the subsequent unequal increases and decreases, are just, reasonable and non-discriminatory. For example, the S&A's allocations are *unconnected* to RORs under current rates.[8] Under either CCOSS filed in this case (Staff or Westar's), the S&A provides some classes that are under-earning under current rates disproportionately larger reductions while providing other classes that are over-earning disproportionately smaller reductions.[9] Dr. Glass's mere acknowledgement that some class revenue allocations were increased and some were decreased–without the basis for each class's relative increase or decrease–does not constitute substantial, competent evidence that those disparate increases and decreases result in just, reasonable, non-preferential, and non-discriminatory rates for all classes.

8. Westar's claim that the allocation was based on Staff's CCOSS, among other things, is equally flawed.[10] Staff's CCOSS showed that Westar over-recovers from RS-DG

[6] *See* Sierra Club and Vote Solar's Petition for Reconsideration ¶¶ 6-7 (Oct. 10, 2018) ("Petition for Reconsideration").
[7] Westar Response ¶¶ 5-6; Staff Response ¶ 10.
[8] *See* SC-VS-CEP Post-Hearing Brief, p. 5 (noting that RS-DG and Lighting classes receive smaller reductions in the revenue requirement than other classes and that Churches and Schools receive larger reductions, which is inconsistent with those classes' relative RORs under either class cost of service study in the record).
[9] *See* Petition for Reconsideration ¶ 7; Direct Testimony of Dorothy J. Myrick, Exhibit DJM-E1 (June 12, 2018) ("Myrick Direct") (All references to Myrick Direct incorporate corrections made by Errata filings on June 19, 2018 and July 5, 2018) (showing current RORs by class under both Staff and Westar CCOSS); Testimony of Greg A. Greenwood in Support of Non-Unanimous Stipulation and Agreement, p. 19 (July 18, 2018) ("Greenwood Testimony in Support of S&A") (percentage reduction from revenue allocation in S&A).
[10] Westar Response ¶ 6.

customers, as indicated by the RS-DG class' relative ROR of 1.29.[11] Yet, the RS-DG class has a disproportionately low base rate decrease (2.42%).[12] Notably, while "[t]he allocation of the $66 million rate decrease in the settlement recognizes that the industrial classes were providing Westar a significantly higher rate of return than other classes" and gives those classes "more of the rate decrease,"[13] the allocation fails to recognize this same dynamic for the RS-DG class. Instead of an above-average allocation of the revenue decrease—because the RS-DG class, like the industrial classes, provides Westar with an above-average ROR—the S&A provides the opposite to RS-DG customers even though Staff's CCOSS showed that RS-DG customers were "contributing more than their fair share to Westar's cost of service."[14] For this reason, the RS-DG allocation runs counter to, rather than being supported by, Staff's CCOSS.

9. In addition to the revenue reduction allocation, Westar and Staff also claim that the RS-DG rate is supported by substantial, competent evidence because ratemaking is not an exact science;[15] the rate is a compromise between settling parties;[16] and the rate is supported by testimony.[17]

10. As discussed above, the fact that the S&A was a product of compromise does not ensure a rate that is just, reasonable, non-preferential, and non-discriminatory based on substantial, competent evidence. The same goes for Westar's "ratemaking is not an exact science" strawman.[18] Sierra Club and Vote Solar do not contend that the S&A fails because it lacks complete precision; rather, it fails because it lacks a sound basis supported by substantial

[11] Myrick Direct, p. 27, Table 2.
[12] Greenwood Testimony in Support of S&A, p. 19; *see also* Tr. Vol. 1, 90:5-18 (Westar, Greenwood).
[13] KIC Response ¶ 16. KIC "t[ook] no position on how the revenue decreases should be allocated between the residential classes." *Id.* ¶ 17.
[14] Westar Response ¶ 6.
[15] *Id.* ¶ 4.
[16] Staff Response ¶ 11; Westar Response ¶ 7.
[17] Staff Response ¶ 11; Westar Response ¶¶ 7-8.
[18] Westar Response ¶ 4.

evidence. Simply asserting that there was a "compromise" and that ratemaking is not an "exact science" does not cure a lack of substantial evidence for the disproportionately smaller allocation of revenue decrease to RS-DG and other classes that are over-earning, as well as over-allocation to customer classes that under-earn. Rather, these assertions are attempts to excuse the lack of evidence. These attempts must fail because substantial evidence is a foundational requirement for Commission action, including approving the S&A.[19]

