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Kansas Corporation Commission
/S/ Susan K. Duffy

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

AUG 15 2007

Susan Talbuffy Docket Room

Before Commissioners: Brian J. Moline, Chair
Michael C. Moffet
Joseph F. Harkins

In the Matter of the Applications of Westar Energy, Inc and Kansas Gas and Electric Company for Approval to Make Certain Changes in their Charges for Electric Service.	) Docket No. 05-WSEE-981-RTS

CURB's Petition for Reconsideration on Remand Issues

The Citizens' Utility Ratepayer Board (CURB), pursuant to K.S.A. 66-118b and K.A.R. 82-1-235, hereby files its petition for reconsideration of the *Order (1) addressing depreciation adjustment following remand; (2) determining transmission revenue requirement for purposes of calculating refunds and prospective rates; (3) resolving ITC related issues; (4) determining interest on refunds; and (5) determining form of refunds* [July 31 *Order*], issued in the above-captioned docket by the Kansas Corporation Commission [KCC or Commission] on July 31, 2007.

I. The KCC erred in ruling on remand that Westar's initial unbundled transmission rate does not have to comply with K.S.A. 66-1237, which deprives ratepayers of the refund to which they are due.

1. The KCC asserts that it is providing for "traditional recovery" of Westar's transmission costs by allowing it to unbundle its transmission rate and call it a transmission service charge (TSC), although only one other utility in the state of Kansas, Midwest Energy, has

an unbundled transmission rate. (July 31 Order, at ¶19; *Transcript*, Remand hearing, at 74 -75). The KCC admits that "today's ruling must be guided by the statute in place," *i.e.*, the 2006 version of K.S.A. 66-1237, not the amended version passed by the legislature in 2007. The KCC claims that the holding of the Court of Appeals that the rate adopted by the Commission "did not comply with the existing statute" does not mean that the rate was unlawful, as CURB and the other intervenors have argued. (July 31 *Order*, at ¶ 19). The KCC offers no plausible explanation for how a rate that does not comply with the law can be "lawful," except to argue that the initial unbundled transmission charge approved by the KCC does not have to comply with K.S.A. 2006 Supp. 66-1237 because the TSC has no "automatic" pass-through provision. The Commission states in its order, "CURB's argument [that the TSC must comply with K.S.A. 66-1237] ignores the most important feature of what the legislature tried to accomplish with the TDC statute, *i.e.*, the accelerated flow through of transmission rates in a fashion that reduces regulatory lag with respect to recovery of transmission costs." (July 31 Order, at ¶).

2. CURB properly focused on resolving the issued raised by the Court of Appeals. The KCC attempts to play down the fact that it was the unbundling of Westar's transmission rate that triggered error at the Court of Appeals, not the flow-through mechanism. While the KCC may believe that the "most important" feature of the statute is the flow-through mechanism, the legislature nevertheless set forth a distinct, requisite procedure for the initial unbundling of transmission rates that must not be ignored.

3. First of all, despite the KCC's argument that its "broad authority" permits it to fashion pragmatic solutions such as the TSC (July 31 *Order*, at ¶21), legislators have now abrogated whatever broad authority it had by prescribing specific instructions to the KCC on how

to unbundle transmission rates. If the legislature believed that the KCC was the best judge of how to unbundle transmission costs, each version of the statute could have simply set forth the process for passing through changes in transmission costs through an unbundled rate. Instead, the legislation sets forth, in both versions, specific requirements that must be met when a utility initially unbundles its rates. Given that the legislature's amendments in 2007 substantially amended the unbundling requirements, but did not eliminate them, it can hardly be said that legislators have not had a chance to give some thought to the matter.

4. Furthermore, there is nothing in the language of K.S.A. 66-1237 that provides an exception that would permit the KCC to approve an initial unbundled rate that does not comply with its requirements if the utility says it does not intend to pass through changes in transmission costs pursuant to the statute. The statute contains no such exception. Basically, the KCC argues that it may ignore the legislature's instructions in paragraph (a) of the statute concerning unbundling, if the utility states that it intends to decline its option to pass through changes in costs under paragraph (b). However, the KCC offers no authority or legal analysis whatsoever for this reading of the statute.

5. Westar may not evade the requirements of the initial unbundling process set forth in the statute by voluntarily foregoing the right to adjust the transmission rate between rate cases to correspond to its underlying costs. The initial unbundled rate must comply with the law as it stood at the time the rate was unbundled.

6. In support of its position that the TSC is not a transmission delivery charge (TDC) subject to K.S.A. 66-1237, the KCC order quotes Staff as stating that the distinguishing factor of the TSC from the TDC under the 2006 version of the statute is that "The mechanism proposed in

the present Stipulation does not automatically pass through FERC changes in costs." (July 31 *Order,* at ¶18; Staff Reply Brief, at 9). But Staff was incorrect. The lack of an "automatic pass through" provision cannot be a "distinguishing factor" making the TSC exempt from the statute because K.S.A. 66-1237 does not contain an "automatic" pass-through provision. There is no provision whatsoever that requires that the rate automatically change when the utility's underlying costs change.

