

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) Docket No. 19-WSEE-355-TAR
Electric Company for Recovery of Certain)
Costs Through Their RECA.)

INITIAL BRIEF OF KANSAS INDUSTRIAL CONSUMERS GROUP, INC.

COMES NOW the Kansas Industrial Consumers Group, Inc. ("KIC"), and respectfully files this *Initial Brief* in the above-referenced case, pursuant to the Order of the State Corporation Commission of the State of Kansas ("Commission" or "KCC") dated April 11, 2019. In support of its Initial Brief, KIC states as follows:

Executive Summary

Westar is proposing to purchase Midwest Power Company's unprofitable 8% interest in Jeffrey Energy Center, the largest coal-fired generation facility in Kansas, and increase its retail electric rates to cover the costs of acquiring and operating that new 8% interest. Under Westar's proposal, ratepayers will be worse off in the future than they are today. The evidence is indisputable that customers do not need the capacity or energy offered by an acquisition of 174 MW of additional coal-fired generation. The evidence conclusively shows the transaction will increase Westar's electric rates by millions of dollars each year with no corresponding improvement in service. In the simplest terms, Westar's proposal to purchase Midwest Power Company's 8% interest in Jeffrey Energy Center is a mechanism to sever the non-regulated business arrangement between Westar and Midwest Power Company, with Westar's retail ratepayers paying 100% of any future losses associated with Midwest Power Company's 8% interest. In other words, this transaction places Westar's retail ratepayers in the position of a financial backstop insulating both Westar and Midwest Power Company from any risk of financial

loss associated with the ownership of the unprofitable 8% interest in Jefferey Energy Center. No matter how the evidence is viewed, this transaction is a proposal to bailout utility shareholders at ratepayers' expense.

I. Background

A. Westar Application & Direct Testimony

1. On March 4, 2019, Westar Energy, Inc., and Kansas Gas and Electric Company (collectively referred to as "Westar") filed an Application to recover costs related to a short-term lease, acquisition, and the future operations of 174 MW of new generating capacity – an 8% interest in the Jeffrey Energy Center ("JEC") currently owned by Midwest Power Company ("MWP").¹ The 8% interest in JEC, including associated operating costs, is not currently used to serve Westar's retail customers and, thus, is not included in Westar's retail rates.²

2. In its Application and the supporting Direct Testimony of Darrin Ives, Westar explains MWP is currently responsible for 8% of all JEC costs. However, Westar believes MWP may refuse to pay its share of these costs moving forward, which could force the two companies into a protracted and costly legal dispute.³ To resolve this legal dispute, Westar and MWP entered into a settlement that will ultimately result in the 8% interest being transferred from MWP to Westar.⁴ From a ratemaking perspective, Westar is requesting its retail customers be required to pay for a short-term lease and eventual acquisition⁵ of the 8% interest in JEC from MWP and to become responsible for all costs of its future operation.⁶ If the Application is approved, the lease

¹ Joint Application for Recovery of Costs through RECA, March 4, 2019, ¶¶ 26-31. (Application, ¶¶ 26-31.)

² Docket No. 18-WSEE-328-RTS, Non-Unanimous Stipulation and Agreement, July 17, 2018, ¶ 27. (18-328 Settlement, ¶ 27.) The 8% interest has never been used to meet retail load obligations. In past years, Westar leased the interest and dedicated its output to serve a wholesale customer.

³ Application, ¶ 6.

⁴ Application, ¶¶ 12-15.

⁵ At page 14, footnote 3, of its Application, Westar explains it will request to recover the \$3.7 million purchase price and future capital costs associated with the 8% interest in its next general rate case.

⁶ Application, ¶¶ 24-31.

costs and deferred and ongoing operating costs will be recovered immediately from ratepayers through Westar's Retail Energy Cost Adjustment surcharge. The MWP-Westar Settlement and related transactions between Westar and MWP are the subject of the present Application.

3. In its Application and supporting testimony, Westar argues the transaction should be approved because it 1) allows Westar to immediately access the energy and capacity associated with the 8% interest,⁷ 2) allows Westar to avoid the risk that MWP may never reimburse Westar for its 8% share of operating expenses and capital costs,⁸ 3) Westar's retail customers received significant benefits associated with a prior lease of the 8% interest by Westar (now expired),⁹ 4) the short-term lease costs (not including additional capital costs, fuel costs, and non-fuel operating costs) are less than expected revenues from the 8% interest,¹⁰ and 5) there are "intangible benefits" of "consolidating ownership of JEC under one parent company, Evergy, Inc."¹¹

B. KIC & USD 259 Direct Testimony

4. On June 4, 2019, KIC and Unified School District #259 Sedgwick County, Kansas ("USD 259"), jointly filed the Direct Testimony of Michael P. Gorman. In his Direct Testimony, Mr. Gorman concluded Westar's proposed acquisition may be a prudent investment to protect the financial interests of its investors, but it is not a prudent investment from the perspective of retail ratepayers.¹² Specifically, Westar's proposal eliminates Westar investors' risk of not fully recovering the operating and capital costs currently assignable to MWP by assigning those cost responsibilities to captive retail ratepayers.¹³

⁷ Direct Testimony of Darrin R. Ives, March 4, 2019, p. 10. (Ives Direct, p. 10.)

⁸ Ives Direct, p. 11.

⁹ Ives Direct, pp. 12-15.

¹⁰ Ives Direct, p. 12.

¹¹ Ives Direct, p. 15.

¹² Direct Testimony of Michael P. Gorman, June 4, 2019, pp. 6-11. (Gorman Direct, pp. 6-11.)

¹³ Gorman Direct, p. 11.

5. Mr. Gorman's testimony documents the fact that Westar's proposal will not benefit ratepayers – and, in fact, offers "negative benefits." Most importantly, the additional capacity and energy associated with the new 8% interest in JEC is not needed to serve Westar's retail customers.¹⁴ Further, Mr. Gorman testifies approval of Westar's Application is expected to increase Westar's retail rates by approximately \$10 million a year in the near term and by about \$138 million in total through 2035.¹⁵

6. Mr. Gorman's testimony demonstrates this rate increase would primarily result from adding MWP's share of JEC costs, which are not currently in Westar's retail rates. These added costs represent an 8% share of the following JEC expenses: 1) non-fuel operations & maintenance expenses ("NFOM"), 2) fuel costs, 3) and future capital expenditures.¹⁶ The one-time recoveries of the \$4.83 million of short-term lease costs, the \$3.7 million purchase price, and \$4.2 million of deferred NFOM represent *additional rate increases* beyond the ongoing increase of about \$10 million to annual rates discussed above.¹⁷

7. Finally, Mr. Gorman notes that the acquisition will expose retail ratepayers to additional uncertainty and financial risks associated with the current economics of owning coal-fired generation plants.¹⁸ Moreover, Mr. Gorman's testimony explains how the proposed transaction creates environmental costs if retail ratepayers are forced to purchase and subsidize the continued operation of the 8% interest in JEC, the largest coal-fired generation facility in Kansas. As detailed in his testimony, the 8% interest in JEC is likely to become de-rated indefinitely and produce no emissions if the Application is denied. Conversely, approving the

¹⁴ Gorman Direct, p. 11, Exhibits MPG-4 & MPG-5.

¹⁵ Gorman Direct, p. 8, Exhibit MPG-1.

¹⁶ Gorman Direct, p. 8, Exhibit MPG-1.

¹⁷ Gorman Direct, pp. 8-9, Exhibit MPG-1; Application, ¶¶ 28, 30; Grady Direct, p. 6.

¹⁸ Gorman Direct, pp. 12-13.

