# THE STATE CORPORATION COMMISSION
# OF THE STATE OF KANSAS

Before Commissioners: Dwight D. Keen, Chair
Shari Feist Albrecht
Susan K. Duffy

| | | |
|---|---|---|
| In the Matter of the Joint Application of Westar Energy, Inc. and Kansas Gas and Electric Company for Recovery of Certain Costs through their RECA. | ) | Docket No. 19-WSEE-355-TAR |

## ORDER ON WESTAR'S APPLICATION TO RECOVER CERTAIN COSTS THROUGH ITS R.E.C.A RELATED TO THE 8% PORTION OF JEFFREY ENERGY CENTER

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

**I. Background:**

1. On March 4, 2019, Westar Energy, Inc. and Kansas Gas and Electric Company (collectively "Westar") filed a Joint Application (Application) for recovery through its Retail Energy Cost Adjustment (RECA) of the lease expense and non-fuel operations and maintenance expense (NFOM) associated with its seven-month lease and subsequent purchase of an 8% interest in the Jeffrey Energy Center (JEC).[1] Concurrent with the Application, Darrin R. Ives filed confidential and public versions of direct testimony, including supporting Attachments, on behalf of Westar.[2]

2. On March 12, 2019, the Commission issued a *Suspension Order*, suspending the Application's effective date until October 30, 2019, but noting the Commission may issue a decision before then.[3]

[1] Joint Application for Recovery of Costs through RECA, ¶¶ 26-31 (Mar. 4, 2019).
[2] Direct Testimony of Darrin R. Ives on Behalf of Westar Energy, Inc. and Kansas Gas and Electric Company (Mar. 4, 2019) (Ives Direct).
[3] *Suspension Order: October 30, 2019*, Ordering Clause A (Mar. 12, 2019).

3. On March 8 and March 13, 2019, respectively, Kansas Industrial Consumers Group, Inc. (KIC) and the Citizens' Utility Ratepayer Board (CURB) petitioned to intervene.[4] Both petitions were granted on March 28, 2019.[5] On April 30 and May 2, 2019, respectively, Tyson Foods (Tyson) and Unified School District #259 (USD 259) petitioned to intervene.[6] Both petitions were granted on May 14, 2019.[7]

4. On June 4, 2019, Justin T. Grady filed confidential and public versions of direct testimony with exhibits and attachments on behalf of Commission Utilities Staff (Staff).[8] Andrea Crane filed direct testimony and appendices on behalf of CURB,[9] and Michael P. Gorman filed confidential and public versions of direct testimony, along with an appendix and exhibits, on behalf of KIC.[10]

5. On June 14, 2019, Grady and Gorman filed cross-answering testimony,[11] and on June 21, 2019, Ives filed confidential and public versions of rebuttal testimony.[12]

6. On July 16, 2019, the Commission held an evidentiary hearing at its Topeka office.[13] The Commission heard live testimony from four witnesses: Ives for Westar, Crane for CURB, Gorman for KIC, and Grady for Staff. The Commissioners asked questions, and the parties had the opportunity to cross-examine and redirect the witnesses.

---

[4] Petition to Intervene of Kansas Industrial Consumers Group, Inc., and Objection to Request for Expedited Review of Application, p. 5 (Mar. 8, 2019); Petition to Intervene and Motion for Protective and Discovery Order, p. 4 (Mar. 13, 2019).
[5] *Order on KIC and CURB Petitions to Intervene and on Westar's Request for Expedited Review of Application*, Ordering Clause A (Mar. 28, 2019).
[6] Tyson Petition to Intervene, p. 2 (Apr. 30, 2019); USD 259 Petition to Intervene, p. 3 (May 2, 2019).
[7] *Order Granting Intervention to Tyson Foods*, Ordering Clause A (May 14, 2019); *Order Granting Intervention to USD 259*, Ordering Clause A (May 14, 2019).
[8] Direct Testimony of Justin T. Grady on Behalf of the Staff of the Kansas Corporation Commission (June 4, 2019) (Grady Direct).
[9] Direct Testimony of Andrea Crane on Behalf of CURB (June 4, 2019) (Crane Direct).
[10] Direct Testimony and Exhibits of Michael P. Gorman on Behalf of Kansas Industrial Consumers Group., Inc. and Unified School District #259 (June 4, 2019) (Gorman Direct).
[11] Cross Answering Testimony by Staff Justin T. Grady on Behalf of the Kansas Corporation Commission (June 14, 2019) (Grady Cross-Answering); Cross Answering Testimony of Michael P. Gorman on Behalf of Kansas Industrial Consumers Group, Inc. and Unified School District #259 (June 14, 2019) (Gorman Cross-Answering).
[12] Rebuttal Testimony of Darrin Ives on Behalf of Westar Energy, Inc. (June 21, 2019) (Ives Rebuttal).
[13] Hearing Transcript. pp. 1, 193 (July 19, 2019) (Tr.).

7. On July 31, 2019, Westar, KIC, USD 259, CURB and Staff filed initial post-hearing briefs, and on August 7, 2019, Westar, KIC, CURB and Staff filed reply briefs.

**II. History Leading to this Docket**

8. In 1991, UtiliCorp (which later changed its name to Aquila) transferred its 8% interest in JEC to a trust and then leased the 8% interest back through a sale/leaseback agreement.[14] Under the lease, UtiliCorp obtained the "exclusive rights to the power and energy produced by the 8 percent undivided interest" in JEC.[15] The lease was set to expire on January 3, 2019.[16] Under the aforementioned trust, Midwest Power Company (MWP) ultimately became the owner participant and managed the 8% interest on the trust's behalf.[17] In its 1991 proceeding, the Commission determined the owner participant under the trust did not become a public utility, but merely a participant in a financing arrangement.[18]

9. In 2007, Aquila (previously UtiliCorp) was selling its electric assets in Kansas.[19] Aquila's sale gave rise to a contractual right of first refusal for Westar stemming from the 1991 transaction,[20] under which Westar had the option to assume the lease held by Aquila for the 8% interest in JEC.[21] In Commission Docket No. 06-MKEE-524-ACQ (06-524 Docket), Westar exercised its right and assumed Aquila's lease for the 8% interest.[22] In addition, Westar and Mid-Kansas Electric Company (MKEC) entered into a Power Purchase Agreement (PPA) whereby

[14] *See* Docket No. 175,456-U (91-UCUE-226-MER), *Order and Certificate*, ¶¶ 22, 26, 31, 37 (Sept. 27, 1991); Ives Direct, p. 3; Grady Direct, p. 9.
[15] 91-226 Docket, *Order and Certificate*, ¶ 26.
[16] Ives Direct, p. 3.
[17] 91-226 Docket, *Order and Certificate*, ¶ 26; CURB Initial Brief, p. 5; Ives Direct, p. 3.
[18] 91-226 Docket, *Order and Certificate*, ¶ 39; Ives Direct, p. 3.
[19] Grady Direct, p. 9.
[20] *See* Ives Rebuttal, p. 6; Grady Cross-Answering, p. 15; Westar Initial Brief, p. 6.
[21] *See* Grady Direct, p. 9; Westar Initial Brief, p. 6.
[22] *See* Docket No. 06-MKEE-524-ACQ, *Order Adopting Stipulation and Agreement*, ¶ 14 (Feb. 23, 2007); Ives Direct, p. 3; Grady Direct, p. 9.

