

**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 REPLY 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 Reply 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.

For the purpose of brevity and relevance, Staff chooses not to address all arguments made in MWP’s Initial Brief. This should not be construed to indicate that Staff concedes or agrees with any of MWP’s positions or arguments.

I. PROCEDURAL HISTORY

1. The Procedural History found in the Initial Brief of KCC Staff file on December 28, 2018 remains the same and is incorporated herein.¹

2. On December 28, 2018 MWP, Westar and KCC Staff simultaneously filed initial briefs on the issue of whether MWP’s Application for Public Convenience and Necessity should be granted.

II. RESPONSE

Sale-Leaseback Arrangements

MWP believes they are entitled to a Certificate because the initial transaction was a sale-leaseback arrangement.² MWP states the transfer of the 8% interest is a situation that was unforeseeable and it expected Westar to exercise the option to purchase the non-severable assets.³ Because Westar has not exercised the option, they deserve a Certificate. This argument is illogical. This case involves highly sophisticated parties who knew there were risks involved with a sale-leaseback transaction. When this sale-leaseback arraignment was made, the outlook

¹ Initial Brief of KCC Staff, at 4 (Dec. 28, 2018).

² Initial Brief of Midwest Power Company, at 8 (Dec. 28, 2018).

³ *Id.*

on power markets looked very bright. Both parties knew the future of this volatile market was uncertain and took this risk knowingly. While it is unfortunate that the power market no longer looks promising, neither party was forced into the transaction. MWP asserts that sale-leaseback transactions end with the lessee purchasing the asset.⁴ This assertion is not supported by any evidence or citation of law. MWP's implication that Westar created this situation by not following standard sale-leaseback norms is unfounded and should be dismissed. The option to purchase at the end of the lease is just that, an option.

Contract Disputes

MWP misses the mark on Staff's position regarding the lingering contract dispute between MWP and Westar. MWP believes Staff's only concern with the contracts is the three cherry-picked provisions to which MWP continuously refers.⁵ This is incorrect. Staff is concerned with MWP's position regarding the situation as a whole.⁶ MWP reaches when making the statement that "no party has disputed MWP's interpretation of contractual provision requiring payment of shortfalls by Westar".⁷ MWP is very selective when framing its argument that there is no dispute over the obligations of Westar and MWP. For context, using the same cite in MWP's Initial Brief, Chad Unrein states "whether the obligation exists in the trust estate to cover what liabilities there are under the ownership and operating agreements, I think is what's debatable".⁸

MWP confirms Staff's concern by admitting there will be litigation regarding the agreements and obligations in its Initial Brief.⁹ Staff purposefully tried not to provide testimony

⁴ Initial Brief of Midwest Power Company, at 8.

⁵ *Id.* at 9, ¶ B.

⁶ Hearing Transcript at 134, ll. 8-11. (Dec. 18, 2018).

⁷ Initial Brief of Midwest Power Company, at 9.

⁸ Tr. at 124, ll. 10-13.

⁹ Initial Brief of Midwest Power Company, at 11.

to its individual analyses of the documents as to whether MWP or Westar's interpretation is correct.¹⁰ Ultimately Staff saw litigation risk and additional costs on both sides.¹¹

Staff analyzed all scenarios and outcomes in this docket.¹² The best outcome, and Staff's recommendation, reduces the cost passed on to ratepayers.¹³ When the lease expires, Westar will begin billing MWP for the costs of the asset.¹⁴ For the interim period, ratepayers may shoulder those costs, however, Staff has weighed this scenario against all other possible outcomes. MWP's proposal is inferior to having Westar proceed with the default provision in the contract.¹⁵ Westar is the largest public utility in the State of Kansas and its financial viability is very important to the Commission's evaluation of public interest.¹⁶ Understandably, letting the undivided interest sit idle is not an ideal outcome, but to accept MWP's position of relying on Westar's financial resources to cover its operational cost shortfalls while MWP retains the profits will likely result in costly and time-consuming litigation for both parties.¹⁷ Staff decided the best course is to recommend denial of the Application and allow Westar proceed with the default provisions.¹⁸

KCC Precedent

In its Initial Brief, MWP attempts to distinguish several past cases where Staff has made similar recommendations.¹⁹ MWP incorrectly claims that Staff based its recommendation for

¹⁰ Tr. at 124, ll. 20-25.

¹¹ *Id.* at 124, ll. 1.

¹² *Id.* at 134, ll. 7-8.

¹³ See *Id.* at 136, ll. 9-12.

¹⁴ *Id.* at 143, ll. 22-23.

¹⁵ *Id.* at 135, ll. 4-15.

