

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

In the Matter of the Application of Midwest)
Power Company for a Certificate of Public) Docket No. 19-MPCE-064-COC
Convenience and Necessity to Transact the)
Business of a Public Utility in the State of Kansas.)

**MOTION FOR ORDER REQUIRING REILING OF APPLICATION AND
SUPPORTING TESTIMONY AND RESTARTING 180-DAY CLOCK**

COMES NOW Westar Energy, Inc. and Kansas Gas and Electric Company (collectively “Westar”) and move the State Corporation Commission of the State of Kansas (“Commission”) for an order requiring Midwest Power Company (“MWP”) to refile its application and supporting testimony in this docket, restarting the 180-day time period for the Commission order, and requiring MWP to explain why it should not be subject to sanctions for misleading the Commission in testimony filed under oath. Commission Staff has indicated that it does not oppose Westar’s request for the Commission to require MWP to refile its application and restart the 180-day clock. In support of its motion, Westar states as follows:

1. On August 10, 2018, MWP filed an application pursuant to K.S.A. 66-131 requesting the Commission grant it a certificate of convenience and necessity to operate as a public utility in Kansas related to MWP’s 8% ownership (through an owner trustee, Wilmington Trust Company) in the Jeffrey Energy Center (“JEC”). In support of its application, MWP provided the verified Direct Testimony of Amy Paine.

2. In its application, MWP recognized that one element of the Commission’s standard for approving a certificate application is demonstration that the applicant has the financial wherewithal to act as a utility in the state and cover its financial obligations, recognizing that “[h]istorically, the Commission has required applicants seeking a CCN to demonstrate that they

have the necessary technical, managerial and financial resources to conduct the business of a public utility.”¹

3. When discussing how MWP meets the financial component of the Commission’s standard, in her verified testimony, MWP witness Amy Paine states:

Q. PLEASE DESCRIBE THE FINANCIAL RESOURCES OF MWP.

A. The sole asset of MWP is the 8% undivided interest in the JEC. Until it is certificated as a public utility and can establish a revenue stream through the sale of energy and capacity in the wholesale market, it will have no cash flow. However, MWP is supported financially by its parent, Key, via a 2007 corporate Guaranty. KeyCorp is one of the nation’s largest bank-based financial service companies, with \$137.7 billion in total consolidated assets as of December 31, 2017 and \$6.3 billion in revenue for the 12 months ended December 31, 2017.

Q. IF MWP DOES NOT HAVE SUFFICIENT CASH FLOWS TO FULFILL ITS OBLIGATIONS UNDER THE OPERATION AGREEMENT, WILL KEYCORP FULFILL THOSE OBLIGATIONS?

A. Yes. The Guaranty provided to MWP by KeyCorp ensures that any obligation undertaken by MWP shall be fully discharged. To the extent required, KeyCorp will modify the Guaranty to ensure that any operations, maintenance or capital expenses required to be paid by MWP pursuant to the Operation Agreement will be paid.²

4. In its application and supporting testimony, MWP clearly recognizes the need to establish financial wherewithal as a prerequisite to satisfying the financial component of the Commission’s standards for securing a CCN. MWP makes a representation to the Commission that it intends to meet this requirement by relying on the financial wherewithal of its parent company, KeyCorp, and by amending the KeyCorp Guaranty as necessary to meet the

¹ MWP Application, ¶ 24.

² Direct Testimony of Amy Paine, at 11.

Commission's requirements. In fact, MWP expressly states that KeyCorp will cover the obligations under the Operation Agreement if MWP does not have sufficient cash flows.³

5. Westar issued a set of data requests to MWP and received responses on November 1, 2018. In those responses, MWP provided an entirely new and directly contrary position, completely reversing the position taken in its application that had been supported with sworn testimony, with respect to its reliance on KeyCorp and the KeyCorp Guaranty to meet the Commission's financial component standard.

