

**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 Approval to Make ) Docket No. 18-WSEE-328-RTS  
Certain Changes in their Charges for )  
Electric Services. )

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**POST-HEARING BRIEF OF THE  
CITIZENS' UTILITY RATEPAYER BOARD**

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January 11, 2021

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COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and, pursuant to the schedule set forth in *Order Setting Procedural Schedule on Rate Design* issued by the State Corporation Commission of the State of Kansas ("Commission") in this docket on June 16, 2020, submits its post-hearing brief regarding the issues on rate design for residential customers with distributed generation ("DG") of Evergy Kansas Central ("Evergy Central" or "Evergy"), formerly Westar Energy, Inc.

## **I. Background**

1. On February 1, 2018, Westar Energy, Inc. and Kansas Gas and Electric Company (collectively "Westar") filed an application with the Commission asking for approval to change their rates.

2. With respect to distributed generation, Westar proposed a change to the rate schedule affecting non-grandfathered residential customers with distributed generation ("DG customers") to implement a three-part rate (fixed customer charge, energy charge, and demand charge) for those DG customers.<sup>1</sup> Westar relied on the Commission's order on the Stipulation and Agreement in Docket No. 16-GIME-403-GIE ("16-403 Docket") in creating a separate rate schedule for DG customers and adding a demand charge to the standard residential service rate. In the 16-403 Docket, the Commission found that DG customers' use of the electric grid as a backup system resulted in less energy being consumed, which resulted in DG customers not paying the same proportion of fixed costs as non-DG customers, creating a cross-subsidy.<sup>2</sup> The Commission agreed in the 16-403 docket that a cost-of-service based three-part rate with a

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<sup>1</sup> Application for Westar Energy, Inc. Volume 1. Pg. 9 ¶18. Docket No. 18-WSEE-328-RTS. Feb. 1, 2018.

<sup>2</sup> Final Order, ¶22, Docket No. 16-GIME-403-GIE Sept. 21, 2017.

demand charge is an appropriate way for Westar to recover the cost of providing services to DG customers.<sup>3</sup>

3. On February 2, 2018, CURB filed its Petition to Intervene and Motion for Protective Order and Discovery Order.<sup>4</sup> The Commission granted CURB intervention on February 8, 2018.<sup>5</sup> CURB was one of many stakeholders granted intervention in this docket.<sup>6</sup>

4. On July 17, 2018, CURB joined with several intervenors in filing a Joint Motion to Approve Non-Unanimous Stipulation and Agreement (“S&A”) which stipulated that Westar was to implement a three-part rate for the DG customers, which included a demand charge of \$9.00 for the summer months and \$3.00 for the winter months.<sup>7</sup> After a two-day hearing over the S&A, the Commission issued its Order Approving Non-Unanimous Stipulation and Agreement on September 27, 2018.

5. On October 12, 2018, Sierra Club and Vote Solar, two intervenors opposed to the S&A, filed a Petition for Reconsideration on the grounds that the DG rate tariff was not based on substantial competent evidence, the DG rate violated state and federal law, and that the DG rate was not in the public interest.<sup>8</sup> The Commission denied the Petition for Reconsideration on November 8, 2018.<sup>9</sup>

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<sup>3</sup> *Id.* at ¶23.

<sup>4</sup> CURB’s Petition to Intervene and Motion for Protective Order and Discovery Order, Docket No. 18-WSEE-328-RTS. Feb. 2, 2018.

<sup>5</sup> Order Designating PHO, Suspension Order, Protective Order, Disc. Order, Granting Interv. CURB, Docket No. 18-WSEE-328-RTS Feb. 8, 2018.

<sup>6</sup> Order Setting Procedural Schedule on Rate Design, pg. 2, ¶2, Docket No. 18-WSEE-328 RTS Feb. 8, 2018.

<sup>7</sup> Non-Unanimous Stipulation and Agreement, ¶46, Docket No. 18-WSEE-328-RTS July 17, 2019.

<sup>8</sup> Sierra Club and Vote Solar’s Petition for Reconsideration, Docket No. 18-WSEE-328-RTS October 12, 2018.

<sup>9</sup> Order on Petition for Reconsideration, Docket No. 18-WSEE-328-RTS Nov. 8, 2018.

6. Sierra Club and Vote Solar filed a Notice of Appeal and the Kansas Court of Appeals took up the case. On April 12, 2019, the Kansas Court of Appeals issued an unpublished Memorandum Opinion, affirming the Commission's Order.<sup>10</sup> Sierra Club and Vote Solar subsequently filed a Petition for Review with the Kansas Supreme Court.

7. On September 3, 2019, the Kansas Supreme Court granted the Petition for Review and heard oral arguments on December 19, 2019.

8. On April 3, 2020, the Kansas Supreme Court reversed and remanded the Court of Appeals' decision. The Kansas Supreme Court found that the three-part DG rate design violated an anti-discrimination statute, K.S.A. 66-117d. The case was remanded back to the Commission for further proceedings on rate design.

9. The Commission reopened this docket for the limited purpose of determining an appropriate DG rate design for Westar (now Evergy Central). Recognizing that the issue of distributed generation is not unique to Evergy Central, the Commission instructed all Kansas electric utilities to enter their appearances in the docket and set a deadline for all other interested parties to file Petitions for Intervention by June 30, 2020.<sup>11</sup> The Commission further set a procedural schedule, requiring parties to file initial comments on the issue of DG rate design by August 14, 2020.

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<sup>10</sup> In the Matter of the Joint Application of Westar Energy, Inc. and Kansas Gas and Electric Company, No. 120,436, WL 1575480 (Kan. App. 2019) (*unpublished*).

