

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

In the Matter of the Application of Great)
Plains Energy Incorporated, Kansas City)
Power & Light Company and Westar)
Energy, Inc. for Approval of the Merger)
of Westar Energy, Inc. and Great Plains)
Energy Incorporated.)

Docket No. 18-KCPE-095-MER

POST-HEARING BRIEF OF THE
CITIZENS' UTILITY RATEPAYER BOARD

April 20, 2018

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COMES NOW, The Citizens' Utility Ratepayer Board (CURB) and respectfully submits its *Post-Hearing Brief* pertaining to the Application by Great Plains Energy Incorporated (“GPE”), Kansas City Power and Light Company (KCP&L), and Westar Energy, Inc. and Kansas Gas and Electric Company (Westar), (collectively referred herein as “Applicants”) seeking approval of the merger of Westar and Great Plains Energy. As set forth below, CURB recommends that the State Corporation Commission of the State of Kansas (“Staff” and “Commission” respectfully) approve the Merger subject to the terms agreed to in the Non-Unanimous Settlement Agreement (“Settlement Agreement”).¹ In support thereof, CURB states as follows:

I. Introduction

1. To begin, CURB believes that the proposed Merger between Westar and GPE, as modified by the Non-Unanimous Settlement Agreement (“Settlement Agreement”), meets the Commission’s Merger Standards, and as a result promotes the public interest. In addition, CURB believes that the Settlement Agreement is supported by the record as a whole, and is reasonable in light of the Commission’s five factor test for determining whether a settlement is reasonable (therefore meeting the public interest standard for settlement). As described thoroughly below, CURB believes that the proposed merger, as modified by the Settlement Agreement, will result in substantial cost-savings and benefits for ratepayers. In these regards, CURB has been consistent in its position that the Merger between Westar and GPE is a good fit given the companies’ contiguous service territories, familiarity with Kansas regulation, and joint ownership of generating facilities. CURB posits that these factors are beneficial when analyzing whether cost-savings will result from the combining of these two companies. Despite CURB’s general approval of the Amended and Restated Agreement and Plan of Merger (described below) filed by

¹ See Non-Unanimous Settlement Agreement (March 7, 2018).

Applicants, CURB recommended additional safeguards, to be considered and adopted by the Commission, to ensure protection and benefits to ratepayers (again, described below). After many days of intense negotiations, CURB, Staff, and other Intervenors were able to guarantee additional safeguards that satisfy CURB's initial recommendations to the Commission. In other words, CURB believes that the conditions and terms of the Settlement Agreement provide the necessary safeguards that will ensure that the proposed Merger will be beneficial to ratepayers. As analyzed below, CURB recommends the Commission approve the Merger, pursuant to the terms and conditions of the Settlement Agreement.

A. Background

2. On June 28, 2016, in Docket No. 16-KCPE-593-ACQ ("16-593 Docket"), the Applicants filed a Joint Application seeking approval of a transaction in which GPE would acquire 100% of Westar's outstanding stock for \$12.2 billion and become the parent company of Westar ("Initial Transaction" or "Initial Agreement").² The Initial Transaction would have resulted in an acquisition premium of approximately \$4.8 billion.³ GPE proposed to finance the Initial Agreement by issuing \$4.4 billion in long-term debt, \$750 million of privately-issued mandatory convertible preferred equity, and \$2.35 billion in public equity, consisting of common stock and mandatory convertible stock.⁴ Had the Initial Transaction been approved, it would have resulted in a holding company capital structure of 32.4% common equity and 59.0% consolidated long-term debt.⁵ For ratemaking purposes the Applicants requested that the subsidiary capital structures (KCP&L and Westar) be utilized, instead of GPE's capital structure, to set rates.⁶ In opposition to

² 16-593 Docket, Initial Application, p. 4.

³ Direct Testimony of Andrea C. Crane on Behalf of CURB, p. 12 (Crane Direct) (January 29, 2018).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at pp. 12-13.

the Joint Application in the 16-593 Docket, CURB, Staff, and Intervenors argued that this approach amounted to “financial engineering,” which results when an artificially high equity ratio is used for ratemaking purposes.⁷ This would have amounted to the Company over earning in order to finance the Initial Transaction.⁸

3. On April 19, 2017, the Commission issued an Order (“Initial Order”) denying the Initial Transaction finding that it was not in the public interest due to the high acquisition premium (“AP”) over book value (\$4.8 billion), lack of guaranteed customer benefits pertaining to merger savings, and concerns that the new combined company would be highly leveraged and thus riskier for ratepayers.⁹ Joint Applicants subsequently filed a Petition for Reconsideration, which was denied by the Commission.¹⁰

4. On August 25, 2017, Applicants filed an Application with the Commission seeking approval of a “Merger of Equals” (“MOE”) between Westar and GPE.¹¹ More specifically, Applicants seek Commission approval of an Amended and Restated Agreement and Plan of Merger (“Merger,” “Amended Agreement,” or “Application”) that calls for GPE and Westar shareholders to exchange their currently held shares for shares in a new holding company, which will have a new, yet to be determined, name (“Holdco”).¹² GPE shareholders will receive 0.5981 shares of Holdco stock for each share of GPE stock.¹³ Westar shareholders will receive 1.0 shares of Holdco stock for each share of Westar stock.¹⁴ Upon close of the Merger, Westar’s former

⁷ *Id.*

⁸ *Id.*

⁹ 16-593 Docket, Initial Order, pp. 10-44.

¹⁰ *See* Joint Applicants' Petition for Reconsideration (May 4, 2018); Order Denying Joint Applicants' Petition for Reconsideration (May 23, 2018).

¹¹ *See* Great Plains Energy Incorporated, Kansas City Power & Light Company, and Westar Energy, Inc.'s Joint Application, p. 6 (Application) (August 25, 2017).

¹² *Id.*

¹³ *Id.* at p. 19.

¹⁴ *Id.*

shareholders will own approximately 52.5% of Holdco and GPE's former shareholders will own approximately 47.5%. The Merger will result in a company structure in which KCP&L and Westar will be subsidiaries of the new Holdco, which will replace GPE.¹⁵ Applicants estimate, in their Application, that the merger will result in gross savings of \$627.0 million from 2018-2022.¹⁶

5. On August 25, 2017, Applicants filed direct testimony of their witnesses¹⁷ in support of their Application.

6. On November 21, 2017, the Commission issued its Order Setting Procedural Schedule ("Procedural Schedule").¹⁸ The Procedural Schedule set deadlines and dates for testimonies, a public hearing, settlement conference(s), discovery cut-off, contested issues lists, a prehearing conference, an evidentiary hearing, etc.¹⁹

7. On January 22, 2018, the Commission held a Public Hearing in Topeka, Kansas which provided ratepayers an opportunity to ask questions and provide comments regarding the proposed Merger of Westar and GPE.

8. On January 29, 2018, CURB, Staff and Intervenors filed direct testimony, each advocating differing viewpoints regarding the merger of Westar and GPE.²⁰

¹⁵ *Id.* at p. 6.

¹⁶Crane Direct, p. 8.

¹⁷ Direct Testimony of Terry Bassham on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Basham Direct) (August 25, 2017); Direct Testimony of Mark Ruelle on Behalf of Westar Energy (Ruelle Direct)(August 25, 2017); Direct Testimony of Kevin E. Bryant on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Bryant Direct) (August 25, 2017); Direct Testimony of Darrin Ives on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Ives Direct) (August 25, 2017); Direct Testimony of Greg A. Greenwood on Behalf of Westar Energy, Inc. (Greenwood Direct) (August 25, 2017); Direct Testimony of Anthony D. Somma on Behalf of Westar Energy, Inc. (Somma Direct) (August 25, 2018); Direct Testimony of Steven P. Busser on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Busser Direct) (August 25, 2017); Direct Testimony of Bruce Akin on Behalf of Westar Energy, Inc. (Akin Direct) (August 25, 2017); Direct Testimony of John J. Reed on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Reed Direct) (August 25, 2017).

