

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

REBUTTAL TESTIMONY OF

Larry Wilkus

**ON BEHALF OF
WESTAR ENERGY, INC.**

**In The Matter Of The Complaint Of Kansas Gas Service,
A Division Of One Gas, Inc., Against Westar Energy, Inc.,
Regarding Westar's Practice Of Offering Payments To Developers
In Exchange For The Developers Designing All Electric Subdivisions**

DOCKET NO. 19-WSEE-061-COM

I. INTRODUCTION

Q: Please state your name and business address.

A: My name is Larry Wilkus. My business address is 818 S. Kansas Avenue, Topeka, Kansas, 66612.

Q: Are you the same Larry Wilkus who filed direct testimony in this docket May 30, 2019?

A: Yes, I am.

Q: What is the purpose of your rebuttal testimony?

A: I will respond to the direct testimony filed by witnesses for the Staff of the Kansas Corporation Commission ("Staff"), Dr. Robert Glass and Mr. Leo Haynos, regarding

Westar's Total Electric Subdivision Heat Pump Program ("Electric Subdivision Rebate" or "Developer Program"), HVAC Rebate Program ("HVAC Rebate") and Builder Program, (these three programs referred to collectively as "Programs").

Q: How is your testimony organized?

My testimony will (1) briefly address Staff's conclusion that Westar's rebate programs are a "practice" under 66-117 and need to be tarified; (2) respond to Staff's assertion that my direct testimony implies the Commission approved the Electric Subdivision Rebate and Staff accepted the offering of the Program because the expenses are in rates, (3) clarify any misunderstanding about Westar's letter of intent with developers under the Electric Subdivision Rebate, (4) respond to Staff's incorrect assertion that the Electric Subdivision Rebate is not in the public interest, and (5) support Staff's position that KGS' request for penalties in this case is not appropriate.

Q: Please summarize your conclusions.

A: I conclude that Westar's Electric Subdivision Rebate, HVAC Rebate, and Builder Program are not considered a "practice" under K.S.A. 66-117, sanctions or penalties are not appropriate, and the Electric Subdivision Rebate is in the public interest and does not constitute predatory practices or distort the home buyers' market. Additionally, Westar appropriately enforces the terms of its letter of intent with subdivision developers.

II. WESTAR'S REBATE PROGRAMS ARE NOT A PRACTICE UNDER 66-117

Q: Should Westar's Programs be considered a "practice" under K.S.A. 66-117 and be included in Westar's tariffs?

A: No. Staff concludes that Westar's Programs fall under the definition of a "practice" as contemplated by K.S.A. 66-117, and therefore, must be filed with the Commission for

1 approval before they can become operative.¹ Staff also concludes that the Programs are
2 required to be tariffed.² I disagree. Although I'm not an attorney, I believe trying to
3 classify day-to-day operations, management actions, or other activities that are not
4 directly customer-related as "practices" under K.S.A. 66-117 is inappropriate. Taking
5 such a step can lead down the road of requiring other non-customer activities to be filed
6 under K.S.A. 66-117, as well, resulting in greater cost to the utility, the Commission, and
7 ultimately to customers. It also places utility companies in the untenable position of not
8 being able to clearly determine whether non-customer business arrangements need to be
9 filed for approval with the Commission, for example, agreements with businesses to
10 share poles or consultant and vendor agreements. I've addressed the preapproval and
11 tariffing issues in my direct testimony from a practical standpoint³; however, since the
12 interpretation of a statute is really a legal issue, the applicability of K.S.A. 66-117 and
13 statutory tariffing requirements will be discussed fully in Westar's post-hearing brief.

14 **III. STAFF'S ASSERTIONS REGARDING COMMISSION APPROVAL AND**
15 **STAFF'S ACCEPTANCE OF THE ELECTRIC SUBDIVISION REBATE IN**
16 **PREVIOUS DOCKETS.**

17
18 **Q: Staff witness Haynos makes the assertion that you imply the Commission approved**
19 **the Electric Subdivision Rebate by approving rates in previous cases that included**
20 **costs for the program.⁴ Is this a fair representation of your direct testimony?**

¹ Haynos Direct Testimony, pp. 8-9.

² Haynos Direct Testimony, pp. 7-8.

³ Wilkus Direct Testimony, pp. 27-30.

⁴ Haynos Direct Testimony, p. 3.

1 A: I think he has mischaracterized my testimony. I stated that the Electric Subdivision
2 Rebate has been in effect since 2011 and that Westar has filed three general rate cases
3 during this time period. My point is that in all these cases Staff has performed a rigorous
4 audit of Westar's expenses and, as far as I am aware, has never raised an issue about the
5 program. The program has been in plain sight given the number of payments made to
6 many developers and builders as well as the fact the program administration is a key
7 function of Westar's products and services group. Furthermore, the Electric Subdivision
8 Rebate has been specifically discussed in other Westar dockets, as noted in my direct
9 testimony. With that perspective, I think it demonstrates that the program raised no
10 concerns during times of thorough review of expenditures for inclusion in rates.