Westar would sell all of its capacity and energy from the 8% portion to MKEC through January 3, 2019, the expiration date for the PPA.[23]

10. In addition to Westar's right of first refusal to assume Aquila's lease of the 8% interest, Ives stated that the 1991 sale/leaseback agreement also contemplated Westar's purchase of the 8% interest, noting that it gave Westar "the right of first refusal to buy out the property at 'Fair Market Value,' which was defined . . . to be a value determined by an appraisal at the time of the 1991 sale/leaseback closing plus inflation."[24]

11. On February 1, 2018, Westar initiated its most recent general rate case (GRC), specifically addressing ratemaking for costs associated with the 8% interest then held by MWP.[25] Prior to the Non-Unanimous Stipulation & Agreement (NS&A) approved by the Commission in Westar's GRC, Westar's rates included both the lease expense and other NFOM costs associated with the 8% interest, and a credit for the revenue Westar was receiving from MKEC under the PPA as an offset to those costs.[26] Under paragraphs 27-32 of the NS&A, the parties agreed to the following provisions regarding Westar's 8% interest in JEC:[27]

> 27. The Parties agree that the $8.3 million of lease payment expense associated with Westar's lease of the 8% interest of Jeffrey Energy Center (JEC) that is currently owned by Midwest Power Company will be removed from base rates and that such removal is reflected in the revenue requirement decrease agreed to by the Parties and stated above. In addition, the Parties agree that the 8% portion of the non-fuel operating and maintenance (NFOM) expense related to the portion of JEC currently owned by Midwest Power Company that is approximately $6.9 million will be removed from base rates and that such removal is reflected in the revenue requirement decrease agreed to by the Parties and stated above.
>
> 28. In the event that Westar enters into a new lease for this 8% share of JEC, or purchases the 8% portion of JEC outright, the Parties agree

[23] *See* Grady Direct, p. 9.
[24] Ives Rebuttal, p. 6.
[25] *See* Docket No. 18-WSEE-328-RTS, Joint Application (Feb. 1, 2018) (18-328 Docket); Ives Direct, p. 5.
[26] Ives Direct, p. 5.
[27] See 18-328 Docket, NS&A, ¶¶ 27-32 (July 16, 2018), attached to *Order Approving Non-Unanimous Stipulation and Agreement* (Sept. 27, 2018).

that Westar will be permitted to file a request to include these expenses (lease expenses and NFOM) through the RECA. Any additional wholesale sales that are directly attributable to this lease extension or purchase shall also be included in the RECA in the event that the Commission approves this request. Westar shall be allowed to utilize a regulatory asset to defer actual lease expense and/or NFOM associated with the 8% portion of JEC in the event that a new lease or purchase agreement is reached. In the filing before the Commission, Westar shall have the burden of showing that the new lease or purchase agreement is a prudent decision for its retail customers.

29. In the event that the Commission approves Westar's filing, it may also include the amortization of the regulatory asset into the RECA. In the event that the Commission denies Westar's filing, Westar shall not be allowed to recover the regulatory asset containing deferred lease and NFOM expenses, and Westar shall be allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC for which the Commission denies Westar recovery of the incurred cost of owning or leasing and operating the 8% portion of JEC. In the event that Westar ends up negotiating a zero-cost transfer of ownership (defined as \$0 or \$1),[28] Westar is automatically entitled to begin recovering actual NFOM expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval.

30. The Parties agree that Westar shall also be allowed to defer any of the 8% of NFOM or capital costs it is unable to recover from Midwest Power Company (or any other third-party owner) as a regulatory asset. Specifically, Westar shall be entitled to begin accruing unrecovered costs to the regulatory asset when Midwest Power Company (or any other third-party owner) is more than 60 days late in making a payment. If Midwest Power Company (or the other third-party owner) ultimately makes payment, the regulatory asset will be reduced for such payment. At the time of Westar's next general rate case, Westar may request recovery of the balance of unrecovered costs that have been deferred in the regulatory asset upon a showing that Westar made reasonable efforts to recover the costs from Midwest Power Company, or any other third party owner.

31. Nothing in this settlement is intended to prejudge Westar's claim for recovery of the unrecovered NFOM and capital costs deferred in the regulatory asset; recoverability will be determined by the

[28] The NS&A has a footnote 6 here, stating: "The zero-cost transfer of ownership is intended only as a mechanism to shift regulatory burden and is not intended to represent either the fair market value of the 8% portion of JEC or the value of the 8% portion of JEC that may ultimately be deemed to be reasonable by the Commission."

> Commission at the time that Westar makes its request for recovery of the regulatory asset. Staff, CURB, and other intervenors specifically reserve their right to make any argument with regard to recovery of the regulatory asset, including the right to argue that none of the regulatory asset should be recovered from customers.
>
> 32. Additionally, Staff and CURB agree that in the event Westar is unable to recover any of the NFOM or capital costs for which Midwest Power Company, or any third-party owner is responsible after the expiration of the lease for the 8% portion of JEC, Staff and CURB will consider taking steps to encourage the Commission to exercise its jurisdiction over Midwest Power Company (or any other third-party owner) and enforce the party's payment obligations.

12. On August 10, 2018, before the Commission issued its Order in Westar's GRC, MWP filed an Application in Docket No. 19-MPCE-064-COC (19-064 Docket), seeking approval to become a certificated public utility in Kansas to own and operate the 8% portion of JEC upon the expiration of its lease to Westar on January 3, 2019.[29]

13. In the 19-064 Docket, MWP ultimately alleged that it had no obligation to cover any revenue shortfalls that might be associated with its operation of the 8% portion of JEC.[30] MWP witness Amy Paine asserted that "MWP has no obligation to pay operations, maintenance or capital expenses that are not paid from revenues generated by the 8% interest in the JEC."[31]

14. About a month after the MWP/Westar lease expired, Westar and MWP agreed to settle on terms for the retroactive, current and future ownership of the 8% interest, and therefore, MWP determined it did not require a certificate and withdrew its Application.[32] Under the settlement agreement, Westar and MWP agreed to extend the term of Westar's lease of the 8% interest for

---

[29] Grady Direct, pp. 12-13.

[30] 19-064 Docket, Initial Brief of Midwest Power Company, pp. 11-12 (Dec. 28, 2018) (19-064 MWP Initial Brief).

[31] 19-064 Rebuttal Testimony of Amy G. Paine, p. 9 (Dec. 4, 2018) (Paine Rebuttal).

[32] 19-064 Docket, Midwest Power Company's Notice of Withdrawal, ¶¶ 4-5 (Mar. 1, 2019). The Commission granted MWP's notice of the withdrawal of its Application in its March 7, 2019, *Order on Notice of Withdrawal of Midwest Power Company's Application*, Ordering Clause A. *See* Ives Direct, Confidential Settlement Agreement and Release, dated Feb. 8, 2019, p. 1.

seven months at $690,000 per month,[33] and Westar agreed to purchase the 8% interest from MWP at the end of the lease extension for $3.7 million.[34]

15. Based on the NS&A provisions from Westar's GRC concerning the 8% JEC lease payment and NFOM costs, Westar filed its Application in this Docket.[35] Westar has asked the Commission for recovery through the RECA of the deferred lease and NFOM expense associated with the 8% interest incurred between the effective date of the lease extension and the date of the Commission's order in this Docket.[36] Westar figured the seven-month lease expense total would come to $4.83 million, and the total amount of NFOM costs during the seven-month lease term would be approximately $3.2 million.[37]

16. Westar has also asked the Commission to allow it to recover through the RECA actual NFOM costs beyond the date of the Commission's order in this Docket.[38] Westar stated it will defer any NFOM expense incurred between the date the purchase transaction closes and the date of the Commission's order.[39] Westar estimated that NFOM costs will be approximately $440,000 per month going forward.[40]

### III. Legal Standards

17. The NS&A controls the legal analysis in this case because the NS&A's provisions pertaining to the 8% lease payment and NFOM furnish the authorization and basis for Westar's requests in this Docket.[41] All the parties to this Docket agreed to the Commission-approved

---

[33] Ives Direct, p. 15 (the term of the lease extension being January 4, 2019 through August 4, 2019).
[34] Ives Direct, p. 15.
[35] Application, p. 12.
[36] Application, p. 12.
[37] Application, p. 13.
[38] Application, pp. 13-14.
[39] Application, pp. 13-14.
[40] Application, p. 14.
[41] *See* NS&A, ¶¶ 27-32.