¹⁸ Order Setting Procedural Schedule (November 21, 2018).

¹⁹ Procedural Schedule, pp. 4-5.

²⁰ Direct Testimony of John Garretson on Behalf of IBEW Local Union 304 (Garretson Direct) (January 29, 2018); Direct Testimony and Exhibits of Michael P. Gorman (Gorman Direct) (January 29, 2018); Direct Testimony of Larry W. Holloway on Behalf of Kansas Power Pool (Holloway Direct) (January 29, 2018); Direct Testimony of David E. Dismukes, PH.D. on Behalf of Kansas Electric Power Cooperative, Inc. (Dismukes Direct) (January 29,

9. On February 5, 2018, KIC filed cross-answering testimony on behalf of Michael P. Gorman.²¹

10. On February 12, 2018, Applicants filed their rebuttal testimony, arguing that the Merger of Westar and GPE, as proposed in their Application, is reasonable and promotes the public interest.²²

B. Non-Unanimous Settlement Agreement

11. All parties in this docket had the opportunity to engage in meaningful settlement discussions. Those settlement discussions were intense, involved much negotiation, and spanned many days. As a result of those discussions, CURB, Staff, Applicants, Sunflower Electric Power Corporation (“Sunflower”), Mid-Kansas Electric Company, Inc. (“Mid-Kansas”), Kansas Power Pool (“KPP”), Midwest Energy, Inc. (“Midwest”), and Brightergy, LLC (“Brightergy”) (collectively referred to herein as the “Signatories”), entered into a Non-Unanimous Settlement

2018); Confidential Direct Testimony of Garrett Cole on Behalf of the Kansas Electric Power Cooperative, Inc. (Cole Direct) (January 29, 2018); Crane Direct; Direct Testimony of Stacey Harden on Behalf of CURB (Harden Direct); Direct Testimony of Cary Catchpole on Behalf of CURB (Catchpole Direct) (January 29, 2018); Direct Testimony of Adam Gatewood on Behalf of the Kansas Corporation Commission (Gatewood Direct) (January 29, 2018); Direct Testimony of Jeff McClanahan on Behalf of the Kansas Corporation Commission (McClanahan Direct) (January 29, 2018); Direct Testimony of Robert Glass on Behalf of the Kansas Corporation Commission (Glass Direct) (January 29, 2018); Direct Testimony of Justin Grady on Behalf of the Kansas Corporation Commission (Grady Direct) (January 29, 2018); Direct Testimony of Leo Haynos on Behalf of the Kansas Corporation Commission (Haynos) (January 29, 2018); Direct Testimony of Walter Drabinski on Behalf of the Kansas Corporation Commission (Drabinski Direct) (January 29, 2018); Direct Testimony of Ann Diggs on Behalf of the Kansas Corporation Commission (Diggs Direct) (January 29, 2018); Direct Testimony of Jason Ianacone on Behalf of IBEW Local 225 (Ianacone Direct) (January 29, 2018); Direct Testimony and Exhibits of Steve W. Chriss on Behalf of Wal-Mart Stores, Inc. (Chriss Direct) (January 29, 2018); Direct Testimony of John Garretson on Behalf of International Brotherhood of Electrical Workers, Local Union No. 304 (Garretson Direct) (January 29, 2018).

²¹ Cross-Answering Testimony of Michael P. Gorman on Behalf of Kansas Industrial Consumers Group, Inc. (Gorman Cross-Answering) (February 5, 2018).

²² Rebuttal Testimony of Bruce Akin on Behalf of Applicants (Akin Rebuttal) (February 12, 2018); Kevin E. Bryant Rebuttal Testimony on Behalf of Applicants (Bryant Rebuttal) (February 19, 2018); Steven P. Busser Rebuttal Testimony on Behalf of Applicants (Busser Direct) (February 19, 2018); Burton L. Crawford Rebuttal Testimony on Behalf of Applicants (Crawford Direct) (February 19, 2018); Greg A. Greenwood Rebuttal Testimony on Behalf of Applicants (Greenwood Direct) (February 19, 2018); Darrin R. Ives Rebuttal Testimony on Behalf of Applicants (Ives Rebuttal) (February 19, 2018); John J. Reed Rebuttal Testimony on Behalf of Applicants (Reed Direct) (February 19, 2018); Anthony D. Somma Rebuttal Testimony on Behalf of Applicants (Somma Direct) (February 19, 2018); Terry Bassham Rebuttal Testimony on Behalf of Applicants (Bassham Direct) (February 19, 2018).

Agreement (“Settlement Agreement”).²³ The Signatories agreed, subject to the terms and conditions contained in the Settlement Agreement, to settle all issues related to the Merger and as a result agreed that the Merger is in the public interest.²⁴

12. CURB will not address every specific settlement term in this portion of its brief, but will address the Settlement and specific terms as they relate to the Commission’s Merger Standards below. The key provisions of the Settlement are, but not limited to, as follows:

- 1) One-time \$50 million upfront rate credits to customers of the Applicants;
- 2) 5 year rate moratorium (subject to certain conditions);
- 3) Annual bill credits to customers of Westar and KCP&L from 2019 to 2022 in the amount of \$8,649,487 for Westar retail electric customers and \$2,817,832 for KCP&L’s Kansas retail electric customers, to be allocated among the customer classes as recommended by Staff witness, Dr. Robert Glass;
- 4) Earning Review and Sharing Plan (“ERSP”) which allows for a sharing of savings from 2019 to 2022 if Westar and KCP&L earned returns, less the fixed annual bill credits, that exceed the 9.3% allowable return on equity (“ROE”), to be recommended in the 2018 rate cases by the Signatories;
- 5) Recovery of transition costs limited to \$50 million on a total company basis, recoverable through amortization over ten years beginning when the 2018 Kansas base rate review rates become effective. Applicants agree to not seek recovery of transaction costs as a result of the Merger (pursuant to the terms in the Settlement Agreement);
- 6) Quality of service conditions, to include annual reporting, penalty provisions,

²³ See Non-Unanimous Settlement Agreement (March 7, 2018).

²⁴ *Id.* at pp. 4-5.

and a recommendation that the Commission open a compliance docket by January 2019 related to service quality and reliability reporting; and

- 7) Extensive reporting requirements to be maintained in a separate compliance docket.²⁵

13. During the period of March 9-12, 2018, Signatories filed testimony in support of the Settlement Agreement.²⁶ Signatories agreed that the Settlement Agreement will result in just and reasonable rates, and that the proposed Merger is in the public interest according to the Commission's Merger Standards.²⁷ The Kansas Municipal Energy Agency ("KMEA") also filed a Statement of Settlement voicing its support for the Merger and recommended that the Commission approve the proposed Merger.²⁸ In addition, the City of Independence, Missouri (Independence), filed a statement supporting the Commission's approval of the proposed transaction.²⁹

14. During the period of March 12-19, 2018, Kansas Industrial Consumers Group, Inc. ("KIC"), the Kansas City, Kansas Board of Public Utilities ("BPU"), and the Kansas Electric Power Cooperative, Inc. ("KEPCo") (collectively referred to herein as the "Non-Signatories") filed

²⁵ See Settlement Agreement, pp. 13-37.