6. In response to Westar's data request 2.02, attached hereto, MWP stated, in part:

[T]he Trust Estate has sole responsibility for the all operating costs allocable to the 8% interest in the JEC. Neither WTC nor Midwest Power has responsibility for such costs in their personal capacities. If there are shortfalls between the revenues generated by the 8% interest and the allocable operating costs, Westar's predecessor in interest (UtiliCorp) agreed to cover such shortfalls. Consent & Assumption Agreement, § 3.3. Westar agreed to assume all obligations and liabilities of UtiliCorp pursuant to the JEC Transfer Agreement (Aug. 11, 2006) and the JEC Consent & Agreement (Feb. 2007) . . . It is not necessary for KeyCorp to guarantee any operating costs required to be paid by Midwest Power pursuant to the Operating Agreement, because as discussed above, Midwest Power is not required to pay any such costs. KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs, because to do so would abrogate the contractual rights described above.

7. In response to Westar's data request 2.03, attached hereto, MWP stated, in part:

The KeyCorp Guaranty does not guarantee the payment of costs associated with the dismantlement of the plant, closure and monitoring of the related landfill, other retirement costs, or future environmental liability allocable to the 8% interest. It appears such costs are addressed by Section 10 of the Operating Agreement. The Operating Agreement is not one of the "Guaranteed Agreements" under the KeyCorp Guaranty.

³ *Id.*

8. MWP's new position articulated in these responses clearly constitutes a material and fundamental change to its application. MWP's responses are wholly inconsistent with the testimony provided in support of its application and completely undermine the factual basis on which MWP relied to argue that it meets the Commission's standards for approval of a certificate application. Based on these responses, it appears that MWP's new position is that it does not have to establish financial wherewithal because Westar is required to cover any shortfalls between the revenue generated by the 8% interest and its share of expenses at the JEC, all while MWP still receives the capacity and energy generated by that 8% interest without satisfying all of the costs allocable thereto under the Operation Agreement. In other words, MWP's new position is that when the lease associated with the 8% interest expires on January 4, 2019, MWP will not pay its obligations if MWP itself does not have cash in the trust to pay those obligations and KeyCorp will not guaranty those payments. Rather, MWP states their belief that Westar will have to pay for any expenses associated with the 8% interest that the trust cannot pay. According to MWP's response, it now believes that the existing KeyCorp Guaranty essentially does not guarantee anything relevant to this proceeding. MWP also has done a further "about-face" and is now no longer willing to modify the KeyCorp Guaranty to ensure that all of the operations and maintenance expenses associated with the 8% interest are paid – as it indicated it would do in its verified direct testimony – because MWP now asserts such a guaranty is not necessary.

9. MWP's complete reversal of its position – of which Westar and Commission Staff learned only 7 days before the deadline for Staff and intervenor testimony currently set in the docket – is particularly outrageous, given the fact that MWP was clearly aware of the Consent & Assumption Agreement on which it now relies to support its new position at the time it filed its

application. Indeed, the Consent & Assumption Agreement actually was attached as an exhibit to MWP's initial filing.

10. Staff and Westar have spent the almost three months since MWP filed its application conducting discovery and developing their positions in the docket based on the representations MWP made in its application and supporting testimony. Now, it appears that those representations were false, or at best highly misleading, and in any event can no longer be relied on.

11. When an applicant makes a material change to an application filed pursuant to K.S.A. 66-131, the Commission has the authority to restart the 180-day clock provided for its decision under the statute.⁴

12. Westar is not fundamentally opposed to the Commission granting a CCN to MWP and is not averse to MWP becoming a full-fledged minority partner in the JEC, provided MWP satisfies the applicable standards in Kansas for securing a CCN. However, due to MWP's "180 degree" change of position that materially undermines its initial application and the sworn testimony previously provided by Ms. Paine, Westar hereby requests that the Commission require MWP to file a new application and supporting testimony, explaining how MWP meets the Commission's standards for approval of a certificate application, since its reliance on KeyCorp's financial standing no longer appears to be valid. The new 180-day clock should run from the date that MWP files its new application and supporting testimony to provide all of the relevant parties