Application *ensures* this unprofitable 8% portion of JEC will continue to produce CO₂, NO_x, SO₂, mercury, and particulate emissions.¹⁹

8. Mr. Gorman concludes his testimony by recommending the Commission deny Westar's Application and exclude all costs associated with the 8% interest from retail cost-of-service rate-setting. Alternatively, Mr. Gorman recommends Westar be allowed to purchase the 8% interest and operate it as an unregulated wholesale asset. Under this scenario, Westar and its investors would be responsible for the costs of the 8% interest, but Westar would also be allowed to retain all the revenues associated with its operation.²⁰

C. CURB Direct Testimony

9. On June 4, 2019, the Citizens' Utility Ratepayer Board ("CURB") filed the Direct Testimony of Andrea C. Crane. In her Direct Testimony, Ms. Crane testifies that Westar has failed to demonstrate that it needs the new 8% interest in JEC to provide service in Kansas, and "the 8% interest has not been included or studied in any IRP [Integrated Resource Plan] planning process."²¹

10. Next, Ms. Crane testifies the 8% interest does not appear to be profitable, citing an expected cash flow shortfall of about \$10 to 10.5 million per year over the next 3 years.²² Therefore, Ms. Crane concludes owning and operating the 8% interest in JEC will result in "higher than necessary rates" and a "net detriment" to Westar's retail ratepayers.²³ For these reasons, Ms. Crane recommends the Commission deny Westar's Application and exclude all costs and revenues associated with the 8% interest in JEC from Westar's retail rates.²⁴

¹⁹ Gorman Direct, pp. 14-15, MPG-6. [Emphasis added.]

²⁰ Gorman Direct, pp. 16-17.

²¹ Direct Testimony of Andrea C. Crane, June 4, 2019, pp. 12, 15. (Crane Direct, pp. 12, 15.)

²² Crane Direct, p. 14.

²³ Crane Direct, pp. 11, 14.

²⁴ Crane Direct, p. 17.

D. KCC Staff Direct Testimony

11. On June 4, 2019, Staff of the Commission ("Staff") filed the Direct Testimony of Justin T. Grady. In his testimony, Mr. Grady explains that Staff supports approval of Westar's Application.²⁵ To reach this recommendation, Mr. Grady agrees with most of the justifications provided by Westar witness Darrin Ives²⁶ and provides an analysis purporting to show a total "net benefit" to customers of \$1.13 million associated with owning and operating the 8% interest in JEC between now and 2035.²⁷

12. To calculate a net benefit to customers, Mr. Grady presents an analysis of the "incremental costs and revenues associated with Westar's decision to extend the lease and then purchase the 8% portion of JEC."²⁸ Mr. Grady's analysis excludes the additional NFOM and capital costs associated with the new 8% interest in JEC because he believes these costs are already "fixed" or "sunk" "from Westar's perspective."²⁹

E. KIC & USD 259 Cross-Answering Testimony

13. On June 14, 2019, KIC filed the Cross-Answering Testimony of Michael P. Gorman. In this testimony, Mr. Gorman explains why Staff's "incremental cost" net benefits study is not reasonable.³⁰ More specifically, Mr. Gorman testifies that Staff's analysis did not consider several added costs to customer associated with purchasing the new 8% interest: fixed O&M cost, property taxes, and capital investment costs.³¹ Mr. Gorman explains this defect in Staff's analysis rests on an unsupported assumption that "any costs associated with the 8% interest owned by

²⁵ Direct Testimony of Justin T. Grady, June 4, 2019, p. 18.

²⁶ Grady Direct, pp. 18-19, Mr. Grady disagrees with Mr. Ives' characterization of fuel costs.

²⁷ Grady Direct, p. 21.

²⁸ Grady Direct, p. 21.

²⁹ Grady Direct, pp. 21, 23-24; Tr., p. 147.

³⁰ Cross-Answering Testimony of Michael P. Gorman, June 14, 2019, p. 2. (Gorman Cross-Answering, p. 2.)

³¹ Gorman Cross-Answering, pp. 2.-3

MWP will be incurred by Westar's retail customers *regardless* of whether Westar acquires the new interest."³²

14. According to Mr. Gorman, including these additional costs, which are not currently in retail rates, will more than offset the "net benefit" estimated by Mr. Grady. Mr. Gorman testifies,

Indeed, the net effect of the all-in cost of JEC relative to forecasted market revenues is a detriment to customers of about \$10.0 million every year for each of the next several years, and a cumulative detriment of \$56 million by 2024. Westar's projections show the all-in costs of the new 8% JEC interest will produce a net detriment to retail customers in every year of future operation if they are added to retail rates. This is in stark contrast to Mr. Grady's claim that customers will benefit from the proposed acquisition.³³

F. KCC Staff Cross-Answering Testimony

15. On June 14, 2019, Staff filed the Cross-Answering Testimony of Justin T. Grady. In his testimony, Mr. Grady agrees with both KIC and CURB's conclusion that "Westar has not demonstrated that its acquisition of the 8% interest in JEC is necessary in order to provide capacity and/or energy to Kansas ratepayers."³⁴ However, Mr. Grady disagrees with both Mr. Gorman and Ms. Crane's decision to review the benefits of this transaction from an "all-in" cost perspective. To highlight his disagreement, Mr. Grady reiterated his belief that most of the operating costs associated with MWP's 8% interest in JEC are already "sunk" to Westar.³⁵

G. Westar Rebuttal Testimony

16. On June 21, 2019, Westar filed the Rebuttal Testimony of Darrin R. Ives. In this testimony, Mr. Ives agrees with the cost-benefit analysis advanced by Staff, which treats many of

³² Gorman Cross-Answering, p. 4.

³³ Gorman Cross-Answering, p. 3.

³⁴ Cross-Answering Testimony of Justin T. Grady, June 14, 2019, p. 5. (Grady Cross-Answering, p. 5.)

³⁵ Grady Cross-Answering, pp. 6-7.

the additional costs of owning the new 8% interest in JEC as "sunk" to customers.³⁶ Mr. Ives further argues this is the correct analysis because of his belief that "if...MWP had failed to pay its share of NFOM and capital costs for the plant due to the contractual dispute that existed, customers would have been responsible for paying those costs through rates."³⁷ Mr. Ives also reiterates his position that customers should bear all the costs to "wrap-up [Westar's] relationship with MWP" because customers benefited from a prior lease of MWP's 8% interest.³⁸

17. In conclusion, Mr. Ives recommends the Commission approve Westar's Application. However, he testifies, "If...the Commission decides to deny our Application, we agree [with KIC's alternative proposal] that Westar should be permitted to operate the 8% portion of JEC as a merchant plant and retain any revenues from that portion of the plant rather than passing them to on to customers."³⁹

H. Evidentiary Hearing

18. On July 16, 2019, the Commission held an Evidentiary Hearing in this matter. During the hearing, the prefiled testimonies of all witnesses were admitted into evidence. In addition, all witnesses were made available for cross-examination and questions from the Commission.

II. Legal Standards for Approval of the Application

19. Westar's Application proposes to increase retail electric rates, and any changes in public utility rates are subject to Commission approval under Kansas law.⁴⁰ To approve any retail

³⁶ Rebuttal Testimony of Darrin R. Ives, June 21, 2019, pp. 1-2.

³⁷ Ives Rebuttal, p. 4.

³⁸ Ives Rebuttal, pp. 4-6.

³⁹ Ives Rebuttal, p. 12.

⁴⁰ K.S.A. 66-117.

rate, the Commission must find the proposed rate is "just and reasonable."⁴¹ The Kansas Supreme Court has described the breadth of this standard, stating,

[T]he goal should be a rate fixed within the "zone of reasonableness" after the application of a balancing test in which the interests of all concerned parties are considered. In rate-making cases, the parties whose interests must be considered and balanced are these: (1) The utility's investors vs. the ratepayers; (2) the present ratepayers vs. the future ratepayers; and (3) the public interest.

...

The term "just and reasonable rates" imports flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and this was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formula but rather to confer on the regulatory authority the power to make and apply policy concerning the appropriate balance between prices charged to utility customers and returns on capital to utility investors consonant with constitutional protections applicable to both.⁴²

20. During the evidentiary hearing, Staff witness Justin Grady recognized this proceeding involves an exercise of policy discretion by the Commission, stating,

I just think these questions are murky enough as it is and there's not a definitive black and white mathematical formula that you can apply to these policy questions.