<sup>11</sup> Order Setting Procedural Schedule on Rate Design, pg. 6, ¶¶15-16, Docket No. 18-WSEE-328-RTS June 16, 2020.

10. On August 14, 2020, a number of parties, including CURB, submitted initial comments regarding the rate design issues in this docket.<sup>12</sup>

11. In its initial comments, CURB analyzed the Kansas Supreme Court’s opinion and remand for legal conclusions and reviewed several policy considerations for the Commission to consider. CURB also evaluated the rate design proposals provided by the Kansas Supreme Court.<sup>13</sup> Finally, CURB proposed moving all DG customers back to the standard residential tariff to ensure that rates were not based on a customer’s DG status. CURB further recommended using a regulatory asset to track forgone revenue until Evergy’s next rate case. One of the noted benefits of CURB’s proposal was the flexibility that allowed room for additional study and guidance on the issue of DG customers using Evergy’s grid.

12. On September 10, 2020, parties filed reply comments to respond to various claims and positions contained in the initial comments. In its reply comments, CURB responded to each group’s analysis of the remand and possible solutions to the DG rate issue. CURB noted that the utilities in this docket were drawing a distinction between the different types of services provided to DG customers resulting from the unique, two-way relationship DG customers have with the grid.<sup>14</sup>

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12 Initial Comments were filed by, or on behalf of, the following parties: 1) the Staff of the State Corporation Commission of the State of Kansas (“Staff”); 2) CURB; 3) Evergy; 4) The Empire District Electric Company (“Empire”); 5) Southern Pioneer Electric Company and Pioneer Electric Cooperative, Inc. (collectively “Southern Pioneer”); 6) Climate & Energy Project, Sierra Club, and Vote Solar (collectively “Renewable Advocates”); 7) United School District #259; and 8) Kansas Electric Cooperatives, Inc., Midwest Energy, Inc., Sunflower Electric Power Corp., and Kansas Electric Power Cooperative, Inc. (collectively “Co-ops”).

13 Initial Comments of the Citizens' Utility Ratepayer Board on Evergy Central's Rate Design, August 14, 2020.

14 Reply Comments of the Citizens' Utility Ratepayer Board on Evergy Central's Rate Design, September 10, 2020.

13. On October 13, 2020, Evergy filed pre-written direct testimony from Mr. Brad Lutz and Dr. Ahmad Faruqui. Mr. Lutz's direct testimony described Evergy's primary and secondary proposals for a new rate design. The primary proposal is a Grid Access Fee (GAF) that charges all residential customer a fee of \$3 per kW of installed DG capacity per month.<sup>15</sup> The secondary option is a minimum bill set at \$35 per month per residential customer, meaning all bills that do not equal or exceed \$35 in a month would see an increase to \$35. Dr. Faruqui discussed the unique usage patterns and services associated with DG customers.<sup>16</sup>

14. On November 13, 2020, parties filed direct testimony to discuss Evergy's proposed rate designs. Staff witness, Dr. Robert Glass, filed testimony that reiterated concerns about the legality of the GAF in light of the Kansas Supreme Court's opinion.<sup>17</sup> Staff also indicated support for the minimum bill if Evergy was able to separate customer data into tiers, reflective of more homogeneous sub-classes of residential customers in order to more accurately identify the likely consumption patterns of different customers.

15. Mr. Brian Kalcic provided testimony on behalf of CURB.<sup>18</sup> CURB modified its earlier recommendation to track forgone revenue such that forgone revenue would now be equal to the revenue otherwise collected from a GAF of \$3 per kW installed capacity per month GAF. Mr. Kalcic also analyzed Evergy's minimum bill proposal and advocated for its rejection due, in part, to its potential to harm low income and non-DG customers.

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15 Direct Testimony of Brad Lutz on Behalf of Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., October 10, 2020.

16 *See* Direct Testimony of Ahmad Faruqui on Behalf of Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., October 13, 2020.

17 Testimony of Robert H. Glass on Behalf of Staff, November 13, 2020. (Glass Direct Testimony).

18 Direct Testimony on Remand of Brian Kalcic on Behalf of CURB, November 13, 2020.

16. On November 23, 2020, CURB filed cross-answering testimony in response to the direct testimony of Dr. Glass.<sup>19</sup> Mr. Kalcic agreed with Staff that the GAF may be subject to appeal if adopted. Mr. Kalcic also reiterated CURB's belief that legislative action will be helpful in creating a more responsive rate design. Finally, Mr. Kalcic critiqued Staff's proposal for a tiered minimum bill system.

17. On December 16 and 17, the Commission held an evidentiary hearing to hear live testimony on the three proposals in front of the Commission.

## **II. Legal Standards**

18. The Kansas Supreme Court remand requires the Commission to re-examine Evergy's rate design as it relates to DG customers. Although the Court established the parameters for an acceptable rate design that complies with the anti-discriminatory provision of K.S.A. 66-117d, the Court also highlighted two distinct points regarding Commission authority. First, the Court stated that its decision did not provide a guarantee that any of its example rate designs would pass the legal or political hurdles associated with the ratemaking process.<sup>20</sup> Second, the Court's decision does not impose any further restrictions on the Commission's judgments concerning how to structure the generation and sale of electricity in Kansas. This language infers that general ratemaking principles and considerations are applicable when reviewing rate design options in this docket.

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<sup>19</sup> Brian Kalcic's Cross-Answering Testimony on Remand on Behalf of CURB, November 23, 2020.

<sup>20</sup> In the Matter of the Joint Application of Westar Energy, Inc. and Kansas Gas and Electric Company, 460 P.3d 821, (Kan. S. Ct. 2020) (Westar Energy, Inc.).



