

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

In the Matter of the Application of )  
Midwest Power Company For )  
A Certificate of Public Convenience )  
And Necessity to Transact the )  
Business of a Public Utility In the )  
State of Kansas. )

Docket No. 19-MPCE-064-COC

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**INITIAL BRIEF OF MIDWEST POWER COMPANY**

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COMES NOW, Midwest Power Company (“MWP”) and hereby files its Initial Brief (“Brief”) in compliance with the Order Setting Procedural Schedule of the State Corporation Commission of the State of Kansas (“Commission” or “KCC”) dated October 23, 2018. For its Brief, MWP hereby states as follows:

**I. INTRODUCTION**

**A. Procedural History**

1. On August 10, 2018, MWP filed an application (the “Application”) with the Commission pursuant to K.S.A. 66-131 requesting a limited and contingent Certificate of Convenience and Necessity (“CCN”) to operate as a public utility in Kansas with respect to its non-severable 8% interest in the Jeffrey Energy Center (the “JEC”). As part of its Application, MWP filed the direct testimony of Amy Paine, Senior Vice President of Midwest Power Company. MWP sought expedited approval of its Application because the sale-leaseback transaction impacting the CCN is expiring on January 3, 2019.

2. On August 17, 2018, Westar Energy, Inc. and Kansas Gas and Electric Company (“Westar”) filed a Petition to Intervene, which was granted on September 18, 2018 by the Commission. Commission Staff (“Staff”) filed direct testimony of Chad Unrein on November 9, 2018 and Westar filed direct testimony of Darrin Ives on November 15, 2018. MWP filed rebuttal testimony of Amy Paine on December 4, 2018, and Steve Dean on December 3, 2018.

3. On October 23, 2018, the Commission issued its Order Setting Procedural Schedule, which scheduled a hearing on December 18, 2018 (the “Hearing”). This Order also scheduled that Simultaneous Initial Post-Hearing Briefs would be due on December 28, 2018 and Simultaneous Reply Briefs on January 4, 2019. The Order set out that a Commission Order will be due by February 5, 2019.

4. On December 18, 2018, at the Hearing, Amy Paine and Steve Dean testified on behalf of MWP, Darrin Ives testified on behalf of Westar, and Chad Unrein testified on behalf of Staff.

**B. The 8% Interest in JEC**

5. In 1991, a sale-leaseback structure for the 8% interest in the JEC was created. At that time, Aquila Inc. (“Aquila”, then Utilicorp United, Inc. (“Utilicorp”)) desired to purchase all of Centel Corporation’s (“Centel”) electric assets in Kansas, which included an 8% interest in the JEC tied to Centel’s customers. For the financing of the transaction, Aquila assigned its purchase rights to Wilmington Trust Company in its capacity as Trustee for a Trust Estate, subject to the Trustee’s agreement to immediately lease the interest back to Aquila (the “Lease”).<sup>1</sup> At that time, Financial Leasing Corporation was the sole beneficiary of the Trust Estate. The Trustee’s purchase of the 8% interest was funded by Financial Leasing Corporation and several Note Purchasers. In order to qualify as a lease for the tax purposes, Aquila was given an option—but not the obligation—to purchase the interest at the end of the Lease. However, as is typical with sale-leaseback transactions for non-severable assets, it was assumed that, upon Lease-end, such interest would nonetheless be purchased by Aquila. As such, preliminary financing parameters and procedures for the Lease-end purchase were set by the Lease.<sup>2</sup> This sale-leaseback transaction was approved by the KCC in Docket 91-UCUE-226-MER.

6. In 2006, Aquila attempted to sell its entire interest in the JEC to Mid-Kansas Electric Company (“Mid-Kansas”). Westar, however, intervened in the docket and forced the parties to file an amended application. Westar exercised an option it had to purchase Aquila’s

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<sup>1</sup> Rebuttal Testimony of Amy Paine, Ex. 3, Lease Agreement, dated August 15, 1991.

