

EE Education Programs.² CURB also recommended the Commission disallow \$2,653.18 in expenses from Westar's Building Operator Certification Program.³

5. CURB next turned to the approval status of Westar's EE programs. CURB noted the program budgets for four of Westar's five EE programs will expire in 2014. Because these program budgets will expire this year, CURB stated, "If Westar intends to continue to offer its programs beyond 2014, it should formally request Commission approval to continue the programs."⁴

6. CURB also argued Westar has not conducted Evaluation, Measurement, and Verification (EM&V) of its EE programs, in conformance with the Commission's Order in Docket No. 08-GIMX-442-GIV.⁵ Therefore, CURB recommended "the Commission order Westar to conduct a complete EM&V in accordance with the 442 Docket with EM&V expenditures limited to 5% of the program budgets...available for review by Staff, CURB and Commission no later than September 1, 2015."⁶

B. Westar's Response to CURB's Reply

7. On October 7, 2014, Westar filed its Response to CURB's Reply. In its Response, Westar addressed every issue raised by CURB – the recommended disallowances, the scope of the present proceeding, the approval status of its EE programs, and its responsibilities with regard to EM&V.

8. First, Westar noted that it did not object to CURB's proposed accounting adjustment.⁷

² CURB's Reply to Staff's Report & Recommendation, September 29, 2014, pp. 4-5. (CURB Reply, pp. 4-5.)

³ CURB Reply, p. 6.

⁴ CURB Reply, pp. 10-11.

⁵ Docket No. 08-GIMX-442-GIV, Order Following Collaborative on Benefit-Cost Testing and Evaluation, Measurement, and Verification, April 13, 2009, ¶ 149. (08-442 Order Following Collaborative, ¶ 149.)

⁶ CURB Reply, p. 15.

⁷ Westar's Response to CURB's Reply to Staff's R&R, October 7, 2014, ¶ 3. (Westar Response, ¶ 3.)

9. Westar next argued that CURB's arguments regarding expired budgets and EM&V should not be considered in this docket. Westar noted the scope of this docket is limited to review of expenditures related to its EE programs. Therefore, Westar contended the approval status of its programs' budgets and the need for EM&V are extraneous issues that should not be considered within the context of this proceeding.⁸

10. Though it contended the above issues should not be addressed in this docket, Westar continued by fully responding to CURB's assertions regarding program budgets and EM&V. Westar rejected CURB's argument that its EE programs expire "after five years just because the Commission requires a five-year budget to be submitted" as part of the initial Application for each program's approval.⁹ Westar also argued that the five-year budget was simply an Application requirement, and the Commission has never otherwise explicitly required approved budgets for EE programs.¹⁰

11. Westar also contended it was not required to perform additional EM&V for any of its programs. For the SimpleSavings program, Westar stated that an EM&V would not be useful or worth the expense required to conduct it.¹¹ Furthermore, Westar argued that Staff is responsible for conducting any EM&V on the SimpleSavings program.¹²

12. Finally, Westar detailed the evaluation activities it has undertaken with regard to its other EE programs.¹³ Westar also asserted it has "complied with its obligations to conduct EM&V in accordance with the guidance that has been provided by the Commission. If the

⁸ Westar Response, ¶¶ 6-7.

⁹ Westar Response, ¶ 9.

¹⁰ Westar Response, ¶ 11.

¹¹ Westar Response, ¶ 13.

¹² Westar Response, ¶¶ 15-16.

¹³ Westar Response, ¶ 17.

Commission chooses to adjust or develop its rules regarding EM&V further in the future, Westar will adjust its methods for performing EM&V as necessary to comply with the new rules.”¹⁴

C. Staff’s Reply to CURB and Westar

13. On October 9, 2014, Staff filed its Reply to CURB’s Reply and Westar’s Response. In its Reply, Staff also addressed every issue raised by CURB. Staff first addressed CURB’s recommended disallowances. Staff did not concur with CURB’s analysis. However, Staff did not object to the adjustment, as Westar had already consented to the disallowance.¹⁵