...

The Commission obviously has plenary authority and considers things much beyond what might go into one individual settlement agreement...I do believe the Commission has the authority to say no today. The Commission has the authority to say yes and probably five or six options in between.⁴³

21. In addition to the standards for just and reasonable rates, the Non-Unanimous Settlement approved by the Commission in Docket No. 18-WSEE-328-RTS makes clear that that the burden is on Westar to show the transaction benefits *customers*. Paragraph 28 of the Settlement states,

⁴¹ K.S.A. 66-101b.

⁴² *Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 488, 512, 720 P.2d 1063, 1070-71, 1086 (1986).

⁴³ Transcript of Evidentiary Hearing, July 16, 2019, pp. 158, 170. (Tr., pp. 158, 170.)

In the event that Westar enters into a new lease for this 8% share of JEC, or purchases the 8% portion of JEC outright, the Parties agree that Westar will be permitted to file a request to include these expenses (lease expenses and NFOM) through the RECA....Westar shall be allowed to utilize a regulatory asset to defer actual lease expense and/or NFOM associated with the 8% portion of JEC in the event that a new lease or purchase agreement is reached. *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.*⁴⁴

22. At paragraph 31, the Settlement continues,

Nothing in this settlement is intended to prejudice Westar's claim for recovery of the unrecovered NFOM and capital costs deferred in the regulatory asset; recoverability will be determined by the Commission at the time that Westar makes its request for recovery of the regulatory asset. Staff, CURB, and other intervenors specifically reserve their right to make any argument with regard to recovery of the regulatory asset, *including the right to argue that none of the regulatory asset should be recovered from customers*.⁴⁵

23. In addition, the parties specifically contemplated a situation where Westar's Application could be denied. At paragraph 29, the Settlement states,

In the event that the Commission denies Westar's filing, Westar shall not be allowed to recover the regulatory asset containing deferred lease and NFOM expenses, and Westar shall be allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC for which the Commission denies Westar recovery of the incurred cost of owning or leasing and operating the 8% portion of JEC.⁴⁶

24. In addition to these broad rate-setting standards, the Commission may wish to address Westar's Application from the perspective of the public interest. As noted above, the public interest is a primary factor to be considered by the Commission when setting rates. In addition, the Commission has authority to review any utility action on this basis through its broad authority to supervise and control utilities and the statutory basis for every utility to obtain and retain a certificate – "the public convenience."⁴⁷ In a precedential order issued in KCC Docket

⁴⁴ 18-328 Settlement, ¶ 28.

⁴⁵ 18-328 Settlement, ¶ 31.

⁴⁶ 18-328 Settlement, ¶ 29.

⁴⁷ K.S.A. 66-101; K.S.A. 66-131; *Cent. Kansas Power Co. v. State Corp. Comm'n*, 206 Kan. 670, 676, 482 P.2d 1, 7 (1971), "The commission is generally charged with the supervision and control of public utilities, subject only to

No. 16-KCPE-593-ACQ, the Commission set forth the standards it uses to evaluate the public interest.⁴⁸ Many of these factors are highly relevant to the transaction proposed in Westar's Application.

III. Analysis

A. Westar's Application Should be Denied because the Transaction is Unnecessary and Produces "Negative Benefits" for Westar's Retail Ratepayers.

i. Additional Energy & Capacity is Not Needed to Serve Retail Ratepayers.

25. The evidence is indisputable that there is no operational need for Westar to acquire the additional energy and generating capacity of the new 8% interest in JEC. Witnesses for KIC, CURB, and Staff all testified to this fact.⁴⁹ And the Commission's own report to the Legislature shows Westar expects to have sufficient capacity until the year 2030 – without adding the extra 174 MW of JEC capacity.⁵⁰

26. It should be further noted that the Kansas Legislature has strongly cautioned against approving new excess generation in its "predetermination" statute, K.S.A. 66-1239. While Westar is not seeking statutory predetermination in this proceeding, Westar *is* asking the Commission to prospectively approve an acquisition of substantial additional generating capacity and recognize the costs of owning and operating this resource in future rates.

27. Under the predetermination statute, electric utilities are allowed to seek approval of generating capacity additions, whether such additions occur through construction or contractual arrangements.⁵¹ However, any utility seeking to pre-determine ratemaking associated with the

statutory exceptions, and an applicant for a certificate must show that public convenience and necessity will be promoted by authorization of the plan for the electric facilities envisioned in the application. Public convenience means the convenience of the public, not the convenience of particular individuals."

⁴⁸ Docket No. 16-KCPE-593-ACQ, Order on Merger Standards, August 9, 2016, ¶ 6.

⁴⁹ Gorman Direct, p. 11, Exhibits MPG-4 & MPG-5; Crane Direct, p. 12; Grady Cross-Answering, p. 5.

⁵⁰ KIC Ex. #4; Tr., pp. 55-56.

⁵¹ K.S.A. 66-1239(c)(1).

addition must include: (A) A description of the public utility's conservation measures; (B) a description of the public utility's demand side management efforts; (C) the public utility's ten-year generation and load forecasts; and (D) a description of all power supply alternatives considered to meet the public utility's load requirements.⁵² Accordingly, though this is not a proceeding for predetermination, it is the relevant policy of the State of Kansas to carefully consider the need for additional generating capacity before such costs are added to rates.

28. When Westar's witness implied there may be a need for the extra capacity due to risks and unforeseen circumstances, CURB witness Andrea Crane strongly protested, stating,

Q. [by Chairman Keen] One of those alleged negative benefits to customers that KIC is pressing us to accept is that there is no operational need for additional capacity. Your take on that?

A. I would agree with that. And I think everyone agrees with that. Mr. Ives agreed in his data request responses that at least there is currently no need for that capacity. He tried to put a slightly different spin on it this morning. But I think we have to keep a couple things in mind. One is that, yes, no one knows for sure what's going to happen in the future. But the data that you looked at today with regard to the surplus of capacity is the, it's the best estimate of the company and the Commission as to what their situation is likely to be; number one. Number two: It already reflects their -- it doesn't reflect ideal conditions. It reflects their best estimate as to what conditions are likely to be, what fuel costs are likely to be. There's also a 12 percent cushion there because to the extent that things vary from the assumptions that were -- that's why there is a need for a reserve margin because we don't know exactly what's going to happen. So SPP requires a reserve margin to meet unforeseen circumstances. That's the whole point of having the 12 percent [reserve margin]. Given all of that, when you look at that document, that demonstrates that this capacity is not needed at least until 2030. One also has to ask yourself, even if we get to 2028, 2029 and Westar needs additional capacity, do we really think coal is going to now be the number one choice? I don't know, maybe it will be, but I tend to doubt it. So I think even if additional capacity at some point is needed, coal may not be the best choice going forward. *So I absolutely think there has been no showing that this capacity is needed now or is likely to be needed in the near term.*⁵³

⁵² K.S.A. 66-1239(c)(2).

⁵³ Tr., pp. 131-32. Emphasis added.

29. Finally, Westar witness Darrin Ives suggested there is market value to the additional capacity that may benefit customers, stating, "...it seems pretty likely with SPP market conditions that at some point over that window, we would be able to make some money off that capacity as well."⁵⁴ However, this statement is directly controverted by Westar's own written position on the value of the 8% interest in a prior docket, where it assigned a \$0 value to the capacity. In modeling the future cash-flows of that interest Westar made the following assumption:

No capacity sales were included. Based off our daily participation in the SPP markets, we believe these revenues will be hard to realize. This is based on a capacity glut in the SPP, additional capacity being added in the SPP and the availability of new 20-year combined cycle gas capacity available in the SPP.⁵⁵

30. The official record in this proceeding overwhelmingly supports a finding that there is no need to add 174 MW of new excess generating capacity to the Westar portfolio. Further, such an addition would be contrary to State policy, as set forth in Kansas statutes.

ii. Acquiring the New 8% Interest in JEC will Increase Retail Rates.