<sup>2</sup> Lease Agreement, §6.



interest, and step into the shoes of Aquila as to its obligations and privileges regarding the 8% interest in the JEC. The KCC approved this transaction in Docket 06-MKEE-524-ACQ, and Westar formally assumed all obligations.<sup>3</sup>

7. In 2007, MWP acquired the 8% interest in the JEC from Financial Leasing Corporation. MWP is an Ohio corporation organized by and existing pursuant to the laws of the State of Ohio, and is in good standing in all respects. MWP conducts business in the State of Kansas as a properly registered foreign corporation in good standing. MWP is a wholly-owned subsidiary of KeyCorp. Currently, the sole asset of MWP is the 8% undivided interest in the JEC, which it holds as the sole participant and beneficiary the Trust Estate. The remaining 92% of the JEC is owned in part by Westar (84%) and Kansas City Power & Light Company (8%), which are now combined under their common parent, Evergy, Inc.

8. Currently, Westar operates the JEC pursuant to the Operating Agreement, dated June 1, 1978 (“Operating Agreement”).<sup>4</sup> Pursuant to the Lease, the 8% interest held by MWP is currently leased to Westar. However, the Lease is set to expire on January 3, 2019, at which time the 8% interest in the JEC will be returned to MWP. For the avoidance of any doubt, although the interest will be “returned” to MWP, on January 4, 2019, the 8% JEC interest is non-severable and the Operating Agreement requires that Westar will continue on as operator of the JEC.

9. Upon the 8% interest in the JEC being formally returned to MWP on January 4, 2019, MWP will have no control over JEC because Westar will continue to be the operator of

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<sup>3</sup> Rebuttal Testimony of Amy Paine, **Ex. 4**, JEC Transfer Agreement, dated August 11, 2006. *See, e.g.*, § 2.1 (“Westar will assume and accept the assignment and transfer of all rights, benefits, claims, liabilities and obligations of Aquila relating to the JEC Transferred Interest, including all rights, benefits, claims, liabilities and obligations of Aquila arising under the JEC Documents.”)

<sup>4</sup> Midwest Power Company Application for Certificate of Convenience and Necessity, **Ex. D**.

JEC, but MWP will have the control over the energy and capacity associated with the 8% interest in JEC. That energy and capacity will be sold in interstate commerce pursuant to the exclusive authority granted by the Federal Energy Regulatory Commission ("FERC"). As such, MWP will no longer qualify for the financial-interest-only exception to the definition of "public utility" under Kansas law.<sup>5</sup> Therefore, MWP believes it is required to apply for a CCN from the KCC in order to legally exercise the limited powers of control it will obtain.

**C. Position of MWP**

10. MWP has demonstrated that it has met the burden to be granted a CCN. Under K.S.A. 66-131, there are three resource requirements that the Commission uses to guide its approval or denial of a CCN in Kansas.<sup>6</sup> These three resource requirements are: (1) technical resource requirements, which MWP has indisputably satisfied; (2) managerial resource requirements, which MWP has indisputably satisfied; and (3) financial resource requirements, which is the only requirement currently in contention based on testimony at the Hearing. MWP submits that it has satisfied this requirement based on the undisputed fact that Westar is obligated to cover any shortfalls of the JEC based on numerous, undisputed contractual provisions, described below. The speculation regarding any subsequent actions that might be taken by Westar in retaliation of such provisions do not go to the matter of whether MWP has the financial resources required to obtain a CCN in Kansas. MWP has the financial resources to cover all obligations that MWP has under the pertinent JEC agreements and contracts.

11. Based on the false pretense that MWP does not have the necessary financial resources, Staff and Westar proposed that the Commission place several conditions on MWP's

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<sup>5</sup> See Docket No. 175,456-U (91-UCUE-226-MER), Order and Certificate, filed Sept. 27, 1991, ¶39 (finding MWP's predecessor in interest qualified for a financial-interest-only exception to the definition of "public utility") (hereinafter "1991 Order").

<sup>6</sup> K.S.A. 66-131.

CCN. As discussed below, none of the conditions are justified and some would be illegal if applied.

