

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 21 2008

 Docket Room

In the Matter of the Application of Westar)
Energy, Inc. and Kansas Gas Electric) Docket No. 08-WSEE-1041-RTS
Company for Approval to Make Certain)
Changes in their Charges for Electric)
Service.)

CURB'S INITIAL BRIEF

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and pursuant to the Commission's October 27, 2008, Prehearing Conference Order, files its Initial Brief in support of the Stipulation and Agreement agreed to by all parties to this docket.

1. On May 28, 2008, Westar Energy, Inc. and Kansas Gas and Electric Company (Westar) filed a joint application with the Kansas Corporation Commission requesting approval to change its rates for retail electric service to its Kansas customers.

2. On October 27, 2008, Westar, CURB, Staff of the State Corporation Commission of the State of Kansas (Staff), Kansas Industrial Consumers Group, Inc., on its own behalf and on behalf of its members (KIC), Unified School District No. 259 (USD 259), Kroger Co., Wal-Mart Stores, Inc., Kaw Valley Electric Cooperative, Doniphan Electric Cooperative, Nemaha-Marshall Electric Cooperative, Kansas Electric Power Cooperative (KEPCo), U.S. Department of Defense, and Midwest Energy, Inc. filed a Joint Motion to Approve Stipulation and Agreement that settled all

cost of service and rate design issues with the exception of the issues of sharing off-system sales margins¹ and rate consolidation.²

3. The Stipulation and Agreement (S&A) includes the following provisions:
- Rates will be increased by \$130 million. This rate increase will be split evenly between Westar North (WEN) and Westar South (WES).
 - Westar will not be permitted to earn a premium return on its current wind investment. Moreover, the S&A states that Westar will not renew its request for a premium return on its current 296 MWs of wind generation in any future proceeding.
 - Amounts currently being recovered in the ECRR (approximately \$16.8 million for Westar North and \$10.3 million for Westar South) will be rolled into base rates, except for minimal amounts relating to the true-up.
 - The RECA tariff will be modified to include monthly adjustments that are projected and disclosed to customers on a quarterly basis. In addition, projected off-system sales will be included at the 50th percentile. The RECA will be subject to an annual true-up. The S&A includes a provision whereby a portion of the off-system sales margins will be credited to full requirements wholesale customers under cost-based formula rate contracts with terms of 20 years or more to the extent such credits are provided for in customers' FERC-approved contracts.
 - The proposed rates include an increase of \$7.6 million in depreciation rates, although the parties (with the exception of Westar) are specifically not agreeing to the depreciation study filed by Westar.
 - Westar must fund a comprehensive study of its distribution vegetative management program by an independent consultant.
 - The S&A identifies, for settlement purposes only, a return on equity of 10.4% and an overall rate of return of 8.49% for regulatory accounting purposes, including the calculation of an Allowance for Funds Used During Construction ("AFUDC"). This return on equity was agreed to, for settlement purposes only, in recognition of the uncertainty in financial markets that currently exists and to use in Westar's abbreviated rate case to be filed in 2009. The S&A specifies that the parties did not use a return on equity of 10.4% to determine the overall revenue requirement.

¹ Off-system sales were addressed in paragraph 15 of the Stipulation and Agreement. All parties except KIC agreed to the provisions of paragraph 15, with KIC reserving the right to file a brief in opposition to the provisions of paragraph 15.

² On October 30, 2008, the Commission issued an Order granting a joint motion to defer the rate consolidation issue to be addressed in a subsequent docket.

- Westar will file a subsequent abbreviated rate case as authorized by K.A.R. 82-1-231(b)(3) to update costs relating to the Emporia Energy Center (“EEC”) and the 296 MWs of wind investment, including operating costs associated with Phase II of the EEC. The S&A also specifies the investments in the EEC and wind generation, and EEC operating costs, costs that are included in the proposed \$130 million base rate increase.
- Specified amortization periods to be used for certain costs as well as other provisions relating to the Renewable Energy Program Rider and the Kansas Investment Tax Credit.
- Proposed class revenue allocation and rate designs for WEN and WES.³

4. The Commission has granted the parties’ motion to defer the consolidation issue to another proceeding.⁴

I. The Commission Should Approve The Unanimous Settlement.

5. The Commission has designated a five-part test to guide its decisions on whether to accept a particular settlement.⁵ As directed by the Commission, CURB will address these guidelines in its discussion below.

