

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of Westar Energy, Inc. and)
Kansas Gas and Electric Company Seeking)
Commission Approval to Implement Changes) Docket No. 16-WSEE-375-TAR
in their Transmission Delivery Charges Rate)
Schedules.)

In the Matter of Westar Energy, Inc. and)
Kansas Gas and Electric Company Seeking)
Commission Approval to Implement Changes) Docket No. 17-WSEE-377-TAR
in their Transmission Delivery Charges Rate)
Schedules.)

In the Matter of Westar Energy, Inc. and)
Kansas Gas and Electric Company Seeking)
Commission Approval to Implement Changes) Docket No. 18-WSEE-355-TAR
in their Transmission Delivery Charges Rate)
Schedules.)

INITIAL BRIEF OF KANSAS INDUSTRIAL CONSUMERS GROUP, INC.

The Kansas Industrial Consumers Group, Inc. ("KIC"), respectfully files its *Initial Brief*. In support of its Initial Brief, KIC states to the State Corporation Commission of the state of Kansas ("Commission" or "KCC") as follows:

Executive Summary

Staff's proposal to retroactively redesign Westar's TDC rates should be rejected for no less than four separate reasons. First, Staff's proposal constitutes impermissible retroactive ratemaking because it requires the Commission to retroactively deviate from lawfully-established final rates. Second, Staff's proposal to retroactively *increase* TDC rates is inconsistent with the plain language of K.S.A. 66-1237 and the Commission's Orders recognizing Westar's TDC rates, "subject-to-refund." Third, Staff's proposal is inconsistent with the Commission's current interpretation of Westar's TDC tariff, as stated in Docket No. 12-WSEE-651-TAR. Finally, Staff's proposal should

also be rejected because it seeks to retroactively-relitigate Westar's 12-CP Allocation in violation of the settlement approved in Docket No. 15-WSEE-115-RTS.

I. Background

A. Westar's 2016 TDC Report

1. More than two years ago, on February 15, 2016, Westar Energy, Inc., and Kansas Gas and Electric Company ("Westar"), in Docket No. 16-WSEE-375-TAR (16-375 Docket), filed a report updating its Transmission Delivery Charge ("TDC") tariff to recover transmission-related costs associated with its retail operations.¹

2. On March 10, 2016, Staff of the Commission (Staff) filed its Motion for Approval of Westar Energy's Transmission Delivery Charge Tariff Subject-to-Refund. In its Motion, Staff noted it would "conduct an audit of Westar Energy's TDC filing, including a review of any Federal Energy Regulatory Commission (FERC) rulings."

3. On March 31, 2016, the Commission issued its Order Granting Application to Implement Changes in Transmission Delivery Charge Subject-to-Refund. In its Order, the Commission recognized Westar's right to implement its 2016 TDC. However, citing K.S.A. 66-1237(c), the Commission noted that it " may require changes in the TDC and impose appropriate remedies, including refunds" if it "subsequently determines that all or part of the TDC rate does not comply with K.S.A. 66-1237."²³

¹ Docket No. 16-WSEE-375-TAR, Tariff for Westar Energy and Kansas Gas and Electric for 2016 Transmission Delivery Charge, Feb. 15, 2016, p. 1.

² 16-375 Docket, Order Granting Application to Implement Changes in Transmission Delivery Charge Subject-to-Refund, March 31, 2016, ¶ 10.

³ Subsequent to its Order allowing Westar to implement its 2016 TDC, the Commission approved a reduction in Westar's TDC due to a later FERC Order, which reduced Westar's transmission costs. Such action is not relevant to the legal issues in this brief.

4. On August 2, 2016, several months after Westar implemented its 2016 TDC, Staff filed a second Report and Recommendation (2016 R&R). In its 2016 R&R, Staff confirmed "that Westar's TDC filing accurately reflects the nature of the costs it incurs from SPP on behalf of its retail customers to provide transmission service and that its TDC charges were calculated correctly in its updated filing."⁴ However, Staff also claimed it had identified "biases in Westar's sampling methodology for its load research sample," which affected the 12-CP allocator Westar used to allocate the TDC charges among the customer classes. Staff argued its concerns warranted "further investigation" and recommended the Commission allow Staff to hire a consultant for further study of the issue.⁵

5. On August 11, 2016, Westar responded to Staff's 2016 R&R, pointing out that modification of the current 12-CP cost allocation factor would violate Westar's TDC Tariff and the Stipulation and Agreement approved by the Commission in Docket No. 15-WSEE-115-RTS.⁶

6. Staff filed a response to Westar on August 22, 2016, wherein Staff stated,

Westar is attempting to predict the future and craft arguments to prevent a possible scenario. Westar is apparently concerned that Staff and its third party consultant will recommend an adjustment to Westar's 12 CP allocators used in the calculation of its TDC. At this time, Staff has made no such recommendation.