14. Staff also largely agreed with Westar regarding the appropriate scope of this proceeding.¹⁶ However, Staff noted that CURB had raised legitimate concerns over expired program budgets and the necessity of EM&V that are both appropriate for consideration by the Commission.¹⁷ Therefore, Staff recommended the Commission develop processes to address the issues raised by CURB in a timely fashion.¹⁸

D. CURB’s Response to Westar and Staff

15. On October 17, 2014, CURB filed a Response to the responsive pleadings of both Westar and Staff. In its Response, CURB continued to argue that budgets are a necessary component of EE programs and are properly within the scope of this proceeding.¹⁹ CURB also extended its argument that Westar is required to conduct EM&V on its EE programs.²⁰

E. The Commission’s Orders

16. On October 28, 2014, the Commission issued its Order Approving Energy Efficiency Rider. In its Order, the Commission accepted CURB’s recommended accounting

¹⁴ Westar Response, ¶ 18.

¹⁵ Staff’s Reply to CURB’s Reply and Westar’s Response, October 9, 2014, ¶¶ 13-15. (Staff Reply, ¶¶ 13-15.)

¹⁶ Staff Reply, ¶ 16.

¹⁷ Staff Reply, ¶ 17.

¹⁸ Staff Reply, ¶¶ 17-20.

¹⁹ CURB’s Response to Westar’s Response and Staff’s Reply, October 17, 2014, ¶¶ 6, 8-20. (CURB Response, ¶¶ 6, 8-20.)

²⁰ CURB Response, ¶¶ 21-28.

adjustment and approved recovery of \$5,515,148 associated with Westar's energy efficiency programs.²¹ The Commission also acknowledged that the scope of this docket is also in dispute and reserved judgment on the effect of Westar's expired program budgets and the need for EM&V until a later date.

17. On January 6, 2015, the Commission issued its Order on Operating Budgets and EM&V Studies. In its Order, the Commission first described the procedural history of this docket and summarized the parties' legal and substantive positions.²² The Commission then ordered Westar to submit operating budgets for each of its ongoing energy efficiency programs by March 16, 2015.²³ The Commission also required Westar to conduct EM&V on the SimpleSavings, WattSaver, and Energy Efficiency Demand Response programs.²⁴

II. Westar's Petition for Reconsideration

18. On January 21, 2015, Westar filed a Petition for Reconsideration (PFR) of the Commission's Order on Operating Budgets and EM&V Studies. In its PFR, Westar seeks reconsideration of the Commission's decisions requiring Westar to submit EE program budgets and conduct EM&V of certain programs.²⁵ Westar appears to argue the Commission's entire Order is invalid for two separate reasons. First, Westar alleges its due process rights have been violated because it did not have adequate notice of the issues in this proceeding and did not have an opportunity to address the issues.²⁶ Second, Westar argues the Commission's Order was unlawful because it did not address certain arguments raised by Westar and Staff.²⁷

²¹ Order Approving Energy Efficiency Rider, October 28, 2014, ¶ 7.

²² Order on Operating Budgets and EM&V Studies, January 6, 2015, ¶¶ 1-6.

²³ Order on Operating Budgets and EM&V Studies, ¶ 8.

²⁴ Order on Operating Budgets and EM&V Studies, ¶ 9.

²⁵ Westar's Petition for Reconsideration, January 21, 2014, ¶¶ 14-19. (Westar PFR, ¶¶ 14-19.)

²⁶ Westar PFR, ¶¶ 14-16

²⁷ Westar PFR, ¶¶ 17-19.

19. Westar also seeks specific reconsideration of the Commission's directive requiring EM&V for the SimpleSavings program.²⁸ Westar does not specifically identify any error in the Commission's decision. However, it appears Westar is arguing the Commission's decision to require EM&V for SimpleSavings is somehow unreasonable, arbitrary, or capricious.