NS&A.[42] The only legal standard set forth in the relevant portion of the NS&A is a prudency standard.[43]

18. Paragraph 28 of the NS&A states that if Westar agreed to a new lease for the 8% share of JEC or purchased the 8% outright, it could seek recovery through the RECA of expenses which had been removed from its base rates in the GRC, namely, lease expense and NFOM. Westar could also seek to include in its RECA any additional wholesale sales directly attributable to any "lease extension or purchase" of the 8% interest.[44] In seeking such recovery, Westar could "utilize a regulatory asset to defer actual lease expense and/or NFOM associated with the 8% portion of JEC."[45] Having leased the 8% interest for an additional seven months beyond the original lease's expiration and purchased the 8% outright, Westar has the burden of showing that its "new [seven month] lease [and] purchase agreement is a prudent decision for its retail customers."[46]

19. Neither the NS&A itself nor the Kansas statutes or regulations identify the proper elements for the prudency analysis in this case.[47] The Kansas Supreme Court has noted the definition of "prudence" as "carefulness, precaution, attentiveness and good judgment."[48] Black's Law Dictionary defines prudence as "[s]ensible and careful, esp. in trying to avoid unnecessary risks; circumspect or judicious in one's activities."[49]

20. The federal circuit courts have defined "prudence" in a similar manner. The Court of Appeals for the First Circuit has held that "[t]he prudence of the investment must be judged by what a utility's management knew, or could have known, at the time the costs were incurred."[50] The Court

[42] 18-328 Docket, *Order Approving Non-Unanimous Stipulation and Agreement*, Ordering Clause A.
[43] NS&A, ¶ 28.
[44] NS&A, ¶ 28.
[45] NS&A, ¶ 28.
[46] NS&A, ¶ 28.
[47] *See* NS&A, ¶¶ 27-32. The reasonable value of electric generating property is not being determined in this case, and thus, the factors provided by K.S.A. 66-128g(a) are not the relevant elements for analyzing the prudence of Westar's decision here.
[48] *Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 495 (1986).
[49] PRUDENT, Black's Law Dictionary (11th ed. 2019).
[50] *Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986).

noted that utility management has broad discretion in conducting business, and therefore, prudent costs must be judged based on "whether they are costs which a reasonable utility management . . . would have made, in good faith, under the same circumstances, and at the relevant point in time."[51] That is, Courts review prudence "based on the particular circumstances existing at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenditures."[52] The D.C. Circuit has likewise held that "a prudence analysis must evaluate a utility's decision on the basis of information available to the utility at the time the decision is made."[53] In a prior Docket, this Commission found that utility decisions "must be reviewed, without the benefit of hindsight, to determine whether [such] decisions are imprudent due to a lack of carefulness, precaution, attentiveness and good judgment."[54]

21. Paragraphs 30-32 are not relevant to Westar's request in this case because those paragraphs address "the 8% of NFOM or capital costs [that Westar] is ***unable to recover from Midwest Power Company*** (or any other third-party owner) as a regulatory asset."[55] Because Westar is *not* seeking to recover any unpaid capital costs from MWP in this case, and the "regulatory asset" mentioned in paragraphs 30-32 is only addressing those specific unpaid costs, the "regulatory asset" in paragraphs 30-32 is not the same "regulatory asset" described in Paragraphs 28-29 and cannot be conflated with it.

## IV. Findings

### *a. Zero-Cost Transfer*

22. As stated in the previous section, the Commission finds the NS&A is controlling in this case, and therefore, the Commission must analyze Westar's request in light of the relevant

---

[51] *Id.* at 282-83.
[52] *Id.* at 283.
[53] *City of New Orleans, La. v. FERC*, 67 F.3d 947, 954 (D.C. Cir. 1995).
[54] Docket No. 10-KCPE-415-RTS, *Order: 1) Addressing Prudence; 2) Approving Application, in Part; & 3) Ruling on Pending Requests*, p. 25 (Nov. 22, 2010).
[55] NS&A, ¶ 30 (emphasis added).

NS&A provisions.[56] The Commission can decide one of Westar's options under the NS&A at the outset, namely, the zero-cost transfer of the 8% interest. Paragraph 29 of the NS&A states "[i]n the event that Westar ends up negotiating a zero-cost transfer of ownership (defined as $0 or $1), Westar is automatically entitled to begin recovering actual NFOM expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval." In that case, Westar does not need Commission approval to begin recovering these costs. The Commission rejects KIC's assertion that the zero-cost transfer provision simply shifted the burden to a party wanting to challenge the justness and reasonableness of Westar's rates should Westar have obtained a zero-cost transfer.[57] The NS&A's "automatically entitled to begin recovering" language in paragraph 29 means that with a zero-cost transfer, Westar needs no Commission approval, and hence, has no burden to ward off a challenge. However, Westar did not obtain a zero-cost transfer, and thus, that option became moot.

23. Nonetheless, that is not the end of the Commission's analysis. For under the terms of paragraph 29, anything above a $0 or $1 purchase cost meant Westar needed Commission approval if it wanted to begin recovering actual NFOM expenses and fuel expenses. Recovery is not "automatic," and by definition, the Commission can say, "No, you cannot recover actual NFOM and fuel expenses."[58] Both Westar and Staff conceded the Commission can say "no" to Westar's request and does not have its hands tied, as it were.[59] Yet, as explained below, Westar's position has the practical effect of tying the Commission's hands.

24. Ives agreed that Westar did not need Commission approval to put costs through the RECA if Westar executed a zero-cost transfer, but argued that "the O&M costs are the same in a zero cost transaction or a $3.7 million transaction," and thus, the O&M costs should *not* be

[56] NS&A, ¶¶ 27-32.
[57] *See* KIC Reply Brief, p. 6.
[58] *See* Tr., p. 135.
[59] Tr., pp. 156, 170; Westar Reply Brief, p. 6.

evaluated.[60] According to Ives' contention, whether the purchase price was $0, $1, $2 or $3.7 million, the fixed NFOM is already accounted for in Westar's previous transactions such that the Commission does not need to look at it – i.e., the Commission merely needs to look at the prudency of the $3.7 million above zero.[61] Commission acceptance of Ives' contention would effectively preclude the Commission from saying "no" to Westar's request to recover NFOM costs, and therefore, negate the Commission's decision-making power.[62] However, the Commission finds that it is not so restricted by the NS&A. Hence, the Commission will evaluate not only the $3.7 million purchase price for prudency, but the entire agreement which encompasses the fixed NFOM costs, all in accordance with paragraphs 28-29 of the NS&A.[63]

***b. Continuity or Discontinuity of New Lease and Purchase in History of Transactions***

25. In addition to the zero-cost ownership transfer option, Westar had other options regarding the 8% interest, including: (1) working with MWP to find another buyer or lessee for the 8% interest;[64] (2) enforcing the default provisions of the JEC ownership and operating agreements against MWP should MWP not cover its costs of ownership;[65] or (3) negotiating with MWP for the purchase of the 8% interest.[66] The NS&A only specifically addressed this last option, i.e., Westar's

---

[60] Tr., pp. 120-21.
[61] *See* Tr., p. 120. *See also* Tr., p. 96 (Ives stating "the fixed costs are the result of the decision that was made back in 2007 and ***the Commission already determined was prudent*** and also are supported by the settlement agreement that all of these parties put together for the rate case where, I think you heard I think it was paragraph 29 said, if we took this over for zero or a dollar, it would just automatically go into the RECA and begin recovery. There wouldn't need to be a Commission determination if the settlement agreement was approved by the Commission, which it was. And the 3.7 million doesn't change the character of those underlying O&M costs that were part of that zero or $1 agreement. That's why I say 3.7 is new, you should look at it. There is a couple reasons why ***the other costs don't need to be evaluated again***" (emphasis added)).
[62] *Contra* NS&A, ¶ 52 (providing that "[n]othing in this Stipulation is intended to impinge or restrict, in any manner, the exercise by the Commission of any statutory right").
[63] *See* NS&A, ¶ 28 (using the phrase "purchase agreement," so the Commission's review is not relegated merely to the purchase "price").
[64] *See* Tr., pp. 75-76.
[65] Grady Direct, p. 15.
[66] Grady Direct, p. 15; NS&A, ¶ 28.

purchase of the 8% interest.[67] However, the prudency of Westar's purchase must not be evaluated in isolation, but in relation to the other options that were open to Westar.

