THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert E, Krehbiel
Michael C. Moffet

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 Brief on Remand Concerning the TDC, ITC and Appropriate Refunds

The Citizens' Utility Ratepayer Board (CURB) submits the following brief discussing CURB's position on three issues to be considered on remand in the above-captioned docket, the transmission delivery charge and the appropriate refunds due to customers, and calculation of the income tax:

I. Summary of Conclusions

1. When a utility opts to unbundle its transmission rates under K.S.A. 66-1237, the utility assumes all of the rights and all of the obligations set out in that statute. Westar and Staff propose that, for purposes of re-setting the illegal transmission rate delivery charge (TDC) that was charged to customers beginning on March 1, 2006, the unbundled rate shall be deemed a "transmission service charge" (TSC) that is based on the final rate set by FERC in November 2006. However, as proposed, the TSC does not comply with K.S.A. 66-1237 or K.S.A. 66-117 as the laws stood on March 1, 2006, and in fact, suffers the same flaws that led the Court of Appeals to find that the TDC was illegal. While the current version of K.S.A. 66-1237 would permit the Commission to approve on a *prospective* basis an unbundled transmission charge

based on the November 2006 FERC rate, the Commission may not *retroactively* apply the new version of K.S.A. 66-1237 to determine a legal level for March 2006 rates. The Commission must comply with the version of K.S.A. 66-1237 that was in effect in March 2006 in re-setting March 2006 rates on remand. Otherwise, Westar and its customers will not be placed back into a position that the KCC could legally have placed them when it issued its rate order in December 2005.

2. To correct the illegality of the transmission delivery charge (TDC) from March 1, 2006, to the present, the Commission must calculate the refund due to customers by crediting ratepayers with the entire amount of the TDC charged to customers, then crediting Westar with transmission costs on a prorated basis, based on Westar's actual transmission costs in the test year. The net amount, plus interest, is the amount of the refund due to customers. Additionally, CURB agrees with Staff witness Doljac that an adjustment of approximately $6 million must be credited to retail ratepayers as a result of errors made in the original agreement setting the TDC.

3. CURB does not object to making an adjustment on a prospective basis to Westar's income tax credit adjustment in this case, to bring Westar into compliance with the regulations of the Internal Revenue Service. If the IRS determines at a later date that a retrospective adjustment is necessary, Westar should be permitted to bring the issue before the Commission for consideration. Westar has agreed not to seek a retroactive adjustment at this time. Since a set of calculations that would establish the appropriate adjustment attributable to changes in Westar's income tax credits that were necessary to comply with Internal Revenue Service regulations has not been finalized, CURB is unable to take a position at this time on the amount of the adjustment.

II. Procedural history

4. The procedural history of this case is well-known to the parties, and is recited accurately in the first ten pages of the *Post-Hearing Brief of the Kansas Industrial Consumers*, filed with the Commission in this docket on June 4, 2007. CURB adopts KIC's recitation of the procedural history of this docket as if set forth herein.

III. Authority governing the transmission delivery charge and refunds due to customers

5. The Court of Appeals found that Westar's TDC as implemented by the Commission in its December 2005 order was illegal under K.S.A. 66-117 and K.S.A. 66-12371 (the 2003 version that was effective at the time of the Commission's order). (Opinion No. 96, 228, July 7, 2006). Specifically, the court found that the TDC rate, which was based on an interim FERC order subject to refund, violated K.S.A. 66-117, because the Commission has no power to approve a rate that is subject to refund after the 240-day statutory deadline for the KCC to issue a final rate order. The court also found that the TDC violated K.S.A. 66-1237, because the statute required Westar to base its unbundled transmission charge on rates approved in a final FERC order. Finally, the court found that the TDC violated K.S.A. 66-1237's requirement that the initial TDC be revenue-neutral, because the rate approved by the KCC allowed Westar to recover more for transmission costs than the amount that had been imbedded in customer rates

1 K.S.A. 66-1237 was first enacted by the legislature in 2003. The statute was amended by HB 2220 in the 2007 session and consistent with its express language, the new version became effective upon its publication in the Kansas Register, which occurred on April 5, 2007. (Kansas Register, Vol. 26, No. 14, April 5, 2007). Throughout this brief, unless otherwise specified, "K.S.A. 66-1237" refers to the original version of the statute passed in 2003, and "K.S.A. 66-1237 [2007] refers to the amended version that is currently in effect.

immediately prior to unbundling.

