

**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) Docket No. 19-WSEE-355-TAR
Costs Through Their RECA)

**POST-HEARING BRIEF OF THE
CITIZENS' UTILITY RATEPAYER BOARD**

July 31, 2019

Table of Contents

I.	Introduction	3
	A. <u>Background</u>	5
II.	Outline of Pertinent Authority	8
III.	Issues Before the Commission	10
IV.	Arguments and Authorities	10
	A. <u>The request to amend the RECA should be viewed like a rate case because the issues stem directly from Westar’s most recent rate case and the tariff has similarities to a rate schedule by requiring prior approval before adjusting the tariff for changes in rates</u>	10
	B. <u>The costs that Westar seeks to recover through its RECA stem from property that is not “used and required to be used” to provide customers with sufficient and efficient service</u>	12
	C. <u>The Settlement Agreement reached in 18-WSEE-328-RTS (“Westar Rate Case S&A”) does not preclude the parties or the Commission from examining the prudence of recovering costs through the RECA</u>	17
	D. <u>The Commission has several options to make Westar whole after the purchase of the 8% interest in JEC</u>	20
V.	Conclusion	21

COMES NOW, The Citizens' Utility Ratepayer Board (“CURB”) and respectfully submits its *Post-Hearing Brief* pertaining to the Joint Application (“Application”) filed by Westar Energy Inc. and Kansas Gas and Electric Company (collectively known as the “Joint Applicants”) seeking approval of recovery of certain costs through their Retail Energy Cost Adjustment (“RECA”). CURB recommends that the State Corporation Commission of the State of Kansas (“Commission”) deny the application. In the alternative to denying the application, CURB recommends that the Commission develop a cost-sharing structure between the ratepayers and the companies’ shareholders. In support thereof, CURB states as follows:

I. Introduction

1. As stated above, CURB recommends that the Commission deny the application to modify the RECA to recover certain costs. On August 4, 2019, Westar is expected to complete a transaction with Midwest Power Company (“MWP”) for the purchase of MWP’s ownership of an 8% undivided interest in the Jeffery Energy Center (“JEC”).¹ In this application, Westar seeks to amend its RECA tariff to allow collection of non-fuel operation and maintenance costs (“NFOM”) that are incurred while operating the additional 8% of JEC. Additionally, Westar seeks to recover seven months’ worth of lease payments paid by Westar to MWP pending the completion of the sale. At \$690,000 per month, this is approximately \$4,830,000. In essence, this is a request to increase rates for the consumer. The record shows that Westar does not currently need this capacity to meet its customers’ demands and will not need the energy for at least another ten years, according to current projections.² CURB believes that ratepayers should not be expected to pay for energy that is not used to provide sufficient and efficient service, and therefore, the Commission should deny the application. Accordingly, if the Commission denies the application,

¹ Direct Testimony of Darrin Ives (Ives Direct), 19-WSEE-355-TAR (March 4, 2019) pg. 2-3.

² Kansas Industrial Consumers Group (“KIC”) Exhibit 4; KIC Data Request #11.

Westar will have the option to either 1) de-rate the 8% and leave it idle or 2) continue producing energy with the 8% as an unregulated asset with which Westar can enjoy the benefits directly for its shareholders. Westar contends that ratepayers have received significant benefits from the sale/leaseback transaction with MWP in 2007. As a result, Westar asserts that the ratepayers should be liable for costs in wrapping up a previously prudent business transaction and to avoid expensive and time-consuming litigation. However, the past benefits of the sale/leaseback transaction are not relevant to the determination of the prudence of the purchase or to the justification of passing the future costs onto ratepayers. Significant changes in circumstances and the energy market have drastically decreased the benefits that could be recognized from the 8% interest. A middle ground approach that splits the cost of operating the 8% interest between ratepayers and the shareholders would also address the imbalance of risk and reward allocation.

2. This docket is appropriately within the purview of the Commission under the settlement agreement reached in Westar's most recent general rate case. The settlement outlined the procedure to address certain costs being flowed through Westar's RECA in a variety of scenarios. One scenario envisioned a request to recover lease expenses and NFOM after a finding that a new lease or purchase agreement is a prudent decision for ratepayers. Staff and Westar contend that review of anything more than the purchase price and new lease expense is inconsistent with the settlement agreement. CURB disagrees. Based on the plain language of the settlement, review of the entire lease and purchase agreement, including recovery of the lease expense and NFOM costs, is appropriate.

3. The parties present a number of options for the treatment of expenses associated with the 8% interest in the JEC. CURB urges the Commission to select the best option that provides

Kansas ratepayers with just and reasonable rates and fairly distributes the risks associated with operating the 8% interest in JEC between ratepayers and shareholders.