11 **Q: Did you mean to imply that the Commission actually approved the program?**

12 A: No. I stated that the expenditures for the Electric Subdivision Rebate are in Westar's
13 retail rates and that incentive programs involving builder/developer rebates have been
14 openly discussed in previous dockets. I did not state that the Commission has specifically
15 approved the rebate programs. In fact, I noted in my direct testimony that Westar has not
16 submitted the Electric Subdivision Rebate to the Commission for approval because such
17 approval is not needed.⁵

18 **IV. LETTER OF INTENT WITH DEVELOPERS**

19 **Q: Staff witness Haynos stated in his direct testimony that Westar admitted it does not**
20 **enforce the terms of the Electric Subdivision Rebate and the program is misleading.**
21 **Is that correct?**

1 A: Not at all. There seems to be a misunderstanding about what the letter of intent means for
2 the program. By signing the letter of intent, the developer represents that it is his
3 intention at that time to build an entire subdivision as all electric. However, if during the
4 subdivision buildout process the developer's requirements should change at any point and
5 gas service is to be installed in any home, then Westar cancels the agreement and no
6 further rebates are paid. This is the developer's choice. The rebates for homes built all
7 electric prior to the change in the developer's plans are not required to be returned.
8 Westar honors the intentions of the developer during the time a subdivision plan was for
9 all electric homes. This is discussed in more detail in the rebuttal testimony of Mr.
10 Cosby.

11 **V. THE ELECTRIC SUBDIVISION REBATE PROMOTES THE PUBLIC**
12 **INTEREST**
13

14 **Q: How does Westar respond to Dr. Glass' assertion that the Electric Subdivision**
15 **Rebate is not in the public interest?**

16 A: Westar disagrees with Dr. Glass. Dr. Glass recognizes that there are net benefits of the
17 program to Westar's customers and to subdivision developers, but he concludes the
18 program is not in the public interest because he believes it harms the customers of KGS
19 and homebuyers.

20 **Q: Why does Dr. Glass' believe the program harms KGS' customers and homebuyers?**

21 A: Dr. Glass bases his conclusions on his belief that Westar has "asymmetrical dominance"
22 in the home heating market that allows for "predatory" behavior to the harm of KGS's

⁵ Wilkus Direct Testimony, pp. 11-18, 21.

1 customers and the indirect harm of homebuyers who own all-electric homes and cannot
2 access gas heating during times when it is cheaper than electric heating.

3 **Q: Does Westar have “asymmetrical dominance” that it is using in a predatory**
4 **manner?**

5 A: No. Westar does not hold a dominant position in the heating marketplace. According to
6 the State of Kansas Census Data, utility gas is the dominant heating fuel⁶, serving 66% of
7 occupied housing units in 2017. Electricity is second with a 23.8% share in 2017.
8 Similar results are shown at the US Energy Information Administration, with gas at
9 65.8% in Kansas and electricity at 24.9% (2017 period). Gas is clearly the dominant fuel
10 for heating, holding a clear advantage in this area over electricity heating options.

11 **Q: Dr. Glass defines predatory behavior as synonymous with ruinous competition.**
12 **Could the Electric Subdivision Rebate be considered predatory behavior or ruinous**
13 **competition?**

14 A: No. I believe these concepts do not apply to Westar’s program. Since I’m not an
15 economist, I think of predatory behavior or ruinous competition more in layman’s terms –
16 undercutting a competitor on price by offering to sell the same product at a price that does
17 not cover cost or taking other actions with an intentional effort to drive competitors from
18 the market.

⁶https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S2504&prodType=table.

1 Dr. Glass states that when a dominant firm uses its dominance to change or limit
2 the behavior of its competitors, the dominant firm is engaging in predatory behavior.
3 However, Westar does not hold a dominant position in the heating marketplace, as
4 discussed above.

5 Dr. Glass asserts that Westar has engaged in predatory behavior based, in part, on
6 an excerpt from an article entitled “Predation”, by Thomas Sharpe.⁷ In the article, Mr.
7 Sharpe states, “However, when a dominant firm uses its dominance to change or limit the
8 behavior of its competitors, the dominant firm is engaging in predatory behavior”. Not
9 only is Westar not a “dominant firm”, the Electric Subdivision Rebate does not attempt to
10 limit the behavior of its competitors, as defined by Mr. Sharpe. Winning the business of
11 a customer to the exclusion of another seller is not limiting the behavior of the seller who
12 did not get the business.

