

**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                    )       Docket No. 19-MPCE-064-COC  
Convenience and Necessity to Transact the                    )  
Business of a Public Utility in the State of Kansas.        )

**INITIAL BRIEF OF WESTAR ENERGY, INC. AND KANSAS GAS AND ELECTRIC  
COMPANY**

**I.       Introduction**

*A.   Executive Summary*

The proposals made by Midwest Power Company (“MWP”) in this docket have the potential to significantly and negatively impact Westar Energy, Inc. and Kansas Gas and Electric Company (together as “Westar”) and their Kansas customers, as well as the public interest generally. As an applicant for a certificate of convenience and necessity to do business as a public utility in Kansas, MWP must meet the Commission’s standards for approval of a certificate, including the requirement that MWP demonstrate it has the financial wherewithal to provide sufficient and efficient service as a public utility. Consistent with the Commission’s standards, MWP should be required to show financial strength and that it has both the ability and intent to pay its obligations related to its Kansas utility operations. MWP should not be permitted to rely on Westar to meet the financial component of the standard through a highly questionable interpretation of its contractual rights. Westar disagrees with MWP’s interpretation of the contracts and disagrees with the conclusion that MWP can fail to pay for expenses at Jeffrey Energy Center (“JEC”) indefinitely without suffering any legal consequences. Furthermore, MWP’s testimony regarding how it plans to meet the financial component of the standard has changed at least twice throughout this proceeding, is not credible, and cannot be relied on.

Given that MWP has not provided the Commission with a reasonable method for meeting the financial component of the standard, the Commission should condition approval of MWP's certificate on the requirements that MWP: (1) accept responsibility for paying its share of operations and maintenance expense and capital costs at JEC, (2) indicate an intent to pay, and (3) commit to provide the financial resources of its parent company, KeyCorp, to guarantee payment of those obligations, as detailed in the Direct Testimony of Westar witness Darrin Ives and Staff witness Chad Unrein. Imposition of such conditions is consistent with Commission precedent and is necessary to protect the public interest.

*B. Background*

On August 10, 2018, MWP filed an application pursuant to K.S.A. 66-131 requesting the Commission grant it a certificate of convenience and necessity to operate as a public utility in Kansas related to MWP's 8% ownership in JEC. The 8% interest is held in a Trust and MWP is the sole beneficiary of that Trust.<sup>1</sup> Wilmington Trust Company ("WTC") is the owner trustee for the Trust.<sup>2</sup> The 8% interest in JEC held by the Trust is currently being leased to Westar, under a lease agreement that expires on January 3, 2019.<sup>3</sup> The Trust took ownership of the 8% interest in JEC as a result of a sale/leaseback transaction executed by UtiliCorp in 1991 and then leased the

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<sup>1</sup> Paine Direct Testimony, at 4.

<sup>2</sup> *Id.*

<sup>3</sup> Ives Direct Testimony, at 3.

interest back to UtiliCorp at that time.<sup>4</sup> Subsequently, in 2007, Westar assumed the lease from UtiliCorp.<sup>5</sup>

Westar, as the operator of JEC, incurs all of the operating and maintenance expense and all of the capital costs necessary to keep the plant operating.<sup>6</sup> Westar then bills the co-owners for their share of the costs, which today is GMO and, after January 4th, will be GMO and the Trust on behalf of Midwest Power.<sup>7</sup> As a result, Westar and its customers have a significant interest in ensuring that Midwest Power has the ability and intent to cover the financial obligations associated with its ownership of 8% of JEC.<sup>8</sup>

The Stipulation and Agreement approved by the Commission in Westar's most recent general rate case, Docket No. 18-WSEE-328-RTS, gives Westar the right to defer as a regulatory asset any O&M expense and capital costs billed to the Trust but not paid by the Trust and seek recovery of those costs in a future rate case.<sup>9</sup> This leaves open the possibility that Westar's retail customers will have to pay all or a portion of MWP's share of costs at JEC if MWP refuses to pay them.<sup>10</sup> However, as Staff recognized, Westar's "financial viability, whether they directly affect

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<sup>4</sup> Paine Direct Testimony, at 5-6.

<sup>5</sup> Paine Direct Testimony, at 6; Ives Direct Testimony, at 3.

<sup>6</sup> Ives Direct Testimony, at 3.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> Unrein Direct Testimony, at 26-27.

<sup>10</sup> *Id.*; Ives, Tr. at 109-110.

ratepayers or not, are [sic] a matter of great importance to the Commission's evaluation of the public interest."<sup>11</sup>

**II. MWP will be a public utility on January 4, 2019 and is required to meet the Commission's standards to obtain a certificate of convenience and necessity in order to transact business as a public utility in Kansas.**

In 1991, the Commission approved the sale/leaseback transaction that resulted in the Trust's ownership of the 8% interest in JEC. In that Order, the Commission found the sale/leaseback arrangement was purely a financing arrangement and did not result in the owner trustee or owner participant (beneficiary of the Trust) becoming public utilities. The Commission explained:

Pursuant to the lease agreements, UtiliCorp will assume sole operational responsibility for the leased interest and will become an assignee of Centel's obligations under the joint operating agreement currently in place among the owners of JEC. The Kansas Power and Light Company will continue to be the operator of JEC. UtiliCorp will have exclusive rights to the power and energy from the ownership interest being sold by Centel. The Wilmington Trust Company, as the owner trustee, the Financial Leasing Corporation, as the owner participant (and any guarantor of the obligations of the owner participant), the indenture trustee and the note purchasers have not participated in this transaction with an intent to enter the business of supplying electricity at wholesale or retail. **The ownership, leasehold, and security interests are financial in nature.** UtiliCorp will be responsible for operational obligations as Centel's assignee under the joint operating agreement . . . **It is clear the agreements are financing instruments and do not confer**

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<sup>11</sup> Unrein Direct Testimony, at 25-26.