31. If Westar's Application is approved, customers will be obligated to pay future NFOM, fuel costs, and capital costs associated with the new 8% interest in JEC.⁵⁶ In fact, the all-in costs of ownership are expected to increase annual rate collection by about \$10 million a year in the near term and add about \$138 million of extra ratepayer costs over the next 15 years.⁵⁷ In *addition* to these long-term rate increases, Westar is also asking customers to pay the \$3.7 million purchase price, \$4.83 million in short-term lease costs, and a projected \$4.2 million of deferred NFOM.⁵⁸

⁵⁴ Tr., p. 90.

⁵⁵ Gorman Direct, MPG-1.

⁵⁶ Application, ¶¶ 26-31.

⁵⁷ Gorman Direct, p. 8, Exhibit MPG-1.

⁵⁸ Application, ¶¶ 28, 30; Grady Direct, p. 6.

32. No costs associated with MWP's 8% interest in JEC are currently in Westar's retail rates. All costs related to MWP's 8% interest were removed from rates in Westar's last rate case, as Westar's lease of that interest was expiring.⁵⁹ Thus, the "all-in" costs of ownership are all incremental to current rates. Both Westar witness Darrin Ives and Staff witness Justin Grady acknowledged this basic fact.⁶⁰ In fact, Mr. Grady's testimony includes a rate impact analysis showing the expected rate increase to residential customers.⁶¹

33. It is also important to recognize this Westar proposal seeks to add substantial costs to Westar rates at a time when Kansas policymakers are searching for ways to manage rising utility prices. Substitute for Senate Bill 69 was recently enacted by the Kansas Legislature and signed into law by Governor Laura Kelly. In addition to other matters, this law seeks a study of "options available to the state corporation commission and the Kansas legislature to affect Kansas retail electricity prices to become regionally competitive while providing the best practicable combination of price, quality and service, including reviewing whether: (A) Capital expenditures and operating expenses of Kansas electric public utilities can be managed to achieve and sustain competitive retail rates while maintaining adequate and reliable service...."⁶² As detailed above, this Westar proposal would substantially increase the capital and operating costs charged to retail ratepayers – making Westar's rates less competitive with the surrounding region – without any corresponding improvements in service or other material benefits.

⁵⁹ 18-328 Settlement, ¶ 27. Westar's new short-term leases of the 8% interest were executed following expiration of the original lease.

⁶⁰ Tr., pp. 117-18, 147-48.

⁶¹ Grady Direct, Confidential Exhibit JTG-2.

⁶² http://www.kslegislature.org/li/b2019_20/measures/documents/sb69_enrolled.pdf

iii. Acquiring the New 8% Interest in JEC may Diminish the Commission's Flexibility to Approve Future Energy Efficiency Programs.

34. During the evidentiary hearing, the Commission heard evidence indicating this acquisition will diminish its flexibility to approve new energy efficiency programs in the future. In particular, counsel for KIC and Westar witness Darrin Ives discussed the Commission's policy statement that "reducing or postponing future construction of generation" is a primary goal of energy efficiency programs. And, for this reason, the Commission places specific emphasis on a specific benefit-cost test when considering the approval of energy efficiency programs.⁶³

35. Even Westar's witness grudgingly agreed, "in theory," "the more surplus generating capacity a utility has or has access to, the less value an energy efficiency program might hold for that utility, especially if the value of the program is premised on avoiding or delaying new generating capacity."⁶⁴

36. KIC is not demeaning the value of Westar's current energy efficiency programs and is not commenting on the potential value of new programs. However, the evidence is clear that – all things being equal – the addition of 174 MW of excess generating capacity will make it much more difficult for future energy efficiency programs to meet a cost-benefit test. Avoiding the addition of generation capacity – and associated costs – is a central tenet of the Commission's energy efficiency policy goals. Approving the addition of 174 MW of unneeded and uneconomic capacity is contrary to the Commission's energy efficiency policy.

37. Related to the topic of resource efficiency is the fact that the Commission is currently in the process of creating a new integrated resource planning ("IRP") process for Westar. As expressly stated in a compliance filing of Westar, Staff, and CURB, the IRP process is intended

⁶³ Tr. pp. 56-59; KIC Ex. #5.

⁶⁴ Tr., p. 59.

to identify "the portfolio of resources that meets customer requirements at the lowest reasonable cost given an uncertain future."⁶⁵ In other words, the IRP process is intended to examine, in a proactive and ongoing fashion, the most efficient manner of serving customers.

38. Westar's IRP process is still under development and has not yet been approved by the Commission.⁶⁶ And the cost-effectiveness of adding of this 174 MW of coal-fired generation has not been studied as part of any integrated resource planning process.⁶⁷ Approving the purchase of 174 MW of unneeded capacity undermines and evades the new IRP process – leading Westar to start the process with an inefficient and partially unplanned portfolio.

iv. Ordering Retail Ratepayers to Subsidize the 8% Interest in JEC Ensures Environmental Costs and Exposes Customers to Additional Financial Risk.

39. As described in the Direct Testimony of KIC witness Mike Gorman, there is an environmental cost associated with Westar's proposal to purchase and continue operating the 8% interest in JEC.⁶⁸ Specifically, Mr. Gorman's testimony explains the proposed transaction creates environmental costs if retail ratepayers are forced to purchase and subsidize the continued operation of the 8% interest in JEC, as is contemplated by Westar's Application. Absent Westar's decision to purchase the 8% interest in JEC, that portion of the plant would likely become "de-rated" indefinitely and produce no emissions. Conversely, approving the Application *ensures* the 8% of JEC will continue to produce CO₂, NO_x, SO₂, mercury, and particulate emissions.⁶⁹

⁶⁵ Docket No. 19-KCPE-096-CPL, Compliance Filing: Capital Plan Reporting & IRP Process Framework, March 1, 2019, p. 1.

⁶⁶ See Docket No. 19-KCPE-096-CPL.

⁶⁷ Crane Direct, p. 15, citing Westar's response to KIC-14: "

⁶⁸ KIC does not herein take a position as to whether a particular power source for electric generation is favored over any other source. Instead, KIC focuses on the all-in costs of a power generation resource. Environmental related costs and risks are a component of the all-in costs of coal-fired generation.

⁶⁹ Gorman Direct, pp. 14-15, MPG-6. [Emphasis added.]

40. KIC recognizes environmental considerations may be more or less important to different policymakers, but environmental impacts are a recognized component of the Commission's public interest test.⁷⁰ In addition, this acquisition of a substantial new amount of coal capacity will expose retail ratepayers to additional uncertainty and financial risks associated with the current economics of owning coal-fired generation plants.⁷¹

41. Based on the foregoing "negative benefits" to customers, KIC recommends the Commission find this transaction is not a prudent investment for ratepayers. KIC submits the Commission can end its inquiry based on these facts showing that the transaction does not benefit ratepayers, since that is the standard set forth in the Westar Rate Case Settlement. However, KIC will address further deficiencies in the Application and the cost-benefit analyses of Westar and Staff.

B. Westar has Not Proven It Cannot Recover the 8% of Operating and Capital Costs Assignable to MWP from MWP or Another Entity.

42. The JEC Operation Agreement obligates the owners to pay all costs on an ownership percentage basis. Specifically, the Agreement states, "All costs, expenses and capital expenditures incurred or associated with the operation, maintenance, repair, replacement or demolition, and any other costs incurred hereunder...shall be shared by the Owners in proportion to their respective percentages...."⁷² During the hearing, Westar witness Darrin Ives confirmed this general provision of the agreement.⁷³ Thus, MWP is generally obligated to pay 8% of all JEC costs.

⁷⁰ Docket No. 16-KCPE-593-ACQ, Order on Merger Standards, August 9, 2016, ¶ 6, "(b) The effect of the transaction on the environment."

⁷¹ Gorman Direct, pp. 12-13.

⁷² Docket No. 19-MPCE-064-COC, Midwest Power Company Application for Certificate of Convenience & Necessity, August 10, 2018, Exhibit D. (19-064 Application, Exhibit D.)