13 In the article cited by Dr. Glass, Mr. Sharpe states that “Predatory pricing may be
14 defined as the temporary strategy of setting prices below cost in order to drive
15 competitors out of business and earn monopoly profits in the future. The reasoning
16 behind this definition begins with an analysis of the differing profit motives of honest
17 competitors and predators.” Sharp continues,

18 A firm engaged in a predatory pricing campaign has a different goal. The
19 predator's objective is a larger than competitive profit in the future, once
20 rivals have been ejected from the market. To achieve this future profit the
21 predator must endure losses in the present. To drive out equally efficient
22 rivals he must set the price low enough for them to sustain losses and go
23 out of business. To accomplish this he must run losses himself -- and,
24 unless the action is highly selective, the dominant undertaking will

⁷ *European Competition Law Review*, 1987, 8, p. 58.

1 experience significant losses. Recouping those losses with future
2 monopoly profits is what makes the strategy pay.”
3

4 Westar is not pricing below cost to drive competitors out of the market; it is not accepting
5 losses now in order to obtain a “larger than competitive profit” in the future. Westar is
6 offering a cost-justified, non-subsidized rebate to attract more business. This is
7 legitimate, healthy competition. It is not predatory behavior.

8 Furthermore, Dr. Glass’ argument fails to apply to this case for another reason.
9 Westar’s rates are set by the Commission based upon Westar’s cost of providing service.
10 In a regulated environment like this, predatory pricing behavior like that described by Mr.
11 Sharpe does not occur. Westar cannot achieve the assumed pay-off – future monopoly
12 profits that are higher than competitive as a result of driving others out of the market.
13 Westar cannot obtain monopoly profits because the Commission would not approve such
14 rates. KGS cannot be driven from the market as it is a certificated public utility that must
15 continue to operate in the marketplace.

16 The assumption that Westar’s Electric Subdivision Rebate is a ploy in which
17 Westar can undercut competitive forces to achieve dominance, thereby enabling Westar
18 to gouge customers with higher-than-market rates in order to maximize profitability, is
19 inaccurate and specifically challenges the core business principles on which the company
20 operates. The fact that both Dr. Glass and Mr. Haynos have arrived at this conclusion is
21 troubling. As described in my direct testimony, the Electric Subdivision Rebate is
22 intended to help build load during non-peak months and better utilize Westar’s
23 infrastructure. This helps mitigate price increases for all of Westar’s customers. Westar
24 is not engaged in practices that are intended to harm KGS or put them out of business;

1 rather Westar is seeking more efficient utilization of its existing infrastructure for the
2 long-term benefits of all of its customers.

3 **Q: So, does the program indirectly harm homebuyers?**

4 A: No. On the contrary, it benefits homebuyers. It is wrong to say that the construction of
5 all-electric subdivisions forecloses the gas option to home buyers⁸, or that it
6 disadvantages home buyers that want houses with gas heating.⁹ If a home buyer prefers a
7 house with both gas and electric, that choice is abundantly available to them in the real
8 estate marketplace, as noted earlier by the predominance of gas heating as the residential
9 heating source in our service territory. There is no evidence this program has diminished
10 their choice in any manner. Dr. Glass presents no data indicating there is a lack of
11 gas/electric houses in Kansas, and no complaints from home buyers about an inability to
12 find adequate gas/electric housing.

13 As the Commission can see from the following chart, between 2009 and 2017,
14 there has been an increase in the number of homes fueled by electric heat in Kansas, but it
15 tracks with what has occurred in surrounding states where this rebate program is not
16 available.

⁸ Glass Direct Testimony, p.6.

⁹ Glass Direct Testimony, pp. 9-10.

Occupied Housing – House Heating Fuel														
Source US Census Bureau														
	Kansas		Oklahoma		Missouri		Nebraska		Colorado		Iowa		Arkansas	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
Increase/Decrease 2009-2017														
Utility Gas	(31,564)	-4%	(39,726)	-5%	(61,717)	-5%	(10,268)	-2%	43,449	3%	(31,261)	-4%	(41,897)	-9%
Electricity	66,448	33%	127,850	30%	164,366	24%	65,757	41%	161,861	54%	82,501	43%	114,416	25%

According to the U.S. Census Bureau, housing units heated by utility gas decreased in 5 of 6 states in close geographic proximity to Kansas. During the same period, housing units heated by electricity increased in all 6 states, and did so at rates of increase from 24% in Missouri to 54% in Colorado. This is consistent with Kansas where gas decreased by 4% and electric homes increased by 33%.

Westar's Electric Subdivision Rebate has not distorted the housing market in Kansas and has not indirectly harmed home buyers by limiting their choices in home buying.

