THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Shari Feist Albrecht, Chair
Jay Scott Emler
Dwight D. Keen

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

ORDER ON PETITION FOR RECONSIDERATION

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

BACKGROUND:

1. On February 1, 2018, Westar Energy, Inc. (Westar) and Kansas Gas and Electric Company (KG&E) (Westar and KG&E collectively referred to as "Westar") filed a Joint Application requesting authorization to make certain changes to their charges for electric service in Kansas pursuant to K.S.A. 66-117 and K.A.R. 82-1-231.[1] Westar provided the direct testimony of 18 witnesses and the schedules required by K.A.R. 82-1-231 in support of its Application.

2. On June 11, 2018, Commission Utilities Staff (Staff), the Citizens' Utility Ratepayer Board (CURB), Sierra Club, Vote Solar and numerous other parties filed direct testimony.

3. On June 12, 2018, Staff witness Dorothy J. Myrick filed direct testimony, and on June 13, 2018, Staff witness Robert H. Glass filed direct testimony.[2]

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[1] Joint Application, p. 1 (Feb. 1, 2018).
[2] For purposes of this Order, any references to the filing of testimony includes the filing of any exhibits and/or schedules with such testimony.

4. On June 22, 2018, Sierra Club and Vote Solar, as well as several other parties, filed cross-answering testimony, and on July 3, 2018, Westar filed rebuttal testimony.

5. Pursuant to the Commission's *Order Setting Procedural Schedule*, the parties began settlement discussions on July 9, 2018.[3] The discussions continued over several days, at the conclusion of which, numerous parties reached a settlement agreement.

6. On July 17, 2018, Staff, CURB, Kansas Industrial Consumers, Inc. (KIC), Unified School District #259 (USD 259), the Kroger Co. (Kroger), the U.S. Department of Defense and all other Federal Executive Agencies (DOD/FEA), HollyFrontier El Dorado Refining LLC (HollyFrontier), Wal-Mart Stores, Inc. (Wal-Mart), Tyson Foods, Inc. (Tyson Foods), Topeka Metropolitan Transit Authority, and The Kansas State Board of Regents (collectively, Joint Movants) filed a Joint Motion to Approve Non-Unanimous Stipulation and Agreement (NS&A). Sierra Club, Vote Solar and Climate and Energy Project (CEP) opposed the NS&A.[4]

7. On July 18, 2018, various witnesses filed testimony in support of, or in opposition to, the NS&A.

8. On July 24 and 25, 2018, the Commission held a hearing on the NS&A.

9. On September 27, 2018, the Commission issued its *Order Approving Non-Unanimous Stipulation and Agreement* (Order), finding that "the NS&A will result in non-discriminatory, just and reasonable rates that are not unduly preferential and that will enable Westar to continue to provide sufficient and efficient service."[5] The Commission also found that "the NS&A represents a fair and reasonable compromise of the disputed issues in this case and establishes rates that properly balance the interests of the parties to this proceeding, both current and future

[3] *Order Setting Procedural Schedule*, ¶ 4 (Mar. 8, 2018).
[4] Sierra Club, Vote Solar, and Climate and Energy Project's Objection to the Non-Unanimous Stipulation and Agreement and the Joint Motion to Approve the Same, ¶ 3 (July 18, 2018).
[5] Order, ¶ 101.

ratepayers, and the public."[6] In addition, the Commission found that "the NS&A satisfies the five-factor test used by the Commission to determine whether to approve settlement agreements."[7]

10. On October 12, 2018, Sierra Club and Vote Solar (Petitioners) filed a Petition for Reconsideration (PFR), alleging the Commission: (1) erred in finding that the NS&A's revenue reduction allocation and residential distributed generation tariff (RS-DG tariff) are supported by substantial competent evidence;[8] (2) erred in approving a proposed RS-DG rate that violates state and federal law;[9] and (3) erred in finding that the RS-DG rate is in the public interest.[10]

11. On October 22, 2018, Westar filed a Response to Sierra Club and Vote Solar's Petition for Reconsideration (Westar PFR Response). Staff and KIC also filed responses to the PFR.[11]

12. On November 1, 2018, the Petitioners filed a Reply in Support of Their Petition for Reconsideration (PFR Reply).

COMMISSION FINDINGS:

13. A petition for reconsideration must state the specific grounds upon which relief is requested.[12] The purpose of requiring matters to be raised in a petition for reconsideration is to inform other parties and the Commission "where mistakes of law and fact were made in the order."[13] An order is lawful if it is within the statutory authority of the Commission and if the statutory rules are followed.[14] All actions of an administrative agency have a rebuttable presumption of validity.[15]

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[6] Order, ¶ 101.
[7] Order, ¶ 101.
[8] PFR, p. 2.
[9] PFR, p. 7.
[10] PFR, p. 28.
[11] Staff's Response to Sierra Club and Vote Solar's Petition for Reconsideration (Oct. 22, 2018) (Staff PFR Response) and Response to Sierra Club and Vote Solar's Petition for Reconsideration (Oct. 22, 2018) (KIC PFR Response), respectively.
[12] K.S.A. 77-529(a).
[13] *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 24 Kan. App. 2d 222, 228 (1997) (citing *Peoples Nat. Gas Div. of N. Nat. Gas Co. v. State Corp. Comm'n*, 7 Kan. App. 2d 519, 525 (1982)).
[14] *Kan. Gas & Elec. Co v. State Corp. Comm'n*, 239 Kan. 483, 496 (1986).
[15] *Trees Oil Co. v. State Corp. Comm'n*, 279 Kan. 209, 226, 105 P.3d 1269 (2005).

