

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners:

Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

NOV 16 2007

 Docket Room

In the Matter of the Petition of Westar)
Energy, Inc. and Kansas Gas and Electric)
Company (collectively "Westar") for)
Determination of the Ratemaking Principles) Docket No. 08-WSEE-309-PRE
and Treatment that Will Apply to the)
Recovery in Rates of the Cost to be Incurred)
by Westar for Certain Electric Generation)
Facilities and Power Purchase Agreements)
under K.S.A. 2003 Supp. 66-1239.)

**PETITION FOR DISQUALIFICATION
OF COMMISSIONER MICHAEL C. MOFFET**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and files this Petition for the disqualification of Commissioner Michael C. Moffet, pursuant to K.S.A. 77-514. In support of its petition, CURB states and alleges as follows:

1. On January 10, 2007, in Governor Kathleen Sebelius' 2007 State of the State address, Governor Sebelius announced a goal to produce 10 percent of the state's electricity from wind power by 2010, and 20 percent by 2020. The Governor also acknowledged that she had met with the "leaders of the state's electric utilities" and stated, "The leaders of our utilities agree that with collaborative work, *a new regulatory philosophy* and consumer support, these goals are achievable." (emphasis added).

2. On October 1, 2007, Westar Energy, Inc. and Kansas Gas and Electric Company (collectively "Westar") filed a petition with the Kansas Corporation Commission ("Commission"), pursuant to K.S.A. 2003 Supp. 66-1239, for determination of the ratemaking principles and treatment that will apply to the recovery in rates of the cost to be incurred by

Westar for certain electric generation facilities and power purchase agreements, both related to the acquisition of wind power.

3. On October 2, 2007, CURB filed its Petition to Intervene in this docket.

4. On October 3, 2007, CURB's Petition to Intervene was granted by the Commission.

5. On October 12, 2007, the Commission issued its Order Setting Procedural Schedule. While K.S.A. 2003 Supp. 66-1239 allows 180 days for a determination, Westar requested and the Commission, in this Order, granted a procedural schedule that will accommodate a decision by December 31, 2007, only 90 days after the filing of the request. CURB expressed its reservations about this short time frame but agreed to work with the parties to process the case in accordance with the schedule. In this Order, the Commission also noted its "desire to facilitate the development of alternative energy resources in Kansas if prudent and reasonable." (Order at Para. 18).

6. From a substantive standpoint, CURB agrees with the Commission's statement in its Order Setting Procedural Schedule that we should "facilitate the development of alternative energy resources in Kansas if prudent and reasonable." In the current case, the Commission will have the opportunity to address important policy issues such as: appropriate cost recovery for wind where it is not the lowest-cost resource in the short run, whether it is more economic to acquire wind through ownership or through purchase contracts, and whether additional returns pursuant to statute should be paid by ratepayers on wind acquisitions. CURB looks forward to engaging the Commission and other parties in those substantive discussions in the current case and in future cases before the Commission.

7. In the conduct of discovery in this matter, on October 18, 2007, CURB issued a data request (CURB 12) to Westar in this docket, requesting information with regard to any meetings between Westar and the Governor, the Lt. Governor, or any member of the Governor's or Lt. Governor's staff occurring between July 1, 2006, and the present, at which the topics of wind energy, energy conservation, Kansas energy policy related to wind energy or energy conservation, incentives for or impediments to additional wind energy or energy conservation in Kansas, or the regulatory process in Kansas as it relates to the opportunity for, or risk of, cost recovery related to wind energy, energy conservation costs or other regulatory expenses were discussed.

8. On November 5, 2007, Westar provided a response to the above-referenced data request which contains, in relevant part: a list of meetings attended by Westar, including the dates and persons in attendance at said meetings (Attachment 1); and a copy of an email dated December 21, 2006, written by Mr. James Haines, then-CEO of Westar, and sent to other executives of Westar. (Attachment 2). The email sets forth Mr. Haines' recollections of a meeting with the Governor, Lt. Governor and the CEOs of Empire, KCPL, KEPCo, Sunflower, Midwest and Westar regarding energy policy in Kansas. This appears to be the meeting alluded to by the Governor in her January State of the State speech.