A. Background

4. On March 4, 2019, the Joint Applicants filed an application with the Commission requesting approval for recovery of certain costs associated with the purchase of an 8% undivided interest in JEC through Westar's RECA. The 8% interest belongs in a trust and is managed by MWP on behalf of the trust. MWP has been leasing its interest to Westar, the owner and operator of JEC, since 2007.³ Westar obtained this lease by assuming it from Aquila, Inc., previously known as Utilicorp. Utilicorp had been leasing the 8% interest from the trust since 1991. Westar operated and maintained all of JEC and would bill its co-owners for their share of the expenses.⁴

5. At the time of Westar's assumption of the lease in 2007, Westar entered into a power purchase agreement ("PPA") with Mid-Kansas Electric Company ("MKEC") to sell the entire output from the 8% interest. The proceeds were used to credit MWP for its share of operating JEC. This PPA and lease agreement expired on January 3, 2019. Despite efforts to continue the arrangement, the parties were unable to reach an agreement before January 3, 2019.⁵

6. Meanwhile, Westar filed a rate case, 18-WSEE-328-RTS ("Westar GRC"), on February 1, 2018. One of the subjects related to the ratemaking treatment of the costs associated with the 8% interest owned by MWP. The parties raised a number of concerns with certain costs being in rates.⁶ Parties reached a settlement in regards to the ratemaking treatment of the 8% interest. The settlement agreement laid out a number of scenarios in which Westar could recover

³ Joint Application, pg. 2

⁴ Direct Testimony of Darrin Ives (Ives Direct), pg. 5, lns. 14-17.

⁵ Transcript of Evidentiary Hearing ("Tr.") at pg. 65, lns. 17-21.

⁶ Application at pg. 4.

costs related to the operation of the 8% of JEC.⁷ The Commission ultimately approved the settlement agreement on September 27, 2018.

7. On August 10, 2018, MWP filed an application pursuant to K.S.A. 66-131 in Docket No. 19-MPCE-064-COC (“MWP Certificate Docket”), requesting the Commission to grant it a certificate of convenience and necessity to operate as a public utility in Kansas related to MWP’s 8% ownership in JEC.⁸ Westar intervened in that docket and filed testimony in opposition because of concerns with MWP’s ability to financially support the 8% interest and MWP’s unwillingness to pay its share of expenses in the event that the parties could not settle in the docket.⁹

8. The application went through evidentiary hearing and the parties submitted post-hearing briefs. While waiting on a Commission order, Westar and MWP reached a settlement agreement that ultimately led MWP to withdraw its application.¹⁰ The agreement involved two short term lease extensions, effective from January 4, 2019 to August 4, 2019. During that period, Westar agreed to lease the 8% from MWP at a cost of \$690,000 per month for seven months. The lease extension was retroactive to January 4, 2019 to avoid an effective transfer of control of the 8% interest in JEC.¹¹ At the end of the lease extension, MWP will transfer its 8% interest in JEC to Westar for the price of \$3.7 million.¹²

9. On March 13, 2019, CURB filed its Petition to Intervene and Motion for Protective Order and Discovery Order. The Commission granted intervention to CURB on March 28, 2019.

⁷ See Non-Unanimous Stipulation and Agreement, Docket No. 18-WSEE-328-RTS, ¶¶ 25-32 (“Rate Case S&A”).

⁸ Application at pg. 1.

⁹ Id. at pg. 3.

¹⁰ Midwest Power Company Notice of Withdrawal, Docket No. 19-MPCE-064-COC (March 1, 2019).

¹¹ Ives Direct at pg. 9, Ins. 16-26.

¹² Ives Direct at pg. 10, Ins. 1-2.

10. On June 4, 2019, CURB, Staff, and Kansas Industrial Consumers Group (“KIC”) filed direct testimony. CURB and KIC opposed the application to collect lease expenses and NFOM costs from the ratepayers due to the imbalance in risk allocation and on their analysis of the expected revenue and costs related to operating the 8% interest in JEC.¹³ Specifically, CURB witness, Andrea Crane, indicated that Westar had not made a compelling case as to why these costs should be borne by Kansas ratepayers and that, from an “all-in” perspective, the revenues from the additional 8% interest in JEC would not even cover the associated fuel costs, resulting in a net detriment to ratepayers.¹⁴

11. On June 14, 2019, Staff and KIC filed cross-answering testimony. Staff criticized CURB’s and KIC’s analytical methodologies and indicated that Westar’s prudence in acquiring the lease from Aquila in 2007 justified collecting the additional lease and NFOM from ratepayers.¹⁵

12. On June 21, 2019, Westar filed its rebuttal testimony, generally agreeing with Staff’s position (collectively referring to Staff and Westar as “RECA Proponents”).¹⁶

13. On July 16, 2019, the Commission held an evidentiary hearing (“Hearing”) on this matter.

¹³ See Direct Testimony of Andrea Crane (Crane Direct) (June 4, 2019); Direct Testimony of Michael Gorman (Gorman Direct) (June 4, 2019).

