

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

In the Matter of the Joint Application of)
Westar Energy, Inc. and Kansas Gas and)
Electric Company for Recovery of Certain) Docket No. 19-WSEE-355-TAR
Costs Through Their RECA)

CURB's Response to Petition for Reconsideration or Clarification

COMES NOW, the Citizens' Utility Ratepayer Board (CURB) and herein responds to the petition for reconsideration or clarification which was filed by Westar Energy, Inc. and Kansas Gas and Electric Company (collectively "Westar"). For the reasons stated below, CURB urges the Commission to deny the filed petition for reconsideration or clarification of the Commission's Order in this docket.

I. Introduction

1. CURB believes that the Commission's Order in this case thoroughly discusses the evidence as it pertains to the key issues, and provides a well-reasoned analysis and a balanced resolution with respect to Westar's purchase of the remaining 8% interest in the Jeffery Energy Center (JEC) and future treatment of NFOM expenses. The Commission analyzed all the appropriate legal standards and properly applied them to the facts in this case. Westar has failed to present good cause as to why the record of testimony should be reopened for additional evidence regarding its efforts to resolve the conflict with Midwest Power Company (MWP). Contrary to Westar, CURB believes that the Order is supported by substantial competent evidence in light of the evidentiary record as a whole.

2. Westar's request for clarification on the automatic recovery provision of costs should be denied because Westar failed to negotiate a zero-cost transfer of ownership. Westar does

not provide any new information that will support a finding on reconsideration that it did meet all requirements to automatically recover costs. The plain language of the 18-WSEE-328-RTS settlement agreement is inconsistent with Westar's claim that it can automatically recover costs if it commits to never recovering the lease expense and purchase price from the 2019 agreement with MWP. Allowing such a transaction would bypass the mechanisms previously agreed to by the parties and call into question the binding power of all such agreements. Therefore, CURB believes that the petition for reconsideration or clarification filed by Westar in this docket is without merit and should be denied.

II. CURB's Response

A. Legal Authority

3. Westar does not argue that the Commission acted beyond its legal authority in issuing the Order. Rather, Westar argues that certain aspects of the Commission's Order are unreasonable as not being supported by substantial competent evidence. Before discussing Westar's allegations, the scope of Kansas law on reasonableness of administrative orders will be outlined.

4. Kansas law is clear that an order issued by an administrative agency is reasonable if it is supported by substantial competent evidence.¹ Substantial evidence refers to evidence possessing something of substance and relevant consequence to induce the conclusion that the decision was proper, furnishing a basis of fact from which the issue raised could be easily resolved.² Stated differently, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.³

¹ Farmland Industries, Inc. v. State Corporation Commission of Kansas, 24 Kan.App.2d 172, 175, 943 P.2d 470, rev. denied 263 Kan. 885 (1997).

² Ward v. Allen County Hospital, 50 Kan.App.2d 280, 285, 324 P.3d 1122 (2014).

³ In re Appeal of Collingwood Grain, Inc., 257 Kan. 237, 237, 891 P.2d 422, 423 (1995)(Syl. ¶ 2).

5. Significantly, an agency's action must be based on a determination of fact, made or implied by the agency that is supported by evidence that is substantial when viewed in light of the record as a whole.⁴ In this respect, a reviewing court will: "(1) review evidence which supports and which contradicts the agency's findings; (2) examine the presiding officer's credibility determination, if any; and (3) review the agency's explanation as to why the evidence supports its findings."⁵ However, a reviewing court may not substitute its judgment for that of the Commission even though there may be conflicting evidence in the record that would support a contrary result.⁶

6. Indeed, Kansas courts recognize that the Commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into fixing utility rates.⁷ Thus, the Commission is vested with wide discretion and its findings have a presumption of validity on review.⁸ The Kansas Supreme Court has determined that it is up to the Commission to determine the weight to be given to testimony presented in cases before it.⁹

B. The Order is based upon substantial competent evidence.

7. The Commission properly reviewed the prudence of Westar's decision to purchase Midwest Power Company (MWP) 8% interest in JEC based upon substantial competent evidence when viewing the record as a whole. Westar argues that the Commission improperly considered the prudence of Westar's actions leading up to the 2019 settlement because it was not brought up by other parties.¹⁰ Westar characterizes a line in a Commission order from Docket No. 10-KCPE-415-RTS (10-415 docket) as an absolute placement of the burden on CURB and KIC to challenge

⁴ K.S.A. 77-621(c)(7).