²⁶ International Brotherhood of Electrical Workers, Local No. 304, 412, 1464 and 1613 Motion Supporting Approval of Non-Unanimous Settlement Agreement (March 9, 2018); Testimony in Support of Non-Unanimous Stipulation and Agreement of Greg A Greenwood on Behalf of Westar Energy (Greenwood Testimony in Support) (March 9, 2018); Testimony in Support of Non-Unanimous Stipulation and Agreement of Darrin R. Ives on Behalf of Great Plains Energy Incorporated and Kansas City Power & Light Company (Ives Testimony in Support) (March 9, 2018); Testimony of Andrea C. Crane in Support of Settlement Agreement on Behalf of CURB (Crane Testimony in Support) (March 9, 2018); Testimony in Support of Non-Unanimous Settlement Agreement of Jeff McClanahan on Behalf of Kansas Corporation Commission Staff (McClanahan Testimony in Support) (March 9, 2018); Testimony in Support of Non-Unanimous Settlement Agreement of Justin T. Grady on Behalf of Kansas Corporation Commission Staff (Grady Testimony in Support) (March 9, 2018); Testimony in Support of Non-Unanimous Settlement Agreement of Leo M. Haynos on Behalf of the Kansas Corporation Commission (Haynos Testimony in Support) (March 9, 2018); Testimony in Support of Non-Unanimous Settlement Agreement of Robert H. Glass, PhD on Behalf of Kansas Corporation Commission (Glass Testimony in Support) (March 9, 2018).

²⁷ Crane Testimony in Support, pp. 19-20.

²⁸ Kansas Municipal Energy Agency Statement of Settlement, pp. 1-2 (April 9, 2018).

²⁹ Statement of the City of Independence, Missouri, pp. 1-2 (April 10, 2018).

testimony in opposition to the Settlement Agreement.³⁰

15. From March 19, 2018, through March 21, 2018, the Commission held an evidentiary hearing (“Hearing”) on this matter.

II. Standard of Review

16. The Commission has a broad grant of authority pursuant to K.S.A. 66-101.³¹ In accordance with that broad grant of authority, the Commission has jurisdiction over proposed utility mergers pursuant to K.S.A. 66-101, K.S.A. 66-127, and K.S.A. 66-101e.³² The Commission has noted that “Kansas statutes do not contain a specific standard for mergers.”³³ In approving a merger, the Commission has stated that the applicant must demonstrate that the merger “will promote the public interest.”³⁴ On August 9, 2016, in Docket No. 16-KCPE-593-ACQ, the Commission issued its Order on Merger Standards reaffirming the mergers standards³⁵ as modified in the 97-WSRE-676-MER Docket (97-676 Docket).³⁶ The Commission indicated that:

The merger standards serve as factors to evaluate whether a proposed merger is in the public interest, rather than a strict checklist. Therefore, an application does not need to satisfy each and every standard, but needs to satisfy enough standards to demonstrate it advances the public interest.³⁷

17. The Commission’s Order on Merger Standards (“Merger Standards”) sets out the

³⁰ Objection to the Nonunanimous Settlement Agreement and the Motion to Approve the Same by Kansas Electric Power Cooperative, Inc. (KEPCo Objection to Settlement) (March 12, 2018); Testimony in Opposition to Non-Unanimous Settlement Agreement of Michael P. Gorman on Behalf of Kansas Industrial Consumers Group, Inc. (Gorman Objection to Settlement) (March 12, 2018); Kansas City, Kansas Board of Public Utilities' Objection to Non-Unanimous Settlement Agreement and Motion to Approve Non- Unanimous Settlement Agreement (BPU Objection to Settlement Agreement) (March 12, 2018).

³¹ “The commission is given full power, authority and jurisdiction to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.” K.S.A. 66-101.

³² Docket No. 174, 155-U, Re Kansas Power & Light Co., 127 P.U.R.4th 201 (November 15, 1991).

³³ *Id.*

³⁴ Order on Merger Standards, ¶ 3, (citing Order, Consolidated Dockets 172,745-U and 174,155-U, p. 34, November 15, 1991).

³⁵ The Commission reaffirmed the merger standards as stated in the November 14, 1991 Order approving the Kansas Power & Light and Kansas Gas & Electric merger in consolidated dockets 172,745-U and 174,155-U.

³⁶ 16-593 Docket, Order on Merger Standards, ¶¶ 4-5 (August 9, 2016).

³⁷ 16-593 Docket, Order, p. 18.

standards to be used in determining whether a proposed merger will promote the public interest,³⁸ those standards are as follows:

- (a) The effect of the transaction on consumers, including:
 - (i) the effect of the proposed transaction on the financial condition of the newly created entity as compared to the financial condition of the stand-alone entities if the transaction did not occur;
 - (ii) reasonableness of the purchase price, including whether the purchase price was reasonable in light of the savings that can be demonstrated from the merger and whether the purchase price is within a reasonable range;
 - (iii) whether ratepayer benefits resulting from the transaction can be quantified;
 - (iv) whether there are operational synergies that justify payment of a premium in excess of book value; and
 - (v) the effect of the proposed transaction on the existing competition.
- (b) The effect of the transaction on the environment.
- (c) Whether the proposed transaction will be beneficial on an overall basis to state and local economies and to communities in the area served by the resulting public utility operations in the state. Whether the proposed transaction will likely create labor dislocations that may be particularly harmful to local communities, or the state generally, and whether measures can be taken to mitigate the harm.
- (d) Whether the proposed transaction will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operations in the state.

³⁸ *Id.* at ¶ 5.

- (e) The effect of the transaction on affected public utility shareholders.
- (f) Whether the transaction maximizes the use of Kansas energy resources.
- (g) Whether the transaction will reduce the possibility of economic waste.
- (h) What impact, if any, the transaction has on the public safety.³⁹

18. Settlements, in general, are favored by the law in the absence of bad faith and fraud.⁴⁰ Kansas Courts and the Commission recognize this fundamental rule.⁴¹ More specifically, the Commission evaluates the evidence in the record as a whole to determine whether a settlement agreement is reasonable and in the public interest under the following factors:

- 1) Has each party had an opportunity to be heard on its reasons for opposing the settlement?
- 2) Is the agreement supported by substantial competent evidence in the record as a whole?
- 3) Does the agreement conform to applicable law?
- 4) Will the agreement result in just and reasonable rates?
- 5) Are the results of the agreement in the public interest, including the interests of customers represented by any party not consenting to the agreement?⁴²

III. Issues Before the Commission

19. In this docket, the Commission has asked the parties to analyze whether the merger of Westar and GPE will promote the public interest.⁴³ More specifically, the parties were asked to analyze whether the merger of Westar and GPE will promote the public interest according to the Commission's Merger Standards.⁴⁴ CURB analyzed the Application and supporting evidence

³⁹ *Id.*

⁴⁰ *See* Fieser v. Stinnett, 212 Kan. 26, 31, 509 P.2d 1156, 1160 (1973).

⁴¹ *Id.*

⁴² Docket No. 08-ATMG-280-RTS, Order Approving Contested Settlement Agreement, pp. 5-6 (May 12, 2008).

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 5.

accordingly. In addition, CURB evaluated the Settlement Agreement according to the Commission's five factor test in order to determine whether the Settlement meets the public interest. Taken together, CURB believes that the Merger is reasonable, in the public interest, and supported by substantial competent evidence in the record.

IV. Arguments and Authorities

A. The Merger of Westar and GPE is in the Public Interest and Should be Approved According to the Terms of the Settlement.