12. This is a unique situation, which requires a careful analysis.<sup>7</sup> As was discussed at length during the Hearing, there are a number of facts in this proceeding which make it different than a traditional CCN application. The nature of the 8% interest in the JEC as a non-severable asset makes many of the implications of being denied a CCN different for MWP and Westar, than such denial would be for a CCN application for a severable asset. Further, MWP is seeking a CCN to operate as an independent power producer (“IPP”) that will only sell power at wholesale in interstate commerce, under the regulation of the Federal Energy Regulatory Commission (“FERC”).<sup>8</sup> It appears that the KCC has never issued a CCN for an IPP, since K.S.A. 66-104 exempts IPPs built after 2001 from KCC regulation. The arbitrary 2001 cutoff requires MWP to request a CCN, when many of the traditional concerns and analyses of a CCN application are inapplicable.<sup>9</sup> Further, the fact that MWP, WTC and KeyCorp have virtually no control over the operations of the JEC, leads the Application to carry a different weight than a traditional application for a CCN.<sup>10</sup>

13. In addition, a number of parties have attempted to make comparisons between this docket and past cases of the Commission, but this docket contains facts dissimilar to past

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<sup>7</sup> Tr. p. 136, ll. 20-24.

<sup>8</sup> MWP has already received its Market-Based Rate Authorization from FERC effective January 1, 2019. Midwest Power Co., Docket No. ER19-223-000 (unpublished delegated FERC letter order issued November 28, 2018).

<sup>9</sup> See generally, Tr. p. 126, l. 11 – p. 130, l. 10.

<sup>10</sup> Tr. p. 92, ll. 6-15; p. 95, ll. 10-18 (Question by Frank Caro, counsel for MWP: “So it’s safe to say that, I mean, they have no control over the maintenance costs of the plant. Correct? That’s done by the operator pursuant to the operating agreement?” Answer by Darrin Ives on behalf of Westar: “Pursuant to the operating agreement which they will be a party to. That’s what conducts the operations and maintenance of the Plant. But you’re right. The operator has the overall responsibility for ensuring effective operation and maintenance of that facility.”)



arrangements.<sup>11</sup> The contracts concerning the JEC have been in existence for decades: the Commission reviewed and approved the original agreements in 1991, and the transfer agreements in 2007. This docket does not contain a party proposing a merger arrangement, this docket contains a party requesting the Commission grant a certificate to continue the transaction that was drafted, approved and consummated in 1991, and has been in existence for over twenty-seven years. Denial of a CCN will not result in the negotiation of a new deal, as the contractual obligations are already locked into place. If the Commission denies the CCN, or grants a CCN with the onerous conditions proposed by Staff and Westar, it will only serve to damage the public interest by creating more uncertainty and undermining the sanctity of the contracts that are already in place.

14. Finally, the transfer of the 8% interest on January 4, 2019 to MWP is a situation that was unforeseen until just a few months ago.<sup>12</sup> When corporations use sale-leaseback arrangements as financing instruments for non-severable assets, there is an expectation that the lessor which owns the asset will almost never become the final owner: the option to purchase at the end of the lease exists for tax purposes, with the intention that the lessee will eventually purchase the asset at lease-end. MWP requests Commission approval for the ability to transact business legally under a CCN in the state of Kansas, so that on January 4, 2019, and onward, it can manage this unforeseeable circumstance.<sup>13</sup>

## **II. ARGUMENT AND AUTHORITIES**

### **A. MWP has satisfied the requirements to be granted a CCN**

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<sup>11</sup> As is discussed in Sec. II.D below, parties have made a number of comparisons attempting to find instances in which the Commission has exercised certain jurisdiction over parent companies, but more pertinent to this Sec. I is the discussion by Cathryn Dinges, counsel for Westar, in Tr. p. 26, ll. 21-24.

<sup>12</sup> Tr. p. 66, l. 19 – p. 67, l. 4.

<sup>13</sup> Direct Testimony of Amy Paine, p. 7, ll. 8-12.



15. There is no dispute as to whether MWP has satisfied the technical and managerial resource requirements to be granted a CCN. For the technical prong, MWP will rely upon Westar to operate the JEC, including the 8% interest, pursuant to its contractual obligations under the Operating Agreement. For the managerial prong, MWP will rely upon a contract with a qualified agent, which will act as a Market Participant for the purpose of scheduling the power and interfacing with the Southwest Power Pool on behalf of MWP.

