

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

APR 30 2012

IN THE MATTER OF THE APPLICATION OF)
KANSAS GAS AND ELECTRIC)
COMPANY FOR APPROVAL OF THE)
ENERGY SUPPLY AGREEMENT BETWEEN)
KANSAS GAS AND ELECTRIC)
COMPANY AND FRONTIER EL DORADO)
REFINING LLC)
COMMERCIAL OR INDUSTRIAL)
CUSTOMERS)

by
State Corporation Commission
of Kansas

DOCKET NO. 12-KG&E-718-CON

**RESPONSE TO WESTAR'S REPLY TO PETITION TO INTERVENE
AND FOR HEARING**

COMES NOW, Occidental Chemical Corporation ("OXY") and respectfully files this Response to the Reply to Petition to Intervene and for Hearing filed by Kansas Gas and Electric Company, d/b/a Westar Energy ("Westar") on April 19, 2012. OXY requests that the Corporation Commission of the State of Kansas ("KCC" or "Commission") grant its Petition to Intervene and Request for Hearing for the reasons set forth below:

1. On March 28, 2012, Kansas Gas and Electric Company ("KGE"), d/b/a Westar Energy, Inc. ("Westar") (Westar and KGE, collectively "Westar") filed an Application ("Application") for an order approving the Energy Supply Agreement ("Agreement") between KGE and Frontier El Dorado Refining LLC ("Frontier").

2. On April 6, 2012, OXY filed a Petition to Intervene and a Request for Hearing ("Petition"). OXY stated in its Petition that (1) Westar did not file any testimony supporting its application; (2) Westar's Application and the attached Agreement lack clarity on numerous points that are material to whether the Agreement would be in the public interest; and (3) certain terms of the Agreement raise serious questions

regarding the claimed benefits of the Agreement. As a customer of Westar that will be affected by the cost of the discount being proposed and the potential reliability implications raised by Westar's Application, OXY has established its right to intervene¹ and to be heard in this proceeding.

3. On April 19, 2012, Westar filed a Reply to Petition to Intervene and for Hearing ("Reply"), which opposed OXY's request for hearing. Westar's opposition to OXY's request for hearing is unpersuasive. Westar's response, including the attached affidavits, raises numerous issues of material fact that the Commission should examine through discovery and a full hearing. As an affected customer, OXY should have the right to fully participate in the determination of Westar's request, including having itself heard before the Commission in a hearing on whether Westar has carried its burden. Westar is seeking Commission approval of a new contract, which contains discounts from Westar's tariffed rates and which Westar admits will affect Westar's other customers.² Due process demands that OXY be allowed to conduct discovery, to submit testimony, and to cross-examine any supporting witnesses that others may put forth. Accordingly, the Commission should grant OXY's request for a hearing, which is necessary to allow OXY (and any other party) to protect its interests, and necessary for the Commission to make a determination of whether Westar's Application would lead to rates that are "unjust or unreasonably discriminatory or unduly preferential," which are prohibited under Kansas law.³

4. On April 24, 2012, the Commission issued a Suspension Order. In its Order, the Commission determined that a full investigation of the Application is deemed

¹ Notably, Westar did not oppose OXY's request to intervene.

² See Reply at ¶7, ¶4.

³ See K.S.A 66-101b.

necessary and proper. OXY agrees. However, in order for the Commission to have a fully developed record and in order to determine whether Westar has met its burden to show that the Agreement does not violate Kansas law, the Commission should grant OXY's request for hearing.

5. Westar's inclusion of affidavits in its Reply to substantiate its claim that the Agreement provides "real benefits" illustrates that Westar's initial filing lacked sufficient factual definition and support. As stated in OXY's Petition, Westar's Application failed to provide sufficient documentation, including testimony, to support the claimed benefits. The Application consisted of only a cover pleading and the Agreement.

6. The affidavits submitted by Westar are conclusory, unsubstantiated, and contain substantial amounts of hearsay. Simply put, the affidavits do not provide competent support for Westar's Application. The affidavits contain no underlying analysis or evidentiary support to demonstrate any "real benefits" of the Agreement. Instead, these affidavits raise more questions and create additional issues of material fact that should be examined through discovery and a full evidentiary hearing.

7. The fact that the Commission approved a predecessor agreement does not establish that this new agreement is in the public interest. First, the prior agreement was reviewed and approved nearly seven years ago.⁴ Thus, while Westar asserts that the changes to the current contract with Frontier are minimal, the Agreement is new and the circumstances under which Westar is seeking this approval are different.⁵ For example, the Agreement contains a new block of service at a lower

⁴ See Docket No. 05-KG&E-906-CON, Order Approving Application for New Agreement (Jun. 13, 2005).