Q: What about Dr. Glass' assertion that this program indirectly harms home buyers because, based on Mr. Prentiss' analysis, electric heating cost approximately \$123/year more than heating with electricity during the 2018-19 heating season?

A: Mr. Prentiss acknowledges that gas heating cost varies more often than electric heating cost.¹⁰ His analysis concerns only the 2018-19 heating season. However, assuming there is a cost differential as Staff says, the program does not harm home buyers for this reason.

¹⁰ Prentiss Direct Testimony, p. 11.

1 Staff ignores the fact that home buyers *voluntarily choose* to buy an all-electric home.
2 Some home buyers still seek out all-electric homes despite the differential. As I
3 explained in my direct testimony, there are a number of reasons a homebuyer might want
4 an all-electric home; for example, they may feel safer not having gas pipelines under their
5 property that could experience leaks and result in explosions, electric rates are more
6 stable over time, or electricity is cleaner for the environment. Westar's program expands
7 their choices in that regard. Again, this is borne out by the fact that all-electric home
8 purchases are increasing in the states surrounding Kansas. Home buyers in Kansas and
9 elsewhere are freely choosing all-electric homes and this program supports and enhances
10 that consumer choice.

11 **Q: What about Dr. Glass' assertion that the program harms KGS' customers?**

12 **A:** Dr. Glass fails to consider the fact that the reduced sales of natural gas for KGS upon
13 which he basis his assertion are not really lost. KGS never had those sales or the
14 revenues generated by them. When a house is built as all-electric, it represents new load
15 that was never part of KGS' rates; KGS' rates are unaffected by this load going all-
16 electric. While potential additional sales of gas do not materialize when a house is built
17 all-electric instead of gas/electric, that does not "harm" KGS' ratepayers. They are
18 paying the same rates as before; the rebate program does not change their rates. In
19 addition, as noted earlier, gas remains the dominant provider of heat source to homes in
20 Kansas and is such KGS is certainly not foreclosed from new load in their service
21 territory.

1 Additionally, Dr. Glass does not recognize that many KGS customers are also
2 Westar electric customers in Kansas. The benefits of lower electric rates resulting from
3 the program flow to those KGS customers just as they do all Westar's customers.

4 Finally, as I said in my direct testimony, Westar's business decisions seek to
5 enhance how we provide service to our customers. Our management enters into business
6 arrangements with third-parties, like developers, with a goal towards improving the
7 efficiency and effectiveness of service to our customers. It would not be prudent for
8 Westar's management to forego opportunities that would benefit Westar customers in an
9 effort to benefit the customers of other companies.

10 **Q: Can you summarize your testimony here regarding whether the Electric Subdivision**
11 **Rebate is in the public interest?**

12 **A:** The public interest requires balancing of all interests affected by the program. When a
13 reasonable evaluation of all relevant factors is considered, it shows clearly that the
14 Electric Subdivision Rebate is in the public interest. The program provides benefits to
15 Westar's customers, to developers and to homebuyers. It does not take away from KGS
16 any of its present sales or revenues, and does not cause costs to be shifted onto KGS
17 customers above what they are now paying in their present rates. The program enhances
18 competition; it does not constitute predatory behavior or an exercise of market power to
19 limit the exercise of free choice by developers and homebuyers.

20 **VI. PENALTIES ARE NOT APPROPRIATE**

21 **Q: Are sanctions or penalties appropriate in this situation?**

1 A: Even if the Commission were to decide that K.S.A. 66-117 applied to these Programs, it
2 would be inappropriate to levy sanctions in this case and Staff has not recommended
3 sanctions. As I stated in my direct testimony, the penalties requested by KGS in its
4 Complaint are unsupportable. Westar has been acting consistent with its understanding
5 of the law and has not violated any order of the Commission or any of its tariffs. Whether
6 or not Staff and other parties believe they focused on the Electric Subdivision Rebate in
7 earlier dockets, they were aware of its existence and did not request the Commission
8 terminate it or disallow recovery of its costs in rates.

9

10 **Q: Does that conclude your rebuttal testimony?**

11 A: Yes, it does.

CERTIFICATE OF SERVICE

19-WSEE-061-COM

I, the undersigned, certify that a true and correct copy of the above and foregoing Larry Wilkus Rebuttal Testimony was served via electronic service this 12th day of August 2019, to the following:

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STATE OF KANSAS)
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VERIFICATION

Larry Wilkus, being duly sworn upon his oath deposes and states that he is the Director, Regulatory Affairs, for Westar Energy, Inc., that he has read and is familiar with the foregoing Direct Testimony, and attests that the statements contained therein are true and correct to the best of his knowledge, information and belief.



Larry Wilkus

Subscribed and sworn to before me this 12 day of August, 2019.



Notary Public

My Appointment Expires: 5/30/22

