

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

**MIDWEST POWER COMPANY’S RESPONSE TO WESTAR’S MOTION FOR ORDER
REQUIRING REILING OF APPLICATION AND SUPPORTING TESTIMONY AND
RESTARTING 180-DAY CLOCK**

COMES NOW, Midwest Power Company (“MWP”) and hereby files its response to the November 5, 2018 *Motion for Order Requiring Refiling of Application and Supporting Testimony and Restarting 180-Day Clock* (“Motion”) filed by Westar Energy, Inc. (“Westar”). Westar’s Motion should be denied, as the allegations made in the Motion are false and restarting the 180-day clock is against the public interest. In support of its Response, MWP hereby states as follows:

I. Background

1. On August 10, 2018, MWP filed an application pursuant to K.S.A. 66-131 requesting on an expedited basis that the Commission grant it a certificate of convenience and necessity to operate as a public utility in Kansas with respect to its 8% interest in the Jeffrey Energy Center (“JEC”). MWP holds its interest through a Trust for which Wilmington Trust Company (“WTC”) is the Owner Trustee. In support of its application, MWP provided the direct testimony of Amy Paine, Senior Vice President, Midwest Power Company. MWP’s application states that it is supported financially by its parent, KeyCorp, via a 2007 corporate

Guaranty, and notes that the Guaranty provided to MWP ensures that any obligation required to be paid by MWP shall be fully discharged.

2. MWP's interest in the 8% portion of the JEC arises from a financial arrangement originally negotiated in 1991 by UtiliCorp, WTC, Financial Leasing Corporation (predecessor in interest to MWP), and several note purchasers. WTC, as Owner Trustee of the Trust, acquired the 8% interest and leased it back to UtiliCorp. In every agreement to which WTC is a party, there are provisions making it clear that WTC is only entering the agreement as Owner Trustee of the Trust and has no personal liability. Additionally, this financial arrangement included the Consent and Assumption Agreement, pursuant to which WTC and Financial Leasing Corporation specifically disclaimed their personal liability for any post-lease shortfalls between revenues and operating expenses and UtiliCorp agreed to cover any such shortfalls. The Commission found this financial agreement to be in the public interest and approved this financial agreement in its Order and Certificate issued in Docket No. 175-465-U (91-UCUE-226-MER) on September 27, 1991. The financial agreement greatly benefited UtiliCorp and facilitated UtiliCorp's purchase of Centel Corporation's public utility assets in Kansas in 1991, which the Commission found to be in the public interest. Several years later, Westar agreed to assume all obligations and liabilities of Aquila, Inc. (formerly UtiliCorp) pursuant to the JEC Transfer Agreement and the JEC Consent & Agreement, which were found to be in the public interest and approved by the Commission in Docket No. 06-MKEE-524-ACQ on February 23, 2007.

3. On November 5, 2018, Westar filed its Motion, attempting to delay the proceedings as leverage to rewrite the UtiliCorp/Westar contractual obligations to cover any revenue shortfalls associated with the 8% interest in the JEC. Westar falsely alleges that MWP,

in its responses to Westar data requests,¹ reversed the position taken in its application with respect to its reliance on KeyCorp and the KeyCorp Guaranty to meet the Commission's financial component standard.² Westar improperly asserts that MWP's responses to Westar data requests (i) constitute a material and fundamental change to its application; (ii) are inconsistent with testimony provided in support of its application; and (iii) undermine the factual basis on which MWP relied to argue that it meets the Commission's standards for approval of a certificate.³ Westar argues MWP's responses to the data requests represent an "about-face" in that MWP is no longer willing to modify the KeyCorp Guaranty to take over Westar's own contractual commitment to ensure that all of the operations and maintenance expenses associated with the 8% interest are paid.

4. Westar now asserts that MWP should be required to file a new application for a certificate of convenience and necessity, supported by new testimony, and that the re-filing of MWP's application should restart the 180-day time period for a Commission decision on MWP's application. Westar also asks the Commission to direct MWP to explain why it should not be subject to sanctions for "misleading the Commission" in the initial version of direct testimony filed under oath.⁴

II. Response of MWP

a. MWP's statements in its application are consistent with the structure of the transactions approved by the KCC

5. MWP vigorously disputes Westar's assertions which it views as evidencing a lack of understanding of the basic transaction structure agreed to the parties in 1991 and affirmed in

¹ A full and complete copy of MWP's data request responses is attached hereto as **Exhibit A**.