19. The Commission has broad authority over public utilities to ensure that utility rates are just and reasonable rates, and that rates maintain reasonably sufficient and efficient service.<sup>21</sup> To that end, approved rates should fall within a “zone of reasonableness” after the application of a balancing test in which the interests of the utility and the ratepayers are evaluated.<sup>22</sup> Specifically, there are three sets of competing interests that the Commission should consider: the utility’s investors and its ratepayers, present and future ratepayers, and the public interest. When evaluating these competing interests, the Commission may consider matters of policy in establishing a “just and reasonable” rate structure.<sup>23</sup> The Commission is not required to set rates at a level that will guarantee the continued financial integrity of the utility.<sup>24</sup> The Kansas Supreme Court remand does not require a deviation from the last point, nor does the remand require the elimination of any particular subsidy.

20. While the Commission is not limited in the kind of policies it may consider in approving a just and reasonable rate structure, it is important to take note of Kansas’ current policy towards distributed generation. At the heart of the Kansas Supreme Court’s analysis is the recognition of a codified preference by the Kansas Legislature for renewable energy production. K.S.A. 66-117d has been the law in Kansas since 1980 and has largely been untouched by the courts and legislators. This case presented the Kansas Supreme Court an opportunity to effectively remove 66-117d from the books in light of K.S.A. 66-1265e. Instead, the Court chose to reinforce

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21 K.S.A. 66-101b.

22 Power Com’n v. Hope Gas Co., 320 U.S. 591, 603, (1944).

23 Midwest Gas Users Association v. State Corporation Commission, 5 Kan.App.2d 653, 659 (1981).

24 Kansas Gas and Elec. Co. v. State Corporation Commission, 239 Kan. 483, 489-90 (Kan. S. Ct. 1986). (discussing Pennsylvania Elec. v. Pennsylvania Pub. Util., 509 Pa. 324, 502 A.2d 130 (Pa. S. Ct. 1985).

the anti-discrimination provision of 66-117d and actually made 66-1265e subordinate to 66-117d, thus preserving the policy towards incentivizing renewable self-generation. The Kansas Legislature will have its first opportunity to review this interpretation of Kansas policy in the 2021 legislative session. Regulators, utilities, and stakeholders are likely to receive some guidance on this issue because if the legislature fails to modify a statute to avoid a standing judicial construction of that statute, the legislature is presumed to agree with the court's interpretation.<sup>25</sup>

21. The overall goals of the parties in this docket are easily discernable. All parties are interested in meeting the mandate of the Kansas Supreme Court's order by establishing a non-discriminatory rate design. Beyond this, Evergy has an interest in enhancing fixed cost recovery from the DG class and the ultimate goal of eliminating any subsidy between the DG and non-DG residential ratepayers in the future.<sup>26</sup> Ratepayers want the most efficient and effective utility service for the lowest cost. From an economics standpoint, residential DG customers, as a subset of residential customers, want the quickest return of their investment in self-generation with the largest return on that investment down the road.

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<sup>25</sup> Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan., 36 Kan. App. 2d 83, 94, 138 P.3d 338, 348 (2006) (quoting Halsey v. Farm Bureau Mut. Ins., 275 Kan. 129, 136, 6 P.3d 691 (2003)).

<sup>26</sup> See Direct Testimony of Brad Lutz on Behalf of Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. pg. 8, lns 14-21. October 13, 2020.

22. CURB believes that a number of the considerations highlighted in its initial comments can assist the Commission with its evaluation of the various arguments and policy concerns:

- What kind of policy will be promoted or discouraged?
- Are non-DG customers disproportionately impacted compared to the impact that DG customers have on the utility?
- Will residential customers readily accept and adapt to this rate structure?
- Who are the winners and losers in this rate design?<sup>27</sup>

In determining the most appropriate rate structure, the answers to these questions relative to each rate design proposal should provide clarity on how each proposal addresses the parties' respective interests. However, the bearing that each consideration will have on the decision should be based on the specific facts and circumstances presented in the record. In addition, the timing of implementation should also play an important role in determining the weight of that consideration. Phrased in a manner similar to the above considerations: What are the pros and cons of implementing this rate design now? The Kansas Supreme Court's remand put no hard deadline in which Evergy should see a specific level of improved fixed cost recovery. Nor did the Kansas Supreme Court mandate that the resulting rate design must incentivize a certain level of growth of DG installation. The salient point is that the Commission should examine each rate option as it relates to the urgency and the significance of the problems it aims to solve.

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<sup>27</sup> Initial Comments of the Citizens' Utility Ratepayer Board on Evergy Central's Rate Design, pg. 7, August 14, 2020. (CURB's Initial Comments). The question of whether the rate design is revenue neutral has been omitted from this list due to the fact that all the rate design proposals utilize some type of regulatory accounting mechanism to address the difference in revenue levels.

### **III. Analysis**

#### **A. CURB's Proposal**

##### **i. Returning All DG Residential Customers to the Two-Part Rate Design Meets the Supreme Court's Mandate Without Significant Upheaval for the Residential Class**

23. The simplicity in CURB's proposal allows the Commission to modify the rate design without causing dramatic changes in customers' bills or instigating extensive litigation. The advantage to this simplicity is unique to CURB's proposal alone and its importance will become more apparent when reviewing Evergy's proposals below. The crux of the Kansas Supreme Court's remand is that the Demand Charge violated 66-117d because it uses a customer's DG status as a basis for charging more for the same goods and services than non-DG customers.<sup>28</sup> Cancelling the RS-DG class and placing DG customers in the RS class outright removes the distinction between DG and non-DG from rate design. Non-DG customers will see no changes to their bills and some DG customers may see bill decreases without the Demand Charge. It is unlikely that either group will disapprove of that outcome and will readily accept the change. No party has presented an argument that this option fails the anti-discrimination provision of 66-117d or any other threats of litigation. Based on the degree of discussion covering the legality of the GAF, the costs of litigation are not as remote as it may be in other cases and should be considered a net benefit for CURB's proposal. Evergy may argue that it is a "loser" in this proposal as it may continue to under-collect fixed costs from DG customers. However, the second part of CURB's proposal will address that argument below.

