

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of Westar Energy, Inc. and)
Kansas Gas and Electric Company Seeking) Docket No. 15-WSEE-021-TAR
Commission Approval for Tariff Revisions to)
the Energy Efficiency Rider.)

Response of CURB to Westar Energy's Petition for Reconsideration

The Citizens' Utility Ratepayer Board (CURB) herein makes its response to the Petition for Reconsideration of Westar Energy, Inc. and Kansas Gas and Electric Company (Westar) that was filed in this docket on January 21, 2015.

1. In its petition, Westar asks for reconsideration of the Commission's January 6, 2015 order, which broadened the scope of this docket to address whether Westar should conduct Evaluation, Measurement and Verification (EMV) of its energy efficiency programs, and ordered Westar to conduct EMV on its SimpleSavings program. Westar claims it has suffered due process violations. CURB addresses Westar's claim below.

I. Westar has not suffered a due process rights violation

2. The Commission's October 28, 2014 order granted Westar's request to include certain costs in its Energy Efficiency (EE) Rider, and also stated that it would issue a subsequent order determining the appropriate scope of the docket. This later statement was in response to CURB's argument that the Commission should require budgets to be filed in this docket and that EMV should be conducted on all of Westar's energy efficiency programs. CURB has requested EMVs to be conducted in several EE Rider dockets because the Commission had previously ordered Westar to

conduct EMV in each of Westar's EE programs, yet Westar has failed to follow through on these requirements. While recognizing that the dockets considering approval of Westar's annual filings to revise the EE Rider to include costs incurred during the previous year are considered "routine" and the Commission generally does not consider questions beyond whether the costs included in the application should be included in the rider, CURB has argued that there is no other forum in which to raise the question of why has Westar not been required to comply with the EMV requirements. CURB has argued that the Commission should enforce these requirements as a condition of approving the costs to be placed in the EE Rider each year.

3. In the January 6 order, the Commission broadened the scope of the docket to address the issues raised by CURB, and ordered Westar to provide budgets for its ongoing EE programs and to conduct EMV on the SimpleSavings, WattSaver and Energy Efficiency Demand Response programs. Westar questions in its petition for reconsideration whether the Commission properly broadened the scope of the docket and claims that its due process right to notice and an opportunity to be heard were deprived by the Commission's order. Westar also claims that the Commission failed to consider its arguments and provide evidence in its order that it considered them, in violation of K.S.A. 77-621(c)(5). CURB argues below that there have been no violations of Westar's due process rights in this docket, that Westar should be required to file EMV and budgets with the Commission for all of its energy-efficiency programs, and that there is no justification for exempting the SimpleSavings program from this requirement.

A. Westar has not been deprived of notice that there was a change in scope of the docket

4. Contrary to Westar's argument, the requirements of K.S.A. 77-621(c)(5) do not apply to a decision to broaden the scope of a docket. The decision to broaden the scope of a docket is procedural and not substantive in nature. There is no rule or provision of law that requires the Commission to support a procedural ruling with substantial and competent evidence as required by K.S.A. 77-621 for substantive rulings; a procedural ruling simply must be within the authority of the agency to make and must be "for good cause shown", consistent with any rules or regulations that may govern the proceedings. The Commission has broad authority granted in Chapter 66 to make procedural rulings for good cause shown. Enlarging the scope of the docket serves the purpose of allowing the parties to address issues pertaining to Westar's obligations to provide budgets and conduct EMV as evidentiary support for its claimed expenditures for EE programs and for lost revenue recovery. Adding to the subject matter of the docket in no way deprives Westar's right to notice or its opportunity to be heard.

5. No party in this docket has a right to the higher level of due process required in a quasi-judicial proceeding. Tariff dockets are ratemaking dockets in which the Commission performs a legislative function, not a quasi-judicial function. As the applicant, Westar is entitled to no more notice in this docket than is owed any other party. Westar has made no allegations that the Commission failed to Westar with its orders or made its decisions outside the confines of a meeting open to the public, actions which would support claims that due process has been denied.