² Westar Motion at ¶5.

³ Westar Motion at ¶ 8.

⁴ *Id.* at ¶ 13.

2007. It is Westar that has completely changed its position and whose current characterization of the Guaranty contradicts not only its own description of that agreement only three weeks ago, but also the agreement itself, which Westar's predecessor agreed to, the KCC approved, and Westar expressly assumed.

6. In its application, MWP stated that "[t]o 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."⁵ As Westar grudgingly recognized in its proposed conditions:

[MWP] does not have direct obligations under the JEC Ownership Agreement or JEC Operation Agreement. Instead, only the Owner Trustee (*i.e.*, WTC), as the holder of legal title to the 8% JEC interest, has obligations under those agreements and, further, a number of provisions of the applicable agreements arguably purport to limit the obligation of [MWP] or WTC to make payments solely out of the assets in the Trust Estate.

Westar's interpretation of the agreements is not "purportedly" correct, it is undeniable. The agreements expressly provide that MWP and WTC have no obligations outside of the Trust and *Westar* is solely responsible for any shortfalls in revenue. The KCC approved the agreements in 1991 and approved Westar's assumption of these same agreements in 2007. At no time has MWP represented that KeyCorp would modify the Guaranty to relieve Westar of its obligation under such agreements.

7. Nor has Westar at any time explained why it would be appropriate to rewrite the parties' commercial agreement in that manner. In fact, contrary to its prior explicit—and correct—admission that neither the Guaranty nor any other document obligates MWP or KeyCorp to cover revenue shortfalls, Westar now attempts to achieve that result through subterfuge, by misleading the Commission into finding that MWP agreed to such an amendment.

⁵ MWP Application at ¶ 28. (Emphasis supplied.)

MWP has not done so, and nothing that it has told the Commission has ever suggested that it would.

8. MWP's response to Westar Data Request No. 2.02 states as follows:

Part (a):

In each agreement regarding Jeffrey Energy Center to which Wilmington Trust Company ("WTC") is a party, there is language stating that WTC is executing the agreement solely in its capacity as Owner Trustee under the powers expressly conferred upon it by the Trust Agreement. This language makes it clear that no personal liability or responsibility is assumed by WTC, and any person making a claim under the various agreements, including the Operating Agreement, must look solely to the Trust Estate for satisfaction of such claim. *E.g.*, Centel Assignment Agreement, § 11 (Aug. 15, 1991); Participation Agreement, § 19.10 (Aug. 15, 1991); Lease Agreement, § 20.9 (Aug. 15, 1991).

Likewise, Midwest Power is not personally liable for any amounts payable by Owner Trustee under the Ownership Agreement or the Operating Agreement, pursuant to Section 4 of the Consent & Assumption Agreement (Aug. 15, 1991), which states:

Owner Participant shall have no liability, obligation, responsibility or duty to any of the undersigned whatsoever for or with respect to any of the transactions contemplated by the Ownership Agreement or (after termination of the Lease) the Operating Agreement, whether as a result of the negligence or willful misconduct of the Owner Trustee in its individual capacity or otherwise.

Accordingly, the Trust Estate has sole responsibility for the all operating costs allocable to the 8% interest in the JEC. Neither WTC nor Midwest Power has responsibility for such costs in their personal capacities. If there are shortfalls between the revenues generated by the 8% interest and the allocable operating costs, Westar's predecessor in interest (UtiliCorp) agreed to cover such shortfalls. Consent & Assumption Agreement, § 3.3. Westar agreed to assume all obligations and liabilities of UtiliCorp pursuant to the JEC Transfer Agreement (Aug. 11, 2006) and the JEC Consent & Agreement (Feb. 2007).

The KCC approved the Consent & Assumption Agreement in Docket No. 175-456-U (Sept. 27, 1991) and the JEC Transfer Agreement in Docket No. 06-MKEE-524-ACQ (Feb. 23, 2007).

Part (b):

It is not necessary for KeyCorp to guarantee any operating costs required to be paid by Midwest Power pursuant to the Operating Agreement, because as discussed above, Midwest Power is not required to pay any such costs. KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs, because to do so would abrogate the contractual rights described above.

9. As noted in response to Westar Data Request Nos. 2.02 and 2.03, a review of the multitude of agreements defining the respective responsibilities and obligations of MWP and WTC clearly demonstrates that the Trust has sole responsibility for all operating costs allocable to the 8% interest in the JEC. Neither WTC nor MWP has any responsibilities for such costs in their personal capacities. Rather, Westar alone, by assuming the obligations of Utilicorp, agreed to be liable for any shortfalls between the revenues generated by the 8% interest and allocable operating costs pursuant to the JEC Transfer Agreement and the JEC Consent & Agreement.