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<sup>28</sup> Westar Energy, Inc. at 331.

24. CURB's proposal to cancel Evergy Central's Residential Standard Distributed Generation tariff and return all DG customers to the two-part rate design provides the Commission with a superior level of flexibility in the face of changing circumstances. CURB believes that legislative action in response to the Kansas Supreme Court's opinion on DG rate design is key to resolving the issue equitably.<sup>29</sup> To that end, there has been a fair amount of skepticism regarding a legislative fix in the near future.<sup>30</sup> If CURB was the sole agency responsible for bringing policy changes in front of the Kansas Legislature, such skepticism might be warranted. However, legislative action is rarely carried out by a single actor and typically requires a coalition of actors to get legislation passed. Representatives from CURB have already been in contact with other parties regarding the upcoming legislative session and the potential for action. CURB is hopeful that these conversations will continue to develop and a path forward can be carved out by all interested stakeholders. Mr. Lutz, in his rebuttal testimony, alludes to the lack of consensus among parties in this docket, which may risk inaction.<sup>31</sup> However, the Legislature has demonstrated an ability to address utility issues in a timely manner, most recently in the context of economic development tariffs.<sup>32</sup> Thus CURB believes that, even if there is a lack of consensus, the obvious need for a clarification in the law allowing the Commission to be able to align optimally the costs/benefits of serving residential DG customers and their rates should, and in fact will drive

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29 CURB's Initial Brief at pg. 8, ¶18; Reply Comments of the Citizens' Utility Ratepayer Board on Evergy Central's Rate Design, pg. 7, ¶14.

30 Transcript of Evidentiary Hearing, Vol. II, pg. 86, Ins. 1-24. December 17, 2020. (Tr. Vol. II); Rebuttal Testimony of Bradley D. Lutz on Behalf of Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., pg. 11, Ins. 4-19. (Lutz Rebuttal Testimony).

31 Lutz Rebuttal Testimony at pg. 11, Ins. 4-19.

32 See K.S.A. 66-101i.

legislative action. In the event that the Kansas Legislature does not take action on this issue, the Kansas Supreme Court's interpretation of K.S.A. 66-117d will continue to stand as the law of Kansas. Regardless of whether the Legislature takes any action on 66-117d, CURB's proposal to cancel the RS-DG class would require virtually no changes to maintain compliance with the law because DG and non-DG customers would be charged the same rates.

**ii. CURB's Use of a Regulatory Asset Gives Due Consideration to Evergy's Interests without Overburdening the Company or Ratepayers**

25. The second part of CURB's proposal addresses the Company's interest in fixed cost recovery without imposing any undue hardships on the Company's operations. CURB recommends that the Commission authorize Evergy to track forgone revenues that would otherwise have been obtained from implementing a monthly GAF of \$3 per kW of installed DG capacity in a regulatory asset, for potential recovery in Evergy's next general rate case.<sup>33</sup> This would provide a reasonable interim solution to the DG rate design issue without imposing dramatic rate impacts on different groups of customers. By specifying an amount of revenue to track based on Evergy's own calculations, CURB gives due consideration to the costs that Evergy may incur in serving DG customers on its grid. From Evergy's perspective, it will be able to take a first step toward enhancing its fixed cost recovery without the risk of litigation that could ultimately reject the approval of a GAF.

26. Given that Evergy will need to request to have this forgone revenue collected through rates in its next rate case, some witnesses expressed concerns regarding the timing and

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<sup>33</sup> Kalcic Direct Testimony at pg. 5, lns. 1-13.

uncertainty of the recovery. Mr. Douglas Shepherd on behalf of the Co-Ops criticized CURB's proposal as one that "kicks the can down the road" by failing to provide immediate mitigation of the cost-shift attributed to DG customers.<sup>34</sup> He continues in the same paragraph to highlight potential uncertainties for how the asset would be treated and to what extent recovery would be allowed. In regards to mitigation of the cost-shift, it is important to note that CURB's proposal is not meant to be a long-term solution. Rather, it is a short-term measure to give time for additional study and legislative guidance without placing undue burdens on the ratepayers. Even if the Commission views CURB's proposal as not immediately mitigating a cost-shift by DG customers, nothing in the record articulates the potential nature of these harms caused by such cost-shifting or what kind of timeline the Commission has to work with to avoid serious consequences.

27. Mr. Shepherd states that the harm associated with the subsidy comes in the form of future problems with a larger DG population and that action in the present is necessary to revolve it.<sup>35</sup> When asked to provide a general timeline as to when tangible problems associated with a DG subsidy will occur, Mr. Shepherd responds that it is dependent on the adoption rate of DG in Kansas, but he cannot identify any issues in the near term.<sup>36</sup> Within this answer lies the obvious conflict between the utilities and Kansas policy. Mr. Shepherd states that various jurisdictions are seeing different levels of DG penetration. It is his belief that the DG population

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34 Cross Answering Testimony Shepherd on Behalf of KEC, MWE, Sunflower, KEPCo., pg. 5, lns. 1-9. November 23, 2020.

35 Tr. Vol. II at pg. 66, lns. 1-8.

36 Tr. Vol. II at pg. 66, lns. 9-25, pg. 67, lns. 1-12.

is growing and that by leaving the cost-shift in place, adoption of DG will be encouraged by virtue of the favorable rate. Recall that one of the currently codified policy goals in Kansas is incentivizing the adoption of renewable self-generation. By increasing the rates that DG customers pay for electricity and reducing the cost-shift, the utilities risk discouraging adoption of DG in Kansas and defying a stated policy goal of the Kansas Legislature. By contrast, CURB's proposal does not do this. The nebulous claims of rapid solar adoption and the resulting harms are speculative at best and do not present a particular urgency to be addressed in this docket. Any criticisms about immediate mitigation of cost-shifting are outweighed by the comparative advantages associated with CURB's proposal.