A. Has each party had an opportunity to be heard on its reasons for opposing the settlement?

6. While this guideline has limited application to a unanimous settlement, all parties were provided an opportunity to be heard on all issues related to the settlement. With respect to the one issue contested by KIC, KIC signed the Stipulation and Agreement but reserved the right to brief the issue of whether a pro rata share of the asset-based off-system sale margins that the Commission

³ Andrea C. Crane Testimony in Support of Stipulation and Agreement, pp. 4-6; Staff Testimony in Support of Settlement Prepared by Jeffrey D. McClanahan, pp. 2-7.

⁴ Order Granting Joint Motion to Defer Rate Consolidation Issue, 10-30-08.

⁵ Prehearing Conference Order, 10-27-08, ¶ 11 (citing: *In the Matter of the Application of Atmos Energy for Adjustment of Its Natural Gas Rates in the State of Kansas*, Docket No. 08-ATMG-280-RTS, ¶ 11).

requires Westar to credit to customers should be credited to Full Requirements customers taking service from Westar under cost-based formula contracts with terms of 20 years or more to the extent such credits are provided for in the customers' FERC-approved agreements with Westar.⁶

7. All parties were given the opportunity to participate in settlement negotiations, either in person or by telephone. All parties were given the opportunity to participate during the October 24, 2008, prehearing conference and the October 29, 2008, and November 5, 2008, technical hearings. As a result, the Commission should find that all parties were provided the opportunity to be heard on all aspects of the settlement.

B. Is the agreement supported by substantial competent evidence in the record as a whole?

8. Kansas courts have defined substantial competent evidence as "that which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved."⁷

9. The Stipulation and Agreement is supported by substantial competent evidence. First, the settled terms come with the zone of reasonableness⁸ of the positions taken by each party in direct, cross-answering, and rebuttal testimony. The Kansas Supreme Court has defined the "zone of reasonableness" concept as applied to Commission rate cases:

⁶ Stipulation and Agreement, ¶ 15. *Full Requirements* is defined in the Stipulation and Agreement, ¶ 15, to mean the supply of capacity and firm energy by Westar to a wholesale customer to serve such wholesale customer's load as the same may fluctuate in real time, less such wholesale customer's resources used to serve its load. *Full Requirements* electric service has a priority equivalent to Westar's firm native load.

⁷ *Kansas Gas and Electric v. Kansas Corp. Comm'n*, 14 Kan. App. 2d 527, 531-532 (quoting *Southwestern Bell Tel. Co. v. Kansas Corporation Comm'n*, 4 Kan. App. 2d 44, 46, 602 P.2d 131 [1979], *rev. denied* 227 Kan. 927 [1980]). See also, K.S.A. 77-621(c)(7).

⁸ In a rate-making case, the goal of the Commission is to establish a rate within the "zone of reasonableness" after application of a balancing test in which the interests of all concerned parties are considered. *Kansas Gas & Electric*, 239 Kan. at 515.

There is an elusive range of reasonableness in calculating a fair rate of return. A court can only concern itself with the question as to whether a rate is so unreasonably low or so unreasonably high as to be unlawful. The in-between point, where the rate is most fair to the utility and its customers, is a matter for the State Corporation Commission's determination.⁹

10. The Stipulation and Agreement is specifically supported by testimony of the five witnesses testifying on behalf of Westar, Staff, and CURB.¹⁰ Each of these witnesses provided testimony demonstrating that the terms of the settlement fall within this zone or range of reasonableness.