Staff has not suggested or requested the Commission 'reopen the determination of the 12-CP allocation factors.' Staff has simply identified an unexplained phenomenon in Westar's load research sample, and is recommending the Commission investigate it.⁷

⁴ 16-375 Docket, Staff Report & Recommendation, August 2, 2016, p. 4. (2016 R&R, p. 4.)

⁵ 2016 R&R, p. 6.

⁶ 16-375 Docket, Westar Energy, Inc. and Kansas Gas and Electric Company's Response to Staff's Report and Recommendation, August 11, 2016, ¶ 4.

⁷ 16-375 Docket, Staff's Response to Westar Energy, Inc. And Kansas Gas and Electric Company's Response to Staff's Report and Recommendation, August 22, 2016, ¶¶ 5-6.

7. On November 8, 2016, the Commission issued an Order approving Staff's request to hire a consultant for further study of Westar's load research sample.⁸

B. Staff's 2017 Consultant Report and Recommendation

8. On September 26, 2017, Staff filed a new Report & Recommendation (2017 R&R). In its Report, Staff noted that it had audited Westar's 2017 TDC filing and confirmed it "accurately reflects the nature of the costs it incurs from SPP on behalf of its retail customers to provide transmission service and that its TDC charges were calculated correctly in its Application."⁹ Included with its 2017 R&R, Staff provided a report from the consultant it hired to study Westar's load research sample.

9. As a result of its consultant's report, Staff recommends changing Westar's 12-CP allocators, which Westar used to design its TDC rates. And Staff specifically recommends "recalculating" Westar's 2016 and 2017 TDCs and billing customers for differences between the charged rates and the new rates proposed by Staff.¹⁰ These re-billed amounts would be large new charges for some customers and refunds for other customers.¹¹

C. Further Proceedings

10. During the pendency of the 16-375 Docket, Westar filed two additional annual updates to its TDC. These updates, the 2017 TDC and 2018 TDC, were filed in KCC Docket Nos. 17-WSEE-377-TAR and 18-WSEE-355-TAR, respectively (17-377 Docket and 18-355 Docket). All three proceedings were subsequently consolidated and merged, with the 18-355 Docket becoming the primary docket.¹² Furthermore, Westar's 2016 TDC, 2017 TDC, and 2018 TDC

⁸ 16-375 Docket, Order Adopting Staff's August 2, 2016 Recommendation, November 8, 2016, ¶ 17.

⁹ 16-375 Docket, Staff Report & Recommendation, September 26, 2017, p. 9. (2017 R&R, p. 9.)

¹⁰ 2017 R&R, pp. 9-12.

¹¹ 2017 R&R, p. 11.

¹² Docket No. 18-WSEE-335-TAR, Order Granting Staff's Motion to Join and Consolidate Proceedings, April 5, 2018, ¶ 14.

each became effective and were charged to customers during their effective period.¹³ Staff's retroactive ratemaking proposal is applicable to each of the three proceedings.

II. Staff's Proposal to Deviate from Lawfully-Established Final Rates is Impermissible Retroactive Ratemaking

A. Westar Properly Implemented its 2016, 2017, and 2018 TDCs.

11. The legal issue in this proceeding is exceedingly simple and can be decided by the Commission with reference to a single statutory provision. The TDC statute, at K.S.A. 66-1237(c), provides the *entire* process Westar must comply with to lawfully change its TDC rates, and it does so in unambiguous plain language.¹⁴ The statute also specifically describes the Commission's role in that process. Westar properly complied with the TDC statute in updating its 2016, 2017, and 2018 TDCs by "[submitting] a report to the commission at least 30 business days before changing [its] transmission delivery charge."¹⁵ The statute does not require Commission approval of Westar's report.

