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Kansas Corporation Commission
/S/ Susan K. Duffy

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

FEB 23 2007

Docket Room

Before Commissioners: Brian J. Moline, Chair
Robert Krehbiel, Commissioner
Michael Moffett, Commissioner

IN THE MATTER OF THE APPLICATION)
OF WESTAR ENERGY, INC., AND KANSAS)
GAS AND ELECTRIC COMPANY FOR) Docket No. 05-WSEE-981-RTS
APPROVAL TO MAKE CERTAIN CHANGES)
IN THEIR CHARGES FOR ELECTRIC SERVICE)

CURB's PETITION FOR RECONSIDERATION

The Citizens' Utility Ratepayer Board (CURB) submits its Petition for Reconsideration, pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. § 82-1-235. As set forth more fully below, CURB requests reconsideration of the Commission's *Order Adopting Further Procedure Following Remand* (hereinafter referred to as the "Order") on the following grounds: (1) the Commission's Order regarding the amount of the adjustment for depreciation is erroneous and not supported by substantial evidence; (2) the Commission's Order regarding the LaCygne sale and leaseback transaction is based on determinations of fact, as set forth below, that are not supported by substantial evidence when viewed in light of the record as a whole; (3) the Commission's Order regarding the LaCygne transaction, as more fully set forth below, is unreasonable, arbitrary and capricious; and (4) the Commission's decision to open the record to consider evidence of costs that could not legally be included in the transmission delivery charge (TDC) in calculating refunds to customers of amounts illegally charged to customers is arbitrary and capricious.

I. Arguments and Authorities

A. Depreciation

1. Removal of Terminal Net Salvage

1. In the Commission's Order, the Commission adopted Staff witness Larry Holloway's adjustment to "eliminate the terminal net salvage costs from non-nuclear steam production plant incorporated into Mr. Spanos' depreciation rates." (*Order*, at 13). The Commission correctly noted that this results in a ***depreciation expense decrease*** of $7,966,238 for Westar North and $10,848,555 for Westar South according to Staff witness Holloway's testimony. (*Id.*, *emphasis added*). This did not go far enough, but it was a start in the right direction.

2. However, the Commission went on to further reduce this amount "to reflect current deferred income taxes of $3,168,770 for Westar North and $4,315,284 for Westar South," resulting in a "net decrease to Westar's total revenue requirement of $11,330,739. (*Id.*)

3. As will be more fully discussed below, the Commission's order reflecting the amount of the decrease to Westar's total revenue requirement is erroreous in two ways. First, because depreciation is an *expense* adjustment, it should not be decreased to reflect current deferred taxes. Rather, the reduction in depreciation expense acts as a dollar-for-dollar reduction in the revenue requirement. Second, Staff witness Holloway's testimony and exhibits did not include pollution control equipment and did not remove the inflation related to the interim net salvage amounts.

4. As indicated in the Commission's Order, none of the parties to this matter have argued against the removal of terminal net salvage. The only dispute between the parties was with regard to the appropriate amount that should be removed from depreciation expense.

Although both Westar and the Joint Intervenors (CURB, KIC, and USD 259) submitted proposed amounts, the amount ultimately ordered by the Commission did not reflect either proposed amount.

5. As the Commission is well aware, the Kansas Court of Appeals addressed the issue of terminal net salvage and the inflation of net salvage at length in its order reversing the Commission's Order on Rate Applications. *Kansas Industrial Consumers Group, Inc. v. State Corp. Comm'n*, 36 Kan. App. 2d 83, 104-10 (2006). In its order, the Court of Appeals specifically noted that "[t]he use of terminal net salvage depreciation increased Westar's revenue requirement by $29 million from the 2000-2001 approved rates." *Id.* at 105. Thus, the decision by the Court of Appeals would support the reduction of the revenue requirement by $29 million, as suggested in the comments submitted by the Joint Intervenors. However, although the amount has been referred to numerous times as "approximately $29 million," the depreciation witness for the Joint Intervenors calculated the adjustment more precisely as $27,352,390. (*See* Majoros Schedule 1, attached).

6. Furthermore, with regard to the inflation adjustment, the Court of Appeals stated, in relevant part, as follows:

> The Commission's adoption of Spanos' depreciation calculations using an inflation adjustment is even more troubling. Although the Commission permitted terminal net salvage depreciation in a prior rate case without objection by the parties, the Commission's prior order did not include the inflation adjustment as calculated by Spanos in this case. Thus, the Commission's order represented a departure from prior policy without an explanation by the Commission for doing so. . . . Other than Spanos' conclusory testimony, there was no evidence before the Commission to support the adoption of the inflation adjustment in calculating depreciation costs. Holloway and Majoros testified in considerable detail that the inflation adjustment was improper under the circumstances and resulted in charging future inflation to current customers. According to Majoros' testimony, Spanos' inflation adjustment nearly tripled the cost of Westar's depreciation as determined in 2001.

> Determining an appropriate depreciation expense is a complex issue in any rate case and inherently involves "speculation" to the degree it requires projection of future events. . . . However, the need to project for future events is not license for the Commission to engage in unchecked speculation. This effect of the Commission's order turns on its head the general principle that changes in rates due to future or nontest year events be, at least to some degree, known and measurable. . . . The underlying assumption of the Commission's decision is that Westar will likely significantly dismantle all or most of its steam generation facilities at the end of their operating life. The Commission then multiplies the effect of this assumption by applying an inflation factor. There is no evidence in the record that comparable utilities dismantle or plan to dismantle most or all of their steam facilities. Likewise, the Commission relied on no evidence that Westar had even *tentative* plans to significantly dismantle any of its facilities. The cumulative effect of this lack of evidence renders the Commission's order "'so wide of the mark as to be outside the realm of fair debate.'" . . . Based upon a review of the entire record, we conclude the Commission's order permitting Westar to include terminal net salvage depreciation adjusted for inflation for all of its steam generation facilities was not supported by substantial competent evidence and must be reversed.

