THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Notice and Application of Westar Energy, Inc. and Kansas Gas and Electric Company for Approval of Use of RECs to Satisfy the Renewable Energy Standards Act for 2011 and 2012.	)))))	Docket No. 11-WSEE-438-MIS

CURB's Response to the Staff Report and Recommendation

The Citizens' Utility Ratepayer Board (CURB) files the following response to the *Staff Report and Recommendation*, which was filed in this docket on March 11, 2011.

Westar Energy, Inc and Kansas Gas and Electric Company (Westar) has filed an application with the Kansas Corporation Commission (KCC or Commission) for permission to utilize, without penalty, renewable energy credits it has accumulated to satisfy a portion of the requirements of the state's renewable energy standards for the years 2011 and 2012. CURB supports Westar's proposal and agrees that the Commission should approve the application. The Commission Staff, in its Staff Report and Recommendation (Report), also recommended that the Commission approve Westar's proposal. However, CURB takes exception to Staff's interpretation of the renewable energy standard, and below expresses its concerns that Staff's interpretation of the standard, if adopted by the Commission in this docket, may penalize Kansas utilities that made voluntary investments in wind generation in advance of statutory mandates. Staff's interpretation of the standards may also penalize the state's ratepayers who have paid a premium for wind power for several years by denying them the benefit of utilizing the native-grown RECs to meet the RES standards.

Regarding appropriate interpretation of the renewable energy standard

CURB is concerned that Staff's Report offers an erroneous, or at best, unsupported interpretation of the statute that established the renewable energy standard. On page 2, the Report states, "Staff believes that is was not the intention of the Legislature in drafting the RES [the renewable energy standard established by K.S.A. 66-1256 *et seq.*] to allow utilities the leeway to use RECs obtained through utility owned generation in a general manner to meet requirements under the RES . . .". Staff is "concerned" with the "policy implications" of allowing a utility to " 'bank' excess renewable capacity for two years through the use of RECs." (Report, at 5). Staff's interpretation of the legislative intent in drafting the RES is not supported by any reference to legislative history or any other supportive documents. Staff asserts there is no "specific language" that would permit a utility the "general ability" to meet the RES with credits obtained from existing generation. However, the Report goes on to state that the language of K.S.A. 66-1261(b), which permits the Commission to waive penalties for a utility not meeting the renewable energy standard but demonstrating a "good faith effort to comply", and which grants the Commission the discretion to consider "mitigating circumstances" in considering a waiver of penalties, would permit the Commission to approve Westar's application. (Report, at 5). Staff "feels" that Westar has provided "ample evidence of a good faith effort" to comply with the statute and therefore, has established good cause for waiver of the penalties for not meeting the RES for years 2011 and 2012. (Staff Report, at 6).

The Staff's conclusion that the legislature did not intend for utilities to utilize banked RECs is simply unsupported. K.S.A. 66-1258 states: "The commission shall establish by rules and regulations a portfolio requirement for all affected utilities to generate or purchase electricity

generated from renewable energy resources or purchase renewable energy credits." Nothing in the language limits the use of a utility's own renewable energy credits to meet the standard. Further, K.S.A. 66-1259 explicitly states, "Renewable energy credits may only be used to meet a portion of portfolio requirements for the years 2011, 2016, and 2020, unless otherwise allowed" by the Commission. Clearly, the legislature anticipated that utilities might need to use credits to meet at least a portion of the requirements as the state's utilities endeavor to build or acquire power from renewable energy generation. The statute has nothing to say about the origin of the renewable energy credits. It describes "renewable energy credit" as "a credit representing energy produced by renewable energy resources issued as part of a program that has been approved by the state corporation commission." K.S.A. 66-1257(e). In other words, if the KCC recognizes the RECs as valid representations of renewable energy produced, they may be used where the statute permits their use to meet a portion of the standard. The definition does not specify that RECs are credits produced by out-of-state utilities or utilities other than the utility that is using them to meet a portion of the RES standard. If Westar is permitted under the statute to purchase credits from another utility that has banked them, why in the world would the legislature bar Westar from utilizing credits it has banked from its own generation?

Therefore, CURB views the statute differently than Staff. It is clear from its provisions that the legislature's intent was to establish, by the year 2020, a requirement that 20% of the state's energy shall be generated from renewable resources. The statute did not establish an immediate RES requirement. The statute was passed in 2009, but the first year that a utility would be required to meet a requirement is in 2011, and that standard is only 10%. The standard increases to 15% in 2016, and 20% in 2010. One should ask, If the legislature wanted the state's utilities to have a

portfolio that contains 20% renewable generation, why didn't it impose the 20% requirement immediately? The obvious answer is that the legislature recognized that building a renewable portfolio not only takes time, but it takes money. The legislature recognized that utilities might have to purchase some renewable energy credits to satisfy the requirements as they built generation facilities or sought sources from which to purchase energy from renewable resources. It would have created a financial disaster to require the state's utilities to be forced into negotiating contracts with generators or with turbine manufacturers under the gun of an unreasonable deadline. It would have created a seller's market and a buyer's nightmare. Clearly, the legislature wanted renewable energy generation, but not at any price.