6. Westar also appears to be claiming that it has a due process right to expect that the scope of the docket will be limited to the issues raised in its application. However, in Commission

proceedings there is no rule or provision of law that requires that the subject matter of a Commission docket shall be limited solely to the issues raised in the applicants' initial filing.

7. Further, Westar cannot reasonably expect to be indefinitely allowed to avoid compliance with previous orders of the Commission requiring EMV because Westar itself does not raise the issue in its annual EE Rider filings. Westar has no right to come to the Commission to ask for recovery of the costs of EE programs and preclude questions about EMV and budgets by simply omitting references to budgets or EMV from its filing. Taxpayers and ratepayers who have been supplying the funds for these programs deserve an accounting of whether the money has been spent wisely, whether the programs are cost-effective and whether expenditures have reasonably conformed to the budgets. Finally, ordering Westar to comply with the conditions that the Commission imposed when it approved the programs is not unreasonably beyond the scope of this docket. The Commission's initial approval of these programs and recovery of their costs through the EE Rider was not a grant in perpetuity to continue operating them without analyses of the programs' value in achieving their purpose in producing energy savings. No party had a reasonable expectation that the Commission would allow these lapses in compliance to continue. Nor did Westar have a reasonable expectation that it would escape the necessity of filing budgets; a budget is a routine component of prudence review of expenditures of a regulated utility.

8. Any party who objected to the conditions imposed upon approval of the programs should have taken the opportunity at the time they were approved to argue against the conditions. All of the parties to this docket have been on notice since the Commission approved these programs that EMV would be required for each program. Additionally, Westar has had ample opportunities in this docket to present its evidence and challenge the rulings and the filings of other parties. Westar has no

right now to insist that it had no notice that it would be required to conduct EMV or provide budgets for these programs.

9. For all these reasons, Westar's due process right to notice has not been violated. Service on the parties of the Commission's January 6 order constituted the only notice due the parties of the Commission's decision to widen the scope of issues to be considered in this docket.

B. Westar has not been deprived of its right to be heard

10. Westar has not presented a single issue in its petition for reconsideration on which it has not had the opportunity to be heard. Further, as noted above, Westar has had multiple opportunities to object to the requirement of EMV in every docket in which the Commission imposed the requirement in approving each of its EE programs. Each order approving the programs has included the condition that EMV would be required, as follows:

- Building Operator Certification Program: "Westar Energy, Inc.'s application for approval of the Building Operator Certification program is granted, conditioned on ... future EM&V analyses for this program being consistent with forthcoming determinations by the Commission."¹
- WattSaver Program: "Evaluation, Measurement and Verification (EM&V) of the WattSaver program should be consistent with the Commission's determinations on this issue in Docket No. 08-GIMX-442-GIV."²

¹ KCC Docket No. 09-WSEE-738-MIS, June 15, 2009, *Order Approving Building Operator Certification Program*, at page 7, ¶3, A.

² KCC Docket No. 09-WSEE-636-TAR, May 27, 2009, *Order Approving Application and WattSaver Rider*, at ¶6(a).

- Energy Efficiency Demand Response Rider: “Evaluation, measurement and verification (EM&V) review of this program be conducted in a manner consistent with forthcoming determinations by the Commission in Docket No. 10-GIMX-013-GIV.”³
- Simple Savings Program: “The Commission finds an initial evaluation, measurement, and verification (EM&V) should be conducted after Simple Savings has been in place for two years, as recommended by the Commission in its Final Order in the 442 Docket. The Commission finds that six months is a reasonable timeframe for completion of an initial EM&V review and that it should be conducted through the EM&V process as laid out in Docket No. 10-GIMX-013-GIV by a third-party provider selected through the request for proposal (RFP) process that is currently being implemented at the Commission.”⁴

Westar was not precluded from objecting to EMV in any of these dockets. Further, Westar had an opportunity in this docket to respond to Staff’s Report and Recommendation, as well as to CURB’s response to Staff’s report, plus the additional opportunity to make its arguments again in its petition for reconsideration. There has been no deprivation of Westar’s right to be heard on the issue of whether Westar needs to provide budgets and EMV results to the Commission. Westar may or may not have a legitimate reason at this juncture to request more time to comply, but it has not been

³ KCC Docket No. 10-WSEE-141-TAR, December 9, 2009, *Order Approving Energy Efficiency Demand Response Program Rider*, at ¶7(a).

