

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of Great       )  
Plains Energy Incorporated, Kansas City       )  
Power & Light Company and Westar Energy,       ) Docket No. 18-KCPE-095-RTS  
Inc. for Approval of the Merger of Westar       )  
Energy, Inc. and Great Plains Energy       )  
Incorporated.       )

**OBJECTION TO NON-UNANIMOUS SETTLEMENT AGREEMENT**

The Kansas Industrial Consumers Group, Inc. ("KIC"), respectfully files its *Objection to Non-Unanimous Settlement Agreement*, pursuant to K.A.R. 82-1-230a(c). In support of its Objection, KIC states to the State Corporation Commission of the state of Kansas ("Commission" or "KCC") as follows:

**I. Background**

1. On August 25, 2017, Westar Energy, Inc., and Kansas Gas & Electric Company ("Westar"), Great Plains Energy Incorporated ("GPE"), and Kansas City Power & Light Company ("KCP&L") (collectively referred to herein as Applicants) filed an Application with the Commission seeking approval of a merger of Westar and GPE.

2. On March 7, 2018, certain parties jointly filed a Non-Unanimous Settlement Agreement (the Settlement), therein recommending specific agreed conditions for approval of the merger and recommending Commission approval of the same. The parties to the Settlement are the Applicants, Staff of the Commission ("Staff"), the Citizens' Utility Ratepayer Board ("CURB"), Sunflower Electric Power Corporation, ("Sunflower"), Mid-Kansas Electric Company, Inc. ("Mid-Kansas"), Kansas Power Pool ("KPP"), Midwest Energy, Inc. ("Midwest"), and Brightergy, LLC ("Brightergy") (collectively referred to as "the Signatories").

## **II. Objection to Non-Unanimous Settlement Agreement**

3. KIC sets forth the following list of objections. Such objections are both legal and substantive in nature. KIC also incorporates herein any positions or issues set forth in the Testimony in Opposition to Non-Unanimous Settlement Agreement of Michael P. Gorman, dated March 12, 2018. Furthermore, the below list of objections is not intended to be exhaustive – only a preliminary identification of known disputes. KIC reserves the right to raise additional grounds of objection during other stages of this proceeding.

4. The Settlement includes a number of financial provisions, which the Signatories recommend the Commission implement following closing of the merger. The primary provisions are as follows:

- 1) One-time upfront rate credits to customers of Applicants;
- 2) 3 to 5-year moratorium on base rate filings;
- 3) No moratorium on any surcharge or tariff filings;
- 4) Signatories agree to take specific positions in the upcoming general rate cases of Westar and KCP&L;
- 5) Annual bill credits to customers of Westar and KCP&L from 2019 to 2022;
- 6) A mechanism to share savings from 2019 to 2022 if Westar and KCP&L earned returns, less the fixed annual bill credits, exceed 9.3%; and
- 7) Westar and KCP&L are allowed to recover up to \$50 million of transition costs on a combined company basis.<sup>1</sup>

### **A. Substantive Objections**

5. KIC objects to these primary provisions on multiple substantive bases. First, KIC reiterates its central objection that the Settlement includes no plan to begin materially addressing

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<sup>1</sup> Non-unanimous Settlement Agreement, pp. 14-24.

the long-term trend of rate escalation. Instead, the Settlement "kicks the can down the road" a number of years to a time when rates will be even higher, and the State will be less economically-competitive with the surrounding region. KIC believes approval of the transaction could promote the public interest, so long as such approval includes a plan to materially address the Applicants' regionally-uncompetitive rates. KIC recommends the Commission approve the rate plan commitment fully set forth in the Testimony in Opposition to Non-Unanimous Settlement Agreement of Michael P. Gorman.

6. KIC also strongly objects to the limited "base rate moratorium" included in the Settlement. Under the Settlement proposal, large rate increases will continue, unabated, over the next several years, as many increased charges are expected to flow through various surcharge mechanisms. Therefore, under the "base rate moratorium," customers are provided very little rate relief, and nearly no rate stability, but are still forced to share significant forecasted merger savings with the Applicants – including excess earnings above the Applicants' authorized returns. Put another way, retail ratepayers get the worst of both worlds – they get virtually no rate certainty and only a part of the forecasted merger savings during the same time period.