16. For the financial resources prong, MWP has demonstrated that it will satisfy all financial obligations for which it is responsible. It will also rely upon the contractual obligations of Westar to cover any shortfalls between revenue and operation costs while the current prices in the capacity and energy markets improve. Neither Staff nor Westar has disputed Westar's obligation to cover such shortfalls, and neither has provided a rational argument for why reliance on a contractual provision for the financial prong is inappropriate, while reliance on contractual provisions for the other prongs is perfectly acceptable.

**B. Whether or not Westar has foreclosure rights is a contractual dispute, which is irrelevant to the fact that MWP has met the burden to be granted a CCN**

17. Throughout the pre-filed testimony, and the Hearing, no party has disputed MWP's interpretation of the contractual provisions requiring payment of shortfalls by Westar.<sup>14</sup> The financial obligations of MWP for any shortfalls of the JEC are covered according to the 1991 Consent and Assumption Agreement, in which Aquila agreed to cover all shortfalls,<sup>15</sup> and

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<sup>14</sup> See, e.g., Tr. p. 23, ll. 14-21. Cathryn Dinges, counsel for Westar, describes the interpretation as "illogical," because Westar *would* exercise its rights of foreclosure (such rights are currently disputed by MWP), but does not assert that the interpretation is incorrect, nor deny that Westar stepped into such obligation to cover shortfalls in the 2007 assumption. Tr. p. 123, l. 25 – p. 124, l. 13. (Chad Unrein, on behalf of Staff, confirming that this is not in dispute).

<sup>15</sup> The form document attached as **Exhibit D** in the Application; the executed version is **MWP's Exhibit 1** from the Hearing. See *generally*, Testimony of Chad Unrein, Exhibit CCU-1; Rebuttal Testimony of Amy Paine, p. 5, l. 15 – p.7, l. 9.

the 2006 JEC Transfer Agreement<sup>16</sup> and 2007 Consent and Agreement<sup>17</sup> in which Westar assumed all obligations of Aquila. The 1991 Consent and Assumption states:

Utilicorp hereby agrees, for the benefit of each of the Consenting Owners, to promptly pay and perform all liabilities and obligations arising out of the Transfer Documents with respect to the Ownership Agreement and the Operating Agreement relating to the Undivided Interest. This Agreement by UtiliCorp shall continue until all such liabilities and obligations are satisfied and whether or not UtiliCorp is then an Owner under the Ownership Agreement or the Operating Agreement or whether or not UtiliCorp then has any ownership or other interest in the Undivided Interest. The agreements of this subsection 3.3 by UtiliCorp shall survive the expiration or termination of the Lease and/or any or all of the other Transfer Documents between UtiliCorp and others.<sup>18</sup>

The 2006 Transfer Agreement states:

Westar will assume and accept the assignment and transfer of all rights, benefits, claims, liabilities and obligations of Aquila relating to the JEC Transferred Interest, including all rights, benefits, claims, liabilities and obligations of Aquila arising under the JEC Documents[.]<sup>19</sup>

The 2007 Consent and Agreement states:

Westar hereby shall be bound by all of the covenants and agreements of Aquila in the JEC Lease Documents and the JEC Project Documents... and shall assume and agree for the benefit of each of the Lessor Parties to pay and perform all liabilities and obligations of Aquila under the JEC Lease Documents[.]<sup>20</sup>

18. As a result, MWP has indisputably satisfied the financial resource prong as required for approval of its CCN Application.<sup>21</sup> MWP has the financial resources to fulfill all of its obligations, and the *absence* of certain obligations cannot be considered a strike against MWP. The only dispute is whether Westar has some form of foreclosure rights in the event

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<sup>16</sup> Rebuttal Testimony of Amy Paine, Ex. 4, Transfer Agreement.

<sup>17</sup> Rebuttal Testimony of Amy Paine, Ex. 5, Consent and Agreement.

<sup>18</sup> Consent and Assumption at §3.3. (Emphasis added).

<sup>19</sup> Transfer Agreement, §2.1.