11. Moreover, Dr. Glass's testimony based on the "estimated value for kW of demand"[20] is an insufficient basis to find the S&A's revenue allocation just, reasonable, non-preferential, and non-discriminatory because it was applied, at most, to a single class. There is no record evidence as to how classes other than the RS-DG class fare under Dr. Glass's proposed metric. A metric applied to a single rate provides no basis to conclude that rate is lawful as compared to rates for other classes.[21]

12. Westar and Staff also point to testimony about the use of class RORs and CCOSS for setting rates for the RS-DG class, including testimony that an ROR is not the only metric to guide allocation and "probably not very reflective" of the RS-DG class.[22] Rather than "ignore" such testimony, as Westar claims,[23] Sierra Club and Vote Solar explained how this view of the CCOSS and ROR—whether true or not—does not provide a basis for the amount of revenue change allocated to the RS-DG class compared to other classes.[24] As discussed above, Dr.

[19] *See* K.S.A 77-621(c).
[20] Petition for Reconsideration ¶ 10 (quoting Tr. Vol. 2, 288:19 (Staff, Glass)).
[21] Petition for Reconsideration ¶ 10.
[22] Staff Response ¶ 12 (quoting Tr. Vol. 2, 288:9 (Staff, Glass)) (internal quotation marks omitted); Westar Response ¶ 8.
[23] Westar Response ¶ 8.
[24] *See* Petition for Reconsideration ¶¶ 45-47.

Glass's alternative metric was applied only to the RS-DG class and, as such, provides no basis for the division of revenue change between the classes.[25]

II. The RS-DG Rate Violates State and Federal Law.

13. Sierra Club and Vote Solar's Petition for Reconsideration demonstrates that the RS-DG rate violates state and federal law because (i) customers who self-generate with renewable resources will pay more due to their use of renewable energy than they would pay, for the exact same loads and usage, if they did not; (ii) these customers are subjected to other prejudices and disadvantages compared to non-generating customers with identical loads and usage; and (iii) such discriminatory treatment is based on costing principles applied only to the RS-DG rate design.[26]

14. Staff responds by mischaracterizing these claims as an attempt to relitigate the Commission's decision in Docket No. 16-GIME-403-GIE ("16-403 Docket").[27] As an initial matter, the order in the 16-403 Docket cannot insulate the Commission's decision in this case against a statutory challenge.[28] Moreover, while the Commission found that a cost-based three-part rate is an appropriate rate design option for RS-DG customers in the 16-403 Docket, in this case, the Commission clearly ruled that it will consider evidence addressing the questions of "whether Westar's proposed rate design for DG customers *in this docket* . . . will *subject such customers to higher rates or charges or any other prejudice or disadvantage*."[29] Thus, Sierra Club and Vote Solar are not re-litigating a prior case, as Staff suggests; rather, they answer the precise question the Commission posed in this case.

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[25] *Id*.
[26] Petition for Reconsideration ¶ 13.
[27] Staff Response ¶¶ 14-16.
[28] *See* Petition for Reconsideration ¶ 37.
[29] Order on Westar's Motion to Strike Portions of Sierra Club's and Vote Solar's Testimony ¶ 10 (July 10, 2018) (citations omitted).

15. Westar argues that "[t]he S&A does not justify the RS-DG rate on the basis of the customers' use of a renewable resource."[30] But the S&A's justification does not determine the lawfulness of the rate. K.S.A 66-117d does not bar utilities from "justify[ing]" a higher (or otherwise prejudicial or disadvantageous) rate based on customers' use of renewable energy; it prohibits utilities from charging customers higher rates based on their use of renewable energy. Try as it might, Westar cannot escape the fact that customers are assigned to the RS-DG class based on their use of renewable energy and once so assigned, charged higher rates and charges.[31] Thus, it is not a coincidence that the impacted customers use renewable generation, as Westar suggests.[32] The use of renewable generation is the defining characteristic of the class.

16. There is no dispute that the S&A subjects most (if not all) residential customers who use renewable energy to higher rates and charges than they would pay if they did not use renewable energy for the exact same loads and usage of grid-supplied electricity.[33] Westar's proffered justification for the rate—differences in usage and load—is, therefore, not supported by the record.[34] Westar refers to a theoretical "break-even point" of roughly 5 kW demand and 900 kWh per month energy usage where customers will pay less under the RS-DG rate than under the RS rate,[35] but tellingly cannot point to a single RS-DG customer with this load pattern. Even if Westar could, the fact that one or more RS-DG customers could pay less under the new