12. As noted above, K.S.A. 66-1237(c) dictates the process Westar must use to change its TDC. Subsection (c) states:

(c) All transmission-related costs incurred by an electric utility and resulting from any order of a regulatory authority having legal jurisdiction over transmission matters, including orders setting rates on a subject-to-refund basis, shall be conclusively presumed prudent for purposes of the transmission delivery charge and an electric utility may change its transmission delivery charge whenever there is a change in transmission-related costs resulting from such an order. The commission may also order such a change if the utility fails to do so. **An electric utility shall submit a report to the commission at least 30 business days before changing the**

¹³ The 2016 TDC became effective April 1, 2016, and was later amended by Westar, effective July 1, 2016. The 2017 TDC became effective April 3, 2017, replacing the 2016 TDC. The 2018 TDC became effective April 3, 2018, replacing the 2017 TDC.

¹⁴ The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009); When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009).

¹⁵ Further, no party has claimed Westar violated its TDC tariff. Though Staff has recommended the Commission retroactively implement the tariff in a different fashion.

utility's transmission delivery charge. If the commission subsequently determines that all or part of such charge did not result from an order described by this subsection, the commission may require changes in the transmission delivery charge and impose appropriate remedies, including refunds.

13. In most instances, public utilities are not allowed to change rates without Commission approval. K.S.A. 66-117 generally prohibits unilateral changes in utility rates, requiring newly-proposed rates to be filed with, and approved by, the Commission. Under K.S.A. 66-117(c), the new rate will become effective if the Commission does not act within 30 days. However, the Commission can suspend the proposed rate and delay a decision up to 240 days.

14. In contrast, the TDC statute specifically applies to the recovery of certain electric transmission-related costs, and it provides a different ratemaking process. A specific statute controls over a general statute,¹⁶ and, under the TDC statute, the utility must only submit a report to the Commission 30 business days prior to changing its TDC. The Commission is not charged with "approving" the rate as "just and reasonable," as it would be under K.S.A. 66-117. And it has no authority to suspend the effectiveness of TDC rates while it investigates those rates.

B. Westar's 2016, 2017, and 2018 TDCs, became Lawfully-Established Final Rates, and the Commission's "Subject-to-Refund" Orders had No Legal Effect.

15. Under the plain language of K.S.A. 66-1237(c), any Commission orders recognizing Westar's TDC reports, "subject-to-refund," had no legal effect. Contrary to the specific controlling Kansas statute, in its 2016 R&R, Staff recommended the Commission "*withhold final decision* on whether the TDC rates are just and reasonable until a third party consultant is able to further investigate the load research sample used to generate the 12-CP allocator and evaluate whether further action is needed."¹⁷

¹⁶ *In re K.M.H.*, 285 Kan. 53, 82, 169 P.3d 1025, 1043 (2007).

¹⁷ 2016 R&R, p. 7. Emphasis added.

16. Of course, such an action – "withholding a decision" – is not available to the Commission and is statutorily impermissible. As noted above, the TDC statute, unlike K.S.A. 66-117, does not empower the Commission to delay a decision – or to make any decision at all – regarding Westar's TDC submittals. This is the clear and unambiguous language and intent of the statute's plain language.

17. And the Commission has no general statutory authority to approve rates on an interim basis or "subject-to-refund." The Kansas Court of Appeals has recognized this, flatly stating, "Under federal cases, rates allowed subject to refund are deemed 'effective' but are not approved rates and the company bears the risk the 'effective' rates will not be fully approved. In contrast to FERC methods and practices, the Commission has no explicit statutory authority to allow rates to go into effect subject to refund."¹⁸

18. The Courts *have* held the Commission has an implied power to grant interim rate relief when an applicant demonstrates its current rates are no longer just and reasonable and interim rate relief is necessary,¹⁹ though the Commission has erected a high bar for such relief.²⁰ And Commission regulations similarly allow interim emergency orders under specific circumstances, with a limited period of effectiveness.²¹ Of course, Westar is not requesting either of these remedies in the present case. Westar has no need for "interim" or "emergency" rate relief, as the TDC statute allows it to promptly and unilaterally change its transmission rates.

19. Following lawful implementation, there is only one exception to the finality of Westar's TDC rates. K.S.A. 66-1237(c) states, "If the commission subsequently determines that

¹⁸ *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 102, 138 P.3d 338, 353 (2006). Emphasis added.

¹⁹ *Kansas-Nebraska Nat. Gas Co. v. State Corp. Comm'n*, 217 Kan. 604, 615, 538 P.2d 702, 712 (1975).

²⁰ See Docket No. 04-AQLE-1065-RTS, Order No. 11 Denying Interim Rate Relief, October 8, 2004.