28. The uncertainty associated with cost recovery is not unique to CURB's proposal and any differences from Evergy's proposal do not tip the balance of interests in Evergy's favor. CURB's proposal utilizes a regulatory asset in order to track the forgone revenue from DG customers. The GAF and minimum bill proposals would generate additional revenue not contemplated in the rate case proper and both require a deferral account to track and examine in the next rate case, as well.<sup>37</sup> CURB perceives that all of the proposals will involve some degree of uncertainty through Evergy's next general rate case. It is more advantageous for parties to continue to study the costs and benefits of having DG on Evergy's grid and how those adjustments may impact future recovery of the forgone revenue, like in CURB's proposal. This approach will help refine the appropriate amount of forgone revenue that should be recovered without over-collecting from residential ratepayers. Under Evergy's proposals, the additional revenue collected

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<sup>37</sup> Lutz Direct Testimony at pg. 9, lns. 17-20; pg. 12, lns. 19-22.



is not likely to be revenue-neutral and, therefore, would be subject to possible refund during the next rate case. Evergy is still in the middle of a rate moratorium, meaning that the next rate case is still a few years away. During this time, residential customers may leave the system completely and lose contact with Evergy. This puts these customers at risk of not receiving a refund. The record does not contain facts that demonstrate a present and significant risk to Evergy's continued financial health or operations in Kansas due to the cost-shift associated with DG customers. This means that the uncertainty of recovery under CURB's proposal should not carry significant weight or spur hasty decisions.

29. One final critique of CURB's proposal came from Empire regarding the two-part rate, as a whole. In its initial comments, Empire took note of the Kansas Supreme Court's comments about the use of volumetric rates to collect fixed costs from customers and asks the Commission to consider changing this underlying rate design policy and allow utilities to recover all or mostly all of their fixed costs through the monthly customer charge.<sup>38</sup> This alternative rate structure lends itself to the current subsidy debate over DG as a result of DG customers' tendency to offset their energy needs with self-generation. CURB reiterates its position from its comments that Empire's proposal would unduly favor utilities by removing all risks associated with collecting fixed costs from ratepayers. The Commission should not make such a drastic change to the current practice of rate design in Kansas solely in response to something such as solar proliferation.

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<sup>38</sup> Comments of the Empire District Electric Company, pg. 2, ¶1, August 14, 2020.

30. Additionally, the Kansas legislature has taken steps towards achieving regionally competitive electric rates for Kansas by authorizing the funding of two extensive studies on Kansas electric rates.<sup>39</sup> From CURB's prospective, the balance of ratepayer and utility interests has been in favor of the utilities for far too long. The Commission should seek out the option that best protects the residential class from increasing bills while addressing Evergy's concerns about fixed cost recovery from the DG class. Therefore, the Commission should proceed with caution on any rate design that will raise the cost of consuming electricity in Kansas and choose CURB's proposal in order to fully evaluate the political and ratemaking landscape before Evergy's next rate case.

**B. Evergy's Proposal: Grid Access Fee (GAF)**

**i. The GAF May Enhance Fixed Cost Recovery From DG Customers at the Expense of Working Against Solar Adoption in Kansas**

31. The GAF seeks to avoid the anti-discrimination provision of 66-117d by applying the new fee to all residential ratepayers, but only applying a charge to customers with installed DG capacity.<sup>40</sup> Non-DG customers would see a \$0 surcharge on their bills while customers with installed DG capacity would see an actual Grid Access Charge (GAC). If the comments from the renewable advocate groups are reflective of DG customer sentiment, DG customers will not be receptive to the GAF. Evergy benefits under this rate design because it would generate more revenue from DG customers. However, there is a trade-off for this increased fixed cost recovery

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<sup>39</sup> *Electric Rate Study*; Substitute for Senate Bill No. 69, 2019 Kansas Legislature. Accessed at [http://www.kslegislature.org/li\\_2020/b2019\\_20/measures/documents/summary\\_sb\\_69\\_2019](http://www.kslegislature.org/li_2020/b2019_20/measures/documents/summary_sb_69_2019).

<sup>40</sup> Lutz Direct Testimony at pg. 7, lns 13-21.

in the form of a detrimental impact on the adoption of solar generation in Kansas. The economic savings associated with self-generation are an important factor to people considering making any investment in DG capacity.<sup>41</sup>

32. The GAF will increase the cost of being connected to Evergy's grid for DG customers. Every kW of solar capacity will cost \$3 more per month, all year long. This cost offsets the savings from the DG system and further delays estimated payback periods. Non-DG customers may also lose interest in DG because of the increased costs/lower profit margin. DG customers may limit expansion of their systems. Simply put, the GAF would go against Kansas's stated policy of incentivizing renewable energy generation by private parties.

