THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Westar Energy, Inc. and Kansas Gas and Electric Company for an Order Authorizing Them to Participate in Efficiency Kansas, Approve the SimpleSavings Program Rider, and Related Cost Recovery.	))))))	Docket No. 10-WSEE-775-TAR

RESPONSIVE POST-HEARING BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD

COMES NOW, the Citizens' Utility Ratepayer Board (CURB) and submits its Responsive Post-Hearing Brief in the above captioned matter.

I. Introduction

On June 4, 2010, Westar Energy, Inc., and Kansas Gas and Electric Company (Westar) filed its application with the Kansas Corporation Commission (KCC or Commission) seeking to become a partner utility with the Efficiency Kansas revolving loan program created by the State Energy Office. Westar will call its program the SimpleSavings loan program. Westar will administer loans issued by Efficiency Kansas to Westar customers and will collect the monthly loan payments on the participating customer's monthly bill. The cost of offering the SimpleSavings program will be paid for by all of Westar's customers through Westar's existing Energy Efficiency Rider. Certain of these costs will be offset by fees charged to customers that participate in the SimpleSavings program.

Westar also proposes a so-called "shared savings" mechanism. The shared savings mechanism will charge all Westar customers for non-fuel margins lost through lower electricity sales to customers that participate in the SimpleSavings program. In its simplest form, the shared savings mechanism is a "hold harmless" mechanism so that Westar does not loose sales revenue due to the increased efficiency created through the SimpleSavings program.

II. Issues No Longer in Dispute

On November 12, 2010 Westar, CURB and the Staff of the KCC (Staff) filed a Joint Notice of Undisputed and Disputed Issues (Joint Notice). In summary, the parties agree that:

1. Westar will assess a $250 fee to customers who finance projects under the program.

2. Westar will assess a $125 fee to customers who begin the SimpleSavings process or meet with Westar to receive education but who do not complete the process and take out a loan.

3. Westar will assess no fee to customers whose audit does not show cost effective improvements are possible.

4. Westar will remove the customer charge from the calculation of the non-fuel revenue of which Westar seeks reimbursement through its shared savings mechanism.[1]

While CURB has some reservations about Westar becoming a partner utility with Efficiency Kansas, as expressed in the pre-filed Direct and Cross-Answering Testimony of Stacey Harden, CURB will not object to the Commission issuing an Order approving the SimpleSavings program, subject to the provisions set forth above as undisputed issues.

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1. CURB does not agree that the Commission should approve Westar's proposed shared savings mechanism and point number 4 above is not tacit approval by CURB of such a mechanism. Rather, point 4 is merely a point of agreement on calculation should the Commission approve the shared shavings mechanism despite CURB's objections.

III. Issues in Dispute

In the Joint Notice the issues that remain in dispute are set forth as follows:

1. CURB opposes implementing a surcharge to track Westar's <u>lost revenues</u> resulting from investments financed through the program.

2. If the Commission approves Westar's <u>lost revenue</u> surcharge, CURB recommends the surcharge be recovered on a historical basis and based on actual verifiable savings achieved through the program instead of Westar's proposal to use estimates provided by an independent third-party auditor.

3. CURB recommends that the Commission initially approve Westar's program as a pilot program with a performance review after fifteen months.

CURB opposes the shared savings mechanism proposed by Westar in this case. While Westar plays with semantics in the labeling of its mechanism, it is clear from the above Joint Notice, agreed to and signed by Westar, that the mechanism is a simple lost revenue mechanism. Lost revenue mechanisms replace 100% of the non-fuel margins lost through decreased sales. Westar's shared savings mechanism simply replaces 100% of Westar's non-fuel margins lost due to participation in the SimpleSavings program. Rohlfs Direct Testimony at 5, Rholfs Cross-Examination, Transcript at 36. The Commission, as set forth in prior policy Orders, does not favor lost revenue mechanisms. Further, the non-fuel revenues lost due to decreased sales from this program are estimated by Staff witness Deupree to be less than $6000 per year for the first five years and do not impose a significant financial impact to Westar's financial condition. To justify approval of Westar's lost revenue mechanism the Commission must ignore its own policy statements set forth in prior Orders and ignore its own Staff's interpretation of those policy Orders as presented in testimony in prior energy efficiency cases. Given the unprecedented nature of this mechanism and the de minimis amount of lost margins that the evidence suggests Westar will face, the Commission should deny approval of Westar's lost revenue mechanism.