²¹ See K.A.R. 82-1-232(b)(2)(B).

all or part of such charge did not result from an order described by this subsection, the commission may require changes in the transmission delivery charge and impose appropriate remedies, including refunds." And this authority exists whether or not the Commission issues an order "approving" the TDC rates subject-to-refund.

20. In its 2016 R&R, Staff confirmed "that Westar's TDC filing accurately reflects the nature of the costs it incurs from SPP on behalf of its retail customers to provide transmission service and that its TDC charges were calculated correctly in its updated filing."²² Staff made an identical finding regarding Westar's 2017 TDC²³ and has raised no concerns regarding the calculation of Westar's 2018 TDC. Thus, the "subject-to-refund" provision of K.S.A. 66-1237(c) has not been triggered and is not relevant to Staff's retroactive ratemaking proposal. Because the TDC rates are not "subject-to-refund," ***they are lawfully-established final rates.***

21. As noted above, Westar properly changed its TDC each year according to the procedure established in statute. The Kansas Courts have held that a rate becomes final after it is lawfully established, *and* the appellate review process is completed.²⁴ In the present case, the legality and effectiveness of Westar's TDC rates were not challenged in the Kansas courts. Therefore, each of the TDCs became effective and final following their lawful and unchallenged implementation.²⁵

²² 2016 R&R, p. 4.

²³ 2017 R&R, p. 9.

²⁴ *Kansas Pipeline P'ship v. State Corp. Comm'n of the State of Kansas*, 24 Kan. App. 2d 42, 57, 60, 941 P.2d 390, 400, 402 (1997). "The real issue is whether the rate authorized by the KCC was final or whether finality should only be obtained after appellate review was completed. We adopt the latter premise and hold that appellate review is part and parcel of the rate-making process. A rate authorized does not become final until the appellate process has run its course. Until that time, a utility charges the rate with an inherent risk of refund if it is reversed... The appellate process is part of the rate-making process. A rate is not final until that process has been completed. The risk of loss in placing such a rate into effect is squarely on the public utility. Further, a refund may be ordered regardless of whether a stay order is sought or issued."

²⁵ The requirement for a utility to submit a report 30 business days prior to changing its rates allows the Commission or an aggrieved party an opportunity to seek judicial review prior to the rates becoming effective. However, following lawful implementation of the new TDC rates, without any challenge, the rates become final.

C. Retroactive Deviation from Lawfully-Established Final Rates – Retroactive Ratemaking – is Prohibited in Kansas.

22. The Courts have succinctly held, "a deviation from [lawfully-established] rates would amount to retroactive rate-making."²⁶ And the Kansas Courts have repeatedly found retroactive ratemaking to be both statutorily and constitutionally prohibited in Kansas.²⁷ The rule "ensures that regulated companies charge only those rates which the agency has approved," and it also *prohibits agencies from retroactively substituting a new rate*, even if the prior approved rate was unreasonably high or low."²⁸

23. The Kansas Courts also recognize the related "filed rate doctrine," which states, "a rate once fixed remains established until changed in some manner allowed by law. No change having been legally made in the rate which existed before ... that rate was the only existing, legally established rate and the Court was bound to apply it."²⁹ This doctrine is incorporated in Kansas's statutory scheme at K.S.A. 66-109.³⁰

24. Describing the Constitutional due process basis for such a rule, the Courts have noted, "In the long-run, the prohibition on retroactive ratemaking is more about process than substance...the KCC adjusts rates as necessary, but does so on a prospective rather than retrospective basis."³¹ The Kansas Court of Appeals notes the equitable and due process necessity for this rule, stating,

²⁶ *United Cities Gas Co. v. Brock Expl. Co.*, 995 F. Supp. 1284, 1293 (D. Kan. 1998).

²⁷ *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); *Sunflower Pipeline Co. v. Kansas Corporation Commission*, 5 Kan. App. 2d 715, 722-23, 624 P. 2d 466, rev. denied 229 Kan. 671 (1981).

²⁸ *SWKI-Seward W. Cent., Inc. v. Kansas Corp. Comm'n*, 408 P.3d 1006 (Kan. Ct. App. 2018). Emphasis added.

²⁹ *Sunflower Pipeline Co. v. State Corp. Comm'n*, 5 Kan. App. 2d 715, 720, 624 P.2d 466, 471 (1981)

³⁰ K.S.A 66-109 states, in relevant part, "No common carrier or public utility governed by the provisions of this act shall, knowingly or willfully, charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates; or demand, collect or receive any rate, joint rate, toll, fare or charge not specified in such schedule or classification...."