As the party challenging the legality of the Commission's Order, the Petitioners bear the burden of proving the Commission's action was invalid.[16]

A. The Allocation of the Revenue Requirement Reduction is Supported by Substantial Competent Evidence.

14. Substantial competent evidence possesses something of substance and relevant consequence and furnishes a substantial basis of fact from which the issues can reasonably be resolved.[17] The Commission has wide discretion and is presumed to act fairly, reasonably, and impartially.[18] The Commission need not state the precise weight it gives to each evidentiary factor, and "[i]t is for the Commission to determine the weight it shall be given, not the courts."[19] Moreover, "[n]othing can be gained by making a comparison of conflicting testimony. The commission is the trier of facts. The commission had the expertise through its staff to sift and evaluate . . . conflicting testimony."[20] A Commission order may be set aside only when the Commission's determination is so wide of the mark as to be outside the realm of fair debate.[21] Moreover, the Commission need not "render its findings of fact in minute detail," but only with the specificity necessary "to allow judicial review of the reasonableness of the order."[22]

15. The Petitioners asserted that "there is no substantial evidentiary basis for the S&A's allocation of the $66 million revenue requirement reduction among the classes."[23] The Petitioners also claimed "the S&A's allocations are unconnected to RORs [i.e., rates of return] under current rates."[24] According to the Petitioners, "there is no apparent connection between a class's relative

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[16] K.S.A. 77-621(a)(1). *See Trees Oil Co.*, 279 Kan. at 226.
[17] *Pickrell Drilling Co. v. State Corp. Comm'n of Kansas*, 232 Kan. 397, 402 (1982).
[18] *Sw. Kansas Royalty Owners Ass'n v. State Corp. Comm'n*, 244 Kan. 157, 165 (1989).
[19] *Id.* at 166 (internal quotations omitted).
[20] *Id.*
[21] *Zinke & Trumbo, Ltd. v. State Corp. Comm'n*, 242 Kan. 470, 474 (1988).
[22] *Id.* at 475.
[23] PFR, ¶ 4.
[24] PFR, ¶ 6.

ROR and the relative (percentage) decrease in base rate revenues it receives through the S&A."[25] The Petitioners claimed the Order erroneously "allocat[ed] greater revenue reductions to classes currently under-earning, such as residential, than to customers overearning, such as the RS-DG customers in Staff's CCOSS [class cost-of-service study] or small general service in Westar's CCOSS."[26]

16. At the outset, the Commission reiterates the NS&A is a result of extensive negotiation and compromise.[27] However, the NS&A did not simply pick a "compromise" out of thin air. As the Commission demonstrated, the various rates, and the RS-DG rate in particular, are based on and supported by substantial competent evidence from Staff, Westar and CURB.[28] The fact that such evidence is not to the Petitioners' liking, or that the Commission gave it more weight than the Petitioners' testimony, does not undermine that evidence. Moreover, "cost-of-service studies . . . are not an exact science. No universal agreement exists about a correct method to use. The studies are a tool the KCC can use to help it set fair rates."[29] "[T]he matter of rate design involves a policy decision which is legislative in nature, and the Commission's orders in that regard demand utmost deference from the judicial branch."[30]

17. The Petitioners' claims that the NS&A's allocation of the revenue requirement reduction was "unmoored" from each class's relative ROR, and that the RS-DG customer class should have received a different allocation because it is supposedly over-earning, rely on an unwarranted over-dependence on CCOS data.[31] The Commission provided a substantial evidentiary and ratemaking basis for its rejection of the Petitioners' over-dependence on CCOS data, namely,

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[25] PFR, ¶ 7.
[26] PFR, ¶ 7.
[27] *See* Order, ¶ 34.
[28] *See* Order, ¶¶ 35-47.
[29] *Farmland Industries, Inc. v. State Corp. Comm'n*, 25 Kan. App. 2d 849, 855 (1999). *See* Order, ¶ 83.
[30] *Midwest Gas Users Ass'n v. State Corp. Comm'n*, 5 Kan. App. 2d 653, 660 (1981).
[31] *See* PFR, ¶ 7.

RS-DG class dynamism in the test year leading to significantly divergent and unreliable CCOS numbers, the necessity of using approximations in ratemaking, and the need for gradualism.[32] Moreover, the Commission relied on Mr. Greenwood's and Dr. Glass's testimony on revenue reduction allocation supported by Appendices C, D and E to the NS&A.[33] Thus, the Commission finds no basis to re-weigh, and a court may not re-weigh,[34] the evidence upon which the Commission relied.