Staff recommends approval of Westar's shared savings mechanism even though Staff admits the mechanism is a traditional lost revenue mechanism. Deupree Direct Testimony at 16. Instead of applying the Commission's policy guidance in a manner consistent with the structure of the Commission's policy Orders, staff simply offers Westar a reward "to encourage adoption and active promotion of EK programs by removing the inherent disincentive associated with such activity". Deupree Direct at 17. Staff has been unwilling to grant lost revenue recovery or decoupling in any of the three prior energy efficiency cases filed with the Commission. The only logical rationale that explains the Staff's sudden switch of position in this case is that Efficiency Kansas is a Commission created, Commission operated program and the Commission seeks to increase participation. Viewed in this context, the general public would be right in questioning Staff's recommendation that the Commission grant Westar the "reward" of lost revenue recovery for supporting Efficiency Kansas.

IV. Commission Policy Framework

The Commission set forth its policy framework for energy efficiency programs and cost recovery in two separate dockets. After extensive comment from all interested parties, the Commission issued two Orders setting forth its specific policy principles: the June 2, 2008, *Order Setting Energy Efficiency Policy Goals* in Docket No. 08-GIMX-442-GIV ("442 Docket") as well as the November 14, 2008, *Final Order Regarding Cost Recovery and Incentives for Energy Efficiency Programs* in Docket No. 08-GIMX-441-GIV ("441 Docket"). The Commission established a general policy framework of review and evaluation of efficiency programs on a uniform and consistent basis. Deupree Direct Testimony at 3.

In the 441 docket, the Commission addressed three broad issues related to cost recovery. First, the Commission decided to allow prudently incurred program costs to be recovered through a rider on the utility bill. The Commission believes that a rider will allow the Commission to maintain its responsibility to review costs for prudence while allowing a "nearly contemporaneous" recovery of program costs for utilities. 441 Order at para. 31-32.

Second, the Commission recognized that a "throughput incentive may be necessary to avoid utilities experiencing loss of margin as a result of implementing energy efficiency programs." 441 Order at para. 45. The Commission devotes 11 pages of its 441 Order, paragraphs 45 through 78, solely to throughput incentives. The Commission decided that, "of the various types of throughput mechanisms the Commission believes decoupling is the best method."441 Order at para. 62. Staff suggested that it will consider decoupling as a method if a utility "can show that a program will have a significant detrimental impact on company finances." 441 Order at para. 47. The Commission appears to adopt this litmus test stating that the utility should "provide a comparison of the potential financial impacts of the energy efficiency programs it has received approval for or intends to seek approval for and the expected financial outcome without energy efficiency programs in place." 441 Order at para. 72. The Commission further stated that "the utility must demonstrate that decoupling makes economic sense in the context of the utility's efficiency program of suite of programs" and that decoupling "should be implemented in context of measurable and verifiable program performance in meeting Commission established goals", noting specifically that "on a basic level, if the program is not performing, it is unlikely utility margins are being negatively affected by energy efficiency". 441 Order at para. 70-71.

Of import to the current case, the Commission stated specifically that it "does not favor Lost Margin Recovery because of the high premium this method places on accurate evaluation of program impacts." 441 Orders at para. 68. In Staff's report to the Commission in the 441 Docket, Staff stated that a lost margin recovery mechanism is "too administratively burdensome especially in light of the fact that the Commission has currently limited the evaluation, measurement and verification budget associated with a particular energy program to 5% of the project costs." [2]

Third, the Commission addressed the use of performance incentives as a nudge towards using demand side resources rather than traditional supply side resources to meet customer energy needs. The Commission devotes the remaining pages of the 441 Order, paragraphs 79 though 111, to performance incentives. The Commission concluded that it is "reluctant to provide additional incentives, resulting in increasing costs to consumers, for energy efficiency programs." 441 Order at para 94. Further, the Commission stated that "if energy efficiency inherently does not result in the same amount of ratebasing, or capitalized costs, that is simply reflective of the nature of the resource." *Id.*_ The Commission however did recognize that "utilities must attract capital and need a sustainable business model to remain financially strong" and that "incentives are important to maintaining that model and to encouraging (*SIC*) utility investment in energy efficiency." 441 Order at para. 95. The Commission determined that the "best manner in which to balance these considerations is to allow for incentives, but limit them to specific energy efficiency programs the Commission has determined are the most beneficial for Kansas energy customers and the long-term energy efficiency goals of the Commission". 441 Order at para. 96. The Commission determined that a performance incentive will only be appropriate for programs that met either or both of the following Commission goals:

a. "Proposals for programs that target low and fixed income customers and renters."

