

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

| | | |
|-------------------------------------|---|----------------------------|
| In the Matter of the Application of |) | |
| Midwest Power Company For |) | |
| A Certificate of Public Convenience |) | Docket No. 19-MPCE-064-COC |
| And Necessity to Transact the |) | |
| Business of a Public Utility In the |) | |
| State of Kansas. |) | |

REPLY BRIEF OF MIDWEST POWER COMPANY

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COMES NOW, Midwest Power Company (“MWP”) and hereby files its Reply Brief (“Brief”) in compliance with the Order Setting Procedural Schedule of the State Corporation Commission of the State of Kansas (“Commission” or “KCC”) dated October 23, 2018. For its Brief, MWP hereby states as follows:

I. INTRODUCTION

A. Procedural History

1. On August 10, 2018, MWP filed an application (the “Application”) with the Commission pursuant to K.S.A. 66-131 requesting a limited and contingent Certificate of Convenience and Necessity (“CCN”) to operate as a public utility in Kansas with respect to its non-severable 8% interest in the Jeffrey Energy Center (the “JEC”). On October 23, 2018, the Commission issued its Order Setting Procedural Schedule, which scheduled a hearing on December 18, 2018 (the “Hearing”). This Order also scheduled that Simultaneous Initial Post-Hearing Briefs would be due on December 28, 2018 and Simultaneous Reply Briefs on January 4, 2019. The Order set out that a Commission Order will be due by February 5, 2019.

B. Position of MWP

2. Requiring a guaranty from KeyCorp for the operating expenses associated with the 8% interest would be an unwarranted abrogation of the JEC contracts by the Commission; MWP has the financial resources necessary to obtain a CCN in the state of Kansas and any such condition is unnecessary. Additionally, it is concerning that much of the precedent upon which Commission Staff (“Staff”) and Westar Energy, Inc. (“Westar”) continue to rely in their Initial Briefs is inapplicable to the present facts and such application must be substantially curbed.

II. ARGUMENT AND AUTHORITIES

A. The financial guaranty condition requested by Westar and Staff is the abrogation of private contracts

3. Westar and Staff both ask the Commission to deny the requested CCN unless MWP agrees to pay millions of dollars for obligations it does not have.¹ Since there is no basis for MWP agreeing to such an unreasonable and onerous condition, the result of Westar's and Staff's recommendation is to deny MWP a CCN. This result is not in the public interest. Denial of MWP's requested CCN does not prevent the 8% interest in the JEC from transferring to MWP. Denial of a CCN does not eliminate near-term shortfalls between operating costs and revenues. Rather, the relief requested by Westar and Staff has the potential to exacerbate near-term shortfalls and has a severe negative impact on the public interest by creating a cloud of uncertainty around the sanctity of contracts and the future viability of sale-leaseback financing in Kansas.²

4. Westar initially proposed onerous conditions via email to the parties on October 18, 2018.³ Westar sought to impose a condition that would make KeyCorp "directly liable for payment and other obligations of [MWP] and WTC, *without regard to any contrary provisions in any other agreement* limiting WTC's or MWP's liability to the assets of the Trust Estate"⁴

In his Direct Testimony, Chad Unrein mirrored this sentiment in Condition #2:

Since MWP must rely on KeyCorp to meet the financial resource threshold requirements for obtaining a utility Certificate in Kansas, MWP explicitly

¹ Staff's Br., pp. 12-13; Westar's Br., p. 25.

² MWP received Market-Based Rate Authorization from the Federal Energy Regulatory Commission. Market-Based Rate Authorization, Docket No. ER19-223-000 (Nov. 28, 2018). The lack of a state certificate should not prevent MWP from engaging in the wholesale markets, but could create uncertainty for other parties that may impact MWP's ability to market power and capacity.

³ Ex. B to Midwest Power Company's Response to Westar's Motion for Order Requiring Refiling of Application and Supporting Testimony And Restarting 180-Day Clock (Nov. 8, 2018).