18. Although the negotiated adjustments departed from the parties' filed positions, the compromise position ultimately reflected in the NS&A is still within the range of the parties' pre-filed positions.[35] Indeed, as KIC stated: "In their cross-answering testimonies, both KIC and DOD-FEA relied on Staff's COSS to propose revenue allocations that would move the classes nearer to cost of service . . . However, while both KIC and DOD-FEA proposed larger decreases for the industrial classes than the system average decrease, both recommendations exercised gradualism . . . "[36] As Staff witness Myrick stated, "CCOS is only one of the many pieces of evidence that the Commission may consider when deciding a rate case. A CCOS may show inequities in rates which need to be addressed, but whatever its indications there are many other information sources and policy considerations which the Commission may consider."[37] Ms. Myrick's testimony is fully in line with Kansas case law stated in paragraph 16 above. Hence, the Commission rejects the undue weight the Petitioners consistently gave to CCOS data.

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[32] *See* Order, ¶¶ 45-46, 65-66, 79, 83-84. *See also Kansas City Power & Light Co. v. State Corp. Comm'n*, 52 Kan. App. 2d 514, 542 (2016) (holding with respect to the Commission's ROE determination and use of gradualism that "[t]he court must avoid the risk of converting what should be an overall review of the total rate to a narrow lens isolating only one or two issues and ignoring the Commission's aggregate decision").

[33] *See* Order, ¶ 35 (relying on pp. 22-23 of Greenwood Testimony in Support of NS&A); Glass Testimony in Support NS&A, p. 6. *See also* Order, ¶ 37 (relying on pp. 2-7 of Glass Testimony in Support).

[34] *Sw. Kansas Royalty Owners Ass'n*, 244 Kan. at 165-66.

[35] *See* Staff PFR Response, ¶ 10; KIC PFR Response, ¶ 17. *See also* Staff's Errata to Testimony of Staff Witness Robert H. Glass, Table 2 (replacing p. 20) (June 19, 2018).

[36] KIC PFR Response, ¶ 15. *See* NS&A, Appendix C; Cross-Answering Testimony of Michael P. Gorman, Exhibit MPG-CA-1 (June 22, 2018); Cross-Answering Testimony of Larry Blank, Table on p. 4 (June 22, 2018).

[37] Myrick Direct, p. 28.

19. Therefore, the Commission affirms its finding that the NS&A's allocation of revenue requirement reduction is supported by substantial competent evidence because it is based in part on Staff's CCOS study, on an initial equal percentage decrease to all customer classes based on existing base rate revenue, on policy considerations such as gradualism, and on certain negotiated adjustments spelled out in Appendices D and E to the NS&A. The Commission denies reconsideration on this point.

B. The RS-DG Rate is Supported by Substantial Competent Evidence

20. The Petitioners' arguments for reconsideration of the NS&A's RS-DG rate also fail. The Commission provided substantial evidentiary support from Westar, Staff and CURB for the three-part RS-DG rate design.[38]

21. The Petitioners' contention that Dr. Glass's "estimated value for kW of demand" metric does not demonstrate an RS-DG rate that is just, reasonable, non-preferential, and non-discriminatory[39] is distinct from the question of whether the NS&A's RS-DG rate is based on substantial competent evidence. It is beyond dispute that Dr. Faruqui and Dr. Glass both provided substantial competent evidence to support the Commission's approval of the NS&A's RS-DG rate design.[40]

22. The Petitioners' contention that Dr. Faruqui erred in asserting that RS-DG customers currently under-recover their costs by 38% is flawed because their contention stringently over-relies on CCOS data,[41] depends on the contested assertion, not found by the Commission, that RS-DG

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[38] Order, ¶ 39. *See* Greenwood Testimony in Support of NS&A, p. 23; Faruqui Direct Testimony, p. 43; Glass Direct Testimony, pp. 32-35; Glass Testimony in Support of NS&A, pp. 2-3; Harden Direct Testimony, p. 25; Kalcic Direct Testimony, p. 17-19.

[39] *See* PFR, ¶ 10.

[40] *See* Order, ¶¶ 40-47. *See also* Faruqui Rebuttal Testimony, pp. 13-14; Faruqui Testimony in Support of NS&A, pp. 2-3; Glass Testimony in Support of NS&A, p. 2; Hearing Exhibit "Staff 1"; Tr., Vol. 1, p. 187 and Vol. 2, pp. 284-85, 287-290.

[41] *See* PFR, ¶ 11

customers should get credit for a particular value of DG exports,[42] and therefore, does not demonstrate that the RS-DG class is over-earning. At most, the evidence may show Dr. Faruqui's 38% number was too high, and that a lower percentage RS-DG under-recovery is more appropriate, something which the NS&A reflects.[43]

23. Based on the Order's well-documented reliance on Dr. Faruqui's and Dr. Glass's testimony on the RS-DG rate design,[44] the Commission affirms its finding of an abundant, substantial, competent and compelling evidentiary basis for approving the NS&A's three-part RS-DG rate design.[45] The Commission agrees with Staff that the Petitioners "offer[] no reason to reconsider the Commission's well-reasoned findings on this issue."[46]