³¹ *United Cities Gas Co. v. Brock Expl. Co.*, 995 F. Supp. 1284, 1293-94 (D. Kan. 1998).

[W]hen a rate has been [lawfully-established] and put into effect...[the rate] may be confidently collected and retained by [the utility]...without misgiving that at some future time...a different conclusion [will be] reached, and those rates [will be] condemned as unreasonable.... Such a method of regulating public utilities has none of the earmarks of due process of law nor the simplest notions of justice.”³²

Just as a utility should be able to confidently collect a lawfully-established final rate, the utility's **customers** should also be able to rely upon lawfully-established utility rates in their purchasing decisions.

25. As described in detail above, Westar's 2016, 2017, and 2018 TDCs were lawfully-established under the processes set forth in K.S.A. 66-1237 and under Westar's tariff. No party challenges this fact. And Westar's TDC rates became final when no party sought judicial review of their implementation. The Commission had no authority to "approve" Westar's TDC rates "subject-to-refund."³³ Staff's proposal to retroactively alter Westar's final TDC rates – and bill customers for the difference – is not permissible under Kansas law.

D. Staff's Prior Legal Arguments

26. In its previous filings, Staff has presented a tortured legal argument to justify its retroactive redesign of Westar's lawfully-implemented TDCs.³⁴ What started as an investigation to understand Westar's methodology³⁵ has now become an after-the-fact attempt to redesign charges already collected from customers. As described below, Staff's legal arguments do not survive scrutiny.

³² *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).

³³ As described in detail above, the TDC rates were only "subject-to-refund" for a very limited scope (costs which did not result from a FERC order). The retroactive refunds and charges proposed by Staff have no relation to this scope and are, therefore, outside the Commission's statutory authority.

³⁴ See Docket No. 16-WSEE-375-TAR, Staff's Sur-Reply to the Kansas Industrial Consumers Group, Inc.'s Reply to Staff's Response, October 27, 2017, ¶¶ 9-27. (Staff Sur-Reply, ¶¶ 9-27.)

³⁵ 16-375 Docket, Staff's Response to Westar Energy, Inc. And Kansas Gas and Electric Company's Response to Staff's Report and Recommendation, August 22, 2016, ¶ 6, "Staff has not suggested or requested the Commission 'reopen the determination of the 12-CP allocation factors.' Staff has simply identified an unexplained phenomenon in Westar's load research sample, and is recommending the Commission investigate it."

i. Staff's argument that the TDC charges are not final rates has no merit.

27. In a previous filing, Staff argued Westar's TDC charges are not final rates. Staff states,

An order that delays ruling on an ultimate issue pending the outcome of a subsequent event is not a final order. Until the Commission issues a final order in a matter, it is free to amend its prior orders. Therefore, the Commission's orders that allowed Westar's TDC charges to go into effect on a subject-to-refund basis while further study was conducted were not "final orders," and the Commission has not yet issued a final order in the instant proceedings. As the Commission has not yet issued a final order, the charges implicated in Westar's TDC proceeding may not be considered "final." Until the Commission issues a final order and the order is no longer subject to judicial review the Commission retains the authority to issue refund orders in the instant matters.³⁶

In other words, Staff contends the Commission's "subject-to-refund" orders somehow "paused" the time period for appellate review, rendering the TDC rates indefinitely non-final. This position is not supported by the plain language of the TDC statute.

28. Unlike the framework of K.S.A. 66-117, Commission "approval" is not needed for Westar to lawfully-change its TDC rates. And, while Staff correctly notes K.S.A. 66-1237 authorizes the Commission to order refunds of TDC rates,³⁷ Staff fails to inform the Commission that this "subject-to-refund" authority is *specifically limited* under the statute.

29. The Commission's authority to "require changes in the transmission delivery charge and impose appropriate remedies, including refunds" is *solely* available where the Commission "subsequently determines that all or part of such charge did not result from an order [approved by FERC]."³⁸ The Commission has not made – nor has Staff recommended – such a determination. In fact, as cited above, Staff's audits confirm Westar's TDC charges accurately reflect its FERC-

³⁶ Staff Sur-Reply, ¶ 27. Citations omitted.

³⁷ Staff Sur-Reply, ¶¶ 7-19.

³⁸ K.S.A. 66-1237(c).

approved costs. Therefore, Westar's TDC rates became final on their effective date, and Staff's proposal constitutes impermissible retroactive ratemaking.

ii. K.S.A. 66-101 does not Permit the Commission to set Rates Retroactively.