10. Westar is now showing its lack of understanding of the numerous contracts it negotiated. There are over 30 agreements to review in detail to understand the various obligations and rights which were previously heavily negotiated by each of the parties and approved by the Commission. These agreements provide a clear picture of a consistent structure applied across the documentation and it is inconceivable how Westar can deny that it is solely responsible under its contracts for any revenue shortfalls associated with the 8% interest in the JEC.

11. Westar's improper attempt to shift its clear contractual obligations onto a financial investor in a public utility asset in Kansas is not in the public interest and sends a damaging message to the financial marketplace.

b. Westar has been aware of its obligations for some time and there is no prejudice

12. Westar's claim that it only learned of MWP's position regarding amending the Guaranty seven days before the deadline for Staff and intervenor testimony is patently false and disingenuous. Counsel for Westar was told verbally of MWP's position that it had no obligation to amend the Guaranty on October 27, 2018 to assume Westar's contractual obligations and MWP's rationale for its position was very clearly articulated and discussed. Furthermore, though MWP was aware of the Consent and Assumption agreement in August when it filed its application, it was Westar's own proposed conditions to MWP's certificate,⁶ and in particular Condition No. 5, circulated by Westar counsel on October 18, 2018, that highlighted the provisions in the various agreements that specifically limit the obligation of MWP and WTC to make payments solely out of the assets of the Trust.

13. Both the data requests and the conditions circulated by Westar on October 18, 2018 cast a spotlight on the financial obligations undertaken by Westar when they thrust themselves into the midst of Mid-Kansas Electric Corporation's ("MKEC's") acquisition of Aquila's assets in 2006. Notably, in Docket No. 06-MKEE-524-ACQ, MKEC and Aquila filed an application that would have made MKEC the Lessee of the 8% interest in the JEC, but Westar pushed itself into the middle of that transaction and forced the parties to file an amended application in which Westar took on all of the obligations of the Lessee. Nobody forced Westar to take this position; in fact, Westar went out of its way to force itself into this position for its own financial benefit. Upon receipt of the data requests and proposed conditions, MWP scrutinized the Consent and Assumption Agreement and other relevant agreements to confirm that it is indeed Westar—not MWP—that has the obligation to cover any revenue deficiencies created by a lack of revenue in the Trust. In fact, not only the Consent and Assumption

⁶ Westar's proposed conditions are attached hereto as **Exhibit B**.

Agreement but the entire suite of documents relevant to the 8% interest in the JEC⁷ make it clear that there is no recourse to any entity other than the Trust. Westar was aware of this obligation since assuming it pursuant to Docket No. 06-MKEE-524-ACQ.

14. Westar is now attempting to unnecessarily delay and derail the regulatory process and take MWP's application hostage in order to convince the Commission to upend the contractual financial commitments it made over a decade ago by requiring MWP or its corporate parent to guarantee payments for shortfalls that are Westar's contractual responsibility.

15. As noted in MWP's response to Westar DR 2.02 as quoted above, the KCC approved the Consent and Assumption Agreement in Docket No. 175-456-U and the JEC Transfer Agreement in Docket No. 06-MKEE-524-ACQ. Westar's attempt to evade its contractual obligations contained within the Consent and Assumption Agreement and to impose a liability on Key which neither Westar nor any of the other contractual parties bargained for is a collateral attack on the Commission Orders approving those agreements. Nowhere in Westar's motion does it deny that it has the contractual obligations noted by MWP. In 2006-2007 Westar perceived value to itself in agreeing to backstop any deficiencies in the Trust, and the bill for that value is now due. Westar should not be permitted to engage in regulatory sleight-of-hand by attempting to force MWP to take on through the Guaranty the very obligations Westar itself bargained for.

c. Restarting the 180-day clock is not authorized by law and is not in the public interest

⁷ See, e.g., Participation Agreement (August 15, 1991) at §§ 19.10, 19.11; Trust Agreement (August 15, 1991) at § 6.06; Lease Agreement (August 15, 1991) at §§ 14.2, 20.0; Consent and Assumption Agreement (August 15, 1991) at § 4; APA Assignment (August 15, 1991) at § 3; Centel Assignment (August 15, 1991) at § 11; Site and Supports Assets Lease (August 15, 1991) at § 13; Support Facilities Agreement (August 15, 1991) at § 5.6; Assignment of Operating Agreement (August 15, 1991) at § 7; Centel Indenture and Bill of Sale (August 15, 1991) at § 11.