6. On remand, the Commission must order that amounts collected under an illegal rate must be refunded to customers. As the Kansas Court of Appeals has stated,

> It seems to us logical that the Joint Applicants should be required to refund the improper portion of the rate to its customers. In the world of the judiciary, when an appellate court takes away something bestowed on a litigant by a trial court, the litigant is required to surrender or return any ill-gotten gains. Otherwise, a successful appeal has little meaning. To suggest that a litigant may somehow retain benefits which an appellate court has determined it was not entitled to simply stands the system on its head and defies logic.

Kansas Pipeline Partnership, 24 Kan. App. 2d 42, 55 (1997). It is clear that the purpose of ordering a utility to make refunds to customers of amounts illegally collected is to put *both* the customer and the utility in the position they would have been in, had the rates been set in a manner consistent with the law.

7. The Commission's obligation to ensure that the rates comply with the law protects the utility as well as consumers. A rate deemed illegal can be too low, as well as too high. In this case, they were too high. By ordering refunds, the Commission is effectively "re-setting" Westar's rates to the level that they should have been set in the first place—assuming, of course, that the refund is calculated correctly.

8. Kansas courts have held that this "re-setting" of rates to correct an illegality does not violate the prohibition against retroactive ratemaking, because the Commission has no authority under the law to order customers to pay an illegal rate, whether it is illegally high, or illegally low. Although to all appearances it seems to be "retroactive ratemaking," the courts have determined that making the appropriate refund or surcharge it is the only way to correct the illegal order and to remedy the harm done to customers or the utility by its illegality. Either

way, the adjustment is considered to "undo" the illegality, and make the Commission's original order legal.

9. Illegal rates are "considered to have been illegal from the outset, and are not considered to have become illegal only as of the date on which the appellate court has found them to be so." *KPP*, 24 Kan. App.2d at 58 [citations omitted]. The TDC rate went into effect on March 1, 2006, and was therefore illegal from that date forward.

10. K.S.A. 66-1237 was amended by the Kansas Legislature and the amended version became effective on April 5, 2007. Had the amended version been in effect on March 1, 2006, when Westar began charging customers under its new TDC rate, the rate would have not been deemed illegal. However, the amended version does not apply retroactively to the rates charged from March 1, 2006 to the present.

11. The KCC may not retroactively apply K.S.A. 1237 [2007] to rates established prior to the amendment of the statute. "A statutory change operates prospectively except when (1) its language clearly indicates the legislature intended retroactive application, or (2) the statutory change does not prejudicially affect the substantive rights of the parties and is merely procedural or remedial in nature." *State v. Dreier*, 29 Kan. App. 2d 958, 959 (2001). "Procecural statutes generally concern the manner and order of conducting lawsuits, while substantive statutes establish the rights and duties of the parties." *Southwestern Bell Telephone, Co. v. Kansas Corp. Comm'n*, 29 Kan. App. 2d 414, 420-21, citing *Ryco Packaging Corp. Chapelle Int'l Ltd.*, 23 Kan. App. 2d, 43 (1996).

12. First of all, there is no language in K.S.A. 66-1237 [2007] that indicates the legislature intended it to be applied retroactively. The question, then, is whether the statute is

procedural or substantive in nature. Although it may be argued that K.S.A. 66-1237 [2007] altered the procedure by which the KCC may approve the initial TDC rate to be implemented, the right of customers of the publicly-regulated utilities to be charged legal rates is unquestioned. To apply the new version of K.S.A. 66-1237 to make "legal" a procedure of calculating the TDC that has already been deemed illegal by a court is to deny customers their right to be charged a rate that was calculated in a manner consistent with the law.

13. Furthermore, the change in the law, if applied retroactively to the March 2006 rates, will alter significantly the amount that Westar's customers must pay for transmission costs, and alter significantly the amount that Westar will receive. The new version thus alters the substantive rights and obligations of all of the parties in this docket. It alters what Westar may recover from customers, and alters what customers must pay to Westar. But the new version may not be applied retrospectively to alter the substantive rights and obligations of the parties as they stood on March 1, 2006, when the illegal TDC took effect. One court has found that when the legislature changed the way workman's compensation benefits were computed, the amendments may only be applied prospectively. "While [the amended law] does not affect the employee's rights to compensation or the amount thereof, it does alter the employers' and the Second Injury Fund's liabilities. These provisions clearly are substantive changes in the law and affect various parties' rights and obligations." *Finkbiner v. ITT Bldg. Service*, 474 N.W. 2d 148 (Mich. App. 1991).