**sufficient managerial or operational control over the JEC interest to constitute a public utility. (emphasis added).<sup>12</sup>**

However, as of January 4, 2019, after the lease expires, MWP will become a public utility under K.S.A. 66-104 and subject to the Commission’s jurisdiction. As Mr. Unrein explained,

If MWP fails to extend the lease or sell its 8% interest in JEC prior to the expiration of the Lease Agreement, the rights to the energy and capacity associated with its 8% interest in the JEC reverts back to the Trust. WTC will act on behalf of the Trust with respect to the 8% interest at the direction of MWP, as the sole participant and owner beneficiary of the trust. After the expiration of the lease, MWP will no longer qualify for the “financial interest only” exception to the definition of “public utility” under K.S.A. 66-104.<sup>13</sup>

Despite MWP witness Paine’s refusal at the evidentiary hearing to agree to the fact that MWP will be a public utility on January 4, 2019,<sup>14</sup> Kansas law is clear that MWP will be a public utility and subject to the Commission’s jurisdiction and oversight. Ms. Paine specifically admitted this fact in her direct testimony, stating that “[u]pon the expiration of the Lease Agreement, exclusive control over the 8% interest will be held by MWP, and as such, MWP will no longer qualify for the ‘financial interest only’ exception to the definition of public utility under Kansas law.”<sup>15</sup>

Because K.S.A. 66-131 requires public utilities to hold certificates of convenience and necessity when doing business in Kansas, this change in circumstances – the upcoming expiration of the lease – necessitated Midwest Power’s application for a certificate in this docket.<sup>16</sup> Mr.

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<sup>12</sup> Order and Certificate, *In the Matter of the Joint Application of UtiliCorp United Inc. and Centel Corporation for Authority to Sell and Transfer the Electrical Utility Operations and Business of Centel to UtiliCorp and, in connection, therewith, Certain Other Related Transactions*, Docket No. 175,456-U, 91-UCUE-226-MER, ¶¶ 38-39 (Sept. 30, 1991) (“1991 Sale/Leaseback Order”).

<sup>13</sup> Unrein Direct Testimony, at 11-12; see also Unrein, Tr. at 133 (“under 66-104, I think Midwest Power, whether they get a CCN in this particular docket or not, they will be a public utility because they will own, operate or control. That gives the Commission some jurisdiction”).

<sup>14</sup> Paine, Tr. at 83-84.

<sup>15</sup> Paine Direct Testimony, at 8.

<sup>16</sup> Paine Direct Testimony, at 6-7.

Unrein explained the Commission's standard for approval of a certificate under K.S.A. 66-131 in his direct testimony:

The fundamental question of K.S.A. 66-131 is: *What promotes the public convenience and necessity?* Over the past 25 years, the Commission has relied on the Merger Standards, which are a series of questions for evaluating whether a transaction would promote the public interest. In addition to the Merger Standards, in past dockets that required certificating a new public utility, the Commission established the threshold requirement that a new public utility must possess the "*financial, managerial, and technical experience*" to provide sufficient and efficient service. In its request, MWP is seeking a Certificate to transact business in Kansas because it is acquiring control of an asset, an 8% interest in the JEC, to operate the asset in the state. Thus, in this instance, one of the questions that needs to be addressed is whether MWP can meet the "*financial, managerial, and technical experience*" threshold.<sup>17</sup>

As is discussed in detail below, Westar's concerns with MWP's Application center around its ability to meet the financial component of the Commission's standard and the veracity of its witnesses' statements regarding how MWP intends to satisfy the financial component of the standard, which have changed at least twice in the four months since MWP filed its Application in the docket.

### **III. MWP does not satisfy the financial resource component of the Commission's CCN standard.**

In order to obtain a certificate to operate as a public utility in Kansas, MWP must meet the Commission's standards, which include the requirement that the applicant have the financial wherewithal to provide sufficient and efficient service as a public utility.<sup>18</sup> In its initial Application and supporting testimony, MWP acknowledged that one element of the Commission's standard for approving a certificate application is demonstration that the applicant has the financial

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<sup>17</sup> Unrein Direct Testimony, at 13.

<sup>18</sup> Unrein Direct Testimony, at 13.

wherewithal to act as a utility in the state and cover its financial obligations, recognizing that “[h]istorically, the Commission has required applicants seeking a CCN to demonstrate that they have the necessary technical, managerial and *financial* resources to conduct the business of a public utility.” (Emphasis added.)<sup>19</sup>

A. *The Trust by itself has no assets other than the 8% interest in JEC and has no business plan that would enable it to earn revenue sufficient to cover MWP’s share of expenses at JEC.*

MWP admits that the Trust holding the 8% interest has no assets other than its interest in the plant.<sup>20</sup> According to MWP, none of the lease payments from Westar – totaling almost \$14 million since 2015 – have been placed into the Trust and that money is not available to pay JEC expenses after expiration of the lease.<sup>21</sup> Instead, MWP has diverted the money around the Trust by arranging for it to be paid directly to MWP.<sup>22</sup> Currently, the balance in the Trust is only \$100.<sup>23</sup>

Under Midwest Power’s own financial analysis, which both Westar and Staff assert is overly optimistic, if Midwest is successful in obtaining a CCN and is able to sell power into the SPP market, Midwest predicts that the operating costs will significantly exceed the revenue generated in the market in the near term.<sup>24</sup> On a cumulative basis after the first four years, the Trust will have approximately \*\* [REDACTED] \*\* in unpaid obligations for MWP’s share of JEC

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<sup>19</sup> MWP Application, ¶ 24.

<sup>20</sup> Paine Direct Testimony, at 4 (“Currently, the sole asset of MWP is an 8% undivided interest in the JEC, which it holds as the sole participant and beneficiary in a Trust for which Wilmington Trust Company is the owner trustee”).

<sup>21</sup> Paine, Tr. at 37-39; Westar Exhibit 1.