16. There is no just cause to re-starting the 180-day clock and requiring MWP to file an amended application and new supporting testimony, and to do so would be damaging to MWP. MWP has made no new arguments requiring an amendment—its initial application and supporting testimony committed to amending the Guaranty to cover any expenses MWP is required to pay—and that is still accurate. Accordingly, MWP meets the financial requirement of the Commission’s CCN standard. Allocation of responsibility for revenue shortfalls is an established contractual matter that will not be altered with a new application. As such, an amended application may only serve to delay MWP’s ability to sell power generated by its 8% interest in the JEC and further exacerbate any revenue shortfalls that Westar is required to pay.

17. In addition, K.S.A. 66-117(c) is the only Kansas statute that specifically permits a re-starting of the clock based upon “an amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment.” In the Freedom Pipeline application referenced by Westar in support of its request to re-start the clock, the Commission did order a re-starting of the clock in a certificate proceeding pursuant to K.S.A. 66-131, but MWP submits that the circumstances of that proceeding are markedly different from the instant docket. In the Freedom Pipeline case, Freedom Pipeline voluntarily and substantially amended its application in an effort to respond to and alleviate concerns vocalized by numerous parties to the docket. In this proceeding, MWP would have no new or additional information to discuss in an amended application, other than to note what is being discussed here; that is, that MWP has the financial obligation to pay expenses arising from its 8% interest in the JEC from proceeds from the Trust,

and when the resources from the Trust are exhausted, the obligation to pay such expenses then falls squarely on Westar. Requiring an amended application and re-starting the 180-day clock will not alter the respective obligations of the parties pursuant to the relevant agreements.

18. Westar's tactic to blame MWP in this proceeding, through its false accusations of misrepresentation and suggestions of sanctions, should be flatly rejected by the Commission. As Westar's discovery requests and proposed conditions clearly demonstrate, Westar was well aware from the time MWP filed its application in early August that the obligations of WTC and MWP were limited to the Trust, yet it delayed sending the data requests and proposed conditions that revealed Westar's knowledge until mid-to-late October, three weeks before its intervenor testimony was due. MWP's timely responses to data requests that were issued at the eleventh hour by Westar can hardly be construed as delay on MWP's part.

19. The evidentiary hearing in this case is still over a month away and the parties have plenty of time to review and confirm the obligations contractually assumed by Westar and account for those obligations when making their case to the Commission.

III. Conclusion

20. For the foregoing reasons, Westar's Motion should be denied and MWP urges the Commission to expeditiously approve its application.

Respectfully submitted,

POLSINELLI PC

By: /s/ Anne E. Callenbach

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VERIFICATION

STATE OF Missouri)
)
COUNTY OF Jackson)

I, Anne E. Callenbach, 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: 
Anne E. Callenbach

The foregoing pleading was subscribed and sworn to before me this November 8, 2018.


Notary Public

My Commission Expires:

3-24-19

KIM SARTAIN
NOTARY PUBLIC-NOTARY SEAL
STATE OF MISSOURI
JACKSON COUNTY
MY COMMISSION EXPIRES 3/24/2019
COMMISSION # 15424786

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 November 8 , 2018, to:

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/s/ Anne E. Callenbach
Anne E. Callenbach

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.01

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.01) Please provide the Assignment and Assumption Agreement dated as of September 2007 between MPC and Financial Leasing Corporation and a list of the Guaranteed Agreements referred to in the KeyCorp Guaranty. Confirm it is KeyCorp's intent for the same list to be covered by any conditional KeyCorp guaranty if ordered by the Commission in this CCN proceeding.

Submitted by: Cathy Dinges

Response:

See attached Owner Participant Assignment and Assumption Agreement between Financial Lesing Corporation and Midwest Power Company, dated September 20, 2007.

The following agreements are referred to as the "Guaranteed Agreements" in the KeyCorp Guaranty. It is KeyCorp's intent to leave the current Guaranty in place, which will cover this list of agreements.