⁴ *In the Matter of the Application of Freedom Pipeline, LLC for a Certificate of Convenience and Necessity to Provide Natural Gas Service as a Not for Profit Public Utility in Stevens, Grant, and Seward Counties, Kansas, Order Denying Amended Application, Docket No. 14-FRPG-599-COC, ¶ 11 (March 26, 2015) ("The Amended Application makes a material change to the Application. Therefore, the 180-day deadline contained in K.S.A. 66-131(b) began to run upon the filing of the Amended Application).*

with sufficient time to evaluate and respond to MWP's new approach for satisfying the Commission's applicable standards.

13. At the time the testimony was filed, MWP had in its possession the agreement on which it now relies to support a different and inconsistent position and MWP's actions have resulted in a waste of Commission Staff's time and resources investigating an application the basis of which is no longer valid. Therefore, Westar also asks the Commission to require MWP, as part of the new testimony to be filed supporting its application, to explain why MWP should not be subject to sanctions for misleading the Commission in the initial version of direct testimony filed under oath.

14. As was indicated above, Commission Staff has indicated that it does not oppose Westar's request for the Commission to require MWP to refile its application and restart the 180-day clock.

WHEREFORE, Westar respectfully requests that the Commission issue an order requiring MWP to refile its application and supporting testimony in this docket, restarting the 180-day time period for the Commission order, and requiring MWP to explain why it should not be subject to sanctions for misleading the Commission in testimony filed under oath, and for such further and other relief as may be appropriate.

Respectfully submitted,

/s/Cathryn J. Dinges

Cathryn J. Dinges, (#20848)

Westar Energy, Inc.

Corporate Counsel

818 South Kansas Avenue

Topeka, Kansas 66612

Phone: (785) 575-8344

Facsimile: (785) 575-8136

cathy.dinges@westarenergy.com

**ATTORNEY FOR WESTAR ENERGY, INC. AND
KANSAS GAS AND ELECTRIC COMPANY**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed, this 5th day of November, 2018, to all counsel of record.

/s/ Cathryn J. Dinges

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.02

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.02) Please (a) identify the respective responsibilities and obligations of each of MPC and the Owner Trustee with respect to the costs of operation, maintenance, capital additions and improvements, fuel and other expenses allocable to the 8% interest in the JEC referenced in the Application under the Operation Agreement after the expiration of the lease in January 2019, and (b) confirm that all of such expenses will be subject to and covered by KeyCorp pursuant to the KeyCorp Guaranty, including in the event the funds in the trust estate are insufficient to fully discharge the obligations of MPC and the Owner Trustee with respect to the expenses allocable to the 8% interest in the JEC. In the case of each of clause (a) and (b), please provide citations or references to the applicable contractual agreements and specific provisions supporting your response. If your response to (b) with respect to any of the identified expenses is that the KeyCorp Guaranty does not cover those expenses, please indicate whether KeyCorp is willing to provide a new or amended guaranty as a condition of obtaining its CCN in this proceeding that does cover such expenses.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to subpart (a) of this data request on the grounds that subpart (a) of the question is not designed to elicit material facts within the Company's personal knowledge, and it requires a conclusion of law in violation of paragraph 16 of the Protective and Discovery Order. Similarly, Midwest Power objects to this data request on the grounds that all subparts of the question require the Company to (1) make a legal conclusion in violation of paragraph 16 of the Discovery and Protective Order; and (2) analyze and prepare data that Westar is able to prepare on its own.