Id., at 109 – 10, *citations omitted; emphasis in original*). As set forth above, the Court of Appeals was extremely critical of Spanos' future inflation adjustments and clearly disapproved of including such amounts in current customers' rates.

7. Turning now to the errors in the determination of the amount of the reduction in depreciation expense, the further reduction of the depreciation expense adjustment for deferred income taxes is clearly erroneous. "In the traditional rate base rate-of-return environment, customer rates and utility costs are components of a utility's revenue requirement. The revenue requirement is calculated by summing operation and maintenance expenses, depreciation expenses, taxes other than income taxes, income taxes (current and deferred), and a return, which is the product of rate base and cost of capital." NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PUBLIC UTILITY DEPRECIATION PRACTICES 195 (1996). Thus, deferred income taxes and depreciation expense are both included in the calculation of the revenue requirement, and deferred income taxes should not be used to further reduce the depreciation

expense. To do so allows deferred income taxes to be considered twice in the calculation of the revenue requirement. Accordingly, the depreciation adjustment should not be reduced for deferred income taxes.

8. Furthermore, while Mr. Holloway's adjustment removes both the terminal net salvage and inflation for most of Westar's depreciation rates, Mr. Holloway did not remove terminal net salvage for the pollution control equipment. This omission is clear upon review of Mr. Holloway's exhibits to his testimony. (*See* Exhibit___LWH-2 at 1.) As shown in Exhibit___LWH-2, Staff's proposed amount for depreciation of the pollution control equipment is the same as the proposal prepared for Westar by Mr. Spanos. However, Mr. Spanos had included terminal net salvage with inflation for the pollution control equipment. (*See* Exhibit___MJM-15 at 1, showing terminal net salvage estimate and inflated future cost of removal as proposed by Westar witness Spanos.)

9. In addition, Mr. Holloway's testimony did not reflect the removal of inflation on the interim net salvage. Given the Court of Appeals' strong disapproval of the inclusion of Spanos' inflation adjustment, the inflation adjustment on interim net salvage must be removed as well. Accordingly, the Commission should decrease the depreciation expense by a total amount of $27,352,390. An exhibit, Majoros Schedule 1, summarizing Mr. Majoros' adjustments to remove terminal net salvage and the inflation from depreciation expenses is attached. The schedule pulls together information from Westar's depreciation study that was filed in this docket, and adjustments from Exhibit MJM-16, drawn from Mr. Majoros' revised schedules that were filed in this docket on September 29, 2005. Again, as noted above, because deferred income taxes are already accounted for in the revenue requirement, reducing the depreciation adjustment for deferred income taxes allows the company to collect for them twice. Mr.

Majoros' adjustment of $27,352,390 properly accounts for the terminal net salvage and future inflation that the Court of Appeals ordered the Commission to remove from the revenue requirement. CURB therefore respectfully requests that the Commission reconsider its previous Order and order this amount removed from the revenue requirement.

B. Sale/Leaseback of LaCygne 2

10. In its Order, the Commission has now determined that the prevailing interpretation of the LaCygne 2 sale and leaseback over the course of the past 20 years is somehow factually incorrect. (Order at 15.) The Commission does not explain how the decision was factually incorrect, other than to state that it now realizes that it should have adopted Westar's argument in the previous rate docket. (*Id.*) Somehow, the Commission concludes that the mere presence of Jim Haines to testify at the hearing in this docket and provide general supporting testimony for Dick Rohlfs is sufficient to justify this attempt to re-write history, twenty years later, and find that two previous orders were factually incorrect. (*Id.* at 16.) This argument is nothing more than a blatant attempt to recharacterize the same argument that lost on appeal with a different label in order to now do an end run around the Court of Appeals' decision on this issue.

11. In further support of this argument, the Commission states that "Joint Intervenors incorrectly characterize the Court of Appeals' analysis as resting on insufficiency of evidence. As the Commission reads the Court of Appeals opinion, the Commission was flawed in its December 28, 2005 and February 13, 2006 orders because it failed to adequately explain its changed position." (*Id.* at 15.) Once again, the Commission's Order on this issue is unsupported

by substantial evidence and is arbitrary and capricious. The Order fails to cite facts that support its changed position, thus the decision is indeed based on insufficient evidence. When there are no facts in the record that would support the 180-degree change in policy, then the Commission has no basis on which to "adequately explain" the change, and therefore should have ordered that Mr. Proctor's recommendation concerning the gain should remain the policy of the Commission.