<sup>22</sup> *Id.*

<sup>23</sup> Paine, Tr. at 40-41; Westar Exhibit 1.

<sup>24</sup> Paine, Tr. at 42-43.

expenses.<sup>25</sup> In the first year after expiration of the lease, the amount of unpaid obligations under MWP's would be over \*\*[REDACTED]\*\*.

Under a forecast prepared by Westar, which both Westar and Staff believe is more realistic, the Trust will have approximately \$138 million in cumulative unpaid obligations for MWP's share of JEC expenses by 2035.<sup>26</sup> Mr. Unrein explained that "[a]t a high level, Westar predicts MWP's cash flow shortfall between \$10 million to \$10.5 million per year over the first three years, and the Westar model does not produce a single year of financial profits through 2034."<sup>27</sup> He concludes that "[g]iven that Westar has had operational control over JEC and used GMO's 8% interest as a barometer," Westar's data is "more convincing of the on-going operations of MWP's interest given the current economics of coal plant operation, low market energy prices, and the overall excess capacity that currently exists in the SPP market."<sup>28</sup>

Since MWP is unable to demonstrate that the Trust has adequate resources to pay MWP's share of expenses at JEC and is therefore unable to meet the financial resources component of the standard on its own, it must find some other way to meet the requirement. However, as is discussed below, MWP has changed its position at least two times in the four months since it filed its Application regarding how it plans to meet the financial component of the Commission's CCN standard and MWP offers no credible testimony regarding its business plan for ensuring its share of the JEC obligations will be paid.

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<sup>25</sup> Paine, Tr. at 43; Westar Exhibit 2.

<sup>26</sup> Unrein Direct Testimony, Exhibit CCU-3.

<sup>27</sup> Unrein Direct Testimony, at 26.

<sup>28</sup> *Id.*



*B. MWP misled the Commission and parties to the docket about its plan to meet the financial component of the CCN standard and MWP's testimony is not credible.*

In its initial Application and direct testimony, MWP touted the financial resources of its parent company, KeyCorp, sending the message that it planned to rely on Key's resources to meet the financial wherewithal requirement.<sup>29</sup> MWP specifically stated that KeyCorp's guaranty would be amended to cover any obligations Midwest Power has under the JEC agreements. When discussing how MWP meets the financial component of the Commission's standard, MWP witness Amy Paine stated:

**Q. PLEASE DESCRIBE THE FINANCIAL RESOURCES OF MWP.**

A. The sole asset of MWP is the 8% undivided interest in the JEC. Until it is certificated as a public utility and can establish a revenue stream through the sale of energy and capacity in the wholesale market, it will have no cash flow. However, MWP is supported financially by its parent, Key, via a 2007 corporate Guaranty. KeyCorp is one of the nation's largest bank-based financial service companies, with \$137.7 billion in total consolidated assets as of December 31, 2017 and \$6.3 billion in revenue for the 12 months ended December 31, 2017.

**Q. IF MWP DOES NOT HAVE SUFFICIENT CASH FLOWS TO FULFILL ITS OBLIGATIONS UNDER THE OPERATION AGREEMENT, WILL KEYCORP FULFILL THOSE OBLIGATIONS?**

A. Yes. The Guaranty provided to MWP by KeyCorp ensures that any obligation undertaken by MWP shall be fully discharged. To the extent required, KeyCorp will modify the Guaranty to ensure that any operations, maintenance or capital expenses required to be paid by MWP pursuant to the Operation Agreement will be paid.<sup>30</sup>

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<sup>29</sup> Unrein, Tr. at 140; Ives Direct Testimony, at 4-5.

<sup>30</sup> Direct Testimony of Amy Paine, at 11.

This testimony led the parties – and likely the Commission – to believe that MWP intended to meet the financial component of the CCN requirement by relying on the financial wherewithal of its parent company, KeyCorp by amending the KeyCorp Guaranty as necessary to meet the Commission’s requirements.<sup>31</sup>

Then, in discovery and rebuttal testimony, MWP completely reversed the position taken in its Application that had been supported with sworn testimony, with respect to its reliance on KeyCorp and the KeyCorp Guaranty to meet the Commission’s financial component standard.<sup>32</sup> Instead, MWP cited to the “non-recourse” provisions that are contained in several of the contracts associated with the sale and leaseback of the 8% interest in JEC to argue that it has no obligation to pay O&M expense or capital costs for JEC. Rather, MWP asserted that Westar is required to cover any shortfalls that occur within the Trust for payment of the 8% share of O&M and capital costs at JEC. Consequently, MWP argued that it is therefore not necessary for KeyCorp to provide a guaranty to cover those expenses.<sup>33</sup>

When asked at the evidentiary hearing how she reconciled the two statements – the statement in direct testimony that MWP would amend the KeyCorp guaranty to cover obligations under the Operating Agreement in order to meet the standard, and the statement in discovery and rebuttal that MWP will not amend the KeyCorp guaranty because MWP has no obligations under the Operating Agreement – MWP witness Paine offered a third version of MWP’s position, which had not been previously presented in either direct or rebuttal testimony.<sup>34</sup> At the hearing, she

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<sup>31</sup> Ives Direct Testimony, at 4-5; Unrein, Tr. at 140 (up until responding to Westar’s data requests, MWP had “demonstrated or at least suggested that they would be willing to modify their guaranty”); Unrein, Tr. at 152 (Staff was misled by MWP’s statement that it would modify the guaranty).

<sup>32</sup> Ives Direct Testimony, at 5-6.

<sup>33</sup> See MWP’s Responses to Westar’s Data Requests 2.02 and 2.03, attached to Ives Direct Testimony; *see also* Paine Rebuttal Testimony, at 5.