1. The terms of the Settlement satisfy Commission Merger Standard (a)(i).

20. As stated above, Commission Merger Standard (a)(i) is as follows:

(a) The effect of the transaction on consumers, including:

(i) The effect of the proposed transaction on the financial condition of the newly created entity as compared to the financial condition of the stand-alone entities if the transaction did not occur; . . .⁴⁵

CURB's view on the financial condition of the combined company, if the proposed Merger is approved according to the settlement terms, has not changed from its initial filed position. In fact, CURB did not raise any concerns regarding the financial structure of the combined company if the Commission approved the Amended Agreement.⁴⁶ CURB expert witness, Ms. Crane, states in her direct testimony:

The combined company should be stronger than either company on a stand-alone basis, as discussed by Mr. Bryant and Mr. Somma in their testimonies. More importantly, the proposed transaction does not contain the problems that were inherent in the original merger transaction due to the need to finance the significant premium that was present in the Original Agreement. As a MOE, the proposed transaction has the benefits of consolidation without the need to impose heavy financing costs to achieve the consolidation. In fact, it is interesting to note that the combined companies will actually begin with equity levels that are higher than normal, due to the additional equity that was issued by GPE in anticipation of the first merger transaction and that is still outstanding. This is in sharp contrast to the prior transaction, which would have resulted in historically low equity levels and

⁴⁵ Order on Merger Standards, ¶¶ 4-5.

⁴⁶ Crane Direct, p. 41.

excessive leverage. Both rating agencies commented on an improved business risk profile for the combined company as compared to GPE and Westar as stand-alone entities. Moody's upgraded GPE's credit rating from Baa3 to Baa2 and affirmed its prior ratings of its subsidiaries, as well as affirmed ratings for Westar. Standard and Poor's affirmed its ratings of both GPE and Westar and raised its outlook for them (and their operating subsidiaries) to Positive from Negative.⁴⁷

21. As it relates to the financial structure of the proposed combined company, CURB did recommend modifications to two of the proposed financial commitments in an effort to provide better long-term protection to the utilities' ratepayers.⁴⁸ Applicants proposed, in their Application, a limit to debt in the capital structures of the holding company, KCP&L, and Westar to no more than 65% debt, along with a commitment that dividend payments to the holding company will not increase debt levels above 65%.⁴⁹ CURB suggested that the Applicants debt limit commitment may be too high, and pointed out that the Applicants generally have a target debt ratio of approximately 50%.⁵⁰ In addition, CURB posited that the Commission traditionally targets capital structures that consist of approximately 50% debt and 50% equity.⁵¹ From CURB's perspective, in order to remain consistent with common regulatory and Commission practice, CURB recommended that the Commission be notified well before the Applicants reach a capital structure of 65% debt.⁵² More specifically, CURB recommended that the Commission be notified if the capital structure of the holding company, KCP&L or Westar exceeds 55% debt so that the Commission can determine whether additional review is needed.⁵³ CURB also recommended that the Applicants should notify the Commission if the issuance of dividends, whether it is the holding company or the subsidiaries (Westar, KCP&L), would result in a debt level above 55%.⁵⁴

⁴⁷ *Id.* at pp. 40-41.

⁴⁸ *Id.* at pp. 41-42.

⁴⁹ *Id.* at p. 42.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

22. Additionally, CURB recommended that the Commission should require the Applicants to seek approval for dividend payments by Holdco, KCP&L, or Westar that exceed 100% of net income.⁵⁵ CURB recommended this additional safeguard to protect the utilities from the cash-flow needs of the holding company. CURB reasoned that this safeguard would prevent Holdco from withdrawing too much cash from the subsidiaries to pay dividends, which may force the utilities to forgo necessary capital investment, or force the utilities to go to the capital markets for additional funds that may result in higher costs, which could lead to a negative effect on their credit ratings.⁵⁶ This scenario could negatively impact the utilities' customers.

23. As a result of the Settlement Agreement, CURB is satisfied that additional terms and conditions are in place in order to provide better long-term protection to the utilities' ratepayers. The Settlement Agreement limits capital structure debt of Holdco to 65% and limits the capital structures of Westar and KCP&L to 60% debt. Furthermore, it "restricts dividends from Westar and KCP&L if the payment of those dividends would cause the utilities to exceed this debt limitation."⁵⁷ As mentioned above, CURB is satisfied that the financial condition of the proposed newly created entity meets the Merger Standards if the proposed Merger is approved. The nature of the MOE alleviates many of the concerns CURB raised about the future financial condition of the combined company raised in the Initial Transaction. The capital structure debt and dividend restrictions, agreed upon by the Signatories, provides additional financial security to the benefit of the ratepayer if the Settlement Agreement is approved. Additionally, the extensive monitoring and reporting requirements, contained in the Settlement Agreement, will allow for additional layers of protection, which will give the Commission and other parties the ability to monitor the actual debt

⁵⁵ *Id.* at p. 46.

⁵⁶ *Id.* at pp. 44-45.

⁵⁷ Crane Testimony in Support, p. 19.

and dividend levels throughout the rate moratorium. Ms. Crane testified:

Given the extensive monitoring and reporting requirements contained in the Settlement Agreement, as well as other safeguards previously imposed by the KCC, I believe that the KCC and other parties will have an opportunity to monitor actual debt and dividend levels, at least during the term of the rate moratorium. If the KCC believes that additional monitoring safeguards are necessary at some point in the future, it can impose additional reporting requirements at that time.⁵⁸

24. Non-Signatories oppose the Settlement Agreement in general. That being said, it is important to note, that BPU did not file any testimony in this proceeding, nor did they provide any substantial competent evidence as to why it opposes the Settlement Agreement. BPU did file a vague, one page objection to the Settlement Agreement.⁵⁹ However, it is unclear to the Signatories why BPU opposes the Settlement Agreement given the lack of evidentiary support. For these reasons, CURB asks that the Commission reject BPU's objection to the Settlement Agreement as it determines whether or not the Merger is in the public interest.

25. As to Commission Merger Standard (a)(i), the remaining Non-signatories also did not raise specific concerns about the future capital condition of the newly combined company.⁶⁰ Like CURB, Non-signatories requested the Commission approve additional commitments as a condition for Merger approval.⁶¹ The main issues identified by the Non-Signatories were related to the rebalancing of the capital structure and commitments regarding the capital structure. CURB posits that these concerns have been met with the additional capital structure conditions agreed to in the Settlement Agreement. Furthermore, Non-Signatories did not specifically raise any objection to the capital structure commitments agreed to in the Settlement Agreement in testimony filed in opposition. From CURB's perspective, given that no objection, or concern, was raised by

⁵⁸ *Id.*

⁵⁹ BPU Objection to Settlement Agreement, p. 1.

⁶⁰ *See* Gorman Direct; *See* Dismukes Direct.

⁶¹ Gorman Direct, p. 30; Dismukes, pp. 23-34.

the Non-Signatories, in their testimony filed in opposition, it appears that the terms agreed upon in the Settlement Agreement (described above) satisfy the Non-Signatories need for further commitments.

26. The combination of restrictions and reporting requirements set forth in the Settlement Agreement, coupled with the fact that the Merger, if approved, will not harm the Applicants financial health, but will likely improve it, is evidence that the proposed Merger satisfies Commission Merger Standard (a)(i). CURB posits that the Merger will promote the public interest when viewed in light of Commission Merger Standard (a)(i).