⁴ KCC Docket No. 10-WSEE-775-TAR, January 31, 2011, *Order Approving Partnership Between Efficiency Kansas and Westar’s Simple Savings Program*, at page 20, E.

deprived of its right to be heard. Westar, simply put, has had all the process in this docket to which it is due.

II. Westar is responsible for conducting the EMV of its EE programs

11. Westar is responsible for conducting EMV of its EE programs. When the Commission approved each of Westar's energy-efficiency programs, it specifically included language regarding EM&V in each order, as follows:

- Building Operator Certification Program: "Westar Energy, Inc.'s application for approval of the Building Operator Certification program is granted, conditioned on ... future EM&V analyses for this program being consistent with forthcoming determinations by the Commission."⁵
- WattSaver Program: "Evaluation, Measurement and Verification (EM&V) of the WattSaver program should be consistent with the Commission's determinations on this issue in Docket No. 08-GIMX-442-GIV."⁶
- Energy Efficiency Demand Response Rider: "Evaluation, measurement and verification (EM&V) review of this program be conducted in a manner consistent with forthcoming determinations by the Commission in Docket No. 10-GIMX-013-GIV."⁷

5 KCC Docket No. 09-WSEE-738-MIS, June 15, 2009, *Order Approving Building Operator Certification Program*, at page 7, ¶3, A.

6 KCC Docket No. 09-WSEE-636-TAR, May 27, 2009, *Order Approving Application and WattSaver Rider*, at ¶6(a).

7 KCC Docket No. 10-WSEE-141-TAR, December 9, 2009, *Order Approving Energy Efficiency Demand Response Program Rider*, at ¶7(a).

- Simple Savings Program: “The Commission finds an initial evaluation, measurement, and verification (EM&V) should be conducted after Simple Savings has been in place for two years, as recommended by the Commission in its Final Order in the 442 Docket. The Commission finds that six months is a reasonable timeframe for completion of an initial EM&V review and that it should be conducted through the EM&V process as laid out in Docket No. 10-GIMX-013-GIV by a third-party provider selected through the request for proposal (RFP) process that is currently being implemented at the Commission.”⁸

Further, in Docket No. 14-WSEE-030-TAR, the Commission expressly stated that it wanted EMV to be conducted on Westar’s EE and demand response programs:

The Commission agrees with CURB that an EM&V review on the prudence of Westar’s energy-efficiency and demand response programs should be done. However, Staff needs time to fully investigate and develop its EM&V processes in Docket No. 14-KCPE-074-GIE. Because of this, ordering a separate EM&V docket to be opened now would be fruitless. Also, to order an EM&V review in this docket would be inappropriate, as is advanced by Staff and is not rebutted by CURB or Westar. Thus, Staff shall file a motion with the Commission to open an EM&V docket on Westar’s energy-efficiency and demand response programs once EM&V processes are in place to administer such a review, presumably after Docket No. 14- KCPE-074-GIE is closed.⁹

The language in these orders is not ambiguous: the Commission intends EMV to be conducted on all of Westar’s EE and demand response programs.

12. CURB has no objection to the Commission electing to open another docket to address the issues to which Westar objects, but as argued above, it does have an objection to granting

⁸ KCC Docket No. 10-WSEE-775-TAR, January 31, 2011, *Order Approving Partnership Between Efficiency Kansas and Westar’s Simple Savings Program*, at page 20, E.

Westar's petition on the basis of its claims that altering the scope of this docket and ordering Westar to proceed with EMV are due process violations. Granting the petition on that basis would narrow the procedural options available to the Commission when it determines that the intended scope of a docket is precluding the Commission from addressing issues that should be addressed.