C. The RS-DG Rate Under the NS&A Conforms to Both State and Federal Law

24. The Petitioners alleged the NS&A will cause RS-DG customers to pay more than non-RS-DG customers "for the exact same loads and usage."[47] However, the Petitioners did not clearly define the phrase "exact same loads and usage," and they used the phrases "same loads and usage,"[48] "same electricity use,"[49] "same . . . usage of grid-supplied electricity,"[50] and "using the same amount of electricity"[51] interchangeably, without any real explanation. It appears the

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[42] PFR, ¶ 11. *See* Initial Brief of Westar Energy, Inc. and Kansas Gas and Electric Company, p. 35 (Aug. 15, 2018) (stating that giving RS-DG customers "'credit' for the value of exports in the CCOS study . . . would result in 'double counting' of the exports and would not be appropriate"). *See also* Tr., Vol. 1, pp. 169-70, 197-202.
[43] *See* Order, ¶ 40 (quoting Dr. Faruqui's testimony that "[u]nder the proposed S&A rate, Westar has estimated that costs will be under-recovered from DG customers by around 30 percent"). *See also* Tr., Vol. 2, p. 285 (Dr. Glass stating that he "got about 30 percent" under-recovery).
[44] *See* Order, ¶¶ 40-47.
[45] *See* Order, ¶ 51.
[46] Staff PFR Response, ¶ 13.
[47] PFR, ¶ 13. *See e.g.* PFR, ¶ 13 (alleging "prejudices and disadvantages [for RS-DG customers] compared to non-generating customers *with identical loads and usage*" (italics added)); PFR, ¶ 14 (alleging that "RS-DG customers will pay more for *the exact same loads and usage* than they would if they did not use renewable generation" (italics added)); PFR, ¶ 20 (claiming that the "S&A will impose higher rates and charges overall for RS-DG customers than for RS customers *using the same amount of electricity and having the same demand*" (italics in original)); PFR ¶ 39 (alleging that "those with renewable energy pay more *for the same loads and usage*" (italics added)).
[48] PFR, ¶ 13.
[49] PFR, ¶ 17.
[50] PFR, ¶ 17.
[51] PFR, ¶ 20.

Petitioners intend the phrase "loads and usage" to stand for demand and *energy* usage, in which case their unqualified claim that RS-DG customers will pay more for the exact same demand and energy usage than they would if they did not use renewable generation is incorrect.[52]

25. Instead, the Commission relied on substantial evidence that on average, RS customers and RS-DG customers do not have the same energy usage,[53] and at the point where an RS-DG customer would be using about the same amount of energy as the average RS customer and have a demand lower than 5 kilowatts, the RS-DG customer would pay less under the RS-DG rate than he or she would under the RS rate.[54] Thus, the Commission rejects the Petitioners' arguments based on the overly broad claim that RS-DG customers will necessarily pay more for the exact same loads and usage as non-RS-DG customers.

i. K.S.A. 66-117d

26. Regarding K.S.A. 66-117d, the essence of the Petitioners' position is the NS&A's RS-DG rate violates the statute because RS-DG customers are ostensibly paying a higher rate, and being prejudiced or disadvantaged, solely based on their use of a renewable energy source.[55] The Commission rejects the Petitioners' claim.

27. The RS-DG customers' use of a renewable energy source is not the ***basis for*** the rate they will pay.[56] Rather, the rate is ***based on*** the fact that RS-DG customers are partial requirements customers who have different energy usage patterns.[57] In other words, their main feature is that they are partial requirements self-generators who *happen to use* solar energy, and thus, the NS&A's rate

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[52] PFR, ¶ 14.
[53] Tr., Vol. 2, pp. 284-85.
[54] *See* Tr., Vol. 1, p. 224 (Dr. Faruqui stating that "there is a break even point around 900 kilowatt hours a month and about 5kW demand"); Order, ¶ 57.
[55] *See* PFR, ¶¶ 14, 16-19, 27-35.
[56] Order, ¶ 55-56, 58. Moreover, as previously noted in paragraph 25 of this Order, *supra*, an RS-DG customer will **not** necessarily pay more under the RS-DG rate than he or she would under the standard RS rate. *See* Tr., Vol. 1, pp. 183, 224.
[57] Order, ¶¶ 55-56, 58.

is *based on* their different energy usage pattern, which is the main "partial requirements" feature.[58] The Commission is the trier of fact and has discretion to weigh and accept testimony presented to it.[59] As Westar stated, "[t]hat the affected customers may happen to use renewable resources does not affect the lawfulness of the S&A and the Order approving it."[60]

28. The Petitioners' critique that "there is no record evidence of any RS-DG customer with" a load pattern of 900 kWh of energy usage and a demand of less than 5 kW[61] is faulty because no record evidence shows that an RS-DG customer is unable to have such a load pattern. Where an RS-DG customer's usage is similar to that of a non-DG customer, which is certainly possible, the RS-DG customer could pay the same as or even less than the non-DG customer.[62]

29. Because the difference in rate is *based on* different energy usage patterns between RS and RS-DG customers, and not on the RS-DG customers' use of renewable energy, the Commission reaffirms its finding that Westar's willingness to change its tariff language borrowed directly from K.S.A. 66-1264(b)[63] to language that will apply to all self-generating customers, regardless of the type of generation, alleviates concerns regarding compliance with K.S.A. 66-117d.[64]

