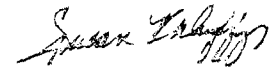


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

JUL 25 2008

Before Commissioners: Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

 Docket
Room

In the Matter of the Application of Westar)
Energy, Inc. and Kansas Gas Electric) Docket No. 08-WSEE-1041-RTS
Company for Approval to Make Certain)
Changes in their Charges for Electric)
Service.)

**CURB'S RESPONSE TO FINDINGS
AND RECOMMENDATIONS OF PREHEARING OFFICER**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and files its response to the Findings and Recommendations of Prehearing Officer. In support of its response, CURB states and alleges as follows:

1. On May 28, 2008, Westar Energy, Inc. and Kansas Gas and Electric Company ("Westar") filed an application with the Kansas Corporation Commission requesting approval to change its rates for retail electric service to its Kansas customers.

2. On June 19, 2008, a scheduling conference was held in the above-referenced docket. On July 11, 2008, the Findings and Recommendations of the Prehearing Officer were filed regarding the scheduling conference.

3. In her Findings and Recommendations, the Prehearing Officer recommends that the Commission hold public hearings on September 2, 3, and 4, 2008, pursuant to what she describes as a "recently approved Commission policy regarding the scheduling of public hearings." ("Open Docket Public Comment Procedures")¹ The Prehearing Officer further recommends that the Commission require Westar to give notice to the public of the public hearings through bill inserts

¹ Findings and Recommendations of Prehearing Officer, ¶ 5.

and newspaper advertising, and that the bill inserts be placed in customer bills so that all customers are notified at least one week prior to the public hearing.² The public hearings would be held before Commission Staff or the intervenors file their testimony on Westar's application.

4. The parties were given until July 25, 2008, to file comments regarding the Findings and Recommendations of Prehearing Officer. CURB's comments and objections to the Findings and Recommendations of Prehearing Officer are below.

I. CURB Objects To Adopting The Proposed Open Docket Public Comment Procedures In This Docket.

5. Throughout the Findings and Recommendations of Prehearing Officer, the Prehearing Officer mischaracterizes CURB's objections to adopting the proposed Open Docket Public Comment Procedures in this docket as "concerns about the policy" rather than objections to the policy.³

6. While this mischaracterization was likely unintentional on the part of the Prehearing Officer, CURB would note for the record that the Consumer Counsel formally objected to the Open Docket Public Comment Procedures adopted by the KCC at the Scheduling Conference.⁴ CURB's objection was subsequently duly noted by the Prehearing Officer: "Mr. Springe's objection and comments have been recorded ..."⁵

II. A Change In Commission Policy Regarding Public Hearings Has Not Been Finalized.

7. The record does not support a conclusion that a change in Commission policy has been finalized. Although there is a document purporting to change the Commission policy on public

² Findings and Recommendations of Prehearing Officer, ¶ 16.

³ *Id.*, at ¶¶ 6-7, 12. The Prehearing Officer did use the term "objected" in paragraph 7 with respect to CURB's comments regarding Commissioner attendance at the informal meeting before the formal public hearing begins.

⁴ Tr. of Proceedings, June 19, 2008, p. 19, lines 22-25, p. 20, lines 1-12 (emphasis added).

⁵ *Id.*, at p. 21, lines 13-14.

hearings (Open Docket Public Comment Procedures), there has been no final order issued or public notice of a change in Commission policy.

8. In addition, the document purporting to change Commission policy on public hearings (Open Docket Public Comment Procedures) contains a space to designate a policy number. However, a policy number has not been indicated to show the proposed policy has been finalized.⁶

9. Further, statements made by the Prehearing Officer at the Scheduling Conference do not support a conclusion that a final change in policy has been made. During the Scheduling Conference, the Prehearing Officer referenced the Open Docket Public Comment Procedures as follows:

*I have been waiting and hoping that we would actually get the official policy to distribute, but what I have and what I – although I guess I should have marked it specifically on the original copy that I used, this is the last version that I have had provided to me that was corrected after the public hearing on June 11th, so it's the closest I can get you to what I expect is the final policy.*⁷

That's my understanding pursuant to the policy that is set forth is this *draft*.⁸

10. The non-final nature of the policy was noted by CURB Consumer Counsel David Springe at the Scheduling Conference:

*"You said the Commission adopted a policy at an open meeting and that's fine, but then you said we're busy rewriting the policy. So I don't know where we're at in terms of the policy process, so I don't know if we are working off a final document or whether there is a final document."*⁹

11. In response, the Prehearing Officer couldn't confirm whether a final policy had been issued:

⁶ Findings and Recommendations of Prehearing Officer, Open Docket Public Comment Procedures, p.1.