¹⁴ Crane Direct at pg. 11, lns. 11-13.

¹⁵ Cross-Answering Testimony of Justin Grady (Grady Cross-Answering), pg. 2, lns. 5-20.

¹⁶ See Rebuttal Testimony of Darrin Ives (Ives Rebuttal).

II. Outline of Pertinent Authority

14. The Commission has a broad grant of authority pursuant to K.S.A. 66-101.¹⁷ Rates, fares, tolls, and charges imposed by a public utility must be just and reasonable, not unjustly or unreasonably discriminatory, and not unduly preferential.¹⁸ Review of a tariff can be classified as either tariff interpretation or as a rate hearing.¹⁹ In determining which standards apply, two factors are utilized when examining a tariff outside of a general rate case: 1. The close relationship between the present case and the prior rate case, and 2. The similarity of the involved tariff to a rate schedule.²⁰ The Commission balances the interests of the utility's investors, ratepayers, and the public in setting just and reasonable rates.²¹ In Kansas, electric public utilities are required to "furnish reasonably efficient and sufficient service and facilities" in its service territory.²² Furthermore, the Commission has the power to require all electric public utilities "to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service...."²³

15. In other words, recovery of costs are not appropriate unless the costs are reasonably necessary to provide efficient and sufficient service to ratepayers. In order for an electric public utility to include property into rates, the property must be "used and required to be used."²⁴ More specifically, the Kansas Court of Appeals has stated that, "capital costs for new plants, generators, or other facilities are allowed into rates only when they become 'used and required to be used' in

¹⁷ "The commission is given full power, authority and jurisdiction to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." K.S.A. 66-101.

¹⁸ See K.S.A. 66-101d.

¹⁹ Kansas Gas and Elec. Co. v. State Corp. Com'n of State of Kansas, 14 Kan.App.2d 527, 529 (1990).

²⁰ Id. (citing In re Application of Southwestern Bell Tel. Co., 9 Kan.App.2d 525 (1984)).

²¹ Kansas Gas and Elec. Co. v. State Corp. Com'n, 239 Kan. 483, 488 (1986).

²² K.S.A. 66-101b.

²³ *Id.*

²⁴ See K.S.A. 66-128(a).

service to ratepayers.”²⁵ Essentially, utility property is required to be used when the utility property is reasonably necessary to provide the utility’s customers with sufficient and efficient service.²⁶ In the event that a utility company incurs costs in the acquisition of excess capacity, the Commission has the power and authority to exclude all or a portion of those costs from the revenue request by the utility.²⁷ “Excess capacity” means any capacity in excess of the amount used and required to be used to provide adequate and reliable service to the public. The Commission can also prohibit or limit the return on costs which are incurred in constructing, maintaining, or operating excess capacity. The law requires that the Commission balance the competing consumer and investor interests to determine just and reasonable rates.²⁸ The Commission is not required to set rates at a level that will guarantee the continued financial integrity of the utility. Rather, rates are set at a level that provide the opportunity for the utility to earn sufficient funds to pay its operating costs and earn a sufficient rate of return to remain financially stable.²⁹ Due to its inherently legislative function, the Commission can consider matters of policy in establishing “just and reasonable” rates.³⁰ Generally, administrative agencies may change positions on an issue if the new position is supported by substantial competent evidence.³¹

²⁵ Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan., 36 Kan. App. 2d 83, 97, 138 P.3d 338, 350 (2006) (emphasis added).

²⁶ *Id.*

²⁷ K.S.A. 66-128(c).

²⁸ Kansas Gas and Elec. Co. at 490.

²⁹ Kansas City Power & Light Co. v. State Corp. Com'n of State, 52 Kan.App.2d 514, 542 (2016).

³⁰ Midwest Gas Users Ass'n v. State Corp. Commission, 5 Kan.App.2d 653, 659 (1981).

³¹ Kansas Indus. Consumers Grp., Inc. at 90.

III. Issues Before the Commission

16. The Commission is tasked with examining all the evidence to determine whether to allow Westar recovery of NFOM and lease expenses through Westar's RECA incurred from a new lease and purchase agreement with MWP to purchase MWP's 8% interest in JEC. Westar also requests to collect future NFOM expenses from ratepayers incurred while operating the purchased 8%. The Commission must evaluate whether the new lease and purchase agreement is a prudent decision for Westar's customers before authorizing this recovery. CURB advocates a review using the above standards and principles to analyze the entire lease and purchase agreement, including NFOM expense treatment.

IV. Arguments

A. The request to amend the RECA should be viewed like a rate case because the issues stem directly from Westar's most recent rate case and the tariff has similarities to a rate schedule by requiring prior approval before adjusting the tariff for changes in rates.