2. The Merger of Westar and GPE meets Commission Merger Standard (a)(ii) and (a)(iv):

27. Commission Merger Standard (a)(ii) and (a)(iv) are as follows:

- (a) The effect of the transaction on consumers, including:
 - (ii) the reasonableness of the purchase price, whether the purchase price was reasonable in light of the demonstrated savings from the merger and whether the purchase price is within a reasonable range.
 - (iv) whether there are any operational synergies that justify payment of a premium in excess of book value.⁶²

CURB analyzed these two merger standards together given the similarity in these standards. Similar to Merger Standard (a)(i), CURB did not initially raise any concerns regarding these two Merger Standards.⁶³ Given that this transaction is an MOE, there is no purchase price specified in the Amended Agreement.⁶⁴ That is not to say there will be no goodwill as a result of the Merger, only that it will be handled as an accounting entry which represents the difference between the market value of GPE's equity and the net book value of its assets.⁶⁵ This entry will have no impact

⁶² Order on Merger Standards, ¶¶ 4-5.

⁶³ Crane Direct, pp. 46-49.

⁶⁴ *Id.* at p. 47.

⁶⁵ *Id.* at p. 48.

on ratepayers because Applicants have agreed to exclude the \$1.52 billion from ratemaking treatment. Moreover, Applicants have agreed to hold ratepayers harmless from any impairment that may result from the goodwill that will be recorded.⁶⁶

28. All Signatories agree with CURB's assessment regarding Merger Standards (a)(ii) and (a)(iv). Specifically, Staff witness Justin Grady, states in his direct testimony:

The Applicants have committed to never seek recovery of merger goodwill from ratepayers, and that commitment does not rely on the Commission using a particular capital structure for ratemaking purposes. Because the Transaction does not rely on excessive transaction-related debt to pay for a large purchase price or acquisition premium, Staff does not have the financial engineering concerns with this Transaction that we did with the original one.⁶⁷

29. Non-Signatories, again, do not raise any concerns regarding goodwill in their testimony opposing the Settlement Agreement. CURB assumes that if the Non-Signatories had issues with the terms agreed to in the Settlement Agreement, as to the nature of the MOE, or the treatment of goodwill for accounting purposes, they would have opposed them specifically in their opposition filings. They did not do so. From CURB's perspective, this indicates that Non-Signatories are not bothered by the conditions agreed to in the Settlement Agreement related to goodwill. For these reasons CURB posits that the Merger, as modified by the Settlement Agreement promotes the public interest in light of Commission Merger Standard (a)(ii) and (a)(iv).

3. The merger of Westar and GPE meets Merger Standard (a)(iii).

30. Commission Merger Standard (a)(iii) is as follows:

(a) The effect of the transaction on consumers, including:

(iii) whether ratepayer benefits resulting from the transaction can be quantified.

CURB's concerns regarding the Amended Agreement focused around Commission Merger

⁶⁶ *Id.*

⁶⁷ Grady Direct, p. 18.

Standard (a)(iii). Given that the savings estimates are projected, CURB was initially concerned about making sure that ratepayers do in fact receive the benefits that the Application presumed.⁶⁸ CURB recommended larger total company (entire jurisdiction) up-front rate credits. More specifically, CURB recommended that the Applicants provide initial rate credits of \$100 million upon the merger closing and additional rate credits of \$50 million in each year from 2020-2022.⁶⁹ In addition, CURB recommended a five year rate moratorium following the effective date of rates in each company's 2018 base rate case, and a rejection of the Applicants' request to defer transition costs associated with the merger.⁷⁰ CURB also recommended that Kansas bill credits be allocated on a per customer basis.⁷¹

31. CURB's concerns related to ratepayer benefits and how they should be passed through to Kansas ratepayers is mitigated by the terms of the Settlement Agreement. The Settlement Agreement provides for initial up-front ratepayer credits of \$50 million. The Kansas jurisdictional share of the total up-front bill credits are \$23,065,299 to Westar customers and \$7,514,220 to KCP&L's customers.⁷² These credits will be allocated among the customer classes using the method recommended by Staff witness, Dr. Robert Glass.⁷³ More specifically, credits will be allocated among customers within each class on the basis of revenue, except for the residential class where credits will be allocated on a per-customer basis.⁷⁴ The Applicants have also agreed to the five-year rate moratorium which CURB initially recommended.

32. During the five-year rate moratorium, Joint Applicants have agreed to provide additional annual bill credits by March 31 in each year 2019-2022 in the amount of \$8,649,487 for

⁶⁸ Crane Direct, pp. 20-21.

⁶⁹ Crane Direct, p. 22.

⁷⁰ *Id.*

⁷¹ *Id.* at p. 27.

⁷² Crane Testimony in Support, p. 5.

⁷³ Glass Direct, pp. 15-18.

⁷⁴ *Id.*

Westar customers and \$2,817,832 for KCP&L's Kansas customers.⁷⁵ This amounts to total guaranteed ratepayer credits of \$125 million (total company).⁷⁶ Additionally, CURB has agreed to the Earnings Review and Sharing Plan ("ERSP"), recommended by Staff Witness Justin Grady, which will be in place from 2019-2022.⁷⁷ During this period, the Applicants will file annual earnings reports by March 31 following the end of each calendar year 2019-2022.⁷⁸ If actual earnings, based on an ROE of 9.3%, exceed the fixed credits for any year mentioned above, the excess earnings will be subject to a 50/50 sharing allocation between ratepayers and shareholders.⁷⁹ Credits to customers will be allocated among customer classes based on the allocations adopted in the upcoming 2018 base rate cases (Westar and KCP&L) and credits will be allocated within each class as described above.⁸⁰ As to transition costs, the Settlement Agreement provides for the recovery of \$50 million. This is approximately 30% less than the transition costs requested in the Application. Moreover, transition costs will be amortized over a ten-year period, mitigating the rate impact to consumers.

33. KIC, a Non-Signatory, argues erroneously that the "Settlement Agreement adopts an inequitable methodology for allocating customer credits."⁸¹ KIC's Objection should be disregarded from the outset, because it raises new arguments, outside of the filing deadlines set by the Commission in the Procedural Schedule. The Procedural Schedule clearly required parties to file direct and cross-answering testimony by January 29, 2018 and February 5, 2018, respectively. CURB and Staff filed testimonies by those deadlines, addressing the issue of allocating customer

⁷⁵ Crane Testimony in Support, p. 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Crane Testimony in Support, p. 6.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Kansas Industrial Consumers Group Inc's Objection to Non-Unanimous Settlement Agreement, p. 4 (KIC Objection) (March 19, 2018).

credits. KIC did not raise this issue at all in direct or cross-answering testimony. KIC waited until it filed its testimony in opposition of the Settlement Agreement to address this issue, which is unreasonable, in that it prevented parties from having the ability to respond to this argument. KIC had every opportunity to address this issue in cross answering testimony, given that CURB and Staff raised these issues in direct testimony. KIC failed to do so. KIC's arguments should be disregarded in view of the fact that they are untimely and clearly inequitable, given that it eliminates all other parties' ability to reasonably address this new unfounded argument.

34. Additionally, KIC has not provided any evidence, in the record, to corroborate the claims raised in Mr. Gorman's testimony opposing the Settlement Agreement.⁸² As mentioned above, KIC did not address this issue in direct testimony.⁸³ Additionally, KIC did not address this issue in cross-answering testimony.⁸⁴ KIC did not provide any work papers or any documentation to support the claims addressed in Mr. Gorman's testimony opposing the Settlement Agreement.⁸⁵ Given that KIC has not provided any substantial evidence to support the claims made in its testimony opposing the Settlement Agreement, CURB requests that the Commission disregard KIC's argument and respectfully requests that the Commission adopt the reasonable position agreed to by the Signatories in the Settlement Agreement.