30. Staff argues the Commission has an "implied" authority to order refunds, pursuant to K.S.A. 66-101, when a utility violates the filed-rate doctrine or when a utility charges a rate before the rate becomes final.³⁹ KIC agrees the Commission has an implied authority to order refunds under these circumstances.⁴⁰ However, neither justification is triggered by Westar's TDC rates.⁴¹

31. Staff does not allege Westar violated the filed rate doctrine. Westar charged the lawful final rates on file with the Commission, pursuant to the updated tariffs included with its 2016, 2017, and 2018 TDC reports. In contrast, Staff's proposal to change those Westar's TDC rates and charge customer for the difference *would* violate the filed rate doctrine by charging customers a rate different from that which appeared in Westar's lawfully-established tariffs.⁴²

32. And, of course, Westar's TDC rates were final rates. This point has been painstakingly detailed throughout this brief. However, it is worth repeating for emphasis. Staff argues the TDC rates were not final because "the Commission's orders that allowed Westar's TDC charges to go into effect on a subject-to-refund basis while further study was conducted were not 'final orders,' and the Commission has not yet issued a final order in the instant proceedings."⁴³

³⁹ Staff Sur-Reply, ¶ 24.

⁴⁰ However, when the filed rate doctrine is violated, the power to order refunds may not extend to *reallocations*, as the Court explicitly tied the Commission's refund authority to "refunds for charges in excess of published rates." *Sunflower Pipeline Co. v. State Corp. Comm'n*, 5 Kan. App. 2d 715, 719–20, 624 P.2d 466, 470 (1981).

⁴¹ Staff does not allege Westar violated the filed rate doctrine. In fact, Westar filed the lawful final rates on file with the Commission. *Staff's proposal* would violate the filed rate doctrine.

⁴² As detailed below, Staff also proposes to implement Westar's tariff in a different manner than the tariff has been explicitly interpreted by the Commission.

⁴³ Staff Sur-Reply, ¶ 27.

33. Yet, Staff ignores the fact that the Commission has no general statutory authority to approve rates, "subject-to-refund."⁴⁴ And Staff fails to inform the Commission that its power to issue nonfinal "subject-to-refund" orders under K.S.A. 66-1237(c) is *specifically limited* to circumstances which are not present in this case. Finally, Staff's assertion that the Commission's orders "allowed" Westar's TDC rates to go into effect is even more misleading – suggesting that the Commission had authority to prevent the TDC changes from becoming effective when it clearly did not.

34. In no way does K.S.A. 66-1237 – or any other statute – authorize the Commission to make TDC rates indefinitely "subject-to-refund," during future investigations of indeterminate length. The statutory "subject-to-refund" provision in K.S.A. 66-1237(c) is precise and explicitly limited. Again, the plain language of K.S.A. 66-1237(c) simply does not say what Staff wants it to say.

35. As noted above, most proposed rate changes can be suspended up to 240 days, pursuant to K.S.A. 66-117(c), allowing the Commission to delay a decision while it investigates the application. However, that general provision does not apply to TDC reports, and K.S.A. 66-1237(c) does not grant the Commission *any* authority to suspend the effectiveness of new TDC rates. Yet, Staff suggests the Commission may *indefinitely* suspend the effectiveness TDC rates, making those rates perpetually nonfinal and subject to refund. Such an outcome was clearly not intended or authorized by the plain language of the TDC statute.

36. The Commission has the general authority to investigate and set new rates at any time under K.S.A. 66-101d. And this authority likely extends to TDC rates.⁴⁵ However, nothing

⁴⁴ *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 102, 138 P.3d 338, 353 (2006). Emphasis added.

⁴⁵ However, as detailed below, re-litigating the 12-CP allocation from Westar's last rate case *would* violate the settlement agreement approved in that proceeding.

in this statutory authority empowers the Commission to make changes to lawfully-established TDC rates in a *retroactive* fashion. And K.S.A. 66-1237(c) absolutely does not empower the Commission to "approve" TDC rates subject-to-refund while Staff performs years-long investigations of the methodologies used to calculate those rates.

37. As detailed herein, Westar properly filed its TDC rate changes pursuant to K.S.A. 66-1237 and its tariff. Westar properly collected its TDC rates pursuant to K.S.A. 66-1237 and its tariff. There is simply no legal authority allowing the Commission to retroactively calculate new charges for all of Westar's customers and send new bills for those amounts. The Commission is always free to investigate existing rates – however, it must do this *prospectively*.