<sup>34</sup> Paine, Tr. at 72 and 86.

testified that the offer she made in direct testimony to amend the KeyCorp guaranty to “to ensure that any operations, maintenance or capital expenses required to be paid by MWP pursuant to the Operation Agreement will be paid,” actually meant that MWP would amend the guarantee so that attorneys’ fees, consultants’ fees, and other expenses incurred in order to sell power into the SPP market would be paid – even though these costs were never mentioned in her direct testimony. Ms. Paine further testified that she never actually meant that KeyCorp would guarantee O&M expense or capital costs related to the operation of JEC – even though that is exactly what she said in her direct testimony.<sup>35</sup>

Ms. Paine insisted that MWP’s position has not changed over the course of the docket.<sup>36</sup> Consequently, it appears that MWP’s plan from the start of the docket was to file its Application and direct testimony without even mentioning that it believed MWP has no obligation to pay for expenses at JEC when there are shortfalls in the Trust and that it believes that Westar has the obligation to cover those shortfalls. Rather than advise the Commission of its legal position that it has no obligation to pay the costs associated with its share of JEC, MWP instead focused on the financial resources of KeyCorp, in an attempt to mislead the Commission and parties into believing that those resources would be available to help cover expenses at JEC.<sup>37</sup> Had Westar not asked data requests that forced MWP to reveal its misdirection on these issues,<sup>38</sup> it would have been possible for the Commission to approve MWP’s certificate without ever knowing that MWP’s

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<sup>35</sup> *Id.*

<sup>36</sup> Paine Rebuttal Testimony, at 9 (“MWP has not changed its position”); Paine, Tr. at 59.

<sup>37</sup> Paine, Tr. at 59-62.

<sup>38</sup> Unrein, Tr. at 140 (“Westar was the one who kind of fleshed out their new position in this particular docket. And in the DRs that were presented they stated they are no longer willing to modify the guaranty and the financial resource requirement is going to be filled through Westar Energy”).

business plan was to “lose money for four years at the expense of Westar, its shareholders and its ratepayers.”<sup>39</sup>

Given MWP’s ever-changing position, it is impossible to know with certainty how it actually intends to meet the Commission’s standard, given the fact that MWP does not meet the standard on a stand-alone basis. The one thing that is clear is that MWP and KeyCorp have no intention whatsoever of paying all of their obligations for MWP’s 8% share of expenses at JEC and that the resulting shortfall could be as much as \$138 million under Westar’s forecast.<sup>40</sup>

*C. MWP’s reliance on Westar to meet the financial component of the CCN standard is not reasonable and is not in the public interest.*

MWP argues that because Westar assumed UtiliCorp’s obligation under the Consent and Assignment Agreement to cover shortfalls for payment of the 8% share of expenses at JEC, MWP should be able to rely on Westar to meet the financial component of the CCN standard.<sup>41</sup> This argument is unreasonable and faulty for several reasons.

First, MWP ignores the fact that the obligation to pay shortfalls taken on by UtiliCorp in the Consent and Assumption Agreement, later assumed by Westar, is an obligation undertaken “for the benefit of each of the Consenting Owners.”<sup>42</sup> The Consent and Assumption Agreement specifically defines “Consenting Owners” to include “Centel, UtiliCorp, KPL and KGE” and that term does not include the Owner Trustee or Owner Participant (i.e., WTC or MWP).<sup>43</sup> MWP is relying on a claimed right to have Westar cover shortfalls in payments when that obligation was

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<sup>39</sup> Paine, Tr. at 65 (questioning from Commissioner Emler); *see also* Unrein, Tr. at 31.

<sup>40</sup> Paine, Tr. at 43; Ives, Direct Testimony, at 11; Unrein Direct Testimony, Exhibit CCU-3.

<sup>41</sup> Paine Rebuttal Testimony, at 11; Unrein, Tr. at 120 (questioning by Mr. Caro).

<sup>42</sup> Tr. at 6, MWP Exhibit 1, Consent and Assignment Agreement, Section 3.3.

<sup>43</sup> *Id.* at Section 1.1; *see also* Paine, Tr. at 82-83; Ives, Tr. at 97; Unrein, Tr. at 119.

only undertaken in the first place for the benefit of a group of parties that did not include MWP or WTC.

Second, as the guarantor of the Trust's payments of its JEC obligations for the benefit of the other owners, anytime Westar makes payment as a result of that guarantee – i.e., when the Trust does not have sufficient revenue to cover expenses – under Kansas law, Westar acquires a right to reimbursement from the guaranteed party (the Trust held by MWP).<sup>44</sup> In other words, assuming that Westar has the obligation to guarantee payment of JEC obligations when there is a shortfall in the Trust, Westar would have the right to recover any payments made from the Trust Estate. Such payments would, of course, make Westar whole and protect it (and its customers) from being required to bear the costs of generation related to the 8% interest in JEC held in Trust for MWP's benefit. However, such a right to reimbursement would only be meaningful if MWP has the financial wherewithal to repay Westar. Given the discussion above demonstrating that the Trust does not have such financial wherewithal on a standalone basis,<sup>45</sup> in order to make this right of reimbursement meaningful and avoid forcing Westar to the courts to enforce its reimbursement right, the Commission should require MWP to provide an adequate financial guaranty to cover those costs up front.

MWP's focus on the non-recourse provisions of the agreements is just a distraction from the real issue before the Commission in this docket – whether MWP meets the standard to obtain a certificate to do business as a public utility in Kansas.<sup>46</sup> The applicability and impact of the non-

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<sup>44</sup> See *Lindsey v. Zeller*, 10 Kan. App. 2d 4, 7 (1984). Even MWP admits that the Trust would have the obligation to pay Westar back if Westar guarantees payments of shortfalls. Paine, Tr. at 67-68.

<sup>45</sup> As was noted above, the weak financial condition of the Trust is due to actions by MWP to divert all income from the lease to itself, leaving the Trust with a balance of only \$100.