⁷³ Tr., pp. 37-38.

43. Unfortunately, as a result of other contractual provisions, Mr. Ives and Mr. Grady have testified to MWP's statements that it will refuse to pay its share of these expenses in the future.⁷⁴ In particular, MWP has cited provisions of a 1991 "Consent and Assumption" agreement.⁷⁵ During the hearing, Mr. Ives agreed this was a primary part of the legal dispute between Westar and MWP.⁷⁶

44. In fact, in prior testimony, Mr. Ives' disputed MWP's argument as follows:

In the event the assets of the Trust Estate are insufficient, MWP apparently believes it can simply employ squatter's rights and fail to fund the payment of operating and other costs allocable to its interest in JEC, but continue to be entitled to the associated capacity and energy and that Westar has no remedy available in that event. This "heads I win, tails you lose" position is nonsensical, is unsupported by the applicable agreements, and is an example of MWP's unjustifiable attempts to shift its responsibility to cover the operating and other costs allocable to the 8% interest in JEC held by the Trust on to Westar and its customers while still benefiting from the capacity and energy generated associated with the 8% interest indefinitely.⁷⁷

45. Further discussing the legal dispute, Mr. Ives testified during the hearing,

We felt like we had a good position based on the contracts. But I'll tell you, if you've looked at those contracts, there are hundreds and hundreds and thousands of pages of documents in those contracts that were constructed back in 1991 and refreshed in 2007. Probably fair to say that there could be several interpretations, if you went through a full legal proceeding, on how that would play out. So I think when you get into that complex litigation, there's always some litigation risks that you have to assess.⁷⁸

46. Counsel for KIC has reviewed the relevant contracts in detail and agrees the legal liabilities of MWP and Westar are an unresolved issue under those documents. And these

⁷⁴ Tr., p. 38; Ives Direct, p. 11, "MWP made it clear in the MWP Certificate Docket that it had no intent whatsoever to pay Westar for MWP's share of expenses at JEC;" Grady Direct, pp. 3-4.

⁷⁵ The "Consent & Assumption" Agreement can be found in Exhibit D to the Midwest Power Company Application for Certificate of Convenience & Necessity in Docket No. 19-MPCE-064-COC. While the terms of this contract have not been the subject of this proceeding (aside from acknowledging the legal dispute), KIC is willing to brief the interpretation and relevance of the contract should such action be deemed necessary by the Commission.

⁷⁶ Tr., p. 38

⁷⁷ KIC Ex. #1.

⁷⁸ Tr., p. 112

liabilities have not been tested or determined by any court.⁷⁹ Yet, while these are the essential documents that will govern the legal dispute between MWP and Westar, there has been virtually no discussion of their applicability or likely interpretation in this case. The contracts were not offered to support Westar's Application and are only now part of the official record because counsel for KIC discussed their terms with Westar and Staff's witnesses during the evidentiary hearing, and Staff requested the Commission take official notice of Docket No. 19-MPCE-064-COC.

47. Despite the fact that there are substantial and unresolved legal disputes over cost responsibility, Westar's witness Mr. Ives confirmed no collection efforts occurred before Westar's settlement with MWP. Westar did not invoice MWP for its share of costs. Westar never sent MWP a demand letter. Westar did not initiate legal action in the courts for collection. No court has ever been asked to find or has ever found MWP in default. No court has ever been asked to require or has required MWP to expose its assets. No court has found MWP is not responsible for its share of costs. No court has found MWP bankrupt or legally unable to pay its share of costs. And, finally, Westar did not foreclose on the 8% interest as compensation for MWP's unpaid obligations.⁸⁰ Westar has not proven MWP or another responsible entity will not and cannot pay the 8% share of JEC costs.

48. Furthermore, Westar has not demonstrated the 8% interest could not be sold to another buyer. Following the expiration of its lease in January 2019, Westar quickly entered into a settlement and agreed to acquire the 8% interest from MWP for a total of about \$8.5 million.⁸¹ Therefore, the Commission will never know if another buyer may have taken over the 8% - and

⁷⁹ Tr., pp. 40-43.

⁸⁰ Tr., pp. 40-43

⁸¹ \$4.83 million in additional short-term lease payments plus the final \$3.7 million purchase price. Westar also agreed to cover any NFOM during the lease, which eliminated millions of dollars of MWP cost obligations.

paid the 8% share of costs. Even Staff's witness, Justin Grady, acknowledged a purchase by a third party would have been a better scenario for customers than the current acquisition by Westar.⁸²

49. Ultimately, Westar did not initiate collection efforts, Westar did not foreclose on the interest (forcing an examination of MWP's assets), and Westar paid a substantial amount of money for the 8% interest instead of waiting to see if MWP could market the interest to another buyer. In short, Westar took the convenient and expedient option – buy the 8% interest and ask ratepayers to cover its costs. As detailed in the Direct Testimony of Michael P. Gorman, this option absolutely offered the least financial risk to shareholders.⁸³ But that does not mean it was a prudent decision for Westar's ratepayers.

50. While the acquisition of MWP's 8% interest in JEC was an expedient option for Westar and may have reduced financial risks to its investors, Westar has not demonstrated the transaction and associated rate increase was necessary or prudent *for customers*. Therefore, the proposed rate increase is unjust and unreasonable, and the Application should be denied.

C. It is Unreasonable for Ratepayers to Pay 100% of Any Unreimbursed Costs Associated with MWP's 8% Interest in JEC.

51. As detailed above, Westar has not established the costs associated with the 8% interest cannot be recovered from MWP, MWP's parent company, another potential buyer of the 8% interest, or any other entity. However, even *assuming* Westar is not ultimately reimbursed by those entities, retail ratepayers should not be forced to purchase and operate the 8% interest.

i. Customers Should Not Pay the Costs of New Capacity They Do Not Need or Benefit From.

52. As detailed above, customers do not need the additional capacity and energy associated with a new 8% stake in the JEC. Moreover, placing the new 8% interest in Westar's

⁸² Tr., p. 151.

⁸³ Gorman Direct, p. 11.

retail costs of service will substantially increase its retail rates. Ownership of this interest offers no operational or financial benefit to customers.

53. When valuing utility property in the ratemaking process, Kansas law requires the Commission to consider "the reasonable value of all or whatever fraction or percentage of the property of any...public utility...is *used and required to be used in its services to the public* within the state of Kansas."⁸⁴ Because the new 8% interest is not required to be used to serve retail customers, it is unreasonable to include the capital costs and associated operating expenses of this unnecessary investment in retail rates.

54. This fact, alone, conclusively support the position that ratepayers should not be forced to pay for the purchase and operation of this additional generating capacity. However, there are additional reasons customers should not pay for the costs of acquiring and operating the extra capacity.

ii. The Regulatory Compact Does Not Require Customers to Insulate Shareholders from Investment Risk.

55. The Westar proposal undoubtedly benefits Westar shareholders, the party currently facing a risk of nonpayment by MWP. The question before the Commission is whether it is appropriate for 100% of this risk to be transferred to ratepayers – *guaranteeing* payment to Westar. This occurs by Westar's proposal to acquire the interest – thus transferring MWP's payment obligations to Westar's retail customers. Such an action is not contemplated or appropriate under the regulatory compact. In his Direct Testimony, KIC witness Mike Gorman explains how the proposed transaction benefits Westar's investors at ratepayers' expense:

⁸⁴ K.S.A. 66-128.

Q IF THE TRANSACTION DELIVERS NEGATIVE BENEFITS TO CUSTOMERS, WHY WOULD WESTAR AGREE TO PURCHASE THE 8% PORTION OF JEC FROM MWP?