7. As previously pointed out by CURB, The utility *may* opt to pass through changes in costs to customers, but there is no "automatic" change, and the utility has the option of *not* passing through changes in its costs through the TDC. A close reading of both versions of the statute reveals that the only difference in this regard is, in the newer version of K.S.A. 66-1237, "if" the KCC finds that a change in the rate is not consistent with a FERC order, the KCC "may" order the utility to alter the rate, and "may" order refunds. The KCC did not have that option in the original version of the statute. However, there is no specific provision in the new version that *requires* the utility to automatically pass through changes to its customers, and no specific provision that *requires* the KCC to ensure that changes are passed through to customers. The statute merely requires that *if* a utility changes the rate, it must pass through the change accurately, and if the KCC finds that the utility has overcharged its customers, it may order refunds. Whether to change the rate is entirely discretionary with the utility, and the decision to review or correct a rate is entirely discretionary on the part of the Commission.

8. Therefore, in either version of K.S.A. 66-1237, the mechanism for passing through changes in costs is hardly "automatic", and it cannot be lack of an "automatic" pass-through of changes in costs under the TSC that makes the TSC so distinguishable that it is

exempt from the initial unbundling requirements of K.S.A. 66-1237.

9. Furthermore, the KCC has also offered no legal analysis that would support its assertion that it can deny Westar its option under the statute to adjust the unbundled transmission rate when its underlying costs change as the result of one of the conditions set forth in the statute. The statute is clear: once a utility's rate has been properly unbundled, any changes the utility makes to the rate are presumptively prudent, if the changes accurately reflect changes that result from an order of a regulatory authority having legal jurisdiction over transmission matters. If the KCC believes it has properly unbundled Westar's rate, it cannot possibly argue that Westar has no right under K.S.A. 66-1237 to adjust its rate between rate cases. All the utility has to do is file a report with the Commission at least 30 business days before making the change. Therefore, the portion of the KCC's order that denies Westar the right to pass through changes in the rate is in violation of either version of K.S.A. 66-1237.

10. Finally, the KCC, by basing Westar's initial unbundled transmission rate on a higher figure than the company's 2004 test year costs, is violating the revenue-neutrality provision of 2006 K.S.A. 66-1237 and violating its provision that rates must be based on a final FERC order. As the KCC's own witness, Mark Doljac testified, "the rate we [Staff and Westar] used effectively, the final FERC rate, is higher than what was in place in 2004." (*Transcript,* Remand hearing, at 177). He testified that that the rate provided for in the stipulation and agreement approved by the Commission was $73.9 million, but that Westar's test year costs were $66.5 million. (*Id.*). So, even if the KCC is correct that it is providing for "traditional recovery" of Westar's costs of service, the evidence does not support the almost $7.5 million in extra revenues awarded to Westar under the TSC. Whether or not the FERC rate had been in place

since 1998, the rates approved in 1998 were still being charged in 2004—according to the Commission's own Staff.

11. As CURB has argued previously, customer refunds must be calculated as if the KCC had approved a transmission rate in its December 2005 order that complied with the provisions of 2006 K.S.A. 66-1237. This is not, as the KCC states, "an unjust result." Westar could have adjusted the rate when the final FERC order in December 2006 changed the utility's costs. The initial rate would have not been in place very long. Whether or not the KCC and Westar liked the necessity of compliance with original version of K.S.A. 66-1237, they were obliged to comply. No other result would be just or legal.

II. Under the circumstances of this remand proceeding, the KCC violated the due process rights of the parties by allowing introduction of a new issue on remand, the resolution of which was not necessary for resolution of the issues remanded by the Court of Appeals.

12. The KCC allowed Westar to present evidence on remand that it needed more revenues because of issues relating to its income tax credits (ITC). However, the purpose of a remand is to correct errors in the ratemaking process, not provide the utility another opportunity to recover more revenues from its customers. As CURB has previously argued, an appellate court's decision to remand a case back to an administrative agency to correct errors is not a *carte blanche* invitation to reopen the docket to give the utility an opportunity to regain the losses it may have incurred in the appellate process. While, as the KCC said, "it was not the purpose of the Court of Appeals in this present case to punish the utility," (Order on Remand, at ¶13), it was

also not the purpose of the Court of Appeals to return jurisdiction to the KCC so that it could mitigate the impact of the refunds on the utility by allowing Westar to raise new issues that will reduce the refund—without giving the other parties a reciprocal opportunity to discover and raise new issues that might offset the reduction.