26. Westar has argued that its "settlement with Midwest Power is simply the next step necessary to conclude [its 2007] prudent business arrangement in the most favorable way for customers."[68] Thus, Westar believes its previous transactions related to the 8% interest and the current settlement agreement with MWP form a continuous whole. Indeed, Ives opined that its "hard [for Westar] to be prudent on the front end and flip and be imprudent on the back end."[69] Therefore, the question of an alleged continuity between Westar's historical transactions and its current agreement is crucial to the Commission's determination as to whether Westar met its prudency burden here. As detailed below, the Commission finds there is *not* an inherent or fundamental continuity running from the sale/leaseback transaction in 1991 through Westar's assumption of the lease in 2007 to the settlement agreement with MWP in the 19-064 Docket, which gave rise to Westar's Application here.[70] Thus, the Commission is unconvinced by Westar's theory of prudency based on historical continuity.[71]

27. Ives stated that he viewed Westar's seven-month lease and purchase as a "wrap-up . . . to [the 1991 and 2007] transactions"[72] and the "conclu[sion of] a business arrangement – that was already found to be prudent – in the most favorable way possible for customers."[73] Ives testified that "customers took the benefits on the front end of the '07 transaction and should, likewise, have the responsibility to pay the costs to conclude the transaction and move forward."[74] Westar asserted that "the question to be decided by the Commission is whether Westar's decision to acquire the 8%

---

[67] NS&A, ¶ 28.
[68] Tr., pp. 13-14.
[69] Tr., p. 63.
[70] Westar Reply Brief, p. 6.
[71] *See* Westar Initial Brief, p. 3.
[72] Tr., p. 109.
[73] Ives Rebuttal, p. 5.
[74] Tr., p. 101.

interest ***in order to resolve and conclude the lease arrangement*** was reasonable given the facts and circumstances existing when Westar made the decision."[75] Indeed, Westar has attempted to portray this as a case of rate removal and reinstatement, arguing that although the Commission in Westar's GRC "temporarily removed" the 8% share of NFOM costs and lease expense as "a break [for customers] from paying these costs," the customers "were clearly on notice that Westar would seek to reinstate them in rates upon execution of a lease or purchase agreement."[76] However, the Commission finds that any alleged continuity between the 1991 and 2007 transactions and Westar's current agreements in this case is insubstantial and insufficient to establish the current settlement agreement as a "wrap-up" of previous transactions.

28. The Commission finds the evidence demonstrates a clear discontinuity between Westar's previous transactions and the current agreement. Although the original lease may have *contemplated* Westar's purchase of the 8%, it did not *require* the purchase and left it uncertain.[77] Indeed, Grady testified that Westar's original lease with MWP "was going to expire right around the same time that Westar's rates were going to be set and there was complete uncertainty as to what was going to happen . . . nobody knew what the future course of events was going to be with regard to that 8 percent."[78] Moreover, even if there was to be a transfer of ownership from MWP to Westar, Westar's previous transactions did not dictate a specific purchase price, as evidenced by the NS&A's provision of a possible "zero-cost transfer" and Westar's eventual negotiation of a purchase price. Thus, the evidence shows that Westar's original lease had no obligatory "wrap-up" provisions. Staff's assertions that "[t]ypically there is always a buy back after the lease" and "[w]hen the Commission approved [the original] financing arrangement, it was not contemplated the result

[75] Westar Initial Brief, p. 6 (emphasis added).
[76] Westar Reply Brief, p. 4.
[77] *See* Ives Rebuttal, p. 6.
[78] Tr., pp. 167-68.

would end with a separate certified utility" are supported by no evidentiary authority, and thus, carry no weight.[79] The Commission finds Westar's $3.7 million purchase of the 8% interest is not a continuous part of the previous transactions.

29. In addition, while Westar's settlement agreement and amendments to its lease with MWP characterize Westar's seven-month lease as an "extension,"[80] the terms of the NS&A, under which Westar was allowed to file for recovery of costs, three times describe Westar's agreement with MWP as a "new lease."[81] The NS&A nowhere describes Westar's path forward here as a wrap-up or concluding arrangement of Westar's earlier transactions. Nothing in the NS&A indicates Westar's request to recover the costs removed from its base rates in the GRC is the "reinstatement" of a temporary removal of those rates. Any recovery of the removed expenses depended on Westar meeting the burden of showing that its new $4.83 million seven-month lease and $3.7 million purchase agreement was a prudent decision for retail customers. As mentioned above, Westar could only have obtained automatic recovery of actual NFOM expenses and fuel expenses if it had negotiated a zero-cost transfer of ownership of the 8% interest.[82] That did not happen, and therefore, under the facts of this case there was no automatic recovery or "reinstatement" of anything for Westar.

30. Furthermore, the original lease expired on January 3, 2019, and the so-called "lease extensions" were not on precisely the same terms as the original lease.[83] Westar's PPA with MKEC also expired on January 3, 2019, and thus, Westar no longer has a wholesale agreement that is "above

[79] *See* Staff Reply Brief, p. 18.
[80] *See e.g.* Confidential Settlement Agreement and Release, p. 2 (attached to Ives Direct); Third Amendment to Lease Agreement, p. 2 (attached to Ives Direct).
[81] NS&A, ¶ 28.
[82] NS&A, ¶ 29.
[83] *See* Tr., p. 86 (Ives clarifying that the $690,000 monthly lease payment for the extension of the seven months was not the same lease payment that was made during the primary term, but "was the average of lease payments over a recent historical period. So they varied a little bit over time and we just calculated the average to utilize for the seven months"). See *also* Second Amendment to Lease Agreement (attached to Ives Direct); Third Amendment to Lease Agreement (attached to Ives Direct); Ives Direct, p. 9 (stating that the $690,000 per month lease payment under the extension "represents the average lease payment amount under the previous lease between Westar and MWP").

market value" to drive down costs to customers.[84] The lack of a PPA creates a distinct discontinuity between Westar's previous transactions and its settlement agreement with MWP because without the PPA, Westar's retail customers are covering new costs, i.e., the costs previously covered by MKEC.[85]

31. Grady also testified that his analysis of the reasonableness of Westar's decision did not consider past customer benefits "[b]ecause these benefits have occurred in the past and they will not be altered as a result of Westar's current decision."[86] Hence, while Grady could see some merit in Westar's argument that the new lease and purchase is simply the cost to wrap up the 2007 agreement, he "[does] not believe [past ratepayer benefits] should be included in the cost/benefit analysis used to evaluate Westar's current decision."[87]

32. The above analysis demonstrates that despite the previously-approved transactions associated with the 8% interest in JEC, there is a distinct discontinuity between those transactions and the current settlement agreement Westar is asking the Commission to find as being prudent. Both Staff and Westar acknowledge that past transactions do not lead inexorably to approval for Westar here. While Westar argued the Commission should make its decision in light of its historical findings, it nonetheless affirmed "the Commission is not bound by its previous decisions approving the sale/leaseback transaction in 1991 and Westar's assumption of the lease agreement in 2007."[88] Grady testified that, although he views Westar's 2007 assumption of Aquila's lease as a prudent decision, his "analysis is not based on the fact that the Commission approved the contract in 2007,"

[84] Ives Direct, p. 3; Tr., pp. 121.
[85] *See* Gorman Direct, p. 4.
[86] Grady Cross-Answering, p. 11.
[87] Grady Cross-Answering, pp. 11-12.
[88] Westar Reply Brief, p. 6.