III. Staff's Proposal to Retroactively Increase TDC Rates is Inconsistent with K.S.A. 66-1237 and the Commission's Orders Recognizing Westar's TDC Rates, "Subject-to-Refund."

38. Notwithstanding the fact that the statutory subject-to-refund provision has not been triggered, K.S.A. 66-1237 allows the Commission to impose *remedies* for customers, including *refunds*, if it subsequently determines all or part of the TDC rates did not result from a FERC-approved order. The statute does not authorize the Commission to retroactively impose *higher* charges on customers.

39. In its Orders recognizing Westar's TDC reports, the Commission correctly informs the utility and its customers that the TDC rates are subject to *refund*, pursuant to K.S.A. 66-1237. For instance, in its 16-375 Docket Order, the Commission states, "If the Commission subsequently determines that all or part of the TDC rate does not comply with K.S.A. 66-1237, the Commission may require changes in the TDC and impose appropriate remedies, including refunds."⁴⁶

⁴⁶ 16-375 Docket, Order Granting Application to Implement Changes in Transmission Delivery Charge Subject-to-Refund, March 31, 2016, ¶ 10.

40. Pursuant to this language, customers could reasonably rely on the TDC rate, with the understanding that they may receive *refunds* in the future. However, this language creates no expectation that certain customers' TDC rates will be retroactively *increased* by millions of dollars, as Staff proposes.⁴⁷ And the magnitude of this increase is notable. Staff proposes to retroactively charge industrial customers between \$2 and 3 million, a very significant portion of which would be charged to KIC members.⁴⁸ Even worse, Staff wants Westar to back-bill small and medium business customers and Kansas schools approximately \$10 million. And these figures have undoubtedly grown significantly since Staff filed its recommendation in November of 2017.⁴⁹ None of these customers have the ability to budget for these added costs. This scenario is the precise reason retroactive ratemaking is constitutionally-prohibited. Putting aside its legal infirmities, Staff's proposal is bad public policy.

41. When rates are implemented "subject to refund," customers have no reasonable notice they may be charged a *higher* amount at a later time. This is both a constitutional due process issue and an equitable argument. No reasonable person would read the language of K.S.A 66-1237(c) and the Commission's "subject-to-refund" orders in the 16-375, 17-377, and 18-355 Dockets to allow retroactive *increases* in TDC rates.

⁴⁷ See 2017 R&R, p. 11.

⁴⁸ See Docket No. 18-KCPE-095-MER, KIC Hearing Exhibit 22. For example, the industrial and special contract customers participating through KIC in the 18-095 Docket composed 43% of Westar's 2017 industrial sales volumes and 35% of all revenues collected from the industrial class in 2017. Therefore, KIC's members would pay a significant percentage of any retroactive charges ordered in this proceeding.

⁴⁹ In its 2017 R&R, at page 12, Staff states, "If the 2017 TDC rates are not revised [by] November 1, 2017, or if the Commission desires a different length of time over to bill the refunds/charges, the calculation of the refund/charge amounts will need to change correspondingly."

IV. Staff's Proposal is Inconsistent with the Commission's Current Interpretation of Westar's TDC Tariff, as Stated in Docket No. 12-WSEE-651-TAR.

42. In Docket No. 12-WSEE-651-TAR (12-651 Docket), Westar submitted updated TDC rates which were allocated among the classes based on the 12-CP from a previous Westar rate case. However, they were not based on the 12-CP approved in Westar's most recent rate case. The Commission eventually found Westar had not properly followed its tariff language regarding allocation of customer charges.

43. In making this finding, the Commission interpreted Westar's TDC tariff language, which was identical to Westar's current TDC tariff language. The Commission explicitly stated, "Under its TDC tariff, Westar must use the 12-CP allocation ratio from its most recent rate case (112 Docket) to allocate the transmission revenue requirement among classes."⁵⁰ This interpretation was supported by Staff, CURB, Westar, and the industrial customers in a settlement filed with the Commission.⁵¹ However, Staff now recommends a different interpretation, allowing it to "correct" the test year data and create new 12-CP allocators. This is not consistent with the tariff interpretation adopted by the Commission in the 12-651 Docket. Therefore, Staff's proposal violates Westar's tariff.