And/or

b. "Proposals that target new and existing residential housing and demonstrate a potential for long term energy savings utilizing a comprehensive whole house concept, pursuant to Commission policy as expressed in Docket 08-GIMX-442-GIV." 441 Order as para. 97.

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2 October 10, 2008, *Notice of Filing Staff's Report to the Commission*, KCC Docket No. 08-GIMX-441-GIV at p. 28.

For programs that meet either or both of these two goals, the Commission stated it "favors the shared benefit approach to performance incentives" noting that "Net benefits generally include avoided energy and capacity cost and transmission and distribution savings". 441 Order at 99.

In its policy Orders, the Commission is clear and direct: the Commission favors decoupling if a throughput incentive is needed, but there is a high evidentiary bar about the financial impacts on the utility offering the programs before decoupling will be granted, and the Commission will consider a shared benefit performance incentive, but only in the limited instances where a program meets one or both of the Commission stated goals of targeting low income customers or offering comprehensive whole house programs.

What the Commission <u>did not say</u> in its policy Orders, and what Staff is specifically advocating for in this case, is that the Commission will simply approve a decoupling type performance incentive mechanism if a utility offers programs that meet either one or both of the Commission's goals; targeting low income customers, or pursing comprehensive whole house programs. In drafting the 441 Order, the Commission tied performance incentives to these two program goals. In drafting the 441 Order, the Commission could have also linked approval of decoupling or other throughput mechanisms to these two program goals, but chose not to create this linkage. These two program goals are clearly spelled out in the performance incentive section of the 441 Order, and specifically left out of the throughput incentive section of the Order. Mr. Deupree concedes that the Commission could have chosen to write the Orders such that both the throughput and the performance incentive sections included the same exact language, but the Commission did not do so. Deupree Cross-Examination at 100. One must conclude that this was not an accident of drafting, but rather a specific policy choice made by the Commission. Further, what the Commission was unequivocal in stating was that it <u>does not favor lost margin recovery mechanisms</u>.

Generally, administrative agencies may change positions on an issue if the new position is supported by substantial competent evidence. However, when an administrative agency deviates from a policy it had adopted earlier, it must explain the basis for the change. *Western Resources, Inc.,* 30 Kan. App. 2d 348, Syl. ¶ 7. Likewise, the process by which an administrative agency reaches its decision must be logical and rational, especially if the agency is deviating from its prior standards. *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 1002, 1012, 76 P.3d 1071 (2003), *rev. denied* 277 Kan. 923 (2004). It is unreasonable for Staff to now stretch its interpretation of the Commission policy Orders to suggest the Commission meant to say that it favors a lost revenue recovery mechanism as a reward for offering a whole house program (Efficiency Kansas). Deupree Cross-Testimony at 3. This is simply inconsistent with the basic tenets and layout of the Commissions policy Orders and the Commission should deny Westar's mechanism on this basis.

V. The Commission Should Deny Westar's Lost Revenue Recovery Mechanism.

a. The Commission Does Not Favor Lost Revenue Mechanisms

The Commission is clear in the 441 Order that it "does not favor Lost Margin Recovery because of the high premium this method places on accurate evaluation of program impacts." 441 Order at para. 68. Westar admits that its proposed shared savings mechanism will allow Westar to build 100% of its margins lost as a result of implementation of the SimpleSavings program into its Energy Efficiency Rider. Rholfs Direct Testimony at 5, Rholfs Cross-Examination, Transcript at 36. Staff states that "the shared savings mechanism, as proposed by the Company, is most closely aligned with what is usually called a lost margin recovery mechanism, although sometimes called limited decoupling". Deupree Direct Testimony at 16. The definition of lost margins contained in the National Action Plan for Energy Efficiency, November 2007 also makes clear that what Westar is proposing is a lost margin recovery mechanism. Harden Direct Testimony at 20.

The Commission was also clear in describing a shared benefit program as one which the net benefits generally include "avoided energy and capacity cost and transmission and distribution savings". 441 Order at 99. Westar's shared savings program does not meet this definition. Under Westar's shared savings program there is no sharing of avoided capacity cost or transmission and distribution savings. Westar claims that all customers will benefit from sharing in the reduced fuel cost generated by the SimpleSavings program. Westar incorrectly posits that this is the sharing of savings (fuel costs) that the Commission envisioned when it discussed shared savings as a performance incentive, and incorrectly concludes that returning 100% of Westar's lost margins is an equal sharing by Westar. Westar's suggestion is purposefully misleading and incorrect. In fact, since every energy efficiency and demand response program should result in some amount of avoided fuel costs, by Westar's definition every energy efficiency program approved by the Commission will qualify for a performance incentive under the Commission's policy guidance. This result is absurd. Under no reading of the Commission's policy Orders can it be concluded that the Commission intended to provide performance incentives for every program that saves fuel.