13. Funding any EE riders without budgets and EMV on the programs filed in the docket is not only in violation of previous Commission orders, it is bad regulatory practice and ignores the fact that ratepayers and taxpayers deserve a public accounting of the millions of dollars they have contributed to these programs. CURB is not being unreasonable in its insistence that Westar should not be allowed recovery in the EE Rider for any program that does not have a budget and a timely EMV on file because the evidence in the record would be insufficient to support recovery from ratepayers.

14. These issues must be resolved, and the sooner, the better. If they are not resolved in this docket, CURB has the option to initiate a new docket by filing a motion requesting that the Commission issue an order to Westar to show cause why the Commission's orders requiring Westar to provide EMV have not been obeyed, or to file a rate complaint on the grounds that the EE Rider rates are unreasonable and not supported by substantial and competent evidence. Regardless of the docket in which these issues are addressed, it is CURB's duty on behalf of ratepayers to insist that Westar's recovery of EE expenses and lost revenues is supported by substantial and competent evidence. Millions of dollars are passing through the EE Rider without any analysis at all of the effectiveness of these programs or the validity of Westar's claims for lost revenues. Budgets and timely EMV results must be filed with the Commission prior to the Commission's consideration of

Westar's claims. Taxpayers and ratepayers deserve to know whether their contributions were spent prudently and resulted in cost-effective energy savings that justify continuing the programs and allowing Westar to recover for lost revenues.

III. Westar should be required to conduct EM&V for the SimpleSavings Program

15. In Westar's petition, Westar incorrectly states that "Westar is not required to conduct the EMV because when Westar's participation in this state program was approved, the Commission indicated that Staff would conduct EMV ...".¹⁰ The Commission Order in Docket 10-WSEE-775-TAR (775 Docket) approving Westar's Simple Savings program states that an

...an initial evaluation, measurement, and verification (**EM&V**) **should be conducted after SimpleSavings has been in place for two years**, as recommended by the Commission in its Final Order in the 442 Docket. The Commission finds that six months is a reasonable timeframe for completion of an initial EM& V review and that it should be conducted through the EM&V process as laid out in Docket No. 10-GIMX-013-GIV and **by a third-party provider** selected through the request for proposal (RFP) process that is currently being implemented at the Commission.¹¹

In its order in the 775 Docket, the Commission also directed Staff to

open an investigation and file a report at the beginning of the **fourth year** of the pilot program to **allow the Commission to examine data** associated with Westar's SimpleSavings program. Staff's report should include, at a minimum, participation in the program, **results of the EM&V**, amount loaned through the program, repayment issues, energy and demand savings, lost revenues recovered by Westar, and any other items Staff finds of use to the Commission.¹²

¹⁰ Westar Petition for Reconsideration, at ¶7.

¹¹ Docket No. 10-WSEE-775-TAR, January 31, 2011, *Order Approving Partnership Between Efficiency Kansas and Westar's SimpleSavings Program*, ¶38.

¹² Docket No. 10-WSEE-775-TAR, January 31, 2011, *Order Approving Partnership Between Efficiency Kansas and Westar's SimpleSavings Program*, ¶37.

(emphasis added). CURB interprets the Commission order as clearly requiring an EM&V to be conducted through the EMV process as laid out in the 10-GIMX-013-GIV Docket, and a Staff report to be filed with the Commission in order to determine whether or not SimpleSavings should be continued. The report filed by Staff would include the EM&V previously conducted by Westar, as ordered by the Commission.

16. Westar further indicates that an EM&V for the SimpleSavings program may not be useful because the public funding for the program was pulled in mid-2011. CURB agrees only that an EM&V of a discontinued program is not useful for determining whether to continue to offer the program. In the 442 Docket, Staff noted that “evaluation is linked with sound regulatory oversight and must be performed within the context of policy goals.”¹³ The Commission further clarified that “(e)valuation should serve as both a test score for use of ratepayer dollars and utility shareholder reward by measuring resource savings and enforcing program accountability.”¹⁴

17. While the language of the order imposing the condition to conduct EMV on the SimpleSavings program might be subject to different interpretations, there is no doubt that the Commission expected EMV to be conducted and that Westar had primary responsibility. CURB interprets the language of that order to state that Westar is responsible for filing the EMV with Staff, but the order does not state who is supposed to perform the EMV. However, the order goes on to state that Staff is to prepare a report and recommendation on whether to continue the program on the basis of that EMV. It’s reasonable to infer Westar would be responsible for the EMV, given the language from all of the previous dockets quoted above.