⁵ Williams v. Petromark Drilling, 299 Kan. 792, 795, 326 P.3d 1057 (2014).

⁶ Western Resources, Inc. v. Kansas Corporation Commission, 30 Kan.App.2d 348, 348, 42 P.3d 162, rev. denied 274 Kan. 1119 (2002) (Syl. ¶ 2).

⁷ Williams Natural Gas Co. v. State Corp. Com'n of State of Kan., 22 Kan.App.2d 326, 335, 916 P.2d 52 (1996).

⁸ Central Kansas Power Co. v. State Corporation Commission, 221 Kan. 505, 561 P.2d 779 (1977).

⁹ Colorado Interstate Gas Company v. State Corporation Commission, 192 Kan. 1, 21,386 P.2d 266 (1963).

¹⁰ Petition for Reconsideration or Clarification of Westar Energy, Inc. and Kansas Gas and Electric Company (Westar Petition), pg. 4, ¶10.

prudence. However, a closer reading of that particular order in the 10-415 docket reveals that the burden of proof was assigned according to a Commission interim order for valuation of electric generating property based on a settlement agreement in 04-KCPE-1025-GIE.¹¹ Westar fails to provide any additional Kansas authority that precludes the Commission from evaluating the prudence or that places the burden upon a party challenging the application or why a prudence analysis under K.S.A. 66-128g is appropriate.¹² Indeed, Westar concedes that the Non-Unanimous Settlement and Agreement from 18-WSEE-328-RTS (NS&A) governs this case and therefore, those provisions dictate where the burden lies. Specifically, the NS&A provides, “[i]n the filing before the Commission, Westar shall have the burden of showing that the new lease or purchase agreement is a prudent decision for its retail customers.”¹³ Accordingly, Westar was required to file the application in this case pursuant to the NS&A in order to recover the costs associated with the 8% interest in JEC and the burden to establish prudence is appropriately placed onto Westar as the applicant and thus the Commission properly reviewed the purchase agreement.

8. Westar argues that the Commission’s evaluation of prudence over the decision to act timely to explore alternatives to the MWP settlement is not based on substantial competent evidence. Westar argues that the actions it took were prudent. However, the timing of Westar’s action makes up only a portion of the Commission’s analysis and were based upon evidence in the record. The record contains numerous facts relating to Westar’s limited efforts to resolve the conflict with MWP. Presented with these unique facts, the Commission relied on standards and

¹¹ Docket No. 10-KCPE-415-RTS, *Procedural Order* (Jul. 23, 2010), pg. 2, ¶6; pg. 3, ¶9; Docket No. 04-KCPE-1025-GIE, *Order Approving Stipulation and Agreement*, pg. 30-31, ¶65.

¹² The Commission order in this docket specifically addresses the application of K.S.A. 66-128g as not relevant to the prudence analysis in this case in Footnote 47. The Commission is looking at the prudence of Westar’s decision to purchase the 8% interest of JEC, rather than to determine the reasonable value of electric generating property.

¹³ Docket No. 18-WSEE-328-RTS, *Order Approving Non-Unanimous Settlement and Agreement* (Sept. 27, 2018) (18-328 NS&A), ¶28.

definitions set up by the courts for reviewing prudence.¹⁴ The Commission determined, in light of the record as a whole, that Westar's actions leading up to the 2019 purchase of the 8% interest were not prudent.

9. First, the Commission agreed with testimony that the energy produced by the additional 8% interest would not be used to supply energy or capacity to customers and therefore the associated costs should not be paid for by customers. In fact, Westar witness Darrin Ives conceded that Westar does not need the 8% interest to meet capacity reserve requirements or to meet current customer needs.¹⁵ The Commission also relied on testimony by both CURB witness Andrea Crane and Staff witness Justin Grady to conclude that the energy is not needed for customers.¹⁶ The Commission then weighed this evidence against the speculative nature of Ives' testimony about "operational limitations" and uncertainty of the future energy markets to conclude that it would not be prudent to affix customers with the costs associated with the purchase of the 8% interest.¹⁷

10. Second, and related to Westar's current complaint about the timing of its efforts to resolve the conflict with MWP, the Commission's determination that the efforts Westar made to address the 2007 lease expiration were not prudent was based upon the record as a whole. Ives testified that despite the lease beginning in 2007, Westar only started discussions with MWP regarding the lease expiration about a year before the expiration date.¹⁸ When questioned about the option of selling the 8% interest to a third party, Ives limited his answer to MWP being unable to find another buyer.¹⁹ The Commission rejected the notion that MWP was solely responsible for

¹⁴ Docket No. 19-WSEE-355-TAR, *Order on Westar's Application to Recovery Certain Costs through its R.E.C.A. Related to the 8% Portion of Jeffery Energy Center*, (19-355 Order) pg. 8, ¶¶18-20.