¹⁶ Staff Direct Testimony Prepared by Chad Unrein at 25, 26 (Nov. 9 2018).

¹⁷ *Id.* at 26.

¹⁸ Tr. at 134, ll. 5-8, 17-21.

¹⁹ Initial Brief of Midwest Power Company, at 14, ¶ D.

denial on two past dockets, 16-ITCE-512-ACQ and 16-SWPE-209-COC.²⁰ Again, MWP misses the point. As MWP knows, each application brought before the Commission is analyzed for its individual merit.²¹ Almost all cases that reach a hearing are unique in nature. MWP differentiates the facts in those Dockets, but it avoids Staff's main concern in each.²² To effectively carry out obligations as a certified public utility in the State of Kansas, parent companies must ultimately be responsible for the subsidiary operating in Kansas.²³

In Docket No. 16-512, the subsidiary ITC Great Plains, which held a limited Certificate of Convenience and Necessity, applied for an "upstream change in ownership" where Fortis would become a majority owner of ITC.²⁴ In Staff's recommended conditions, explicit recognition from Fortis that it would be ultimately responsible for ITC was required to meet the financial resource threshold.²⁵

In Docket No. 16-209, Xcel Energy Southwest Transmission (XEST) a subsidiary of Xcel Energy Inc. applied for a Certificate of Convenience and Necessity.²⁶ Again, Staff's recommendation was that the Commission explicitly recognize that Xcel will retain ultimate responsibility for the operations and financing of the assets.²⁷

Here, while the facts are slightly different than the past Dockets, the scenario is the same. MWP, a subsidiary of KeyCorp is applying for a Certificate of Convenience. Staff, after a very thorough analysis of the application, has recommended that explicit recognition of financial

²⁰ *Id.* (In MWP's Initial Brief, they also claim Staff uses Docket No. 01-WSRE-949-GIE as reasoning for denial. Staff has never mentioned this Docket No. so it will not be discussed in this Reply Brief.)

²¹ Tr. at 136, ll. 7-8.

²² Staff Report and Recommendation at 8, Docket No. 16-ITCE-512-ACQ (Sep. 2, 2016), Staff Report and Recommendation at 7, Docket No. 16-SWPE-209-COC (May 25, 2016).

²³ Staff R&R at 8 Docket No. 16-512.

²⁴ Joint Application for Transaction Approval and Expedited Treatment, at 1, 2 Docket No. 16-ITCE-512-ACQ (May 10, 2016).

²⁵ Staff R&R at 8 Docket No. 16-512.

²⁶ Staff R&R at 2 Docket No. 16-209.

²⁷ *Id.*

support from KeyCorp is necessary to meet the financial resource threshold and public convenience and necessity standard found in K.S.A. 66-131.²⁸

III. CONCLUSION

Staff has attempted to collaborate with all parties in this docket. Staff has laid out a path that gives MWP the opportunity to demonstrate its application can meet the standard in K.S.A. 66-131. MWP has decided not to take that opportunity. Along with agreeing to the set of conditions laid out in Staff's testimony, KeyCorp and MWP must modify the Guaranty and explicitly commit to provide the necessary capital injections needed to cover the operating expenses, maintenance expenses and capital expenditures of its undivided interest in JEC. Without those modifications and conditions, MWP is unable to meet the financial resource threshold requirement and public convenience and necessity standard in K.S.A. 66-131.

WHEREFORE, Staff respectfully submits its Post-Hearing Reply 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

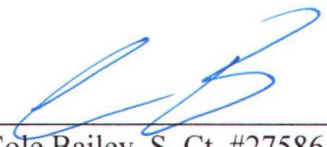
ATTORNEYS FOR COMMISSION STAFF

²⁸ Staff Direct Testimony Prepared by Chad Unrein at 27 (Nov. 9 2018).

VERIFICATION

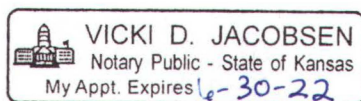
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) ss.
COUNTY OF SHAWNEE)

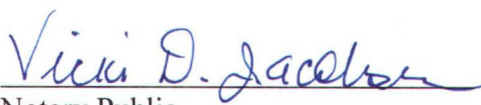
Cole Bailey, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Staff's Reply Brief*, and attests that the statements therein are true and correct 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 4th day of January, 2019.





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 Staff's Reply Brief was sent via electronic service this 4th day of January, 2019, 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
POL SINELLI PC
900 W 48TH PLACE STE 900
KANSAS CITY, MO 64112
Fax: 913-451-6205
acallenbach@polsinelli.com

FRANK A. CARO, JR., ATTORNEY
POL SINELLI 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