K.S.A. 66-1261 imposes penalties for utilities that do not meet the standards, but there is also further evidence that the legislature did not want renewable energy at any price in K.S.A. 66-1261(b). That section of the statute provides that the Commission **shall** exempt a utility from administrative penalties if the utility demonstrates that customer rates would increase by more than 1% as a result of investments in renewable energy resources to meet the requirements in 2011 or 2012. [K.S.A. 66-1260 and 66-1261(b)]. This clearly indicates that the legislature understood that building a renewable portfolio is not cost-free, and did not want ratepayers to be unreasonably burdened by the state's efforts to encourage renewable energy generation. The plain language of the RES statutes demonstrate the legislature's intent to allow the utilities to utilize alternative methods of meeting its requirements so long as they are demonstrating viable progress toward the 2020 goal. Staff's conclusion that the legislature did not intend to "allow the utilities the leeway to use RECs obtained through utility owned generation in a general manner" to meet the RES goals is an erroneous interpretation of the statutes.

Further, Staff's selection of the phrase "in a general manner" is puzzling, and CURB fails to grasp why the Staff interprets Westar's very specific request to use its own banked RECs to meet the standards in two specific years while their planned wind farms are being built is using the credits "in a general manner." CURB views Westar's proposal as a narrowly-tailored request based on the language of the statute and the specific circumstances of the company at this point in time. Furthermore, Westar built wind farms and began purchasing wind energy well before it was required to do so, clearly fulfilling the statute's intent to increase the proportion of renewable generation in its portfolio. Its ratepayers have been paying higher rates in part because of that renewable energy in Westar's portfolio, and there is nothing in the statute that indicates that the legislature would prefer that the ratepayers of another utility should be the beneficiaries of the sale of RECs to Westar, rather than Westar's own ratepayers benefiting from Westar's retention of the RECs for the purpose of meeting the RES. Ratepayers have been paying the extra cost of integrating the wind power that Westar was not required to have by statute for the years during which the RECs were generated, and it makes no sense that the legislature would require that Westar's ratepayers foot the bill for buying RECs from another utility when it has its own RECs in the bank. It appears that Staff "feels" that, if it were not for the ample evidence of a good faith effort on the part of Westar to meet the RES, that Westar's ratepayers should instead suffer the consequences of Westar having had the foresight to build towards a more renewable future *before* the RES standards kicked in. (Report, at 6). However, this "feeling" is not a reasoned interpretation of the statute, and is simply not consistent with the statute's goals to "promote compliance" with the RES statutes. K.S.A. 66-1261(a).

Westar is clearly permitted by K.S.A. 66-1258 to use renewable energy credits to meet a portion of its portfolio requirement for the year 2011. There is nothing in the statute that specifies

that the renewable energy credits must be purchased from another utility. Further, the provisions in the statute that provide that the Commission shall not impose penalties if a utility's efforts to meet the requirements would increase the revenue requirement by 1% clearly indicates that the legislature was concerned that ratepayers not be unduly burdened by the cost of meeting the RES standards. CURB sees nothing in this statute that indicates that the legislature intended to forbid Westar from using RECs accumulated from its own voluntary investments in generation of renewable energy, bought and paid for by Kansas ratepayers at a premium over the cost of traditional generation. The statute clearly anticipates that building a renewable facility takes time, and provides a variety of ways for utilities to meet the requirements as the portfolio is built. The standard anticipates that a utility making good faith efforts and demonstrable progress toward meeting the RES would nevertheless fall short and provides "leeway" to use some RECs along the way to meet a portion of the requirements. It simply makes no sense that the legislature intended that Westar, which started making progress towards building a renewable generation portfolio before it was required to do so by statute, should now be required to go out and sell its accumulated REC credits, then buy more RECs from another renewable generator. Staff's interpretation imputes an intention to the legislature that simply makes no sense.

Thus, CURB strongly urges the Commission to look at the plain language of the statute in interpreting its meaning. Yes, the statute provides penalties for noncompliance. However, the statute also provides alternative ways to comply. The legislature clearly recognized that building a renewable portfolio takes time, and attempted to build safeguards against unreasonable bill impacts. What is a more unreasonable bill impact than requiring Westar to go out and buy RECs on the market when it already owns enough renewable energy generation to create its own RECs? Kansas

ratepayers have been paying a premium on energy as a result of the voluntary investments of the state's utilities in renewable energy for several years. Interpreting the statute as requiring ratepayers to fund the purchase of another utility's RECs to meet the RES when they have been paying for the energy that created native Kansas-generated RECs just doesn't make sense. The first rules of discerning legislative intent are to assume that the legislature has common sense and that it meant what it said. The common sense interpretation is that the legislature intended to encourage the construction of more renewable energy generation facilities in Kansas, not to penalize the utilities that had already begun doing so voluntarily.