1. Participation Agreement (Aug. 15, 1991)
2. Trust Agreement (Aug. 15, 1991)
3. Lease Agreement (Aug 15, 1991)
4. The Tax Indemnification Agreement (Aug 15, 1991)
5. Amendment No. 5 to Ownership Agreement (Aug 15, 1991)
6. The Consent and Assumption Agreement (Aug 15, 1991)
7. The APA Assignment (Aug 15, 1991)
8. The Centel Assignment (Aug 15, 1991)
9. The Support Assets & Unit 4 Bill of Sale (Aug 15, 1991)
10. The Centel Deed (Aug 15, 1991)
11. The Site and Support Assets Lease (Aug 15, 1991)
12. The Support Facilities Agreement (Aug 15, 1991)



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13. The Assignment of Operating Agreement (Aug. 15, 1991)
14. The Centel Indenture & Bill of Sale (Aug. 15, 1991)
15. The Mortgage (Aug 15, 1991)
16. The Notes (Aug. 15, 1991)
17. The Indenture (Aug. 15, 1991)
18. The Closing Certificate (Sept. 30, 1991)
19. The CitiBank Guarantee (Sept. 30, 1991)
20. Owner Participant Assignment & Assumption Agreement (Sept. 20, 2007)

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/1/2018

Westar Energy
Midwest Power Certificate of Public Convenience
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2nd Set of Data Request

Data Request No: 2.02

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.02) Please (a) identify the respective responsibilities and obligations of each of MPC and the Owner Trustee with respect to the costs of operation, maintenance, capital additions and improvements, fuel and other expenses allocable to the 8% interest in the JEC referenced in the Application under the Operation Agreement after the expiration of the lease in January 2019, and (b) confirm that all of such expenses will be subject to and covered by KeyCorp pursuant to the KeyCorp Guaranty, including in the event the funds in the trust estate are insufficient to fully discharge the obligations of MPC and the Owner Trustee with respect to the expenses allocable to the 8% interest in the JEC. In the case of each of clause (a) and (b), please provide citations or references to the applicable contractual agreements and specific provisions supporting your response. If your response to (b) with respect to any of the identified expenses is that the KeyCorp Guaranty does not cover those expenses, please indicate whether KeyCorp is willing to provide a new or amended guaranty as a condition of obtaining its CCN in this proceeding that does cover such expenses.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to subpart (a) of this data request on the grounds that subpart (a) of the question is not designed to elicit material facts within the Company's personal knowledge, and it requires a conclusion of law in violation of paragraph 16 of the Protective and Discovery Order. Similarly, Midwest Power objects to this data request on the grounds that all subparts of the question require the Company to (1) make a legal conclusion in violation of paragraph 16 of the Discovery and Protective Order; and (2) analyze and prepare data that Westar is able to prepare on its own.

Without waiving the foregoing objection, Midwest Power responds as follows:

Part (a):

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In each agreement regarding Jeffrey Energy Center to which Wilmington Trust Company ("WTC") is a party, there is language stating that WTC is executing the agreement solely in its capacity as Owner Trustee under the powers expressly conferred upon it by the Trust Agreement. This language makes it clear that no personal liability or responsibility is assumed by WTC, and any person making a claim under the various agreements, including the Operating Agreement, must look solely to the Trust Estate for satisfaction of such claim. *E.g.*, Centel Assignment Agreement, § 11 (Aug. 15, 1991); Participation Agreement, § 19.10 (Aug. 15, 1991); Lease Agreement, § 20.9 (Aug. 15, 1991).

Likewise, Midwest Power is not personally liable for any amounts payable by Owner Trustee under the Ownership Agreement or the Operating Agreement, pursuant to Section 4 of the Consent & Assumption Agreement (Aug. 15, 1991), which states:

Owner Participant shall have no liability, obligation, responsibility or duty to any of the undersigned whatsoever for or with respect to any of the transactions contemplated by the Ownership Agreement or (after termination of the Lease) the Operating Agreement, whether as a result of the negligence or willful misconduct of the Owner Trustee in its individual capacity or otherwise.

Accordingly, the Trust Estate has sole responsibility for the all operating costs allocable to the 8% interest in the JEC. Neither WTC nor Midwest Power has responsibility for such costs in their personal capacities. If there are shortfalls between the revenues generated by the 8% interest and the allocable operating costs, Westar's predecessor in interest (UtiliCorp) agreed to cover such shortfalls. Consent & Assumption Agreement, § 3.3. Westar agreed to assume all obligations and liabilities of UtiliCorp pursuant to the JEC Transfer Agreement (Aug. 11, 2006) and the JEC Consent & Agreement (Feb. 2007).