12. Furthermore, the Court of Appeals' decision to overturn the Commission's ruling on LaCygne was quite clear that it rested both on a lack of evidence to support the change in position *and* a finding that the failure to explain the change in position was arbitrary and capricious. Specifically, the Court of Appeals stated as follows:

> The question here is not whether the Commission is barred from changing its decision on the treatment of the LaCygne 2 sale/leaseback. The question is whether the Commission's decision to reverse itself is supported by the evidence or is arbitrary and capricious. It is clear that Westar presented the same evidence in this proceeding that it had presented in the prior case. Rohlfs testified in both cases about the LaCygne 2 sale/leaseback and the manner in which the proceeds of the transaction were used to benefit the ratepayers. The only difference in the present case was Haines' testimony, which was similar to Rohlfs' testimony but much less specific. There was no evidence of any economic or market changes warranting reversal of the Commission's decision. Instead, the Commission essentially changed a finding of fact it had made in an earlier case, *i.e.*, whether the proceeds of the LaCygne 2 sale/leaseback were used solely to benefit the ratepayers. In its brief, the Commission sets forth policy arguments justifying the reversal of the LaCygne 2 decision. However, these policy concerns do not appear in the Commission's order and will not be permitted to justify its actions on appeal.
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> A change in an agency decision or policy must be supported by substantial competent evidence. Substantial competent evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. . . . A decision that is not supported by substantial evidence is one that is so wide of the mark as to be outside the realm of fair debate. . . .
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> However, when an administrative agency deviates from a prior policy, the change in policy must not only be supported by substantial evidence, but the agency must also *explain its change in position*. . . . Otherwise, the change in policy is considered arbitrary and capricious. Here, the Commission failed to give any

> reason for reversing its order on the LaCygne 2 sale/leaseback issue other than citing Haines' testimony. As previously noted, however, this same evidence had been presented by Westar in the prior rate case. There may have been a valid reason for the Commission to change its ruling on this issue, but the Commission failed to express one in its order. Even an admission by the Commission that its prior ruling was factually incorrect would have provided a basis for reversing its decision, but the Commission provided no such explanation in its order. We conclude the Commission's order regarding the LaCygne 2 sale/leaseback was unreasonable, arbitrary, and capricious. Accordingly, this order is reversed and remanded for further consideration.

Unified Sch. Dist. No. 259 v. State Corp. Comm'n, 138 P.3d 417, 2006 WL 1903044 (Kan. App. July 7, 2006; emphasis in original).

13. The Commission further claims that this revelation that both the September 17, 1987 Order regarding the LaCygne transaction and the July 25, 2001 Order on Rate Applications in the previous rate case were factually incorrect comes after a careful review of the Commission's previous orders on this issue. Yet, the Commission has cited no specific language from the July 25, 2001 Order on Rate Applications which is allegedly incorrect.

14. To the contrary, a "careful review" of the July 25, 2001 Order on Rate Applications in the 436 docket demonstrates that the previous order was written after careful consideration of all the testimony and the September 17, 1987 Order on the LaCygne transaction. Specifically, the Commission stated as follows:

> 72. <u>LaCygne Sale/Leaseback</u>. In 1987, the Commission approved the sale by KGE of its 50% undivided interest in LaCygne Unit 2 and addressed treatment of KGE's sale and leaseback transaction. The Order notes the obvious benefits of the transaction to KGE, and then states:
>
> > Of equal importance to the Commission is the benefit to the customer. KGE contends the benefits of the transaction will be reflected in its cost of service. KGE proposes to amortize the book gain on the sale of LaCygne 2 to its Kansas jurisdictional cost of service over the life of the lease transaction. KGE also proposes to reduce its rate base by the book value of LaCygne 2, **reflect the unamortized gain as a reduction in rate base for future rate**

> **cases** and include the benefits of the use of the proceeds from the sale in its cost of service. Docket No. 156,521-U, September 17, 1987 Order, p. 11 (emphasis added).
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> 73. Staff and KIC propose a rate base adjustment to recognize cost-free capital created from the gain on KGE's sale of LaCygne in 1987. They state that by the terms of the 1987 Order, the gain from LaCygne sale funds are to be considered cost free capital in future rate cases. KIC also emphasizes that this would be the fair and reasonable treatment regardless of any specific language in the Order. (Proctor direct, 13, 58-61; Exh. JMP-8, Sch. 1; Dittmer direct, 15-18; KGE Update Schedule B-1; Dittmer surrebuttal 20-23.)
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> 74. The Applicants do not dispute what the Order says, but claim that the Order is in error (Rohlfs rebuttal, 31.) They discuss the unique characteristics of KGE's regulatory history and state that the intended benefits from the Order have already been recovered. (Rohlfs rebuttal, 23-25, 29-39; Rohlfs reply 2-9.)
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> 75. This adjustment was raised by Staff in the 1997 rate proceeding involving KGE and WRI, but that case was settled and the adjustment was not ruled upon. Docket No. 193,306-U and 193,307-U, January 15, 1997 Order, pp. 23-25, ¶¶ 43 and 45. The Applicants argue that making the Staff and KIC adjustment would give all the benefits of the gain to ratepayers, contrary to *Kansas Power & Light Co. v. Kansas Corporation Commission*, 5 Kan. App. 2d 514, 620 P.2d 329 (1980), *rev. denied* 229 Kan. 670 (1981). In its Reply Brief, KIC correctly states that the LaCygne transaction is not an outright sale of utility property (as was the case in the *Kansas Power & Light Co.* case), but was a refinancing transaction. (See 1987 LaCygne Order, pp. 9-11.) In addition, what the Court found objectionable in the *Kansas Power & Light Co.* case was the fact that ratepayers were receiving **all** of the profits from the sale. 5 Kan. App. 2d at 529. That is clearly not the case here. The 1987 Order specifically referred to the substantial monetary benefits that KGE would receive as a result of the transaction. 1987 LaCygne Order, pp. 11-12.
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> 76. In arguing this adjustment, the Applicants focus on the wording of KGE's Application and the intent of KGE, ***but what is controlling is the language in the Order and the intent of the Commission. The Applicants should have sought reconsideration and appealed the 1987 Order if they disagreed with its ruling on future rate base treatment. The provisions of the 1987 Order are clear and reasonable, and will be followed by the Commission.*** The adjustment of KIC and Staff is approved and results in a decrease of $86,496,813 to KGE's rate base. (Proctor direct, 58-61, Exh. JMP-8; Staff revised KGE Schedule A-3, Adjustment 2; Dittmer direct, KGE Update Schedule B-1.)

