

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

**RESPONSE OF KANSAS INDUSTRIAL CONSUMERS GROUP TO WESTAR
PETITION FOR RECONSIDERATION OR CLARIFICATION**

COMES NOW the Kansas Industrial Consumers Group, Inc. ("KIC"), and respectfully files this *Response* to Westar's Petition for Reconsideration or Clarification dated September 27, 2019. In support of its Response, KIC states to the State Corporation Commission of the State of Kansas ("Commission" or "KCC") as follows:

I. Background

1. The official record of this proceeding is cited at length in KIC's Initial Brief, dated July 31, 2019. KIC will not repeat this exhaustive procedural history herein.

2. On September 12, 2019, the Commission issued its Order on Westar's Application. In its Order, the Commission denied Westar's request to recover costs related to a short-term lease, acquisition, and the future operations of 174 MW of new generating capacity – an 8% interest in the Jeffrey Energy Center ("JEC") currently owned by Midwest Power Company ("MWP"). In its Order, the Commission found Westar's acquisition of the 8% interest was not a prudent decision for retail ratepayers for the following reasons:

- 1) Westar does not need the 8% portion of JEC to satisfy service and capacity needs, and customers should not pay for generation they do not need;¹

¹ Order on Westar's Application to Recover Certain Costs through Its R.E.C.A related to the 8% Portion of Jeffrey Energy Center, September 12, 2019, ¶¶ 35-38. (Order, ¶¶ 35-38.)

- 2) Westar's efforts to address the lease expiration were not prudent;²
 - 3) Westar was aware of the economic risks of operating the 8% interest in JEC and did not take reasonable steps to protect itself and customers;³
 - 4) Westar settled with MWP without any wholesale power purchase agreement to offset the costs of owning the 8% interest;⁴
 - 5) Westar's assertions about the effects of litigation with MWP are speculative;⁵
- and
- 6) The new lease and purchase agreement would unjustifiably increase retail rates.⁶

3. On September 27, 2019, Westar filed a Petition for Reconsideration or Clarification of the Commission's Order. In its Petition, Westar requests the Commission reconsider its decision on two grounds. First, Westar contends the Commission's finding that Westar "failed to act timely to explore alternatives to the MWP settlement" is not supported by substantial evidence and requests the Commission schedule additional evidentiary proceedings on this issue.⁷ Second, Westar requests the Commission "clarify" that Westar will be allowed to recover tens of millions of dollars of deferred and future operating, capital, and decommissioning costs associated with the 8% interest in JEC if Westar commits not to seek recovery of roughly \$8.5 of acquisition costs.⁸

² Order, ¶¶ 39-47.

³ Order, ¶¶ 48-49.

⁴ Order, ¶ 52.

⁵ Order, ¶¶ 53-55.

⁶ Order, ¶¶ 56-57.

⁷ Petition for Reconsideration or Clarification of Westar Energy, Inc. and Kansas Gas and Electric Company, September 27, 2019, ¶¶ 8-12. (Westar PFR, ¶¶ 8-12.)

⁸ Westar PFR, ¶¶ 13-18.

II. Response to Westar Petition for Reconsideration

a. The Commission's Order is Based on Substantial Competent Evidence

4. In its Petition, Westar states, "The Commission also determined that Westar's decision to enter the settlement with MWP and acquire the 8% interest in JEC was not prudent, based in part on the Commission's finding that Westar did not act in a timely manner to sufficiently explore other alternatives to the MWP settlement."⁹ Westar goes on to claim this finding is not supported by substantial evidence because "no party in the docket alleged that Westar did not act timely to explore alternatives to the settlement with MWP and there is no evidence whatsoever in the record on that issue."¹⁰

i. Westar Had the Burden to Demonstrate the Prudence of the Acquisition for Its Retail Customers and Did Not Meet That Burden.