The Commission should be clear in its factual findings that what Westar is proposing in its shared savings mechanism is in fact a lost revenue mechanism, that the Commission was clear in its policy Orders that it does not favor lost revenue mechanisms, that shared savings performance incentives, if allowed, require sharing of avoided capacity costs and transmission and distribution savings and are not simply designed to allow customers to share in reduced fuel costs.

b. The Amount of Lost Margins Are Small, and Do Not Significantly Impact Westar's Finances

Lost margin recovery mechanisms (Limited decoupling as staff witness Deupree defines it) clearly fall within the throughput incentive section of the Commission 441 policy Order. The Staff of the Commission was clear in its recommendation to the Commission in the 441 docket that it will consider decoupling as a method if a utility "can show that a program will have a significant detrimental impact on company finances." 441 Order at para. 47. The Commission appears to adopt this litmus test stating that the utility should "provide a comparison of the potential financial impacts of the energy efficiency programs it has received approval for or intends to seek approval for and the expected financial outcome without energy efficiency programs in place." 441 Order at para. 72. The Commission further stated that "the utility must demonstrate that decoupling makes economic sense in the context of the utility's efficiency program of suite of programs" and that decoupling "should be implemented in context of measurable and verifiable program performance in meeting Commission established goals". Order at para. 70-71.

Westar fails to provide any evidence in this case to meet the standard of proof set forth by the Commission. The only evidence provided by Westar that attempts to estimate the potential financial impacts on company margins was provided by Jim Ludwig, Westar's Executive Vice-President for Public Affairs and Consumer Services at the Commission Ordered public hearing in this case. Mr. Ludwig estimated that Westar will experience $22,000 of lost revenue in the first year of this program which is equal to 0.002 percent of Westar's annual sales. Harden Direct Testimony at 24. Westar did not enter this evidence into the record.

Staff witness Deupree did perform a comprehensive statistical analysis of data developed from the How$mart Program developed by Midwest Energy. How$mart is a comprehensive whole house loan program nearly identical to Westar's proposed SimpleSavings program. Staff's analysis of projected revenue impacts to Westar is the only substantial competent evidence in the record. Staff's analysis is "technical, lengthy and difficult to explain in a testimonial format", but did include "an ordinary least squares regression process controlling for the effects derived from weather, inter-customer idiosyncrasies (cross-sectional effects) and participation within the How$mart program". Deupree Direct Testimony at 12. Staff's analysis of the impacts of the SimpleSavings program is presented in Exhibits MWD-1 and MWD-2, attached to Mr. Deupree's Direct Testimony (as corrected in Hearing Exhibit Staff 2). The detailed analysis behind Exhibits MWD-1 and MWD-2 (and Staff 2) is submitted into the record at hearing as Hearing Exhibits CURB 1 and CURB 2. According to Staff's comprehensive analysis, as detailed in CURB 1, Staff projects that Westar will lose $28,610 in company margins in the first 5 years of offering the SimpleSavings program. According to Mr. Deupree, these estimates are nominal dollars, meaning when discounted back to today's value, it will be about $2000 less than the $28, 610 figure. Deupree Cross-Examination at 114.

The only evidence in the record before the Commission clearly indicates that the impact on Westar's margins from offering the SimpleSavings program is less than $6000 per year. Even if it could be argued that Staff's numbers are not correct, an argument there is no evidence to support, doubling or tripling Staff's estimate still results in a de minimis impact on Westar. The Commission must find that based on the record in this case, Westar has not provided the required evidence that there is a significant detrimental impact on Westar's finances to justify a lost margins or decoupling type throughput incentive. Nor has Westar provided any evidence that its shared savings mechanism "makes economic sense in the context of the utility's efficiency program of suite of programs" or that the shared savings mechanism will be implemented in context of "measurable and verifiable program performance in meeting Commission established goals", as required by the Commission in its 441 Order. The Commission must deny Westar's shared savings mechanism for failing to meet the Commission's expressed standard of proof to support such mechanisms.

c. Staff is Not Providing a Uniform and Consistent Interpretation of the Commission Policy Orders.

