

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

In the Matter of the Joint Application of            )  
Westar Energy, Inc. and Kansas Gas and        )  
Electric Company for Recovery of                )  
Certain Costs Through Their RECA.            )

Docket No. 19-WSEE-355-TAR

**REPLY BRIEF OF THE CITIZEN’S UTILITY RATEPAYER BOARD**

COMES NOW, the Citizens’ Utility Ratepayer Board (“CURB”), and files this Reply Brief pursuant to the Kansas Corporation Commission’s (“Commission”) April 11, 2019, Order Granting Joint Motion for Procedural Schedule. In support of its reply brief, CURB states as follows:

**I. REPLY TO STAFF’S AND WESTAR’S BRIEF**

**a. Staff and Westar’s interpretation of the 18-328 settlement agreement renders certain conditions of recovery ineffective and misconstrues the parties’ rights.**

1. CURB disagrees with Commission Staff’s (“Staff”) and Westar’s characterization of the language contained in the settlement agreement from the 18-WSEE-328-RTS (“18-328”) case. Staff and Westar attempt to stretch the plain language of Paragraphs 28, 29, and 31 to be an absolute restriction on the parties’ ability to analyze any request to recover lease expenses and non-fuel operating and maintenance (“NFOM”) costs. They also try to insert language into the settlement agreement that the parties unconditionally agree to support Westar’s recovery of expenses. However, neither party is able to cite to anything in the record that is indicative of an agreement by CURB or Kansas Industrial Consumers Group (“KIC”) to fully support recovery of any costs incurred as a result of operating the 8% interest in Jeffery Energy Center (“JEC”).

2. As stated in its post-hearing brief, CURB believes that the settlement agreement creates a procedure for Westar to gain Commission approval for recovery of NFOM and lease expenses.<sup>1</sup> None of the provisions state that CURB irrevocably offers its support for Westar to recover these costs. The only section that comes close to such a conclusion is Paragraph 29 and its reference to a zero-cost transaction. However, nothing in that section concludes that CURB agrees that recovery is a prudent decision. Instead, Westar was automatically entitled to recovery without having to file an additional request if certain conditions were met. It is unreasonable to read into Paragraph 29 an assumption of the parties' respective positions going forward. The agreement allocated risk among the parties and encouraged Westar to negotiate a \$0 or \$1 price. Failing to satisfy that condition subjects Westar to Commission review and all other interveners' input with no additional restrictions.

3. Staff and Westar's interpretation of Paragraph 31 unreasonably limits the parties' substantive rights and cannot be reconciled with the procedures set out in Paragraph 28. They assert that the settlement agreement creates two distinct regulatory assets. Staff contends that the disclaimer in Paragraph 31 about the parties' rights only applies to a separate asset that contains the NFOM costs that Midwest Power Company ("MWP") fails to pay.<sup>2</sup> However, this distinction does not support the notion that CURB and KIC have given up the ability to make arguments about recovering future expenses. Paragraph 31 should be read to apply to a single regulatory asset containing both unrecovered NFOM costs from MWP and the future costs incurred by operating the 8% interest. Staff witness Mr. Justin Grady even characterizes Paragraph 31 as boilerplate language to ensure the Commission that its hands are not tied on future issues from the settlement

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<sup>1</sup> Post-Hearing Brief of the Citizens' Utility Ratepayer Board, pg. 17, ¶27.

<sup>2</sup> Post-Hearing Brief of Commission Staff ("Staff's Brief"), pg. 11, ¶26.

agreement.<sup>3</sup> It does not follow that the absence of similar language after Paragraph 29 creates a completely separate restriction on the Commission and parties.

4. Staff and Westar narrowly construe the plain language of Paragraph 28 to assert that only the lease expense and purchase price should be evaluated by the Commission. CURB disagrees. Paragraph 28 reads: “In the filing before the Commission, Westar shall have the burden of showing that the new lease or purchase *agreement* is a prudent decision for its retail customers” (*emphasis added*). They effectively substitute the word “agreement” with “price” and insert “expense” in the last line of Paragraph 28. Mr. Grady criticizes CURB for imposing a higher standard on Westar due to a greater-than-zero price upon the premise that purchase price has no impact on NFOM expenses.<sup>4</sup> If Westar and Staff truly believe that only the lease expenses and purchase price need to be examined for prudence, then the discussion about cost-benefit analysis is moot. Yet, a large majority of the record and the parties’ initial briefs refer to the conflicting views of incremental costs versus all-in costs.<sup>5</sup> In order to give this analysis any relevance to the docket, a review of the *entire* lease and purchase agreement is required.

**b. It is not reasonable for Westar to require ratepayers to pay for unnecessary and uneconomical capacity.**

5. Westar has failed to meet its burden of showing that purchasing the 8% interest in JEC is a prudent decision for ratepayers because the additional capacity is not needed to provide efficient and sufficient service. The record contains an abundance of evidence that Westar is not purchasing this capacity to meet customer demand, but rather as a way to dislodge itself from a business deal that has gone bad. CURB’s use of an all-in approach does not appear out of thin air,

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<sup>3</sup> Transcript of Evidentiary Hearing (Tr.) at pg. 170, Ins. 2-20.

<sup>4</sup> See Cross-Answering Testimony of Justin Grady (Grady Cross-Answering) pg. 19, Ins. 12-19.