5. As a preliminary matter, Westar misstates the burden of proof in rate applications, including this Application to increase its Retail Energy Cost Adjustment ("RECA") tariff rates. Under Kansas law, utility rates are deemed *prima facie* reasonable unless, or until, changed or modified by the Commission.¹¹ Therefore, the utility bears the burden of making a *prima facie* showing that its rates are no longer reasonable when it files an application under K.S.A. 66-117.¹²

6. In its Petition, Westar claims "The party challenging the prudence of a decision made by the utility has the burden of identifying and proving the alleged imprudence."¹³ KIC emphatically rejects the notion that customers had the burden of proving Westar's *imprudence* in this proceeding. While it is true that an intervening party in a utility rate case bears the burden of

⁹ Westar PFR, ¶ 7.

¹⁰ Westar PFR, ¶ 9.

¹¹ K.S.A. 66-115.

¹² *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 4 Kan. App. 2d 674, 681, 610 P.2d 121, 128 (1980). See also *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 217 Kan. 604, 615, 538 P.2d 702, 712 (1975).

¹³ Westar PFR, ¶ 10.

proof with respect to certain issues initially raised by those parties (similar to the burden in a Complaint proceeding),¹⁴ the prudence of Westar's acquisition of the 8% interest in JEC was not such an issue. The prudence of Westar's purchase of the 8% interest was the sole subject of Westar's Application to change its RECA rates and was the central and dispositive issue in this case. Thus, to increase its RECA rate, Westar was required to demonstrate the prudence of its decision.

7. More importantly, pursuant to the Settlement Agreement approved in Docket No. 18-WSEE-328-RTS ("18-328 Settlement"), Westar *agreed* it would have the burden of demonstrating the prudence of this transaction for its customers. This assignment of burdens was to be applied in this case, *regardless* of the default burdens assigned under Kansas law.¹⁵ Paragraph 28 of the Settlement states,

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 that Westar will be permitted to file a request to include these expenses (lease expenses and NFOM) through the RECA....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.*¹⁶

8. As described below, KIC rejects the suggestion that there is no record evidence on the issue of whether Westar sufficiently explored alternatives to the MWP settlement. However, as noted in KIC's Reply Brief, "To the extent this proceeding's record is inadequate or does not

¹⁴ *Wycoff v. Bd. of Cnty. Comm'rs of Logan Cnty.*, 191 Kan. 658, 664-65, 383 P.2d 520, 526 (1963). See also *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of State of Kansas*, 28 Kan. App. 2d 313, 321, 16 P.3d 319, 326 (2000).

¹⁵ *Boos v. Nat'l Fed'n of State High Sch. Associations*, 20 Kan. App. 2d 517, 521-24, 889 P.2d 797, 802-03 (1995), "It is a basic rule of contract law that courts will allow parties to choose the terms by which they will be bound under written agreements....A settlement agreement, by its nature, substitutes contractual performance for what was previously claimed to be due...The rule is clear that unambiguous contracts must be enforced according to their plain, general, and common meaning in order to ensure the intentions of the parties are enforced."

¹⁶ Docket No. 18-WSEE-328-RTS, Non-Unanimous Stipulation and Agreement, July 17, 2018, ¶ 28. (18-328 Settlement, ¶ 28.) Emphasis added.

reflect sufficient "context" (as suggested by Westar and Staff), such an inadequacy should fall on the party with the burden to support the Application. Such a contention should not be used [as] a shield against consumer interests seeking to voice their concerns about the proposed transaction."¹⁷

ii. Contrary to Westar's Assertions, the Commission Received and Relied Upon Substantial Evidence to Deny Westar's Application.

9. As noted above, Westar *claims* no party raised the issue of Westar's decisional process leading up to the expiration of its lease, and the Commission received no evidence on this issue. However, the prefiled testimonies filed by KIC and the Citizens' Utility Ratepayer Board ("CURB") repeatedly indicated Westar had not met its burden to of showing the new lease and purchase agreement is a prudent decision for its retail customers. More importantly, Westar and Commission Staff ("Staff") built their cases and claims of customer benefits on the faulty premise that purchasing the 8% interest in JEC was prudent because Westar had no alternative options to avoid or reduce the costs associated with that interest.¹⁸ Indeed, both Westar and Staff argued KIC and CURB's analyses using the "all-in" costs of owning the 8% JEC interest were flawed for this precise reason.¹⁹