[30] Westar Response ¶ 10; *see also id*. ¶ 14.
[31] *See* Petition for Reconsideration ¶ 16.
[32] Westar Response ¶ 11 ("That the affected customers may happen to use renewable resources does not affect the lawfulness of the S&A and the Order approving it.").
[33] Petition for Reconsideration ¶ 17 (citing to Tr. Vol. 1, 185:5-13 (Westar, Faruqui) (Faruqui concluding that the under-recovery Westar alleges is reduced from 38% under existing RS rates to 30% under the S&A's RS-DG rates); *id*. at 185:25-186:3 (Westar, Faruqui) ("Q. So that 8 percent is the amount that's going up that those customers will pay because they pay more under the DG rate going forward than under the RS? A. That's correct."); Testimony in Opposition to Non-Unanimous Stipulation and Agreement of Madeline Yozwiak, p. 9:13-18 (July 18, 2018) (finding that under the S&A, the average customer in the RS DG class would pay $1,056.51 per year under the proposed RS-DG rate whereas the same customer would only be charged $1,044 under the RS rate)).
[34] Westar Response ¶ 10; Petition for Reconsideration ¶ 20.
[35] Westar Response ¶ 13.

rate does not save it from violating the law. K.S.A. 66-117d does not allow higher or prejudicial rates for some customers as long as at least one customer may not pay more or be prejudiced. And as Sierra Club and Vote Solar explained, all DG customers who are within 150% of the average RS-DG customer usage (under 600 kWh per month) will pay more than their non-DG counterparts would in the RS class, as will the RS-DG class as a whole.[36]

17. Westar's "willingness" to change the tariff to apply to all self-generating customers[37] also does not avoid or cure a K.S.A. 66-117d violation because K.S.A. 66-117d prohibits subjecting customers utilizing renewable generation to prejudice or disadvantage—whether explicitly or incidentally.[38] A facially neutral tariff violates K.S.A. 66-117d when its *effect* is prejudicial to customers who utilize renewable energy. Additionally, K.S.A. 66-1265(e) does not support a finding that the RS-DG rate is consistent with K.S.A. 66-117d, as Westar suggests,[39] because allowing separate rate structures for RS-DG customers does not mean that such structures can violate K.S.A. 66-117d's prohibition on higher, prejudicial, or disadvantageous rates.[40] For this reason, Westar's reliance on K.S.A. 66-1264(b) also fails.[41]

18. Westar also argues that the RS-DG rate does not burden or disadvantage customers.[42] But this claim is belied by the record, which shows that the RS-DG rate is harder to understand and respond to, thereby making it harder for customers who use renewable energy to save money as compared to customers who do not use renewable energy.[43] With respect to customers on demand charges, Westar witness Dr. Faruqui testified that "[s]ome of them" had a

[36] Petition for Reconsideration ¶ 24; SC-VS-CEP Post-Hearing Brief, pp. 11-12.
[37] Westar Response ¶ 11.
[38] Petition for Reconsideration ¶ 22 (discussing *In re Complaint Against Aquila, Respondent by James H. Thorp, III Complainant as to Unjust and Unreasonable Estimated Billing*, Docket No. 05-AQLG-1056-COM).
[39] Westar Response ¶ 12.
[40] *See* SC-VS-CEP Post-Hearing Brief, pp. 16-17.
[41] Westar Response ¶ 11 (noting that K.S.A. 66-1264(b) authorizes different rate schedules for customer-generators).
[42] Westar Response ¶ 16.
[43] Petition for Reconsideration ¶¶ 28-30.

problem and that "not everyone is responsive"[44] and his discussion of "experiments and pilot programs"[45] does not demonstrate that all customers who use renewable energy are protected against prejudice or disadvantage.[46]

19. Westar contends that the S&A's RS-DG rate does not violate federal law because Dr. Glass included RS-DG customers in the RS class when he developed his proposed revenue requirement allocations and that approach, which was used in the S&A, applied the same data and principles to DG and non-DG residential customers.[47] That argument is false on both counts.

20. First, while Dr. Glass's *preliminary* proposal was an equal revenue requirement, it was modified by the S&A, which does not apply equal revenue allocation.[48] For example, RS customers without renewable generation receive a 30% larger decrease in base rates (-3.52%) than RS-DG customers (-2.42%) under the S&A.[49]

21. Second, the rate design relies on costing principles that applied only to the RS-DG rate design and that are inconsistent with the systemwide costing principles applied to design rates for other customers. The RS-DG rate collects more in total rates and charges than the RS rate for identical loads and usage of grid-supplied electricity, and it collects a portion of demand classified costs through charges based on each customer's peak use whereas the RS rate imposes no charge based each customer's peak use.[50] Moreover, the Order specifically relied on Dr.