13. Allowing the utility to raise new issues on remand deprives the other parties of due process, because the utility is in exclusive possession of the evidence that might provide evidence of offsetting reductions in costs. The utility is under no obligation to provide evidence of reductions in its costs that may have occurred while the case has been on remand. Since no prudent utility is going to voluntarily bring forth evidence of reductions in its costs that have occurred during the remand period, the ratepayers are at a distinct disadvantage if the utility can raise new issues on remand: the only new issues and evidence that a utility will introduce are those that favor the utility.

14. Because the utility is in exclusive possession of the evidence of its costs, the other parties cannot present new evidence on remand that might mitigate the rate impact of the KCC's decisions without conducting additional discovery. If the other parties were given a fair opportunity for additional discovery in a remand proceeding, the proceeding could expand to resemble the original rate case in size and scope. Obviously, it is not desirable to re-do the entire rate case on remand, but once you have let the utility introduce evidence of its increased costs on remand that weren't part of the original case, the only way to restore the fairness to the process is to allow the other parties access to evidence of all of the utility's costs, so that if there are offsetting reductions in the utility's costs, the other parties may ensure that the KCC takes them into account along with the increases in costs that the utility has introduced on remand. Allowing

such extended discovery would be fair, but the efficiency of the appellate process would be severely compromised if the parties could continually raise new issues and demand a review of reductions and increases in costs every time a case comes back to the KCC on remand. A case might never become final.

15. Therefore, the only other way to keep the remand process fair to all of the parties without making it unconscionably unwieldy is to limit the purpose and scope of the proceedings on remand to addressing and correcting the errors identified by the Court of Appeals. That does not mean that new evidence cannot be introduced at all on remand—no one has seriously argued that—but that the KCC should prohibit the introduction of new issues on remand, and should limit the introduction of new evidence to *that which is necessary* to the KCC to resolve the errors for which the case was remanded. Otherwise, the remand process is tilted unfairly toward the party that holds all the evidence—the utility.

16. Furthermore, resolution of the ITC could have been and should have been addressed in a separate docket. As USD 259 has argued, the many corrections Westar made to the calculations in the effort to determine the appropriate adjustment was compelling evidence that this issue was too complex to be considered on remand. The fact that the final calculation was "only" $48,146 higher than the original calculation is no reason to justify denying the parties' objections to addressing the ITC on remand: if the parties had not investigated and objected to Westar's numerous errors, there is no telling what the final number would have been. If the parties had been able to address this issue in a separate docket, without the pressure not to delay resolution of the issues on remand, even more errors might have been discovered. There is simply a point where parties will accept a set of numbers as "final"—not because they agree that

they are accurate, but simply because insisting on further discovery too expensive or threatens to delay final resolution of more important issues.

17. Thus, the utility has another advantage when introducing evidence of new costs late in the process—especially if refunds are due to the customers. The other parties are often being pressured by clients to finally resolve the case, clients who may be reluctant or unable to fund additional discovery. Inaccuracies may not be detected if the parties are under pressure to resolve the original issues that were remanded in the case and get refunds flowing to clients. When fear of further delays discourages thorough vetting of new information at a late stage in the proceedings, the party presenting the new information is at a distinct advantage.

18. All in all, limiting the remand proceedings to correcting the errors identified by the Court of Appeals is simply more consistent with due process. Not only is it unfair to allow the party in exclusive possession of the evidence to exploit the remand process by selectively introducing new issues that favor its case, limiting the proceedings to the issues on remand protects the interests of the parties and the public in judicial efficiency and the finality of judgments. Precluding the parties from raising new issues on remand prevents the parties from exploiting or prolonging the appellate process, and protects parties from the unexpected expenses of discovery or insufficient vetting of new evidence on issues that were not even raised in the original case.

III. The KCC's explanation on remand of its decision on LaCygne is insufficient to overcome the Court of Appeal's ruling that its decision was arbitrary and capricious.

19. On remand, the KCC purportedly corrects its erroneous decision on the LaCygne

issue by explaining that the September 17, 1987, order of the Commission was "factually incorrect" in stating that Westar South had initially proposed to reflect the unamortized gain on the sale of LaCygne as a reduction in rate base for future rate cases. However, finding that the accounting treatment was "error" because it was not proposed by Westar is as arbitrary and capricious as the December 2005 order on the issue. The Commission's order in 2001 specifically addressed the issue of authorship of the proposal, and found that whether or not the company had initially proposed this accounting treatment was irrelevant: "what is controlling is the language in the order and the intent of the Commission." (Order 07/25/01, 01-WSRE-436-RTS, at ¶ 76). Therefore, whether or not Westar was the originator of the proposal, the Commission intended the result, and authorship is irrelevant now to whether the result was fair and reasonable. As the Commission then noted, the company had not sought reconsideration and had not appealed the language of the 1987 order: its objections were simply too late.