Staff's concern that the state's utilities could game the system and circumvent the intent of the legislature to increase the generation of renewable energy in Kansas by using their own RECs ignores the powers of the Commission to prevent that from happening. The KCC has oversight over the process of ensuring that the utilities meet the RES, and is well-placed to monitor the progress of the utilities towards meeting the 2020 standard and prevent gaming. That is clearly what the legislature intended when it assigned the KCC to oversee compliance and impose penalties if the utility isn't making suitable progress towards meeting the standards. Furthermore, the standards for 2011 and 2012 are less stringent than for future years. The legislature provided alternatives and exemptions at the front end of the process that will not be available later on. Under the standards of 2016 and 2020, it's highly unlikely that a utility could accumulate enough of its own RECs to meet the future requirements without significantly increasing its investments in renewable energy generation—which is exactly what the legislature intended to encourage. Since the legislature specifically provided that RECs could be used for a portion of the requirement in 2011, and provided that a utility making significant progress toward meeting the requirements with its own generation or

purchased power could escape penalties in 2011 or 2012, the clear intent of the legislature is to promote orderly progress toward the ultimate goal in 2020, not to create a bonanza for turbine manufacturers by mandating unreasonable deadlines that would force utilities into untenable bargaining positions. The fact that the requirements get more stringent in future years and the Commission has been granted discretion to impose penalties are the safeguards that the legislature built into the statute to ensure that the state's utilities do not rely too heavily on RECs to meet the RES, whether they are home-grown RECs or purchased on the market. Therefore, there is no reason to believe that interpreting the statute as allowing a utility to use its self-generated RECs to meet a portion of the requirements in 2011 and 2012 will lead to utilities habitually using them as a substitute for building generation to meet future standards. The Commission is empowered to allow the utilities to do so—but is also empowered to deny permission to continue doing so it if it appears that the utility is simply taking advantage of the Commission's discretion to allow it. But the authority to do so comes from K.S.A. 66-1261(b), not in the purported legislative intent to deny utilities the right to use their native-grown RECs to satisfy a portion of the standards that may be met with RECs.

The reasoned, common sense interpretation of the statute is that a utility that got a jump start on meeting the standards should not be penalized by denying the validity of its own RECs to meet a portion of the standards. The KCC should make the common sense decision that the legislature did not intend Kansas ratepayers to pay for RECs unnecessarily when their Kansas-based utilities have accumulated RECs on a voluntary basis. Furthermore, adopting Staff's interpretation of the statute in this docket could penalize the ratepayers of the other state utilities that have made significant investments in wind generation well in advance of the mandatory requirements.

Thus, CURB urges the Commission to interpret the RES standards as permitting a utility to utilize its self-generated RECs to meet a portion of the RES standards in the years where the statute permits the use of RECs to meet a portion of the standard. Rather than denying the use of self-generated RECs to meet a portion of the RES standard where permitted, which penalizes ratepayers, the KCC should use its authority under K.S.A. 66-1261(b) to impose penalties on utilities that fail to demonstrate good faith efforts and satisfactory progress towards meeting future RES standards—the cost of which the statute forbids recovering from ratepayers. K.S.A. 66-1261(b). The purpose of the statute is to promote the construction of renewable energy generation facilities in Kansas, not to penalize utilities that were in the forefront of investing in renewable energy or to penalize the ratepayers who have been paying a premium for that energy.

Regarding the waiver of penalties

Westar is also permitted by K.S.A. 66-1261(b) to request a waiver of penalties for 2011 and 2012 for a utility that demonstrates that it is making a good faith effort to meet the RES requirements, and the Commission also has the discretion to waive or reduce penalties if it finds mitigating circumstances. Staff's Report acknowledges that Westar has provided ample evidence that it is making tangible progress toward meeting—and actually exceeding—the more stringent standard of 2016. CURB agrees that Westar has established that it has met the requirements of K.S.A. 66-1261(b) and is eligible for a waiver of any penalties for noncompliance. While, as argued above, CURB also believes that Westar should be allowed to use its own RECs to meet the portion of the 2011 and 2012 standards not met by its generation and purchased power contracts, and that the Commission should find that Westar has met the standards, in the event that the Commission agrees

with Staff's interpretation of the RES standards, CURB urges the Commission to waive any penalties that the Commission has discretion to impose on the grounds that Westar has sufficiently demonstrated that it is making significant and demonstrable progress toward meeting and exceeding the 2016 standard for renewable generation.

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 Citizens' Utility Ratepayer Board; that she has read the above, and foregoing document and upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 22nd day of March, 2011.

Notary Public

My Commission expires: 01-26-2013.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 28, 2013

CERTIFICATE OF SERVICE

11-WSEE-438-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 22nd day of March, 2011, to the following:

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