⁵ See *e.g.*, Application at 1: "Westar and Frontier have entered into a new Electric Service Agreement (the Agreement) and hereby submit the Agreement to the Commission for approval." See also Agreement at 1: "[T]he parties desire to replace in its entirety the Previous Agreement with the terms set forth. . . ."

rate than what Frontier is currently paying.⁶ It is undisputed that the Commission has not reviewed this proposed new energy block or the new, lower rate being proposed. In addition, the affidavits make clear that Frontier's load has grown, which means that the cost of the Frontier discount to Westar's other customers has increased (i.e., the discount from the standard tariffs is being applied over a larger usage even though the amount of potential interruptibility has not increased). The Commission should examine whether the cost of this larger discount is justified by the value of the limited resource being contracted for, which remains at the same level as it was under the prior agreement. Further, whether the terms of the Agreement provide the same benefit to Westar and its customers today as it may have nearly seven years ago is a factual issue that must be examined. *The Commission must conduct a new, independent review of the Agreement to determine whether it is in the public interest,*⁷ and it should not base its decision on what it may have done in the past based on a different agreement under different circumstances.

8. Westar has provided no support for its assertion that approval of the contract will benefit customers by increasing Frontier's contribution to Westar's cost of service. Westar has provided no comparison of the Frontier rate to either Westar's average or incremental cost of service. Nor has Westar provided any analysis of whether the Frontier load would exist on Westar's system regardless of the discounts contained in the Agreement, in which case the entire discount being offered would constitute a reduction in Frontier's contribution to Westar's cost of service. In addition, the Agreement does not appear to require Frontier to make purchases from Westar

⁶ See Rohlfs Affidavit at ¶2, ¶4.

⁷ See K.S.A. 66-117.

(above a nominal amount).⁸ This further calls into question the alleged contribution to and impact on Westar's cost of service.

9. Issues of material fact exist as to whether the Agreement will help or harm reliability on Westar's system. Westar asserts that the Agreement supports reliable service to its customers because the Agreement requires Frontier to start its cogeneration facility pursuant to Westar's instructions.⁹ However, the terms of the Agreement only require Frontier to maintain its facility so that it is "capable of being started for the production of steam and electricity pursuant to [Section 4.5] within a *commercially reasonable period of time*."¹⁰ Starting the facility within an undefined period of time does not offer added reliability benefits to Westar's customers. In addition, it is undeniable that the Agreement provides a much longer notification period—48 hours as compared to two hours—during the winter months than what is provided for in the ISR tariff. The winter months make up the bulk of the hours of the year and are constituted of the eight months outside of the summer period (June, July, August, and September). Serious questions exist as to whether the discount being offered to Frontier is justified. Westar has indicated that the resource has little to no value during two-thirds of the year.¹¹ The Commission should examine this in light of the fact that the discount is being applied to the entirety of Frontier's load, even though the limited resource is much smaller than Frontier's load and will likely be even smaller once de-rating for peak summer temperatures is taken into account.¹²

⁸ See Agreement at Section 4.4C and 11.3.

⁹ Reply at ¶5.

¹⁰ Agreement at Section 3.3 (emphasis added).

¹¹ See Reply at note 2; Rohlf's Affidavit at ¶6.

¹² Gas-fired generation commonly loses some of its output capability during summer periods due to higher ambient temperatures.

10. Despite Westar's attempt to clarify the Agreement with Frontier, Westar has failed to establish the parameters under which Frontier is required to operate its cogeneration facility and the consequences for failing to meet this requirement. The Commission cannot evaluate whether this Agreement is in the public interest without a thorough understanding of the resource that Westar has contracted for, which necessarily turns on the parameters surrounding operation of the cogeneration facility. Westar replies to OXY's position on this point by erroneously claiming that there are "clear consequences to Frontier if it fails to make its facilities available as required by the Agreement."¹³ However, Westar's reliance on Section 11.5 of the Agreement is misplaced. This provision addresses a requirement for Frontier to repair the cogeneration facility if it becomes inoperable. This section does not address the situation in which Frontier's facility is operable, but it is not started in a timely manner upon Westar's request.

11. Issues of material fact exist as to whether the Agreement provides enough interruptibility value to offset the discounts to Frontier that Westar's other customers will be forced to pay. Westar argues that the Agreement gives it the flexibility to require Frontier to run its cogeneration facility (and thereby reduce Frontier's load on Westar's system) an unlimited number of times each year for a maximum of 1000 hours,¹⁴ which, examined superficially, is more than the number of hours available under Westar's ISR tariff. Under the ISR tariff, Westar is not limited to an interruption for a System Condition, and instead may curtail customers under a much broader set of conditions.¹⁵ This clearly gives Westar more flexibility than it has under the Agreement,

¹³ Reply at ¶6.

¹⁴ Reply at ¶7.

¹⁵ See *generally*, Interruptible Service Rider at Sheet 4.

in which Frontier can be called on only upon a "System Condition." Thus, under the ISR tariff, Westar has at its discretion multiple hours a day over many weeks to interrupt customers taking service under that tariff.¹⁶ Rather than providing Westar with more flexibility, the Agreement contains less flexibility at a higher cost than if Frontier were being served under the ISR tariff. Further, the additional hours that may exist under the Agreement provide little value over the ISR tariff. As an example, assuming at least some of the capability to interrupt under the ISR tariff would be used for System Conditions, it is highly questionable that Westar would use the 360 hours available to it under the ISR tariff and still need the additional 640 hours under the Agreement for a System Condition. Moreover, if Westar had such a high level of regular System Conditions to utilize 1000 hours of interruption, the Commission would need to carefully evaluate the quality of service that Westar is providing to customers. Finally, in light of the very remote chance that these additional hours will be needed, the Commission must examine whether these additional hours justify the significant cost of this Agreement to Westar's other customers. These are issues that the parties should be allowed to examine in discovery and through a full evidentiary hearing.