<sup>46</sup> Unrein, Tr. at 146.

recourse provisions are legal issues that will ultimately be resolved either through negotiations among the parties or through litigation.<sup>47</sup>

Westar disagrees with MWP's unreasonable and illogical suggestion that it can rely on Westar to cover shortfalls indefinitely without suffering any legal consequences. As Westar witness Ives explained, the "failure of MWP and WTC to pay their share of JEC costs would allow Westar to, in essence, foreclose on MWP's interest in JEC."<sup>48</sup> MWP's testimony does "not tell the whole story as to what would likely happen if MWP failed to fully pay its share of allocable JEC costs."<sup>49</sup> The non-recourse provisions

ensure that neither WTC nor MWP can be forced into covering the operating and capital expenses for JEC with respect to the 8% interest held by the Trust in the event that the assets held in the Trust Estate are insufficient to fully cover such costs. However, WTC's and MWP's underlying obligation to make payments with respect to the 8% interest held by the Trust would not be eliminated in such event; that is, I do not believe that MWP can simply rely on Westar to bear the burden of a shortfall in revenues vs. operating expenses and capex with no consequences as MWP seems to suggest . . . MWP is in a similar position from a legal perspective as a homeowner who owns a home subject to a non-recourse mortgage. If the homeowner fails to make his or her monthly mortgage payment the bank may not be able to sue to force the homeowner to continue making the required scheduled payments under the mortgage, but the bank can exercise its right to foreclose on the house due to the homeowner's payment default. Thus, in this situation, the homeowner has a choice: he or she can continue to make payments on the mortgage and preserve the right to continue to occupy the home even though the bank cannot bring a claim against the homeowner in his or her individual capacity, or it can let the bank exercise its remedies for nonpayment of the mortgage and the homeowner will be out looking for a place to live. That choice is essentially the same one that MWP may face in the event that the funds in the Trust Estate are not sufficient to cover its share of JEC costs and capital expenditures. It can dip into its own pocket (or that of KeyCorp) to cover any

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<sup>47</sup> Ives Direct Testimony, at 9; Unrein, Tr. at 153.

<sup>48</sup> See Ives Direct Testimony, at 7; Section 16 of the Ownership Agreement.

<sup>49</sup> Ives Direct Testimony, at 7.

shortfall in funds needed to pay its allocable share of JEC expenses or, alternatively, it can run the risk that the other Owners in the JEC can exercise remedies against it for non-payment (similar to a foreclosure), ultimately taking over ownership of the Trust's 8% interest.<sup>50</sup>

MWP's approach is to ask the Commission to give it a CCN without requiring it to take responsibility for its share of costs at JEC. Apparently, once MWP obtains the CCN, it will refuse to pay its share of costs – relying on its interpretation of the non-recourse provisions – and force Westar to go through a time-consuming and expensive litigation process in order to take over ownership of the 8% interest held by the Trust.<sup>51</sup> This approach is detrimental to Kansas and Kansas customers, is not in the public interest and is not consistent with the Commission's standard for allowing a company to become a public utility in Kansas, which requires the company requesting the CCN to demonstrate that it possesses the financial, technical and managerial resources necessary to conduct utility operations in the state.<sup>52</sup> As Staff witness Mr. Unrein testified, "MWP's reliance on Westar as a financial resource to cover any shortfalls between its operating revenue and its financial obligation to cover the full operating, maintenance, and capital expenditures is not in the public interest."<sup>53</sup>

While it is true that Westar would be able to exercise legal remedies to take over ownership of the 8% of JEC held by the Trust if WTC and MWP do not pay their bills, such a process would involve time-consuming and expensive litigation and would likely be drawn out over an extended period of time, all of which would negatively impact Westar and our customers and not be in the

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<sup>50</sup> Ives Direct Testimony, at 7-9.

<sup>51</sup> Ives Direct Testimony, at 9-10; Unrein Direct Testimony, at 26.

<sup>52</sup> Ives Direct Testimony, at 9-10; Unrein Direct Testimony, at 25-26.

<sup>53</sup> Unrein Direct Testimony, at 25.

public interest.<sup>54</sup> If MWP wants the Commission to approve a CCN for it to operate as a utility in Kansas and allow it to sell power into the market, it should be required to commit to cover its share of expenses and capital expenditures without forcing Westar to wade through lengthy and expensive litigation in order to exercise legal remedies and force MWP out.<sup>55</sup>

As Staff explained, the fact alone that there is a potential for litigation over the parties' rights and obligations under the non-recourse provisions makes it unreasonable for MWP to rely on those provisions to meet the financial component of the CCN standard.<sup>56</sup> And MWP's suggestion that denial of its Application would only make the shortfall for which Westar is responsible larger because it couldn't earn revenue from sales to the market<sup>57</sup> is illogical. MWP is the party creating the shortfall through its own behavior and refusal to obtain a guaranty from its parent company to cover expenses for which the Trust is clearly responsible. Despite the fact that MWP is creating the problem, MWP has the audacity to accuse the Commission of making the problem it created worse if the Commission denies its Application – all when MWP clearly hasn't satisfied the Commission's standard.<sup>58</sup> As Mr. Unrein stated, given the fact that MWP does not meet the standard for approval of a CCN, it would be more reasonable and consistent with the

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<sup>54</sup> Ives Direct Testimony, at 14.

<sup>55</sup> *Id.*

<sup>56</sup> Unrein, Tr. at 141 (“Staff knows there's litigation potential in that agreement, unlike the operating agreement or the technical prong. Westar is not willing to fund the losses without at least going into litigation. And it's that particular arrangement that Staff finds kind of to be the worst part of the technical kind of the financial resource component. It's that particular prong that Staff has relied on as not in the public interest”); Unrein, Tr. at 153-154 (“The financial resource requirement is significantly different and there's going to be controversy and most likely litigation outside of this Commission that would settle it . . . And we just feel like, because of the contractual dispute between the two entities, you cannot rely on that as achieving any financial resource requirement a CCN requires”).

<sup>57</sup> See Tr. at 134-135 (MWP counsel's questions to Staff witness Unrein).