and therefore, he does not believe the Commission's hands are tied.[89] He argued, "I do believe the Commission has the authority to say no today."[90]

33. The fact that Westar has not "acquired new generation or [is not] planning to construct new generation,"[91] although a unique circumstance, does not therefore establish Westar's purchase of the 8% interest as a continuous business arrangement with previous deals. Westar has not previously owned the 8% interest in JEC, and no historical provision required Westar to purchase it. Westar's decision to buy the 8% interest is something new and creates discontinuity with the past transactions. This discontinuity between the 1991 and 2007 transactions and Westar's current agreement means the Commission analyzes the prudency of Westar's current decision on its own terms, and not as an essential continuation or wrap-up of Westar's previous business arrangements related to the 8% interest. Therefore, the Commission will not find that Westar has met its prudency burden regarding the current decision simply because Westar's decision to assume the lease from Aquila in 2007 was considered prudent.[92]

### c. *Prudency Determination of New Lease and Purchase of 8% Interest in JEC*

34. When evaluated under its own terms, the Commission finds Westar's decision to enter into the new lease and purchase agreement for the 8% interest in JEC was not a prudent decision for its retail customers. Given the facts and circumstances Westar's management knew or could have known at the time of its settlement agreement with MWP, Westar has not satisfied or fulfilled the burden of showing prudency in its decision to enter into that settlement agreement.[93] Several separate and independent bases underpin the Commission's finding of imprudence:

---

[89] Tr., p. 156.
[90] Tr., p. 170.
[91] Tr., p. 109.
[92] *See* Westar Initial Brief, p. 18.
[93] *See* ¶¶ 19-20 of this Order, *supra*.

i. Customers should not pay for energy they do not need.

35. The Commission finds that the evidence supports the conclusion that Westar does not need this 8% portion of JEC to satisfy its current service and capacity needs. This is something Westar was aware of when it entered into the new seven-month lease and purchase agreement with MWP. Ives testified that Westar does not currently need the 8% interest in JEC "to comply with the capacity reserve requirements."[94] Indeed, he conceded that under the scenario presented in the Commission's 2019 Electric Supply and Demand Annual Report, "Westar expects to have sufficient capacity . . . until 2030."[95] He left open the question of whether Westar might need this 8% to serve retail load "between now and 2035,"[96] which is to say, he provided no evidence that the 8% *will be needed* at any point before 2035 to serve retail load.[97] Indeed, Westar acknowledged it has not included or studied this 8% interest with regard to any Integrated Resource Plan (IRP) planning process.[98]

36. Crane argued that "there has been no showing that this capacity is needed now or is likely to be needed in the near term."[99] Grady testified that "Westar has not demonstrated that its acquisition of the 8% interest in JEC is necessary in order to provide capacity and/or energy to Kansas ratepayers."[100]

37. The Commission weighs the above evidence that Westar does not need the 8% interest to meet its capacity requirements against Ives' hypothesizing about various future unknown operational variables that may create a need by Westar for the 8% interest (e.g., impacts of weather,

[94] Tr., p. 52.
[95] Tr., pp. 55-56. *See* KIC Exhibit #4 (July 16, 2019).
[96] Tr., p. 52.
[97] *See* Tr., p. 106 (Ives stating "[w]hat we don't know is what we don't know between now and 2035" regarding Westar's need for the 8% interest in JEC).
[98] Crane Direct, p. 15. *See* KIC Initial Brief, ¶ 38 (stating that "Westar's IRP process is still under development and has not yet been approved by the Commission. And the cost-effectiveness of adding . . . this 174 MW of coal-fired generation has not been studied as part of any integrated resource planning process").
[99] Tr., p. 132.
[100] Grady Cross-Answering, p. 5.

possible SPP changes in the capacity it ascribes to intermittent resources like wind and "all the scenarios surrounding these that can push these surpluses and deficits around depending on outcomes").[101] The evidence that Westar currently does not need the capacity is based on hard data and factual statements, while Ives' assertions about "operational limitations" are speculative and, in Ives' own words, "[w]hat we don't know is what we don't know between now and 2035."[102] The Commission finds the evidence weighs in favor of concluding that Westar did not purchase this capacity to aid it in satisfying current or future customer demand requirements.

38. Customers do not benefit by paying for capacity and/or energy they are not reasonably expected to need. Westar was aware that the 8% portion of JEC was not necessary for it to meet its capacity requirements when it entered into its new lease and purchase agreement. Therefore, the Commission finds Westar has not demonstrated that it would be prudent for customers to bear the new costs associated with the new lease and purchase of the 8% interest.[103]

ii. Westar's efforts to address the lease expiration were not prudent.

39. The Commission finds that Westar was fully aware that the original lease with MWP for the 8% interest in JEC was expiring without any obligatory wrap-up provisions.[104] Further, the Commission finds that the Westar and Staff foundational assumption that Westar could not, under any circumstance, avoid the fixed NFOM and capital costs associated with operating the 8% portion of JEC[105] is unsubstantiated by the evidence in the record. Thus, the Commission finds Westar did not thoroughly anticipate the consequences associated with the expiration of the original lease.

40. The evidence shows that Westar had been the lessee of the 8% interest in JEC since 2007,[106] and therefore, had known since at least 2007 that the lease of the 8% interest was set to

[101] Tr., pp. 106-07.
[102] Tr., pp. 106-07.
[103] *See Kansas Gas & Elec. Co.*, 239 Kan. at 495; PRUDENT, Black's Law Dictionary; *Violet*, 800 F.2d at 282-83.
[104] *See e.g.* Tr., p. 75.
[105] *See* Ives Rebuttal, p. 9; Grady Direct, pp. 4-5.
[106] Docket No. 06-524, *Order Adopting Stipulation & Agreement*, ¶ 14 (Feb. 23, 2007).

expire on January 3, 2019. Moreover, Westar had no foundation for assuming or presuming that any costs of its original lease agreement, post-expiration in January 2019, would be allowed in its rates.[107] At the hearing, Ives stated that Westar "had off-and-on dialog for a period of time with Midwest Power leading up to the conclusion of the lease . . . [W]e ran out of discussions and ultimately continued dialog after the rate case and during the process of the CCN docket."[108] Ives later testified that "leading up to the end of the lease, there were a number of discussions and a number of considerations that were undertaken for utilization of the power, including discussions with Mid-Kansas. But there were none that were able to be entered and executed."[109]

41. When asked at what point Westar began to discuss with MWP the possibility of Westar purchasing the 8% interest from MWP, Ives replied: "Probably over a year in advance of the termination of the lease in January of 2019."[110] And regarding the lease expiration, Ives stated, "Midwest Power and Westar began talking about what would happen when the lease expired well over a year in advance of the expiration of the lease . . . A number of months[,] maybe a year before the termination, Westar did not elect its right to purchase the asset, which triggered a chain of events towards the expiration of the lease."[111] When asked about trying to sell the 8% to a different third party, Ives said that Westar "had those discussions with Midwest a number of times. And I can only assume that Midwest considered the opportunity to sell it elsewhere and didn't have the right offer or opportunity to do that. Because they made it very clear in the CCN proceedings that they did not intend to be a long-term owner of the 8 percent."[112]

42. Ives acknowledged Westar had an option in the 2007 agreement with Aquila to purchase the 8%, but he averred,

---

[107] *See* KIC Initial Brief, ¶ 74.
[108] Tr., pp. 40-41.
[109] Tr., 65.
[110] Tr., pp. 74-75.
[111] Tr., p. 75.
[112] Tr., pp. 75-76.

