

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

DEC 20 2010



In the Matter of the Application of Westar Energy,)
Inc. and Kansas Gas and Electric Company for an) Docket No. 10-WSEE-775-TAR
Order Authorizing Them to Participate in Efficiency)
Kansas, Approve the SimpleSavings Program Rider,)
and Related Cost Recovery.)
)

PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW

COMES NOW, the Citizens Utility Ratepayer Board (CURB) and submits its Proposed Findings of Fact and Conclusions of Law, for the Kansas Corporation Commission's (Commission) consideration in the above captioned docket.

On December 20, 2010, CURB filed its Responsive Post-Hearing Brief in the above captioned docket. CURB adopts the arguments, facts and law contained therein in support of the proposed Findings of Fact and Conclusion of Law herein. As supported in its Post-Hearing Responsive Brief, CURB submits the following proposed findings to the Commission:

I. Proposed Findings of Fact

1. Proposed Finding: Westar, CURB and Staff agree that Westar's SimpleSavings program should be approved subject to the following agreements:
 - a. Westar will assess a \$250 fee to customers who finance projects under the program.
 - b. Westar will assess a \$125 fee to customers who begin the SimpleSavings process or meet with Westar to receive education but who do not complete the process and take out a loan.

- c. Westar will assess no fee to customers whose audit does not show cost effective improvements are possible.
2. Proposed Finding: Westar's shared savings mechanism should be denied. Harden Direct Testimony at 26.
3. Proposed Finding: The Commission set forth its policy framework for energy efficiency programs and cost recovery in two separate dockets. After extensive comment from all interested parties, the Commission issued two Orders setting forth its specific policy principles: the June 2, 2008, *Order Setting Energy Efficiency Policy Goals* in Docket No. 08-GIMX-442-GIV ("442 Docket") as well as the November 14, 2008, *Final Order Regarding Cost Recovery and Incentives for Energy Efficiency Programs* in Docket No. 08-GIMX-441-GIV ("441 Docket").
4. Proposed Finding: The Commission established a general policy framework of review and evaluation of efficiency programs on a uniform and consistent basis. Deupree Direct at 3.
5. Proposed Finding: Allowable performance incentives are addressed by the Commission in paragraphs 79 through 111 of the 441 Order. The Commission is reluctant to provide additional incentives, resulting in increasing costs to consumers, for energy efficiency programs. 441 Order at para 94. If energy efficiency inherently does not result in the same amount of ratebasing, or capitalized costs, that is simply reflective of the nature of the resource. *Id.*
6. Proposed Finding: The Commission limited performance incentives to specific energy efficiency programs the Commission has determined are the most beneficial for Kansas energy customers and the long-term energy efficiency goals of the Commission. 441 Order at para. 96.
7. Proposed Finding: The Commission specified only two types of programs that would be

permitted performance incentives:

- a. Proposals for programs that target low and fixed income customers and renters.

and/or

- b. Proposals that target new and existing residential housing and demonstrate a potential for long term energy savings utilizing a comprehensive whole house concept, pursuant to Commission policy as expressed in Docket 08-GIMX-442-GIV. 441 Order at para. 97.

- 8. Proposed Finding: The Commission favors the shared benefit approach to performance incentives. Net benefits to be shared generally include avoided energy and capacity cost and transmission and distribution savings. 441 Order at 99.
- 9. Proposed Finding: Lost margin recovery mechanisms clearly fall within the throughput incentive section of the Commission 441 policy Order paragraphs 45 through 78. Deupree Cross Examination at 101.
- 10. Proposed Finding: If the Commission had intended to allow throughput incentives (decoupling or lost revenue recovery) as a performance incentive reward for programs that target low and fixed income customers and renters or are comprehensive whole house programs, the Commission would have included these programs in the throughput incentive section of the 441 order. Since both programs are included in the language in the performance incentive section of the 441 Order and both programs are specifically excluded from the throughput incentive section of the 441 Order, it is reasonable to conclude that the Commission did not intend to allow lost revenue or decoupling as a performance incentive. Deupree Cross Examination at 100-101.

11. Proposed Finding: The Commission does not favor lost margin recovery mechanisms. 441 Order at para. 68, Harden Direct Testimony at 21, 497 Docket, Buchanan Direct at 14.
12. Proposed Finding: Westar's proposed shared savings mechanism is what is traditionally referred to as a lost revenue mechanism. Rholf's Direct Testimony at 5, Rholf's Cross-Examination, Transcript at 36, Deupree Direct Testimony at 16, Harden Direct Testimony at 20.
13. Proposed Finding: Westar's shared savings program does not meet the definition of a shared savings program because Westar does not share avoided energy and capacity cost and transmission and distribution savings. 441 Order at 99.
14. Proposed Finding: Every energy efficiency and demand response program should result in some amount of avoided fuel costs. By Westar's definition of shared savings every energy efficiency program approved by the Commission will qualify for a performance incentive under the Commission's policy guidance. Under no reading of the Commission's policy Orders can it be concluded that the Commission intended to provide performance incentives for every program that saves fuel, therefore Westar's shared savings mechanism must be denied as inconsistent with Commission policy guidance.
15. Proposed Finding: Given the Commission's hesitance to embrace lost revenue recovery mechanisms, the utility should meet a high evidentiary standard to gain approval. 497 Docket, Buchanan Direct at 14.
16. Proposed Finding: To receive a throughput incentive, a utility must show that a program will have a significant detrimental impact on company finances. 441 Order at para. 47.