<sup>58</sup> MWP's argument runs afoul of the “chutzpah doctrine” as explained by the D.C. Circuit Court of Appeals in *Marks v. Commissioner of Internal Revenue*, 947 F.2d 983, 986 (D.C. Cir. 1991) (“It is quite apparent that the reason the Marks kept the Commissioner - and the government - unapprised of their whereabouts was because they were fugitives from criminal prosecution. To turn around and blame the Commissioner for not finding them runs afoul of this court's developing “chutzpah” doctrine”).



public interest for the Commission to deny the Application and allow Westar to move forward with foreclosure proceedings when MWP does not pay its share of obligations.<sup>59</sup>

*D. MWP's suggestion that the Commission is somehow bound in this docket because it previously approved the sale/leaseback transaction is simply wrong.*

MWP suggests that the Commission cannot impose the conditions proposed by Staff and Westar in this docket because it already approved the sale/leaseback arrangement in 1991 and Westar's assumption of the lease in 2007.<sup>60</sup> MWP is incorrect that those previous decisions bind the Commission's actions in this docket in any way.<sup>61</sup> When the Commission approved the sale/leaseback arrangement in 1991, it was reviewing the transaction and the Trust's ownership of the 8% interest in JEC as a purely financial arrangement and found that neither the Owner Trustee nor the Owner Participant were public utilities as a result.<sup>62</sup> Now, circumstances have changed completely, and MWP will be a public utility on January 4 by virtue of its ownership interest in JEC, and is seeking authority from the Commission to do business as a public utility in the state so that it can make sales into the market and obtain revenue from those sales.<sup>63</sup>

A financing arrangement where the real beneficiaries of the 8% interest are protected from liability for expenses at the plant may be acceptable for an entity holding only a financial interest

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<sup>59</sup> Unrein, Tr. at 148.

<sup>60</sup> MWP Opening Statement, Tr. at 17 and 19.

<sup>61</sup> Although the Commission is generally required to follow its precedent, it may deviate from prior positions when there is a rational basis for a change in position. *See, e.g., Water District No. 1 v. Kansas Water Authority*, 19 Kan. App. 2d 236, 243 (1994). Here, the expiration of the lease clearly provides a basis for deviation from the prior treatment of MWP and the Trust.

<sup>62</sup> Order and Certificate, *In the Matter of the Joint Application of UtiliCorp United Inc. and Centel Corporation for Authority to Sell and Transfer the Electrical Utility Operations and Business of Centel to UtiliCorp and, in connection, therewith, Certain Other Related Transactions*, Docket No. 175,456-U, 91-UCUE-226-MER, ¶¶ 38-39 (Sept. 30, 1991) ("1991 Sale/Leaseback Order"); *see also* Unrein, Tr. at 116 ("the arrangement was simply financial").

<sup>63</sup> Unrein Direct Testimony, at 12; Ives Direct Testimony, at 10; Paine, Tr. at 48; Ives, Tr. at 102-103 ("the owner trust and participant were not a public utility when they first looked at those documents. Now that you are in requesting a CCN as a public utility under those contracts . . . What is different today than what was going on in 2006? The Commission said Midwest Power was not a public utility because it was a financial transaction. Today Midwest

and not acting as a public utility with control over the asset.<sup>64</sup> However, this arrangement is not reasonable for a public utility seeking authority to do business in the state.<sup>65</sup> It is reasonable and appropriate for the Commission, in order to protect the public interest, to require Midwest Power to demonstrate the ability and intent to pay – and KeyCorp to guarantee payment of – its share of JEC costs in order to obtain approval of its application.<sup>66</sup>

The Commission clearly has the authority to review MWP's Application in light of the circumstances as they exist today and in light of the fact that MWP is before the Commission seeking approval of a certificate.<sup>67</sup> The fact that the Commission previously approved a financing arrangement for the 8% interest in JEC and Westar's participation in that arrangement has no impact on the Commission's decision regarding MWP's Application in this docket.

**IV. The Commission should only approve a certificate for MWP if it includes the conditions necessary to ensure the financial component of the CCN standard is met and to protect the public interest.**

Westar is not opposed to the Commission's approval of a CCN for MWP as long as it includes the conditions necessary to ensure that the CCN is in the public interest. In his direct testimony, Westar witness Ives proposed the conditions Westar believes are necessary to ensure that the financial component of the CCN standard is met and that approval of the certificate is in

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Power has come in in front of this Commission and asked to be a Kansas public utility and own assets in Kansas and needs to demonstrate that they meet the criteria for this to be in the public interest").

<sup>64</sup> Ives, Tr. at 102 ("There's a different threshold today as a public utility than a financial transaction that the Commission looked at in 1991").

<sup>65</sup> *Id.*

<sup>66</sup> See Ives Direct Testimony, at 10; Unrein Direct Testimony, at 12.

<sup>67</sup> Unrein, Tr. at 146-147; Unrein, Tr. at 151 and 154-155 ("It's an analysis on its current request and the conditions that led Staff to its opinion in this docket . . . I think the application before the Commission you have to evaluate what's in the public interest at the time the Applicant necessarily comes forward with the CCN or request for a certificate").

the public interest.<sup>68</sup> Staff witness Unrein proposed very similar conditions in his direct testimony.<sup>69</sup> These conditions would “ensure that MWP actually meets the financial component of the Commission’s CCN standard by requiring KeyCorp to guarantee payment of 8% of the expenses and capital expenditures at JEC, since WTC and MWP may not have the financial resources to make such payments themselves.”<sup>70</sup> The conditions would also ensure that “the Commission retains the necessary jurisdiction over WTC, MWP and KeyCorp in order to enforce the conditions and those parties’ obligations as the co-owner of the largest power plant in the state” and “help to protect Westar’s Kansas retail customers and Westar itself from having to fund MWP’s obligations as a co-owner of JEC.”<sup>71</sup> As Mr. Unrein explained, “[w]ithout explicit recognition from MWP that KeyCorp is ultimately responsible for maintaining the financial integrity of MWP and the modification of the existing corporate guaranty that explicitly provides these assurances, the Commission cannot be assured that the threshold ‘financial qualifications’ requirement will be met.”<sup>72</sup>

*A. The conditions proposed by Staff and Westar are consistent with Commission precedent.*

The conditions proposed by Westar and Staff – that would require KeyCorp to recognize the Commission’s jurisdiction over it for purposes of for purposes of Kansas utility operations related to the 8% undivided interest in JEC, including but not limited to the enforcement of financial obligations related to capital investments, operating and maintenance expenses, fuel

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<sup>68</sup> Ives Direct Testimony, at 12-13.