14. The United States Court of Appeals held that a statute requiring that the Department of Housing and Urban Development and the Environmental Protection Agency to promulgate regulations that would require landlords to disclose the presence of lead-based paint

to tenants could not be applied to make a landlord liable under the statute, where the regulations themselves had not yet been promulgated at the time the landlord offered the property for lease. *Sweet v. Sheahan*, 235 F. 3d 80 (C.A. 2 N.Y., 2000). The regulations to be promulgated created the duty, not the statute itself, and they had not yet been promulgated by the deadline set by the statute. Even though the regulations were in place by the time the case was on appeal, the court held that they could not be applied to impose a liability on the landlord who had not provided the disclosures required by the new regulations, not only because the statute itself imposed no obligation, but because the court would be overriding the intent of the agencies that the regulations should not become effective until a certain date. *Id.*, 235 F. 3d at 89.

15. Thus, the new version of K.S.A. 66-1237 [2007] may be applied prospectively by the KCC to establish the appropriate level of the TDC rate for Westar going forward from the present, but it may not be applied retroactively to substantially change the rights and obligations of the parties. The Court of Appeals has ruled that the old version of K.S.A. 66-1237 required the initial TDC to be revenue-neutral, and to be based on a final approved rate. When the legislature enacted the requirement of revenue-neutrality, it bestowed on utility customers the right to pay an initial TDC that was no higher than the transmission costs already imbedded in rates. That is a substantive right. When the legislature required that the initial TDC shall be based on a final approved rate, it bestowed on utility customers the right to pay rates that had been previously approved by an authority authorized to set transmission rates for a utility. That is a substantive right. The legislature also bestowed on the utilities the right to unbundle rates, and to continue to recover from customers an amount equivalent to that which was previously imbedded in rates. Those are substantive rights, as well. Although the rates to be set on remand

are not "final," in re-setting the rates charged from March 1, 2006 forward to the present, the KCC must apply the law as it existed on March 1, 2006, and may not apply the law as it was subsequently amended. Since the difference in impact on Westar and the customers is approximately $6 million, the difference is substantial to all parties. (Remand Hearing, Tr. Rolphs at 40; Exhibit CURB R-2).

16. Furthermore, applying K.S.A. 66-1237 [2007] to unbundled transmission rates established prior to April 5, 2007, would override the intent of the legislature to make the new version effective on that date. Since the legislature did not expressly state that the amendments should apply retrospectively, the KCC must apply the law as it existed at the time Westar began charging the rate to customers. The KCC may apply the new version to rates set on a prospective basis only.

IV. The TSC proposed by Westar and Staff is illegal under K.S.A. 66-1237

17. Westar and Staff have proposed to calculate refunds and set transmission rates going forward from March 1, 2006, based on the rate set by FERC in November 2006, and propose that Westar pass through the refund and recover future costs from customers in a separate line item on customer bills that is unbundled from Westar's base rates, but renamed as the "transmission service charge" (TSC). While CURB acknowledges that the Commission may, if it chooses to do so, take into account changes in Westar's transmission costs since the test year and allow Westar to recover them in customer rates under the new version of K.S.A. 66-1237, the Commission must ensure that the rates being re-set on remand for the period March 1, 2006 to the present do not violate the law as it stood on March 1, 2006, the date the rates went into

effect. The TSC, if approved, would violate the law as it stood on March 1, 2006.

18. The legislature in 2003 gave authority to the publicly-regulated electric utilities of Kansas to unbundle their transmission rates from base rates in K.S.A. 66-1237(a). If the utility opted to unbundle its transmission rates, the KCC could not refuse to allow the utility to do so. The KCC's role in the unbundling process under K.S.A. 66-1237 was to ensure that the unbundling process resulted in an initial TDC was set at a level that was no more or no less than the transmission costs that were bundled in rates and had been approved by final order in a previous proceeding. These have been referred to in this docket as the requirements for revenue neutrality and finality. It was understood by all that Westar's transmission costs would be based on final rates set at FERC and charged to Westar by the SPP.