<sup>20</sup> Consent and Agreement, §2.2.

<sup>21</sup> See generally, Tr. p. 71, ll. 12 -22.

Westar pays for shortfalls. While ultimately an issue for the courts, Westar's alleged foreclosure rights are superseded by the numerous non-recourse provisions, and the 1991 Consent and Assumption Agreement.<sup>22</sup> Regardless, the foreclosure rights issue fundamentally misses the question of the financial resource requirement for MWP to be granted a CCN in Kansas.<sup>23</sup>

19. On January 4, 2019, the JEC will continue to operate. On February 5, 2019, the day that the Commission is scheduled to rule on the CCN, the JEC will continue to operate. On February 6, 2019, the day *after* the Commission has ruled on the CCN, and onward, the JEC will continue to operate.<sup>24</sup> The expiration of the Lease, and the reversion of the interest to MWP does not affect the day-to-day operations of the JEC, and will not affect the citizens of Kansas who obtain their power from the JEC. Specifically, there is no harm to the Westar ratepayer or the Westar shareholder to grant the CCN, and there is no harm to the public.<sup>25</sup> As Westar has done each and every day it operates the JEC, Westar will pay the costs associated with running the JEC: the fuel costs, and the non-fuel operations and maintenance costs, as well as any capital expenditures necessary.<sup>26</sup> Westar will then invoice MWP,<sup>27</sup> and MWP will pay its financial obligations up until the point where there are shortfalls between the expenses and the revenue,<sup>28</sup>

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<sup>22</sup> Including but not limited to: Rebuttal Testimony of Amy Paine, **Ex. 1** (the Centel Assignment and Agreement, dated August 15, 1991, § 11); Rebuttal Testimony of Amy Paine, **Ex. 2** (Participation Agreement, dated August 15, 1991, § 19.10); Lease Agreement, § 20.9.

<sup>23</sup> This is undisputed by Westar. Tr. p. 23, l. 23 - p. 24, l. 1. (Cathryn Dinges, counsel for Westar: "The dispute over the interpretation of the contracts will ultimately be resolved either through negotiations between the parties or by the courts and that dispute is really not relevant to the Commission's decision in this docket."); Tr. p. 98, ll. 11-14 (Darrin Ives on behalf of Westar: "[I]t's kind of irrelevant because at the end of the day those will be contractual disputes settled through negotiations or the courts. Don't affect the Commission's ruling on a CCN.").

<sup>24</sup> Tr. p. 126, ll 2-6.

<sup>25</sup> In addition, it must be noted that the expenses of the JEC were anticipated in Docket 18-WSEE-328-RTS, the most recent Westar rate case, which provides an option for Westar to recover certain costs related to the JEC if necessary. *See generally*, 18-WSEE-328-RTS, Non-Unanimous Stipulation and Agreement, ¶¶27-32.

<sup>26</sup> *See generally*, Tr., p. 21, ll. 9-12; Tr. p. 91, ll. 19-23.

<sup>27</sup> *See generally*, Tr., p. 21, ll. 13-15; Tr. p. 91, l. 23 - p. 92, l. 5.

<sup>28</sup> Tr. p. 68, ll 2-11.



at which point the contractual provisions requiring Westar to cover the shortfalls will trigger. Then, upon a shortfall, it will be up to the determination of the parties whether and how to pursue those disputes based on the differently-interpreted contractual provisions.

20. To be clear, potential litigation is not a rational basis for denying a CCN. As was discussed at length at the hearing, Staff had concerns that litigation would ensue between Westar and MWP pending the end of the lease, and the differences in the interpretation of the numerous contracts binding the JEC.<sup>29</sup> However, if threatened litigation was a basis for denying a CCN, it would encourage any party opposed to a CCN to threaten meritless litigation in an attempt to tie the Commission's hands. Further, Westar and MWP both have the financial resources for such litigation, and using such resources to determine the adequate division of responsibility is an exercise appropriate of two corporations in their respective positions. This does not threaten the public interest; invalidating or altering a contract is more dangerous to the public interest than any such litigation. Moreover, denying the CCN will not alleviate the Staff's concern about litigation. If the CCN is denied, the 8% interest will nevertheless revert to MWP and—in the absence of settlement—the parties will still end up litigating the contractual issues.