<sup>5</sup> See Initial Brief of Westar Energy, Inc. and Kansas Gas and Electric Company, pg. 14 (“Westar’s Brief”); Staff’s Brief at pg. 12.

but rather is reflective of the same approach that Westar and Staff took in MWP's Certificate of Convenience and Necessity ("CCN") docket.<sup>6</sup> All the parties agree that such a view indicates that operating the 8% interest in JEC will not cover its costs and be uneconomical over the long run. Westar and Staff continue to rely on the past when justifying passing the future expenses onto ratepayers. The trouble with this mentality is that it does not take into account the vastly different market conditions between 2007 and now. There is no longer a wholesale buyer that is paying higher-than-market prices. There is an overabundance of capacity that creates a projected surplus for Westar until 2030.<sup>7</sup> CURB believes that the benefits under the original lease should not have a bearing on the outcome of this case because those past benefits have no impact on costs going forward. Capacity that is not necessary to provide efficient and sufficient service should not be financed by ratepayers.

**c. Staff's criticism for a lack of details on a deregulated 8% interest of JEC is unwarranted.**

6. Staff contends that CURB's and KIC's solution to deregulate the 8% interest is based on generalized conclusions.<sup>8</sup> Staff bolsters this issue into a parade of administrative horrors for the Commission.<sup>9</sup> However, according to Mr. Grady, pursuing such a path "wouldn't be anything inventive or difficult to administer."<sup>10</sup> He explains that revenue from the 8% interest could be recorded "below the line," allowing Westar to monetize the asset and keep the value. Mr. Grady does note that some parameters for certain costs should be established, but does not waiver at the notion of accomplishing the task.<sup>11</sup> CURB's suggestion does not represent a last ditch effort,

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<sup>6</sup> Rebuttal Testimony of Darrin Ives (June 21, 2019) ("Ives Rebuttal") pg. 9, lns. 1-3.

<sup>7</sup> See KIC Exhibit #4; KIC DRs #11 and 12.

<sup>8</sup> Staff's Brief at pg. 15, ¶33.

<sup>9</sup> Id. at pg. 16.

<sup>10</sup> Tr. at pg. 173, lns. 12-25.

<sup>11</sup> Tr. at pg. 174, lns. 1-5

but rather a solution based on equity between ratepayers and shareholders that is conscientious of the past.

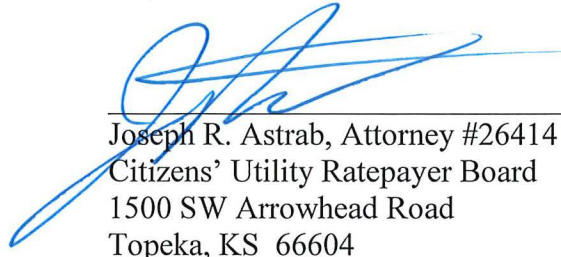
## II. CONCLUSION

7. Westar has failed to show that the new lease extension and purchase agreement of the 8% interest in JEC is a prudent decision for ratepayers. The additional capacity is not needed to provide service to its customers. When considering all the costs it takes to operate this portion of JEC, the revenue in the marketplace is unlikely to cover these costs, resulting in a net negative for ratepayers. Viewing the costs incrementally is not appropriate in this situation and only serves to avoid the fallout between Westar's and MWP's legal conflict.

8. Staff's and Westar's interpretation unreasonably limits the parties' rights as interveners in the docket and fails to give effect to all portions of the 18-328 settlement agreement. CURB disagrees with the notion that it has conceded prudence on recovery of NFOM costs as part and parcel of the settlement agreement. The plain language supports a review of the entire purchase agreement. Staff's and Westar's belief that only lease expense and purchase price need to be reviewed is inconsistent with their efforts into analyzing the cost/benefits of operating the 8% interest. Even if the Commission accepts Staff's and Westar's view on Paragraph 31, none of the language in the settlement agreement indicates that CURB has previously promised to unconditionally support a position of prudence along with Westar.

WHEREFORE, CURB respectively submits its *Reply Brief* and recommends the Commission accepts CURB's position on the above issues and deny Westar's application to recover lease expenses and NFOM costs through its RECA from ratepayers. In an alternative to denying the application, CURB recommends that the Commission fairly allocates risk and divides the operating costs between ratepayers and shareholders.

Respectfully submitted,



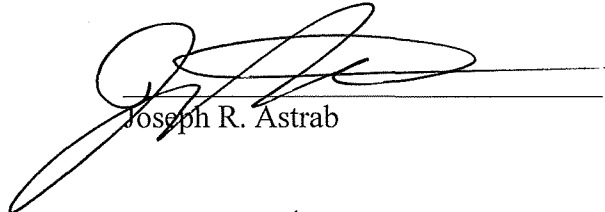
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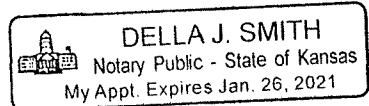
**VERIFICATION**

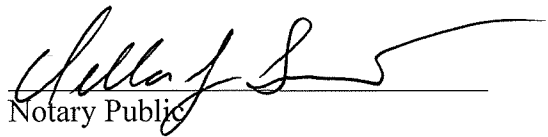
STATE OF KANSAS                    )  
  )  
COUNTY OF SHAWNEE            )        ss:

I, Joseph R. Astrab, 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.

  
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Joseph R. Astrab

SUBSCRIBED AND SWORN to before me this 7<sup>th</sup> day of August, 2019.



  
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Notary Public

My Commission expires: 01-26-2021.

**CERTIFICATE OF SERVICE**

19-WSEE-355-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 7<sup>th</sup> day of August, 2019, to the following:

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