

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

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

POST-HEARING BRIEF OF COMMISSION STAFF

Cole Bailey, S. Ct. #27586
Litigation Counsel
Amber Smith, S. Ct. #23911
Chief Litigation Counsel
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: 785-271-3186
Email: c.bailey@kcc.ks.gov

ATTORNEYS FOR COMMISSION STAFF

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Staff of the State Corporation Commission of the State of Kansas (“Staff” and “Commission,” respectively), submits its Post-Hearing Brief regarding the Application of Midwest Power Company for a Certificate of Public Convenience and Necessity to transact the business as a public utility in the State of Kansas, pursuant to K.S.A. 66-131.

I. EXECUTIVE SUMMARY

Midwest Power Company (MWP) owns an undivided 8% interest in Jeffrey Energy Center in Pottawatomie County, Kansas. Currently, the 8% ownership interest is leased to Westar under a Lease Agreement, which expires on January 3, 2019. At the expiration of the lease, the rights to the energy and capacity associated with its 8% interest reverts back to MWP and at that time, MWP will be a public utility under K.S.A. 66-104.¹

Although MWP will be a public utility as defined under K.S.A. 66-104, they will not be able to operate as a public utility in Kansas until the Commission grants them a certificate of public convenience and necessity under K.S.A. 66-131.²

In pre-filed direct testimony, Staff listed certain conditions that MWP must meet in order to demonstrate that their application meets the standard in KSA 66-131.³

MWP has taken the position that, because of certain provisions in a Consent and Assumption agreement, they already have met the standard found in K.S.A. 66-131. MWP has made it clear they will not accept the conditions listed by Staff.⁴

¹ K.S.A. 66-104(a) defines “public utility” in relevant part as “every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery... in or through any part of the state.”

² K.S.A. 66-131(a) (“No . . . public utility . . . governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the corporation commission that public convenience and necessity will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state.”).

³ Staff Direct Testimony Prepared by Chad Unrein at 38 (Nov. 9 2018).

⁴ Amy Paine Rebuttal Testimony at 4 (Dec. 3 2018).

After a thorough analysis, Staff has concluded that MWP's current application does not satisfy the public convenience and necessity standard required by K.S.A. 66-131 to obtain a certificate. Staff recommends denial of the application.

II. PROCEDURAL HISTORY

On August 10, 2018, MWP filed an Application with the Commission for a Certificate of Public Convenience and Necessity to transact business as a public utility in the State of Kansas, pursuant to K.S.A. 66-131.⁵ Direct testimony was filed by Amy G. Paine on behalf of MWP.⁶ MWP requests the Commission to (i) approve its request to operate its 8% undivided interest in Jeffrey Energy Center (JEC), (ii) make a determination regarding Exempt Wholesale Generator status in accordance with Section 32(c) of the Public Utility Holding Company Act of 1935, and (iii) either confirm that specific statutes are inapplicable to MWP or grant a waiver of such statutes.⁷

On September 18, 2018, the Commission issued an Order Granting Intervention to Westar Energy, Inc. and Kansas Gas Company ("Westar"), as co-owner of the JEC and as the lessor of MWP's 8% interest in the JEC.⁸

On October 23, 2018, the Commission issued an Order Setting Procedural Schedule.⁹

On November 5, 2018, Westar filed a Motion to Require Refiling of Application and Supporting Testimony and Restarting 180-Day Clock due to discovering through data requests, that MWP does not meet the standards to operate as a public utility pursuant to K.S.A. 66-131.¹⁰

⁵ Application of MWP, (Aug. 10, 2018).

⁶ Direct Testimony of Amy G. Paine on Behalf of MPC, (Aug. 10, 2018).

⁷ Application of MWP, p. 1, (Aug. 10, 2018).

⁸ Order Granting Intervention to Westar Energy, Inc., (Sep. 18, 2018).

⁹ Order Setting Procedural Schedule, (Oct. 23, 2018).

¹⁰ Westar's Motion to Require Refiling of Application, (Nov. 5, 2018).

