

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert Krehbiel, Commissioner
Michael Moffett, Commissioner

STATE CORPORATION COMMISSION

MAR 30 2007

 Docket Room

IN THE MATTER OF THE APPLICATION)
OF WESTAR ENERGY, INC., AND KANSAS)
GAS AND ELECTRIC COMPANY FOR)
APPROVAL TO MAKE CERTAIN CHANGES)
IN THEIR CHARGES FOR ELECTRIC SERVICE)

Docket No. 05-WSEE-981-RTS

CURB's PETITION FOR RECONSIDERATION OF THE DECISION TO REOPEN THE RECORD TO CONSIDER ISSUES RELATED TO INVESTMENT TAX CREDITS

The Citizens' Utility Ratepayer Board (CURB) submits its Petition for Reconsideration, pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. § 82-1-235. As set forth more fully below, CURB requests reconsideration of the Kansas Corporation Commission's decision to reopen the record of this docket to consider issues related to investment tax credits (ITC), as determined in the Commission's *Order Denying Reconsideration*, *Order Granting Clarification*, and *Order Opening Record for Limited Purpose* (Order), issued on March 20, 2007.

1. The Commission agreed to reopen the record based on speculative concerns of Westar that the Internal Revenue Service "will conclude" that Westar is not complying in good faith with IRS rules relating to the ITC, "if" the Commission does not allow Westar to reset the ITC amortization, and "could be" subject to penalties. (Order, at ¶¶30, 32). The Commission dismissed concerns raised by Unified School District 259 that reopening the docket to consider the ITC issues would further delay final resolution of this docket. The Commission concluded that the request of USD 259 to delay hearings for one week in this docket to resolve the scheduling conflict created when the Commission scheduled two hearings on the same day in

this and another docket somehow conflicted with and negated its concerns that reopening the docket to consider ITC issues would delay resolution of this docket. (Order, at ¶31).

2. To address the last issue first, the parties to this docket did not create the scheduling conflict. The parties who called the conflict to the Commission's attention and requested a change in the schedule to resolve the conflict did not seek the change for purposes of delay, but simply to resolve the problem of not being able to be in two places at once. The request for a one-week change was not unreasonable given the schedule in the other docket, and the parties appreciate the Commission's decision to alter the procedural schedule to resolve the conflict.

3. However, it was simply unreasonable for the Commission to then use the parties' request as a reason for rejecting USD 259's argument that reopening the record will unreasonably delay final resolution of this docket, as if it forfeited its right to make this argument because it was one of the parties who requested resolution of the scheduling conflict. The request for the one-week delay was not for the purpose of gaining more time to prepare to address the ITC issues, and, in any case, certainly does not provide enough time for their resolution, even if it had been for that purpose. It was simply a request for a one-week change in the schedule to resolve a scheduling conflict. It should not be considered as a reason for concluding that reopening the docket for evidence on the ITC issue will not unreasonably delay final resolution of this docket. It is simply unfair to interpret a party's simple request for a one-week delay to accommodate parties who were already scheduled to appear in another docket as evidence that the party has abandoned its argument that reopening the docket to hear the ITC issue will cause unnecessary delay in resolution of this docket.

4. Furthermore, if the Commission intends to give appropriate consideration to the evidence concerning the ITC and the policy and legal issues that have been raised by Westar's request, final resolution of this docket will be delayed much longer than a week or the month that Westar requested. There are two major issues to resolve concerning the ITC: 1) what composite rate should be used prospectively, and 2) whether an adjustment should be made retrospectively. The first issue can be resolved through investigation of the evidence and the applicable IRS regulations, but the second issue concerns 35 years of amortization and considerations of policy, as well as speculation as to what the IRS will decide in response to the Commission's resolution of the first issue. Given that no one at this point is able to conclusively say whether or not the IRS will require a retroactive adjustment, or, if it does, whether a retroactive adjustment that increased customer rates would be legal under Kansas law prohibiting retroactive ratemaking, it seems highly unlikely that a simple resolution of the issue is forthcoming in a week or a month.

5. Moving this issue to a separate docket would allow the Commission to finally resolve the remaining issues of this docket without further delay. Moving the ITC to a separate docket would permit the Commission to give appropriate and due consideration to the complex issues and policy matters of the ITC, and, if need be, delay consideration of whether to make retroactive adjustments until after the IRS has responded to the Commission's determination of the adjustment to make prospectively. It is quite possible that the IRS would be satisfied with the Commission's determinations on the threshold issue of what adjustment to make prospectively. Therefore, a determination on whether to make a retroactive adjustment may not be necessary. It simply doesn't make sense to try and make such a determination in anticipation of a decision that may never be made.

6. Therefore, the Commission has a choice. It can make final resolution of this docket a reality within the next few weeks. Or it can make final resolution of this docket dependent on resolving the ITC issue, which will require an initial determination on the rate going forward. There will be a choice of two courses of action after making the initial determination on the prospective adjustment. The Commission could go ahead and decide to make a retroactive adjustment as well, even though it may not be necessary, and may not be acceptable to the IRS. Or the Commission could await input from the IRS on the prospective adjustment, to see if further action by the Commission will be required. If the IRS is not satisfied with the prospective adjustment, the Commission can then tackle the complex problem of what to do with the 35 years' prior amortization of the ITC and how it is might be possible to make the IRS happy without violating the prohibitions against retroactive ratemaking. Given that the IRS runs on its own timetable, there is no way to tell how long this issue will remain unresolved. It may take months or years before rates are final in this docket.

7. Therefore, since a decision from the IRS on the Commission's initial determination may make further action by the Commission unnecessary, it just makes more sense to move the ITC deliberations to a separate docket and bifurcate the proceeding into two phases: a proceeding to determine the ITC adjustment going forward, and then, if the IRS is not satisfied with that adjustment, a second proceeding to consider the more complex issues of whether to make a retroactive adjustment and how it might be accomplished without violating the stricture against retroactive ratemaking.

8. Furthermore, there is no reason whatsoever to conclude that Westar will incur severe penalties from the IRS if it is proceeding in good faith to resolve the matter with the Commission, and no reason whatsoever to conclude that a retroactive adjustment is necessary, in

advance of any IRS determination to the contrary. The notion that action must be taken immediately is sheer speculation. Westar is attempting to exploit widespread but not necessarily well-founded fears of the IRS as unreasonable, arbitrary and evil. Given the procedural delays that have occurred thus far, adding additional issues to this docket and risking further delay of the final determination of rates because of unfounded speculation about what that mean old IRS will do if you don't is unreasonable and arbitrary, and certainly unfair to ratepayers.

9. Lastly, although CURB's consultant has received requested information from Westar and communicated with Westar personnel on this issue, there is no consensus on ITC issues at this juncture, other than the fact that they will need to be addressed at some point in the future. The fact that Westar has expeditiously provided information to CURB is appreciated, but it is no reason for the Commission to conclude that the ITC issues can be resolved expeditiously. We could all have all the information we need, agree that it is accurate and sufficient to make a determination—and still disagree about what the final resolution of the issues should be. An extra week or even an extra month built into the schedule will not be nearly sufficient to resolve them, especially if the Commission judiciously awaits the response of the IRS to the prospective adjustment rather than attempting to anticipate its response by making a retroactive adjustment that may be unnecessary.

Therefore, CURB respectfully requests that the Commission reconsider its decision to reopen the record in this docket to consider issues related to the ITC, and respectfully requests

that the Commission address the ITC in a bifurcated proceeding in a separate docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

05-WSEE-981-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, hand-delivered this 30th day of March, 2007, to the following:

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