

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

JAN 27 2006

 Docket Room

In the Matter of the Applications of Westar)
Energy, Inc and Kansas Gas and Electric) Docket No. 05-WSEE-981-RTS
Company for Approval to Make Certain)
Changes in their Charges for Electric)
Service.)

CURB's Motion to Deny Admission of Additional Evidence and Arguments

The Citizens' Utility Ratepayer Board (CURB) moves the Commission to deny Westar Energy's request to submit additional evidence and arguments on that evidence in its *Petition for Specific Reconsideration, For the Submission of Additional Evidence and Clarification*, filed on January 17, 2006, with the Kansas Corporation Commission (Commission) in the above-captioned docket. CURB supports its motions as follows:

1. As CURB argued in Westar's last rate case (01-WSRE-436-RTS) when Westar offered evidence eighty days after the evidentiary hearing had concluded, the opportunity afforded Westar to ask the Commission revisit its decision in this matter is not an open-ended invitation to keep introducing more evidence to support its application for a rate increase.

2. If the evidentiary record is enlarged when a party makes a responsive filing, then the process is not properly "re - consideration," but consideration of additional evidence for the first time. It matters not whether the newly-submitted evidence confirms or disputes evidence previously submitted by the parties.

3. CURB is aware that the Commission has wide discretion to allow additional evidence into the record, and that it appreciates having access to relevant and persuasive information – and, no doubt, accords new information which has neither of those qualities the degree of appreciation it deserves. While CURB believes Appendices 1 through 5 fall into the

latter category and will be accorded little weight if it is admitted, CURB must object to admission of these Appendices on the grounds that Westar's opportunity to reargue the evidence does not properly include the right to introduce new evidence merely because it believes it will confirm that the company was right.

4. Granting a petition for reconsideration is, by definition, to agree to review the evidence on the record and reconsider the reasonableness of the decision in light of that evidence. If the evidentiary record is still in the process of being created during the reconsideration process, at what point does the "reconsideration" process stop? Will Westar be afforded yet another opportunity to petition for reconsideration by alleging that the Commission did not give its newly-submitted evidence adequate consideration? If Westar is permitted to add more bulk to the record with every filing, the reconsideration process may never come to an end. The Commission must come to the conclusion that enough is enough: the evidentiary record is complete.

5. It must be noted that the legislature has provided a statutory deadline for the Commission to issue a decision in a rate case that only the utility may waive. K.S.A. 66-117(c). In fact, in recognition of the difficulty of meeting the statutory deadline when faced with new evidence, K.S.A. 66-117(c)(1) provides that if the utility "substantially alters the facts used as a basis for" its rate request, the commission may deem the amendment as a "new application and the 240-day period shall begin again from the date of the filing of the amendment." Thus, a utility that provides new evidence late in the decision-making process should be prepared to start the process over again. The company exercised its right to a timely order by not waiving the deadline, but is unfairly seeking to prolong the time for the presentation of evidence by introducing additional evidence after the order has been issued. If the Commission allows this evidence to be admitted, then it should order that the 240-day period to rule on the case began again on the day that Westar filed its petition.

6. Regarding the substance of the evidence Westar has submitted, Appendix 3 is a chart that presents new calculations on net present value which could have been produced at the hearing. Westar's failure to present this evidence at hearing cannot be attributed to the unavailability of the information at the time of the hearing. These new calculations are simply used to reargue an issue that Westar already had full opportunity to argue. It should not be allowed to do it again with a new set of calculations.

7. Westar's evidence on shareholder value in Appendices 1 and 2 is entirely irrelevant. Regardless of Westar's concern about its shareholders' interests, the Commission is obligated to consider other factors in setting rates, including the public interest and the interests of ratepayers. Furthermore, the evidence presented in Appendices 1 and 2 is insufficient to establish that the Commission's order negatively affected Westar's stock value. Stock prices are notoriously volatile and subject to rapid and sometimes inexplicable movement caused by any number of factors, which, if they could be consistently and accurately identified and predicted, would eliminate the need for ratings agencies altogether.

