2006.12.18 11:41:24
Kansas Corporation Commission
/S/ Susan K. Duffy

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

DEC 18 2006

Docket Room

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

Joint Comments of Intervenors CURB, KIC and USD 259

The Citizens' Utility Ratepayer Board (CURB), the Kansas Industrial Consumers Group, Inc. (KIC), and Unified School District No. 259 (USD 259) respond jointly, as follows, to the Kansas Corporation Commission's *Order Soliciting Comments Following Judicial Review Proceedings* that was issued on November 20, 2006, in the above-captioned docket:

I. Preliminary Comments

1. The Commission has asked for comment from the parties on the appropriate procedure that should be used to address the issues that the Kansas Court of Appeals reversed and remanded in three separate opinions issued on July 7, 2006, in Case Nos. 06-96228-A, 06-96264-A and 06-96251-A. CURB, KIC and USD 259 (collectively, the Intervenors) agree that requesting input from the parties is not the appropriate action at this juncture. The court's mandate is clear. The court unambiguously ordered the Commission to reverse these three decisions. If the Commission wanted further guidance or clarification as to the appropriate course of action, the Commission should have availed itself of the opportunity under Kansas

Supreme Court Rule 7.05 to move for rehearing or modification from the Court of Appeals within 10 days of the court's decision. The Commission did not avail itself of the opportunity to seek clarification. While rehearing or modification is not a matter of right, and the court may have declined such a motion, if the Commission believes there are ambiguities, the court, not the parties, would have been the appropriate interpreter of its own opinions.

2. That said, the Commission has nevertheless asked for comments, and the Respondents offer their comments below.

II. Authorities on the issue of rehearing on remand.

3. "An order of the Kansas Corporation Commission requiring a public utility to refund a rate which an appellate court has held unlawful is not retroactive ratemaking . . . An order of the Commission "determined unlawful by the appellate courts is unlawful from the date it was authorized . . . . . [a] rate does not become final until the appellate process is over." *Kansas Pipeline Partnership v. Kansas Corporation Comm'n*, 24 Kan. App.2d 42, Syl. ¶¶ 7, 9; 57, 941 P.2d 390, *rev. denied* (1997). Unless the appellate court explicitly requires the Commission to hold additional hearings or receive additional evidence, there is no right to a rehearing on remand: the decision whether to hear additional evidence is within the discretion of the KCC. *Id.*, at 50.

4. In *Kansas Pipeline Partnership* (KPP), the Court of Appeals found that there was no abuse of discretion not to reopen the record, in light of the extensive evidence in the record and the opportunities that KPP had during the course of the original proceedings to present evidence supporting its position. *Id.*, at 50. On remand, without taking additional evidence or

rehearing the issue, the Commission determined that KPP had failed to meet its evidentiary burden to establish that it had incurred certain costs. *Id.*, at 52. "A negative finding that a party did not carry its requisite burden of proof will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice." *Id.* [citation omitted].

III. Arguments against hearing new evidence or testimony.

5. The most straightforward path to resolving the issues remanded to the Commission is for the Commission to issue an order reversing its decisions. The Commission may do so, because the Court of Appeals did not explicitly order a rehearing or taking of new evidence. If the Commission issues an order supported by the record and is consistent with the orders of the Court of Appeals, there will be no grounds for appeal, and the rate case will be concluded once and for all. On the other hand, if the Commission reopens the record for new evidence or a rehearing, the risk that one or other of the parties will appeal is increased exponentially. The Commission may rest assured that appeals will be filed by one or more of the parties if the Commission takes new evidence or rehears these issues and determines, as a result, that one or more of the remanded issues should not be reversed on the basis of the new evidence or rehearing, or instead determines that, despite the new evidence, the Commission must reverse. Another appeal will delay the finality of this docket by another six months or more.

6. The Commission must consider other negative consequences if the docket is reopened for proceedings other than the simple issuance of an order corrected in compliance with the Court of Appeals orders. First of all, it is inequitable to allow the party who did not prevail

on appeal a second or third bite at the apple: Westar had ample opportunity to present evidence and argue its claims in the original proceeding. Westar did not request an extension of the 240-day time clock, and it is inappropriate now to extend the proceedings to permit the company to make new arguments. Secondly, consumers deserve certainty in their rates, and a delay in providing refunds will only increase the amounts to be returned to consumers. Additionally, it is expensive enough to participate in rate cases—it is more so with a second round of appeals. Finally, the Commission must consider the risk of being overruled by the Court of Appeals a second time in the same case. The risks are simply less onerous if the Commission issues an order without reopening the docket for new evidence or rehearing.

a) Future dismantlement costs of steam plant: ($29 million) adjustment to revenue requirement.