The KCC approved the Consent & Assumption Agreement in Docket No. 175-456-U (Sept. 27, 1991) and the JEC Transfer Agreement in Docket No. 06-MKEE-524-ACQ (Feb. 23, 2007).

Part (b):

It is not necessary for KeyCorp to guarantee any operating costs required to be paid by Midwest Power pursuant to the Operating Agreement, because as discussed above, Midwest Power is not required to pay any such costs. KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs, because to do so would abrogate the contractual rights described above.

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Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Laine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.03

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.03) Please confirm that the KeyCorp Guaranty will, absent a permitted transfer by MPC of the 8% JEC interest to another party, remain in effect until the complete retirement of the JEC and that the guaranty will guarantee the payment of all costs associated with the dismantlement of the plant, including closure and monitoring of the related landfill and other retirement costs allocable to the 8% JEC interest including any future environmental liability. Please provide citations or references to the applicable contractual agreements and specific provisions supporting your response. If your response is that the KeyCorp Guaranty will not remain in effect until the complete retirement of JEC and/or that it will not guarantee payment of any of the costs listed above, please indicate whether KeyCorp is willing to provide a new or amended guaranty as a condition of obtaining its CCN in this proceeding that does remain in effect until the complete retirement of JEC and does guarantee payment of all of the costs listed above.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to this data request on the grounds that request is not designed to elicit material facts within the Company's personal knowledge, and/or that the request requires a conclusion of law. Midwest Power further objects on the grounds that the question is designed to require the Company to analyze and prepare data that Westar is able to prepare on its own.

Response:

Without waiving the foregoing objection, Midwest Power responds as follows:

The KeyCorp Guaranty does not guarantee the payment of costs associated with the dismantlement of the plant, closure and monitoring of the related landfill, other retirement costs, or future environmental liability allocable to the 8% interest. It appears such costs are addressed by Section 10 of the Operating Agreement. The Operating Agreement is not one of the "Guaranteed Agreements" under the KeyCorp Guaranty.

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For the same reasons as discussed in Westar Data Request 2.02, KeyCorp is not willing to provide a new or amended guaranty that would make KeyCorp responsible for such costs.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Faine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
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Data Request No: 2.04

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.04) Please confirm that Westar, in its capacity as an Owner and Operator, will be a direct beneficiary of the KeyCorp Guaranty if MPC or the Owner Trustee were to fail to meet its payment obligations as an Owner with respect to the 8% JEC interest under the Operation Agreement after the expiration of the lease. Please provide citations or references to the applicable contractual agreements and specific provisions supporting your response. If your response is that Westar, in its capacity as an Owner and Operator, is not a direct beneficiary of the KeyCorp Guaranty after expiration of the lease, please indicate whether KeyCorp is willing to provide a new or amended guaranty as a condition of obtaining its CCN in this proceeding that makes Westar, in its capacity as an Owner and Operator, a direct beneficiary.

Submitted by: Cathy Dinges

Response:

Westar, in its capacity as an Owner and Operator, is not a direct beneficiary of the KeyCorp Guaranty.

For the same reasons as discussed in Westar Data Request 2.02, KeyCorp is not willing to provide a new or amended guaranty that would make Westar, in its capacity as an Owner and Operator, a direct beneficiary.

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Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.05

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.05) Describe all steps MPC has taken or plans to take to register as a market participant at SPP and to register its 8% share of JEC in the SPP market, including a description of timing for each step. Provide copies of any correspondence between KeyCorp or MPC and SPP and provide a written description of any verbal conversations that have occurred between representatives of Key Corp or MPC and representatives of SPP.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to this request to the extent that the request for written descriptions of any verbal conversations requires preparation of documents that do not currently exist and is overly burdensome.

Response:

Without waiving the foregoing objection, Midwest Power Responds as follows:

Please see Midwest Power Company's Response to KCC Staff DR No. 3, which was provided to Westar Energy on October 11, 2018 and is being updated concurrently with this response, for information pertaining to the current status of negotiations with a consultant to act as Market Participant within SPP. Correspondence between SPP and Midwest Power's consultant, DAI, is attached.

Westar Energy
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Verification of Response

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Signed: Amy Laine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.06

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.06) Please describe the estimated amount of credit support or security that will need to be provided by MPC or KeyCorp in respect of its SPP obligations, including credit support in favor of any market participant engaged by MPC/KeyCorp/WTC to market the energy and/or capacity associated with the 8% JEC interest.