1. The filing of this application follows procedural requirements outlined in the settlement agreement from Westar's most recent rate case, 18-WSEE-328-RTS ("Westar Rate Case S&A").

17. As part of a settlement in the 18-328 rate case, the parties agreed to establish a set of conditions to allow Westar to recover certain expenses associated with operation of the 8% interest in JEC owned by MWP.³² The settlement agreement was crafted without the foresight of the fate of the 8% interest in JEC and the parties attempted to draft for every possible outcome involving the RECA. In the settlement agreement, Westar amended its RECA to be consistent with recommendations from Staff. Westar also withdrew its request to amend the RECA to allow changes in revenue from additional wholesale contracts to flow through the RECA. Westar would

³² Westar Rate Case S&A at ¶¶25-32.

be allowed to flow the lost revenues from expiration of the MKEC PPA through the RECA.³³ Paragraph 28 deals directly with the inclusion of lease expenses and NFOM costs being included with the RECA. The relationship between this case and the 18-328 case is extremely close as this case is a shoring up of the only outstanding issue from the 18-328 case based on terms from the settlement agreement. Therefore, the first factor weighs in favor of reviewing this case with ratemaking standards.

2. The RECA is similar to a rate schedule because of the provisions that require KCC approval before modifying rates and acts to bind both the utility and the customer.

18. The RECA contains terms and conditions for approval with the KCC before changing rates, similar to a rate schedule. A rate schedule involves “pricing the product to particular classes of customers to permit the utility to recover revenue to which it is entitled” while a tariff is defined as “those terms and conditions which govern the relationship between the utility and its customers.”³⁴ While tariffs are broader than rate schedules, the two draw similarities when a tariff is required to comport with conditions and provisions approved by the Commission. In Kansas Gas and Elec. Co. v. State Corp. Com’n of State of Kansas, 14 Kan.App.2d 527, the Court found that the tariff in question could be suspended by the Commission by notifying the utility in advance. Additionally, the tariff contained language that “the rates and any terms or conditions provided herein are subject to changes or substitutions, either in whole or in part, made from time to time by a legally effective filing of the Company with, or by order of, the regulatory authority having jurisdiction....”³⁵ The procedure to effectuate this section gave the Commission a window of time to review submitted information and inform the utility company of issues. The Court found

³³ Id. at ¶26.

³⁴ Kansas Gas and Elec. Co. v. State Corp. Com’n of State of Kansas, 14 Kan.App.2d 527, 534 (1990), quoting In re Application of Southwestern Bell Tel. Co., at 530-31 (1984).

³⁵ Id. at 536.

this particular portion of the tariff to support the notion of applying ratemaking factors to the analysis.

19. Here, the RECA includes similar language on Paragraph 9 of the “NOTES TO THE TARIFF” section: “All provisions of this rate schedule are subject to changes made by order of the regulatory authority having jurisdiction.”³⁶ The RECA contains a section that requires the Commission Staff to review changes in the RECA’s Southwest Power Pool (“SPP”) charges and credits as submitted by Westar. In the event that an agreement is not reached by Staff and Westar, Westar is able to file an application requesting the change.³⁷ In addition to the plain language in the RECA referring to itself as a rate schedule, the requirement for Commission approval is similar to a rate schedule. Therefore, the second factor weighs in favor of reviewing this case with ratemaking standards.

B. The costs that Westar seeks to recover through its RECA stem from property that is not “used and required to be used” to provide customers with sufficient and efficient service.

1. RECA Proponents have not demonstrated that the additional 8% capacity is needed, or being used; therefore, the additional 8% is not necessary to provide efficient and sufficient service and does not meet the K.S.A. 66-128 requirement of “used and required to be used.”

20. The additional 8% capacity is not needed, nor being used to provide efficient and sufficient service to Westar’s customers. The Joint Applicants bear the burden of proof regarding this issue. Simply put, the Joint Applicants have not met that burden, nor has any other party to this docket, and as a result, the NFOM and lease expenses associated with the 8% interest should not be paid by the ratepayers. Conversely, the record contains substantial competent evidence that the 8% interest is not and will not be used to provide sufficient and efficient service to Westar’s

³⁶ Application at “Clean Version of RECA Tariff” Sheet 7, ¶9.