¹⁵ Transcript of Evidentiary Hearing ("Tr.") at pg. 52, 55-56. *See* KIC Exhibit #4 (Jul. 16, 2019).

¹⁶ 19-355 Order, pg. 17, ¶36-37.

¹⁷ *Id.* at pg. 18, ¶38.

¹⁸ Tr. at pg. 75.

¹⁹ Tr. at pg. 76.

finding a third party or that Westar was absolved from pressing MWP sooner to address issues arising from the lease expiration.

11. Westar has had ample opportunity to pad the record with its efforts to address the conflict with MWP in its initial application, pre-filed testimony, and live testimony at the hearing but chose not to. Instead, Westar chose to focus on the economics of the 8% interest and litigation risks in its application. Both KIC and CURB responded to those issues and pressed Westar about its efforts to address the lease expiration issues. Westar claims that the Commission should assume that all parties associated with the 2007 lease (Westar, MWP, and KeyBank) took the most reasonable efforts to address the pending lease expiration because of their business acumen.²⁰ Ives testified as much when questioned about efforts to handle the 8% interest with the other parties and speculated on their efforts.²¹ The Commission rejected these and other assumptions regarding the parties' efforts leading up to the lease expiration.²² Reopening the record will not shed additional light on Westar's efforts. Westar fails to show how it has obtained new information not already available to them leading up to the application in this case. Westar has had its day in court and failed to meet its burden of proof.

12. Both KIC and CURB criticized Westar's proposal to saddle customers with the new costs associated with the settlement with MWP throughout the proceedings.²³ The Commission found a lack of prudence for Westar's outright failure to pursue alternatives to foreclose on MWP or to locate a buyer for the energy. The Commission honed in on the fact that the purchase agreement with MWP and the proposal to pass the costs onto customers was not the product of exhaustive efforts to resolve the matter. Rather, the purchase agreement came together at the end

²⁰ Westar Petition at pg. 4-5, ¶11.

²¹ Tr. at pg. 76

²² 19-355 Order at pg. 21-21, ¶45.

²³ See Crane Direct at pg. 13, pg. 15-16; KIC Initial Brief at pg. 19-20. Tr. at pg. 39-43, 79-80.

of the 19-064 CCN docket with MWP, after the lease had already expired.²⁴ The record contains sufficient information and facts for the Commission to weigh when making its decision.

13. Third, the Commission found that Westar was aware of the economic risks of operating the 8% interest and Westar's hastened efforts to pass that risk only onto customers was not prudent. The entirety of the 19-064 docket was admitted into the record during the evidentiary hearing. Testimony in that docket predicted huge shortfalls from operating that 8% interest and Westar knew of that potential. Additionally, Westar's failure to secure a Purchase Power Agreement (PPA) similar to the one with Mid-Kansas Electric Company (MKEC) before rushing into the purchase agreement with MWP was not prudent for customers. This was based on the live testimony from Ives.²⁵ Given Westar's significant emphasis on the benefit that customers received under the 2007 lease and the role that the PPA with MKEC played in that benefit, it is appropriate for the Commission to consider the absence of such an agreement in a prudency determination for customers.

C. Westar's proposal to never seek recovery of lease payments and purchase price to satisfy Paragraph 29 of the 18-328 NS&A is improper and incompatible with the plain language of the Agreement.

14. Westar incorrectly interprets the language of Paragraph 29 in the NS&A by broadly reading the conditions behind automatic recovery of costs associated with the 8% interest. Westar now asks the Commission to rule that Westar can qualify for automatic recovery under Paragraph 29 if Westar commits to never seeking recovery of the \$3.7 million purchase price or the \$4.83 million lease payments. This request is unjustified. The Commission order clearly explains that the automatic recovery provision of Paragraph 29 is moot in this case because Westar did not

²⁴ 19-355 Order at pg. 23, ¶47.

²⁵ Tr. at pg. 76.

negotiate a zero-cost transfer of ownership of the 8% interest with MWP.²⁶ This is a condition precedent that all parties agreed upon.