Order on Rate Applications, KCC Docket No. 01-WSRE-436-RTS, at 28-30, *emphasis in paragraph 76 added*); *affirmed on appeal* in *Western Resources, Inc. v. State Corp. Comm'n*, 30

Kan. App. 2d 348, 363 (2002).

15. As set forth in the Order on Rate Applications in the 436 docket, Westar had its chance to correct the language in the September 17, 1987 Order on the LaCygne transaction. Westar failed to file a petition for reconsideration and appeal the 1987 Order. Having failed to do so at the time the 1987 Order was entered, Westar has no right to seek reversal of the terms of the 1987 Order now. Yet, nearly twenty years later, the Commission now grants Westar's request to re-write the 1987 Order and finds that the 1987 Order was "factually" incorrect. Of course, without such a finding, the Commission would be hard pressed to explain how the Order on Rate Applications in the 436 docket was factually incorrect.

16. Not only does the Commission's current Order reward Westar's failure to file a petition for reconsideration and appeal the 1987 Order, it also completely ignores the testimony submitted by James Proctor in this docket and the 436 docket. Mr. Proctor was the Chief of Accounting and Financial Analysis for the KCC at the time it conducted its review of the LaCygne 2 sale/leaseback, and the KCC conducted its review under his direction. (Proctor Direct at 32.) Mr. Proctor testified that the Staff adjustment on the LaCygne 2 transaction was the intended and proper result and that it comports with sound ratemaking policy. (Proctor Direct at 33.) Mr. Proctor further testified that Westar's use of the proceeds from the gain on the sale of LaCygne 2 should have no relevance to question of whether to treat the gain as cost-free capital. (Proctor Direct at 35.) Clearly, Mr. Proctor was in a much better position than Mr. Haines to divine the intent of the KCC when it issued the 1987 Order.

17. Furthermore, while the Commission ignores the above testimony of Mr. Proctor in the Order, it also now erroneously asserts that following Mr. Proctor's recommendation is somehow "poor policy" because it would not provide any incentives to Kansas utilities to enter

into transactions that would benefit ratepayers. (*Order,* at 19). This statement is in complete contradiction to the Commission's findings in the 436 case—which were affirmed on appeal—that the transaction provided KGE "obvious" and "substantial monetary benefits," in addition to benefits for its customers. There are absolutely no findings in this case that would support the conclusion that the balance of the benefits was unfairly tilted towards the customers by adopting Mr. Proctor's recommendation. Indeed, every review of the 1987 Order has concluded that the LaCygne transaction provided benefits for both the company and its customers—which completely contradicts the Commission's conclusion in this docket that the company would have had no incentive to complete the transaction had the Commission followed Mr. Proctor's recommendations. Mr. Proctor has "more than twenty years of experience in regulating public utility companies for two state utility commissions and as a regulatory consultant primarily to state regulatory agencies" (Proctor Direct, at 1), and has been hired repeatedly by the Commission as a consultant to analyze financial transactions by Kansas utilities. Surely with his vast experience, Mr. Proctor would not have testified that "[w]hen a utility sells utility assets for a gain, it is sound ratemaking treatment to attribute the benefits to ratepayers. If any of the gain on the sale is retained by shareholders, the utility is provided funds that facilitate over-earnings" if it was an incorrect statement. (Proctor Direct, at 33). While the Commission states that the adjustment "makes no sense in this particular context" (*Order*, at 19), it is, in fact, Mr. Proctor's approach that "makes sense" in the context of sound ratemaking: the ratepayers who paid for the construction of the utility asset should be the ones to receive the benefit of the gain upon its sale. The company retained the "substantial monetary benefits" from the transaction, according to the Commission and the Court of Appeals. However, as Mr. Proctor testified, failure to implement his adjustment on the LaCygne 2 transaction allows Westar to earn above its authorized rate of

return (Proctor Direct, at 34), which results in denying ratepayers their share of the benefits—benefits that were explicitly intended to balance the "substantial monetary benefits" that the transaction provided the company. There is simply no evidence in the record that supports the Commission's recent conclusion that Mr. Proctor's recommendation denies the company the "substantial monetary benefits" that were the company's incentive for completing the transaction. And there is simply no evidence in the record that Mr. Proctor has lost credibility with the Commission since his recommendation was first adopted by the Commission, and no evidence that his conclusions were somehow erroneous. The Commission, in attempting to supply the Court of Appeals with an adequate explanation of its complete reversal, has offered only more assertions that it was "wrong" in 1987, but has pointed to no facts in the record that show that it was wrong. The erroneous decision is not rescued by resorting to calling Mr. Proctor's recommendation "poor policy" when the evidence that it was "good policy" that benefited ratepayers and the company alike stands uncontested.

18. For all of the reasons set forth above, CURB respectfully requests that the Commission reconsider its Order with regard to the LaCygne 2 sale/leaseback and implement Staff's adjustment in accordance with the Court of Appeals' decision.

C. Transmission Delivery Charge (TDC)

19. CURB takes issue with the Commission's decision to take additional evidence of Westar's current transmission costs on remand with respect to determining the amount of refunds due to customers. Additionally, to the extent that the Commission has ruled in advance of the hearing on this matter about the appropriate use of the new FERC rate on remand or the Joint

Intervenors' arguments with respect to retroactive ratemaking, CURB requests reconsideration of the Commission's Order with respect to these issues.