21. The conditions proposed by Staff ("Staff's Conditions")<sup>30</sup> and Westar ("Westar's Conditions")<sup>31</sup> on this issue miss the mark. In the midst of this contractual dispute, should the Commission require any type of guaranty from KeyCorp, MWP's parent, as a condition of the CCN, the Commission would be inherently picking a side in what is indisputably a contractual

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<sup>29</sup> Tr. p. 141. (Chad Unrein on behalf of Staff: "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.")

<sup>30</sup> Direct Testimony of Chad Unrein, p. 38.

<sup>31</sup> This shall include both the conditions enumerated in the Direct Testimony of Darrin Ives, p. 12, and the conditions circulated via e-mail on October 18, 2018, which are attached as **Exhibit B** to Midwest Power Company's Response to Westar's Motion for Order Requiring Refiling of Application and Supporting Testimony And Restarting 180-Day Clock.



dispute.<sup>32</sup> The Commission cannot claim that it remains neutral on the contractual dispute if it were to alter contracts previously agreed to in a manner that benefits one party to the detriment of the other party. Not only would it be picking a side, but requiring a guaranty would be rewriting a deal that was struck in 1991, and again in 2006, and was approved by the Commission in each of those instances; requiring a guaranty is a bailout of Westar, at the expense of MWP.

22. Finally, the effect of the Commission abrogating or rewriting any of the JEC contracts by requiring an unnecessary guaranty sets uncertain precedent for any transactions in the future. There would be questions about the value of contractual provisions, when the KCC shows that it can, and will, abrogate any agreement that might potentially cause litigation in the future. This would have the effect of invalidating financial instruments which currently allow utilities to obtain capital at rates and through methods beneficial to ratepayers that they might not otherwise be able to obtain.

### **C. Granting the CCN is in the Public Interest.**

23. In 1991, the sale-leaseback transaction allowed Aquila access to capital on reasonable terms, which resulted in a lower cost of service for its customers.<sup>33</sup> The sale-leaseback was approved by the Commission as an instrument that provided benefits to the ratepayer, and to Aquila who voluntarily entered into the obligations contained in the agreements. Requiring MWP to cover the obligations voluntarily entered into by Aquila and

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<sup>32</sup> See, e.g., Tr. p. 28, l. 24 – p. 29, l. 1. (Cole Bailey, counsel for Staff: “The hearing today is about Midwest Power’s application for a certificate, not about the contracts and agreements between the parties.”); Tr. p. 29, ll. 9-18; Tr. p. 69, ll. 18-19. (Amy Paine on behalf of MWP: “Westar and Midwest Power will be involved in a contract dispute.”).

<sup>33</sup> Tr. p. 116, ll. 4-7 (Chad Unrein on behalf of Staff: [discussing the benefits of a sale-leaseback] “I mean it allows financial institutions to be able to come in and fund arrangements. You know. It gives you additional access to market capital that you may or may not have had without a financial leaseback.”). See also, Tr. p. 101, l. 19 – p. 102, l. 5.

assumed by Westar, after the benefit of the agreements has already inured to the ratepayers, would undermine the sanctity of the agreements and be contrary to the public interest. Denial of the CCN (or granting the CCN based on onerous conditions) only serves to create uncertainty for the JEC and for future financial arrangements in Kansas. Conversely, approval of the CCN will permit the contractual issues to be resolved through the appropriate avenues of negotiation or litigation, while allowing MWP to operate as a public utility in the meantime, thereby providing more certainty regarding MWP's ability to sell energy generated by the 8% interest. The operations of the JEC are not harmed by granting a CCN to MWP: by nature of being a non-severable asset, there are no incremental costs to having MWP involved in the JEC. Approval of the CCN will also confirm that financial investors and corporations supplying electric power in Kansas can rely on the contracts made without fear of inappropriate interference.