Without waiving the foregoing objection, Midwest Power responds as follows:

Part (a):

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

In each agreement regarding Jeffrey Energy Center to which Wilmington Trust Company (“WTC”) is a party, there is language stating that WTC is executing the agreement solely in its capacity as Owner Trustee under the powers expressly conferred upon it by the Trust Agreement. This language makes it clear that no personal liability or responsibility is assumed by WTC, and any person making a claim under the various agreements, including the Operating Agreement, must look solely to the Trust Estate for satisfaction of such claim. *E.g.*, Centel Assignment Agreement, § 11 (Aug. 15, 1991); Participation Agreement, § 19.10 (Aug. 15, 1991); Lease Agreement, § 20.9 (Aug. 15, 1991).

Likewise, Midwest Power is not personally liable for any amounts payable by Owner Trustee under the Ownership Agreement or the Operating Agreement, pursuant to Section 4 of the Consent & Assumption Agreement (Aug. 15, 1991), which states:

Owner Participant shall have no liability, obligation, responsibility or duty to any of the undersigned whatsoever for or with respect to any of the transactions contemplated by the Ownership Agreement or (after termination of the Lease) the Operating Agreement, whether as a result of the negligence or willful misconduct of the Owner Trustee in its individual capacity or otherwise.

Accordingly, the Trust Estate has sole responsibility for the all operating costs allocable to the 8% interest in the JEC. Neither WTC nor Midwest Power has responsibility for such costs in their personal capacities. If there are shortfalls between the revenues generated by the 8% interest and the allocable operating costs, Westar’s predecessor in interest (UtiliCorp) agreed to cover such shortfalls. Consent & Assumption Agreement, § 3.3. Westar agreed to assume all obligations and liabilities of UtiliCorp pursuant to the JEC Transfer Agreement (Aug. 11, 2006) and the JEC Consent & Agreement (Feb. 2007).

The KCC approved the Consent & Assumption Agreement in Docket No. 175-456-U (Sept. 27, 1991) and the JEC Transfer Agreement in Docket No. 06-MKEE-524-ACQ (Feb. 23, 2007).

Part (b):

It is not necessary for KeyCorp to guarantee any operating costs required to be paid by Midwest Power pursuant to the Operating Agreement, because as discussed above, Midwest Power is not required to pay any such costs. KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs, because to do so would abrogate the contractual rights described above.

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Laine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.03

Submitted to: Midwest Power Company

Request Date: October 18, 2018

Date Information Needed: November 1, 2018

Please provide the following:

- 2.03) Please confirm that the KeyCorp Guaranty will, absent a permitted transfer by MPC of the 8% JEC interest to another party, remain in effect until the complete retirement of the JEC and that the guaranty will guarantee the payment of all costs associated with the dismantlement of the plant, including closure and monitoring of the related landfill and other retirement costs allocable to the 8% JEC interest including any future environmental liability. Please provide citations or references to the applicable contractual agreements and specific provisions supporting your response. If your response is that the KeyCorp Guaranty will not remain in effect until the complete retirement of JEC and/or that it will not guarantee payment of any of the costs listed above, please indicate whether KeyCorp is willing to provide a new or amended guaranty as a condition of obtaining its CCN in this proceeding that does remain in effect until the complete retirement of JEC and does guarantee payment of all of the costs listed above.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to this data request on the grounds that request is not designed to elicit material facts within the Company's personal knowledge, and/or that the request requires a conclusion of law. Midwest Power further objects on the grounds that the question is designed to require the Company to analyze and prepare data that Westar is able to prepare on its own.

Response:

Without waiving the foregoing objection, Midwest Power responds as follows:

The KeyCorp Guaranty does not guarantee the payment of costs associated with the dismantlement of the plant, closure and monitoring of the related landfill, other retirement costs, or future environmental liability allocable to the 8% interest. It appears such costs are addressed by Section 10 of the Operating Agreement. The Operating Agreement is not one of the "Guaranteed Agreements" under the KeyCorp Guaranty.

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

For the same reasons as discussed in Westar Data Request 2.02, KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/01/2018