35. Taking into account the totality of the Settlement Agreement, CURB believes that it provides significant quantifiable ratepayer benefits. Ratepayers will receive the benefit of guaranteed merger savings over the first five years post-closing of \$125 million. In addition, ratepayers will see the benefit of a five-year base rate moratorium in which they will not see any

⁸² Gorman Testimony in Opposition, pp. 13-14.

⁸³ Mr. Gorman did not address the issue of customer bill credit allocation in his direct testimony. *See* Gorman Direct.

⁸⁴ Mr. Gorman did not address the issue of customer bill credit allocation in his cross-answering testimony. *See* Gorman Cross-Answering.

⁸⁵ Gorman Testimony in Opposition, pp. 13-14.

additional base rate increases. Ratepayers may also see additional benefits as a result of the ERSP. For these reasons, CURB contends that the Merger, as modified by the Settlement Agreement, promotes the public interest when viewed in light of Commission Merger Standard (a)(iii).

4. The acquisition of Westar by GPE meets Commission Merger Standard (a)(v).

36. Commission Merger Standard (a)(v) is as follows:

(a) The effect of the transaction on consumers including:

(v) the effect of the proposed transaction on existing competition.

CURB believes there will be very little impact on competition related to the elimination of Westar as an independent entity from the industry.⁸⁶ CURB raised a couple of general concerns as it relates to the elimination of Westar as an independent entity. CURB stated that there may be some short-term impact on the progress of future technological development and implementation of new power sources.⁸⁷ In addition, the elimination of one independent entity from the industry will remove an entity that may examine issues from a different perspective.⁸⁸ Conversely, CURB recognized that the newly merged company may have a greater advantage given its greater size and financial strength.⁸⁹ This advantage may allow the Company to be a more significant player in the development of energy related technologies and services.⁹⁰ CURB believes the merger will have very little impact on competition given that each utility, now, is only authorized to provide service within a certified geographical area.⁹¹ Given that CURB does not believe that competition will be impacted in any significant way, CURB posits that the merger meets Commission Merger

⁸⁶ Crane Direct, pp. 49-50.

⁸⁷ Crane Direct, p. 49.

⁸⁸ *Id.*

⁸⁹ *Id.* at p. 50.

⁹⁰ *Id.*

⁹¹ *Id.* at p. 49.

Standard (a)(v).

5. The merger of Westar and GPE meets Commission Merger Standard (b).

37. Commission Merger Standard (b) is as follows:

(b) The effect of the transaction on the environment.

CURB believes that this transaction will likely have a positive impact on the environment.⁹² The Merger will likely lead to the early retirement of certain coal generation.⁹³ In addition, the Merger could result in “synergies regarding reserve margins that would result in the need for less generation, thereby benefiting the environment.”⁹⁴ Applicants may be able to pursue additions to their energy portfolios as a result of a stronger financial profile of the combined company.⁹⁵ Given these reasons, CURB posits that the merger meets Commission Merger Standard (b).

6. The Merger of Westar and GPE meets Commission Merger Standard (c).

38. Commission Merger Standard (c) is as follows:

(c) Whether the proposed transaction will be beneficial on an overall basis to state and local economies and to communities in the area served by the resulting public utility operations in the state. Whether the proposed transaction will likely create labor dislocations that may be particularly harmful to local communities, or the state generally, and whether measures can be taken to mitigate the harm.

CURB believes that the Applicants have satisfied Commission Merger Standard (c). The Merger will result in the loss of approximately 938 employees across all regulatory jurisdictions of the combined company by the end of 2021.⁹⁶ “While the loss of these jobs will have a negative impact on the local economy, job reduction is necessary in order to produce more efficient utilities and to

⁹² *Id.* at p. 50.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at p. 54.

maximize the cost savings that are the principal factor driving this transaction.”⁹⁷ The loss of jobs may negatively impact local economies; however, bill credits and lower utility rates will mitigate the impact.⁹⁸ CURB believes that lower utility rates could likely attract new businesses, creating additional jobs, which will positively impact local economies.⁹⁹ In addition, CURB noted that the reduction in staffing will be accomplished without any involuntary severance and that more than 500 of the employee reductions will have voluntarily occurred by the time the merger closes.¹⁰⁰

39. The Settlement Agreement also provides for the retention of an operating headquarters in Topeka for up to ten years following the merger and requires that the Applicants maintain at least 500 employees at the Kansas headquarters location for at least five years.¹⁰¹ In addition, “[t]he Settlement Agreement also includes employee commitments regarding collective bargaining agreements, maintenance of comparable compensation levels and benefits for all employees for two years, and no involuntary severance of employees as a result of the Merger. The Settlement Agreement also includes management and organizational provisions regarding the Board of Directors post-merger.”¹⁰² Given the potential positives this Merger may have on local economies and the agreed-upon commitments by the Applicants, CURB concludes that the Applicants have satisfied Commission Merger Standard (c).

7. The Merger of Westar and GPE meets Commission Merger Standard (d).

40. Commission Merger Standard (d) is as follows:

(d) Whether the proposed transaction will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operations in the state.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Crane Testimony in Support, p. 7.

¹⁰² *Id.*

The Merger will preserve the jurisdiction of the Commission and the capacity of the Commission to effectively regulate and audit public utility operations in Kansas. CURB initially recommended that the Commission make approval contingent upon GPE's assurance that the Commission retain its right to regulate affiliate transactions and require certain reporting requirements.¹⁰³ The Settlement Agreement alleviates any concerns that CURB initially raised regarding the Commission's right to regulate affiliate transactions. The Settlement Agreement contains provisions regarding affiliated interests, including filing and reporting requirements, and also requires that the Applicants comply with the Commission's affiliate transaction rules.¹⁰⁴ Applicants have also "committed to meeting with Staff and CURB no later than sixty (60) days after the closing of the merger to discuss the expected impact on the allocation of costs among Holdco's utility and non-utility subsidiaries and have committed to filing updates to the current Cost Allocation Manuals ('CAMs')." ¹⁰⁵

41. The Settlement Agreement also alleviates any concerns CURB had regarding reporting requirements raised by CURB witness, Ms. Stacey Harden.¹⁰⁶ The Settlement Agreement includes a recommendation that the Commission open a compliance docket to maintain filings related to the Merger.¹⁰⁷ Additionally, the Settlement Agreement requires periodic meetings with Staff and CURB to examine the actual benefits of the merger in relation to the expectations derived from the Company's initial integration planning.¹⁰⁸ The Settlement Agreement also calls for a Capital Plan Reporting compliance docket during the rate moratorium which will provide Staff and the Commission data in order to understand forecasted and actual capital expenditures during

¹⁰³ Crane Direct, p. 55; *See* Harden Direct, pp. 3-8.

¹⁰⁴ Crane Testimony in Support, p. 8.

¹⁰⁵ *Id.* at p. 9.

¹⁰⁶ *See* Harden Direct, pp. 3-8.

¹⁰⁷ Crane Testimony in Support, p. 9.

¹⁰⁸ *Id.*

the rate moratorium.¹⁰⁹

42. Furthermore, the Applicants have agreed to:

[R]eporting requirements, including a requirement to provide integrated resource plans ('IRP') filed in Missouri to the KCC. KCP&L and Westar will also provide Staff and CURB with access to all written information provided to common stock, bond or bond rating analysts relating to KCP&L, Westar, or Holdco. The Joint Applicants will also make available all books, records and employees as may be reasonably required to verify compliance with KCP&L's and Westar's CAM and any conditions ordered by the Commission. The Settlement also assures Staff and CURB access to various other documents, including material related to the Board of Directors.¹¹⁰

The conditions agreed to by the Applicants, in the Settlement Agreement, satisfy the concerns and recommendations CURB raised with regard to the filed Amended Agreement. In light of these additional commitments, CURB posits that the Applicants have satisfied Commission Merger Standard (d).