³⁷ Application at “Clean Version of RECA Tariff” Sheet 9, ¶13.

ratepayers. According to Westar witness Mr. Darrin Ives, the entire output from the 8% interest has been sold to MKEC under the PPA since 2007.³⁸ The parties to that agreement failed to renew the arrangement before its expiration on January 3, 2019. Ultimately, MWP agreed to a settlement with Westar that resulted in the excess capacity being sold into the SPP market.³⁹

21. This capacity from the 8% is not needed to meet Westar's obligation to provide service to its customers. The record shows that Westar anticipates having a surplus of energy to meet its system peak conditions through 2030.⁴⁰ In response to KIC data request #11 and #12, Westar indicates that it does not currently need the 8% interest in JEC to comply with the SPP's capacity reserve requirements or Westar's retail load. Westar argues that the planning scenario provided in the evidentiary hearing does not factor in a myriad of other market conditions and scenarios that could affect energy levels.⁴¹ Westar seems to downplay the accuracy of the planning model from KIC exhibit #4. However, even if the market shifts and more energy is needed, it does not default to the 8% in JEC being a cost-effective way to obtain that energy. Furthermore, the notion that the 8% in JEC will serve as a safety net in the future lacks merit because Westar itself has not even contemplated it within any Integrated Resource Plan planning process.⁴²

22. Westar has not demonstrated that utilizing the additional 8% will be a cost-effective way to meet increased demand.⁴³ Coal generation is having to make way for other forms of energy production. Ms. Crane's professional experience gives her unique insight to national trends with energy.⁴⁴ She is involved in several cases around the country where coal plants are shutting down

³⁸ Ives Direct at pg. 3

³⁹ Ives Direct at pg. 9

⁴⁰ KIC Exhibit #4.

⁴¹ Tr. at pg. 55, lns. 4-22 (July 16, 2019).

⁴² Westar Response to KIC DR #14.

⁴³ Crane Direct at pg. 12, lns. 6-8 (June 4, 2019).

⁴⁴ Crane Direct at Appendix A.

prematurely and renewable energy is being promoted.⁴⁵ She contends that coal generation will become less favorable and less economic over time. The movement towards renewable energy is picking up momentum and aiming to outpace the more “traditional” forms of energy production. More and more leaders are looking for ways to curb carbon emissions and reduce the impact people have on climate change. KIC witness Mr. Michael Gorman touches on the uncertainty associated with coal generation. He predicts that the risk of increasing costs associated with environmental retrofits and regulation will make the JEC even more uneconomical for ratepayers.⁴⁶ Faced with those changes, revenue produced by the 8% may not be able to cover the costs to operate and maintain it.⁴⁷ Using ratepayers to prop up a form of electricity that is going out of favor does not advance policy goals of sufficient and efficient service and cleaner energy.

2. Any past benefits that ratepayers received under the sale/leaseback transaction are not relevant in determining prudence going forward because those benefits have been significantly altered since the end of the original lease on January 3, 2019.

23. The benefits that ratepayers may have received since 2007 from the PPA with MKEC are not an appropriate guidepost for the justification of ratepayers assuming 100% of the risk for operating the additional 8%. Westar and Staff frame this issue as a one-sided equity argument: because ratepayers benefited under a specific set of circumstances, ratepayers must bear the complete fallout when those circumstances no longer exist. In their minds, the pendulum must swing back against the ratepayers. This thinking is flawed. The millions of dollars accrued over the past decade does not translate into a boon for current and future ratepayers. Rates will not decrease nor will customers have better access to electricity because Westar had a previously favorable deal with a buyer who is no longer willing to buy at today’s prices.

⁴⁵ Tr. at pg. 133, lns. 1-16.

⁴⁶ Gorman Direct at pg. 12, lns. 9-21.

⁴⁷ Gorman Direct at pg. 12, lns. 22-23

24. Ms. Crane testifies that ratepayers were not a party to the acquisition of Aquila's lease nor had any responsibility in crafting the arrangement between Westar, MWP, and MKEC.⁴⁸ Westar's predecessor and Westar itself were in the best position to craft the terms and conditions of the acquisition and to protect itself from the problems leading up to the expiration of the lease in 2019. Instead of utilizing the various foreclosure and recovery mechanisms available in the agreements surrounding the 8% interest in JEC, Westar and MWP waited until the conclusion of MWP's certification docket before coming to an agreement and making the ratepayers the payer of last resort.⁴⁹ The margins for profit in selling the energy into the SPP market are much slimmer than those produced under the original lease and MKEC PPA.⁵⁰ CURB asserts that the risks associated with the uncertainty of the energy market in the future can result in a net negative for ratepayers, who, under the proposal, will be covering the expenses without seeing any additional service.

3. An all-in cost analysis for the 8% interest is the appropriate way to view future benefits because the energy from the 8% is not used or required to be used to provide electricity to customers.

25. CURB contends that the cost/benefit analysis in this case should include the fuel and fixed NFOM costs to JEC.⁵¹ Westar argues that an incremental analysis which looks at the incremental benefits of operating the 8% interest over the costs that Westar incurs operating 100% of JEC as owner and operator.⁵² Mr. Grady explains that only the variable costs (fuel and variable NFOM) should be included because the remaining fixed costs are incurred by Westar by virtue of running JEC.⁵³ He says that Westar is only incurring these expenses due to the decision to assume

⁴⁸ Crane Direct at pg. 15, lns. 12-15.