**ii. The GAF Is Exposed to Similar Legal Challenges as the Demand Charge, Which Risks Further Litigation and Increased Costs for Ratepayers**

33. The GAF is more prone to disruption from legislative action. During the time that the GAF is implemented, the Legislature may choose to respond to the Kansas Supreme Court's interpretation of 66-117d and 66-1265e. If the Legislature chooses to endorse the court's interpretation, whether directly or implicitly, then challenges to the GAF's legality will presumably be successful. If the Legislature instead changes the statute to avoid this interpretation, not only may the GAF be safe from another remand, but other rate designs may be viable once again, namely the three-part rate. Although the GAF may pass legal muster in that scenario, parties may begin looking for other ways to implement a rate design that allows different prices among DG and non-DG customers to replace the GAF. Evergy is unable to accurately

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<sup>41</sup> Tr. Vol. I at pg. 281, lns. 7-15.

compare the revenue effects generated by the GAF compared to the three-part rate design due to the number of “grandfathered” DG customers who would be subject to the GAF, if approved.<sup>42</sup> Depending on the overall burden imposed on DG customers from each rate structure, some parties may find themselves asking the Commission to re-evaluate the issue of rate design in the near future

34. This docket has generated a significant amount of debate regarding the services provided to DG customers while connected to Evergy’s grid. It is highly likely that certain groups will appeal a decision to implement the GAF. It will be a long and costly endeavor for which ratepayers may end up paying. The questions regarding the nature of DG services will surely be a large focus for litigation. Because the Kansas Supreme Court did not address this particular topic in its remand, it is difficult to evaluate how litigation might impact the balancing of interests. However, the Commission should take note of the Court’s reasoning for striking down the Demand Charge and the similarities between the GAF and Demand Charge as these factor into policy considerations for Kansas.

35. In its opinion, the Kansas Supreme Court places a significant amount of weight on Kansas’s policy towards renewable generation as codified in 66-117d. The Court determined that Kansas’s long-standing policy preference to incentive renewable generation by private parties remained the current legislative position.<sup>43</sup> The protections offered by 66-117d are to prohibit utilities from charging DG customers a higher price than non-DG customers for the same

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42 Lutz Direct Testimony at pg. 10, lns. 1-7.

43 Westar Energy, Inc. at 331.

service.<sup>44</sup> 66-1265e allows utilities to propose separate rate structures for all DG customers after 2014.<sup>45</sup> Differential pricing among rate classes has been upheld in Kansas as long as there is a reasonable basis to support it, such as policy or economical reasons.<sup>46</sup> However, regardless of the economic justification of mitigating a cost-shift between DG and non-DG customers, the Court struck down the Demand Charge because the Demand Charge was a higher charge to DG customers that did not reflect an added service, which equated to price discrimination.<sup>47</sup> The Court continues in the same breath to say that this price discrimination undermines the policy preferences of the Legislature, which the Court could not accept. Unless this policy goal is altered by lawmakers, the courts are likely to continue reviewing these cases from this perspective.

36. The GAF exhibits some of the same characteristics as the Demand Charge that put the GAF at risk of a similar fate. A GAF will only appear as an amount due on a customer's bill if that customer has installed DG capacity. Non-DG customers would pay the exact same bills under either the three-part DG rate design or GAF. This discrepancy lends itself to the conclusion that the GAF is also a form of price discrimination.

37. The utilities have asserted that DG customers' two-way relationship with the grid represents a separate and unique service, and therefore the GAF is not applied on the basis of a customer's DG status.<sup>48</sup> The utilities claim that the charge is to reflect the costs of these additional

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44 Id. at 329.

45 Id.

46 Midwest Gas Users at 663.

47 Westar Energy, Inc. at 330.

48 *See generally* Direct Testimony of Ahmad Faruqui on Behalf of Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., October 13, 2020 (Faruqui Direct Testimony); Verified Initial Comments of Southern Pioneer Electric Company and Pioneer Electric Cooperative, Inc., August 14, 2020; Joint Initial Comments on

two-way services. Not only has this particular argument not been raised in front of the courts before, but the language of “same services” does not even appear in 66-117d. The language in 66-117d seems to actually preempt the utilities’ new arguments in that 66-117d prohibits utilities from considering renewable self-generation as a basis for establishing higher rates for *any* service or commodity sold to such consumer.<sup>49</sup> The statute also prohibits gas and electric utilities from subjecting such customers to “any other prejudice or disadvantage on account of the use of any such renewable energy source.”<sup>50</sup> The Kansas Supreme Court opinion does not address the latter prohibition, which presents a significant risk of additional costly litigation. Raising the price of owning DG capacity in Evergy’s jurisdiction compared to non-DG customers is clearly a type of prejudice against DG customers on account of using DG. In fact, the GAF presents a greater risk of prejudice or disadvantage because the more DG capacity that is installed, the higher the charge will be on the bill. The ultimate question will be whether attributing the charge to a separate service will be a reasonable basis to allow the prejudice, in addition to determining whether separate services avoid the anti-discrimination provision of 66-117d. These are all questions and considerations that CURB’s proposal completely avoids and should weigh against implementation of the GAF at this time.

38. The Commission should not be in a rush to draw a response from the courts on this issue again. The Kansas Supreme Court’s remand does not require the Commission to

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Rate Design Options from Kansas Electric Cooperatives, Inc., Midwest Energy, Inc., Sunflower Electric Power Corp., and Kansas Electric Power Cooperative, Inc., August 14, 2020.

49 K.S.A. 66-117d.

50 Id.

approve a rate design that must improve fixed cost recovery. That outcome is simply a factor for the Commission's consideration. The Company has not made any claims of materially significant operational or credit concerns regarding the ongoing subsidy issue, nor has it provided any forecasts regarding increased solar proliferation in Kansas and associated problems. The GAF is estimated to generate \$205,000 of revenue not accounted for in the three-part rate design.<sup>51</sup> Evergy is preparing to make significant investments over the next several years as laid out in its Sustainability Transformation Plan (STP) in Docket No. 21-EKME-088-GIE. It does not appear that the GAF (or the minimum bill) play a substantial role in acquiring the financing for these programs, nor do they present an obstacle in moving forward with that plan.