On November 8, 2018, MWP filed a response to Westar's motion, arguing that the Wilmington Trust Company has the sole financial responsibility of any operating expenses related to the 8% interest in JEC.¹¹ MWP and WTC are not financially responsible in their personal capacities.¹²

On November 9, 2018, confidential and public versions of the Direct Testimony of Chad Unrein on Behalf of the Staff of the Kansas Corporation Commission was filed.¹³ Mr. Unrein concludes that for the reasons stated in his testimony, MWP does not meet the standards of K.S.A. 66-131, nor should MWP be exempted from certain Kansas statutes. Mr. Unrein's conclusion is consistent with the Commission Order in the ITC 07-380 Docket, where the Commission stated it would not issue an exemption or make a finding of inapplicability of certain Kansas statutes.¹⁴

On November 13, 2018, Westar replied to MWP's Response to Westar's Motion, stating that MWP did change its position from the Application through responses to Westar's data requests.¹⁵

On November 14, 2018, MWP filed a Surreply to Westar's response in support of Westar's motion, stating that MWP has not restated its position as set out in its Application.¹⁶

On November 15, 2018, the Commission issued an Order on Westar's Motion for Refiling of Application, denying Westar's Motion.¹⁷

¹¹ MWP's Response to Westar's Motion, (Nov. 8, 2018).

¹² MWP's Response to Westar's Motion, at 6, ¶ 9, (Nov. 8, 2018).

¹³ Direct Testimony of Chad Unrein on Behalf of the Staff of the Kansas Corporation Commission, (Nov. 9, 2018).

¹⁴ Direct Testimony of Chad Unrein, at 39, ll. 3-15, (Nov. 9, 2018).

¹⁵ Reply in Support of Westar's Motion, (Nov. 13, 2018).

¹⁶ MWP's Surreply to Westar's Reply, (Nov. 14, 2018).

¹⁷ Order on Westar's Motion for Refiling, (Nov. 15, 2018).

On November 15, 2018, Direct Testimony of Darrin Ives on Behalf of Westar Energy, Inc. and Kansas Gas and Electric Company was filed, stating its opposition to MWP's Application.¹⁸

On December 3, 2018, confidential and public Rebuttal Testimony of Steve R. Dean on Behalf of MWP was filed.¹⁹

On December 4, 2018, Rebuttal Testimony of Amy G. Paine on Behalf of MWP was filed.²⁰

On December 18, 2018, an Evidentiary Hearing was held before this Commission.

III. ISSUES AND APPLICABLE STANDARDS

a. *Whether MWP should be granted a certificate of public convenience and necessity pursuant to K.S.A. 66-131.*

Public Convenience and Necessity

The applicable legal standard to decide whether to grant a certificate of public convenience is set out in K.S.A. 66-131. In general, the main inquiry is whether the applicant demonstrates that granting the certificate will promote “public convenience and necessity.”²¹

K.S.A. 66-131 states:

No common carrier or public utility, including that portion of any municipally owned utility defined as a public utility by K.S.A. 66-104, governed by the provisions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the corporation commission that **public convenience** will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state. (Emphasis added).

¹⁸ Direct Testimony of Darrin Ives, (Nov. 15, 2018).

¹⁹ Rebuttal Testimony of Steve R. Dean, (Dec. 3, 2018).

²⁰ Rebuttal Testimony of Amy G. Paine (Dec. 4, 2018).

²¹ See K.S.A. 66-131(a). See also Cent. Kansas Power Co. v. State Corp. Comm'n, 206 Kan. 670, 676, 482 P.2d 1, 7 (1971) ([A]n applicant for a certificate must show that public convenience and necessity will be promoted by authorization of the plan for the electric facilities envisioned in the application.”).

The Commission has also used the term “necessity” when determining whether to issue a certificate of convenience under K.S.A. 66-131. The courts have always spoken in terms of public necessity, as well as convenience, when issuing certificates.²² The term “necessity” has developed through the years and has been approved by judicial interpretation of K.S.A. 66-131. The term is used by judicial implication rather than the usual express statutory statement.²³

The fundamental issue is whether the public convenience will be promoted by granting the certificate. In order to understand this legal standard, Staff provides analysis of threshold tests, case law, past certificate dockets and Commission authority to grant certificates such as this one.

Commission’s Broad Discretion

The Kansas legislature created the Kansas Corporation Commission and granted it exclusive authority and jurisdiction to supervise, control, and regulate public utilities in this state.²⁴ The Commission is vested with wide discretion and its findings have a presumption of validity on review.²⁵ The Commission has the authority to impose lawful conditions on public utility certificates.²⁶ The Commission is an administrative body whose delegated authority must be supported by a clear standard governing the exercise of the delegated authority.²⁷ Traditionally, the Commission has used administratively-created threshold tests as a mechanism to aid its use of authority.