17. Proposed Finding: To receive a throughput incentive, a utility must provide a comparison of the potential financial impacts of the energy efficiency programs it has received approval for or intends to seek approval for and the expected financial outcome without energy efficiency programs in place. 441 Order at para. 72.
18. Proposed Finding: A utility must demonstrate that a throughput incentive makes economic sense in the context of the utility's efficiency program of suite of programs. 441 Order at para. 70.
19. Proposed Finding: Throughput incentives should be implemented in context of measurable and verifiable program performance in meeting Commission established goals. 441 Order at para.71.
20. Proposed Finding: It is unreasonable for Staff to interpret the Commission policy Orders to suggest the Commission now favors a lost revenue recovery mechanism as a reward for offering a whole house program. Deupree Cross-Testimony at 3.
21. Proposed Finding: Westar fails to provide any evidence in this case to meet the standard of proof set forth by the Commission.
22. Proposed Finding: Staff's analysis of projected revenue impacts to Westar is the only substantial competent evidence in the record. Staff's analysis is "technical, lengthy and difficult to explain in a testimonial format", but did include "an ordinary least squares regression process controlling for the effects derived from weather, inter-customer idiosyncrasies (cross-sectional effects) and participation within the How\$mart program". Deupree Direct Testimony at 12.
23. Proposed Finding: Staff's comprehensive analysis, projects that Westar will lose \$28,610 in company margins in the first 5 years of offering SimpleSavings. Hearing Exhibit CURB-1. These estimates are in nominal dollars, meaning when discounted back to today's value, it will be

about \$2000 less than the \$28, 610 figure, or less than \$6000 annually for the first five years of the SimpleSavings program. Deupree Cross-Examination at 114. This evidence is undisputed in the record.

24. Proposed Finding: Staff correctly denied Empire’s request for a lost revenue mechanism because Empire offered no explanation of how the mechanism makes economic sense in the context of the utility’s energy efficiency program or suite of programs and did not directly provide data to support its proposal for a lost revenue mechanism sufficient to address the Commission’s desire for information related to the expected financial outcome associated with the proposed energy efficiency programs and did not directly address rate volatility, as required by the Commission. 497 Docket, Buchanan Direct Testimony at 15.

25. Proposed Finding: Staff correctly applied the Commission’s suggested criterion for “significant” as 0.5% of base revenue when it compared Empire’s estimated lost revenue due to the programs at \$10,943 (or Staff’s analysis of Empire’s lost revenue of \$15,040) to Empire’s base revenue from its last case of \$17,458,452. Staff correctly concludes that Empire’s lost revenues do not meet the Commission’s criterion for significance and it is not clearly apparent that lost revenues serve as a strong deterrent to implementation of energy efficiency programs in this instance. 497 Docket, Buchanan Direct Testimony at 18.

26. Proposed Finding: Staff errs in this case by not applying the Commission’s policy framework in a uniform and consistent manner with that used in the Empire case. Staff should have compared Westar’s lost revenues against Westar’s base revenue to determine significance. Staff must conclude that \$6000 of lost margin revenues do not meet the Commission’s criterion for

significance and it is not clearly apparent that lost revenues serve as a strong deterrent to implementation of energy efficiency programs in this instance.

27. Proposed Finding: Staff correctly applied the Commission's high evidentiary standard regarding financial impact, as it did in the Empire case, in denying KGS' request for decoupling. Staff correctly determined that the recovery of less revenue in and of itself does not indicate significant detrimental impact on the finances of the company. Staff correctly required KGS to explain how the declining revenues will negatively impact the financial stability of the company, how it will influence its capacity to borrow money and at what interest rate and the effects of the financial stress on the customer service. 421 Docket, Glass Direct Testimony at 13.
28. Proposed Finding: Staff errs in this case by not requiring Westar to explain how the declining revenues will negatively impact the financial stability of the company, how it will influence its capacity to borrow money and at what interest rate and the effects of the financial stress on the customer service.
29. Proposed Finding: Staff correctly applied the Commission's high evidentiary standard regarding financial impact, as it did in the Empire and KGS cases, in denying Black Hills request for decoupling. Staff correctly focused on the need to see evidence providing economic justification for decoupling, including a comparison of potential financial effects with and without decoupling in place. Staff correctly compares potential lost margin revenues of \$38,921 to Black Hills latest base revenue requirement of \$37,765,176 and correctly concludes that the effect of implementing energy efficiency programs on revenues is unlikely to be significant enough to deter its participation and decoupling solely to address the revenue variability related to energy efficiency is likely to be unnecessary. 639 Docket, Buchanan Direct Testimony at 20.