⁴ *Id.* (emphasis added).

agrees that KeyCorp will retain the responsibility for the financial obligations related to [the] interest of JEC held by WTC and KeyCorp agrees to modify its existing Guaranty to explicitly provide assurances that it will fund the financial obligations related to the 8% interest of JEC held by WTC and make clear the Guaranty applies to both MWP's and WTC's obligations under the Ownership Agreement. The financial assurances in the Guaranty must satisfy the interest of all parties in the case.⁵

Westar's then repeated its request for onerous conditions in the Direct Testimony of Darrin Ives, in which he proposed:

Because MWP is relying on the financial resources of KeyCorp to meet the threshold requirements for MWP obtaining a utility certificate in Kansas, KeyCorp accepts it will retain ultimate responsibility for the financial obligations related to the 8% interest of JEC held by WTC. . . .

KeyCorp agrees to modify its existing guaranty of payment and performance obligations (as MWP offered to do so in its Application) to make clear that such guaranty applies to both MWP's and WTC's obligations under the JEC Ownership Agreement and JEC Operation Agreement. . . .

KeyCorp agrees that Westar, and its successors and assigns, in its capacity as Owner and/or Operator of the JEC, is and will be a direct beneficiary of KeyCorp's guaranty of payment and performance obligations of WTC and MWP under the JEC Ownership Agreement and JEC Operation Agreement.⁶

5. The Commission cannot impose such conditions as a prerequisite for obtaining a CCN, as such imposition would amount to the abrogation of two separate sets of contracts and agreements enacted, approved, and consummated on two separate occasions. It would rewriting a deal that was made and approved twice before and has been in place for twenty-seven years.

6. Requiring a guaranty from KeyCorp to cover obligations that MWP does not have is a modification, and subsequently an abrogation, of the JEC contracts. Staff and Westar attempt to liken this situation to that of past merger approvals in which the Commission has

⁵ Direct Testimony of Chad Unrein, p. 38, ll. 13-20; *see also*, Staff's Initial Br., p. 12.

⁶ Direct Testimony of Darrin R. Ives, p. 12, l. 14 – p. 13, l. 2.

reviewed *proposed* contracts and set certain parameters within which the Commission would approve said contracts, effectively providing parties the option to move forward and make amendments to the proposed contracts in order to obtain approval, or not.⁷ In other words, the transactions were *contingent* on Commission approval. In contrast, the contracts at issue here have been approved, executed, and in existence for over twenty-seven years. Most importantly, these contracts have been *relied upon* for over twenty-seven years. The guaranty requested by Staff and Westar would change the rules of the game: changing the contractual provisions that have been relied upon for budgeting and forecasting for the future, to the benefit of one party and the detriment of the other. In prior merger cases, the applicants had the option to accept the KCC's conditions or walk away; they did not have to continue down the path of a merger if the Commission's edits to the proposed contracts were against their interests in the aggregate. In this case, MWP does not have the option to walk away from the deal after seeing what the Commission orders in this CCN proceeding—this is a deal that Westar and the Kansas ratepayers have benefited from for over twenty-seven years. If the Commission were to change the terms of the deal at this stage in the contract life and to the severe detriment of MWP, it would be an extreme form of contract abrogation.

7. Contracts that are “freely and fairly made, including those made in the field of public utilities, are favorites of the law.”⁸ In Kansas, the power of the State Commission to abrogate contracts is conditioned on the public interest and the police power of the state.⁹ From the beginning of this doctrine in Kansas, the Kansas Supreme Court was clear that “[a]bsent this public interest, abrogation of contracts may not be effected merely to relieve one or the other of

⁷ See, e.g., Westar's Initial Br. p. 23; Staff's Initial Br., p. 12; Tr. p. 26, l. 22 – p. 27, l. 6.