20. The Commission's Order asserts that there is no retroactive ratemaking issue involved in determining the issues related to the TDC because no additional funds will be collected from ratepayers. (*Order,* at 22.) If, however, in determining the amount of refunds, the Commission declines to refund amounts illegally collected from customers because costs that could not have been legally included in rates at the time the Commission's order was issued are retroactively deemed to have been a legitimate part of Westar's costs at the time the order was issued, then CURB contends the act would be tantamount to retroactive ratemaking. CURB understands the Commission's Order, which expresses the intention to adopt the FERC rate which was approved November 7, 2006, as Westar's costs for setting the rates paid from December 1, 2005, forward, as expressing the intent to engage in retroactive ratemaking.

21. Therefore, CURB objects to reopening the record to determine the amounts to be refunded to customers. Evidence of Westar's transmission costs since the TDC was implemented is irrelevant to the task of the Commission to refund amounts illegally charged to customers. The Court of Appeals ruled that the transmission delivery charge (TDC) was illegal because the charge was not revenue-neutral as required by statute, and not based on the cost to Westar of the final FERC rate that was embedded in Westar's rates at the time the TDC was implemented. The illegal rates—the amounts charged to ratepayers that exceed the final FERC rate that was embedded in rates at the time the TDC rate was implemented—must be refunded.

22. If the Commission adjusts the amount of the refund based on a reassessment of Westar's costs since the TDC was implemented, the result will be that some of the amounts illegally charged to customers will not be returned. The Commission cannot comply with the

Court of Appeals opinion without a complete refund of all revenues that were collected illegally from customers.

23. The remand to correct the illegal order and make refunds was not a carte blanche invitation from the Court of Appeals to recalculate the refunds based on Westar's current costs. The remand was ordered to correct the illegality of the Commission's order. The TDC was illegal because it included costs beyond those permitted to be included in rates by statute, which were the amounts beyond the final FERC-approved rates embedded in Westar's rates *at the time the TDC was implemented.* The only way to correct the illegality is to return the amounts included in the TDC over and above the final FERC-approved rates that were embedded in customer rates at the time the order was issued.

24. A summary of the impact of the TDC on the revenue requirement, as approved in the Stipulation and Agreement, is attached (Kalcic Schedule 1). The amount illegally included in the revenue requirement was $13,251,128 annually, as reflected in CURB's witness Brian Kalcic's calculations. That amount, prorated to reflect the actual period it has been included in rates, must be refunded to customers, because it was illegal—*regardless of how Westar's transmission costs have changed since the Commission issued its order.* Since the *only* costs legally permitted to be included in the TDC were the costs related to the final-approved FERC rate that was embedded in Westar's rates at the time the TDC was implemented, changes in Westar's costs since that date are simply irrelevant to the calculation of the amounts illegally charged to customers that must be refunded.

25. This is an *entirely separate issue* from whether the Commission may opt to take further evidence on Westar's current transmission costs in order to make a fair determination of the amount to embed in Westar's rates *going forward.* The fact that the Commission intends to

revise Westar's rates going forward to eliminate the TDC and re-embed Westar's current transmission costs in rates does *not* eliminate the obligation to refund the *entire amount that was charged illegally to customers in the TDC.* CURB may also object to the Commission's decision to consider recent changes in Westar's transmission costs in setting rates going forward, but at least that decision will rest on whether it is reasonable to do so. But denying any portion of the refund of illegal rates to customers is not only unreasonable, but illegal.

26. CURB recognizes that revising Westar's rates going forward, in light of the Court of Appeals' opinion, is not retroactive ratemaking *per se.* However, calculating the *refunds* by taking into account changes in transmission costs as much as two years outside of the test year is simply unsupportable on several grounds. Most importantly, calculating the refund in this manner will allow Westar to retain amounts charged illegally to customers in the TDC. Further, if the Commission does not consider whether there have been changes in revenues as well as costs for the past two years, there will likely be a mismatch between revenues and costs in rates—defeating entirely the purpose of using a test year to freeze costs and revenues at a point in time to accurately set rates. Such a piecemeal review of the changes in Westar's costs on only one item—transmission—is unreasonable and is an example of single-issue ratemaking, which is not permitted under our regulatory scheme.

27. Finally, to calculate the refund based on costs that were not embedded in Westar's rates when the December 2005 order was issued is retroactive ratemaking. The Commission may consider known and measurable changes in setting rates for Westar *going forward.* Whether it is reasonable to consider changes that have occurred two years outside the test year is another issue, but it remains that the Commission cannot correct the illegality of the TDC rate by making new findings about the underlying costs. What made the TDC illegal was that it

included costs beyond those based on the most recently-approved FERC rate that had been embedded in Westar's rates. That amount was fixed at the time the TDC was implemented. Anything over that amount included in rates was included illegally—*regardless of what Westar's actual costs were in addition to the embedded FERC rate, and regardless of what the costs were at a later date.*

28. It is not retroactive ratemaking to order a refund, and it is not retroactive ratemaking to set Westar's rates going forward on known and measurable changes in its underlying transmission costs. But it is retroactive ratemaking to reduce the amount of the refund due to customers for a rate charged illegally by taking into account changes in *costs that could not have legally been included in the TDC rate at the time it was implemented.* Therefore, there is no reason to open up the record for new evidence to calculate the refund.