²² Gen. Comm’n Sys., Inc. v. Kan. Corp. Comm’n, 216 Kan. 410, 416, 532 P.2d 1341, 1347 (1975).

²³ *Id.*

²⁴ Kansas Gas and Elec. Co. v. State Corp. Comm’n, 293 Kan. 483, 491, 720 P.2d 1063, 1073 (1986).

²⁵ Cent. Kansas Power Co. v. State Corp. Comm’n, 221 Kan. 505, 511, 561 P.2d 779 (1977).

²⁶ Kansas Electric Power Coop., Inc. v. State Corp. Comm’n, 235 Kan. 661, 683 P.2d 1235, syl. 1 (1984).

²⁷ See Kansas One-Call Sys. Inc. v. State, 294 Kan. 220, 231, 274 P.2d 625, 634 (2012).

Merger Standards

In order to evaluate whether the applicant has met the public convenience and necessity standard, the Commission has used the “Merger Standards” originally adopted in Docket Nos. 172,745-U and 174,155-U. These Merger Standards were recently affirmed in Docket No. 16-410 and are listed below:²⁸

- a. The effect of the transaction on customers;
- b. The effect of the transaction on the environment;
- c. Whether the proposed transaction will be beneficial on an overall basis to state and local economies and to communities in the area served by the resulting public utility operations in the state. Whether the proposed transaction will likely create labor dislocation that may be particularly harmful to local communities, or the state generally, and whether measures can be taken to mitigate the harm;
- d. Whether the proposed transaction will preserve the jurisdiction of the KCC and the capacity of the KCC to effectively regulate and audit public utility operation in the state;
- e. The effect of the transaction on affected public utility shareholders;
- f. Whether the transaction maximizes the use of Kansas energy resources;
- g. Whether the transaction will reduce the possibility of economic waste; and
- h. What impact, if any, the transaction has on public safety.

Additionally, in Docket Nos. 07-380, 08-028, and 08-936, the Commission modified and added to the Merger Standards:²⁹

- a. The financial ability of the Applicant;
- b. The technical operations ability of the Applicant;
- c. The managerial ability of the Applicant;
- d. The impact on transmission in other states; and
- e. The historical presence of the Applicant.

²⁸Order on Merger Standards, at 2-3, Docket No. 16-EPDE 410-ACQ (Aug. 9, 2016) (410 Order).

²⁹ Order Approving Stipulation & Agreement and Addressing Application of Statutes at ¶¶ 36-37, Docket No. 07-ITCE-380-COC (Jun. 5, 2007); Order Approving Unanimous Settlement Agreement at ¶¶ 40, 44, Docket No. 08-KMOE-028-COC (Aug. 12, 2008); Order at ¶ 50, Consolidated Docket Nos. 08-ITCE-936-COC *et al.* (Dec. 18, 2008) (“whether a transmission line in Kansas has a negative impact on transmission when neighboring states should be considered.”); Order Granting Joint Motion to Approve Stipulation and Agreement at ¶ 277, Consolidated Docket Nos. 08-ITCE-936-COC *et al.* (May 22, 2009) (“the Commission concludes it should focus its attention on three factors: (a) the financial condition of an Applicant to construct and operate... (b) the knowledge, expertise, and experience of an Applicant to establish its ability to undertake and complete such a project in Kansas”).

IV. ANALYSIS

Currently MWP's Application does not meet the financial resource threshold needed to demonstrate they can meet the standard of public convenience and necessity in K.S.A. 66-131.

Midwest Power Company's Application

In order to evaluate whether MWP's application has met the public convenience requirements in K.S.A. 66-131, Staff performed a more limited analysis of the application under the relevant merger standards set out above.³⁰ In this case, the Commission does not have ratemaking jurisdiction over MWP and there is no individual transaction like there would be in a merger.³¹ The focus should be on the merger standards that can be correlated with MWP's specific situation.