⁴⁹ Tr. at pg. 80, lns. 1-18.

⁵⁰ Tr. at pg. 66, lns. 15-22.

⁵¹ Crane Direct at pg. 12, lns. 8-14.

⁵² Ives Rebuttal at pg. 9, lns. 9-22.

⁵³ Grady Cross-Answering at pg. 2, lns. 9-15.

the Aquila lease in 2007 and MWP's decision to not pay those expenses after the lease expires. Westar's position revolves around leaving ratepayers alone to pay the expenses because the transaction in 2007 was deemed prudent and now the expenses cannot be avoided.⁵⁴

26. Staff and Westar's analysis leaves out several factors that make the operation of the 8% of JEC a potential negative for ratepayers. First, Westar is not using the 8% capacity from MWP to supply power to its retail customers. Ratepayers should not be expected to pay for costs that do not stem from providing sufficient and efficient service. Second, Ms. Crane points out that the analysis that Westar provided in the 19-064 docket indicated that revenues from the 8% interest in JEC would not produce a single year of profits through 2034.⁵⁵ This takes into consideration of costs that only MWP may incur. However, Ms. Crane highlights that even allocating a reasonable level of fuel and fixed NFOM costs would result in a loss with the 8%.⁵⁶ She indicates that Westar and Staff unfairly assume that without MWP or any other party available to cover these expenses, it should automatically default to ratepayers to cover them. The shareholders remain a viable group to pay. Mr. Gorman also advocates for an all-in cost approach. He indicates that the 8% interest costs were included in Westar's cost of service, but only because the costs were offset by the revenue generated by the MKEC PPA.⁵⁷ He, too, notes Staff's and Westar's mere assumption that ratepayers should pay for the costs due to the benefits, but states that it is the Commission's review of the purchase agreement that determines whether ratepayers should bear the NFOM and associated fuel costs, rather than past benefits received under a prior agreement.⁵⁸

⁵⁴ Grady Cross-Answering at pg. 3, lns. 2-4.

⁵⁵ Crane Direct at pg. 14, lns. 3-9.

⁵⁶ Crane Direct at pg. 14, lns. 7-13.

⁵⁷ Gorman Cross-Answering at pg. 4, lns. 6-11.

⁵⁸ Gorman Cross-Answering at pg. 5, lns. 10-21.

C. The Settlement Agreement reached in 18-WSEE-328-RTS (“Westar Rate Case S&A”) does not preclude the parties or the Commission from examining the prudence of recovering costs through the RECA.

1. Staff’s interpretation of certain language in the S&A is too narrow and effectively makes Commission approval moot.

27. The S&A creates certain conditions precedent in order to allow Westar to recover lease expenses and NFOM through the RECA. Paragraph 28 governs the procedure in the event that Westar enters into a new lease or purchase agreement for the 8% share of JEC. Westar is able to create a regulatory asset that contains actual lease expenses and/or NFOM associated with the 8% interest. Westar is then authorized to file a request with the Commission to include these expenses in the RECA to collect them from ratepayers. Westar has the burden of showing that the new lease or purchase agreement is a prudent decision for its retail customers. Paragraph 29 contemplates a number of scenarios associated with Westar’s request to recover these costs. If the Commission denies the request, Westar is not allowed to recover the regulatory asset with the deferred lease and NFOM expenses. However, in that event, Westar would be allowed to retain any wholesale sales directly attributable to the 8% interest. In the event that Westar negotiates a “zero-cost” transfer of ownership (defined as \$0 or \$1), then Westar is automatically entitled to start recovering actual NFOM and fuel expenses associated with the 8% ownership without Commission approval. In Paragraph 30, Westar is also able to use a regulatory asset to keep track of unrecovered costs associated with the 8% when MWP is more than 60 days late in making a payment. Paragraph 31 acts as a disclaimer in preserving the rights of other parties and the Commission in determining the recoverability of the regulatory asset.

28. Staff and Westar assert that CURB's taking an adverse position on the current application is logically inconsistent with what is laid out in Paragraph 29 and 31.⁵⁹ They assert that CURB was a signing party to the Westar Rate Case S&A and thus has implicitly agreed to Westar's recovery of these expenses and that a difference in purchase price should not subject Westar to a higher burden of proof. However, Paragraph 29 does not set restrictions on a party's position in the recovery of those expenses. The "zero-cost" event removes the necessity for a filing with the Commission and thus, removes further input from other parties. CURB and other signatories could very well be opposed to Westar's filing, but agreed to forgo argument in that specifically defined event.