**D. To exercise jurisdiction over KeyCorp and WTC misapplies precedent and is inappropriate in this docket.**

24. Staff and Westar have based their argument that the Commission can and should exercise jurisdiction over KeyCorp and WTC based on three dockets, all of which are clearly distinguishable from the present case. Most fundamentally, MWP is an IPP and not a franchised traditional public utility. In all cases but this one, IPPs *themselves* are not regulated by the Commission, so extending jurisdiction over an IPP's *parent company* goes much too far. Moreover, the conditions proposed by Westar and Staff in this case go beyond the requirements imposed in the previous dockets, as none of those dockets required the parent companies to submit themselves to regulation as a public utility.

(1) 01-WSRE-949-GIE<sup>34</sup>

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<sup>34</sup> Tr. p. 52, l. 9 – p. 55, l. 6. Docket reference provided by Westar to put Commission on administrative notice.

25. KCC Docket No. 01-WSRE-949-GIE addressed the inappropriate comingling of a public utility with its non-utility affiliate businesses.<sup>35</sup> The situation in Docket No. 01-WSRE-949-GIE is hardly analogous to the present case, where there has been no accusation of inappropriate comingling of public utility business with non-public utility business. In fact, any concerns about affiliate transaction issues are appropriately addressed by K.S.A. 66-1401, 66-1402 and 66-1403, which are further discussed below.

(2) 16-ITCE-512-ACQ<sup>36</sup>

26. KCC Docket No. 16-ITCE-512-ACQ addressed the acquisition of ITC Great Plains, LLC (“ITC Great Plains”) by Fortis, Inc. (“Fortis”). As part of the settlement in that case, Fortis agreed to provide equity capital injections as necessary to maintain the financial integrity and credit rating of ITC Great Plains.<sup>37</sup> Fortis also agreed to notify the KCC in the event of a credit-rating downgrade and to take certain corrective actions.<sup>38</sup> Fortis did not agree to be generally regulated as a “public utility.” Moreover, ITC Great Plains’ cost of service is indirectly, but automatically, recovered through retail rates. Accordingly, the credit ratings of ITC Great Plains and Fortis have an indirect impact on retail rates and the condition imposed was narrowly tailored to address that impact. Conversely, in this case, Staff and Westar have proposed a general condition that would subject WTC and KeyCorp to the KCC’s broad jurisdiction over public utilities, with no nexus to any defined ratepayer harm.

(3) 16-SWPE-209-COC<sup>39</sup>

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<sup>35</sup> See 01-WSRE-949-GIE, Order No. 51: Requiring Financial and Corporate Restructuring by Western Resources, Inc., filed Nov. 8, 2002.

<sup>36</sup> Tr. p. 55, l. 7- p 56, l. 1. Docket reference provided by Westar to put Commission on administrative notice. See also, Direct Testimony of Chad Unrein, p. 28.

<sup>37</sup> 16-ITCE-512-ACQ, Order Approving the Transaction with Conditions, Ex. A, filed Oct. 11, 2016, ¶ 11.

<sup>38</sup> *Id.* at ¶ 12.

<sup>39</sup> Direct Testimony of Chad Unrein, p. 28.



27. KCC Docket No. 16-SWPE-209-COC involved the transfer of certain transmission assets from Southwest Public Service Company (“SPS”) to Xcel Energy Southwest Transmission, LLC (“XEST”), both of which were wholly-owned subsidiaries of Xcel Energy, Inc. (“Xcel”). Staff proposed that the Commission “explicitly recognize that Xcel is ultimately responsible for the operation and maintenance of the Transmission Assets held by any entity under its corporate umbrella.”<sup>40</sup> The parties eventually withdrew their application,<sup>41</sup> and the Commission never issued an order on the merits. First, the condition proposed by Staff in the Xcel case did not make Xcel a “public utility,” subject to the Commission’s general jurisdiction. Second, the proposal was never ruled upon by the Commission and, therefore, does not amount to valid precedent. Third, as with the ITC case, the condition in the Xcel case was proposed at the outset of a transaction requiring Commission approval and not as an additional condition many years after the subject transaction was consummated and approved by the Commission.