A Because it eliminates Westar's risk of fully recovering the cost of this resource from either MWP or from wholesale market energy sales, and transfers this cost recovery risk to ratepayers. Purchasing the 8% interest and recovering the associated operating costs from captive retail ratepayers – instead of MWP – will eliminate significant financial risk currently facing investors, which is the risk that MWP may refuse to pay its portion of operating costs. Essentially, ratepayers are being asked to take on additional costs and serve as a financial backstop, so Westar and its investors can escape their relationship with MWP.⁸⁵

56. Similarly, CURB witness Andrea Crane testifies,

The KCC should reject Westar's implied argument that ratepayers should be responsible for any costs not recovered from MWP. The Company's argument ignores one major party to this transaction – the Company's shareholders. Simply because Westar is unable to obtain cost recovery from a joint owner is no reason to burden Kansas ratepayers with these additional costs. If Westar had been unable to obtain reimbursement of costs relating to the 8% interest in JEC from MWP, then the Company's shareholders, not its ratepayers, should be responsible for these costs. Ratepayers should not be the guarantor of last resort.⁸⁶

57. There are several underlying causes of this potential loss – each qualifying as "investment risk." First, due solely to market forces, the marketability of the energy and capacity from the 8% interest has rapidly declined. This reversal of profitability is the underlying reason MWP is refusing to pay its share of operating expenses, since MWP claims its payment obligations do not extend to periods where there are "cost shortfalls."⁸⁷ Therefore, the future unprofitability of MWP's 8% interest is the underlying factor posing a risk of loss for Westar shareholders.

58. Westar may contend that it owns and operates the remainder of JEC for the benefit of its ratepayers, so those customers should compensate Westar when it faces the risk of a financial loss associated with its ownership interest. But ratepayers are not a proxy for investors.

⁸⁵ Gorman Direct, p. 11. Emphasis added.

⁸⁶ Crane Direct, pp. 13-14. Emphasis added. See also, Tr., pp. 127-28.

⁸⁷ Docket No. 19-MPCE-064-COC, Rebuttal Testimony of Amy G. Paine, December 3, 2018, pp. 6-7.

59. Westar owns its existing interest in JEC. Using this asset, Westar provides service to its customers. To compensate Westar and its investors for their investment and attendant risks, ratepayers pay to Westar a return of, and on, this investment.⁸⁸ This is the "regulatory compact."

60. Because investors are compensated for financial risks with a market-based return,⁸⁹ the regulatory compact requires the risks associated with market losses must reside with the utility (i.e., profitability is not guaranteed).⁹⁰ The United States Supreme Court has expressly recognized the fact that ratepayers are not required to insulate shareholders from market risks, even when such costs may flow from an initially prudent investment.⁹¹

61. And, more specifically, when economic forces are at work – such as the market decline in the value of the energy produced by the 8% interest in JEC – customers are not required to protect shareholders from resulting losses. As held by the United States Supreme Court,

[I]t may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of

⁸⁸ *State of Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri*, 262 U.S. 276, 290–91, 43 S. Ct. 544, 547, 67 L. Ed. 981 (1923), "The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable.... The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, *the allowance for risk incurred*, and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined." Emphasis added.

⁸⁹ *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692, 43 S. Ct. 675, 679, 67 L. Ed. 1176 (1923), "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties...."

⁹⁰ "There is no constitutional requirement that a utility's rates be set by a regulatory authority at a sufficiently high level to guarantee a return on its capital investments, irrespective of the interests of the ratepayers and the public." *Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 483, 720 P.2d 1063, 1068 (1986).

⁹¹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315-16 (1989).

existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.⁹²

62. Westar is compensated for the risk associated with owning and operating its generation resources. The risk of non-reimbursement of costs by a co-owner (caused by market forces) is one of those risks. It is not reasonable to ask ratepayers to pay Westar a market-based return and also insulate investors from investment risks of declines in wholesale energy prices.

63. Aside from the economic decline in the marketability of the 8% JEC energy, there are other traditional investment risks involved. These are general business risks such as the risk of poor contracting practices (detailed below) and the risk of troubled and potentially-litigious business relationships (co-ownership with MWP). As with the above-described economic risks, these are typical investment risks associated with the operation of an electric utility and are compensated by an annual profit margin component of retail rates. To the extent these risks produce financial losses, it is unreasonable under Kansas law for customers to act as a financial backstop to insulate shareholders.

iii. Staff's Cost-Benefit Analysis does Not Accurately Reflect Costs and Benefits from the Perspective of Customers.

64. As detailed above, the Westar proposal to purchase and operate MWP's 8% interest in JEC is not needed to provide service and will increase Westar's retail rates. However, the 18-328 Settlement required any purchase of the 8% interest to be a prudent decision for Westar's customers. Therefore, to demonstrate a "benefit" to customers, Staff performed an "incremental cost" net present value calculation. This calculation purported to show a total net present value benefit to customers of \$1.13 million.⁹³

⁹² *Mkt. St. Ry. Co. v. R.R. Comm'n of State of Cal.*, 324 U.S. 548, 567, 65 S. Ct. 770, 779–80, 89 L. Ed. 1171 (1945).

⁹³ Grady Direct, p. 21.

65. During the evidentiary hearing, Staff witness Justin Grady acknowledged Staff's cost-benefit analysis does not consider a large amount of new costs associated with the ownership of MWP's 8% interest – all of which would be "incremental" from the perspective of retail ratepayers.⁹⁴ And Mr. Grady acknowledged the exclusion of these added costs is premised upon a set of assumptions.⁹⁵ KIC considers these assumptions to be a set of "worst-case scenarios" for ratepayers, which have not yet occurred and do not fairly reflect the obligations of the parties. It is only under this specific scenario that Staff's claim of a "net benefit" to customers is valid.

66. As noted in testimony and confirmed during the hearing, Staff's analysis assumes the following:

- 1) No other buyer would ever purchase MWP's 8% interest in JEC;⁹⁶
- 2) Neither MWP nor any other 3rd party would ever pay any of the 8% costs;⁹⁷ and
- 3) In future rate cases, the Commission would have found Westar's retail ratepayers should pay 100% of any operating and capital costs unpaid by MWP.⁹⁸

As described throughout this brief, none of the above assumptions have been established. Accordingly, Staff's analysis is not a reliable way of viewing costs and benefits from the perspective of ratepayers. Rather, Staff's worst-case scenario analysis appears to be designed to justify the transaction and resolve this troubled business relationship between Westar and MWP.

67. Instead of seeing this transaction from ratepayers' perspective, both Staff and Westar are emphasizing the *convenience* of the transaction for Westar and the Commission. As stated by Westar witness Ives and repeated by Staff witness Grady:

⁹⁴ Tr., pp. 147-148.

⁹⁵ Tr., pp. 149-52.

⁹⁶ Tr., pp. 150-51.

⁹⁷ Tr., pp. 149-50.

⁹⁸ Tr., p. 152.

There is value in eliminating the risk of extended, time-consuming, and expensive litigation and eliminating the potential of an adverse outcome in litigation. Resolution of the dispute with MWP allows the Commission and other parties not to be further burdened with the likely contentious oversight and regulation of an unwilling out-of-state owner of 8% of JEC.⁹⁹

68. KIC does not dispute the convenience to Westar of using ratepayer funds to resolve the Westar-MWP relationship. However, this proposal does not result just and reasonable rates and does not, in any way, balance the interests of ratepayers, shareholders, and the public interest.

iv. Westar and Staff's Retrospective Arguments regarding Past Ratepayer Benefits are Irrelevant to the Constitutional Prospective Ratemaking Process and are Unfair to Current and Future Ratepayers.

69. Both Staff and Westar argued in prefiled written testimony that it is fair to burden future customers with financial losses associated with MWP's 8% interest in JEC because past customers received financial benefits from Westar's now-expired lease of that interest.¹⁰⁰ These arguments ignore the rights of current and future ratepayers to enjoy just and reasonable rates that are calculated to reflect the lowest reasonable current cost of serving those ratepayers.¹⁰¹ The Westar proposal burdens these current and future ratepayers with additional costs simply because a past contractual relationship benefited past ratepayers – even though the future costs are projected to be much larger than any past benefits.¹⁰²

⁹⁹ Ives Direct, p. 15; Grady Direct, pp. 16, 24.

¹⁰⁰ Ives Direct, pp. 13-15. Grady Cross-Answering, pp. 8, 11-12.