In recommending the Commission approve Westar's shared savings mechanism in this case, Staff significantly deviates from prior interpretations of the Commission policy Orders Staff has presented in testimony in other energy efficiency cases.

In a case almost directly analogous to the current Westar case, Empire District Electric Company in Docket No. 10-EPDE-497-TAR (497 docket or Empire case) filed for approval of a suite of energy efficiency programs and for the imposition of a lost margin recovery mechanism. Staff witness Janet Buchanan provided testimony giving broad background on lost revenue mechanisms and presenting Staff's interpretation of the Commission's policy Orders. Mr. Deupree concedes that Ms. Buchanan is his superior and "has a fairly accurate understanding of the Commission's intent in the 441 and 442 Orders". Deupree Cross-Examination at 84.

In Empire, Ms. Buchanan specifically notes that while the Commission "has not eliminated the lost margin mechanism from consideration, it has indicated that it 'does not favor' this method of attempting to address the throughput incentive". 497 Docket, Buchanan Direct Testimony at 14. Ms. Buchanan goes on to note that "given the Commission's hesitance to embrace lost revenue recovery mechanisms, one would expect a utility to offer ample support for its request". *Id.* Following the Commission policy Orders Ms. Buchanan criticizes Empire because it offers "no explanation of how the mechanism makes economic sense in the context of the utility's energy efficiency program or suite of programs" and that Empire "did not directly provide data to support its proposal for a lost revenue mechanism.....sufficient to address the Commission's desire for information related to the expected financial outcome associated with the proposed energy efficiency programs" and that "Empire did not directly address rate volatility, as discussed by the Commission". *Id* at 15. As discussed above, in the current case, Staff required none of the above information to be submitted by Westar that it required of

Empire.

In making Staff's recommendation to deny the lost revenue mechanism in the Empire case, Staff also looked at whether the programs cause a significant detrimental impact on the utility's finances. In the Empire case Ms. Buchanan testified that the "Commission's suggested criterion for 'significant' is 0.5% of base revenue" and then compared Empire's estimated lost revenue due to the programs, $10,943 (or Staff's analysis of Empire's lost revenue of $15,040), to Empire's base revenue from its last rate case of $17,458,452. Ms. Buchanan concluded that "lost revenues do not meet the Commission's criterion for significance and it is not clearly apparent that lost revenues serve as a strong deterrent to implementation of energy efficiency programs in this instance" *Id* at 18. In the current case, Staff does not evaluate the level of Westar's lost revenue in comparison to Westar's base revenues from its last rate case to determine whether Westar's lost revenues meet the Commission's "significance" test. If Staff had, it would note that Staff estimated less than $6000 of lost revenues per year under this program and Westar's annual base revenue, according to Mr. Rholfs, is in the $1 billion range. If Staff is applying the Commission's policy framework in a uniform and consistent manner with that used in the Empire case, Staff must conclude that $6000 of lost margin revenues "do not meet the Commission's criterion for significance and it is not clearly apparent that lost revenues serve as a strong deterrent to implementation of energy efficiency programs in this instance." In fact it is simply inexplicable why Staff in the Empire case denied a $10,000 lost revenue adjustment on a $17 million base revenue, but in Westar now approves a $6000 lost revenue adjustment on a $1 billion base revenue.

Kansas Gas Service Company (KGS), in Docket No. 10-KGSG-421-TAR (421 Docket or KGS case) proposed becoming an Efficiency Kansas utility partner. KGS also proposed a decoupling mechanism to address throughput concerns. If Staff is providing a uniform and consistent review in the current Westar case, Staff in KGS should have considered and approved KGS's decoupling mechanism because it will have provided a "performance incentive" reward for a program that "uniquely addresses the Commission policy goal of encouraging adoption and active promotion of programs the Commission viewed as particularly in the public interest". Deupree Cross-Testimony at 3. However, a review of Staff's testimony in the KGS case finds no language suggesting the Commission "may be willing" to award decoupling (or any other throughput incentive) as a performance incentive to encourage the adoption and promotion of Commission favored programs. Staff in fact recommended that Commission approve KGS's application to partner with Efficiency Kansas and specifically recommended denial of KGS's request for decoupling. 421 Docket, Glass Direct Testimony at 3. KGS received no performance incentive reward for offering a program that supported Commission goals, but now Westar does? Clearly, the current Westar case is the first instance where Staff has created, or interpreted the Commission Orders as having this reward performance incentive policy.