30. The Commission also rejects the Petitioners' interpretation of K.S.A. 66-117d[65] because it proves too much.[66] That is, the Petitioners' interpretation of the statute leads to the unreasonable and absurd result that any renewable energy user must *necessarily* be billed at the

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[58] This belies the Petitioners' claim that the "*sole* difference between residential customers in the default RS class and those in the RS-DG class is the latter group's use of renewable energy to serve part of their electricity needs." PFR, ¶ 16.
[59] *Sw. Kansas Royalty Owners Ass'n*, 244 Kan. at 166; *Application of Sw. Bell Tel. Co.*, 9 Kan. App. 2d 525, 538 (1984).
[60] Westar PFR Response, ¶ 11.
[61] PFR, ¶ 24.
[62] *See* ¶ 25 of this Order, *supra*. *See also* Tr., Vol. 1, p. 224.
[63] *See* Westar PFR Response, ¶ 11.
[64] *See* Order, ¶ 61.
[65] *See* PFR, ¶¶ 15-16.
[66] *See* Order, ¶ 62.

same rate as a non-renewable energy user.[67] This interpretation entirely negates the "as a basis for" and "on account of" language in the statute, rendering it meaningless. Indeed, on the Petitioners' reading, such language is superfluous because *ipso facto* any user of renewables who is placed into a separate rate class or who receives a different rate will necessarily be receiving that rate based on his or her use of renewables. The Kansas Supreme Court has held that "[a]s a general rule, statutes are construed to avoid unreasonable results"[68] and "a statute should never be given a construction that leads to . . . or that would lead to an absurd result."[69] In addition, "[t]here is a presumption that the legislature does not intend to enact useless or meaningless legislation."[70] The Petitioners' interpretation runs afoul of these holdings.

31. The Commission also finds the Petitioners' arguments regarding the Commission's application of Docket No. 16-GIME-403-GIE (16-403 Docket) lack merit. The Petitioners argued that "the Commission's finding in the 16-403 Docket cannot insulate its decision in this case against a statutory challenge [from K.S.A. 66-117d]."[71] However, because the Petitioners misinterpret and misapply K.S.A. 66-117d, their assumed "statutory challenge" to the Commission's findings in the 16-403 Docket does not exist. Pertinent here again is the fact that the Commission considered the rate design for the RS-DG customer class under the NS&A[72] and found it was not *based on* the RS-DG customers' use of solar energy, but on their distinct energy usage pattern.[73] Dr. Glass provided

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[67] Contrary to the Petitioners' protestation in their PFR, ¶ 39. The Commission rejected the Petitioners' misleading "same loads and usage" argument in paragraphs 24-25 of this Order, *supra*.
[68] *Sw. Bell Tel. Co. v. Beachner Const. Co.*, 289 Kan. 1262, 1269 (2009).
[69] *State v. Roudybush*, 235 Kan. 834, 846 (1984).
[70] *Sw. Bell Tel. Co.*, 289 Kan. at 1269.
[71] PFR, ¶ 37.
[72] *See* PFR, ¶ 38 (stating that "the Commission also made clear in this rate case 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*"). *See also Order on Westar's Motion to Strike Portions of Sierra Club's and Vote Solar's Testimony*, ¶ 10 (stating "the Commission will give due weight to any testimony addressing the questions of whether Westar's proposed rate design for DG customers *in this docket* will result in just and reasonable rates for such customers or will subject such customers to higher rates or charges or any other prejudice or disadvantage").
[73] *See* Order, ¶¶ 55-56, 58.

a clear statement of "the problem with distributed generation" ascertained in the 16-403 Docket, namely, "that they [i.e., DG customers] still had similar *demand* on the system, but they used *less energy*."[74] That is, the RS-DG class does ***not*** have the "exact same loads and usage" as the RS class if one is talking about *energy* load and usage. Thus, there is no "prejudicial effect of the RS-DG rate" pursuant to K.S.A. 66-117d, as the Petitioners charge.[75]

32. The Petitioners wrongly assert that "[t]he record evidence in this case shows that the RS-DG rate is harder to understand and respond to,"[76] and therefore prejudices or disadvantages the RS-DG customers *on account of* their use of a renewable energy source, in violation of K.S.A. 66-117d.[77] The truth, of course, is that "the record evidence" varied on this question.[78] Nonetheless, the Commission based its Order on substantial competent evidence demonstrating that it is not difficult to change usage and save energy under a three-part rate structure.[79] Dr. Faruqui testified that Westar's RS-DG customers "*can very easily do* the same things that other residential customers on demand charges have done in the U.S. for years and years which is just know what are the biggest appliance[s] and make sure that all of them are not running at the same time."[80] He continued: "Those five [major] appliances, don't run all of them at the same time. That's *the simple message* that many of these 50 demand rates that are out there are using to help customers lower their demand. It has nothing to do with solar. The solar customer when they have that demand charge would have the same motivation to do the same behavior change that others have done around the country."[81] The Commission finds this evidence to be persuasive.