8. Furthermore, even assuming that the order had some influence on shareholder value, there is no reason whatsoever to believe that the rate order had any more influence on Westar's stock price than, for example, the company's own negative comments about the order in conference calls and to the press. Had company taken a positive attitude and cheerfully announced, "We got the ECA, we got the environmental rider, and got the Commission to entirely reverse itself on depreciation and LaCygne—all of which mean millions and millions of dollars to us!", Westar's stock might have risen in response. However, regardless of whether the rate order influenced Westar's stock values or the company's own negativity played a part, the Commission cannot engage in endless revisions of orders to take into account new evidence of the purported impact of previous orders, or a rate case would never come to an end.

9. Additionally, anyone familiar with utility regulation knows that the rating

agencies are never happy with any order that does not grant the company 100% of what it requested, even if the utility's request was unreasonable and not supported by the evidence. CURB doubts that thorough research could uncover one single positive comment by a ratings agency concerning the work product of a public utility commission that is doing its job fairly and competently. Frankly, the only thing that utility commissions could possibly do to make ratings agencies happy is to quit regulating utilities altogether. Just as the empire should ignore the opinions of unhappy spectators in the bleachers, the opinions of ratings agencies should have no bearing whatsoever on the Commission's reconsideration of the reasonableness of its order.

10. Finally, what other commissions have done in other rate cases (Appendices 4 and 5) is irrelevant to this proceeding. The rate orders in those dockets were based on the evidence presented in those cases, and based on the law in those states. Besides, there is no reason to believe that the companies are similar enough to justify a comparison. Northern States Power Company (Appendix 5) was not even included in the list of companies that Westar's own equity witness believes are comparable to Westar. And Oklahoma Gas and Electric (Appendix 4), which the witness did think was comparable to Westar, only derives 30% of its revenues from sale of electricity—as compared to 100% of Westar's revenues—which was pointed out by CURB witness Dr. Woolridge. (D. Test., Woolridge, Exh. JRW-3). Without allowing the other parties to present evidence and argument in response to this additional evidence, the Commission cannot possibly have sufficient evidence before it to determine the relevance of these other decisions to its own determinations. But the Commission simply does not need more evidence to determine whether its order was reasonable on reconsideration.

11. Thus, CURB respectfully moves the Commission to deny the portions of Westar's petition that consist of new or additional evidence and deny admission of the arguments relating to this evidence, as identified in the following list.

12. The following appendices, paragraphs and portions of paragraphs contained in

Westar Energy's Petition for Specific Reconsideration, For the Submission of Additional Evidence and Clarification should be denied admission, or be stricken from the record:

Paragraphs 5, 6, 7, and 12 (including Table 1);
Paragraph 13 (including Table 2 and footnote);
All portions of paragraph 14 following the words "\$120 to \$180 million";
The last two sentences of paragraph 20;
The last sentence of paragraph 38 and Table 3;
Paragraph 39 (including Table 4);
Paragraph 40 (including Table 5);
Paragraph 42 (including Table 6);
The last sentence of paragraph 44 (and Figure 1);
The last two sentences of paragraph 46 (and what is referred in the text as "Figure 2" but is not labeled as such, chart entitled "Westar System Peak Load Vs. Capacity");
The last sentence of paragraph 47;
Paragraph 48;
Paragraphs 56 and 58 (including footnotes);
Paragraph 59;
The words "severe diminution of Westar's shareholder value" in the last sentence of paragraph 61;
All but the first three sentences of paragraph 62;
The words "has been immediately costly to its shareholders" in the third sentence of paragraph 69;
Statements marked a, b, and c in paragraph 95.
Appendix 1
Appendix 2
Appendix 3
Appendix 4
Appendix 5

13. In the event that the evidence and arguments identified above are deemed by the Commission to have been admitted into the record, CURB would then respectfully move the Commission to strike them from the record.

Respectfully submitted,



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