⁷ Tr. of Proceedings, June 19, 2008, p.12, lines 4-12 (emphasis added).

⁸ *Id.*, at p. 14, lines 1-3 (emphasis added).

⁹ *Id.*, at p. 14, lines 22-25, p. 15, lines 1-4.

As far as I did, this is a final document, but *I have not been given a hard copy*. I'm not preparing this document, so that's why – I mean that may be why *I can't tell you for sure.*"¹⁰

12. To the best of CURB's knowledge and belief, the purported change in policy has never been posted on the Commission website or posted publicly in any manner.

13. As a result, nothing in the public record indicates a final change in Commission policy regarding the scheduling of public hearings has been made by the Commission.

III. The Commission Should Delay Or Reconsider Any Decision To Change Its Policy Regarding Public Hearings Until It Provides The Opportunity For CURB And Other Parties To Comment On The Proposed Departure From Longstanding Commission Practice.

14. At the open meeting where the Commission discussed the proposed changes to longstanding Commission practice regarding public hearings, counsel for Commission Staff were the only persons given an opportunity to provide information to the Commission. Interestingly, both Staff attorneys told the Commission that they opposed the proposed change in policy.¹¹

15. It has been longstanding Commission practice to schedule public hearings after all of the parties have filed direct testimony in rate cases. Before departing from this historical practice, the Commission should provide CURB and other parties who typically participate in rate cases the opportunity to submit comments on the proposed change in policy. The proposed change in policy will deny fundamental fairness and due process. Further, the Commission has denied CURB and

¹⁰ *Id.*, at p. 15, lines 5-9 (emphasis added).

¹¹ Staff's position was not explicitly stated on the record at the Scheduling Conference, but was expressed during the open meeting on June 11, 2008. Tr. of Proceedings, June 19, 2008, p. 21, lines 5-8.

other parties the opportunity to provide information to the Commission that should be considered before making such an abrupt change in policy.¹²

16. The Commission should delay any decision to change its policy regarding public hearings until it provides the opportunity for CURB and other parties to comment on the proposed departure from longstanding Commission practice. If the Commission determines it has finalized a decision to depart from its longstanding practice regarding public hearings, the decision is not supported by substantial competent evidence and should be reconsidered.

IV. CURB's Right To Provide Ratepayers A Thorough Briefing At The Public Hearings Or Comment On The Merits Of The Application Is Denied By Scheduling The Public Hearings Prior To The Filing Of Intervenor And Staff Testimony.

17. On its face, the Open Docket Public Comment Procedures states, in pertinent part:

3. The **purpose of the informational meeting and how it will be conducted** should be clearly stated. The following is an example of a sufficiently clear statement of the purpose: "The KCC will hold (a) public meeting(s) to allow the Applicant to fully explain its request to the public. Applicant and the KCC Staff will be available to answer questions; CURB and other intervenors may also elect to attend and thus be available to answer questions. *All parties other than Applicant and CURB, if CURB elects to attend, will not comment on the merits of the application during the informational meeting.* The Commission members may attend the informational meeting. Staff Counsel will conduct the informational meeting.

4. The **purpose of the public hearing and how it will be conducted** should be clearly stated:

"The KCC will hold (a) public hearing(s) for the following purposes: To assure that members of the public, *after being provided a thorough briefing by the Applicant (and CURB, if CURB attends) have the opportunity to make their views on the application known to the Commissioners and parties.*¹³

¹² See, Tr. of Proceedings, June 19, 2008, p. 18, lines 18-25.

¹³ Findings and Recommendations of Prehearing Officer, Open Docket Public Comment Procedures, p. 3, ¶¶ 3-4 (emphasis added).

18. As noted by CURB Consumer Counsel David Springe at the Scheduling Conference, ratepayers appearing at public hearings scheduled before CURB, other intervenors, and Staff have filed testimony will be denied the benefit of the analyses of CURB, Staff, and other intervenors. This will unfairly bias the information provided to ratepayers during the informal sessions in favor of Westar, which had months to prepare and file its application and testimony.

19. This proposed new policy will effectively deny CURB the right it has, both traditionally and as described in the Open Docket Public Comment Procedures, to “comment on the merits of the application” and provide ratepayers a “thorough briefing” of Westar’s position as well as that of CURB and other parties. Traditionally, CURB has had the opportunity to comment on the merits of the application and fully brief ratepayers on the analysis of the application developed by CURB’s consultants, other intervenors, and Staff, in filed testimony. The proposed Open Docket Public Comment Procedures *purports* to give CURB the right to “comment on the merits of the application” in the informational meeting and provide “a thorough briefing” during the public hearing.