19. K.S.A. 66-1237 (b) provided a process by the utility could simply notify the KCC that it intends to change the TDC no more than 30 days from the date of notice to the KCC. The utility could change the TDC and start passing through the increase or decrease to customers. The option to change the TDC rate was the utility's. If its FERC rates decreased, it was not required to decrease the TDC. The only protection for customers against being overcharged for transmission was that if the KCC subsequently determined that a change in the utility's TDC rates was inconsistent with the change in FERC rates, it could order the utility to adjust the TDC. However, there was no provision mandating review of the TDC by the KCC, and the only opportunity provided for KCC review of the TDC in the statute was the option to review a change when the utility notified the KCC of its intention to change the TDC. If FERC decreased the utility's rates, the utility would not be obligated to change the TDC and decrease its rates.

20. Thus, the first paragraph of K.S.A. 66-1237 (section a) established the right of a

utility to unbundle its transmission costs and bill customers for those costs in a separate line item, and established requirements for setting the initial TDC. The second paragraph of K.S.A. 66-1237 (section b) provided a procedure by which the utility could change the TDC to reflect changes in its FERC rates, but did not require the utility to change the TDC when its FERC rates changed. If the utility sought a change as a result of a change in its FERC rates, the KCC was allowed, but not required, to review the change and order the utility to adjust the TDC if the change was not consistent with the change in FERC rates.

21. It is important to note that K.S.A. 66-1237 did *not* mandate that a utility change its TDC to reflect changes in FERC rates. A utility, after having unbundled its transmission rates under the provisions of K.S.A. 66-1237(a) and implemented its initial TDC, could never be required by the KCC to adjust the TDC *unless* the utility changed the TDC *and* the KCC chose to review whether the change was consistent with an order from FERC *and* found an inconsistency with a final FERC order *and* chose to order an adjustment. Once the initial TDC was set, there was no obligation whatsoever for the utility to change it again. Thus, the utility could unbundle its transmission rate, but opt not to change the rate to reflect changes in its FERC rate.

22. The "transmission service charge" proposed by Staff and Westar in this remand proceeding is simply an unbundled transmission rate established under K.S.A. 66-1237(a). Although Westar states that it does not intend to seek to change the TSC, and therefore it is not a "transmission delivery charge," the TSC is an unbundled transmission rate, and like all unbundled transmission rates of utilities, must initially comply with the requirements of K.S.A. 66-1237. There was no inherent right of a utility to unbundle its transmission costs until K.S.A. 66-1237 was enacted, and the legislature made its intentions clear that it wanted the initial

unbundling to be done according to the provisions of K.S.A. 66-1237(a). Because the proposal of Westar and Staff would have the Commission approve the TSC as the basis for re-setting transmission rates charged to customers from March 1, 2006 forward and for calculating the refund attributable to the illegal TDC, the TSC must comply with the version of K.S.A. 66-1237 that was in place on March 1, 2006. Otherwise, Westar and its customers will not be put back into a position that the Commission could have legally placed them in when it issued its rate order in December 2005.

23. The initial TSC is functionally no different than an initial TDC and changing the word "delivery" to "service" does not make it exempt from the statute that created Westar's right to unbundle transmission rates. Any initial unbundled rate must meet the criteria set forth in K.S.A. 66-1237. The fact that Westar does not intend to seek changes in the TSC does not make it exempt from the criteria that apply to the initial unbundled rate. The initial TSC, for purposes of K.S.A. 66-1237, is legally indistinguishable from an initial TDC.

24. Not only is the TSC legally indistinguishable from a TDC, the label "TSC" chosen by Westar for its unbundled transmission rate to be set in this remand proceeding is linguistically indistinguishable from a TDC and functionally so similar to a TDC that it is virtually indistinguishable. First of all, although both versions of K.S.A. 66-1237 refer to the unbundled transmission cost line-item charge as a "transmission delivery charge," the law does not specify that those particular words should be used on customer bills to identify the charge. There is nothing in the statute that would have prevented Westar from proposing that the line-item be identified as the "transmission service charge," "transmission costs," "FERC-related costs" or any other label, so long as the label did not mislead customers. There is nothing in the

statute that would have prevented the Commission from determining that a label other than "transmission delivery charge" would be a more appropriate label on customer bills. The specific name of the charge makes little difference, so long as customers understand what they are being asked to pay and what the charge is for.

25. Secondly, in utility regulation, the terms "transmission service" and "transmission delivery" have virtually the same meaning. Even if there may be some finely-drawn linguistic distinction in the dictionary meanings of two terms, they are commonly used interchangeably to refer to the same thing in regulatory proceedings. A customer cannot be expected to understand the difference. Furthermore, the company does not intend to provide any information to customers that will explain the difference in the TSC and the TDC.