29. CURB therefore petitions for reconsideration of the Commission's decision to reopen the record to consider new evidence of Westar's transmission costs in calculating the refund. CURB requests that the Commission calculate the TDC refund without reference to any underlying transmission costs other than the final FERC rate that was embedded in Westar's rates at the time the TDC was implemented. To consider other transmission costs, or changes in the FERC rate since the TDC was implemented in calculating the refund will not correct the illegality of the TDC rate, will not make customers whole, and will not comply with the prohibition against retroactive ratemaking.

30. CURB has raised the TDC refund issue herein in order to ensure that it has preserved its right to appeal the issue of whether the Commission may properly consider evidence of Westar's transmission costs beyond the final FERC rate embedded in Westar's rates when the TDC was implemented in *determining the amount to be refunded to customers.*

CURB's objection is based on the fact that the Court of Appeals ruled that it was illegal to include any amount in the TDC beyond the amount embedded in rates that was based on final-approved FERC rates: subsequent changes in Westar's costs are simply irrelevant to the determination of how much to refund. CURB recognizes that the Commission has determined it will take further evidence on this issue, but simply wants to ensure it is not deemed in the future to have waived its objections to the Commission's intention to reopen the record on remand to take further evidence on Westar's recent transmission costs *in order to calculate refunds*. CURB assumes that any objections it may have to the reasonableness or accuracy of the Commission's decisions concerning the size of the refund and any changes to Westar's rates going forward will be properly raised in a petition for reconsideration after the hearing and the Commission's final rate order has been issued.

31. Therefore, CURB respectfully requests that the Commission reconsider its Order with respect to opening the docket for new evidence to determine the refunds due customers, and instead order that a refund of $13,251,128 annually be refunded to customers, prorated for the period of time during which the TDC was charged to customers. CURB does not object to opening the docket for new evidence to determine the appropriate transmission costs to be included in Westar's rates going forward, but reserves its rights to petition for reconsideration the final determination of the amount of the refund or the final rates to be determined in subsequent proceedings.

II. Conclusion

32. In determining just and reasonable rates, the Commission must make findings supported by substantial evidence and cannot make determinations that are unreasonable,

arbitrary, and capricious. As set forth above, the Commission's *Order Adopting Further Procedure Following Remand* with respect to the above items does not comply with those requirements.

For all of the reasons set forth above, CURB respectfully requests that the Commission reconsider its *Order Adopting Further Procedure Following Remand* as set forth above; and for such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

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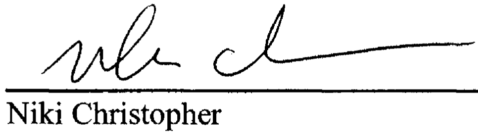
VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

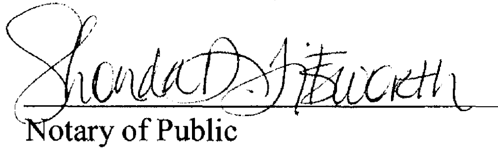
I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the above named petitioner; that she has read the above and foregoing, and, upon information and belief, states that the matters therein appearing are true and correct.



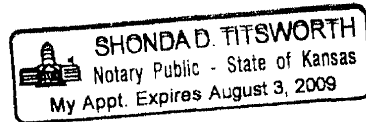
Niki Christopher

SUBSCRIBED AND SWORN to before me this 23rd day of February, 2007.



Notary of Public

My Commission expires: 8-03-2009.



ATTACHMENTS

MAJOROS SCHEDULE 1 - DEPRECIATION ADJUSTMENT

KALCIC SCHEDULE 1 - TRANSMISSION DELIVERY CHARGE (TDC) ADJUSTMENT

MAJOROS SCHEDULE 1

ACCOUNT		ORIGINAL COST	COMPANY PROPOSED ANNUAL ACCRUAL		MAJOROS REVISED ANNUAL ACCRUAL		DIFFERENCE
			AMOUNT	RATE	AMOUNT	RATE	
(1)		(2)	(3)	(4)	(5)	(6)	(7)=(5)-(3)
	WESTAR NORTH STEAM PRODUCTION PLANT						
311.00	STRUCTURES & IMPROVEMENTS						
	JEFFREY	153,486,630	3,311,410	2.16	2,050,137	1.34	(1,261,273)
	TECUMSEH	14,658,030	526,238	3.59	310,136	2.12	(216,102)
	LAWRENCE	22,871,212	570,132	2.49	331,592	1.45	(238,540)
	HUTCHINSON	5,547,667	196,211	3.54	91,050	1.64	(105,161)
	TOTAL STRUCTURES & IMPROVEMENTS	196,563,540	4,603,991	2.34	2,782,916	1.42	(1,821,075)
312.00	BOILER PLANT EQUIPMENT						
	JEFFREY	291,979,243	8,370,954	2.87	5,299,923	1.82	(3,071,031)
	TECUMSEH	48,157,901	2,297,522	4.77	1,464,326	3.04	(833,196)
	LAWRENCE	92,419,175	3,066,776	3.32	1,902,147	2.06	(1,164,629)
	HUTCHINSON	16,007,287	1,040,464	6.50	698,978	4.37	(341,486)
	TOTAL BOILER PLANT EQUIPMENT	448,563,606	14,775,716	3.29	9,365,374	2.09	(5,410,342)
312.10	POLLUTION CONTROL EQUIPMENT						
	JEFFREY	140,733,721	8,118,014	5.77	5,441,588	3.87	(2,676,426)
	TECUMSEH	8,635,762	663,460	7.68	470,034	5.44	(193,426)
	LAWRENCE	11,339,226	684,989	6.04	483,733	4.27	(201,256)
	TOTAL POLLUTION CONTROL EQUIPMENT	160,708,709	9,466,463	5.89	6,395,355	3.98	(3,071,108)
312.20	BOILER PLANT EQUIPMENT - TRAIN CARS						
	JEFFREY	294,464	10,609	3.60	10,609	3.60	0
	TECUMSEH	5,183,981	253,961	4.90	254,553	4.91	592
	LAWRENCE	12,246,742	462,217	3.77	462,777	3.78	560
	TOTAL BOILER PLANT EQUIPMENT - TRAIN CARS	17,725,187	726,787	4.10	727,939	4.11	1,152
314.00	TURBOGENERATOR UNITS						
	JEFFREY	130,840,042	6,905,858	5.28	4,969,104	3.80	(1,936,754)
	TECUMSEH	21,727,970	2,108,120	9.70	1,389,162	6.39	(718,958)
	LAWRENCE	54,246,444	3,448,005	6.36	2,271,278	4.19	(1,176,727)
	HUTCHINSON	11,874,764	1,293,367	10.89	495,772	4.18	(797,595)
	TOTAL TURBOGENERATOR UNITS	218,689,220	13,755,350	6.29	9,125,317	4.17	(4,630,033)
315.00	ACCESSORY ELECTRIC EQUIPMENT						
	JEFFREY	49,071,728	1,140,633	2.32	837,657	1.71	(302,976)
	TECUMSEH	11,194,779	499,997	4.47	374,700	3.35	(125,297)
	LAWRENCE	15,574,870	574,725	3.69	464,868	2.98	(109,857)
	HUTCHINSON	3,670,809	121,615	3.31	63,206	1.72	(58,409)
	TOTAL ACCESSORY ELECTRIC EQUIPMENT	79,512,186	2,336,970	2.94	1,740,431	2.19	(596,539)