III. Statutory Standard of Review

20. Kansas courts examine the validity of Commission orders pursuant to the Kansas Judicial Review Act (KJRA), K.S.A. 77-621 *et seq.* On appeal to Kansas courts, Westar would bear the burden of proving the Commission's action was invalid.²⁹ The validity of the Commission's action is determined in accordance with the standards of judicial review provided in K.S.A. 77-621, as applied to the Commission's action at the time it issued its Order on Operating Budgets and EM&V Studies. Westar must prove one of the eight grounds under K.S.A. 77-621(c) in order to obtain relief, and, of those grounds, two appear to be implicated. Though the statutory provisions are not specifically identified in Westar's PFR, Westar apparently asserts the Commission (a) engaged in an unlawful procedure by violating Westar's due process rights and by failing to address certain arguments of Westar and Staff,³⁰ (b) and acted in a manner that was otherwise unreasonable, arbitrary, or capricious.³¹

IV. Staff's Response

A. The Commission Did Not Engage in an Unlawful Procedure by Violating Westar's Procedural Due Process Rights When It Ruled on Issues Raised in This Proceeding by CURB.

21. Westar cites a Kansas Supreme Court decision that explains the procedural due process required in quasi-judicial administrative proceedings. Staff agrees the

²⁸ Westar PFR, ¶¶ 20-25.

²⁹ K.S.A. 77-621(a)(1).

³⁰ Westar PFR, ¶¶ 14-16, ¶¶ 17-19. K.S.A. 77-621(c)(5).

³¹ Westar PFR, ¶¶ 20-25; K.S.A. 77-621(c)(8).

present proceeding is quasi-judicial in nature. Staff also agrees with the standards recited by the court and cited by Westar. Specifically, the Court states,

An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a *reasonable opportunity to know the claims of the opposing party and to meet them*. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence.³² (Emphasis added.)

22. With reference to the preceding language, Westar generally alleges its due process rights were violated because “In this [docket the] issues decided by the Commission were not clearly defined and the parties were provided no opportunity to present evidence, explain, or rebut any of those issues.”³³ Westar does not provide any detailed discussion of how aware it was of the opposing party’s (CURB’s) claims and what opportunities it had to rebut those claims.

23. In reviewing the procedural history of this docket, it is clear Westar did have “a reasonable opportunity to know the claims of the opposing party” and was afforded a sufficient opportunity to address those issues. Not only was Westar given an opportunity to evaluate and respond to the issues raised by CURB, Westar did, in fact, extensively respond to those issues.

24. CURB first raised the issues of Westar’s expired EE program budgets and EM&V of Westar’s EE programs in its Reply filed September 29, 2014. CURB explained its concerns in detail and served its Reply on Westar. As noted above, Westar filed a fully-responsive pleading addressing all issues raised by CURB on October 7, 2014. Westar was aware of the issues being raised and addressed those issues.

³² *Suburban Med. Ctr. v. Olathe Cmty. Hosp.*, 226 Kan. 320, 331, 597 P.2d 654, 662-63 (1979).

³³ Westar PFR, ¶ 16.

25. Westar and Staff both contended the budget and EM&V issues would be more appropriately addressed in a separate proceeding. However, the Commission did not agree with that recommendation. That fact should not obscure the reality that both Westar and Staff *were aware of CURB's contentions*, had an opportunity to address them, and did, in fact, fully respond.

B. The Commission's Order Did Not Engage in Unlawful Procedures When It Failed to Address Certain Arguments of Westar and Staff

26. Westar claims the Commission's order is invalid because it failed to address or recognize the arguments of Westar and Staff regarding the scope of this docket and the necessity of program budgets and EM&V.³⁴ Simply put, the Commission is not required to discuss all record evidence or arguments raised by the parties, as Westar seems to imply. The Commission is only required to make a clear finding that is specific enough to allow judicial review of the reasonableness of the order and which has record evidentiary support.³⁵

27. In this case, the Commission concisely summarized the positions of the parties before stating its findings. The Commission's findings themselves were specific enough for review because they were clearly stated, and a reviewing court will be able to identify the record evidence that both supports and detracts from the findings. While the Commission could have engaged in a more lengthy explanation of how it weighed the competing arguments and evidence, it was not legally required to do so. Furthermore, while the Commission did not agree with the positions advanced by Staff and Westar, Staff does recognize there is record support for the ultimate findings reached by the Commission.

³⁴ Westar PFR, ¶¶ 17-19.