8. The Merger of Westar and GPE meets Commission Merger Standard (e).

43. Commission Merger Standard (e) is as follows:

(e) The effect of the transaction on affected public utility shareholders.

CURB believes that the Merger will benefit both Westar and GPE shareholders. There is potential for shareholders to benefit from their ownership in the larger and more diversified entity.¹¹¹ This is a result of the combined company being able to take advantage of merger related efficiencies and lower costs due the combined company's larger size.¹¹² Both Westar and GPE shareholders approved the merger indicating that both companies' shareholders view the Merger as beneficial to their interests.¹¹³ "Management believes these factors will result in improved profitability for

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at pp. 9-10.

¹¹¹ Crane Direct, pp. 56-57.

¹¹² *Id.*

¹¹³ *Id.* at p. 56.

the utilities and allow them to earn closer to their authorized returns. In addition, Westar shareholders will receive an immediate increase of 15% in dividends while the dividend to GPE shareholders will be kept whole.”¹¹⁴ There is also a plan for the new holding company to repurchase shares in the years following the approval of the merger in order to rebalance its capital structure which will likely increase or maintain the shareholders’ stock values.¹¹⁵ As a result of this analysis, CURB believes that the Amended Agreement, as modified by the Settlement Agreement, satisfies Commission Merger Standard (e).

9. The Merger of Westar and GPE meets Merger Standard (f) and (g).

44. Commission Merger Standard (f) and (g) are as follows:

(f) Whether the transaction maximizes the use of Kansas energy resources.

(g) Whether the transaction will reduce the possibility of economic waste.

CURB believes that the Merger meets Commission Merger Standard (f). CURB noted that this transaction will likely result in the retirement of certain Kansas generation resources.¹¹⁶

Additionally, these retirements could result in more efficient use of such resources if the Merger results in a favorable impact on reserve margins.¹¹⁷ The Merger could also result in enhancing the efficiency of generation resources that are jointly owned by Westar and KCP&L.¹¹⁸ Given this analysis, CURB believes that the net impact is neutral in regards to Kansas energy resources. However, the financial pressures are not as prevalent as in the Initial Transaction and there is no indication that capital expenditures or maintenance spending will be negatively impacted on a combined basis; also, given that the Merger is between two utilities that both serve Kansas

¹¹⁴ *Id.* at p. 57.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at p. 58.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

customers, it will naturally lead to a reliance on Kansas energy resources; therefore, taken together, CURB believes that the Applicants have satisfied Commission Merger Standard (f).

45. As to Commission Merger Standard (g), CURB believes that Applicants have complied with its requirements. As discussed, the Merger will likely result in more efficient use of resources, which will result in minimizing economic waste.¹¹⁹ In addition, synergies resulting from two merging utilities that share an ownership interest in certain generation facilities will likely reduce waste. Given the likely reduction in economic waste as a result of the Merger, CURB posits that the Applicants have satisfied Commission Merger Standard (g).

10. The Merger of Westar and GPE meets Commission Standard (h).

46. Commission Merger Standard (h) is as follows:

(h) What impact, if any, the transaction has on public safety.

CURB initially recommended certain requirements related to quality of service for the Merger to meet Commission Merger Standard (h).¹²⁰ As a result of the Settlement Agreement, Applicants have agreed to quality of service requirements that CURB believes meets Commission Merger Standard (h). More specifically, Applicants have agreed to provide annual reports on quality of service and have agreed to penalties if certain benchmarks are not achieved.¹²¹ If penalties are incurred, then the Applicants are required to invest the monetary amounts of any penalty in items intended to improve quality of service and those costs will not be recoverable from customers.¹²² Applicants, CURB, Staff, and KPP have also agreed jointly to recommend that the Commission open a compliance docket by January 2019 related to service quality and reliability reporting and to provide timely reports of ongoing operations and maintenance activities related to customer

¹¹⁹ *Id.* at p. 58.

¹²⁰ *See* Catchpole Direct.

¹²¹ Crane Testimony in Support, p. 9.

¹²² Settlement Agreement, p. 27.

quality of service.¹²³ CURB believes that these terms will ensure quality of service and reliability for ratepayers. In light of the conditions agreed upon in the Settlement Agreement, CURB believes that the Applicants have met Merger Standard (h).

B. The Settlement meets the Commission’s five factor test for settlement and should be approved according to its terms and conditions.

1. Each party had an opportunity to be heard on its reasons for opposing the settlement.

47. Each party in this docket had the opportunity to participate in settlement negotiations regarding this transaction. The Commission’s Procedural Schedule required certain dates be set for Settlement Conference(s) which every party was aware of, had the opportunity to attend, and be heard.¹²⁴ Parties discussed issues, raised concerns, and negotiated aggressively in extensive negotiations that lasted many days.¹²⁵ As a result, a Settlement Agreement was reached by the Signatory parties. While some parties did not sign the Settlement Agreement, CURB believes that all parties had the opportunity to participate in settlement and had every opportunity to be heard on the reasons why they opposed the Settlement Agreement. In addition, Non-Signatory parties had the opportunity to file testimony opposing the Settlement Agreement, to participate in the Evidentiary Hearing (in which they had the opportunity to cross examine signatory parties on the provisions of the Settlement Agreement) and had the opportunity to file a post-hearing brief with the Commission outlining their opposition to the Settlement Agreement and their specific reasons for doing so. CURB posits that this settlement factor has been met extensively.

¹²³ *Id.* at pp. 27-28.

¹²⁴ *See* Procedural Schedule, pp 4-5.

¹²⁵ Crane Testimony in Support, p. 11.

2. The Settlement is supported by substantial evidence in the record as a whole.

48. The majority of parties in this docket filed comprehensive testimony supporting the Merger in general. CURB and Staff proposed additional safeguards in order to further protect Kansas ratepayers and ensure an equitable sharing of benefits with those ratepayers.¹²⁶ As a result of the Settlement Agreement, CURB believes the additional recommendations it proposed have been satisfied by the terms and conditions in the Settlement Agreement.¹²⁷ Ms. Crane noted in testimony that, “[w]hile the Settlement Agreement does not address all of the issues raised by all of the intervenors, the provisions of the Settlement Agreement do address many of the concerns raised by the parties and is based on the evidence in the record.”¹²⁸

49. Additionally, the majority of the parties in this docket signed the Settlement Agreement (including Staff and CURB), provided testimony in support of the Settlement Agreement, and provided evidence at the hearing supporting the Settlement Agreement.¹²⁹ In these regards, it is CURB’s position that there is substantial competent evidence in the record, as a whole, upon which to approve the Merger, pursuant to the conditions of the Settlement Agreement.

3. The agreement conforms to applicable law.

50. As discussed above, the Merger must promote the public interest, according to the Commission’s Merger Standards. Additionally, the Settlement Agreement must meet the Commission’s five factors in order for the Settlement Agreement to be deemed in the public interest. CURB analyzed (above) the Merger, as modified by the Settlement Agreement and

¹²⁶ *Id.* at pp. 11-12.

¹²⁷ *Id.* at p. 12.