MAJOROS SCHEDULE 1

ACCOUNT	ORIGINAL COST	COMPANY PROPOSED ANNUAL ACCRUAL		MAJOROS REVISED ANNUAL ACCRUAL		DIFFERENCE
		AMOUNT	RATE	AMOUNT	RATE	
(1)	(2)	(3)	(4)	(5)	(6)	(7)=(5)-(3)

MAJOROS SCHEDULE 1

	ACCOUNT	ORIGINAL COST	COMPANY PROPOSED ANNUAL ACCRUAL		MAJOROS REVISED ANNUAL ACCRUAL		DIFFERENCE
			AMOUNT	RATE	AMOUNT	RATE	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)=(5)-(3)
316.00	MISCELLANEOUS POWER PLANT EQUIPMENT						
	JEFFREY	10,655,696	291,789	2.74	201,834	1.89	(89,955)
	TECUMSEH	3,320,277	161,677	4.87	118,739	3.58	(42,938)
	LAWRENCE	4,493,202	223,466	4.97	183,777	4.09	(39,689)
	HUTCHINSON	1,124,545	44,173	3.93	25,027	2.23	(19,146)
	TOTAL MISCELLANEOUS POWER PLANT EQUIPMENT	19,593,720	721,105	3.68	529,379	2.70	(191,726)
	TOTAL WEN STEAM PRODUCTION PLANT	**1,141,356,168**	**46,386,382**	**4.06**	**30,666,711**	**2.69**	**(15,719,671)**
	WESTAR SOUTH STEAM PRODUCTION PLANT						
311.00	STRUCTURES & IMPROVEMENTS						
	JEFFREY	48,670,387	973,211	2.00	572,415	1.18	(400,796)
	RIPLEY	2,111,828	237,212	11.23	(11,755)	-0.56	(248,967)
	NEOSHO	2,683,172	234,290	8.73	107,829	4.02	(126,461)
	MURRAY GILL	5,224,995	182,222	3.49	59,410	1.14	(122,812)
	GORDAN EVANS	4,074,654	113,750	2.79	50,224	1.23	(63,526)
	LACYGNE UNIT 1	25,508,581	746,501	2.93	504,103	1.98	(242,398)
	LACYGNE UNIT 2	1,691,460	110,254	6.52	37,456	2.21	(72,798)
	TOTAL STRUCTURES & IMPROVEMENTS	89,965,078	2,597,440	2.89	1,319,683	1.47	(1,277,757)
312.00	BOILER PLANT EQUIPMENT						
	JEFFREY	92,602,293	2,767,822	2.99	1,795,631	1.94	(972,191)
	RIPLEY	613,728	245,117	39.94	431,711	70.34	186,594
	NEOSHO	5,302,976	618,133	11.66	355,547	6.70	(262,586)
	MURRAY GILL	20,797,771	633,806	3.05	108,999	0.52	(524,807)
	GORDAN EVANS	29,092,095	1,144,493	3.93	615,071	2.11	(529,422)
	LACYGNE UNIT 1	86,057,779	2,591,265	3.01	1,575,614	1.83	(1,015,651)
	LACYGNE UNIT 2	23,880,703	1,764,528	7.39	586,967	2.46	(1,177,561)
	TOTAL BOILER PLANT EQUIPMENT	258,347,346	9,765,164	3.78	5,469,540	2.12	(4,295,624)
312.10	POLLUTION CONTROL EQUIPMENT						
	JEFFREY	43,513,437	2,071,252	4.76	1,163,204	2.67	(908,048)
	LACYGNE UNIT 1	40,563,914	915,212	2.26	159,640	0.39	(755,572)
	TOTAL POLLUTION CONTROL EQUIPMENT	84,077,351	2,986,464	3.55	1,322,844	1.57	(1,663,620)
312.20	BOILER PLANT EQUIPMENT - TRAIN CARS						
	JEFFREY	92,020	3,085	3.35	3,089	3.36	4
	LACYGNE UNIT 2	1,286,716	0	-	(10,251)	-0.80	(10,251)
	TOTAL BOILER PLANT EQUIPMENT - TRAIN CARS	1,378,736	3,085	0.22	(7,162)	-0.52	(10,247)