29. With that condition left unfulfilled, the parties are left with a typical filing without other limitations on rights. If Staff and Westar's interpretation is followed, then what is the purpose of filing a formal request? If parties are supposed to presume the prudence of the lease or purchase agreement, then why bother to have the Commission review it? Mr. Grady questions how a \$3.7 million purchase price that has no effect on the level of NFOM would subject Westar to a higher standard to justify recovery.⁶⁰ This train of thought begs the question of why does a \$0 or \$1 purchase price (that also has no effect on the level of NFOM) get to bypass the rate-making process and authority of the Commission. The answer to both questions is the same: it was agreed to in the Westar Rate Case S&A. Regardless of the implication such an agreement has, Paragraph 29 does not establish each parties' position on recovery of expenses; it simply doles out risk among the parties.

⁵⁹ Cross-Answering Testimony of Justin Grady (Grady Cross-Answering) pg. 19, lns. 12-19.

⁶⁰ Id. at pg. 20, lns. 1-3.

2. The lease and purchase agreement as a whole must be examined for prudence, not just the purchase price and lease expenses.

30. Staff contends that Paragraph 28 and 29 of the Westar Rate Case S&A leaves Westar the burden to show that only the purchase price and lease extensions are prudent decisions for customers.⁶¹ However, as Ms. Crane points out in her live testimony, the Westar Rate Case S&A and Paragraph 28 focuses on the Commission's authority to approve or deny recovery of the regulatory assets, which contain NFOM.⁶² She further explains that the plain language of Paragraph 28 uses the broader term "lease or purchase agreement" rather than specifying the purchase price and lease expenses.⁶³ The agreement between Westar and MWP that led to the termination of the 19-MPCE-064-COC docket ("MWP S&A") contemplates resolution of MWP's obligation to pay Westar for operating the 8% on MWP's behalf.⁶⁴ As part of the new purchase agreement, Westar and MWP agreed to release one another 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."⁶⁵ The MWP S&A also releases and discharges MWP from any and all obligations related to the 8% interest and terminates all the prior agreements between the parties.⁶⁶ These releases include the NFOM expenses that Westar had been billing MWP and that MWP had indicated it would not pay. Without MWP to pay these expenses, Westar turns to the ratepayer as the payer of last resort to cover the costs. Therefore, the NFOM costs should be evaluated by the Commission in addition to all other factors presented.

⁶¹ Id. at lns. 8-15.

⁶² Tr. at pg. 129, lns. 12-18.

⁶³ Tr. at pg. 135, lns. 1-5.

⁶⁴ Ives Direct, Attachment A, "Confidential Settlement Agreement and Release" (February 8, 2019).

⁶⁵ Id. at §4(a)

⁶⁶ Id. at §§4(d) and (e).

D. The Commission has several options to make Westar whole after the purchase of the 8% interest in JEC.

- 1. The Commission can choose to allow Westar to operate the 8% interest in JEC as an unregulated asset, giving its shareholders the opportunity to profit just as the ratepayers have previously.**

31. CURB and KIC have both advanced a similar alternative proposal for Westar to simply operate the 8% interest as an unregulated asset.⁶⁷ In essence, any revenue generated above and beyond the operating costs would be retained by Westar for the benefit of its shareholders. Ratepayers would have no expectations to receive credit towards their rates from the revenue. Likewise, ratepayers should be insulated from having to bear the costs of operating the 8% interest in the event wholesale revenues do not cover expenses. Both Staff and Westar have recognized this as a potential option, but have chosen to advocate for a ratepayer-backed solution.⁶⁸

32. Based on the RECA proponents' analysis and revenue forecasts, there is an expected profit to come from buying this 8% for most of JEC's remaining life. Westar would enjoy nearly an identical time period of revenue that ratepayers did under the original lease agreement. Although the revenue coming in is different than that under the original lease, this should encourage Westar to find a willing wholesale buyer to further increase revenue. Staff and Westar continue to rely on the argument that the past benefits to ratepayers justify collecting expenses from ratepayers. It is important to note that Westar and other parties in 2007 were subject to the same uncertainty in the market. Ratepayers also risked not making a profit during the MKEC PPA and were unable to do anything about it. With this alternative proposal, Westar would still be able to recoup its expenses and enter into another favorable wholesale agreement that Westar alone may enjoy. This best accomplishes the goal of balancing ratepayer and shareholder interest by

⁶⁷ Crane Direct at pg. 18, lns. 1-5; Gorman Direct at pg. 16, lns. 15-20.

⁶⁸ Ives Rebuttal at pg. 12, lns. 13-16.; Tr. at pg. 173, lns. 12-25

providing Westar the opportunity to exclusively enjoy the benefits of utilizing the 8% interest in JEC.

2. The Commission can choose to allocate a percentage of the lease expense and NFOM expenses with the 8% interest in JEC between ratepayers and shareholders.