¹²⁸ *Id.*

¹²⁹ International Brotherhood of Electrical Workers, Local No. 304, 412, 1464 and 1613 Motion Supporting Approval of Non-Unanimous Settlement Agreement (March 9, 2018); Greenwood Testimony in Support; Ives Testimony in Support; Crane Testimony in Support; McClanahan Testimony in Support; Grady Testimony in Support; Haynos Testimony in Support; Glass Testimony in Support; Kansas Municipal Energy Agency Statement of Settlement.

determined that it does indeed meet the public interest, in light of the Commission's Merger Standards. Additionally, as analyzed in this portion of the brief, CURB posits that the Settlement Agreement meets all of the Commission's five factors for settlement, and therefore CURB recommends that the Commission find the Settlement Agreement to be in the public interest.

51. With respect to the Agreement amongst Signatory parties to recommend a 9.3% ROE in the upcoming base rate cases, KIC argues that the Non-Unanimous Settlement Agreement will "bind the hands of future Commissions."¹³⁰ Additionally, KIC arbitrarily suggests that CURB and Staff have failed to protect the public interest, statutorily required under Kansas law, as a result of the Settlement Agreement.¹³¹

52. First, the very suggestion or allegation that CURB and Staff have intentionally neglected their duties, as required by Kansas law, goes beyond the pale, is misleading, and is simply not true. Second, CURB agreed to a comprehensive Settlement Agreement that will provide substantial benefits and cost-savings to residential and small commercial ratepayers in the next five years, and potentially beyond. CURB also secured additional ring-fencing measures that will protect residential and small commercial ratepayers post-merger, as a result of zealously advocating for those interests. The agreement by Signatories to recommend an ROE of 9.3%, is just that, a recommendation. The Commission remains free to adopt any ROE it finds reasonable based on substantial competent evidence. Additionally, Non-Signatory parties, to include KIC, are free to argue, in the rate cases, any ROE they feel is just and reasonable and supported by substantial evidence. All parties will be given the necessary due process rights that are required under law. Finally, KIC has provided no legal basis (case law or statutory support) for asserting that CURB and Staff have acted unlawfully in recommending a 9.3% ROE in KCP&L and

¹³⁰ KIC Objection, p. 5.

¹³¹ *Id.* at p. 5.

Westar's upcoming (2018) base rate cases. Given these reasons, CURB asks that the Commission disregard KIC's unreasonable assertions and recommends approval of the Settlement Agreement in that it conforms to applicable law.

4. The agreement will result in just and reasonable rates.

53. It is CURB's position that the Settlement Agreement will result in just and reasonable rates. Ms. Crane spoke specifically to this point in testimony:

Both Westar and KCP&L will have rate cases in 2018 to determine appropriate base distribution rates for each utility. Therefore, the KCC will have the ability to ensure that just and reasonable rates are implemented in 2018. Base rates will then remain unchanged during a five-year rate moratorium period, providing further protection to ratepayers. Moreover, during this five-year period, ratepayers will receive a minimum of \$125 million in fixed bill credits. In addition, ratepayers will also receive 50% of any additional earnings in excess of a 9.3% ROE. These provisions will ensure that ratepayers will share in the benefits if actual merger savings are higher than projected. These provisions will also ensure that ratepayers will benefit from other factors, such as higher-than-anticipated revenues or additional cost savings that are not directly related to the merger.¹³²

Given these reasons, coupled with other benefits that will result from the approval of the Settlement Agreement (addressed above), CURB believes that the Settlement Agreement will result in just and reasonable rates for ratepayers.

5. The results of the agreement are in the public interest, including the interests of customers represented by any party not consenting to the agreement.

54. CURB believes that the conditions outlined in the Settlement Agreement will result in a Merger that is in the public interest.¹³³ As CURB discussed above, the Merger of Westar and KCP&L is a good fit. They both have a contiguous service territory, "which should maximize efficiencies of combining the utilities under common ownership."¹³⁴ Both companies are local

¹³² Crane Testimony in Support, p. 12.

¹³³ *Id.* at p. 13.

¹³⁴ *Id.*

companies within Kansas and both are familiar with Kansas regulation. The Companies share ownership of certain generation. The Merger of these Companies makes sense for many reasons. In addition, it is estimated that the Merger will result in millions of dollars of savings during the first five years, with the potential for further savings moving forward (as described above).¹³⁵ Ms.

Crane testified:

While I do not believe that savings after five-years should be given much consideration by the KCC, the savings expected during the initial five-year period are sufficient to provide real benefits to Kansas ratepayers resulting from the merger, especially given the level of fixed and guaranteed bill credits reflected in the Settlement Agreement. During this period, ratepayers will benefit from minimum annual savings of \$22.5 million and \$7.5 million that will be reflected in rates resulting from the 2018 base rate cases for Westar and KCP&L respectively. In addition, Westar and KCP&L ratepayers are guaranteed additional bill credits of \$23.06 million and \$7.51 million respectively in 2018, and of \$8.65 million and \$2.82 million respectively for each year from 2019-2022. Ratepayers may also receive additional bill credits if actual earnings are higher than projected. Ratepayers benefit from an agreed-upon ROE of 9.3% that will be recommended by the signatories in the 2018 base rate cases and used in the earnings sharing tests during the rate moratorium period. Moreover, this ROE will be utilized for a five-year period, even if capital costs increase over this time.¹³⁶

55. Moreover, CURB also recognizes that the Settlement Agreement provides for additional ratepayer benefits. The Settlement Agreement provides for quality of service benchmarks and penalties if those benchmarks are not met. The Settlement Agreement also contain extensive reporting requirements over the rate moratorium period (as analyzed above). In addition, there are commitments to maintain 500 employees at the Kansas headquarters for at least five years post-close and the assurance that there will not be any involuntary layoffs as a result of the Merger. Finally, the Settlement Agreement was signed by parties that represent the interests of a diverse group, to include the interests of: residential and small commercial ratepayers, the public generally,

¹³⁵ *Id.*

¹³⁶ *Id.* at pp. 13-14.

was signed by signatories representing a broad range of interests, and given the terms of the Settlement Agreement, CURB posits that the Settlement Agreement is in the public interest.

V. Conclusion

56. As analyzed above, CURB believes the Merger, as conditioned by the Settlement Agreement, promotes the public interest, in that it meets the Commission's Merger Standards. CURB believes that the conditions and terms of the Settlement Agreement provide the necessary safeguards to ensure that ratepayers will benefit as a result of this transaction. CURB also believes the additional reporting requirements and commitments will be beneficial to ratepayers moving forward.

WHEREFORE CURB respectfully submits its *Post-Hearing Brief* and recommends the Commission approve the Applicants Amended Application, as modified by the Settlement Agreement, in that it is in the public's interest.

Respectfully submitted,



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VERIFICATION

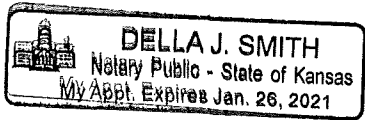
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COUNTY OF SHAWNEE) ss:

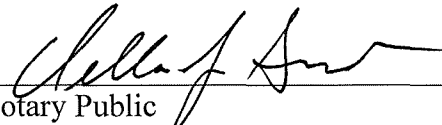
I, Thomas J. Connors, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.



Thomas J. Connors

SUBSCRIBED AND SWORN to before me this 20th day of April, 2018.





Notary Public

My Commission expires: 01-26-2021.

CERTIFICATE OF SERVICE

18-KCPE-095-MER

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 20th day of April, 2018, to the following:

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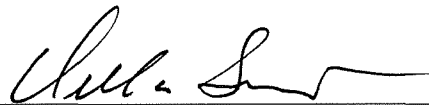
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