⁸ Farmland Indus. v. State Corp. Comm'n, 25 Kan.App.2d 849, 853, 971 P.2d 1213, 1217 (Ct. App. Kan. 1999) (citing Kansas Power & Light Co. v. Mobil Oil Co., 198 Kan. 556, 559, 426 P.2d 60, 64 (Kan. 1967)).

⁹ Cent. Kansas Power Co. v. State Corp. Comm'n, 181 Kan. 817, 827, 316 P.2d 277, 285 (Kan. 1957).

the parties from unprofitable or injudicious undertakings.”¹⁰ This idea has been traced through the doctrine’s history to present day, where the KCC has held itself to explicitly honor contracts “unless adverse to the public welfare.”¹¹

8. The Kansas courts have set a high bar for a state agency to abrogate a contract as to the determination of what they consider to be *adverse to the public interest*.¹² Earliest in that doctrine’s history, *Wichita R. & Light Co.*, a Kansas Supreme Court case required that, in order to abrogate a contract, continued performance under that contract “should bear so heavily on the power company that its general revenues would be depleted....”¹³ However, if such contracts merely affect “net profits or dividends on that portion of the power company’s property devoted to the performance of the contracts” then, the Kansas Supreme Court held, there was “no excuse” to intrude on the contract of the private individuals.¹⁴

9. At issue in this proceeding are a number of contracts, approved in 1991, and again in 2006, freely and fairly negotiated by sophisticated parties.¹⁵ It is abundantly clear and undisputed that Westar took on the obligations of Aquila, Inc. (“Aquila”) under the 1991 Consent and Assumption Agreement.¹⁶ Westar acknowledged this fact by proposing a condition

¹⁰ *Id.* (emphasis added).

¹¹ *Farmland Indus.*, 971 P.2d at 1218.

¹² The Kansas case law is consistent with the *Mobile-Sierra* doctrine established by the United States Supreme Court, which holds that contracts may only be abrogated in “extraordinary circumstances where the public will be severely harmed.” *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 551 (2008); *see also* *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* 350 U.S. 332 (1956); *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

¹³ *Wichita R. & Light Co. v. Court of Indus. Relations*, 113 Kan. 217, 214 P. 797, 803 (Kan. 1923) (emphasis added).

¹⁴ *Id.*

¹⁵ Including, but not limited to: the 1978 Operation Agreement (Application, Ex. D), the 1975 Ownership Agreement (Application, Ex. D), the 1991 Consent and Assumption (MWP’s Hearing Ex. 1), the 2007 Consent and Agreement (Rebuttal Testimony of Amy Paine, Ex. 5).

¹⁶ *See* Consent and Assumption Agreement, § 3.3 (Aug. 15, 1991) (MWP’s Hearing Ex. 1); JEC Transfer Agreement, § 2.1 (Aug. 11, 2006) (Rebuttal Testimony of Amy Paine, Ex. 4).

that would expressly supersede the “contrary provisions in any other agreement limiting WTC’s or MWP’s liability to the assets of the Trust Estate.”¹⁷ If Westar was truly attempting only to make KeyCorp “directly liable for payment and other *obligations of* [MWP] and WTC”—that is, obligations that actually exist—it would have been unnecessary to override provisions “limiting WTC’s or MWP’s liability”—that is, terms that provide that MWP *does not have* any liability.¹⁸ However, this is not Westar’s intent. Rather, Westar is requesting that the Commission bail it out of a deal it no longer finds advantageous, even though the deal has been in place for twenty-seven years and was twice approved by the Commission.