In denying KGS' request for decoupling Staff also applied the Commission's high evidentiary standard regarding financial impact, as it did in the Empire case, noting that "the recovery of less revenue in and of itself does not indicate 'significant detrimental impact on the finances of the company.' KGS needs to explain how the declining revenues will negatively impact the financial stability of the company, how it will influence its capacity to borrow money and at what interest rate and the effects of the financial stress on the customer service". 421 Docket, Glass Direct Testimony at 13. Again, in the current Westar case, Staff asked for none of the information required in KGS or Empire on whether there is a significant impact on revenues, whether there is an impact on Westar's ability to borrow money and at what interest rate and the effects on the financial stress on the customer service.

Black Hills Energy, in Docket No. 10-BHCG-639-TAR (639 case or Black Hills), proposed offering a suite of energy efficiency programs, proposed a decoupling mechanism and proposed additional shared savings performance incentives. In testimony filed less than 3 months before Staff filed its recommendation in the current Westar case, Ms. Buchanan testified for Staff and again focused on, among other things, the need to see the evidence the Commission requested be addressed in a decoupling filing, including providing economic justification for decoupling, and a comparison of potential financial effects with and without decoupling in place. 639 Docket, Buchanan Direct Testimony at 20. Ms. Buchanan again compares potential lost revenues of $38,921 to Black Hills latest base revenue requirement of $37,765,176 and concludes that "the effect of implementing energy efficiency programs on revenues is unlikely to be significant enough to deter its participation and decoupling solely to address the revenue variability related to energy efficiency is likely to be unnecessary". *Id.* At 21 While there were many other issues in the Black Hills case, Staff asked the same basic questions it asked in the Empire and KGS cases, made the same revenue calculations and came to the same basic conclusions. Most importantly, Staff applied this same review methodology in both lost revenue and decoupling cases. The one case that stands out as inconsistent with the uniform methodology Staff has applied to these questions is the current Westar case.

The standard of evidence the Commission must meet for its decisions to be lawful and valid was considered in *Zinke & Trumbo Ltd. v. Kansas Corp. Comm'n,* 242 Kan. 470, 749 P.2d 21 (1988). In *Zinke,* the Court held that to be lawful and valid, the Commission's decision must be supported by substantial competent evidence, and must not be unreasonable, arbitrary, or capricious. 242 Kan. at 474. The evidence is clear that prior to the current Westar case, Staff uniformly operated under a policy that the Commission does not favor lost revenues and is hesitant to embrace lost revenues. Further, Staff has required a high evidentiary burden of utilities that file and request these types of mechanisms. However, in the current Westar case, Mr. Deupree now states that Staff interprets the phrase "does not favor" to mean "may be willing to consider a proposed lost margin recovery mechanism", proving such mechanism is shown to "uniquely address policy concerns the Commission has expressed elsewhere".

Deupree Cross-Testimony at 3. Further, in advancing the new "may be willing" policy, Staff fails to require Westar to meet any of the evidentiary requirements that Staff has made every other utility meet in reviewing these mechanisms. Mr. Deupree's "may be willing" policy appears to be a 180 degree turn in interpretation, tone and evidentiary rigor from prior Staff testimony. Taken in its best light, the only evidence in the record that evaluates the revenue impacts of offering the SimpleSavings program on Westar's financial condition is Staff's projected $6000 per year non-fuel margin loss. A $6000 annual non-fuel margin loss to Westar, a utility with a $1 billion annual revenue requirement, cannot be found to be of a magnitude to meeting the high evidentiary required of other utilities making applications with the Commission, and is unlikely to be significant enough to deter Westar's participation in this program. The Commission must conclude that Staff's application of Commission policy in this case is not uniform and consistent with Staff's application of Commission policy in other instances and therefore not supported by substantial competent evidence, is unreasonable and arbitrary and capricious.

d. Lost Revenues May Be Charged Even When Westar Earns More Than Its Allowed Revenue Requirement.

Westar's lost revenue mechanism will charge customers for past lost revenues but apply the charge to customer bills in current time. As proposed, the lost revenue charge will be put on consumer bills without any regard to whether or not Westar's current revenues are in excess of its Commission allowed revenue requirement. It is therefore possible that during very hot summer months, Westar's normal rates and increased volumes due to weather could result in Westar collecting more revenue than its Commission allowed revenue requirement at the same time Westar is increasing rates to recover lost margins from the SimpleSavings program. Rholfs Transcript P. 37. Since there is no review of whether Westar's actual revenues are above or below allowed revenue, the Commission, through the lost revenue mechanism, may be approving consumer rates that will collect in excess of the allowed Commission Revenue Requirement. This type of single issue rate making should be avoided by the Commission.

e. Granting Westar's Lost Revenue Mechanism Will Encourage Other Utilities to Seek Lost Revenue Mechanisms.