¹⁰¹ Ratemaking in Kansas is prospective in nature and based on a historical test year, subject to "known and measurable" adjustments to a utility's cost of service. *Kansas Power & Light Co. v. State Corp. Comm'n*, 5 Kan. App. 2d 514, 517, 620 P.2d 329, 333 (1980), "Ratemaking, by its very nature, is prospective and in order to neutralize the negative effects of speculation and guesswork about future economic conditions, it is accepted practice to base future rates upon known past and present conditions through the use of data gathered during a specified test period. This process of prognostication creates a conflict between the need to lend some finality to ratemaking by utilizing a well-defined, finite test period and the need to base calculations upon the latest available relevant data which often pertains to time periods other than the test period. A satisfactory resolution of this conflict is that when known and measurable post-test-year changes affect with certainty the test-year data, the commission may, within, its sound discretion, give effect to those changes." See also, *United Cities Gas Co. v. Brock Expl. Co.*, 995 F. Supp. 1284, 1293–94 (D. Kan. 1998); *Kansas Gas & Elec. Co. v. State Corp. Comm'n of State of Kan.*, 14 Kan. App. 2d 527, 533, 794 P.2d 1165, 1170 (1990).

¹⁰² Compare cumulative negative cash flow in Gorman Direct, MPG-1 with confidential estimated past benefits set forth in Ives Direct, p. 14.

70. KIC does not dispute that Westar furnished contracts to the Commission related to the assumption of the lease of MWP's 8% interest in 2007 pursuant to K.S.A. 66-101c. And KIC does not dispute the Commission allowed Westar to enter into that arrangement. However, neither Westar nor Staff have produced – and KIC has not found – any Orders of the Commission expressly finding Westar's contractual arrangements with MWP to be "prudent" despite repeated references to such a finding.¹⁰³

71. More importantly, even if such an arrangement was deemed prudent at that time, there was no "predetermination" of future ratemaking associated with the Westar-MWP business relationship – specifically for periods following the lease term. And no party has claimed Commission approval of contracts amounts to "predetermination" or "preapproval" of all potential rate impacts associated with such contracts – transferring all financial risks from shareholders to ratepayers. Specifically, Staff witness Justin Grady clarified during the evidentiary hearing that the Commission's hands are not tied in any legal sense to include these costs in rates based on the lease assumption authorized by the Commission in 2007, and Staff's position is based on policy considerations rather than legal requirements.¹⁰⁴

72. Importantly, the Kansas Legislature *has* provided a statutory process for ratemaking treatments to be "predetermined," which does alter traditional ratemaking principles.¹⁰⁵ This statute is the exclusive means of ratemaking "predetermination" under Kansas law. Under the statute, Westar could have requested the Commission predetermine the ratemaking associated

¹⁰³ See, e.g., Ives Rebuttal, pp. 2, 6-8; Grady Cross-Answering, pp. 15-16.

¹⁰⁴ See Tr., p. 156, Staff witness Grady: "My analysis is not based on the fact that the Commission approved the contract in 2007 and so the Commission's hands are tied. I don't believe that. I'm just doing a regulatory policy, regulatory decision-making analysis...."

¹⁰⁵ K.S.A. 66-1239.

with its contractual relationships with MWP.¹⁰⁶ As noted above, predetermination was not sought or granted for Westar's contractual relationship with MWP.

73. Both the revenues and costs of the initial lease were included in retail rates during the term of the lease. As noted by multiple witnesses, it was appropriate to ask customers to pay the costs of the lease (including all costs of the 8% interest in JEC) at that time, because there was a wholesale revenue source offsetting the financial burdens of the lease. In contrast, the current proposal asks ratepayers to take on the ownership burdens of the 8% interest without any corresponding source of revenue to offset those burdens.

74. While the Commission may have found the earlier lease arrangement appropriate, the Commission has never issued a decision finding costs associated with the Westar-MWP business relationship should be included in rates *following* the expiration of Westar's lease. In fact, as the lease was expiring, the Commission *removed* the costs associated with the 8% interest from retail rates in Westar's last rate case.¹⁰⁷ This removal of costs at the expiration of the lease demonstrates the costs associated with MWP's 8% interest are not "sunk" from the perspective of ratepayers, as contended by witnesses for Westar and Staff.¹⁰⁸ Thus, these alleged "sunk" costs are all "incremental" to customers. In other words, none of these "sunk" costs are in retail rates and would represent additional new costs if they are added to rates.

75. The simple fact is that Westar always has an ongoing obligation to demonstrate the justness and reasonableness of its cost of serving customers.¹⁰⁹ Costs that were reasonable under

¹⁰⁶ K.S.A. 66-1239(c)(1): Prior to undertaking the construction of, or participation in, a generating facility *or prior to entering into a new contract*, a public utility may file with the commission a petition for a determination of the rate-making principles and treatment, as proposed by the public utility, that will apply to recovery in wholesale or retail rates of the cost to be incurred by the public utility to acquire such public utility's stake in the generating facility during the expected useful life of the generating facility or the recovery in rates of the contract during the term thereof. (Emphasis added.)

¹⁰⁷ 18-328 Settlement, ¶27.

¹⁰⁸ Grady Direct, pp. 21, 23-24; Ives Rebuttal, p. 8.

¹⁰⁹ K.S.A. 66-101b.

one set of circumstances more than a decade ago may be unreasonable under changed conditions today – and vice versa. Considering "past benefits" is not a rational manner of determining the lowest reasonable cost of serving customers today. Would Westar contend its rates should be reduced below its current cost of service in consideration of "past detriments" to customers? Furthermore, even though past benefits are irrelevant in setting prospective cost-based rates, it is worth noting the future expected financial costs to future ratepayers of \$138 million are far larger than the purported past benefits to previous ratepayers.¹¹⁰

76. As succinctly stated by CURB witness Andrea Crane, "The Commission should examine the proposed ratemaking treatment in light of Westar's current and future needs to provide electric service to regulated Kansas ratepayers. Based on that criteria, the proposed transaction is neither necessary nor economical."¹¹¹

v. Westar and Its Shareholders, Not Retail Ratepayers, are the Primary Beneficiaries of the MWP-Westar Settlement.

77. In the Settlement Agreement between MWP and Westar, MWP alleges Westar breached the terms of their prior lease and releases all of its legal claims against Westar for such breach. Specifically, the Settlement states,

WHEREAS, during the term of the Lease, the Owner Trustee and Midwest alleged that Westar, as lessee under the Lease and operator of the JEC, breached the terms of, inter alia, the Lease thereby causing an Event of Default (as defined in the Lease);

WHEREAS, Westar and Evergy dispute the allegations of the Owner Trustee and Midwest, and maintain that no breach or Event of Default occurred with respect to the Lease or any of the Governing Agreements; and

WHEREAS, to effectuate a complete settlement of the claims between and among the Parties without conceding disputed issues of liability that may or may not arise by operation of law, all Parties desire to avoid the uncertainty, burden and expense of litigation and any appeals, and to settle, compromise, and amicably resolve all

¹¹⁰ Compare cumulative negative cash flow in Gorman Direct, MPG-1 with confidential estimated past benefits set forth in Ives Direct, p. 14.