20. However, scheduling the public hearings prior to the filing of testimony by CURB, other intervenors, and Staff renders meaningless the purported opportunity for CURB to “comment on the merits of the application” and provide the public with “a thorough briefing.” It is impossible for CURB to comment on the merits of the application and provide a thorough briefing to ratepayers *prior to the final analysis and filing of testimony by its consultants*. Without being provided *meaningful* comments on the merits and a *meaningful* briefing by CURB (on CURB’s filed position as well as the filed position of other Intervenors and Staff), ratepayers will be denied the opportunity

to develop fully-informed views on the application and to provide informed comment to the Commission.

V. The Change In Policy For Scheduling Public Hearings Is Not Necessary.

21. The Prehearing Officer notes the valid reasons listed by CURB for scheduling public hearings after the filing of intervenor and Staff testimony, including the fact that the public “will be better informed about the details of the utilities application if Staff’s and intervenors’ respective positions evaluating the application are available before the public hearing.” The Prehearing Officer states that “other reasons exist for inviting the public to comment earlier in the proceeding”, but lists only one.

22. The sole reason cited by the Prehearing Officer to justify scheduling public hearings prior to the filing of Intervenor and Staff testimony is that “early public comments give Staff and Intervenor an opportunity to take public input into account in reaching a position and can be addressed when filing testimony on the issues.”¹⁴ This reason does not justify the Commission’s departure from longstanding Commission practice, since the Commission can and previously has provided Staff opportunities to amend their filed positions after public input.

23. Interestingly, while the Open Docket Public Comment Procedures states the Commission’s intent to allow public comments to be timely heard by Staff prior to the submission of written testimony by Staff witnesses, it also states that, “It is not intended that Staff be required to respond to specific comments in its filed testimony.”¹⁵ The Commission’s intent in hearing public comments in the docket is thus unclear.

¹⁴ Findings and Recommendations of Prehearing Officer, ¶ 14.

¹⁵ Findings and Recommendations of Prehearing Officer, Open Docket Public Comment Procedures, p. 1.

VI. Scheduling Public Hearings Earlier Will Cause Additional Direct Mailing Expenses.

24. On July 21, 2008, Westar filed Comments of Westar Energy, Inc. and Kansas Gas and Electric Company Regarding the Findings and Recommendations of the Prehearing Officer. In its Comments, Westar advises the Commission that the early scheduling of the public comments would cost Westar (and ultimately ratepayers) at least a minimum of \$84,000 to send notice to customers through a direct mailing instead of through bill inserts. Additionally, Westar notes that the costs will increase by \$12,000 per day if the Commission issues its Order after July 28, 2008.¹⁶

25. This additional expense is not justified. Ratepayers will bear this expense, yet receive no benefit from the early scheduling of public hearings. To the contrary, as demonstrated above, ratepayers are prejudiced by the scheduling of public hearings prior to full analysis of the application by CURB, other intervenors, and Staff as reflected in filed testimony. As a result, the Commission should reconsider its decision to schedule public hearings prior to the time intervenors and Staff file testimony.

VII. Commissioners Should Not Attend The Informal Session Prior To The Formal Public Hearings.

26. Commissioners should not attend the informal sessions prior to the formal public hearings. Not only will broad, general information about regulating utilities be discussed by the Applicant, CURB, and possibly Staff, rate case-specific questions will be posed and answers given by company personnel or counsel for the Applicant. If this information is provided in the presence of the Commissioners, it should be made on the record with opportunity for objections by Intervenors, Staff, and the Applicant. This will necessarily require the Chairman to rule on objections.

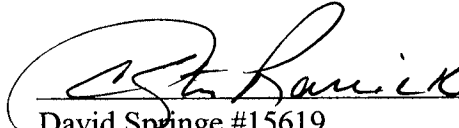
¹⁶ Comments of Westar Energy, Inc. and Kansas Gas and Electric Company Regarding the Findings and Recommendations of the Prehearing Officer, ¶ 4.

27. Complicating the informal sessions in this manner is ill-advised and unnecessary. CURB urges the Commission to reconsider any decision to attend the informal sessions scheduled prior to the formal public hearings.

VIII. Conclusion.

WHEREFORE, CURB RESPECTFULLY REQUESTS THE Commission reconsider the proposed change in policy contained in the Open Docket Public Comment Procedures and as recommended by the Prehearing Officer, and schedule public hearings as it has traditionally scheduled them – after Staff, CURB, and other intervenors have filed their direct testimony.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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