Westar was granted recovery of $5.8 million of energy efficiency and demand response program costs in Docket 11-WSEE-032-TAR. These dollars are being recovered currently in Westar's Energy Efficiency Rider on consumer bills and total annual costs are expected to increase in the future. In this case, on direct questioning from CURB Counsel, Westar refused to commit to not seek lost revenue recovery in the future for the revenues lost due to its existing energy efficiency programs in the future. Rholfs Cross-Examination at 36. If the Commission grants Westar lost revenues in this docket, the Commission will have a difficult time denying lost revenues to Westar for its other programs. Such a later denial will appear to be arbitrary and discriminatory. It is also highly likely that every utility in the state is watching this docket with great interest. If the Commission approves lost revenues for Westar, how can the Commission not approve the same treatment of other utilities? The Commission runs the risk in this docket of setting what CURB considers a poor policy precedent that it may later regret. While CURB can understand the Commission's interest in supporting its Efficiency Kansas program, the Commission must refrain from making policy judgments in this case that will have long range implications, simply to accomplish a parochial goal of increasing Efficiency Kansas participation.

f. Consistency with the America Reinvestment and Recovery Act is Not Relevant To This Proceeding.

Westar argues that the proposed shared savings mechanism will meet the America Reinvestment and Recovery Act of 2009 (ARRA) goals by helping to insure Westar has an incentive to implement the SimpleSavings program. Application at para.7. Of course, providing an unprecedented regulatory mechanism to insure 100% recovery of any potential lost margins resulting from implementing energy efficiency programs will likely provide a utility with an incentive to proceed with a program. However, the relevant question for the Commission is whether the lost revenue mechanism is <u>necessary</u> to accomplish the goals set forth in the ARRA act. Clearly a lost revenue mechanism is not necessary to accomplish the goals of the ARRA. The ARRA requires that the applicable state regulatory authority will seek to implement "a general policy that ensures that utility financial incentives are aligned with helping consumers use energy more efficiently" and "provide timely cost recovery and a timely earnings opportunity for utilities associated with cost effective measurable and verifiable energy savings in a way that sustains and enhances utility customers incentive to use energy more efficiently." *Id.* Clearly, the policies set forth by the Commission in the 441 and 442 Orders meet the ARRA requirements. The 441 and 442 Orders set forth specific Commission policy guidance, allows for performance incentives that increase utility revenue opportunities, balance consumer concerns about increasing rates during difficult economic times and provide a energy efficiency bill rider to allow "reasonably contemporaneous" cost recovery. The 441 and 442 Orders meet every element of the ARRA. Surely Westar cannot be suggesting that the Commission is not currently in compliance with its responsibilities under the ARRA?

g. Summary

The Commission should not grant Westar's proposed shared savings mechanism. The mechanism is clearly a lost revenue recovery mechanism, and not a traditional shared savings mechanism. The Commission has stated clearly that it does not favor lost revenue mechanisms and in policy Orders clearly avoided the use of decoupling or other throughput incentives to reward performance, even in pursuit of programs favored by the Commission. The Commission set a high level of evidentiary requirements regarding the financial impact of energy efficiency programs that must be met before the Commission will allow throughput incentives like lost revenue or decoupling. In three prior energy efficiency cases Staff has rejected lost revenue and decoupling proposals because the level of lost revenues was so small that it failed to meet the Commission standard of significant detrimental impact. Staff consistently found that the effect of implementing energy efficiency programs on revenues is unlikely to be significant enough to deter utility participation in energy efficiency programs. In the current case, Staff estimates that Westar's non-fuel margin losses to due to the SimpleSavings programs will be only $6000 per year. There is no evidence to contradict Staff's analysis. Given Westar has a $1 billion annual revenue requirement, the Commission can come to no conclusion other than the level of lost revenue in this case is unlikely to be significant enough to deter Westar's participation in SimpleSavings.

The Commission must reject Staff's interpretation of the Commission policy Orders as suggesting the Commission meant to allow lost margin recovery as a performance incentive for companies that pursue programs supported by the Commission. The Commission was clear that it preferred a shared savings mechanism if performance incentives are to be allowed and the section of the 441 Order that dealt with throughput incentives like lost revenue mechanism contain no language to suggest that the Commission will award such mechanisms for simply pursuing programs supported by the Commission.