26. Customers will not be able to see any functional difference, either, at least at first. When refunds attributable to the illegal TDC are passed through to customers as a credit to the TSC, customers will not be told that they are receiving refunds and will not be given an explanation as to why the TSC, which is supposedly a fixed, not a variable rate, is different this month than last month. (Remand Hearing, Tr. Rolphs at 49 – 50). When the refunds are finally disbursed to customers, the TSC will increase back to its original size. Again, the variability of the TSC will make it look exactly like a TDC to a customer.

27. Furthermore, there is no functional difference. Under the TDC statute—either version—the utility may choose to unbundle its transmission rates from base rates and reflect changes in its underlying transmission costs by changing the rate, or may choose to leave the rate the same. Westar will continue to have both options if the TSC is approved—either by electing to notify the Commission, once again, that the company is going to implement a TDC under

K.S.A. 66-1237, which, if approved, would allow Westar to alter its rates to take into account changes in its transmission costs; or, the company may do nothing if its underlying costs change. The difference to customers will not be evident in any way.

28. It should be noted that the new version of K.S.A. 66-1237 [2007] gives the Commission authority to require changes in the TDC if the utility does not reduce the TDC and pass through any reductions in its FERC rates to customers, but the new version does not *require* the Commission to exercise that authority. If, as CURB asserts here, the TSC is subject to the TDC statute, the KCC could order Westar to reduce the TSC accordingly under the new version of K.S.A. 66-1237(2)(c) if Westar's FERC rates decreased in the future, but the new version of the statute would not require the KCC to order a reduction.2 The new version of the statute would allow the KCC to order Westar to increase its TSC if its FERC rates increased, as well. Since the choice to order a reduction or an increase to be consistent with a FERC order is entirely discretionary with the Commission, there is no way to predict whether the TSC will actually be adjusted in the future—but under the new version of K.S.A. 66-1237[2007], the TSC could be adjusted to be consistent with changes in FERC rates, just as the TDC is intended to fluctuate with FERC rates. Functionally, the TSC is simply indistinguishable from the TDC.

29. For all practical purposes, the TSC is identical to an initial TDC that hasn't changed yet, even if we accept for the sake of argument that it is not subject to the requirements of K.S.A. 66-1237. Even then, the TSC can be viewed a "placeholder" on the customer's bill for what will become the TDC, which is inevitable in an era of rising costs. The reason is clear: no

2 Other requirements in case law and statutes would bind the KCC to order a reduction under its obligation to establish just and reasonable rates that reflect the cost of service, but K.S.A. 66-1237 itself does not create a binding obligation to reduce the TDC if the utility's FERC rate is reduced.

well-managed utility would pass up the opportunity to recover more in rates if its costs have increased. If Westar's transmission costs increase, it will simply file a request to convert the TSC to a "variable" TDC under K.S.A. 66-1237[2007], and increase the rate. That it will do so is inevitable.

30. If one then considers what will happen if Westar's transmission costs decrease, the difference between the TDC and the TSC completely disappears. What happens is: *nothing.* The company will simply opt not to apply for a change in its transmission rates. (Remand hearing, Tr. Rolphs, at 76). Even though its costs may have decreased, Westar will have the option, whether the charge for transmission costs is called a TSC or a TDC, to keep the rate the same. Although the KCC now has, under the new version of K.S.A. 66-1237 [2007], more authority to order a change in the rate if it is inconsistent with the FERC rates in effect, and presumably would choose to protect ratepayers by reducing the TDC or TSC to a level consistent with FERC rates, the KCC is not required to order a reduction. Therefore there is no functional difference whatsoever in how customers will be effected by the TSC or the TDC. If Westar's transmission costs go up, the company will convert the TSC to a TDC, and rates will go up. If Westar's transmission costs go down, Westar will have the option of continuing to label the charge for these costs a TSC, and not reduce rates, or take the option under the TDC statute to stand pat and not change rates. It will face some risk that the KCC would order a reduction under the new version of the law, but there is no guarantee that it would happen.

31. Thus, the argument that the TSC is functionally or legally distinguishable from a TDC, and therefore exempt from the requirements of K.S.A. 66-1237 is simply specious. Linguistically, the difference in the meaning of the two labels is nonexistent. The law can't tell

the difference. Customers will not be able to tell the difference. The so-called "fixed" TSC charge will vary whenever refunds or surcharges are ordered, and will vary again once the refunds are fully disbursed or surcharges are fully collected, just as a TDC would vary. Furthermore, if the KCC determines that the TSC is subject to the requirements of K.S.A. 66-1237 [2007], then the KCC at its discretion may order an adjustment to the TSC when Westar's FERC rates change. The notion that the TSC is different because it will be a "fixed" charge is simply wrong. There is no difference between the TSC and a TDC under the law.