<sup>69</sup> Unrein Direct Testimony, at 38.

<sup>70</sup> Ives Direct Testimony, at 14.

<sup>71</sup> *Id.*

<sup>72</sup> Unrein Direct Testimony, at 27.

expenses and other expenses associated with the ownership and operation of the 8% interest and would require KeyCorp to accept ultimate responsibility for the financial obligations related to the 8% interest of JEC held by the Trust – are consistent with Commission precedent and with recommendations made by Staff in other dockets.<sup>73</sup> As Mr. Ives explained, “Staff made similar recommendations in the docket addressing Fortis, Inc.’s acquisition of ITC Great Plains, LLC and ITC Holdings Corp., Docket No. 16-ITCW-512-ACQ, and in the Joint Application of Southwestern Public Service Company and Xcel Southwestern Transmission, LLC, Docket No. 16-SWPE-209-COC. Staff’s proposed conditions were incorporated in the Commission’s order in the Fortis/ITC docket and the application in the Xcel docket was ultimately withdrawn.”<sup>74</sup> As Mr. Unrein explained, the reason that Staff recommended these conditions in the Fortis/ITC docket and the Xcel docket was “the reliance on the financial resources of the parent company of the entity requesting the Certificate.”<sup>75</sup> Specifically, the Commission approved the requirement that Fortis – the non-public utility parent company – was required “to provide equity capital injections as needed for maintaining the financial integrity of ITC Great Plains.”<sup>76</sup>

In this case, similar circumstances exist – where MWP is relying on the financial resources of its parent company – because “the revenue produced from the sale of energy and capacity will

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<sup>73</sup> Unrein, Tr. at 144 (“Each time a subsidiary does not have the adequate resources, Staff has always looked to the parent company that controlled the asset that ultimately did have the financial resources”).

<sup>74</sup> Ives Direct Testimony, at 13; *see also* Ives, Tr. at 107.

<sup>75</sup> Unrein Direct Testimony, at 28.

<sup>76</sup> Order Approving Transaction with Conditions, *In the Matter of the Joint Application of ITC Great Plains, LLC and its Parent Company, ITC Holdings Corp., Together with Fortis Inc., FortisUS Inc., ITC Investment Holdings Inc. and Element Acquisition Sub Inc., for an Order Approving the Acquisition by Fortis Inc. of the Majority of All Classes of the Stock of ITC Holdings Corp., and its Subsidiary Companies, Including ITC Great Plains, LLC*, Docket No. 16-ITCE-512-ACQ, ¶ 14 (Oct. 11, 2016) (“As set forth in Merger Condition No. 11, Fortis has committed to provide equity capital injections as needed to maintain the financial integrity of ITC Great Plains and ITC Great Plains’ investment-grade credit rating. Staff stated this commitment is necessary to ensure that the ‘financial qualifications’ requirement will be met”).

not meet its current projected operating costs, and MWP's own financial model shows significant cash shortfalls throughout its first two years of operation.”<sup>77</sup> Thus, “explicit recognition” of the Commission's jurisdiction over KeyCorp and KeyCorp's obligation to provide the financial resources necessary to cover MWP's and WTC's obligations under the Ownership and Operation Agreements is necessary to “meet the requirements of K.S.A. 66-131.”<sup>78</sup>

*B. The Commission clearly has jurisdiction over the affiliates of a public utility to the extent their behavior has the potential to affect the public interest or Kansas customers.*

Despite MWP witness Paine's suggestion to the contrary,<sup>79</sup> the Commission has jurisdiction over the affiliates of a public utility to the extent necessary to protect the public interest or Kansas customers. In its orders in the Western Resources (referenced in the orders as “WRI”) restructuring docket, a docket opened to investigate the actions of Western Resources' non-public utility affiliate, Westar Industries, Inc. (referenced in the orders as “Westar”), the Commission clearly set out the principles applicable to its assertion of jurisdiction over non-utility affiliates.<sup>80</sup> In its Order Initiating Investigation, the Commission explained that it has

plenary authority under K.S.A. 66-101 to “supervise and control” the electric utilities doing business in Kansas and “is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction” . . . the Commission finds that the matters set forth in this Order warrant an investigation into whether the participation by WRI and its affiliates in the transactions and relationships described herein, and any other transactions or relationships which may emerge from the investigation, is consistent with Kansas law, including WRI's and KG&E's statutory

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Paine Rebuttal Testimony, at 14.

<sup>80</sup> Order Initiating Investigation, *In the Matter of the Investigation of Actions of Western Resources, Inc. to Separate its Jurisdiction Electric Public Utility Business from its Unregulated Businesses*, Docket No. 01-WSRE-949-GIE (May 8, 2001) (“Western Resources Restructuring Docket”).

obligations to provide efficient and reliable service to Kansas customers at just and reasonable rates. The Commission further finds that it has jurisdiction to conduct this investigation.<sup>81</sup>

Then, in its final Order in the docket, in response to a challenge from Western Resources to the Commission's jurisdiction to impose requirements on its non-utility affiliate, the Commission explained that it had "sufficient legal basis" to take "reasonably necessary actions to protect the public interest from harm."<sup>82</sup> The Commission explained:

The Commission is not exercising jurisdiction over all of WRI's internal decisions or transaction. Rather, the Commission, consistent with the overall regulatory scheme of the Kansas Public Utilities Act, is exercising jurisdiction over transactions that affect the public interest.