### **C. Evergy's Proposal: Minimum Bill**

#### **i. The Minimum Bill Unfairly and Unreasonably Favors Evergy's Interests in Fixed Costs Recovery While Disproportionally Affecting Non-DG Customers**

39. Evergy's Minimum Bill proposal would start at \$35 per month and would provide Evergy the opportunity to increase fixed cost recovery from both DG and non-DG customers. The Kansas Supreme Court notes that the minimum bill is a non-discriminatory rate design that complies with 66-117d, and thus would likely avoid a challenge under the same, similar to CURB's proposal. However, Evergy's minimum bill proposal retains the RS-DG class designation separate from non-DG customers.<sup>52</sup> Unlike the GAF, the Minimum Bill is a charge based on consumption applied to all residential customers.<sup>53</sup> The initial proposal sets the

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51 Lutz Direct Testimony at pg. 9-10, lns. 23, 1.

52 Lutz Direct Testimony at pg. 12, lns. 11-12.

53 Tr. Vol II at pg. 266, lns. 5-21.

minimum bill at \$35 per month in order to recover approximately half of the \$77 per month in fixed costs required to serve customers.<sup>54</sup> Evergy's proposed minimum bill of \$35 equates to roughly consuming 278 kWh and paying the associated volumetric charge on that amount. At the "full recovery" \$77 minimum bill, it would equate to using 850 kWh per month.<sup>55</sup> This "full recovery" minimum bill presented here does not reflect future levels of fixed costs, and Evergy would likely require a higher minimum bill to achieve full recovery moving forward.<sup>56</sup> If a \$35 minimum bill is approved in this docket, the Commission must remain vigilant about the problems associated with a rising minimum bill. Evergy does not intend to leave it at \$35 and foresees a minimum bill above \$77.<sup>57</sup> If approved, Evergy would enjoy an increased level of guaranteed recovery without any corresponding changes in operations or rate of return. Evergy proposes to utilize a deferral account to track changes in revenue under the minimum bill to review in its next rate case. Unlike CURB's recommendation to use a regulatory asset to track forgone revenue, Evergy's minimum bill may result in an over-collection of revenue that will require some kind of refund to remain revenue neutral.

40. The minimum bill will disproportionately impact non-DG customers compared to DG customers. Even at \$35, the minimum bill will raise the bills of some non-DG customers. Evergy has studied the potential impact of the minimum bill on low-income and other customers. Mr. Lutz states that bills associated with unoccupied homes and apartments, outhouses, garages,

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<sup>54</sup> Lutz Direct Testimony at pg. 11-12, lns. 10-22, 1-4.

<sup>55</sup> Kalcic Direct Testimony at pg. 7, lns. 8-12.

<sup>56</sup> Tr. Vol I at pg. 158, lns. 20-23.

<sup>57</sup> Id. at lns 8-23.



and other non-household buildings may see bill increases.<sup>58</sup> Evergy acknowledges that this data illustrates an unfavorable effect of the minimum bill and is a reason that Evergy prefers the GAF.<sup>59</sup> The disparity between the impacts on DG and non-DG customers becomes more apparent as the minimum bill increases. Evergy has calculated that the average monthly usage for residential customers is 853.5 kWh.<sup>60</sup> Using a breakeven level of consumption of 850 kWh per month with a \$77 minimum bill, all residential customers using less than the class average would see an increase in their bills than they do today.<sup>61</sup> While this might adequately recover the fixed costs associated with serving the DG class, Evergy would increase its fixed cost recovery from a larger number of its non-DG customers. That end result unduly favors Evergy while increasing the bills of residential customers of various demographics and backgrounds, all in response to a DG subsidy of \$200,000 per year.

41. As the minimum bill rises, more low income people will see bill increases and energy conservation measures will produce fewer benefits. Low income customers are more affected by bill increases and budget changes compared to middle- and upper-class populations. Low income homes also tend to be smaller and less energy-efficient. As a result, usage patterns may fluctuate within a given income range. The minimum bill sets a threshold consumption level for all households. As a result, many conservation efforts, including the installation of smart devices and weatherization measures, may become cost-prohibitive. Reducing consumption and

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58 Lutz Direct Testimony at pg. 13, lns. 7-22.

59 Id. at pg. 14, lns. 6-9.

60 Id. at pg. 13, lns. 11-12.

61 Kalcic Direct Testimony at pg. 8, lns 1-7.

altering usage behavior currently has a savings value equal to the volumetric charge for residential customers. A minimum bill does not necessarily change that value, but rather a customer's ability to retain that value. If a customer manages to use less than the breakeven level of kWhs, their monthly bill is simply set at the minimum level and no financial benefit is gained from the conservation effort. The problem is magnified as the minimum bill is set higher and more people lose out on the value of reducing their usage. The impact may be even more compounded for people who wish to alter their environmental impact but cannot afford the transition to self-generation. Dr. Faruqui testified that one of the primary factors for solar proliferation in Kansas is passion for the environment.<sup>62</sup> Under a minimum bill structure, customers who are passionate about the environment but cannot afford solar panels may have to re-examine their decision to support that passion.

**ii. The Minimum Bill Will Create Administrative Burdens and Regulatory Conflicts That Outweigh the Benefits to Evergy and Stakeholders**

42. In order to address low income and other non-DG ratepayer concerns, educational materials and override provisions need to be a part of implementation of a minimum bill. Evergy represents that it could work with individual customers to override application of the minimum bill in certain situations.<sup>63</sup> Notwithstanding the volume of requests, this will require additional administrative resources and employees to operate, in addition to creating a process to apply for the relief. Stakeholder input will be necessary to develop effective metrics and standards while

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<sup>62</sup> Tr. Vol. I at pg. 262, lns. 12-20.