7. A better approach is to condition approval of the Settlement on a full retail rate freeze – as in other mergers – and to eliminate the Earnings Review & Sharing Plan (ERSP).<sup>2</sup> This would fully incentivize the Applicants to maximize savings, while providing true rate stability to customers. To KIC's knowledge, it has not been the KCC's practice to approve "rate moratoriums" that leave retail ratepayers exposed to substantial rate increases during the designated moratorium period. Given the absence of any real rate certainty or stability, it would be inappropriate to refer to the Settlement proposal as a rate moratorium in any genuine sense of the phrase.

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<sup>2</sup> As set forth in the testimony of Michael P. Gorman, KIC supports one exception to the rate freeze – a continuation of the RECA mechanism to recognize fluctuating fuel costs.

8. KIC also objects to the Settlement on the basis that it adopts an inequitable methodology for allocating customer credits. The basis for this objection is detailed in the Testimony in Opposition to Non-Unanimous Settlement Agreement of Michael P. Gorman.

## **B. Legal Objections**

9. The Settlement suffers from a number of legal infirmities, which must be cured before the Settlement can be approved. Otherwise, the Settlement is unlawful.

10. First, the ERSP mechanism is, quite clearly, a rate. It is a formula rate calculation intended to adjust customer charges and utility returns annually over the next five years by calculating earnings and crediting customers. Presumably, this mechanism was formulated in an attempt to address rates during a period without full base rate reviews.<sup>3</sup> This rate was proposed by the Applicants and other Signatories to the Settlement and has not been subject to any public notice or other process afforded pursuant to the requirements of K.S.A. 66-117 and Commission regulations regarding rate applications.<sup>4</sup> To be clear, the notice of this merger proceeding provided no notice that a formula rate mechanism could be reasonably expected to be a subject of the proceeding.<sup>5</sup>

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<sup>3</sup> Most precisely, the ERSP is a formula rate with an incentive component that can adjust allowed base rate returns upward on an annual basis by allowing the utilities to retain excess earnings to compensate the utilities for customer bill credits and to also retain additional earnings in excess of a 9.3% return.

<sup>4</sup> See K.A.R. 82-1-231, including provisions defining a "major rate application;" *Farmland Indus., Inc. v. State Corp. Comm'n of Kansas*, 24 Kan. App. 2d 172, 180, 943 P.2d 470, 481 (1997), finding the KCC's filing requirements apply even where rates are expected to decrease; See also, *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 92–93, 138 P.3d 338, 347–48 (2006), noting a "regulatory framework" for adjusting customer charges is a form of ratemaking in Kansas.

<sup>5</sup> See Affidavit Regarding Customer Notice, January 9, 2018, Exhibit 1, "The Commission will decide whether to approve the merger based upon whether the Commission finds the merger promotes the public interest. The Commission will evaluate any possible effects on customers, operational cost savings, competition in the market for electricity, labor dislocations, environmental impacts and any other relevant issues, in making its determination." See also, *Farmland Industries, Inc. v. State Corporation Comm'n of Kansas*, 24 Kan. App. 2d 172, 183, Notice in KCC proceedings should provide customers "notice of the subject matter to be considered and of the opportunity to participate in the hearing."

11. Similarly, the Settlement includes agreements regarding ratemaking issues in a very recently-filed rate application and a yet-to-be-filed rate application. The Customer Notice in this merger proceeding did not reference – nor could it have referenced – either the Westar rate case (filed on February 1, 2018) or the KCP&L-KS rate case (not yet filed). To address issues in these rate cases in the Settlement is both a violation of due process (for interested parties unaware such issues would be considered in this proceeding) and the Commission's regulations regarding notice of major rate applications.<sup>6</sup>

12. Further, while private litigants are free to settle differences at any time, the Settlement involves Signatories who are statutory entities imbued with public rights and responsibilities. Under Kansas law, Staff and CURB are tasked with representing certain public interests in Commission rate proceedings. The public has an expectation that such duties will be fulfilled on its behalf. However, under the Settlement, both public bodies have committed themselves to recommend certain ratemaking positions in the upcoming rate cases of Westar and KCP&L – cases which are either in very preliminary stages or which have not yet been filed. Again, the public notice of this merger proceeding did not indicate rate case issues would be considered and certainly did not notify the public that its representatives could be committing to rate case positions in this merger proceeding.<sup>7</sup>

13. In addition to defective notice, the Settlement also seeks to inappropriately bind the hands of future Commissions. This intent is apparent at paragraph 32.iv., where the Signatories

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<sup>6</sup> K.A.R. 82-1-231. See also, *Farmland Industries, Inc. v. State Corporation Comm'n of Kansas*, 24 Kan. App. 2d 172, 180. See also, *SWKI-Seward W. Cent., Inc. v. Kansas Corp. Comm'n*, No. 116,795, 2018 WL 385692 at \*8-9, 14 (Kan. Ct. App. Jan. 12, 2018), finding the Commission cannot disregard its own rules and regulations.