Submitted by: Cathy Dinges

Response:

The registered market participant will have responsibility for satisfying the SPP credit obligations, not Midwest Power or KeyCorp.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paene

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.07

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.07) In assessing the financial obligations of WTC/MPC/KeyCorp with respect to the 8% JEC interest following the expiration of the lease in January 2019, please provide the projected amount of any cash flow shortfalls, determined on at least a semi-annual basis, between the revenues derived from energy and capacity sales less the amounts of cash expenses allocable to the 8% JEC interest for such periods.

Submitted by: Cathy Dinges

Objection: Midwest Power objects to this request because the documents requested are protected by the attorney-client privilege. Notwithstanding this objection, to the extent required, the Company will respond with relevant information when it responds to Staff DR No. 8, also due on November 1, 2018.

Response:

Without waiving the foregoing objection, Midwest Power responds as follows:

Please see Midwest Power's CONFIDENTIAL response to KCC Staff Data Request No. 8, which is being provided concurrently with this response.

Westar Energy
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2nd Set of Data Request

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Lane

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.08

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.08) Please provide the names and respective energy market, operational, financial or other relevant expertise of MPC/KeyCorp's proposed representatives to the various JEC operating committees under the JEC Ownership and JEC Operating Agreement, including for example, the Owners' committee, the fuel supply committee and the Owners' accounting committee, upon the expiration of the lease.

Submitted by: Cathy Dinges

Response:

This information is unknown at this time.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.09

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.09) Provide support for the statement made by MPC counsel at the October 11, 2018 technical conference that capacity and energy prices in the SPP are rising and that natural gas prices are rising and explain the impact that MPC believes the claimed rising prices have on MPC's ability to meet the Commission's standard for approval of its certificate application.

Submitted by: Cathy Dinges

Objection: Midwest Power Company objects to this data request on the grounds that the statements and opinions of counsel do not constitute relevant or admissible evidence in this proceeding and are not germane to the Commission's determination of MPC's qualifications to operate as a public utility for the limited purpose of owning and operating its 8% interest in the JEC.

Response:

Midwest Power Company re-affirms its objection to this data request.

Westar Energy
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Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/01/2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.10

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.10) Describe the process that would be required for KeyCorp to obtain board approval of a new or modified guaranty, including the amount of time that would be required to obtain such approval. Please describe the threshold for requiring Board approval for a KeyCorp guaranty if the Commission were to determine receipt of the CCN by MPC was to be conditioned on a newly structured KeyCorp guaranty.

Submitted by: Cathy Dinges

Objection: Midwest Power Company objects to this data request on the grounds that the internal process KeyCorp utilizes to obtain board approval of a new or modified guaranty, if required, is a managerial decision that is not relevant to the Commission's determination of MPC's qualifications to operate as a public utility for the limited purpose of owning and operating its 8% interest in the JEC.

Response:

Midwest Power Company re-affirms its objection to this data request. Additionally, this data request is irrelevant based on the response to Westar DR No. 2.02.

Westar Energy
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Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Parie

Date: 11 / 01 / 2018

Westar Energy
Midwest Power Certificate of Public Convenience
Docket No. 19-MPCE-064-COC
2nd Set of Data Request

Data Request No: 2.11

Submitted to: Midwest Power Company
Request Date: October 18, 2018
Date Information Needed: November 1, 2018

Please provide the following:

- 2.11) Provide copies of any filings that have been made with the Federal Energy Regulatory Commission ("FERC") by KeyCorp or MPC related to the 8% interest of JEC owned by MPC. Please supplement this response when any related FERC filings are made in the future.

Submitted by: Cathy Dinges

Response:

Midwest Power filed its market-based rate authority application on October 30, 2018 in FERC Docket No. ER19-223. The application is attached hereto.

Verification of Response

I have read the foregoing Information Request and answer(s) thereto and find answer(s) to be true, accurate, full and complete and contain no material misrepresentations or omissions to the best of my knowledge and belief; and I will disclose to the Commission Staff any matter subsequently discovered which affects the accuracy or completeness of the answer(s) to this Information Request.