> "[I]f [Westar] would have exercised that, the range of costs to purchase that 8 percent was between 80 and 120 or $130 million . . . We did not believe that was in the best interest of Westar's customers or Westar to do that. So we did not execute that option and chose to let that lease move towards expiration. We ultimately determined that a negotiated purchase of the 8 percent could be done in a way with the lease extension and the $3.7 million that would be beneficial to our customers, both from an incremental cost standpoint and from an avoidance of costs from a litigation standpoint and from a reluctant partner standpoint."[113]

43. When explaining "sunk costs," Ives testified: "[O]ur view of sunk costs would be . . . that entering the arrangement in 2007 to execute that first right of refusal ultimately put us in a spot where, at [the] conclusion of that transaction, there was going to be an outcome either we were going to purchase the arrangement or Midwest was going to continue on or a third party would continue on. What complicated it was when the only party at the table to take on that 8 percent, Midwest, said they weren't going to pay those 8 percent of those costs. We [are] then left holding and paying those costs."[114] By the time this so-called "complication" arose in late 2018,[115] it was already the eleventh hour as far as the lease expiration was concerned, and therefore, makes the situation appear as if Westar had no choice in the matter. Westar seems to give the impression that with all of its resources and personnel, somehow it could not find a way to address the "sunk costs" other than to transfer those costs onto customers. From the perspective of requiring ratepayers to bear the costs associated with this business judgment, the Commission does not accept this alternative as a prudent course or choice.

44. As Ives' testimony set out above demonstrates, the possible circumstances surrounding the termination of the original lease were not a surprise to Westar. While no one could anticipate precisely what was going to happen,[116] Westar had been in discussions with MWP for

[113] Tr., pp. 80-81.
[114] Tr., p. 93.
[115] *See* 19-064 Docket, Westar's Motion for Order Requiring Refiling of Application and Supporting Testimony and Restarting 180-Day Clock, ¶¶ 5-9 (Nov. 5, 2018).
[116] *See* Tr., pp. 153-54.

over a year in advance of the lease expiration.[117] Hence, the Commission finds Westar's decision to enter into the settlement agreement lacked prudence because under the circumstances, it is not reasonable for Westar to pass approximately $8.5 million in new lease and purchase costs, plus future NFOM costs, onto customers.[118]

45. As mentioned above, the Commission rejects Westar's and Staff's foundational assumption that Westar had no alternative but to incur the fixed NFOM and capital costs.[119] The incremental value on which Staff relies rests upon the assumption that there was no one else to pay the fixed NFOM costs or "sunk" costs,[120] and the assumption that customers are being exposed to those costs because of the prudence of the decision in 2007, and not due to a demonstrable claim of prudence for this current agreement.[121] The Commission does not accept this rationale. Grady stated that "the only way Westar would not be incurring the costs is if they had somebody else to bill the costs to. And they would only have somebody else to bill the costs to if they didn't take over the lease in 2007."[122] The first sentence of Grady's statement is correct. However, the rationale of the second sentence does not follow. Grady's testimony assumes that Westar would have had someone else to pay the costs if there was another buyer or if MWP had paid the costs.[123] But Grady's assumptions are that MWP was not going to pay the costs and that no other buyer existed because if there had been one, MWP would have found them.[124] Again, the Commission rejects this compilation of assumptions. Neither logic nor anything in the record of this case suggests that the onus was entirely on MWP to find another buyer,[125] or that Westar was absolved from engaging

---

[117] Tr., pp. 74-75.
[118] *See* Grady Direct, p. 6; Application, p. 11.
[119] Ives Rebuttal, pp. 3-4; Grady Direct, p. 7; Tr., p. 161.
[120] *See* Tr., p. 150.
[121] Tr., pp. 13, 161.
[122] Tr., p. 156.
[123] *See* Grady Direct, pp. 3-4, 8, 14, 17; Tr., p. 150-51.
[124] Grady Direct, pp. 4, 14-15; Tr., pp. 151, 161.
[125] *See* Tr., pp. 75-76 (Ives stating that Westar had discussions with MWP regarding a possible sale of the 8% interest to a different party).

MWP sooner to address the possible circumstances arising from the expiration of the lease in January 2019. Based on Ives' and Grady's testimony at hearing, it appears that Westar waited until the lease expiration was nearly upon it before taking action.[126] Then when the expiration was at hand, and finding itself unable to obtain a zero-cost transfer of ownership, Westar made no attempt to force MWP's hand legally,[127] but rather opted for a settlement agreement that could potentially burden customers with millions of dollars in lease extension and purchase costs, as well as the fixed NFOM costs throughout the expected 16 years of the remaining life of JEC.[128]

46. With regard to the ultimate purchase price paid by Westar, Ives claimed Westar was "really good" by getting the purchase price "down to about 5 percent of that 80 million. But we didn't get it to zero. We got it to 3.7 [million]."[129] The Commission finds Ives' characterization of the $3.7 million as "really good" should again be viewed in light of the fact that Westar negotiated this purchase price at the eleventh hour. The record does not show whether Westar could have negotiated a price any lower, but the record *does* show that Westar waited until about a year within lease expiration to engage MWP. Then once MWP balked at paying any cost shortfalls, Westar quickly settled, apparently believing it could rely on the supposition that there is a seamless continuity between the prudency of the 2007 agreement and the prudency of the $3.7 million purchase price. But as the Commission has determined, there is no essential continuity. There is a distinct separation between the previous agreements and what Westar has settled on here, most clearly shown by the fact that Westar has had to come before the Commission seeking approval for the settlement agreement.

---

[126] *See e.g.* Tr., pp. 40, 75, 81, 167-68.
[127] *See* Tr., pp. 40-43.
[128] The original lease expired on January 3, 2019, and Westar entered into its settlement agreement with MWP about a month later, on February 8, 2019. *See* Ives Direct, Confidential Settlement Agreement and Release, dated Feb. 8, 2019, p. 1
[129] Tr., p. 103.

47. Ives claimed that aside from the new lease and purchase agreement "our only other alternative was Midwest taking [the 8% interest] and not paying and Westar being on the hook to pay [the fixed costs, the variable costs, the capital cost, everything associated with that] anyway."[130] But this is an "alternative" that only arose once the 19-064 CCN Docket was well underway in late 2018, when the lease was set to expire in a few months. Thus, although Westar makes it seem as if it was simply between a rock and a hard place in late 2018, there is no evidence it was in such a place previous to that, when it could have attended to the consequences of the lease expiration. Hence, the Commission finds Westar did not exercise the necessary attentiveness and judiciousness in avoiding the potential risks to customers,[131] and therefore, Westar has not met its burden of showing that its new lease and purchase decision was prudent.

iii. <u>Westar was aware of the economic risks of operating the 8% interest in JEC</u>.

48. In the 19-064 Docket, Westar provided a financial model that addressed GMO's historical 8% interest in JEC as a barometer for gauging the operating revenues of the 8% interest owned by MWP, stating: "Over the past three years, the market has not warranted GMO generating its entire 8%."[132] Thus, Westar should have taken reasonable, sensible and precautionary steps to shore up cost coverage for an expiring lease on the 8% portion of JEC.

49. To be clear, the Commission is *not* here advocating or advancing any policy that would suggest, directly or by inference, the shuttering of coal plants entirely or piecemeal, or the de-rating or idling of various percentages of such plants, or anything similar or analogous thereto. The Commission *is* saying, however, that Westar should have better anticipated the end of its lease with MWP and should not have accepted a settlement agreement costing millions of dollars with the expectation of passing those costs onto customers. Although courts "review the prudence of the

---

[130] Tr., p. 105.
[131] *See* ¶¶ 19-20 of this Order, *supra*.
[132] 19-064 Docket, Direct Testimony Prepared by Chad Unrein, p. 26 (Nov. 9, 2018).

utility's actions and the costs resulting therefrom based on the particular circumstances existing at the time the challenged costs were actually incurred,"[133] Westar did not simply one day find itself in the happenstance of leasing, as Grady described it, "an 8 percent portion of a 2100 megawatt coal-fired generating plant 45 miles northwest of Topeka, Kansas . . . with the energy prices in the SPP marketplace."[134] Westar was aware of the nature of the 8% interest it was leasing and the risks surrounding the business choices it was making in this instance. Westar has not demonstrated those choices were prudent for Westar's retail customers.

iv. Westar has acknowledged that the 8% interest in JEC is not likely to become profitable.