In the context of a public utility, intercorporate dealings and reorganizations can have negative consequences for economic viability of the utility's operation and visit financial misfortunes not only on the shareholders but also ratepayers of the utility company. . . . The requirements of the Supplemental Order and this Order prevent WRI from endangering its assets through transactions with its affiliates and saddling the utility business with debt associated with its nonutility investments. Such requirements are reasonably necessary to protect the public from the harm caused by WRI's transactions, as currently designed.

. . . .

The Kansas Legislature granted the Commission full power, authority and jurisdiction to supervise and control electric public utilities. The Commission recognizes that the rights offering was filed at the SEC by Westar and not WRI. But WRI controls Westar, and thus has the power to prevent Westar from taking actions which harm WRI's ratepayers. . . .

. . . the Commission's powers go beyond strictly setting rates and extend to enactment of rules, policies and regulations that are reasonably necessary steps in ratemaking to serve the public interest and fulfil the Commission's statutory obligation to "supervise and

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<sup>81</sup> *Id.* at ¶¶ 14 and 18.

<sup>82</sup> Order, Western Resources Restructuring Docket, ¶ 71 (July 20, 2001).

control” electric public utilities. The Commission is expected to fulfill its statutory duties and do what is reasonably necessary to protect the public.<sup>83</sup>

More recently, the Commission exercised jurisdiction over a non-utility affiliate in order to protect the public interest when it denied Great Plains Energy Incorporated’s (“GPE”) initial request to acquire Westar in Docket No. 16-KCPE-593-ACQ. Many of the concerns the Commission had about the initial transaction between GPE and Westar were related not to conduct of the two Kansas public utilities involved (Westar and KCP&L) but to the potential financial condition of the non-utility parent company, GPE, after consummation of the proposed transaction.<sup>84</sup>

*C. MWP will have the option to comply with the proposed conditions in order to obtain approval of its CCN Application and the Commission would not be “re-writing” contracts by imposing conditions.*

MWP suggests that the conditions proposed by Staff and Westar would “re-write” existing contracts.<sup>85</sup> That is not at all what Westar is proposing. Instead, Westar has proposed certain

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<sup>83</sup> Order, Western Resources Restructuring Docket, ¶¶ 72-73, 76-77 (July 20, 2001).

<sup>84</sup> Order, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Westar Energy, Inc. for Approval of the Acquisition of Westar Energy, Inc. by Great Plains Energy Incorporated*, Docket No. 16-KCPE-593-ACQ (April 19, 2017) (“Order Denying GPE merger with Westar”). For example, the Commission found that

GPE's market capitalization is only \$4.8 billion, yet it proposes to pay Westar a \$4.9 billion acquisition premium. The size of the acquisition premium calls into question GPE's ability to service the transaction-incurred debt as evidenced by Moody's decision to downgrade GPE to the lowest investment grade rating. To remain at an investment grade rating, there is little margin for error. If GPE's projections are inaccurate or intervening events such as rising interest rates occur, GPE is in danger of losing its investment grade rating . . . GPE does not dispute that they will incur a large amount of debt to acquire Westar. Nor does it dispute it has no written plan to deleverage.

*Id.* at ¶¶ 92 and 94.

<sup>85</sup> MWP Opening Statement, Tr. at 12.

conditions the Commission should impose on its approval of MWP's certificate in order to remain consistent with its past practice in awarding such a certificate and to protect the public interest.<sup>86</sup> MWP can choose to comply with those conditions by committing to provide the financial resources of KeyCorp to cover its share of expenses at JEC and obtain the requested certificate or to not comply and not obtain approval of its request.<sup>87</sup>

The Commission imposes these types of conditions on a regular basis. In its Order denying GPE's and Westar's first request to obtain approval of their merger, the Commission made findings in that docket that the contracts between Great Plains and Westar were not in the public interest and outlined changes that could be made to the agreements in order to satisfy its merger standards.<sup>88</sup> Westar and Great Plains were free to choose to rework their agreements in order to obtain approval of the merger or to refuse to make changes but not receive approval from the Commission.<sup>89</sup> As Mr. Ives explained, in the GPE/Westar merger docket, "the contracts were signed, executed and concentrated and put in place for the merger. In fact, Great Plains had issued equity and issued debt in regards to those contracts that ultimately ended up getting unwound because they couldn't meet the Commission's standards for public interest. Midwest will have a

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<sup>86</sup> Ives Direct Testimony, at 12-13.

<sup>87</sup> Ives, Tr. at 105.

<sup>88</sup> See Order Denying GPE merger with Westar, generally.

<sup>89</sup> Ives, Tr. at 100-101, 105.



choice to make, if the Commission imposes conditions on this deal, whether they want to meet the Commission standards for demonstrating the public interest.”<sup>90</sup>

## **V. Conclusion**

It is not in the public interest for MWP to obtain a certificate so that it can force Westar to incur costs, including costs to buy coal, to operate its 8% share of Jeffrey without taking responsibility for paying the full amount of those costs, or for MWP to force Westar into default remedies or costly litigation to take over ownership of its 8% share of the plant. If MWP wants a certificate, it needs to take financial responsibility up front and make the financial resources of its parent company, KeyCorp, available to back up that commitment. The conditions Mr. Ives and Mr. Unrein proposed in their direct testimony achieve this result, are consistent with Commission precedent, and would protect the public interest. Therefore, Westar requests that the Commission approve MWP’s request for a certificate only if it includes the conditions proposed by Staff and Westar.

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<sup>90</sup> Ives, Tr. at 105.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed, this 28<sup>th</sup> day of December 2018, to all counsel of record.

/s/ Cathryn Dinges

Cathryn Dinges