10. It could be argued that Westar made an imprudent choice in 2006 when it stepped into the 06-MKEE-524-ACQ docket, and then stepped into the shoes of Aquila. However, at the time that it acquired the rights and obligations of Aquila, Westar anticipated a valuable asset during the term of the lease and at lease end. Moreover, during the term of the lease, the ratepayers received the benefit of that acquisition. In 2019, however, according to the forecasts provided by the various parties, the profitability of the JEC is in question in the near-term. Circumstances have changed that have affected the end-of-lease benefit that Westar hoped for and voluntarily assumed in 2006. However, changed circumstances are possible with regard to any contract and do not justify abrogation. The obligations of Westar under the contracts are a far cry from *depletion* of Westar’s general revenues, and the Commission has no authority to save Westar from a merely unprofitable or injudicious undertaking. Such abrogation would stray far outside the bounds of the police power given to state agencies to protect the public interest. Indeed, abrogation would be contrary to the public interest, for the reasons discussed above.

¹⁷ Ex. B to Midwest Power Company’s Response to Westar’s Motion for Order Requiring Refiling of Application and Supporting Testimony And Restarting 180-Day Clock (Nov. 8, 2018).

¹⁸ *Id.*

B. Westar and Staff's conditions are based on inapplicable precedent

11. Throughout this proceeding, Westar and Staff have proposed conditions for the Commission to impose on the parent entities of MWP. They base this reasoning on past dockets, including the ITC Docket (16-ITCE-512-ACQ),¹⁹ the Xcel Docket (16-SWPE-209-COC),²⁰ the Western Resources docket (01-WSRE-949-GIE),²¹ and the Great Plains Acquisition Docket (16-KCPE-593-ACQ).²² However, as discussed at length in MWP's Initial Brief, this situation of an 8% non-severable asset, being held by parent companies that (1) are not being alleged to be co-mingling funds, (2) are not in the business of operating utility assets, and (3) are relying upon contracts over twenty-seven years old, is different than the above dockets. Any "precedent" that can be found in these dockets is limited at best, and would be misapplied if used as proposed by Staff and Westar.

C. MWP has the financial requirements necessary to obtain a CCN for the 8% JEC interest

12. MWP has applied for a *limited and contingent* CCN, based only on the fact that it received the full control over the capacity and dispatch of 8% of the power associated with the JEC based on the expiration of the Lease Agreement on January 3, 2018.²³ In order to further the public convenience and necessity, the Commission is responsible for certificating the public utilities transacting business in the state of Kansas.²⁴ As MWP has described at length, the 8% interest in the JEC is a non-severable piece of the larger JEC, which will continue to operate pursuant to the numerous agreements enacted over the previous twenty-seven years. MWP is

¹⁹ Westar's Initial Br., p. 20; Staff's Initial Br. p. 12.

²⁰ Westar's Initial Br., p. 20; Staff's Initial Br. p. 12.

²¹ Westar's Initial Br., p. 21

²² *Id.* at 22.

²³ See Lease Agreement (Aug. 15, 1991), attached as Ex. 3 to the Rebuttal Testimony of Amy Paine.

²⁴ K.S.A. 66-131(a).

requesting that the Commission find that based on these JEC agreements, which govern the day-to-day operations of the JEC, the obligations of the various owners, and all other aspects of the JEC, that MWP is in the appropriate position for this limited and contingent CCN based on its undisputed proposal of how to cover any revenue shortfalls, thus fulfilling the financial resource prong.

13. As has been described extensively: litigation is a part of private contract negotiation, execution, and operation. Denying a CCN based on the potential of litigation is inappropriate and would set a dangerous precedent for any party attempting to undermine another party's CCN application. Kansas case law makes clear that injudicious and unprofitable decisions are part of private contracts by utilities that the Commission reviews and approves. There are instances in which contracts will be litigated by the parties, but the Commission cannot interpret or abrogate contractual provisions based upon threatened litigation. That is for a court of law.

14. MWP has provided a means by which the financial requirement is covered. The means has been described by Westar as "illogical" based on the assumption that Westar can and would initiate foreclosure proceedings based on MWP exercising its rights under the contract. However, this does not go to the fact that JEC's bills will be paid, the JEC will continue to function, and MWP has significant reason to believe that Westar's interpretation is incorrect and would not be upheld in a court of law.²⁵ As a result, MWP has shown that it has the financial wherewithal, and any further issues are outside of the scope of what the KCC can, and should, be examining in this application for a limited and contingent CCN.