9. CURB is concerned with several statements in Mr. Haines' email. First, Mr. Haines noted that there was a discussion at the meeting of the fact that in the short run, adding wind will increase costs for some companies and this may be contrary to historical KCC practice that emphasizes the lowest-cost means to meet load. Mr. Haines stated that the Governor indicated her "policy initiative" will address this fact and "will change it so that companies that

commit to wind *will be fully compensated.*” Second, regarding the need for more aggressive conservation/energy efficiency programs, Mr. Haines stated that the attendees discussed a “need to fund their start-up through the use of forward looking adjustments in rate cases or the creation of regulatory assets.” Finally, and of particular concern to CURB, is the statement by Mr. Haines that “at the end of the meeting, the Lieutenant Governor asked each CEO to commit. I said that with the *assurances that were made re cost recovery* that Westar would do its share, as did the other CEO’s for their companies.” (See Attachment 2).

10. The Board must assume that the statements made by Mr. Haines in the email are true and that assurances were given at the meeting regarding cost recovery for wind acquisition. The Board’s concern arises from the fact that no statute in Kansas specifically assures cost recovery for wind acquisitions in KCC proceedings. From a practical standpoint, the Governor is simply unable to give assurances with regard to the outcome of any ratemaking issue or practice at the KCC without specifically directing and/or obtaining the agreement of *at least two Commissioners* (a majority of the Commission).

11. From a procedural standpoint, separate and distinct from the substantive issues in the case, if instructions were given to or commitments were made by any of the Commissioners that will impact or dictate the outcome of the decision of the Commission in this or other dockets in the future, the Board can only conclude that the due process rights of our clients have been compromised. The Board’s concern also extends to the possibility that CURB’s due process rights may be compromised in other dockets before the Commission that will address issues related to ratemaking and cost recovery for conservation/energy efficiency programs.

12. CURB notes that on November 9, 2007, Commissioner Joseph F. Harkins filed a

Notice of Recusal in this docket, citing his prior involvement with energy issues and encouraging consideration of alternative energy resources, including wind generation. CURB appreciates Commissioner Harkins' sensitivity to the importance of the issues before the Commission and the impact that a mere appearance of conflict can have on the integrity of the Commission's decision.

13. Consumers of Kansas need to be assured of the integrity of the Commission processes, given the importance of the issues at hand, as well as the long-term implications and substantial costs to consumers that may result from the decisions that will be made by the individuals that sit in judgment at the KCC. Given the shortened time frame of this docket, the Board's concerns outlined above, and the need for CURB, as the statutory advocate for residential and small commercial ratepayers, to be assured that the integrity of the Commission process will protect the due process rights of our clients, CURB must respectfully request, pursuant to K.S.A. 77-514, that Commissioner Michael C. Moffet disqualify himself from presiding in this case on the basis of administrative bias, prejudice or interest. CURB is making a similar request of Commissioner Thomas E. Wright in a separate filing.

14. K.S.A. 77-514 provides the standards relating to recusal and the appropriate means by which a party may petition for recusal of one or more commissioners of the Kansas Corporation Commission in proceedings governed by the Kansas Administrative Procedures Act:

K.S.A. 77-514. Presiding officer. (a) For agencies listed in subsection (h) of K.S.A. 75-37,121, and amendments thereto, the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. For all other agencies, the agency head, one or more members of the agency head, a presiding officer assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by the agency head shall be the presiding officer.

(b) *Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.*

(c) *Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.*

(d) A person whose disqualification is requested shall determine whether to grant the petition, *stating facts and reasons for the determination.*

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) If the office of administrative hearings cannot provide a presiding officer, a state agency may enter into agreements with another state agency to provide presiding officers to conduct proceedings under this act.

(g) Notwithstanding any quorum requirements, if the agency head of a professional or occupational licensing agency is a body of individuals, the agency head, unless prohibited by law, may designate one or more members of the agency head to serve as presiding officer and to render a final order in the proceeding. (emphasis added).

15. In the event that Commissioner Moffet determines he should not be disqualified for administrative bias, prejudice or interest, K.S.A. 77-514 (d) requires that he shall provide the “facts and reasons” for that determination. To eliminate the appearance or question of administrative bias, prejudice or interest, CURB respectfully requests that the facts and reasons provided by Commissioner Moffet pursuant to K.S.A. 77-514 address the following:

- The Commissioner has not been directed by the Governor, Lt. Governor, or any representative of the Governor or Lt. Governor to take any specific action in any case that may come before the Commission, nor has the Commissioner otherwise made any specific commitment to any person to take a specific action in any case that may come before the Commission regarding :
 - Cost recovery related to the acquisition of wind power in any amount by any company or to otherwise ensure “*that companies that commit to wind will be fully compensated.*”
 - Whether the decision of a company to own wind assets as opposed to

acquiring wind through purchase contracts will be deemed reasonable and prudent.