Signed: Amy Paine

Date: 11/01/2018

Anne Callenbach

From: Cathy Dinges <Cathy.Dinges@westarenergy.com>
Sent: Thursday, October 18, 2018 8:49 AM
To: Anne Callenbach; Amber Smith (a.smith@kcc.ks.gov); c.bailey@kcc.ks.gov; Frank Caro; Andrew Schulte
Cc: Darrin Ives; Greg Greenwood; Justin Grady; Chad Unrein
Subject: Docket No. 19-MPCE-064-COC
Attachments: 2018-10-18 Proposed Conditions on Midwest Power Company Certificate.docx

As we discussed at the technical conference, Westar has given some consideration to the conditions we would be looking for if the CCN is issued for MPC. A list of those proposed conditions is attached. We are happy to discuss these if the parties would like or answer any questions.

Cathy Dinges

KCP&L and Westar, Evergy Companies
Corporate Counsel
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If you've received this message in error, I apologize for the inconvenience. Please don't distribute it. Instead, please just delete it and respond to let me know of my error. Then, have a wonderful day.



Conditions on Midwest Power Company's ("MPC") Certificate should include:

1. MPC and KeyCorp accept that KeyCorp, MPC, and Wilmington Trust Company ("WTC"), not in its individual capacity but solely as Owner Trustee, are all subject to the Commission's jurisdiction for purposes of Kansas utility operations related to the 8% undivided interest in Jeffrey Energy Center ("JEC") that is held in a trust, of which MPC is the sole participant and beneficiary, and of which WTC is the Owner Trustee, including but not limited to the enforcement of financial obligations related to capital investments, operating and maintenance expenses, fuel expenses and other expenses associated with the ownership and operation of the 8% interest of JEC held by WTC.
2. Because MPC is relying on the financial resources of KeyCorp to meet the threshold requirements for MPC obtaining a utility certificate in Kansas, KeyCorp accepts it will retain ultimate responsibility for the financial obligations related to the 8% interest of JEC held by WTC.
3. Commission denial of MPC's request for exemption from certain Kansas statutes in paragraph 41 of its Application, consistent with Commission precedent in Docket No. 07-ITCE-380-COC, where the Commission specifically stated it would not issue an exemption or make a finding of inapplicability and that Kansas utilities are responsible for determining their own compliance with applicable laws.
4. MPC and KeyCorp agree that KeyCorp represents an "Affiliated Interest" under K.S.A. 66-1401, 66-1402, and 66-1403, statutes that confer certain jurisdiction to the Commission regarding access to documents including but not limited to books and records, submission of contracts, review of affiliate transactions detail.
5. KeyCorp agrees to modify its existing guaranty of payment and performance obligations (as MPC offered to do so in its Application) to make it clear that such guaranty applies to both MPC's and WTC's obligations under the JEC Ownership Agreement and JEC Operation Agreement. Currently the guaranty only applies to the Owner Participant's (i.e., MPC's) obligations but MPC does not have direct obligations under the JEC Ownership Agreement or JEC Operation Agreement. Instead, only the Owner Trustee (i.e., WTC), as the holder of legal title to the 8% JEC interest, has obligations under those agreements and, further, a number of provisions of the applicable agreements arguably purport to limit the obligation of MPC or WTC to make payments solely out of the assets in the Trust Estate (as defined in the Trust Agreement), including but not limited to, Section 3.01 of the Trust Agreement (attached as Exhibit T to the Participation Agreement), Section 4 of the Consent and Assumption Agreement dated August 15, 1991 (attached as Exhibit G to the Participation Agreement) and Section 7 of the Assignment of Operating Agreement dated August 15, 1991 (attached as Exhibit B to the Participation Agreement). Therefore, KeyCorp agrees that as a condition of the Commission granting a certificate (CCN) to MPC KeyCorp will modify the guaranty to provide that KeyCorp will be directly liable for payment and other obligations of MPC

and WTC, without regard to any contrary provisions in any other agreement limiting WTC's or MPC's liability to the assets of the Trust Estate, especially since it is likely that the Trust Estate at various times will not receive sufficient revenues or possess sufficient assets necessary to cover the applicable fuel, operation and maintenance expenses, and/or operating capital, environmental remediation, and post-closure retirement and dismantlement costs associated with the 8% interest in JEC.

6. KeyCorp agrees that Westar, and its successors and assigns, in its capacity as Owner and/or Operator of JEC, is and will be a direct contractual beneficiary of KeyCorp's guaranty of payment and performance obligations of WTC and MPC under the JEC Ownership Agreement and JEC Operation Agreement. Currently, only Westar as "Lessee" is a beneficiary of the guaranty but Westar will no longer be a "Lessee" once the Lease expires on January 3, 2019.¹

¹ This last sentence is explanatory only and should not be part of the condition.