11. On behalf of CURB, Andrea Crane testified that while the \$130 million rate increase specified in the Stipulation is higher than the increase contained in her direct testimony, it reflects a decrease of \$47.6 million from the amount originally claimed by Westar.¹¹ Recognizing the existence of litigation risk (the likelihood that the Commission would not adopt all of her adjustments), Ms. Crane testified that she believed the settlement represented a reasonable resolution of the issues presented in this case.¹²

12. Ms. Crane also noted that several of her policy recommendations favorable to ratepayers were included in the Stipulation and Agreement, including: the permanent withdrawal of Westar's request for a premium return on the 296 MWs of wind generation currently being constructed by Westar; the inclusion in base rates of certain costs previously recovered through the

⁹ *Southwestern Bell Tel. Co. v. State Corporation Commission*, 192 Kan. 39, 41, Syl. 17, 386 P.2d 515 (1963).

¹⁰ Andrea C. Crane Testimony in Support of Stipulation and Agreement (CURB); Staff Testimony in Support of Settlement Prepared by Jeffrey D. McClanahan (Staff); Staff Testimony in Support of Stipulated Settlement Agreement with Regard to Rate Design Prepared by Dorothy J. Myrick (Staff); Testimony in Support of Stipulation and Agreement of William B. Moore (Westar); and Testimony in Support of Stipulation and Agreement of Dick F. Rohlfs (Westar).

¹¹ Andrea C. Crane Testimony in Support of Stipulation and Agreement, p. 6.

¹² *Id.*, at 6-7.

ECRR; and the structure of the RECA tariff. Ms. Crane testified that including these important policy recommendations was critical in making the settlement even more favorable for ratepayers.¹³

13. In his direct testimony, CURB witness Brian Kalcic urged the Commission to revise Westar's residential rate design to provide stronger price signals to Westar's residential customers to encourage conservation, provide a level of affordability over a "first block" or baseline level of customer usage, and delay the need to additional generation units.¹⁴ The settlement adopts these rate design principles and moves existing rates toward accomplishing this goal.

14. Testifying in support of the settlement on behalf of Staff, Jeffrey McClanahan noted that the \$130 million revenue increase specified in the settlement falls within a range of reasonableness because it is between the high-end of Westar's request and the low-end of CURB's request.¹⁵ Mr. McClanahan also pointed out that approximately 50 witnesses filed direct, cross-answering, and rebuttal testimony involving numerous revenue requirement determinations including numerous accounting adjustments, class cost of service adjustments, and rate design proposals. He further noted that as a whole, the filed testimony provides evidence with which this Commission could have made a ruling had the case been fully litigated – and that the \$130 million revenue increase, even though part of a black box determination, falls within a range of reasonableness of the evidence in the record and is therefore supported by substantial competent evidence.¹⁶ Finally, Mr. McClanahan indicated that Staff's filed position would have been amended had the case been litigated, changing Staff's combined revenue increase to approximately \$113 million.¹⁷

¹³ *Id.*, at p. 7, 9.

¹⁴ Direct Testimony of Brian Kalcic, pp. 2, 8-9.

¹⁵ Staff Testimony in Support of Settlement Prepared by Jeffrey D. McClanahan, p. 8.

¹⁶ *Id.*

¹⁷ *Id.*, at p. 10.

15. Dorothy Myrick testified on behalf of Staff in support of the class revenue allocation and rate design contained in the settlement. Ms. Myrick noted that the agreement utilizes Staff's billing determinants (number of customers, demand and energy usage). She further noted that utilizing the agreed-upon billing determinants and class revenues, base rates were designed to generate the appropriate class revenue.¹⁸ Ms. Myrick acknowledged CURB's proposal to encourage conservation by revising existing rate structures to provide a stronger conservation-oriented price signal to residential customers and testified that the settlement makes movement toward CURB's goal and provides an incentive to residential customers to lower their bill by conserving energy usage.¹⁹ Ms. Myrick concluded that class allocation of the revenue increase specified in the settlement is reasonable in terms of the percentage increase or nominal dollar amount assigned to each class, and that the agreed-upon rate design fulfills the principle of cost-causer/cost-payer and establishes rates that are non-discriminatory.²⁰