- The allowance of an additional rate of return in any amount for any company on any investment pursuant to K.S.A. 66-117(e).
- Any action to address or change the *“historical ratemaking practice at the KCC”* which emphasizes lowest cost means to satisfy load.
- To take specific regulatory or accounting action related cost recovery for any company for investments in, or expenditures otherwise made on energy conservation and energy efficiency programs, including funding the startup of more aggressive conservation/energy efficiency programs *“through the use of forward looking adjustments in rate cases or creation of regulatory assets.”*

16. The Board believes that providing the above assurances will ensure consumers that their due process rights are protected and the integrity of the decision making process before the KCC is maintained. Such assurances will alleviate similar concerns of the Board regarding other dockets that may be currently before the Commission or may come before the Commission in the future, as additional companies acquire wind energy and/or implement energy conservation and efficiency programs.

WHEREFORE, CURB RESPECTFULLY REQUESTS that the Commissioner recuse, or, in the alternative, provide a filing in this docket regarding the “facts and reasons” for his decision not to disqualify as required by K.S.A. 77-514 (d), to eliminate any possible appearance of administrative bias, prejudice or interest that may be evident from the above-described facts.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Springe", is written over a horizontal line.

David Springe #15619

Niki Christopher #19311

C. Steven Rarrick #13127

Citizens' Utility Ratepayer Board

1500 SW Arrowhead Road

Topeka, KS 66604

(785) 271-3200

(785) 271-3116 Fax

Meetings

Dec. 18, 2006	4:00 p	Governor Sebelius' meeting with electric utility CEOs and members of her administration re: renewables and energy efficiency @ the Capitol
Feb. 6, 2007	11:30 a	Lt. Gov. Mark Parkinson meeting with Jim Haines, Jim Ludwig, Mark Schreiber, Kelly Harrison, Doug Sterbenz @ Westar offices
April 12, 2007	9:30 a	Lt. Gov. Mark Parkinson meeting with Jim Haines, Jim Ludwig, Mark Schreiber, John Bottenberg @ the Capitol
May 25, 2007	10:00 a	Governor Sebelius press conference with utility CEOs, Jim Haines, Bill Moore re: energy production/conservation efforts, wind and energy efficiency @ the Capitol
June 12, 2007	11:30 a	Lt. Gov. Mark Parkinson meeting with Joe Harkins, Jim Haines, Bill Moore @ the Capitol
June 13, 2007	11:00 a	Lt. Gov. Mark Parkinson meeting with Doug Sterbenz, Jim Ludwig @ the Capitol
Oct. 3, 2007	2:30 p	Lt. Gov. Mark Parkinson meeting with Bill Moore, John Moore, Jim Ludwig, Mark Ruelle @ the Capitol (materials attached)

James Haines/WRI
01/02/2007 08:45 AM

To nancy_fienhage@wr.com
cc
bcc
Subject Fw: CONFIDENTIAL

Please copy and file the attached email. Thanks.

----- Forwarded by James Haines/WRI on 01/02/2007 08:41 AM -----

Bill Moore/WRI
12/21/2006 05:14 PM

To James Haines/WRI@WRI
cc
Subject Re: CONFIDENTIAL

Sounds like a good discussion which could put her at significant odds with some members of the KCC.

Sent from my BlackBerry Handheld.

James Haines

----- Original Message -----

From: James Haines
Sent: 12/21/2006 04:27 PM
To: Bruce Akin; Greg Greenwood; Kelly Harrison; Larry Irick; Ken Johnson; Peggy Loyd; Jim Ludwig; Bill Moore; Mark Ruelle; Tony Somma; Doug Sterbenz; Leroy Wages; Caroline Williams; Jeff Beasley
Subject: CONFIDENTIAL

CONFIDENTIAL

Colleagues:

Governor Sebelius requested a meeting late Monday afternoon with CEO's of Empire, KCPL, KEPCo, Sunflower, Midwest, and Westar. In addition to the governor, lieutenant governor elect Parkinson, and Joe Harkins also attended the meeting. The purpose of the meeting was threefold: 1) The governor introduced the lieutenant governor elect and indicated that he will not (as John Moore has) take responsibility for a cabinet position. Rather he will work on special policy projects. Initially, he will be responsible for final development and implementation of a state energy policy. 2) The governor does not favor a mandatory portfolio standard for energy efficiency/conservation programs and/or alternative energy projects. 3) Nonetheless, she strongly supports efficiency/conservation/ and renewable projects. She indicated that the policy initiative will contain a call for a voluntary commitment for 10% of peak load in Kansas to be satisfied with efficiency/conservation/renewable projects by 2010 and for 20% to be so satisfied by 2020. She believes that most, perhaps all, of this commitment should be satisfied with wind turbines.