32. Even if the TSC is ultimately ruled to be a distinct type of unbundled transmission charge not subject to the provisions of K.S.A. 66-1237, the result for customers will be the same. If Westar's transmission costs go down, customers will not receive a reduction in rates, whether or not the charge is called a TDC or a TSC. If Westar's transmission costs go up, Westar will apply for an increase in rates by implementing a TDC, and customer rates will increase. The argument that Westar will not be able to increase its rates under a TSC simply ignores the obvious: the day after this case is finally decided, it can apply for a TDC, and will do so as soon as its transmission costs increase, if not before. No well-run utility would pass up an opportunity to increase its rates without going through a full-blown rate case. In fact, the company could elect to implement a TDC the day after a TSC is approved in this case.

33. Quite simply put, the TSC is virtually indistinguishable from a TDC that hasn't increased yet. Thus it can be argued that the transmission service charge proposed by Westar for rates *going forward* is for all intents and purposes linguistically, functionally and legally indistinguishable from a transmission delivery charge, and therefore must comply with all of the criteria set out in K.S.A. 66-1237 [2007]. It will be subject to adjustment under the new

authority of the KCC to order adjustments consistent with changes in FERC rates.

34. However, the proposal of Westar and Staff seeks to calculate customer refunds as if the TSC rate, which will be based on the final FERC rate approved in November 2006, became effective March 1, 2006. This is illegal, because the TSC does not meet the criteria set out by the version of K.S.A. 66-1237 that was in effect on March 1, 2006. Although, as Staff pointed out, the rates in this case are not yet "final," the process of calculating refunds is intended to put customers and the utility back into the position they would have been in had Westar begun charging a Commission-ordered legal rate on March 1, 2006. On that date, the version of K.S.A. 66-1237 then in effect prohibited basing a newly-unbundled transmission rate on a FERC rate that was not yet final, and required that it be revenue-neutral. On March 1, 2006, the rate ultimately approved by FERC in November 2006 was not yet final, and because it increased the amount recovered by Westar for transmission costs over that imbedded in rates just previously to unbundling the transmission rate, it was not revenue-neutral. Therefore, the unbundled transmission rate that is to be used as the basis of calculating customer refunds for the period March 1, 2006 to the present cannot be based on the November 2006 rate. Calling the unbundled rate a TSC instead of a TDC does not exempt it from the requirements of the law in effect at the time it was implemented.

35. In this remand proceeding, the Commission is "re-setting" the illegal rates it set in December 2005 and which Westar began charging in March 2006. For purposes of calculating the refunds, the Commission must come up with a result that would have been legal when it issued its order. Thus, the refund must be calculated as if customers had paid legal rates in March 2006 to the present. To be legal, rates for March 2006 must comply with the law as it

existed at the time the rates were implemented. The Commission cannot use the April 2007 version of the law to judge the validity of rates for any period prior to April 2007, and because its final order on remand will make the first prospective change in Westar's rates since the new version of the law became effective, the new law will only apply to the rates that are set prospectively.

36. Going forward, the TSC, or the TDC, or whatever the company chooses to label the unbundled transmission costs, must comply with the 2007 version of K.S.A. 66-1237. However, the rates being "re-set" for the period March 1, 2006 to the present must be legal under the law as it was on the date that Westar started charging the rate to customers. Retroactive application of K.S.A. 66-1237 [2007] will not put Westar and its customers back in the place that they would have been in had the Commission approved a legal rate in December 2005.

V. Correctly calculating the refund for the TDC

37. To calculate the refund correctly in this case, the first calculation is to credit customers for the entire amount charged to customers through the illegal TDC. Second, because the utility is entitled to recover its prudently-incurred costs, the Commission should credit to Westar an amount for its transmission costs, prorated for the period from March 2006 to the present. This amount should be calculated based on substantial evidence of Westar's actual transmission costs in 2004, the test year, just as all its other costs in the rate case were calculated. Then, the appropriate annual interest rate should be applied. The result of this three-step calculation is the amount that should be refunded to Westar's customers. This would put Westar and its customers back into the position they would have been in, had the Commission issued an

order in December 2005 that set Westar's rates in a manner that comports with the law, and would also be consistent with the way the Commission determined how the rest of Westar's costs in the case should be recovered.