Staff's position in this case is not grounded in the Commission policy Orders and contradicted by the Staff's own testimony in the three prior energy efficiency cases.

VI. Additional Requirements if the Commission Approves Westar's Lost Revenue Mechanism.

a. *Approve the SimpleSavings Program as a Pilot Program Through April of 2012*

CURB recommends that if the Commission decides to approve Westar's SimpleSavings program, the Commission approve the program as a Pilot Program through April of 2012. The Efficiency Kansas Program is funded with federal ARRA funds that are required to be spent by April 2012. While there is an expectation that the State Energy Office will disburse all of the ARRA funds by that date, it makes sense to use the April date as a natural review point for this program. The vast majority of energy efficiency programs approved by the Commission start as pilot programs and it certainly consistent that the Commission will want to review this program's progress in April of 2012 to determine funding and to examine whether it makes economic senses to continue operating a program with limited funding. There is no rational argument to be made that this program should not be subject to review over time and April 2012 is a natural review date. As such, the Commission should approve the SimpleSavings program as a pilot program to be reviewed in April of 2012.

b. *Restrict Westar to Only Recovering Actual Verifiable Lost Revenues on a Historical Basis*

Westar proposes to use the estimated kWh savings provided by home energy auditors to calculate the lost margins that result from participation in the SimpleSavings program. The estimated kWh savings will be multiplied by Westar's non-fuel margin rate (approximately 7.4 cents) to create the lost revenue amount to be charge to Westar's customers. At no point will Westar calculate actual lost revenue based on actual participant reductions in electricity use. Rholfs Cross-Examination at 40. Functionally, Westar will be estimating its lost margins and then asking the Commission to charge customers based on this estimated loss. Staff on the other hand recommends reviewing lost margins based in a "census basis". Deupree Cross-Examination at 116. Staff intends to look at each customers's billing history to determine actual levels of lost revenues. *Id.* CURB supports Staff's recommendation that the Commission track individual customer data for SimpleSavings participants on a "census basis" to determine whether there is any actual loss in margins prior to Westar charging other customer for that loss. If the Commission allows an unprecedented lost revenue recovery mechanism, the Commission should not also allow that mechanism to charge rates that are not based on actual margins lost. Westar customers deserve to know that if they must pay lost margins, that those lost margins are tied to actual data, and not theoretical estimates.

c. *Narrowly Interpret Commission Policy to Restrict Lost Margin Revenue Recovery On Only This Specific Program and Make Clear This is Not a General Commission Principle Available For Every Energy Efficiency Program.*

If the Commission approves Westar's lost revenue recovery mechanism, the Commission must find that approval is a narrow exception to the general policy expressed in the 441 and 442 Orders. The Commission should reject Staff's broad "may be willing" interpretation of the Commission policy and clearly state that the Commission will consider lost margin recovery for only participation in the Efficiency Kansas program. An interpretation of the 441 and 442 Orders more broad than this narrow exception will create an incentive for each Kansas utility to seek its own lost revenue recovery mechanism. Under no circumstance can the Commission's 441 and 442 Orders be read to create a broad category of energy efficiency programs that would qualify for lost revenue recovery. The Commission must be careful to not create such an incentive though a broad interpretation in this docket.

VII. Conclusion

CURB respectfully requests that the Commission issue an Order approving Westar's SimpleSavings program, as modified by the agreements set forth in the Joint Notice, and for the reasons set forth above, denying Westar's request for a shared savings recovery mechanism. In the event that Westar withdraws this application, as it requests to do if it does not receive approval of its shared savings mechanism, then CURB respectfully requests the Commission open a separate investigation docket into Westar's existing generating capacity, existing and proposed environmental upgrade cost estimates, existing environmental cost recovery rider and existing energy efficiency programs. A comprehensive docket evaluating all supply and demand side options, including the cost of potential environmental upgrades, any possible alternatives to environmental upgrades and reviewing whether it is appropriate to continue utilizing the environmental cost recovery rider is an appropriate step to take if Westar is reluctant to move forward with the SimpleSavings program, or other energy efficiency programs that provide a cost effective and viable alternative to supply side resources or avoid potential environmental upgrade costs.

Respectfully submitted,

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, David Springe, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above, and foregoing document and upon information and belief, states that the matters therein appearing are true and correct.

David Springe

SUBSCRIBED AND SWORN to before me this 20th day of December, 2010.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2013

Notary Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

10-WSEE-775-TAR

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, electronic service, or hand-delivered this 20th day of December, 2010, to the following:

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