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[74] Order, ¶ 44 (italics added).
[75] PFR, ¶ 36.
[76] *See* PFR, ¶ 28.
[77] *See* PFR, ¶¶ 27, 30.
[78] *See* Order, ¶ 60; PFR ¶ 28.
[79] *See* Order, ¶¶ 57, 60.
[80] Tr., Vol. 1, p. 225. (Italics added).
[81] Tr., Vol. 1, pp. 225-26. (Italics added).

33. Moreover, the Commission finds the above evidence contradicts the Petitioners' unsubstantiated and misleading claim that "[t]he RS-DG rate design is more difficult to understand and respond to, requires additional steps to respond to, compared to the default rate for non-DG customers, and only some, but not all, customers will be able to respond."[82] Questions regarding "difficulty" and "response" are highly subjective, speculative and vary amongst individuals. The Petitioners cite no evidence that it is universally easier for any particular customer to respond to any particular rate, whether they be an RS customer, an RS-DG customer, or any kind of customer at all. Further, the Petitioners have no basis for implying that non-DG customers need not learn anything new, or that a customer's having to learn something new is tantamount to that customer being prejudiced or disadvantaged.

34. Further, the Petitioners have not shown that an RS-DG customer's inability to respond has anything to do with the inherent nature of the three-part RS-DG rate design. K.S.A. 66-117d does not stand for the proposition that a renewable energy user is prejudiced or disadvantaged because he or she simply chooses not to respond to his or her rate design. Many non-DG customers will also choose not to respond to the necessary signals for reducing their energy consumption and electricity bills. As Dr. Faruqui testified:

> "[S]ome customers don't pay attention to what the rates are, just ignore it. It's there but they don't even pay attention to it. Others are price sensitive and they respond. And some respond by a small amount, and some respond by a lot . . . It could simply be knowledge of their big, major appliances . . . And the message is very simple, don't use all your big appliances all at the same time. Here are your five big appliances. So no technology needed, just education and awareness."[83]

35. Based on the above, and consistent with its Order, the Commission finds that an RS-DG customer's failure to save energy under the three-part rate has to do with the customer's

[82] PFR, ¶ 30.
[83] Tr., Vol. 1, pp. 186-88.

willingness to take very simple actions, just as it does under any other rate structure. Thus, the Petitioners' argument that the three-part RS-DG rate is inherently more difficult to manage, and therefore, prejudicial or disadvantageous, fails.

36. The Commission's findings on the question of the ease or difficulty in understanding and responding to the RS-DG rate are a matter of the weight given to competing testimony. The Commission has discretion to determine the weight to be given to each evidentiary factor, and the Commission need not state the precise weight it gives to each such factor.[84] Moreover, "[n]othing can be gained by making a comparison of conflicting testimony. The commission is the trier of facts."[85]

37. The Commission also rejects the Petitioners' contention that the RS-DG rate violates K.S.A. 66-117d because the rate is mandatory.[86] The Petitioners' argument fails because, as stated above, the RS-DG rate, whether voluntary or involuntary, is not "based on [RS-DG customers'] use of renewable generation,"[87] but on disparity of usage patterns. The RS-DG rate does not violate K.S.A. 66-117d, and therefore, the Commission denies reconsideration on this point.

ii. 18 C.F.R. § 292.305

38. The Petitioners alleged "the RS-DG rate violates 18 C.F.R. § 292.305 because it is not based on systemwide costing principles applied to design rates for other customers."[88] However, for numerous reasons the Commission rejects the charge that it violated 18 C.F.R. § 292.305, and thus, denies reconsideration.

39. First, the Petitioners' preemption argument is without merit. The Commission did not find that 18 C.F.R. § 292.305 conflicted with Kansas law, but merely that it did not nullify

[84] *Sw. Kansas Royalty Owners Ass'n*, 244 Kan. at 166.
[85] *Id.*
[86] PFR, ¶ 38.
[87] PFR, ¶ 38.
[88] PFR, ¶ 41.

Kansas law on ratemaking and rate design. The burden is on the Petitioners to show there is an "actual conflict" between a federal regulation and state law such that preemption exists,[89] a burden which the Petitioners have failed to carry. Moreover, were the Commission to accept the Petitioners' preemption argument here, it would obliterate the principle of federalism[90] in ratemaking/rate design and ultimately nullify the Commission's ratemaking authority, delegated by the Kansas legislature.[91]

40. Second, the Petitioners implied, if not explicitly argued, that the Commission should have applied Ms. Myrick's CCOS study to obtain a consistent system-wide costing principle,[92] thereby attempting again to bootstrap the Commission into a rigid over-dependence on a CCOS study.[93] Based on the evidence before it, the Commission found that application of any single CCOS study was flawed because neither Westar's nor Staff's CCOS study accurately measured the rate of return for the RS-DG class.[94] Indeed, the diverging demand numbers provided by the Petitioners themselves illustrate the difficulty of arriving at an accurate metric through consistent adherence to CCOS data.[95] There is no evidence in the entire Code of Federal Regulations or United States Code, neither of which defines the phrase "consistent systemwide costing principles," that the Commission was required to pick one of the CCOS studies or some variant thereof and inflexibly apply it for the

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[89] *See* PFR, ¶ 53, fn. 97. *See also Sw. Kansas Royalty Owners Ass'n*, 244 Kan. at 164; *Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 161 (10th Cir. 1992), cert. granted, judgment vacated sub nom. *Arkansas-Platte & Gulf P'ship v. Dow Chem. Co.*, 506 U.S. 910, 113 S. Ct. 314, 121 L. Ed. 2d 235 (1992), and adhered to, 981 F.2d 1177 (10th Cir. 1993).