44. KIC recognizes the Commission may deviate from an earlier policy or interpretation. However, it must explain the basis for that change, and it is obligated to prospectively advise the interested parties of the new policy.⁵² Therefore, if the Commission chooses to re-interpret Westar's tariff language, it must do so only on a prospective basis. Westar

⁵⁰ Docket No. 12-WSEE-651-TAR, Order Granting Joint Motion to Approve Stipulation and Agreement and to Dismiss the Evidentiary Hearing, September 27, 2012, ¶ 26.

⁵¹ See Docket No. 12-WSEE-651-TAR, Joint Motion to Approve Stipulation and Agreement and to Dismiss the Evidentiary Hearing in this Docket, August 27, 2012.

⁵² *Home Tel. Co. v. State Corp. Comm'n of State of Kansas*, 31 Kan. App. 2d 1002, 1012, 76 P.3d 1071, 1077 (2003).

and its customers should be allowed to confidently rely on Westar's existing tariff language and explicit Commission interpretations thereof.

V. Staff seeks to Retroactively-Relitigate Westar's 12-CP Allocation in Violation of the Settlement Approved in Docket No. 15-WSEE-115-RTS.

45. In a settlement agreement filed in Docket No. 15-WSEE-115-RTS, the Westar, Staff, CURB, KIC, and other parties agreed "Westar's next Transmission Delivery Charge (TDC) filing shall use the recalculated 12 CP which takes into account the CP data from [Large General Service and Industrial & Large Power customers] being moved to the appropriate class."⁵³ While the new 12-CP produced in the 15-115 Docket allocates costs somewhat differently than the 12-CP in past Westar rate cases, no party objected to Westar's 12-CP resulting from the 15-115 Docket. In fact, from the industrial customers' perspective, the new 12-CP allocator and the base rate allocations in the 15-115 Docket were both essential parts of settlement. KIC viewed these cost allocation items as an important step toward accurately reflecting Westar's costs of serving each customer class. They did not go far enough to address interclass rate subsidies, but they were a step in the right direction.

46. In its 2016 R&R, Staff correctly noted Westar's most recent rate case, the 15-115 Docket, produced a new 12-CP allocator.⁵⁴ Staff also confirmed the 12-CP allocator alters the proportion of revenue requirement assigned to each customer class, as compared to previous Westar 12-CP allocators.⁵⁵ However, even though some parties had considered the new 12-CP an important part of settlement, Staff reasoned there must be "Problems with Westar's 12-CP

⁵³ Docket No. 15-WSEE-115-RTS, Joint Motion to Approve Stipulation and Agreement, August 6, 2015, ¶ 41; Order Approving Stipulation and Agreement, September 24, 2015,

⁵⁴ 2016 R&R, p. 6.

⁵⁵ 2016 R&R, p. 6.

Allocator" because it produced somewhat different allocations from the 12-CP in Westar's previous rate case.⁵⁶

47. Following a lengthy investigation, Staff now recommends calculating new 12-CP class allocators. Staff says these new allocators are "correct" because the results look more like the 12-CP in a prior Westar rate case.⁵⁷ So, while some parties viewed the evolving 12-CP as a more appropriate and acceptable result, Staff seized on that change as evidence that the allocations must be corrected. While Staff clearly disagrees with the 12-CP class allocations approved in the 15-115 Docket settlement, it would be inequitable and a violation of the settlement agreement to allow Staff to re-litigate those allocations in this setting.

48. Though this is a legal brief, KIC asserts its strong disagreement with the conclusion that Westar's 12-CP allocators are somehow flawed. Rather, Staff appears to simply disagree with the *results* of Westar's methodology and now recommends smoothing the data to better fit its desired cost allocation outcomes. The appropriate forum for litigating cost allocation is in a general rate case. Staff and all other parties will have a chance to argue this issue in Westar's ongoing rate case. And a new 12-CP allocator will then be adopted in that case for prospective use in future Westar TDC filings.

49. The Commission should reject Staff's flawed legal arguments and proposal to retroactively change Westar's lawfully-established TDC rates. In addition, as a matter of sound public policy, the Commission should reject Staff's proposal to retroactively redesign Westar's TDC charges more than two years after those rates were fixed and charged to customers.

⁵⁶ 2016 R&R, p. 6; 2017 R&R, p. 3.

⁵⁷ 2017 R&R, pp. 7-8.

WHEREFORE, KIC respectfully requests the Commission issue an Order declining Staff's proposal to retroactively redesign Westar's TDC rates and closing the consolidated Westar TDC dockets.

Respectfully submitted,

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

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 1st day of June, 2018.



Notary Public

My Appointment Expires: *June 21, 2021*

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 1st day of June, 2018 to the parties below:

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