28. As the above cases demonstrate, the Commission has consistently developed conditions that narrowly address the specific concern at hand. In this case, the proposed conditions by Staff and Westar are unreasonably broad and vague. While some narrowly-tailed conditions—such as restricting the flow of funds out of the Trust Estate or MWP to KeyCorp—may be drafted to be reasonable, no party has proposed such conditions. Rather, Staff and Westar ask the Commission to declare broad jurisdiction over entities that do not qualify for jurisdiction under the law.

**E. MWP should be exempt from 66-101b through 66-101f, 66-109, 66-117, 66-128 and 66-128a through 66-128g**

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<sup>40</sup> 16-SWPE-209-COC, Report and Recommendation Utilities Division, filed May 25, 2016, p. 14,

<sup>41</sup> 16-SWPE-209-COC Motion for Withdrawal of Joint Application, filed June 3, 2016.



29. Staff argues that the Commission should deny the request for exemption of such statutes, “consistent with the Commission Order in the ITC 07-380 Docket”<sup>42</sup> however such docket is not factually similar to the issue at hand, and so such instructive guidance must be appropriately curbed. Initially, in the ITC docket, ITC was considered to be exempt from K.S.A. 66-101b through 66-101f, 66-128 and 66-128a through 66-128e based on federal preemption, and MWP requests the same treatment for these statutes, as such federal preemption would apply to the KCC’s regulation of MWP in a similar manner as to ITC. For the remaining statutes, the ITC docket contains limited precedential value. ITC Great Plains was a transmission-only company, with a limited, transmission-only CCN. The Commission looked at ITC as a provider of solely transmission service throughout its analysis of this issue,<sup>43</sup> and therefore any applicable precedent must be viewed through such lens. In many pertinent ways, MWP as a minority interest holder in a 2185MW coal plant, is in a vastly different circumstance, which has material implications on the analysis. However, based on their differences, MWP requests again an exemption from the provisions of 66-109, 66-117, 66-128 and 66-128f through 66-128g based on their inapplicability to the situation of MWP as a minority-interest owner in the JEC.

**F. An agreement by MWP and KeyCorp that KeyCorp represents an “Affiliated Interest” is superfluous, as the statutes speak for themselves**

30. Staff’s Condition that MWP and KeyCorp agree that KeyCorp represents an “Affiliated Interest” under K.S.A. 66-1401, 66-1402 and 66-1403 is an unnecessary condition to place on the CCN. The statutes speak for themselves, and any such “agreement” by KeyCorp and MWP does not alter the requirements of the statutes.

**III. CONCLUSION**

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<sup>42</sup> Direct Testimony of Chad Unrein, p. 38.

<sup>43</sup> 07-ITCE-380-COC, Order Approving Stipulation & Agreement And Addressing Application of Statutes, filed June 5, 2007 , pp. 20-21.

In this unique situation, MWP has met the standard to be granted a CCN. It has indisputably satisfied the technical and managerial resource requirements. At issue is only the financial resource requirement, which it has met through contractual arrangements put in place in 1991 and 2006, which fulfill the obligations of MWP pertaining to the JEC. It is not necessary for the Commission to put any such condition on the CCN that would abrogate, or in any way affect those contractual provisions, for which the differing of interpretations is for a court to decide. MWP has requested the ability to legally transact business in the State of Kansas, and has requested a waiver of statutes that simply do not apply to the situation of MWP and the JEC.

WHEREFORE, for the reasons cited above, MWP respectfully requests the Commission grant MWP the relief described above.

Respectfully submitted,

POLSINELLI PC

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**VERIFICATION**


STATE OF Missouri )

COUNTY OF JACKSON )

I, Frank Caro, being duly sworn, on oath state that I am counsel to Petitioners, that I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

By:   
Frank Caro

The foregoing pleading was subscribed and sworn to before me this December\_\_\_\_, 2018.

  
Notary Public

My Commission Expires:

3/12/2021

BETTY J. LAW  
NOTARY PUBLIC-NOTARY SEAL  
STATE OF MISSOURI  
JACKSON COUNTY  
MY COMMISSION EXPIRES 3/12/2021  
COMMISSION # 13539229

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading has been   x   emailed,        faxed,        hand-delivered and/or mailed, First Class, postage prepaid, this December 28, 2018, to:

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