13 Docket No. 08-GIMX-442-GIV, June 2, 2008, *Order Setting Energy Efficiency Policy Goals, Determining a Benefit-Cost Test Framework, and Engaging a Collaborative Process to Develop Benefit-Cost Test Technical Matters and an Evaluation, Measurement, and Verification Scheme*, ¶ 46.

18. Even if one accepts Westar's interpretation that Staff is supposed to conduct EMV, there can be no doubt that the Commission expected EMV to be performed and that the parties would have an opportunity to respond to Staff's report and recommendation on the results of the EMV. There is no lack of evidence that the Commission required EMV to be conducted on the SimpleSavings program. Again, Westar may be able to support an argument that it needs more time to comply, but not on the basis that the due date imposed is in itself a due process violation. CURB would not object to the Commission granting a reasonable extension of time for Westar to provide the documents if it is needed. CURB's interest is in getting the information, not rigid enforcement of deadlines. Additionally, the fact that the SimpleSavings program is scheduled to be discontinued should not have any effect on the accuracy of EMV performed on this program. Although the low participation¹⁵ has been affected considerably by the withdrawal of the federal grant money that was targeted to the program, there is no reason whatsoever to believe that the lack of continued funding affected the continuing performance of the energy-efficiency measures that were installed in participants' homes. Those improvements should be functional and producing energy savings for some years to come. There is no reason to believe that the performance of the improvements is affected by the number of participants. Thus, there is no reason to believe that EMV results will be distorted by the premature demise of this program and should be conducted

19. An EM&V of the SimpleSavings program – no matter the program's current status or number of participants – will not only determine the accuracy of the program's expenditures and lost

¹⁴ *Id.* at ¶47.

¹⁵ Westar has reported higher participation in a separate docket than it has reported in this docket. Since CURB is arguing that the level of participation is not relevant to determining whether budgets and EMV are required, the actual number of participants is significant only in that the disparity in numbers calls into question Westar's accuracy in tracking the number or reporting it and is another reason supporting the need for closer analysis.

margins, but will generate invaluable information about energy efficiency programs and measures. As noted above, the Commission in the 14-30 Docket approving Westar's annual EE Rider, the Commission reiterated that EMV is required for all of Westar's EE and demand side management programs; SimpleSavings was not exempted from the requirement even though the funding had been pulled from the program long before the docket had been opened.¹⁶

20. This is not a disagreement over a small amount of money, even if the number of participants is not as high as originally envisioned. Over \$3,000,000 of loans were funded in a year through the SimpleSavings program.¹⁷ Both ratepayers and taxpayers have provided the money for the program. Additionally, Westar was allowed to recover \$48,370 in lost margins associated with the implementation of the SimpleSavings program.¹⁸ Furthermore, participants are making payments to Westar to pay back the loans; we should be keeping track of that money as well.

21. An EM&V of the SimpleSavings program – no matter the program's current status or number of participants – will not only determine the accuracy of the program's expenditures and lost margins, but will generate invaluable information about energy efficiency programs and measures. If it wasn't effective, then we will know not to take a similar approach in future programs. But if it was effective, then that might be justification for arguing that the grants for funding the loans should be reinstated or that Westar should develop another source of funding the program. And if it wasn't successful, then at least we will know not to take that approach again. At minimum, EMV should enable us to identify which improvements or combination of improvements were the most effective and least effective in producing cost-effective energy savings.

¹⁶ Docket No. 14-WSEE-030-TAR, October 15, 2013, *Order Approving Westar's Energy Efficiency Rider*, at ¶7.