15. Westar attempts to bypass this strict requirement by stating that electing not to recover the purchase price or lease payments is in effect the same as paying \$0 or \$1. Westar hopes to take a second bite at the apple of automatic recovery by negotiating directly with the Commission. However, as CURB stated in its initial brief, it is the requirement of achieving a zero-cost transfer that triggers the recovery.²⁷

16. Westar's interpretation as laid out in its Petition for Reconsideration and Clarification adds language to the NS&A without approval from the other signing parties. Had the impact by shareholders bearing costs truly been the intent behind Paragraph 29, the parties, including Westar, could have added language to establish that. The footnote to Paragraph 29 of the NS&A undercuts Westar's claim that it is allowed automatic recovery of costs, even under its proposal in this petition. Footnote 6 of the NS&A explains that the zero-cost transfer provision is a mechanism to shift regulatory burden and not an endorsement by the Commission of fair market value of the property.²⁸ The Commission correctly analyzes the provisions in Paragraph 29 as a mechanism to allow Westar to avoid the rigors of regulatory review of a new lease or purchase agreement. The \$0 or \$1 price provision is a condition precedent to automatic recovery designed to allocate risk among the parties and give Westar a way to forgo Commission approval. Failure to meet that condition required a filing by Westar and a review for prudence as written in Paragraph 28 of the NS&A, which is precisely what occurred in this case.

²⁶ 19-355 Order at pg. 10, ¶22.

²⁷ See CURB Initial Post-Hearing Brief (Jul. 31, 2019) at pg. 18.

²⁸ See 18-328 NS&A footnote 6.

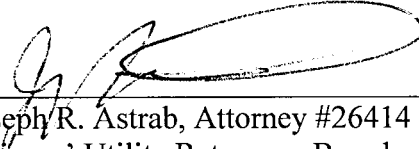
III. Conclusion

17. CURB believes that the Commission's Order is based on substantial competent evidence as provided in the record as a whole. Pursuant to Paragraph 28 of the NS&A, Westar, as the applicant, has the burden of showing that the new lease and purchase agreement it entered with MWP is a prudent decision for its customers. The record contains sufficient facts and information that the Commission has reviewed and weighed in its capacity as an administrative agency. Westar has had ample opportunities to respond to questions and testimony regarding its efforts to resolve the issues surrounding the impending expiration of the 2007 lease with MWP. Westar has not provided any new evidence in its petition for reconsideration that would justify reopening the record.

18. Westar's attempt to bypass the provisions in the NS&A are not appropriately brought in a petition for reconsideration and should be denied. Allowing such a patchwork attempt to satisfy clearly defined requirements that were the product of negotiation would undermine the faith and credit that goes into drafting settlement agreements. The Commission has completely analyzed the requirements for automatic recovery and anything short of a zero-cost transfer of ownership does not trigger the automatic recovery provisions of Paragraph 29.

WHEREFORE, CURB respectfully requests that the Commission deny Westar's petition for reconsideration on the issues presented and deny Westar's request to reopen the case for hearing on timeliness of Westar's actions. Furthermore, CURB requests that the Commission deny Westar's proposal to not seek recovery of the lease expenses or purchase price from customers in exchange for the benefit of automatic recovery of costs pursuant to Paragraph 29 of the NS&A.

Respectfully submitted,

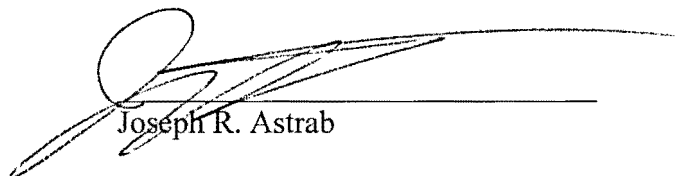
A handwritten signature in black ink, appearing to read 'J. Astrab', is written over a horizontal line.

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VERIFICATION

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, Joseph R. Astrab, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief under the pains and penalties of perjury.



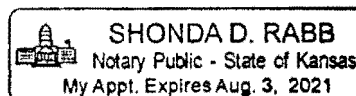
Joseph R. Astrab

SUBSCRIBED AND SWORN to before me this 7th day of October, 2019.



Notary Public

My Commission expires: 8-3-2021.



CERTIFICATE OF SERVICE

19-WSEE-355-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 7th day of October, 2019, to the following:

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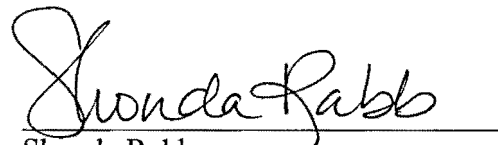
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