7. There is no purpose to be served by rehearing the issue to be reversed. For example, on the issue of the reversal of Westar's claims for future dismantlement costs, there is ample evidence in the record that Westar cannot provide supporting data for its dismantlement claims. Spanos said the data he used to develop Westar's claim aren't available. Westar employees said the company has no dismantlement plans for any of its plants. Without such evidence, the Court of Appeals agreed with the Intervenors that Westar had failed to meet its burden of coming forward with evidence supporting its claims. Commission must therefore assume that no such evidence is available to elicit on rehearing or from another round of written testimony. The Commission must conclude that rehearing this issue or opening it up for additional evidence is futile.

8. Moreover, the reversal can be accomplished without taking further evidence. There is no ambiguity about what costs are to be eliminated from the company's claim. The court agreed with Mr. Majoros that Westar's unproven claims for future removals—plus excessive inflation—should not be included in the company's rates. Westar had experienced an average of $14.3 million yearly in actual removal costs over a five-year period, but with unproven claims for future removals and inclusion of excessive inflation, Spanos had improperly calculated Westar's annual costs at $43.3 million. (Majoros, D. Test. at 21). The Commission's order should therefore issue an order deducting $29 million from the revenue requirement, leaving $14.3 million in rates to cover Westar's probable removal costs. It will not be necessary for the Commission to recalculate the costs to address the Court of Appeals' concern that the inflation adjustment was excessive because the entire amount relating to future dismantlement costs should be eliminated over and above the $14.3 million.

9. Finally, because the Commission adopted specific evidentiary requirements for future dismantlement claims in subsequent proceedings—an action of which the Court of Appeals indicated its approval—there is no need for the Commission to reconvene or take comments on that issue, either. Westar now has Commission and Court of Appeals guidance on what kind of evidence will be required if the company wants to claim future dismantlement costs in its next rate increase request.

b) Accounting treatment of the LaCygne leaseback: Net ($11 million) adjustment to revenue requirement based on ($64,334,683) adjustment to rate base.

10. On the issue of whether the Commission should have reversed its long-standing

position on the appropriate accounting treatment of the LaCygne leaseback, the arguments against reopening the docket for new evidence or a rehearing are much the same as those made above on the issue of dismantlement costs. The Court of Appeals found that the evidence used by the Commission to justify its 180-degree turn on the accounting treatment for LaCygne was insufficient to support the reversal of the Commission's longstanding policy. Although the Commission could, conceivably, troll the record in an attempt to find additional evidence supporting its decision to reverse the LaCygne decision in the previous rate case, there is no more evidence to cull from the record that would support the decision.

11. Furthermore, as the court noted, the evidence that Westar presented in this case was, in substance, the same evidence that had been presented to the Commission in previous rate cases in which it decided to uphold the accounting treatment. The fact that Mr. Haines testified in this case, but not in the previous rate case, was noted by the court, but it also noted that Mr. Haines' testimony offered nothing new on the issue. Westar had ample opportunity to bring in new evidence, if there was any, in arguing for reversal of the accounting treatment, but did not do so. There is no reason to believe that now, many years after the Commission first determined the appropriate accounting treatment of the LaCygne leaseback, some persuasive piece of new evidence is awaiting discovery, if only the Commission would reopen the docket. If it was out there, it would have been introduced in one of the several proceedings that have touched on this issue over the years. Life at the Commission isn't like the Perry Mason show, where exciting mystery witnesses often roared into court at the last minute to provide eyewitness accounts that would change the course of the trial. Given the wide latitude granted participants in Commission proceedings to present evidence that is, at times, only remotely relevant to the issue in dispute, if

there was a remote chance for a Perry Mason-style revelation by a witness, it would have occurred years ago. The original determination has stood undisturbed for years, and there is simply no possibility that reopening the docket will elicit new and persuasive evidence that would justify changing the long-standing policy of the Commission.