³⁵ *Farmland Indus., Inc. v. State Corp. Comm'n of State of Kan.*, 25 Kan. App. 2d 849, 852, 971 P.2d 1213, 1217 (1999). "To assure the KCC has engaged in lawful procedures and followed prescribed procedures, K.S.A. 77-621(c)(5), the KCC must render a written decision that is concise and contains a specific statement of relevant law and basic facts that support the decision. The KCC is not required to state factual findings in minute detail, but must be specific enough to allow judicial review of the reasonableness of the order. To guard against arbitrary action, conclusions of law must be supported by findings of fact supported by evidence in the record."

C. The Commission’s Decision to Require EM&V for The SimpleSavings Program Was Not Unreasonable, Arbitrary, or Capricious.

28. Westar appears to assert the Commission’s decision to require EM&V for SimpleSavings is somehow unreasonable, arbitrary, or capricious, though it does not identify specific error.³⁶

29. The arbitrary and capricious test relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching a determination or whether the agency's action is without foundation in fact.³⁷ Applying this standard, the Commission’s decision in this proceeding is reasonable when weighing the competing arguments and evidence available to it. In this case, there is clearly evidence that both supports and detracts from the Commission’s decision to require EM&V for SimpleSavings.

30. While Staff believes there is record evidence to support the Commission’s decision, Staff is also cognizant of Westar’s very real concerns that “given the limited application of the program, EM&V [may not] provide useful information or ...be worth the expense, which is borne by [Westar’s] customers.”³⁸ However, Staff also agrees with CURB’s assertions that EM&V of SimpleSavings presents an opportunity to examine valuable data on how Kansas may be able to reduce base load energy consumption.³⁹ To that end, Staff recommends the Commission grant very limited reconsideration on this issue.

31. Staff has evaluated the SimpleSavings data available to Westar. Based on this review, Westar can conduct limited and efficient EM&V that will be targeted to gain the most valuable insights, while eliminating the most inefficient or impossible requirements. Staff

³⁶ Westar PFR, ¶¶ 20-25.

³⁷ *Sokol v. Kansas Dept. of SRS*, 267 Kan. 740, 746, 981 P.2d 1172 (1999).

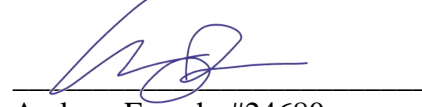
³⁸ Westar PFR, ¶ 6. *See also* Westar Response, ¶ 13.

³⁹ CURB Reply, pp 11, 15.

specifically recommends the Commission limit the SimpleSavings EM&V requirement to the items attached to this filing as Attachment 1. This position balances Westar's cost and efficiency concerns with the need for meaningful evaluation of the data produced by the program.

WHEREFORE Staff submits its *Response to Westar's Petition for Reconsideration* and recommends the Commission deny Westar's Petition for Reconsideration of the Commission's entire Order, but grant limited reconsideration of the Commission's EM&V requirement for SimpleSavings to the extent recommended in paragraph 31 above.

Respectfully submitted,



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Minimal EM&V for Simple Savings

1. Cost Effectiveness

- a. Use the Simple Saving Data Set as the date that the treatment took place
- b. Get a year's usage data before and whatever usage data is available since for each participant
- c. If possible create a matching data set with the participant matched with a neighbor with similar usage patterns
- d. Get the cost data for the program

2. Process Analysis

- a. List of the problems implementing the loan program
- b. A statement from Franklin that they do not do Residential loan programs and why

3. Statistical Analysis of Usage Data

- a. Aggregate participant and control group so there are two data streams
 - i. Do a difference in means test over time to see if there is a difference before and after the implementation of the energy efficiency measures
 - ii. Econometrically estimate equations for each of the two data streams using a dummy variable for the implementation in the participant data set and compare the results
- b. Aggregate the participant and the control group and econometrically estimate an equation and then see if the parameter on the dummy is significant
- c. Use panel regression on the disaggregated participant and control data
 - i. Estimate each group separately and compare the results
 - ii. Estimate the groups combined with dummy for implementation and see if the parameter on the dummy is significant

CERTIFICATE OF SERVICE

15-WSEE-021-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing docket was served via electronic service this 2nd day of February, 2015, to the following:

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