50. At the time of its settlement agreement with MWP, Westar knew or had strong evidence that the 8% portion of JEC it was purchasing was not going to become profitable. In the 19-064 Docket, Westar quoted Staff witness, Chad Unrein, regarding MWP's cash flows for the 8% interest in JEC as follows: "At a high level, Westar predicts MWP's cash flow shortfall between $10 million to $10.5 million per year over the first three years, and the Westar model does not produce a single year of financial profits through 2034."[135] In that same Docket, concerning capacity sales for the 8% interest, Westar did not include any such sales in its cash flow assumptions, asserting that capacity "revenues will be hard to realize."[136]

51. Westar can only argue against the above position it took in the 19-064 Docket by claiming, as Ives did at the hearing, that the evaluation of MWP's interest in the 8% in the 19-064 Docket and the evaluation of the 8% in this Docket are distinct.[137] Yet that distinction can only be made if the Commission were to agree with Westar that there is an essential continuity between the 2007 transaction and the current agreement or that there is no one else to pay the fixed NFOM costs,

---

[133] *Violet*, 800 F.2d. at 283.
[134] Tr., p. 151.
[135] 19-064 Docket, Westar Initial Brief, p. 8 (Dec. 28, 2018).
[136] *See* Gorman Direct, Exhibit MPG-1, page 2 of 3.
[137] *See* Tr., p. 71.

and therefore, the fixed NFOM should not be part of the cost/benefit analysis here.[138] The Commission has already determined there is no essential continuity and has rejected the claim that no one else could have paid the fixed NFOM costs. Hence, the fixed NFOM *should be* considered in the cost/benefit analysis. Therefore, the Commission finds it would not be prudent to shift onto customers the losses incurred by Westar for its purchase of an 8% interest in JEC, an interest that Westar has acknowledged was unlikely to become profitable.

v. Westar settled with MWP without any PPA to cover costs.

52. When Westar entered into its new lease and purchase agreement with MWP, Westar was aware that it no longer had a wholesale PPA that is "above market value" to drive down costs to customers.[139] Thus, Westar realized that customers would no longer benefit from the cost-of-service offset that the PPA with MKEC had provided.[140] In light of Westar's aforementioned knowledge that the 8% interest was unlikely to become profitable on its own, the Commission finds that customers should not bear the burden of Westar's purchase of the 8% interest without a corresponding PPA or other arrangement to offset the cost-of-service.

vi. Westar's assertions about the effects of litigation with MWP are speculative.

53. Westar speculated about various outcomes that could ensue if it had pressed MWP legally for MWP's failure to bear its share of the costs of operating JEC. However, the Commission finds no factual basis for this speculation by Westar. Accordingly, Westar did not meet the burden of showing that its settlement agreement was prudent and reasonable in this regard. Ives hypothesized about "the potential for long and expensive litigation" with MWP,[141] that litigation "would be very lengthy and . . . very expensive,"[142] and that MWP would likely not have paid the

[138] Tr., p. 71.
[139] Ives Direct, p. 3; Tr., pp. 121.
[140] *See* Gorman Cross-Answering, p. 4.
[141] Tr., p. 40.
[142] Tr., p. 78.

invoices, leading to "prolonged litigation . . . [p]robably would have been a minimum of a year, could have been upwards of two, depending on how argumentative that litigious process got."[143]

54. However, as Ives testified at hearing, Westar settled with MWP before undertaking any efforts to test MWP's resolve in the face of possible litigation.[144] Thus, the Commission agrees with KIC:

> Ultimately, Westar did not initiate collection efforts, Westar did not foreclose on the interest (forcing an examination of MWP's assets), and Westar paid a substantial amount of money for the 8% interest instead of waiting to see if MWP could market the interest to another buyer. In short, Westar took the convenient and expedient option – buy the 8% interest and ask ratepayers to cover its costs.[145]

55. The Commission finds Westar's failure to test MWP's legal position and resolve prior to accepting a settlement agreement, and thereafter suggesting that customers cover the costs associated with Westar's acquisition of the 8% interest, under these circumstances, does not demonstrate prudence by Westar.[146]

<u>vii. Westar's settlement agreement unjustifiably increases retail rates</u>.

56. As found above, the Commission does not accept Westar's assertion that it had to incur the fixed NFOM costs, and accordingly, the Commission does not accept the contention that customers were exposed to these costs regardless of the option pursued by Westar.[147] The Commission finds that Westar's decisions regarding the 8% interest at issue, not the 2007 agreement, potentially exposed customers to the NFOM costs. Therefore, Commission approval of Westar's lease and purchase agreement would unjustifiably increase retail customer rates.

57. When the fixed NFOM costs are properly included in the cost/benefit analysis in this case, retail customers must incur the costs of future NFOM, fuel costs, and some very likely capital

---

[143] Tr., pp. 110-11.
[144] *See* Tr., pp. 110-12
[145] KIC Initial Brief, p. 20.
[146] *See* ¶¶ 19-20 of this Order, *supra*.
[147] *See* Tr., p. 159.

costs associated with the new 8% interest in JEC.[148] The Commission acknowledges Staff's point that capital costs and "dismantling costs" do not impact customers dollar-for-dollar in the year they are incurred by the utility.[149] However, Staff's analysis would still leave customers responsible for approximately $93 million dollars in increased retail rates over the next 15 years.[150] Customers could incur these increased costs, as well as the $3.7 million purchase price, $4.83 million for the additional seven-month lease costs, and a projected $4.2 million in deferred NFOM costs.[151] Given these additional costs, the Commission finds Westar has not met its burden of showing that the new lease and purchase agreement was a prudent decision for Westar's retail customers.

***d. The Commission's prudency analysis does not constitute "hindsight review."***

58. Westar's "hindsight" argument relied on several points. First, Westar relied on the claim that previous customers enjoyed "millions of dollars in benefits" from past transactions, and thus, the Commission cannot question the quality of those transactions here.[152] It is Westar's contention that for the Commission to approve previous Westar transactions where customers have enjoyed significant benefits and then fault Westar for poor contracting in those transactions constitutes hindsight review.[153] This argument fails because the Commission has not found that Westar engaged in "poor contracting." The Commission acknowledges its approval of the 1991 and 2007 transactions, however, those transactions are not in essential continuity with the current settlement agreement, and therefore, the prudency of those past transactions provides no basis for the Commission's prudency analysis in this case. The Commission agrees that Westar's lease with MWP "need[ed] to be concluded,"[154] but the record in this case indicates the lease had no specific

---

[148] Joint Application, ¶¶ 26-31; KIC Initial Brief, p. 13; Tr., p. 148, 151.
[149] *See* Staff Reply Brief, pp. 12-13.
[150] *See* Staff Reply Brief, pp. 11-13; KIC Initial Brief, p. 13.
[151] KIC Initial Brief, p. 13.
[152] Westar Initial Brief, p. 26.
[153] Westar Initial Brief, p. 26.
[154] Tr., p. 95.

conclusion provisions, and thus, Westar had many options for concluding the lease.[155] Other than the zero-cost transfer option, any agreement Westar made to conclude the lease in accordance with the NS&A must be analyzed for prudency on its own terms. The Commission finds that Westar has not demonstrated prudence with regard to the current agreement given the context of Westar's knowledge and the circumstances surrounding that current agreement that are thoroughly described herein.

59. Westar has claimed that the Commission would be guilty of "hindsight regulation" if it found "that shareholders should be required to bear all 'market risks' if market conditions – such as the market for coal generation – change after Westar has made a prudent decision in order to serve its customers."[156] According to Westar, if the Commission disallowed recovery of costs from an earlier prudent investment whenever market conditions changed over time, no utility could continue to operate.[157] However, this argument again assumes the Commission is disallowing recovery of costs in this Docket because market conditions have made the previous prudent transactions "less competitive" or imprudent.[158] The Commission's finding here is not based on this analysis. Market conditions have indeed changed since 2007. However, Westar's settlement with MWP has not been demonstrated to be prudent for customers since Westar knew at the time it entered into the agreement that it did not need the 8% portion to meet its current capacity requirements, that revenues from operating the 8% portion were not likely to cover costs, and that it had no PPA to cover costs.