12. In an attempt to defuse concerns about the longer notice (and reduced flexibility) provided for in the Agreement during winter months, Westar alleges that it has "rarely implemented an interruption outside the Summer period."¹⁷ Given this assertion, it is reasonable to further explore what added benefits Westar's ratepayers receive for paying for the severely restricted availability of Frontier's cogeneration facility in the winter months. Westar has also failed to demonstrate added benefits

¹⁶ For example, under the 360 hours provided by the ISR tariff, Westar has interruptible capability for 6 hours per weekday for 12 weeks.

¹⁷ Reply at note 2; Rohlfs Affidavit at ¶16.

associated with the 30-minute difference between the notification period in the Agreement and the ISR tariff. Further, it is also reasonable to explore what the true value to customers is from a cogeneration facility with a “nominal generating capacity of 35 MW”¹⁸ when it is well-known that gas turbines are generally substantially de-rated in the summer months due to ambient heat. Westar has provided no information on how many megawatts they will get from this Agreement when they call on the resource on a hot summer afternoon. Given the discount to Frontier that Westar is asking its other customers to pay for, these are issues that should be explored fully during this case and that support OXY’s request for an evidentiary hearing.

13. Westar also fails to support its claims regarding the economic benefits to the state resulting from the Agreement. The affidavit of a Westar employee, Terrance D. Wilson, is unsubstantiated, conclusory, contains hearsay and is insufficient to establish the facts necessary to support Westar’s request for approval of this Agreement. Westar’s attempted reliance on this affidavit provides substantial support for OXY’s position that it should be allowed to conduct discovery, submit testimony, and cross-examine any supporting witnesses that others may put forth. Any alleged relationship between any claimed expansions at the Frontier facility and the discounts provided under this Agreement must be fully examined. The Commission should grant OXY’s request for a hearing, which is necessary to allow OXY to protect its interests, and necessary for the Commission to make a determination of whether Westar’s Application satisfies Kansas law and will not lead to rates that are unjust or unreasonably discriminatory or unduly preferential.

¹⁸ Agreement at Article 1, “Cogeneration Plant.”

14. In summary, Westar's reply highlights a tremendous number of material issues of fact that remain in dispute and that support OXY's request for an evidentiary hearing. OXY's request for a hearing should be granted.

WHEREFORE, OXY respectfully requests that the Commission grant OXY's Petition to Intervene and Request for Hearing and grant such other relief as is just and proper.

Respectfully submitted,



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Attorneys for Occidental Chemical
Corporation ("OXY")

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

Teresa J. James, of lawful age, being first duly sworn, upon oath states:

That she is one of the attorneys for Occidental Chemical Corporation ("OXY"), that she has read the above and foregoing document, knows the contents thereof, and knows that all of the statements made therein are true.

Teresa J. James

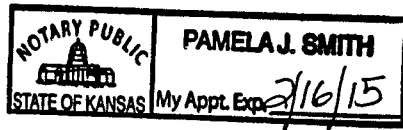
Teresa J. James

SUBSCRIBED AND SWORN to before me this 30th day of April, 2012.

Pamela J. Smith

Notary Public

My Appointment Expires:
2/16/15



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Westar's Reply to Petition to Intervene and for Hearing was sent via U.S. First Class mail on this 30th day of April, 2012, to:

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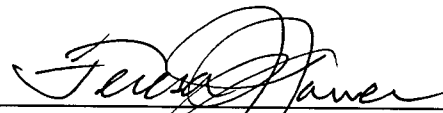
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In addition, on April 30, 2012, a copy of the foregoing Response to Westar's Reply to Petition to Intervene and for Hearing was sent via email to:

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April 30, 2012

Patti Petersen-Klein
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Received
on

APR 30 2012

by
State Corporation Commission
of Kansas

RE: Docket No. 12-KG&E-718-CON
Our File No. 30938-0002
Response to Westar's Reply to Petition to Intervene and for Hearing

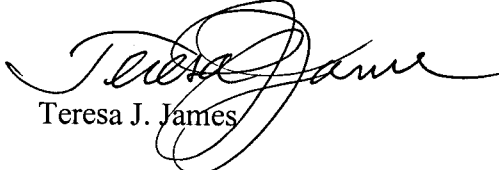
Dear Ms. Petersen-Klein:

Enclosed please find the original and seven copies of OXY Chemical Corporation's Response to Westar's Reply to Petition to Intervene and for Hearing in the above referenced docket.

Please do not hesitate to contact me if you have any questions. Thank you.

Sincerely,

MARTIN, PRINGLE, OLIVER,
WALLACE & BAUER, L.L.P.



Teresa J. James

TJJ/pjs

Enclosures

cc: Service List
Tammy Cooper
Phillip Oldham
Stanford J. Smith