[90] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 241 (1947) (holding that "due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered").

[91] *See Farmland Indus., Inc. v. State Corp. Comm'n of Kansas*, 24 Kan. App. 2d 172, 180 (1997) (holding that "the KCC has power to set rates 'reasonably necessary . . . to maintain reasonably sufficient and efficient service' from electric public utilities").

[92] *See* PFR, ¶¶ 42-43.

[93] *See* PFR, ¶ 42.

[94] *See* Order, ¶ 45.

[95] *See* PFR, ¶ 50 (i.e., 5 kW of average demand from Dr. Glass, purportedly relying on Dr. Faruqui; 2.2 kW of demand from Ms. Myrick's CCOS study; and 3.65 kW of demand from Dr. Glass's Proof of Revenue).

sake of "consisten[cy]."[96] Because of the dynamism of the RS-DG class over the course of the test year, the Commission relied in part on Ms. Myrick's CCOS study, but also on Dr. Glass's recommendation based on other factors.[97]

41. The seeming implication that the Commission was required to strictly follow Ms. Myrick's system-wide analysis[98] (i.e., her CCOS study) is contradicted by: (1) the United States Supreme Court, holding that "[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science . . . Generally, the legislature leaves to the ratesetting agency the choice of methods by which to perform this allocation;"[99] (2) the District of Columbia Circuit Court of Appeals, holding that "[r]atemaking is, of course, much less a science than an art. Cost itself is an inexact standard and may, in a particular set of circumstances, serve as the basis for several different rates . . . [and] even under a purely cost-based rate scheme, absolute equivalence of overall rates of return among similar customer groups is little more than an ideal;"[100] and (3) the Kansas Court of Appeals, holding that "a structure imposing different rates on different classes will be upheld if there is a reasonable basis for it"[101] and "not all discrimination between customers is unlawful with the prohibition applying only to those differences in treatment which are unjust or unreasonable."[102]

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[96] *See* 18 C.F.R. § 292.305.
[97] *See* Order, ¶¶ 45-46.
[98] *See* PFR, ¶ 43.
[99] *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 825-26 (1983) (internal citations and quotations omitted).
[100] *Alabama Elec. Co-op., Inc. v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982) (stating that "the typical complaint of unlawful rate discrimination is leveled at a rate design which assigns different rates to customer classes which are similarly situated"). The evidence in this case demonstrates that the RS and RS-DG customer classes are ***not*** "similarly situated."
[101] *Farmland Indus., Inc. v. Kansas Corp. Comm'n*, 29 Kan. App. 2d 1031, 1047 (2001) (holding that "the KCC has broad discretion in making decisions in rate design types of issues"). *See Midwest Gas User* Ass'n, 5 Kan. App. 2d 653, 663 (1981); *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 616 (1978) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 in holding that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").
[102] *Midwest Gas Users Ass'n v. State Corp. Comm'n*, 3 Kan. App. 2d 376, 388 (1979).

42. Third, and related to the second point, the Petitioners' argument here boils down to the notion that the Commission should have relied on the Petitioners' preferred analysis, rather than the analysis of Dr. Faruqui and Dr. Glass. The Commission explicitly set out the basis for its reliance on the expert testimony and analysis of Dr. Faruqui and Dr. Glass, and its reasons for rejecting the Petitioners' claim that an exacting application of a CCOS study is necessary under state and federal law.[103] The Commission explained in its Order why it accepted Dr. Glass's testimony that an over-dependence on a CCOS study is erroneous.[104] Thus, the Commission finds the Petitioners' attempts to discount Dr. Faruqui's and Dr. Glass's arguments are not persuasive. The Commission properly acted within its discretion as the trier of fact[105] and had the expertise through its Staff to evaluate and weigh testimony.[106] The expert opinions of Drs. Faruqui and Glass are based on substantial competent evidence and are within the realm of fair debate.[107] Accordingly, the Commission finds no merit to the Petitioners' arguments.

43. Fourth, had the Commission applied Ms. Myrick's estimated value for demand for each customer class, it would have meant roughly $20 per kW for the standard RS customers, but roughly $28 per kW for the RS-DG customers.[108] As Westar aptly noted: "The demand charges adopted in the S&A for RS-DG customers . . . are well below the level that the application of consistent data and costing principles indicates would be appropriate."[109] The Commission thus

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[103] *See* Order, ¶¶ 79-85.
[104] Order, ¶¶ 45, 66, 81-83.
[105] *Sw. Kansas Royalty Owners Ass'n*, 244 Kan. at 166.
[106] *Id.*
[107] *See Zinke & Trumbo, Ltd.*, 242 Kan. at 474.
[108] *See* Order, ¶ 46; Tr., Vol. 2, p. 288 (Dr. Glass stating that "for residential customers like $17 or something like that"); Staff's Notice of Filing of Substitute Exhibit [Corrected Version] for Dorothy J Myrick, Exhibit DJM-E1, p. 46 (June 13, 2018).
[109] Westar PFR Response, ¶ 21.