16. Dick Rohlfs, testifying on behalf of Westar, pointed to the investment required for the Emporia Energy Center (EEC), its current wind generation project, and the Spring Creek generation facility, as well as significant costs associated with the 2007 ice storm as significant factors leading to and justifying the agreed upon \$130 million revenue requirement increase.²¹ While this was a black box settlement in which the parties did not specifically agree to revenue requirement components, Mr. Rohlfs identified certain costs that provide substantial competent evidence supporting the \$130 million stipulated revenue requirement, including: the \$7.6 million additional

¹⁸ Staff Testimony in Support of Stipulated Settlement Agreement with Regard to Rate Design Prepared by Dorothy J. Myrick, p. 2.

¹⁹ *Id.*, at page 3.

²⁰ *Id.*, at p. 4.

²¹ Testimony in Support of Stipulation and Agreement of Dick F. Rohlfs, p. 7.

depreciation expense; payroll and benefit increases ranging from \$15 to \$20 million; additions to the storm reserve up to \$5 million; other new investments in non-generation rate base of at least \$60 million, CWIP of approximately \$100 million; an increase in the earned return on existing assets to a reasonable authorized return; and several small additional items. Mr. Rohlfs testified that “collectively, these items would add at least \$50 to \$70 million to the \$80 to \$90 million increase in revenue requirement discussed above that is associated with EEC, Spring Creek, wind generation and the ice storm bringing the total increase that Westar believes to be justifiable to approximately \$130 to \$160 million.”²²

17. William Moore, Westar’s President and Chief Executive Officer, testified that using an assumed return on equity in the range of 10.2% to 10.6% would reasonably support a rate increase ranging from \$130 to \$160 million, based on Westar’s additional and substantial investment in:

- the Emporia natural gas peaking facilities;
- the development of 296 MW of wind generation;
- the Spring Creek natural gas generation facility; and
- the recovery costs involving the 2007 ice storm.²³

18. To examine whether the Commission's action is supported by substantial competent evidence, the record must contain evidence “which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.”²⁴

19. The record before the Commission contains substantial competent evidence to support Commission approval of the settlement.

²² *Id.*, at pp. 7-8.

²³ Testimony in Support of Stipulation and Agreement of William B. Moore, pp. 2-3.

²⁴ *Southwestern Bell Tel. Co. v. Kansas Corporation Commission*, 4 Kan.App.2d 44, 46, 602 P.2d 131 (1979), rev. denied 227 Kan. 927 (1980).

C. Does the stipulation and agreement conform to applicable law?

20. In 1986, the Kansas Supreme Court identified the general constitutional and legal principles applicable in rate-making decisions:

An important question to be considered is what a regulatory agency should seek to accomplish in such a case. The leading cases in this area clearly indicate that the goal should be a rate fixed within the 'zone of reasonableness' after the application of a balancing test in which the interests of all concerned parties are considered. In rate-making cases, the parties whose interests must be considered and balanced are these:

- (1) The utility's investors vs. the ratepayers;
- (2) the present ratepayers vs. the future ratepayers; and
- (3) the public interest.²⁵

21. The Commission is authorized under K.S.A. 66-101b to require a public utility to furnish reasonably efficient and sufficient service and to establish "just and reasonable" rates. The Kansas Supreme Court noted that the United States Supreme Court, in applying the standard requiring 'just and reasonable' rates, "emphasized that the focus of inquiry is properly upon the end result or 'total effect' of the rate order, rather than upon the rate-setting method employed."²⁶

22. In general, Kansas favors compromising and settling disputes when the agreement is entered into intelligently, and in good faith.²⁷ The Commission's authority to approve settlement of disputes stems from its broad powers to set just and reasonable rates.²⁸

23. CURB is unaware of any provision contained in the settlement that does not conform to applicable law. As a result, the Commission should find the Stipulation and Agreement conforms to applicable law.

²⁵ *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 488, 720 P.2d 1063 (1986) (emphasis added).