20. Despite the fact that the Commission told Westar in 2001 that it was fourteen years too late to object to the language of the 1987 order, Westar objected again in this case. Now, the Commission claims that Westar was correct, and finds the terms of the 1987 and 2001 orders are not clear and reasonable, despite the fact that the Commission in 2001 found that the "provisions of the 1987 Order are clear and reasonable." (*Id.*) This determination that 20 years of policy must change was made in spite of the Court of Appeals' finding that the evidence presented in this case was essentially the same as was presented previously.

21. When the Court of Appeals told the KCC that since the evidence in this and the previous cases had been essentially the same, the Commission needed to find that "its prior ruling was factually incorrect" to justify its reversal of the treatment on LaCygne, the court did

not mean that the Commission could rest its 180-degree change in position on such an inconsequential error as the allegation that treating the gain as cost-free capital was not an idea that originated with Westar. It does not matter who authored the proposal, if, as two previous Commissions found, the proposal was fair to both Westar and its customers. The fact that Westar did not author it does not justify finding that it is now bad policy.

22. Which party proposed the treatment is simply irrelevant to the determination of whether the accounting treatment of LaCygne has been good policy since 1987. The Commission's statement that it can "only conclude that Westar South never proposed the rate base reduction and it was in error for the Commission to order such an accounting" (Order, 2/8/07, at ¶26) is patently absurd: there is no support in the law for the proposition that the Commission may not order a specific accounting treatment if it was not originally proposed by the utility, if the Commission finds that the treatment is fair and reasonable to the utility and to the other parties.

23. Furthermore, the Commission's reversal completely alters the balance that made the original proposal fair to both Westar and its customers. The fact is that Westar immediately realized the bulk of the benefits of the LaCygne transaction at the time of the sale: it reaped substantial tax benefits and utilized the gain from the sale to improve its financial condition, at a time when it was taking considerable heat from the KCC and the public over the rate increases that were necessary when Wolf Creek came on line. It needed no additional incentive to enter into the transaction. Since the benefits to ratepayers were to accrue over time, reversing the treatment now deprives ratepayers of their full share of the benefits contemplated by the transaction. Since the 1987 and 2001 Commissions both found that there was a fair and

reasonable balance of benefits from the sale and leaseback of LaCygne to both Westar and to the ratepayers in the accounting treatment set out in the 1987 order, reversing that treatment unfairly alters the balance—especially if the reversal is founded on the flimsy premise that the Commission's 1987 order attributed the authorship of this balanced proposal to the wrong party.

24. The KCC's finding that the alleged error "will discourage Kansas utilities from coming forward with similar proposals in the future that benefit ratepayers" is simply unsupported. The LaCygne transaction was a unique transaction made under unique circumstances. KG&E was facing intense public and regulatory pressure to provide some relief to its customers after the huge rate increases necessitated by the huge costs of building its nuclear plant—the only one ever built in Kansas. That was incentive enough to enter into the transaction, but Westar also reaped numerous immediate benefits. Whether or not Westar originated the entire LaCygne proposal is beside the point: the accounting treatment of the transaction provided Westar immediate benefits, which was balanced by benefits to ratepayers that would accrue over time. There is no evidence whatsoever to indicate that Westar did not reap the benefits contemplated by the Commission in 1987.

25. Furthermore, ratepayers deserved to benefit from the sale of the plant because they had paid their fair share for it. Westar was in no position in 1987 to credit customers for the full value of their contributions to the cost of building LaCygne. That is why the benefits to customers were contemplated to accrue over time. By interrupting the incremental flow of benefits to ratepayers, the KCC has substantially disrupted the balance that was inherent in the original plan.

26. Furthermore, there is simply no reason now to deny ratepayers their full share of

benefits contemplated by the 1987 order, which was thoroughly reviewed and approved by the 2001 order, on the grounds that Westar has been deprived of the incentive to enter into such transactions. The simple truth is that Westar received most of its benefits early, and the only incentive it lacks now is the incentive to uphold its end of the bargain if the Commission will not act to protect the protect the fairness of the transaction by allowing the continued flow of benefits to ratepayers that was contemplated in 1987.

Therefore, for all of the above reasons, CURB seeks reconsideration of the Commission's rulings on remand concerning Westar's transmission rate and the calculation of the appropriate refund, the ITC issue, and the LaCygne issue, and respectfully requests the appropriate relief.

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 15th day of August, 2007.

Shonda D. Titsworth
Notary of Public

My Commission expires: 8-03-2009.

SHONDA D. TITSWORTH
Notary Public - State of Kansas
My Appt. Expires August 3, 2009

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, or hand-delivered this 15th day of August, 2007, to the following:

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