¹⁷ This data was provided by Westar in response to CURB DR 5 in KCC Docket No. 15-WSEE-181-TAR

22. Additionally, CURB is concerned that there hasn't been any reporting on the participants' performance of their obligations to pay back the loans. The degree to which they have met their obligations will be indicative of the effectiveness of the program and perhaps reveal weaknesses in the program's design or administration. Regulators should be able to assess the payback rate and ensure that the funds recovered are tracked and returned to the lender or reinvested in energy-savings programs.

IV. Budgets should be filed in the docket, not simply provided to Commission Staff

23. Regarding the need for program budgets, the need is clear: any program—especially a program that is spending other people's money—should be operated with a budget that functions as an aspirational goal that guides expenditures. Budgets provide guidelines to alert administrators that spending is out of hand or is perhaps insufficient to accomplish the program goals. If Westar has developed budgets for these programs but simply doesn't want to provide them to the Commission, then the Commission should enforce its orders by conditioning recovery of expenditures in the EE Rider on Westar's compliance with these orders.

24. Further, as noted above, Westar cannot possibly establish the prudence of its expenditures and administration of these programs without filing the budgets on the record. It's not enough to informally provide the figures to the Commission's Staff or other parties: if they are not placed in the record, Westar's claims of prudence are unsupported. The parties and the public should have access to this information and be able to decide for themselves whether Westar's expenditures and administration of the programs have been prudent and cost-effective. Filing it in the docket

18 Lost margins totaling \$48,370 were included as part of Westar's EE Rider applications in Docket Nos. 12-WSEE-

would also provide open access to this information and add to the body of data available to assist commissions, utilities and customer advocates in other jurisdictions in making better-informed decisions in designing and administrating energy efficiency programs.

V. Conclusions and request for relief

The Commission should uphold its January 6 order and deny Westar's petition for reconsideration because Westar has not suffered any due process violations in this docket. Further, Westar should be required to conduct EMV on all of its EE programs, including the SimpleSavings program. Additionally, Westar should be required to file budgets and EMV results on the record to be eligible for recovery of EE expenditures. For good cause shown, CURB would not oppose allowing Westar more time to comply with the Commission's order, but not on the grounds that Westar has suffered any due process violations.

Therefore, CURB respectfully requests that the Commission deny Westar's petition for reconsideration, that the Commission clarify that Westar is required to file the required budgets and EMV results in the docket, rather than simply provide them to Staff, and order any such other relief that would ensure that ratepayers and taxpayers are provided an accurate accounting and EMV analyses of the expenditures made on Westar's EE programs, as well as an accounting of the repayments of the loans made by the participants in the SimpleSavings program and the disposition of the money collected from the participants.

Respectfully Submitted,



David Springe #15619
Niki Christopher #19311
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

VERIFICATION

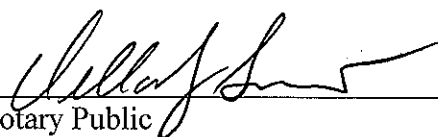
STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, Niki Christopher, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

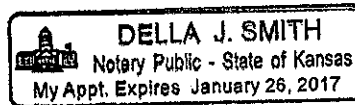


Niki Christopher

SUBSCRIBED AND SWORN to before me this 2nd day of February, 2015.



Notary Public



My Commission expires: 01-26-2017.

CERTIFICATE OF SERVICE

15-WSEE-021-TAR

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


ANDREW FRENCH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
a.french@kcc.ks.gov

BRIAN G. FEDOTIN, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
b.fedotin@kcc.ks.gov

JEFFREY L. MARTIN, VICE PRESIDENT, REGULATORY AFFAIRS
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
jeff.martin@westarenergy.com

CINDY S. WILSON, DIRECTOR, RETAIL RATES
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
cindy.s.wilson@westarenergy.com

CATHRYN J. DINGES, CORPORATE COUNSEL
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
cathy.dinges@westarenergy.com



Della Smith
Administrative Specialist