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[44] Tr. Vol. 1, 190:19-23 (Westar, Faruqui).
[45] Westar Response ¶ 16.
[46] *See* Petition for Reconsideration ¶¶ 31-34.
[47] Westar Response ¶ 20.
[48] Tr. Vol. 2, 291:22-292:12 (Staff, Glass) (explaining that his initial "revenue neutral" proposal was neutral as to the "the previous rate design" and not as to the final S&A revenue allocation).
[49] Greenwood Testimony in Support of S&A, p. 19; *see also* Tr. Vol. 1, 90:5-18 (Westar, Greenwood).
[50] 18 C.F.R. § 292.305(a) (requiring that rates for self-generating customers not discriminate and describing a non-discriminatory rate as one based on "systemwide costing principles"); *See In re Swecker v. Midland Power Cooperative*, Docket No. FCU-99-3 (C-99-76), 2000 WL 477524 (Iowa Utilities Board, Mar. 28, 2000), *approved in Swecker v. Midland Power Cooperative*, Docket FCU-99-3, Order Affirming Proposed Decision and Order as

Glass's on-the-stand analysis based on metrics derived and applied *only to RS-DG customers*—rather than a metric applied to all customers—which also violates federal law.[51]

22. Westar also contends the RS-DG rate is just and reasonable and not unduly discriminatory because RS-DG customers use a different type of service than do RS customers and Dr. Glass's alternative analysis does not have to be applied to the latter.[52] But Dr. Glass's "alternative" is used to impose higher charges for the same service– identical loads and usage by residential customers– which is unduly discriminatory, unjust and unreasonable.

23. Moreover, Westar's response gets federal law backwards. Federal law prohibits different rates for self-generating customers unless justified by cost of service and pricing policies applied uniformly to all customers.[53] Here, different rates for RS-DG customers were applied based on analysis done *only* for those customers. Westar's insistence that Dr. Glass's RS-DG analysis should be applied only to RS-DG customers because they self-generate is exactly the discriminatory treatment barred by federal law.

24. Finally, the S&A does not serve the interests of RS-DG customers, who are forced onto an unlawful, unreasonable, and unjust rate. Westar highlights the Commission finding that the RS-DG rates are in the interest of the RS-DG class because these customers could face a rate increase but are getting a decrease.[54] However, the evidence presented to show

Modified by Order Issued May 18, 2000, 2000 WL 1471588 (Iowa U.B., Aug. 25, 2000) (finding that collecting demand costs from DG customers through demand charges and from non-DG customer through energy charges is discriminatory because cost assignment based on individual customer demand is a different pricing principle than assignment based on overall energy use).

[51] 18 C.F.R. § 292.305.

[52] Westar Response ¶¶ 22-24.

[53] 18 C.F.R. § 292.305; 45 Fed. Reg. 12,214, 12,228 (Feb. 25, 1980); *In the Matter of the Application of El Paso Elec. Co. for Revision of Its Retail Elec. Rates Pursuant to Advice Notice No. 236*, 15-00127-UT, 2015 WL 6659184, at *8 (Oct. 28, 2015) (explaining that 18 C.F.R. § 292.305(a) protects self-generating customers "against discrimination (i.e., higher rates), and permitting (but not requiring) utilities to charge them higher rates only in limited, carefully prescribed circumstances.").

[54] Westar Response ¶ 26 (citing to Order Approving S&A ¶ 91).

that customers who use renewable energy should face a rate hike is deeply flawed.[55] The public interest is served when, among other things, "ratepayers are protected from . . . discriminatory prices."[56] Because the Order subjects RS-DG ratepayers to discriminatory treatment, the public interest is harmed, not served.

CONCLUSION

For the reasons discussed above and in Sierra Club and Vote Solar's Petition for Reconsideration, the Commission should grant reconsideration.

Respectfully submitted,

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[55] Petition for Reconsideration ¶ 61 (citing to *id.* ¶¶ 10-12, 42-51).
[56] Order Approving S&A ¶ 86 (quoting Mr. Grady's testimony).

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VERIFICATION

DISTRICT OF COLUMBIA) ss

I, Jill Tauber, of lawful age and being duly sworn, state and affirm the following: that I am counsel for Sierra Club and Vote Solar; I have read and reviewed the above and foregoing Sierra Club And Vote Solar's Reply in Support of their Petition for Reconsideration; and the contents thereof are true and correct to the best of my information, knowledge, and belief.

JILL TAUBER

SUBSCRIBED AND SWORN before me this 1st day of November, 2018.

Notary Public

My commission expires:

MARIO A. LUNA
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 14, 2023

MARIO A. LUNA NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 3-14-23

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2018, a true and correct copy of **SIERRA CLUB AND VOTE SOLAR'S REPLY IN SUPPORT OF THEIR PETITION FOR RECONSIDERATION** was electronically delivered to the following individuals:

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