33. A dividing of the operating and maintenance expenses and any resulting revenue offers a fair middle ground between ratepayer and shareholder interests. Ratepayers have access to additional capacity if it may be required in the event of significant supply and demand changes. Shareholders are able to receive revenue from the continued wholesale sales of the excess capacity. The splitting of these costs should reflect each parties' relative risks associated with negative turns in the energy market. This represents a fair balance of interests as now both ratepayers and shareholders will be invested in profitability of the 8% interest and sharing the potential risks. The one-sided benefits that Staff and Westar argue will no longer be present when all stakeholders in Westar share the costs. In the event that market conditions are not favorable, Westar retains the option to simply de-rate the 8% and cease incurring variable costs.⁶⁹ As a result, Westar can look for most the efficient way and time to operate or de-rate the 8% with its shareholders being directly invested in the outcome.

V. Conclusion

34. The record clearly supports CURB's position that the new lease and purchase agreement between Westar and MWP is not a prudent decision for Kansas ratepayers. This case should be evaluated on the basis of setting just and reasonable rates. In order to do so, the use of the 8% interest in JEC must be reasonably necessary to provide sufficient and efficient service to Westar customers. For over a decade, the energy produced by this 8% in JEC has been sold. Westar

⁶⁹ Tr. at 176, lns. 6-25; pg. 177, lns. 1-21.

continues to be able to provide sufficient and efficient service to its customers without having to rely on production from MWP's 8% interest. This resource is unlikely to be used and required to be used to help meet Westar's capacity demands for another ten years. Past benefits have little to no bearing on JEC's future performance or on future ratepayers to enjoy those benefits. Ratepayers would have been subjected to market risks during the original lease just as ratepayers will be subject to risk if it is required to pay expenses through the RECA.

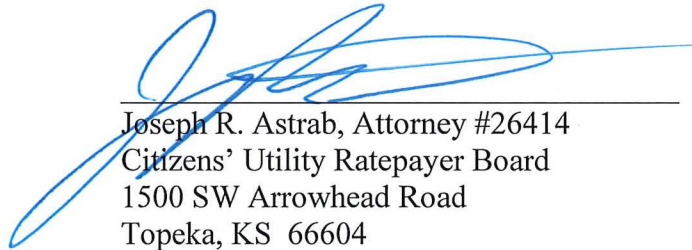
35. The Commission should evaluate the new lease and purchase agreement as a whole. Paragraph 28 does not carve out specific areas when determining if the decision is a prudent one. The Westar Rate Case S&A allows the parties to take their respective positions because certain conditions precedent were not met. It does not follow that Westar's recovery of its costs be conditioned on a prudent finding by the Commission when all parties are automatically required to agree that it is a prudent decision. This logic effectively takes away all incentive for Westar to negotiate a zero-cost transaction. Whether or not the purchase price is \$2 or \$3.7 million does not affect each parties' position when a zero-cost transaction simply bypasses the requirement to get Commission approval. The condition in Paragraph 29 was not met and therefore parties are not tied down to any particular position.

36. The parties have laid out several options for the Commission to consider in this case. The first option is to deny the application and allow Westar to operate the 8% as an unregulated asset for the benefit of the shareholders. This would act as a counterbalance to the benefits that ratepayers received over a similar period of time. The second option has the ratepayers and shareholders both be responsible for some split percentage of the expenses associated with operating and maintaining the 8%. This fairly accounts for each side's interests and provides an opportunity for allocating risks and benefits moving forward. Finally, Westar could be allowed to

de-rate the 8% on its own and determine when to operate the plant when market conditions are favorable.

WHEREFORE, CURB respectfully submits its *Post-Hearing Brief* and recommends the Commission deny the application to amend the RECA and allow Westar the option to operate the 8% interest in JEC from MWP as an unregulated asset or to de-rate it. In an alternative to denying the application, CURB recommends that the Commission fairly divide the expenses collected from ratepayers through the RECA and Westar's shareholders.

Respectfully submitted,

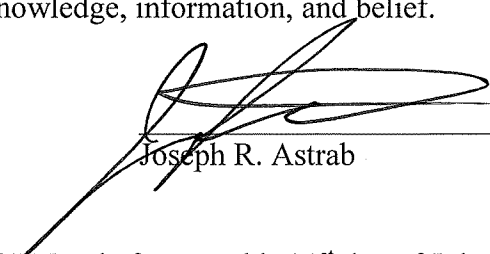


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VERIFICATION

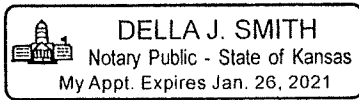
STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

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.



Joseph R. Astrab

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





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 31st day of July, 2019, to the following:

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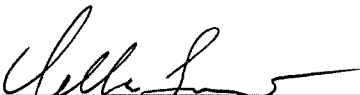
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