<sup>63</sup> Lutz Rebuttal Testimony at pg. 6-7, lns. 17-23, 1-5.

enhancing transparency in the process. Education and identification for potential recipients will also require significant effort to limit the number of customers adversely impacted by minimum bill changes. Requests will usually require a case-by-case determination by Customer Care representatives. This will be an ongoing cost to implement the minimum bill as financial circumstances changes for ratepayers.

43. Non-DG customers who see bill increases with a minimum bill may choose to leave the system outright, and Evergy losing more fixed revenue as a result.<sup>64</sup> Customers who have bills for unused or non-residential building are currently paying the only customer charge. With even a \$35 minimum bill, those customers would see a \$20 increase in each bill for simply being connected to the grid. If these customers do not qualify for low income assistance or relief from the minimum bill, a customer in that position must either accept the higher bill or choose to disconnect their property from the grid. These types of property may not be essential to the customer to remain connected. Disconnection comes with its own fees, so this customer is not likely to be receptive to the rate design, regardless of the choice. Evergy recognized this issue during testimony and indicated that it would be open to implementing a similar opt-out program for these groups if the facts warrant it.<sup>65</sup> If such a program is needed, it will be an additional ongoing cost for the minimum bill.

44. Parties have differing expectations regarding implementation of the minimum bill and these differences will require subsequent rate hearings to resolve. Evergy has indicated that

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64 Tr. Vol. I at pg. 80, lns. 6-25.

65 Tr. Vol. I. at pg. 80-81, lns. 6-26, 1-15.

it does not intend to keep the minimum bill at \$35 and that the level for full recovery will likely increase in the future. During the hearing, Dr. Glass testified that Staff considered the minimum bill to be a “stopgap intermediate measure” and that it did not fit with Staff’s philosophy on rate design.<sup>66</sup> Additionally, Evergy’s inability to create tiered subclasses for calculating the minimum bill based on dwelling type made the minimum bill a less favorable option.<sup>67</sup> It is Staff’s hope that Evergy will come up with a better rate design in the next rate case. Implementing the minimum does not require significant time or resources, but establishing low income relief options will. If a minimum bill is approved, Staff would be reluctant to acquiesce to the minimum bill going above \$35.<sup>68</sup> As such, Evergy’s and Staff’s positions on the minimum bill were no longer in sync by the end of the evidentiary hearing. The present opposition to the minimum bill along with the substantial administrative requirements discussed above set a high bar to adopting the minimum bill even as an intermediate measure.

45. The minimum bill would have pervasive impacts throughout the residential class in the form of reductions to the volumetric rate in the future, which negatively impacts energy conservation. Mr. Kalcic discusses the effect of the minimum bill in an exchange with Commissioner French. The primary conclusion is that with a minimum bill, more of Evergy’s residential revenue requirement will be recovered by the minimum bill provision. In order to avoid over collecting the class’s revenue requirement, the volumetric charge is the natural place in the rate design to make a corresponding reduction to account for the increase in fixed charge

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66 Tr. Vol. II at pg. 185, lns. 2-23.

67 Id. at pg. 217, lns. 14-23.

68 Id. at pg. 217, lns. 6-7.

revenue.<sup>69</sup> As the minimum bill revenue increases with higher minimum bills, the necessary reductions to volumetric charges grow larger. In the end, higher consumption households would see bill decreases while lower consumption households below the breakeven level would see bill increases. Such a result is not desirable as it sends wrong price signals for ratepayers interested in energy conservation during what may be a transitional time for Evergy in regards to distributed generation. Moreover, such a change would likely be brought up in Evergy's next rate case if the minimum bill is approved here. Residential customers will view the side-effects of the minimum bill as another way Evergy can guarantee fixed charge revenue at the expense of the most vulnerable of ratepayers as time progresses. Given the insignificance of the amount of the subsidy here, these issues should weigh heavily against implementation of the minimum bill.

#### **IV. Conclusion**

46. After review of the traits of each proposal, CURB's recommendation to cancel the RS-DG class, place all residential DG customers onto the standard two-part residential rate schedule, and allow Evergy to track forgone revenue in a regulatory asset provides the best balance to all the parties' interests and offers several advantages over Evergy's GAF and minimum bill proposals. Residential ratepayers' interests should take precedent in this docket in light of the policy and practical implications of each proposal and long-standing Kansas policy towards renewable energy. Additional guidance from the Kansas Legislature will be helpful in addressing the many topics in this docket. CURB's proposal allows time for the legislative process to work through the issues and provides unequalled flexibility for the Commission,

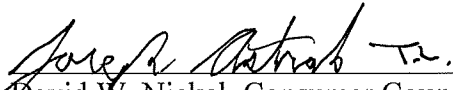
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<sup>69</sup> Tr. Vol. II at pg. 91-92, lns. 1-25, 1-21.

utilities, and stakeholders to craft a better rate design without requiring significant changes to the existing residential rate structure. There are no compelling concerns that warrant rushing into creating a new rate design without additional information and clarification from the legislature.

47. WHEREFORE, CURB respectfully requests that the Commission adopts CURB's recommendations for modifying Evergy's DG rate design.

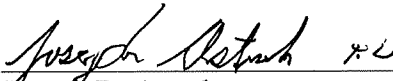
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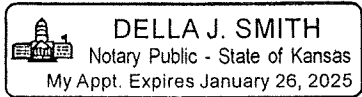
**VERIFICATION**

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.

  
\_\_\_\_\_  
Joseph R. Astrab

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of January, 2021.



  
\_\_\_\_\_  
Notary Public

My Commission expires: 1/26/2025



**CERTIFICATE OF SERVICE**

18-WSEE-328-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 11<sup>th</sup> day of January, 2021, to the following:

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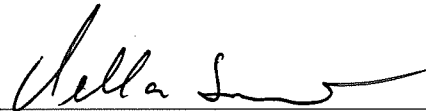
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