¹¹¹ Crane Direct, p. 17.

disputes between them on the terms and conditions set forth herein, and to release and obtain releases from each other as to any and all potential claims;....¹¹²

78. Thereafter, at Section 4 of the MWP-Westar Settlement, MWP grants Westar a full release, stating,

The Trust and the Owner Trustee...releases and forever discharges Westar, Evergy and each and all of their present and former officers, directors, employees, affiliates, subsidiaries, parents, divisions, managing directors, associates, successors, assigns, representatives, agents, and attorneys (collectively, the “Westar Released Parties”) from any and all demands, disputes, controversies, suits, actions, causes of action, claims, promises, agreements, attorneys’ fees assessments, debts, sums of money, damages, judgments, obligations and liabilities whatsoever, upon any legal or equitable theory, whether known or unknown, against each and all of the Westar Released Parties, in connection with the JEC, the 8% Undivided Interest, or the Governing Agreements, which each or any Trust Party now has or ever had from the beginning of the world to the Effective Date and with respect to claims arising in the future based in whole or in part upon facts that exist or existed on the Effective Date, by reason of any manner, cause or thing whatsoever.¹¹³

79. During the evidentiary hearing, Westar's witness was unable to describe the nature of Westar's alleged breach(es) or to identify the nature or magnitude of MWP's claims against Westar.¹¹⁴ However, it is clear from the MWP-Westar Settlement that Westar is receiving the benefit of eliminating potential future litigation against itself and its employees. This benefit is, of course, in addition to the immense shareholder benefits described at length throughout this brief (eliminating the risk of non-payment by MWP).

80. Without knowing the exact nature of MWP's claims against Westar, it is impossible to calculate the potential benefit to shareholders of obtaining a release of such claims. However, it is highly unlikely any litigation costs or judgments against Westar would have been included as

¹¹² Ives Direct, Attachment A, pp. 1-2.

¹¹³ Ives Direct, Attachment A, p. 3.

¹¹⁴ Tr., pp. 49-51.

prudently incurred operating expenses in Kansas retail rates. Thus, any exposure was purely to shareholders, and any release solely benefitted shareholders.

81. Again, this benefit to Westar is in addition to the significant financial upside of insulating itself against the risk that MWP may not pay its share of costs, which is the focus of this proceeding. However, these releases of claims against Westar further demonstrate it is not just and reasonable for ratepayers to pay 100% of the costs of this transaction, where substantial benefits are flowing to shareholders. Because Westar's proposal is primarily designed to protect its shareholders from legal claims and other financial risks, the Commission should find it is inappropriate to ask ratepayers to fund the transaction.

vi. If Additional Operating Costs are "Unavoidable" Due to Contracting Oversights, such Costs are Not Prudently Incurred and are Not Reasonable Operating Expenses that Should be Charged to Retail Ratepayers.

82. Westar and Staff claim one reason MWP may not reimburse Westar for its share of operating costs is that MWP may be "judgment proof."¹¹⁵ In other words, MWP may not have had sufficient assets to pay its share of costs, leaving foreclosure litigation as Westar's only chance of collection. As noted above, Westar has not proven MWP is unable to pay its share of costs, because it has not initiated any process to make that showing.

83. However, it is clear from the trail of documents, that Westar also did not secure any guarantees of payment from other responsible parties in the event MWP was unable to pay its share of costs following expiration of the lease.¹¹⁶ The lack of payment guarantees may not have been apparent or problematic during the term of the now-expired lease. However, Westar was aware the term of its agreement was limited, and it is shocking that Westar would not have

¹¹⁵ Tr., pp. 43-44; Grady Direct, pp. 14-15.

¹¹⁶ Tr., pp. 43-45; See also, Docket No. 19-MPCE-064-COC, Rebuttal Testimony of Amy G. Paine, December 3, 2018, pp. 4-7, contending there are no parental guarantees or obligations in the contracts assumed by Westar.

contemplated a manner of securing MWP's payments *following* the lease term – when MWP became both entitled to keep its 8% share of revenue and obligated to pay its 8% share of costs.

84. Payment guarantees are highly common and expected in the business world and utility industry. In fact, such provisions are part of standard contracting practices for both Westar and its parent company, Evergy, Inc.¹¹⁷ Further, certain of Westar's Commission-approved tariffs require proof of creditworthiness or security deposits before a retail customer may receive service.¹¹⁸ Similarly, the Commission's regulations require certain operators of oil, gas, and injection wells to submit financial guarantees to obtain a license.¹¹⁹ The Commission cannot reasonably hold Westar to a lesser contracting standard in securing payments related to the largest coal-fired generation facility in the State.

85. Westar's apparent failure to exercise reasonable contracting practices and negotiate guarantees for tens of millions of dollars of obligations following the expiration of its lease demonstrates imprudence in contracting that customers should not be punished for.

86. Potential losses related to lack of payment guarantees are a risk that should fall on shareholders. Yet Westar, in this proceeding, is demanding that customers pay for 100% of the potential costs of this mistake.

87. To the extent Westar cannot obtain reimbursement from MWP due to contracting oversights, such losses should not be considered prudently incurred operating expenses to be included in "cost-of-service" ratemaking. Therefore, because Westar's Application asks customers to pay 100% of the costs previously assignable to MWP, the Westar Application should be rejected.

¹¹⁷ Tr., pp. 45-49; KIC #2.

¹¹⁸ Tr., p. 46; See also, KIC #3, establishing the Southwest Power Pool Credit Policy to minimize "...the likelihood of losses due to default...."

¹¹⁹ K.A.R. 82-3-120(g).

D. The Commission Should Allow Westar to Purchase and Operate the 8% interest in JEC Separate from Its Retail Cost-of-Service Operations.

88. In their Direct Testimonies, both KIC witness Mike Gorman and CURB witness Andrea Crane recommended the Commission allow Westar to purchase and operate the 8% interest in JEC as an "unregulated" or "below-the-line" asset.¹²⁰ Mr. Gorman states,

Because the acquisition would not be prudent for the benefit of ratepayers, but may be prudent for the benefit of investors, a regulatory structure should be implemented to provide Westar an ability to mitigate this cost recovery risk, and be made whole for its costs associated with [the] 8% [interest in] JEC.

...

Westar's current proposal simply seeks to use the retail ratepayers as a financial backstop for the troubled business partnership between Westar and MWP. If Westar truly believes purchasing the 8% interest in JEC is a good investment, then it should be allowed by the Commission to purchase the interest as an unregulated asset.¹²¹

89. This arrangement will place both the risk of loss and opportunities for profit with shareholders. Shareholders will be obligated to cover the costs of owning the 8% interest, but shareholders will also retain all revenues generated by the 8% interest in the wholesale markets.¹²² Most importantly, under this arrangement, retail ratepayers would not be required to pay the costs of an excess asset that is not needed to provide retail service.

90. As discussed during the evidentiary hearing, this specific scenario is expressly contemplated and authorized at paragraph 29 of the 18-328 Settlement. And Staff witness Justin Grady noted this would be a feasible outcome, stating,

[I]t wouldn't be anything inventive or difficult to administer. We just, we don't even have to call it a deregulated or unregulated asset. It's below the line. Right. You cannot recover these costs from retail customers. And so you're free to monetize and get all the value out of that asset that you want to. I mean, there probably would have to be some parameters around allocating all of the fixed costs, right,

¹²⁰ Gorman Direct, pp. 16-17; Crane Direct, p. 17.

¹²¹ Gorman Direct, pp. 16-17.

¹²² Gorman Direct, p. 17.

decommissioning costs and any potential shareholder...litigation costs or liability claims. But we could do it.¹²³

WHEREFORE, KIC respectfully requests the Commission deny Westar's Application and allow Westar to operate the 8% interest in Jeffrey Energy Center as contemplated at paragraph 29 of the 18-328 Settlement and under the regulatory parameters described at pages 17-18 of the Direct Testimony of Michael P. Gorman.

Respectfully submitted,

/s/ **Andrew J. French**

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¹²³ Tr., pp. 173-74.

VERIFICATION

STATE OF KANSAS)
)
COUNTY OF JOHNSON) ss:

Andrew J. French, being duly sworn upon his oath, deposes and states that he is the Attorney for the Kansas Industrial Consumers Group, Inc., that he has read and is familiar with the foregoing *Initial Brief of Kansas Industrial Consumers Group, Inc.*, and the statements therein are true to the best of his knowledge, information, and belief.



Andrew J. French

SUBSCRIBED AND SWORN to before me this 31st day of July, 2019.



Notary Public

My Appointment Expires:



CERTIFICATE OF SERVICE

I hereby certify a true copy of the foregoing was served by electronic mail (when available) or regular U.S. mail (unless otherwise noted), the 31st day of July, 2019, to the parties below:

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