rejected such an application and consistently applied other principles and metrics (e.g., gradualism).[110]

44. To the extent the Commission has not addressed every one of the Petitioners' specific arguments in its PFR regarding this regulation, it is because the Commission has already sufficiently addressed such arguments in its Order and finds there is nothing in them to merit reconsideration. The Commission finds its Order properly relied on the Commission's state ratemaking authority, did not violate 18 C.F.R. § 292.305, and therefore, reconsideration is unwarranted.

iii. **K.S.A. 66-101b**

45. Regarding the Petitioners' charge that the Commission violated K.S.A. 66-101b, the Commission again denies reconsideration. Contrary to the Petitioners' assertion that they "do not contend that the Commission must strictly adhere to a specific CCOSS result to design rates,"[111] the Commission finds advocacy of such strict adherence to be the clear import of the Petitioners' argument.[112] Again, the evidence in this case demonstrates that such stringent reliance on CCOS data would lead to unjust and unreasonable rates for the RS-DG class,[113] which K.S.A. 66-101b does not allow.

46. Moreover, the Petitioners mischaracterized the Commission's quotation of Dr. Glass's statement about revenue neutrality.[114] The Commission did not state that it relied on Dr. Glass's revenue neutrality testimony to support the proposition that a customer in the RS-DG class with average demand and energy usage would pay the same rate as he would under the RS tariff, as

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[110] *See* Order, ¶ 66; KIC PFR Response, ¶¶ 14-15 (stating that Westar and Staff COSS's "both show the 'large power' and Large General Service classes . . . providing excessive revenue – subsidizing other classes . . . The studies reached divergent results on most other classes . . . [and] both KIC and DID-FEA . . . recommendations exercised gradualism and stopped short of fully eliminating the interclass rate subsidies indicated by Staff's COSS"). Application of principles such as gradualism show the falsehood of the Petitioners' claim that "RS-DG rates are designed based on metrics derived and applied *only to RS-DG customers.*" PFR, ¶ 41.

[111] PFR, ¶ 57.

[112] *See e.g.* PFR ¶¶ 7, 9, 11 and 42.

[113] *See* Order, ¶ 47; Myrick Exhibit DJM-E1, p. 46.

[114] *See* PFR, ¶ 60.

the Petitioners argue.[115] The Commission was simply demonstrating that Dr. Glass's RS-DG rate design for the NS&A was revenue-neutral, cost-based, and resulted in just and reasonable rates, particularly in light of the fact that, given the RS-DG customer class's energy usage, they could rightly be receiving a significant rate *increase.*[116]

47. The Petitioners' other arguments pertaining to K.S.A. 66-101b are not new, and thus, need not be addressed further. The Petitioners have not demonstrated the Commission erred in fact or law in finding that the NS&A's RS-DG rate is just and reasonable. The Commission affirms the NS&A's RS-DG rate as just, reasonable, non-discriminatory, non-preferential and fair in preventing Westar's RS-DG customers from facing significant rate shock.[117]

D. The RS-DG Rate Under the NS&A is in the Public Interest

48. The Petitioners' opinion that the NS&A's RS-DG rate is not in the public interest provides no new factual or legal arguments, and thus, provides nothing for the Commission to reconsider. The Commission agrees with Westar that the Commission "implement[ed] a conservatively set demand charge for RS-DG customers that starts to reduce the subsidy from non-distributed generation customers to distributed generation customers," but "the reduction to the subsidy is far less than was proposed by Westar and supported by evidence in its original filing."[118]

49. Having reviewed the Petitioners' November 1, 2018 PFR Reply, the Commission finds it adds nothing materially new for consideration, but essentially reiterates arguments the Commission has addressed above. Hence, the Commission will not lengthen this order with additional analysis and findings that will not alter its substance or effect.

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[115] *See* PFR, ¶ 60.
[116] *See* Order, ¶¶ 84-85.
[117] *See* Order, ¶ 85.
[118] Westar PFR Response, ¶ 26.

CONCLUSION:

50. The Commission concludes the Petitioners' PFR and PFR Reply do not set forth any basis for Commission reconsideration of its September 27, 2018 Order. As demonstrated above, the NS&A's revenue reduction allocation and RS-DG rate are supported by substantial competent evidence. The RS-DG rate comports with both state and federal law, is just and reasonable, and is in the public interest. Therefore, the Commission finds the Petitioners' PFR should be denied.

THEREFORE, THE COMMISSION ORDERS:

A. The Petitioners' Petition for Reconsideration is denied.

B. This Order constitutes final agency action as defined by K.S.A. 77-607(b)(1). Lynn M. Retz, Secretary to the Commission, is the agency officer designated to receive service of a petition for judicial review on behalf of the agency.[119]

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 11/08/2018

Lynn M. Retz
Secretary to the Commission

MJD

[119] K.S.A. 77-613(e).

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18-WSEE-328-RTS

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