60. Westar has argued that "the Commission should evaluate the prudency of Westar's decision to settle with MWP and purchase the 8% interest in light of the fact that Westar's

[155] *See e.g.* Grady Direct, pp. 14-15.
[156] Westar Reply Brief, p. 13.
[157] Westar Reply Brief, p. 13.
[158] *See* Westar Reply Brief, p. 13.

assumption of the lease was prudent when it occurred and caused Westar to incur certain costs related to the 8% interest."[159] Again, this erroneously assumes a seamless continuity between Westar's 2007 assumption of Aquila's lease and Westar's current decision to settle with MWP. The Commission has not based its findings herein on the hindsight of what Westar should have known in 2007. However, Westar is not, by virtue of a prudent decision in 2007, shielded from the review of its separate decision in 2019 which, in all respects, is not a "wrap up" of the 2007 decision. The terms of the NS&A specifically identify Westar's 2019 decision to be a new decision, and the Commission has evaluated it in that light.

***e. Westar's opportunity to operate the 8% interest as an unregulated asset***

61. Ives testified that should the Commission deny Westar's Application, as it does here, "Westar should be permitted to operate the 8% portion of JEC as a merchant plant and retain any revenues from that portion of the plant rather than passing them on to customers."[160] The NS&A itself stipulates that, "[i]n the event that the Commission denies Westar's filing . . . Westar shall be allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC for which the Commission denies Westar recovery of the incurred cost of owning or leasing and operating the 8% portion of JEC."[161] Both KIC and CURB also endorsed this option.[162] Moreover, Grady asserted the viability of this option, stating that if Westar "can't recover their regulated costs, well, of course they get to recover the margins or the revenues that they can create from the asset . . . [and] . . . it wouldn't be anything inventive or difficult to administer . . . [T]here probably would have to be some parameters around allocating all of the fixed costs, right, decommissioning costs and any potential . . . litigation costs or liability claims. But we could do it."[163] Thus, the Commission finds

[159] Westar Reply Brief, p. 14.
[160] Ives Rebuttal, p. 12.
[161] NS&A, ¶ 29.
[162] *See* Gorman Direct, pp. 16-17; Crane Direct, p. 17; Tr., p. 126.
[163] Tr., pp. 173-74.

Westar should be allowed to operate the 8% portion of JEC as a merchant plant and retain any revenues from its operation of that portion of the plant.

*f. Applicability of the Commission's findings in this case*

62. Although the Commission finds Westar has not met its burden of demonstrating that its new lease and purchase agreement was a prudent decision for its retail customers, the Commission also makes clear that its findings here are strictly limited to the facts and circumstances of this Docket. This case has presented the Commission with a very unusual set of facts and circumstances. Thus, the Commission's findings should be narrowly construed to address solely the particular scenario before it in this Docket. The Commission's findings here do not convey or advance any specific broad or general policies. Rather, the Commission's findings are intended simply to resolve the specific case before it.

**V. Conclusion**

63. Given the legal elements for determining prudency, the Commission finds Westar has not borne its burden of proving that its decision to enter into the new seven-month lease and $3.7 million purchase agreement with MWP was a prudent decision for its retail customers. The Commission finds Westar entered into the settlement agreement knowing, (i) it did not need the 8% portion of JEC to satisfy its capacity requirements; (ii) the lease with MWP was expired and its expiration had been impending for some time with no concluding provisions; (iii) the economic risks of operating the 8% interest in JEC; (iv) the 8% portion of JEC was not likely to become profitable; (v) a PPA no longer existed to offset the cost-of-service for the 8% portion; (vi) its claims regarding MWP's litigation position were untested and speculative; and (vii) the costs associated with the settlement agreement will increase retail customers' rates. Based on these facts in existence at the time Westar committed itself to the costs of the settlement agreement with MWP, the Commission finds Westar's decision showed a lack of prudence necessary to compel customers to

bear the costs associated therewith. Thus, the Commission finds Westar shall not be allowed to recover the regulatory asset containing deferred lease and NFOM expenses. Further, Westar shall not be allowed to recover from customers fuel costs, future NFOM expenses or future capital expenditures associated with the 8% interest. However, Westar shall be allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC for which the Commission has denied Westar recovery of the incurred cost of owning or leasing and operating the 8% portion of JEC.

**THEREFORE, THE COMMISSION ORDERS:**

A. Westar's March 4, 2019 Joint Application for Recovery of Costs through RECA is denied. Westar has failed to meet its burden of showing that its new lease and purchase agreement was a prudent decision for its retail customers.

B. Westar shall not recover the new lease expense, NFOM costs (both NFOM costs in the regulatory asset and future NFOM costs), future capital expenditures or fuel costs for the 8% interest in JEC from customers.

C. Westar is allowed to retain any wholesale sales that are directly attributable to the 8% portion of JEC for which the Commission has denied Westar recovery of the incurred cost of owning or leasing and operating the 8% portion of JEC.

D. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).[164]

E. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

[164] K.S.A. 66-118b; K.S.A. 77-503(c); K.S.A. 77-531(b).

**BY THE COMMISSION IT IS SO ORDERED.**

Keen, Chair; Albrecht, Commissioner; Duffy, Commissioner

Dated: 09/12/2019

Lynn M. Retz

Lynn M. Retz
Executive Director

MJD

## CERTIFICATE OF SERVICE

19-WSEE-355-TAR

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 09/12/2019.

JOSEPH R. ASTRAB
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604
Fax: 785-271-3116
j.astrab@curb.kansas.gov

***Hand Delivered***

TODD E. LOVE, ATTORNEY
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
t.love@curb.kansas.gov

DAVID W. NICKEL, CONSUMER COUNSEL
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
d.nickel@curb.kansas.gov

SHONDA RABB
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
s.rabb@curb.kansas.gov

DELLA SMITH
CITIZENS' UTILITY RATEPAYER BOARD
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3116
d.smith@curb.kansas.gov

COLE BAILEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
c.bailey@kcc.ks.gov

MICHAEL DUENES, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
m.duenes@kcc.ks.gov

ANDREW J. FRENCH, ATTORNEY AT LAW
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH ST STE 750
OVERLAND PARK, KS 66210-2362
Fax: 913-661-9863
andrew@smizak-law.com

JAMES P. ZAKOURA, ATTORNEY
SMITHYMAN & ZAKOURA, CHTD.
7400 W 110TH ST STE 750
OVERLAND PARK, KS 66210-2362
Fax: 913-661-9863
jim@smizak-law.com

TOM POWELL, GENERAL COUNSEL-USD 259
TOM POWELL
903 S. Edgemoor
Wichita, KS 67218
tpowell@usd259.net

## CERTIFICATE OF SERVICE

19-WSEE-355-TAR

AMY FELLOWS CLINE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON, LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
Fax: 316-630-8101
amycline@twgfirm.com

TIMOTHY E. MCKEE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON, LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
Fax: 316-630-8101
temckee@twgfirm.com

CATHRYN J. DINGES, CORPORATE COUNSEL
WESTAR ENERGY, INC.
818 S KANSAS AVE
PO BOX 889
TOPEKA, KS 66601-0889
Fax: 785-575-8136
cathy.dinges@westarenergy.com

DAVID L. WOODSMALL
WOODSMALL LAW OFFICE
308 E HIGH ST STE 204
JEFFERSON CITY, MO 65101
Fax: 573-635-7523
david.woodsmall@woodsmalllaw.com

/S/ DeeAnn Shupe

DeeAnn Shupe