In general, Staff believes that MWP is technically correct in their own determination of the merger standards and that continued operations of the 8% ownership interest in JEC is in the public interest.³² However, because of the unique position the MWP is in, special weight should be afforded to three specific merger standards. Staff believes the most important evaluation of whether granting the certificate promotes public convenience and necessity is in the determination that MWP has the technical, managerial and financial ability to operate as a public utility.³³

As mentioned above, the Commission has recognized three threshold qualifications that every new public utility must meet in order to provide sufficient and efficient service.³⁴ Most recently engrained in Commission precedent, Docket No. 11-GBEE-624-COC confirms each new public utility must possess the technical, managerial and financial experience in order to

³⁰ Direct Testimony of Chad Unrein, p. 29, ll. 6-11, (Nov. 9, 2018).

³¹ *Id.* ll. 1-5.

³² *Id.* at 32-33.

³³ *Id.* at 13, ll. 15-20.

³⁴ *Id.* at 13, ll. 12-15.

gain a Certificate under K.S.A. 66-131.³⁵ It is Staff's belief that this analysis is central in the MWP evaluation.³⁶

Technical and Managerial Thresholds

The main threshold question of the technical resource requirement is whether MWP possess the expertise to operate and maintain the asset in an efficient and sufficient manner.³⁷ Here, MWP clearly does not have the technical or engineering expertise to fulfill this obligation; however, due to the 1978 Operating Agreement, Westar will continue to be responsible operating and maintaining JEC in accordance with industry standards.³⁸ In Staff's evaluation, because of the 1978 Operating Agreement, MWP has shown ample evidence that Westar will continue to be obligated to operate and maintain JEC. Staff concurs with MWP that the technical resource threshold should not apply directly to MWP or the technical resource requirement is fulfilled by Westar.³⁹

To sell wholesale energy into the market, MWP will need to meet requirements and regulation of the FERC. In order to meet the FERC regulations and manage its interest in JEC, MWP plans to hire a Market Participant consultant to act on MWP's behalf.⁴⁰ The Market Participant will manage and schedule the energy and capacity sales from MWP's 8% interest in JEC. At the evidentiary hearing on December 18, 2018, MWP's counsel made a point to mention that "we have contracts with a market participant and Staff made a recommendation that we provide those contracts when they are fully executed and they will be executed on Friday."⁴¹

³⁵ Docket No. 11-GBEE-624-COC, Order Approving Stipulation & Agreement and Granting Certificate at 25, ¶ 63 (Dec. 7, 2011).

³⁶ Unrein Direct, at 13.

³⁷ Unrein Direct, at 17.

³⁸ *Id.*, (The 1978 Operating Agreement continues until there is an abandonment of JEC).

³⁹ *Id.*

⁴⁰ *Id.* at 40.

⁴¹ Hearing Transcript at 158, (Caro) (Dec. 18, 2018).

In Staff's evaluation, MWP has demonstrated that the Market Participant it hired would be able to execute an agreement in order to fulfill the necessary managerial resource threshold.⁴²

Financial Resource Threshold

The most critical threshold component in MWP's Application is the financial resource requirement.⁴³ While the technical and managerial thresholds were met, MWP will still need to be responsible for the operation and maintenance cost pursuant to the 1978 Operating Agreement. MWP's sole asset is the 8% undivided interest in JEC. MWP's only financial support comes from its parent company KeyCorp through a guaranty that was attached to the Application.⁴⁴ As of December 31, 2017, KeyCorp is one of the largest financial service companies with \$137.7 billion in consolidated assets.⁴⁵ When MWP first filed the Application for a certificate, Staff's understanding was that KeyCorp and MWP would modify the guaranty to placate Staff's concern about MWP's ability to meet the financial resource threshold,⁴⁶ therefore ensuring payment of the operation and maintenance cost of the undivided interest in JEC. After making explicit statements about modifying the guaranty, MWP significantly changed its position, stating that pursuant to the Consent and Assumption Agreement, KeyCorp would not be modifying the guaranty. In response to Westar's Data Request 2.02, MWP stated, in part:

“...It is not necessary for KeyCorp to guarantee any operating costs required to be paid by Midwest Power pursuant to the Operating Agreement, because as discussed above, Midwest Power is not required to pay any such costs. KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs, because to do so would abrogate the contractual rights described above.”

⁴² Unrein Direct at 19.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 20.