²⁵ Including, but not limited to provisions found in: Rebuttal Testimony of Amy Paine, Ex. 1 (the Centel Assignment and Agreement, dated August 15, 1991, § 11); Rebuttal Testimony of Amy Paine, Ex. 2 (Participation Agreement, dated August 15, 1991, § 19.10); Lease Agreement, § 20.9.

D. Westar attempts to cast MWP and KeyCorp in an unfavorable light with misleading and fictitious assertions

15. Westar's allegation that MWP changed its position is a red herring. Westar's Initial Brief spends considerable time casting aspersions against MWP for what it perceives to be a change in position.²⁶ Westar claims that MWP witness, Amy Paine, changed her position by clarifying that, to the extent necessary, KeyCorp would cover MWP's expenses for items such as legal fees, marketing expenses, and consultants.²⁷ Such clarification is not a change in position, as it is consistent with MWP's statements from the beginning, that MWP has the backing of KeyCorp for expenses that are actually the obligation of MWP. Accordingly, MWP's position is clear as to what KeyCorp is willing to cover and what it is not, and the Commission previously denied Westar's motion to restart the 180-day statutory clock based upon allegations that MWP changed its position.²⁸

16. Westar attempts to cast further aspersions against MWP by claiming that Ms. Paine refused to accept the fact that MWP will be a public utility on January 4, 2019.²⁹ However, Ms. Paine agreed that MWP must obtain a certificate "if that's what the statute says."³⁰ Clearly, MWP has presented itself to the Commission's jurisdiction in this proceeding, recognizing the authority of the Commission to grant or deny a certificate to do business in the state of Kansas. Although this situation is truly unique and MWP is unlike any other entity that has been previously regulated by the Commission, MWP has not in any way attempted to dispute its obligation to file for a certificate, as Westar falsely alleges.

²⁶ Westar's Initial Br., pp. 9-12.

²⁷ Westar's Initial Br., p. 10 (citing Tr., p. 72, 86).

²⁸ Order on Westar's Motion for Refiling of Application and Westar's Motion for Leave to File Testimony Out of Time (Nov. 15, 2018).

²⁹ Westar's Initial Br., p 5.

³⁰ Tr., p. 84, l. 1.

17. Further, Westar's claim that MWP has "diverted [lease payments] around the Trust by arranging for it to be paid directly to MWP" is patently false and a shameless attempt to cast MWP and KeyCorp in an unfavorable light.³¹ By making this allegation, Westar falsely implies that there is a requirement that lease payments be available to pay for operating expenses after the expiration of the Lease Agreement.³² No such requirement exists. MWP's non-severable 8% interest in the JEC is a financial instrument, which comes with obligations to other investors who have shared in the investment, and benefit, of the instrument. As has been detailed repeatedly throughout this proceeding, Westar makes the lease payments to the Indenture Trustee, and the Indenture Trustee distributes such payments to all the participants in the transaction, as provided for by the various agreements which finance the 8% JEC interest.³³ This was most clearly articulated to Westar in MWP's response to Westar's Data Request No. 3.01 (attached hereto as **Ex. A**), and at the Hearing in the testimony of Ms. Paine, when she explained:

Westar pays [rent payments] to the indenture trustee and then they go to Midwest and the other participants. And then what Midwest and the other participants do with their payments is, obviously, they have an outstanding principal balance. So those payments are used to amortize down the principal balance.³⁴

Of course, Westar is aware of this process, as it is spelled out in the agreements that Westar has been operating under for over a decade.³⁵ Nevertheless, it appears Westar prefers to muddle the record and cast false aspersions on MWP and KeyCorp in an attempt to gain favor with the Commission.

³¹ Westar's Initial Br., p. 7.

³² Westar's Initial Br., p. 7.