VI. Setting rates going forward

38. Normally, the "re-setting" of rates effective back to the date the illegal rates became effective would complete the process. The proposal of Westar and Staff suggests such an approach. The rate would be effective from that point on, into the future, until the next rate case results in a new rate order. While that result would be perfectly satisfactory to CURB in this case—if the rate was based on Westar's transmission costs during the test year, as Westar's other costs were determined in this case—the Commission has the authority to prospectively set rates by taking into account known and measurable changes in costs since the test year. CURB accepts the November 2006 FERC rate as a reasonable proxy for Westar's transmission costs going forward. Although the practice of including costs from outside the test year in rates distorts rates in favor of the utility, by taking into account increases in Westar's costs outside the test year without examining possible increases in revenues that Westar may have received outside the test year, CURB recognizes that the final FERC rate represents a "known and measurable" change that the Commission may take into account in setting Westar's rates going forward.

39. However, Westar and Staff's proposal to calculate the TDC portion of the refund using the rate finally approved by FERC at the end of November 2006 would be to effectively set rates effective in March 2006 on a rate that was not yet final FERC, a result that the Court of

Appeals has already rejected in this case because it was inconsistent with K.S.A. 66-117 and with K.S.A. 66-1237. To re-set rates by referencing the FERC rate set in November 2006 would also be setting rates for March 2006 based on evidence that was not yet in existence, violating the prohibition against allowing a company to recover for costs that are not supported by substantial evidence in the record. Although the Commission may permit recovery in rates for costs incurred outside the test year *if* there is substantial evidence of "known and measurable" changes in costs since the test year, the authority to allow recovery for known and measurable changes is only the authority to set rates *prospectively*. Even Westar witness Rolphs acknowledged that it would be unusual to use a "known and measurable" change to alter rates retrospectively. (Remand Hearing, Tr. Rolphs at 85). Staff Witness Doljac noted that the "known and measurable change" standard applies to costs "moving forward." (Remand Hearing, Tr. Doljac at 181). The Commission cannot effectively re-set rates for March 2006 based on evidence that did not exist at the time the Commission made its decision, and that did not come into existence until almost a year later.

40. Additionally, Westar and Staff argue that retail customers should be satisfied with receiving the same amount in refunds that Westar will receive from SPP. The SPP refund will compensate Westar for the difference in the interim rate it was charged from December 2005 until November 2006—when FERC finally approved a rate lower than the interim rate Westar had been passing through to its customers. The argument is that since this refund will accurately adjust Westar's account with SPP, passing the SPP refund through to customers will adjust their account with Westar.

41. This argument sounds plausible on its face, but simply passing through the SPP

refund will not put Westar and its customers back into a position that the Commission should have *legally* put them in when it issued its order in December 2005. This argument entirely ignores the fact that the Commission has already been told by the Court of Appeals that the unbundled rates that went into effect in March 2006 were illegal because they not revenue-neutral and were based on a FERC rate that was not yet final, violating the version of K.S.A. 66-1237 that was in effect. The fact that Westar and Staff want the TSC to be based on a now-"final" FERC rate, rather than the interim FERC rate used previously, is still not consistent with the law in March 2006. The fact that the November 2006 FERC rate is now final gives the Commission the option of approving a TDC *prospectively* based on that rate, but it may not calculate customer refunds as if that rate was final on March 1, 2006. Furthermore, while FERC may order rates subject to refund, Kansas law prohibits the Commission from doing so. It may only order refunds if the original rate put into effect was illegal. The KCC cannot correct the illegality of the March 1, 2006 rates with reference to a change in the statute that did not occur until April 2007.

42. Staff has argued that the TSC is not subject to K.S.A. 66-1237, and therefore the Commission can use the November 2006 rate to set the level of the TSC. However, this argument ignores the fact that the purpose of the company's application was to request an increase *based on its costs and revenues in the test year.* Its transmission costs in the test year were considerably lower in the test year than the costs resulting from the November 2006 rate order. If the Commission properly approaches the goal on remand as the Kansas Court of Appeals has described it—which is to put the customers and Westar back into the position they would have been in if the rates Westar began charging on March 1, 2006 were legal—then the

Commission must look to the test year to determine what Westar's costs were, just as it looked to test year data for all the other costs for which Westar sought recovery.

