

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS **MAR 21 2012**

by
State Corporation Commission
of Kansas

IN THE MATTER OF WESTAR ENERGY)
AND KANSAS GAS AND ELECTRIC)
COMPANY SEEKING COMMISSION)
APPROVAL TO IMPLEMENT CHANGES IN) DOCKET NO. 12-WSEE-651-TAR
THEIR TRANSMISSION DELIVERY)
CHARGES RATE SCHEDULES.)
_____)

OCCIDENTAL CHEMICAL CORPORATION'S PROTEST AND MOTION TO DISMISS

COMES NOW, Occidental Chemical Corporation ("OXY") and moves the State Corporation Commission of the State of Kansas ("KCC" or "Commission") to dismiss the Application of Westar Energy, Inc., and Kansas Gas and Electric Company purportedly seeking approval of updated Transmission Delivery Charge (TDC) rates within its TDC tariff, but in fact attempting to change its tariff. In support of its Motion, OXY states as follows:

1. On February 24, 2012, Westar Energy, Inc. ("Westar") and Kansas Gas and Electric Company ("KGE") (Westar and KGE, collectively "Westar") filed what they claim to be an updated Transmission Delivery Charge (TDC) tariff in the above-titled docket allegedly pursuant to K.S.A. 66-1237.

2. K.S.A. 66-1237 allows utilities to "recover costs associated with transmission of electric power, in a manner consistent with the determination of transmission-related costs from an *order of a regulatory authority having legal jurisdiction*, through a separate transmission delivery charge included in customers' bills." K.S.A. 66-1237(a) (emphasis added). The statute allows the Commission to determine the electric utility's initial transmission delivery charge "from transmission-

related costs approved in the electric utility's most recent retail rate filing *or in an order establishing rates in response to a general retail rate application by an electric utility.*" *Id.* (emphasis added).

3. Westar's request is contrary to K.S.A. 66-1237 (c) because it is not an updated TDC but instead is a request to revise their tariff, potentially resulting in significant changes to the allocation of costs among Westar's retail customer classes. Westar's Application should be dismissed for the following reasons:

A. In contravention to the plain language of K.S.A. 66-1237(c), Westar is attempting to do more than update its TDC rates. Westar's Application seeks to make fundamental changes to its TDC tariff. Although K.S.A. 66-1237 gives Westar the right to update the TDC rates on an abbreviated schedule, it does not give Westar the right to change the underlying tariff on an abbreviated schedule and bypass other procedural requirements. The proposed changes to the tariff have not been subject to scrutiny or review by the Commission or other interested parties. As recognized by Westar in its filing, the proposed changes will result in changes to the allocation of costs among the various retail customer classes.¹ Changes to the tariff, even under K.S.A. 66-1237(a)-(b), are subject to the timeframe and review under K.S.A. 66-117, not K.S.A. 66-1237(c). It is simply not appropriate to use a rate update mechanism such as the TDC update process to make fundamental changes to the underlying tariff.²

¹ Westar's Supplemental Information Regarding Proposed Tariff Language Changes at p. 2 (filed March 6, 2012).

² Oxy's interpretation is consistent with the common and long-standing meaning of formula rates, whereas Westar's view fundamentally departs from this common definition. Thus, changes to the components of the formula must proceed through the full regulatory process for tariff changes. *Entergy Services, Inc.*, 137 FERC ¶ 61,029 at P 49 (2011) ("Because the Commission has approved the formula, it is the filed rate and under the filed rate doctrine may not be changed absent a section 205 or section

B. Assuming *arguendo* that changes to the underlying tariff were somehow appropriate in a TDC rate filing, Westar has failed to cite authority from an “order of a regulatory authority having legal jurisdiction,” that would support the changes sought in the Application. Absent the existence of such an order, Westar cannot meet the requirements of K.S.A. 66-1237(a) and its Application should be dismissed.

C. Westar’s Application inappropriately attempts to shift TDC costs in order to offset the impact of the Commission’s anticipated decisions on unrelated costs in Westar’s pending rate case, docketed with this Commission as 12-WSEE-112-RTS. The Application improperly attempts to influence the KCC’s decision in the rate case by offering to mitigate increases in certain customers’ non-TDC rates by changing the allocation of TDC costs in this proceeding. Westar’s attempt to improperly shift TDC costs in an effort to influence the approval of its pending settlement is inappropriate and its Application should therefore be dismissed.

D. The proposed changes to the tariff improperly ask the Commission to abdicate its oversight responsibility and leave it to Westar’s discretion how to

206 proceeding.”); *City of Azusa, California*, 138 FERC ¶ 61,049 at P 3 (2012); *City of Benning, California*, 136 FERC ¶ 61,134 at P 2 (2011); *Ocean State Power II*, 69 FERC ¶ 61,146 at n.39 (1994) (“Any change in the formula itself, however, constitutes a change in the rate and thus must be filed under section 205. Additionally, if a formula rate contains a stated component such as ROE, fixed at a particular level, a change to that component also requires a section 205 rate filing.” (internal citations omitted)). In addition, the formula rate cannot be used to authorize the utility to make changes that require the exercise of judgment. *Florida Power & Light Company*, 74 FERC ¶ 61,038 at 61,092 (1994) (“Depreciation is among the costs that require separate Commission scrutiny when reflected in a formula rate because they involve an exercise of judgment and an evaluation of future events such as service lives and interim retirements, rather than direct recording of an out-of-pocket expense. Accordingly, utilities with formula rates must file for changes in depreciation.”); *Oklahoma Gas and Electric Company*, 122 FERC ¶ 61,071 at P 35 (2008) (General Plant and Administrative and General Expenses); *Florida Power Corporation*, 134 FERC ¶61,145 at P 19 (2011); *Boston Edison Company*, 61 FERC ¶ 61,026 at 61,146 (1992) (rate of return on equity).