The governor recognized that, for some companies, in the short run adding wind will increase cost. She further recognized that historically the rate making standard at the KCC has emphasized the lowest cost means to satisfy load. She indicated that the policy initiative will address this historical practice and will change it so that companies that commit to wind will be fully compensated.

There was discussion about the need for new transmission projects from west to east and about the fact that such projects might not in their early years be economic. For such projects, there will be a consideration of socializing the costs across all users in Kansas.

There was discussion about the need for more aggressive conservation/energy efficiency programs and

Attachment 2

the need to fund their start up through use of forward looking adjustments in rate cases or creation of regulatory assets.

At the end of the meeting, the lieutenant governor asked each CEO to commit. I said that with the assurances that were made re cost recovery that Westar would do its share, as did the other CEO's for their companies.

Jim

CERTIFICATE OF SERVICE

08-WSEE-309-PRE

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, or hand-delivered this 16th day of November, 2007, to the following:

* JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 SOUTH HICKORY
PO BOX 17
OTTAWA, KS 66067
Fax: 785-242-1279
jflaherty@andersonbyrd.com

ANNE BUTTS
EMPIRE DISTRICT ELECTRIC COMPANY
602 JOPLIN (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5169
abutts@empiredistrict.com

* BLAKE MERTENS
EMPIRE DISTRICT ELECTRIC COMPANY
602 JOPLIN (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5169

* TIM WILSON
EMPIRE DISTRICT ELECTRIC COMPANY
602 JOPLIN (64801)
PO BOX 127
JOPLIN, MO 64802
Fax: 417-625-5169

CARL A. HUSLIG, PRESIDENT
ITC GREAT PLAINS, LLC
1100 SW WANAMAKER ROAD, SUITE 103
TOPEKA, KS 66604

* DANA BRADBURY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
d.bradbury@kcc.ks.gov
**** Hand Deliver ****

* MATTHEW SPURGIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Fax: 785-271-3354
m.spurgin@kcc.state.ks.us
**** Hand Deliver ****

CONSTANCE L. SHIDLER, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH STREET
SUITE 750
OVERLAND PARK, KS 66210
Fax: 913-661-9863
connie@smizak-law.com

JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH STREET
SUITE 750
OVERLAND PARK, KS 66210
Fax: 913-661-9863
zakoura@smizak-law.com

MATTHEW FAUL, ATTORNEY
SONNENSCHN NATH & ROSENTHAL LLP
4520 MAIN STREET
SUITE 1100
KANSAS CITY, MO 64111
Fax: 816-531-7545
mfaul@sonnenschein.com

ROGER STEINER, ATTORNEY
SONNENSCHN NATH & ROSENTHAL LLP
4520 MAIN STREET
SUITE 1100
KANSAS CITY, MO 64111
Fax: 816-531-7545
rsteiner@sonnenschein.com

KARL ZOBRIST, ATTORNEY
SONNENSCHN NATH & ROSENTHAL LLP
4520 MAIN STREET
SUITE 1100
KANSAS CITY, MO 64111
Fax: 816-531-7545
kzobrist@sonnenschein.com

CERTIFICATE OF SERVICE

08-WSEE-309-PRE

* DAVID BANKS, ENERGY MANAGER
UNIFIED SCHOOL DISTRICT 259
SCHOOL SERVICE CENTER COMPLEX
3850 N HYDRAULIC
WICHITA, KS 67219-3399
Fax: 316-973-2150
dbanks@usd259.net

* SARAH J LOQUIST, ASSISTANT GENERAL COUNSEL
UNIFIED SCHOOL DISTRICT 259
ROOM 405
201 N WATER
WICHITA, KS 67202
Fax: 316-973-4497
sloquist@usd259.net

* MARTIN J. BREGMAN, EXEC DIR, LAW
WESTAR ENERGY, INC.
818 S KANSAS AVENUE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
martin_bregman@wr.com



Shonda Titsworth

* Denotes those receiving the Confidential
version