MAJOROS SCHEDULE 1

	ACCOUNT (1)	ORIGINAL COST (2)	COMPANY PROPOSED ANNUAL ACCRUAL AMOUNT (3)	COMPANY PROPOSED ANNUAL ACCRUAL RATE (4)	MAJOROS REVISED ANNUAL ACCRUAL AMOUNT (5)	MAJOROS REVISED ANNUAL ACCRUAL RATE (6)	DIFFERENCE (7)=(5)-(3)
314.00	TURBOGENERATOR UNITS						
	JEFFREY	42,501,768	2,509,097	5.90	1,877,949	4.42	(631,148)
	NEOSHO	4,376,391	751,311	17.17	336,117	7.68	(415,194)
	MURRAY GILL	23,125,022	1,552,258	6.71	385,880	1.67	(1,166,378)
	GORDAN EVANS	22,735,282	541,168	2.38	132,660	0.58	(408,508)
	LACYGNE UNIT 1	23,324,011	1,464,974	6.28	858,144	3.68	(606,830)
	LACYGNE UNIT 2	5,606,664	463,135	8.26	162,311	2.89	(300,824)
	TOTAL TURBOGENERATOR UNITS	121,669,137	7,281,943	5.99	3,753,060	3.08	(3,528,883)
315.00	ACCESSORY ELECTRIC EQUIPMENT						
	JEFFREY	15,519,164	357,740	2.31	261,213	1.68	(96,527)
	WICHITA	196,685	0	-	0	0.00	0
	RIPLEY	658,792	58,321	8.85	(79,065)	-12.00	(137,386)
	NEOSHO	1,937,671	120,401	6.21	38,271	1.98	(82,130)
	MURRAY GILL	5,919,304	148,628	2.51	39,162	0.66	(109,466)
	GORDAN EVANS	5,770,813	115,738	2.01	51,837	0.90	(63,901)
	LACYGNE UNIT 1	12,239,428	302,844	2.47	212,304	1.73	(90,540)
	LACYGNE UNIT 2	2,133,732	105,377	4.94	34,968	1.64	(70,409)
	TOTAL ACCESSORY ELECTRIC EQUIPMENT	44,375,588	1,209,049	2.72	558,690	1.26	(650,359)
316.00	MISCELLANEOUS POWER PLANT EQUIPMENT						
	JEFFREY	3,634,656	132,009	3.63	101,365	2.79	(30,644)
	RIPLEY	300,132	38,564	12.85	20,878	6.96	(17,686)
	NEOSHO	482,389	70,502	14.62	46,087	9.55	(24,415)
	MURRAY GILL	1,431,423	87,044	6.08	52,939	3.70	(34,105)
	GORDAN EVANS	1,349,651	60,784	4.50	39,107	2.90	(21,677)
	LACYGNE UNIT 1	4,210,990	145,323	3.45	109,305	2.60	(36,018)
	LACYGNE UNIT 2	1,253,341	62,098	4.95	20,413	1.63	(41,685)
	TOTAL MISCELLANEOUS POWER PLANT EQUIPMENT	12,662,581	596,324	4.71	390,094	3.08	(206,230)
	TOTAL WES STEAM PRODUCTION PLANT	**612,475,817**	**24,439,469**	**3.99**	**12,806,750**	**2.09**	**(11,632,719)**
	TOTAL WESTAR NORTH AND SOUTH	**1,753,831,985**	**70,825,851**		**43,473,461**		**(27,352,390)**

Sources:
Cols. (3) and (4) from Company Study.
Cols. (5) and (6) from Majoros Exhibit___(MJM-16).

WESTAR ENERGY, INC.

TDC S&A Revenue Requirement Impacts
by WEN, WES and Wholesale Jurisdictions

Line	Classification	TDC Per Orig. Filing	TDC Per S&A	Elec Revenue Adjust. Per S&A: Acct 447 Sales for Resale	Elec Revenue Adjust. Per S&A: Acct 456 Oth Elec Revenue	Net COS Adjustment Per S&A
		1	2	3	4	5
1	WEN Retail	$39,762,794	$31,471,652	($5,885,160)	($9,025,712)	$6,619,730
2	WES Retail	$31,913,734	$31,037,756	($2,073,447)	($5,433,929)	$6,631,398
3	Subt Retail	$71,676,528	$62,509,408	($7,958,607)	($14,459,641)	$13,251,128
4	Wholesale	$9,894,574	$19,061,694	$7,958,607	$14,459,641	($13,251,128)
5	Total Westar	$81,571,102	$81,571,102	$0	$0	$0
	Source:	Exh.__(WSS-3)	S&A	S&A	S&A	5 = 2-1-3-4

Excel Consulting
2/15/07

CERTIFICATE OF SERVICE

05-WSEE-981-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, hand-delivered this 23rd day of February, 2007, to the following:

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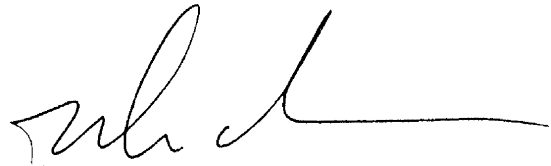

Niki Christopher