implement or account for gradualism, swings in rate impacts and customer migration between rate schedules without any Commission oversight. This self-executing tariff change is improper under any statutory or regulatory scheme and would undermine the KCC's proper role in setting rates pursuant to the statutory framework that exists under Kansas law.

E. Westar has avoided giving any notice to its rate payers in violation of their due process rights by attempting to change the tariff using K.S.A. 66-1237. OXY was not served and upon information and belief no other retail customers were served with notice. This matter should have been brought pursuant to K.S.A. 66-117, which would provide for notice of the proposed changes to retail customers. Those customers, and in particular OXY, are entitled to notice and an opportunity to be heard regarding changes to the tariff and rates affecting retail electric service in Kansas. Failure to provide such notice violates OXY's due process rights as provided by the Kansas and U.S. Constitutions.

4. On March 15, 2012, the KCC Staff filed a Motion for a Suspension Order in this matter and requested the Commission to grant a temporary waiver of the tariff language requiring Westar to use the new 12-CP data. OXY agrees with the Staff's assessment that Westar is "bootstrapping a tariff change . . . to a transmission related cost update." (Staff Motion at p. 3, ¶ 8.) The Staff has identified some of the problems in allowing Westar to proceed under K.S.A. 66-1237: Westar's changes to the TDC are properly reviewed under K.S.A. 66-117, which requires a full investigation as opposed to the abbreviated 30-day period for simple TDC updates. (*Id.*) Based on that

determination, the proper remedy is to dismiss Westar's Application and not proceed under some modified procedure.

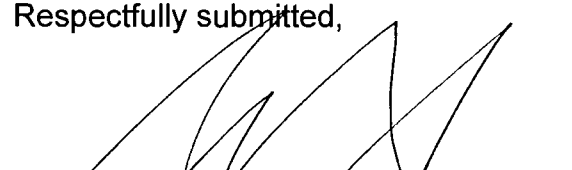
5. OXY does not agree with the Staff's recommendation to waive the tariff language, basically suspending Westar's proposed changes to the TDC, while allowing the updates to the TDC to move forward without following the provisions of the approved tariff as it currently stands. The legislature has prescribed specific procedures for changes to a tariff and updates to TDCs: K.S.A. 66-117 for fundamental tariff changes and K.S.A. 66-1237(a)-(b) for updates to the TDC. Westar has failed to follow correct procedure under both statutes. Allowing Westar to move forward with updates when the Application is flawed gives Westar an opportunity to attempt to further manipulate the procedural requirements without notice to interested parties. Further, Westar has not provided any specific numbers as to what the TDC calculated under the approved tariff would be with the Staff's proposed waiver. The Commission is in no position to approve even the Staff's proposal without such information concerning what actual rates the Commission is being asked to approve. As a result, the Commission should dismiss Westar's application. In the alternative, this matter should be set for proceedings to be conducted in accordance with the provisions of the Kansas administrative procedure act, including notice to all potentially interested parties, discovery, pre-hearing conferences, pre-filed testimony and hearing.

WHEREFORE, OXY respectfully requests that the Commission dismiss Westar's Application to Implement Changes in their Transmission Delivery Charges Rate Schedules. In the alternative, this matter should be set for proceedings to be conducted in accordance with the provisions of the Kansas administrative procedure act, including

notice to all potentially interested parties, discovery, pre-hearing conferences, pre-filed testimony and hearing.

WHEREFORE, OXY requests such other relief as is just and proper.

Respectfully submitted,



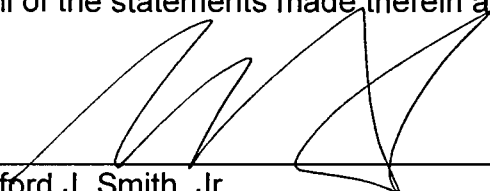
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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF KANSAS)

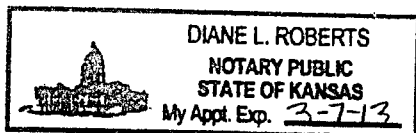
Stanford J. Smith, Jr., of lawful age, being first duly sworn, upon oath states:

That he is one of the attorneys for the intervener, Occidental Chemical Corporation ("OXY"), that he has read the above and foregoing Petition to Intervene, knows the contents thereof, and knows that all of the statements made therein are true.



Stanford J. Smith, Jr.

SUBSCRIBED AND SWORN to before me this 21st day of March, 2012.





Notary Public

My Appointment Expires:
3-7-13

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Intervene was sent via U.S. First Class mail on this 21st day of March, 2012, to:

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