⁴⁶ *See Id.*

Given MWP's current position, Staff does not believe they meet the financial resource threshold necessary to become a public utility.⁴⁷ Through their own financial model, MWP forecasts significant shortfalls in revenue with operating costs exceeding the revenue it will generate for several years.⁴⁸ MWP will be insulated from market risks and volatility in energy prices while Westar is left to fund the losses in its operation until the revenue generated from the undivided interest in JEC exceeded the operational costs.⁴⁹

V. STAFF'S RECOMMENDATION

While Staff's evaluation of applications such as these are taken at a case by case analysis, the ultimate recommendation falls in line with past docket precedent.⁵⁰ In Docket Nos. 16-ITCE-512-ACQ and 16-SWPE-209-COC Staff had very similar concerns when the financial resources of the parent company of the entity requesting the Certificate was at issue.⁵¹ However, unlike the situation here, those entities requesting certificates in 16-512 and 16-209 had more viable business plans. Here, the plan is not viable. Both Westar and MWP agree revenues will not exceed costs for the first several years of the operation.⁵² In order to meet the financial resource threshold requirement, MWP and KeyCorp would need to agree to provide explicit assurances to the Commission that without explicit recognition from MWP that KeyCorp is ultimately responsible for maintaining the financial integrity of MWP and the modification of the existing guaranty to provide theses assurances, Staff recommends denial of the application.⁵³

⁴⁷ *Id.* at 25.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See Id.* at 28.

⁵¹ *Id.*

⁵² *See Id.* at 26 (Both MWP and Westar submitted financial models. While they had different forecasts, both models predicted significant shortfalls in revenue for the first several years).

⁵³ *Id.* at 27.

VI. CONCLUSION

Commission should find MWP's Application for a Certificate of Public Convenience and Necessity does not meet the financial resource threshold, the Application does not meet the public convenience and necessity standard in K.S.A. 66-131, and deny the application for these reasons

WHEREFORE, Staff respectfully submits its Post-Hearing Brief, requests the Commission deny Midwest Power Company a Certificate of Public Convenience and Necessity to transact the business of a public utility in the State of Kansas.

Respectfully submitted,

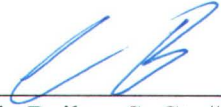
/s/ Cole Bailey
Cole Bailey, S. Ct. #27586
Litigation Counsel
Amber Smith, S. Ct. #23911
Chief Litigation Counsel
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: 785-271-3186
Email: c.bailey@kcc.ks.gov

ATTORNEYS FOR COMMISSION STAFF

VERIFICATION

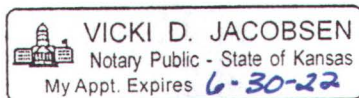
STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

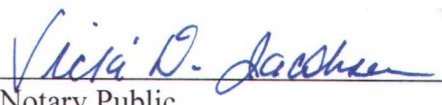
Cole Bailey, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Post-Hearing Brief of Commission Staff*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



Cole Bailey, S. Ct. #27586
Litigation Counsel
The State Corporation Commission
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 28th day of December, 2018.





Notary Public

My Appointment Expires: June 30, 2022

CERTIFICATE OF SERVICE

19-MPCE-064-COC

I, the undersigned, certify that a true and correct copy of the above and foregoing Post-Hearing Brief of Commission Staff was served via electronic service this 28th day of December, 2018, to the following:

ANTHONY WESTENKIRCHNER, SENIOR PARALEGAL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST 19TH FLOOR (64105
PO BOX 418679
KANSAS CITY, MO 64141-9679
Fax: 816-556-2787
anthony.westenkirchner@kcpl.com

COLE BAILEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
c.bailey@kcc.ks.gov

MICHAEL DUENES, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
m.duenes@kcc.ks.gov

AMBER SMITH, CHIEF LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3167
a.smith@kcc.ks.gov

CATHRYN J DINGES, CORPORATE COUNSEL
KANSAS GAS & ELECTRIC CO.
D/B/A WESTAR ENERGY
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
cathy.dinges@westarenergy.com

ANDREW B. YOUNG, ATTORNEY
MAYER BROWN LLP
1999 K STREET NW
WASHINGTON, DC 20006
Fax: 312-701-7711
ayoung@mayerbrown.com

ANNE E. CALLENBACH, ATTORNEY
POLSINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fax: 913-451-6205
acallenbach@polsinelli.com

FRANK A. CARO, JR., ATTORNEY
POLSINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fax: 816-753-1536
fcaro@polsinelli.com

LESLIE WINES
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
leslie.wines@westarenergy.com

/s/ Vicki Jacobsen

CERTIFICATE OF SERVICE

19-MPCE-064-COC

Vicki Jacobsen