³³ Tr. p. 77, ll. 8-23; *see also*, Response to Westar Data Request 3.01, attached hereto as Ex. A.

³⁴ Tr. p. 77, ll. 8-23.

³⁵ Response to Westar Data Request 3.01 (citing to Section 3.6 of the Lease Agreement and Section 3.5 of the Indenture of Mortgage, Assignment of Lease and Security Agreement).

18. KeyCorp is a bank holding company, and the JEC lease is a financial investment. KeyCorp and MWP are free to utilize the return on their investment as they see fit, including to pay outstanding principal balances or to make other investments. In fact, this is the arrangement that was approved by the Commission in 1991.³⁶ It is entirely baseless and illogical to expect MWP and KeyCorp to retain rent payments so that they would be available in the previously unforeseen event that the 8% JEC interest reverts to MWP and the revenues are insufficient to cover operating costs. Regardless, as explained repeatedly and unmistakably, the obligation to pay any shortfalls between revenues and operating costs resides solely with Westar.

III. CONCLUSION

19. WHEREFORE, for the reasons cited above, MWP respectfully requests the Commission grant MWP the relief described above.

Respectfully submitted,

POLSINELLI PC

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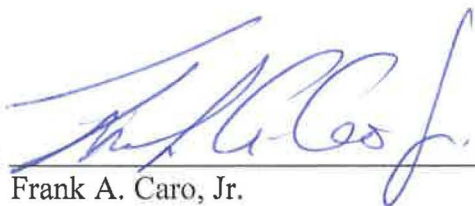
ATTORNEYS FOR MIDWEST POWER COMPANY

³⁶ Order and Certificate, Docket No. 175-456-U (91-UCUE-226-MER) (Sept. 27, 1991).

VERIFICATION

STATE OF Missouri)
COUNTY OF Jackson)

I, Frank A. Caro, Jr., being duly sworn, on oath state that I am counsel for Midwest Power Company, that I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

By: 
Frank A. Caro, Jr.

The foregoing pleading was subscribed and sworn to before me this January 4, 2019.


Notary Public

My Commission Expires:

1/30/2021

PHYLLIS E. EDWARDS
NOTARY PUBLIC-NOTARY SEAL
STATE OF MISSOURI
CLAY COUNTY
MY COMMISSION EXPIRES 1/30/2021
COMMISSION # 13471396

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
3rd Set of Data Request

Data Request No: 3.01

Submitted to: Midwest Power Company
Request Date: November 7, 2018
Date Information Needed: November 21, 2018

Please provide the following:

- 3.01) Please state the total dollar amount paid by Westar to the trust held by Wilmington Trust Company as lease expense since Westar assumes the lease. Please provide statements showing all amounts paid into the trust held by Wilmington Trust Company ("WTC") since 2013 and showing all amounts paid out of WTC during that time period, including dollar amounts and a description of each payment made or amount received.

Submitted by: Cathy Dinges

Midwest Power Company Response:

There are no statements or invoices issued for rents or lease expense. Payment schedules were set forth in the documents at closing. Westar initiates the payment through the Indenture Trustee according to Section 3.6 of the Lease Agreement and Section 3.5 of the Indenture of Mortgage, Assignment of Lease and Security Agreement. MWP receives the payment from the Indenture Trustee and enters the payment into a receivable account. As such, no rents are paid through the Trust Estate.

The Trustee (Wilmington Trust Company) is not involved in this process.

The rents recieved by MWP since 2013 are as follows:

| | |
|----------|----------------|
| 1/3/2015 | \$1,076,027.71 |
| 1/3/2016 | \$2,549,897.46 |
| 1/3/2017 | \$5,759,776.41 |
| 1/3/2018 | \$4,556,075.30 |

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
3rd Set of Data Request

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the requestor any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: _____

Amy Paine

Date: _____

11/20/2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading has been ___x___ emailed, ___ faxed, ___ hand-delivered and/or mailed, First Class, postage prepaid, this January 4, 2019, to:

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