<sup>7</sup> Furthermore, certain of the agreed ratemaking treatments appear to allow future rate increases based on non-test year occurrences, rendering these treatments inappropriate, and potentially illegal, from a revenue requirement synchronization standpoint. KIC also notes these future rate increases would occur during the "rate moratorium" described in the Settlement, further diluting any value associated with that mechanism.

commit to specific rate case recommendations – severely limiting the range of positions and testimony available to the Commission in those proceedings. But the Commission's hands are even more clearly bound by paragraph 32.i., which requires future Commissions to approve ROEs at or above 9.3% in each of the upcoming Westar and KCP&L rate cases – irrespective of the prevailing cost of equity capital at the time of the Commission's decisions – and any failure to do so acts to shorten the agreed base rate moratorium from 5 years to 3 years.

14. Further, the Settlement also limits the jurisdiction of future Commissions by requesting this Commission approve an incentive formula, the ERSP, which allows Westar and KCP&L to retain earnings above those authorized by future Commissions for a period of five years.

15. In addition to inappropriately limiting future Commissions' abilities to regulate the utilities, the ERSP formula rate is also unlawful to the extent it grants returns in excess of the utilities' actual incurred costs of service (including costs of capital), regardless of the costs of service determined by the Commission in Westar and KCP&L's upcoming rate proceedings. Overearning can occur at any time when rates are not under review. However, *overearning is a feature of this rate*, which the Signatories are asking the Commission to approve.

16. A formula rate granting excess returns is not permitted under Kansas law.<sup>8</sup> As noted by the Kansas Court of Appeals, "the KCC has no power to permit an applicant to recover...costs when the applicant did not incur...the costs in question." The Court continued, "Throughout these proceedings, the argument has been made that the KCC may do nearly anything it desires if it is achieving a laudable goal such as breaking up a monopoly in the marketplace. We

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<sup>8</sup> See K.S.A. 66-117(e), setting forth the list of specific cases where the Commission may allow incentive returns; Section Entitled: "66-117. Change of rates or schedules; procedure; effective date; higher rates of return *in certain cases*; hearing; property tax surcharge authorized." (Emphasis added.)

disagree. However laudable its motives may be, the KCC is still controlled by the rule of law. Even if it furthers [a laudable goal], the KCC has no power to permit recovery of costs which were [not incurred] by the applicant."<sup>9</sup> The cost of equity capital is a cost of service just like any other utility cost. The Commission has authority to estimate a utility's cost of equity capital, but it has no power to permit recovery of capital costs in excess of those it expects the company to incur.

17. Finally, the settlement provision allowing recovery of transition costs constitutes retroactive ratemaking to the extent those costs were incurred prior to or outside the test years utilized for the Westar and KCP&L 2018 rate cases. KIC is not aware of any application from the Applicants requesting authority to prospectively begin tracking and deferring such costs for recovery in future periods. Therefore, customers have not received constitutional notice of such retroactive cost recovery in future rates.

18. KIC is not opposed to the merger of Westar and GPE. In fact, as the most vocal party concerning the issue of rate escalation and the economic harm of uncompetitive electric rates, KIC encourages Westar and GPE to take any and all actions which may reduce their costs of service. However, the Application, as filed, and the Settlement, as filed, do not promote the public interest and are legally deficient in that the terms are not in compliance with applicable law.

WHEREFORE, KIC respectfully requests the Commission reject the Settlement, as filed.

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<sup>9</sup> *Williams Natural Gas Co. v. State Corp. Comm'n of State of Kan.*, 22 Kan. App. 2d 326, 336-338.

Respectfully submitted,

/s/ **Andrew J. French**

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**VERIFICATION**  
**K.S.A. 53-601**

I verify under penalty of perjury that the foregoing is true and correct.

/s/   
Andrew J. French

Executed on March 19, 2018.

### **CERTIFICATE OF SERVICE**

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or regular U.S. mail (unless otherwise noted), the 19<sup>th</sup> day of March, 2018, to the parties below:

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