43. Because Westar opted to unbundle transmission costs from the base rate costs in its application, there is no direct evidence of Westar's transmission costs in its application. It merely provided the Commission a copy of its application to FERC for an increase. (Tr., Remand Hearing, Rolphs, at 40, 57). Given that FERC ultimately rejected the rate that Westar proposed, FERC obviously did not accept all of the evidence in the application at face value. Therefore, the application is not good evidence of what Westar's costs were during the test year.

44. However, evidence of Westar's transmission costs are contained in Exhibit CURB R-1, which is a copy of Westar's responses to CURB Data Requests 304 and 310 that was introduced and entered into the record during the remand hearing. (Remand Hearing, at 37). Westar witness Dick Rolphs and Mark Doljac both confirmed on the stand that the company's response to CURB 310 accurately reported Westar's transmission costs for the test year and that they were lower than the rate granted in November 2006. (Remand Hearing, Tr. Rolphs at 37, 73 – 74; Doljac at 177). Since the Commission used evidence of Westar's other costs and revenues in the test year to set rates in this case, the Commission should use evidence of Westar's transmission costs and revenues from the test year to put Westar and its customers back into the position they would have been had the Commission set rates appropriately in December 2005.

45. CURB also supports Doljac's proposal to correct, at least to some degree, the errors in allocations that CURB witness Brian Kalcic noted in his Rebuttal Testimony concerning the agreement reached by Westar and Staff in December 2005 regarding the TDC. Doljac confirms that errors in allocations between retail and wholesale customers were made, and that

an adjustment of approximately $6 million must be credited to retail ratepayers to correct the errors. (Remand hearing, Tr. Doljac, at 162 – 63).

VI. Prospective adjustment of the income tax credit adjustment

46. CURB does not object to the Commission making a prospective adjustment to Westar's income tax credit adjustment, but has raised an objection, as have other of the Intervenors, to making a retroactive adjustment. Westar states that it is now seeking only a prospective adjustment. The fact that the final amount of the adjustment has yet to be determined at this writing aptly demonstrates the Intervenors' objections to interjecting this new issue so late in the case: the calculations are complex and it has proved difficult to come up with an error-free adjustment. CURB simply asks the Commission to provide the parties a fair opportunity to scrutinize the finalized adjustment and raise objections if they continue to find errors in the calculations.

VII. Conclusions and Request for Relief

47. The Commission must comply with the version of K.S.A. 66-1237 that was in effect in March 2006 in re-setting March 2006 rates on remand to calculate refunds due customers for the period from March 1, 2006 to the present. Otherwise, the refund will not correct the harm done by the illegal rate, and Westar and its customers will not be placed back into a position that the KCC could legally have placed them when it issued its rate order in December 2005. The Commission must also credit retail ratepayers with approximately $6 million in errors that were made in the original allocation of the TDC to wholesale and retail

customers, and award interest on the amount illegally charged. CURB does not object to using the November 2006 FERC rate in setting Westar's transmission rate going forward, but using the November 2006 FERC rate to calculate refunds would have the same legal flaws as the rate deemed illegal by the Court of Appeals. Finally, CURB does not object to making an adjustment on a prospective basis to Westar's income tax credit adjustment in this case, to bring Westar into compliance with the regulations of the Internal Revenue Service. No retrospective adjustment should be made. If the IRS determines at a later date that a retrospective adjustment is necessary, Westar should be permitted to bring the issue before the Commission for consideration. The parties should be afforded an opportunity to review and make written comments if necessary, once the final calculation of the ITC adjustment is made available.

48. Therefore, CURB respectfully requests that the Commission calculate the refund and set rates prospectively in a manner consistent with the conclusions stated above, which would be consistent with the law, as well as consistent with the Commission's statutory obligation to make a balanced decision that protects ratepayers as well as the utility in setting just and reasonable rates.

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 4th day of June, 2007.

Notary of Public

My Commission expires: 6-04-07.

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, hand-delivered this 4th day of June, 2007, to the following:

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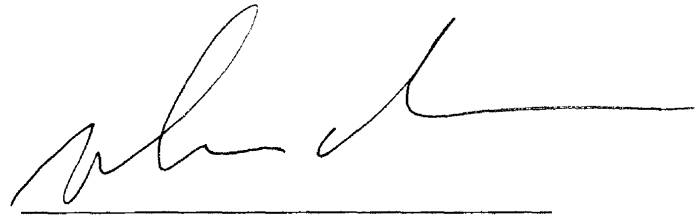

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