30. Proposed Finding: Staff errs in this case by not applying the Commission's policy framework in a uniform and consistent manner with that used in the Empire, KGS and Black Hills cases. Staff should have compared Westar's lost revenues against Westar's base revenue to determine significance.
31. Proposed Finding: It is possible that in during very hot summer, Westar's normal rates and increased volumes due to weather could result in Westar collecting more revenue than its Commission allowed revenue requirement at the same time Westar is increasing rates to recover lost margins from the SimpleSavings program. Rholf's Cross-Examination at 37.
32. Proposed Finding: The policy expressed in the 441 and 442 orders meet the requirements of the America Reinvestment and Recovery Act of 2009 (ARRA). Allowing Westar's lost revenue recovery mechanism is unnecessary to meet the ARRA goals.

II. Conclusions of Law


33. Proposed Finding: Generally, administrative agencies may change positions on an issue if the new position is supported by substantial competent evidence. However, when an administrative agency deviates from a policy it had adopted earlier, it must explain the basis for the change. *Western Resources, Inc.*, 30 Kan. App. 2d 348, Syl. ¶ 7. Likewise, the process by which an administrative agency reaches its decision must be logical and rational, especially if the agency is deviating from its prior standards. *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 1002, 1012, 76 P.3d 1071 (2003), *rev. denied* 277 Kan. 923 (2004). Staff interpretation of the Commission policy Orders to suggest the Commission meant to say that it favors a lost revenue recovery mechanism as a reward for offering a whole house program (Efficiency Kansas)

is unreasonable. Staff's interpretation is inconsistent with the basic tenets and layout of the Commissions policy Orders and the Commission should deny Westar's mechanism on this basis.

34. Proposed Finding: The standard of evidence the Commission must meet for its decisions to be lawful and valid was considered in *Zinke & Trumbo Ltd. v. Kansas Corp. Comm'n*, 242 Kan. 470, 749 P.2d 21 (1988). In *Zinke*, the Court held that to be lawful and valid, the Commission's decision must be supported by substantial competent evidence, and must not be unreasonable, arbitrary, or capricious. 242 Kan. at 474. Staff's application of Commission policy in this case is not uniform and consistent with Staff's application of Commission policy in other instances and therefore not supported by substantial competent evidence, is unreasonable and arbitrary and capricious.

WHEREFORE, CURB Respectfully submits the above Findings and Fact and Conclusions of Law and requests the Commission issue an Order consistent with the Facts and Law contained herein.

Respectfully submitted,



David Springe #15619

Niki Christopher #19311

C. Steven Rarrick #13127

Citizens' Utility Ratepayer Board

1500 SW Arrowhead Road

Topeka, KS 66604

(785) 271-3200

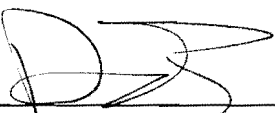
(785) 271-3116 Fax

VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

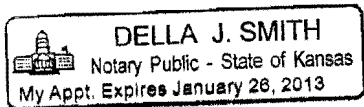
I, David Springe, of lawful age, being first duly sworn upon his oath states:

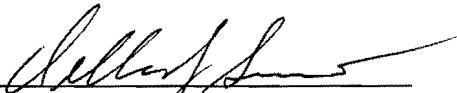
That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above, and foregoing document and upon information and belief, states that the matters therein appearing are true and correct.



David Springe

SUBSCRIBED AND SWORN to before me this 20th day of December, 2010.





Notary Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

10-WSEE-775-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, electronic service, or hand-delivered this 20th day of December, 2010, to the following:

COLLEEN HARRELL, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
c.harrell@kcc.ks.gov
**** Hand Deliver ****

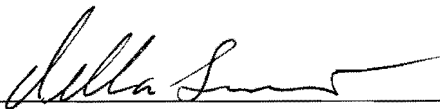
MATTHEW SPURGIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
m.spurgin@kcc.ks.gov
**** Hand Deliver ****

EILEEN M. SMITH, M.ARCH., PRESIDENT/CEO
KANSAS SOLAR ELECTRIC CO-OPERATIVES, INC.
PO BOX 2
LAWRENCE, KS 66044
ks_sec@yahoo.com

MARTIN J. BREGMAN, EXEC DIR, LAW
WESTAR ENERGY, INC.
818 S KANSAS AVENUE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
marty.bregman@westarenergy.com

CATHRYN J. DINGES, CORPORATE COUNSEL
WESTAR ENERGY, INC.
818 S KANSAS AVENUE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
cathy.dinges@westarenergy.com

MIKE LENNEN, VP REGULATORY AFFAIRS
WESTAR ENERGY, INC.
818 S KANSAS AVENUE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8119
michael.lennen@westarenergy.com



Della Smith