²⁶ *Id.*, at 489, citing *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

²⁷ *Bright v. LSI Corp.*, 254 Kan. 853, 858, 869 P.2d 686 (1994).

²⁸ *Farmland Industries, Inc. v. Kansas Corporation Comm'n*, 24 Kan. App. 2d 172, Syl ¶5, 186-87.

D. Will the stipulation and agreement result in just and reasonable rates?

24. In determining whether to approve this settlement, the Commission must make an independent determination that the settlement constitutes a reasonable remedy or resolution of issues.²⁹ The Commission has been presented with substantial competent evidence sufficient to make an independent determination that the unanimous settlement in this case constitutes a reasonable remedy or resolution of the issues presented.

25. All parties believe the unanimous settlement results in just and reasonable rates. Five witnesses testifying on behalf of Westar, Staff, and CURB, collectively, presented testimony indicating the settlement will result in just and reasonable rates.³⁰

26. The Commission has been presented with the testimony of these five witnesses in support of the settlement as well as the pre-filed direct, cross-answering, and rebuttal testimony filed by the parties. In light of this evidence, and after balancing the interests of all parties, the Commission should conclude the settlement results in just and reasonable rates.

E. Are the results of the agreement in the public interest, including the interests of customers represented by any party not consenting to the agreement?

27. The only persons authorized to *determine* whether the settlement is in the public interest are the three Commissioners deciding this case. There are no parties to this proceeding who have not consented to the settlement, so that portion of this guideline is inapplicable.

²⁹ *Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 28 Kan. App. 2d 313, 316 (2000), rev. denied March 20, 2001, citing *Farmland Industries v. Kansas Corporation Comm'n*, 24 Kan. App. 2d 172, Syl. ¶ 5, 186-87 (1997).

³⁰ Andrea C. Crane Testimony in Support of Stipulation and Agreement, pp. 6-8; Staff Testimony in Support of Settlement Prepared by Jeffrey D. McClanahan, pp. 9-10; Staff Testimony in Support of Stipulated Settlement Agreement with Regard to Rate Design Prepared by Dorothy J. Myrick, pp. 3-4; Testimony in Support of Stipulation and Agreement of William B. Moore, pp. 2-6; and Testimony in Support of Stipulation and Agreement of Dick F. Rohlf, pp. 2-4, 6-8, 13-14.

28. The five witnesses testifying in support of the settlement on behalf of Westar, Staff, and CURB all testified that the settlement can be found to be in the public interest.³¹

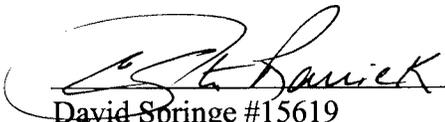
29. As noted by counsel for Westar in his opening statement, the settlement is “supported by all the parties in this proceeding representing virtually every class of service in [Westar’s] system, residential, commercial, industrial, institutional, and even our wholesale customers.” CURB agrees with Westar that achieving a unanimous settlement with the diverse group of customers and interests in this docket supports a finding that the public interest would be served by approval the settlement.³²

30. As a result, CURB urges the Commission to find the settlement in the public interest, including the interests of all parties to this proceeding, based on the record as a whole.

II. Conclusion

31. Based on the foregoing, CURB respectfully urges the Commission to approve the unanimous Stipulation and Agreement.

Respectfully submitted,



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³¹ Andrea C. Crane Testimony in Support of Stipulation and Agreement, pp. 6-7; Staff Testimony in Support of Settlement Prepared by Jeffrey D. McClanahan, pp. 10-12; Staff Testimony in Support of Stipulated Settlement Agreement with Regard to Rate Design Prepared by Dorothy J. Myrick, p. 4; Testimony in Support of Stipulation and Agreement of William B. Moore, pp. 1-6; and Testimony in Support of Stipulation and Agreement of Dick F. Rohlfs, pp. 1, 14.

³² Tr., at pp. 14-15.

CERTIFICATE OF SERVICE

08-WSEE-1041-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, electronically served, or hand-delivered this 21th day of November, 2008, to the following:

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