12. Finally, ruling on the LaCygne issue will not require additional fact-finding or calculations. Reversal of the Commission's recent ruling on the accounting treatment of the leaseback merely requires the Commission to return to the status quo. The amount in dispute was clearly identified in testimony and it is a simple matter to deduct it from the revenue requirement. There is no need to take testimony on developing the appropriate accounting treatment, because it is a long-standing policy that is supported by the record. The Commission should simply issue an order that states that the evidence in the record is insufficient to support making a change in the Commission's long-standing policy on the appropriate accounting treatment of the LaCygne leaseback. Any other course of action is futile and opens up the possibility of additional appeals.

c) Transmission Delivery Charge: ($13,251,129) adjustment to revenue requirement

13. The Commission does not need to hold a rehearing or take new evidence on the transmission delivery charge (TDC) in order to carry out the dictates of the Court of Appeals. The court ruled that the TDC, if implemented, must be revenue-neutral—in other words, breaking out the transmission charges from base rates and creating a separate line-item surcharge must not result in a net increase in rates to customers. The TDC also must be based on an approved final rate. As the court also noted, while K.S.A. 2005 Supp. 66-1237(a) does not

prohibit implementing the initial TDC in a pending rate proceeding, if the result of doing so is not revenue-neutral, then it shouldn't be done, even if it is inconvenient for the parties. It also ruled that basing the TDC on a FERC rate that is not final is in violation of 66-1237(a) and 66-117. Therefore, the TDC, when implemented, must be based on the "retail rates in effect immediately prior to the effective date of the initial transmission charge," and must be based on an approved final rate.

14. In order to carry out the court's order, the Commission must simply order that the initial TDC will have to be implemented in a separate proceeding from this rate case. Witness Brian Kalcic identified the increase in the revenue requirement as a result of implementation of the TDC as provided in the settlement agreement as $13,251,129 over Westar's filed position. Removing that amount from the revenue requirement would return transmission costs included in rates to the "revenue neutral" point. The Intervenors have no objection to basing this portion of Westar's rates on the costs contained in Westar's original filing.

15. The Commission should determine that if Westar wants to implement a TDC, then it must do so in a separate proceeding, based on final approved rates from this case. Then, in the next rate case, it may bring forward a request for revision in the TDC to reflect any changes in final FERC-approved rates for wholesale transmission. Handling the implementation of the TDC in this manner will allow the Commission to comport with the statutes, while allowing Westar to implement a TDC in the near future. Since Westar is free to file a new rate case and request the Commission to open a TDC docket at any time, the delay attributable to the necessity of assuring compliance with the statutes could be minimal.

16. If, instead, the Commission reopened this issue for rehearing or new evidence in

an effort to establish a TDC in this docket, the disputes that marked the original proceeding will arise again, leading inevitably to another appeal, and perhaps, another reversal by the Court of Appeals. To avoid unnecessary delays, the simplest and most straightforward solution is to calculate the revenue requirement using the transmission costs that Westar originally filed in this case, and to address the implementation of the TDC in a separate docket.

IV. Refunds

17. The Intervenors request simply that the Commission order that refunds due to customers are returned in an amount that each customer overpaid, with reasonable interest. The Intervenors would have no objection to Westar making the refunds as credits on consumer bills, but the Intervenors agree that the amounts refunded should be *clearly identified as refunds* on the billing statements, to avoid giving misleading price signals to customers and to notify the customers (many of whom have inquired about the pending refunds) that they have been duly distributed. The Intervenors recommend that the amounts due to customers who are no longer customers of Westar should be distributed equitably among the current group of customers.

18. The Intervenors also request that the Commission order Westar to file quarterly reports in this docket on the distribution of the refunds to customers until the refunds have been disbursed entirely, and that members of the Commission's rate design Staff be assigned to informally work with Westar to verify that the method selected to refund or credit the amounts due to customers is efficacious and completed in a reasonable period of time. There is no need to open a hearing on this issue if the Commission assures the parties that it will monitor the process and verify that the refunds have been made.

V. Conclusions

19. The Intervenors CURB, KIC and USD 259 jointly agree that the Commission can and should carry out orders of the Kansas Court of Appeal on remand without rehearing or taking new evidence. Reopening the record to receive new evidence or testimony is unnecessary, not only because the court did not order the Commission to do so, but also because the record contains sufficient facts to support the decisions the court ordered the Commission to make. Further, simply issuing an order in compliance with the court's orders will be the simplest, most straightforward means of concluding this docket. Finally, the parties' and consumers' interest in concluding this proceeding and ensuring that the refunds are made efficaciously will be served best by taking the course that minimizes the risk of further appeals.

Therefore, the Intervenors respectfully request that the Commission comply with the orders of the Court of Appeals to reverse the three decisions discussed herein by simply issuing an order without receiving additional evidence or conducting a rehearing, and by ordering that the amounts overpaid by each customer shall be returned to each customer in the amount each customer paid, with reasonable interest.

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 18th day of December, 2006.

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, hand-delivered this 18th day of December, 2006, to the following:

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