10. Because Westar's consideration of alternatives to the MWP settlement was clearly foundational to Westar and Staff's positions – and their criticisms of KIC and CURB's positions – counsel for KIC and CURB devoted substantial time to this issue during the evidentiary hearing. Cross-examination largely focused on Westar's witness, which afforded Westar a substantial opportunity to explain its decisional process in the time leading up to the lease expiration. In

¹⁷ Reply Brief of Kansas Industrial Consumers Group, Inc., August 7, 2019, ¶ 26. (KIC Reply Brief, ¶ 26.)

¹⁸ Joint Application for Recovery of Costs through RECA, March 4, 2019, ¶ 13 (Application, 13); Direct Testimony of Darrin R. Ives, March 4, 2019, p. 11 (Ives Direct, p. 11); Direct Testimony of Justin T. Grady, June 4, 2019, pp. 4-5 (Grady Direct, pp. 4-5). See also, Tr., pp. 149-52, At hearing, Staff witness Justin Grady conceded that Westar's perceived lack of alternatives to a purchase was a foundational assumption to his cost-benefit analysis.

¹⁹ Cross-Answering Testimony of Justin T. Grady, June 14, 2019, p. 15. (Grady Cross-Answering, p. 15.); Rebuttal Testimony of Darrin R. Ives, June 21, 2019, p. 9. (Ives Rebuttal, p. 9.)

addition to cross-examination, Westar's witness answered many questions from the Commission, itself. During this examination, the Commission heard testimony from Westar's witness regarding the urgency with which Westar addressed the conclusion of its lease, Westar's knowledge of the lease expiration date, the depth of Westar's negotiations with MWP, and whether Westar seriously considered alternatives to purchasing the 8% interest, among other topics.

11. In its Order, the Commission meticulously cites the official record, including the testimony of Westar's witness at hearing, for the evidence it relied upon to reach its decision.²⁰ Westar does not claim the cited evidence is incorrect or incomplete. Rather, Westar seems to unbelievably argue this evidence does not exist ("there is no evidence whatsoever in the record on that issue").

12. KIC submits the Commission's finding that "Westar did not exercise the necessary attentiveness and judiciousness in avoiding the potential risks to customers"²¹ is fully supported by substantial competent evidence, as cited in the Commission's Order. For that reason, Westar's request for reconsideration is without merit.

13. Furthermore, as cited above, the Commission relied on six separate grounds to find Westar's purchase of the 8% JEC interest was not a prudent decision for retail customers. These included grounds separate from Westar's imprudence in addressing its expiring lease by failing to adequately and promptly explore alternatives to a purchase of the 8% interest. For instance, the Commission directly found Westar's decision to purchase the 8% interest was imprudent because the additional 174 MW of coal capacity is not needed to serve customers.²² The Commission also

²⁰ Order, ¶¶ 39-47.

²¹ Order, ¶ 47.

²² Order, ¶¶ 35-38, "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."

found "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."²³ In its Petition, Westar does not challenge these findings. In fact, it challenges only one of the Commission's six grounds for denying the Application, all of which provide a separate and independent basis to deny the Application.²⁴

14. The Commission heard and relied upon substantial competent evidence to find Westar did not act prudently to explore alternatives to the present transaction prior to the expiration of its lease. And the Commission relied on additional grounds, all supported by substantial record evidence, to find the purchase of the 8% interest in JEC was not prudent for Westar's retail customers. None of these additional grounds are challenged by Westar. Westar did not meet its evidentiary burden, and there is no compelling reason to afford Westar an opportunity to build and present a new record. Therefore, the Commission should reject Westar's request to reconsider its Order by reopening the record for further proceedings.

b. The Commission Should Reject Westar's Request for "Clarification."

i. Westar's Request for "Clarification" is Inconsistent with the Plain Language of the 18-328 Settlement.

15. In its Petition, Westar partially quotes the 18-328 Settlement at paragraph 29, omitting certain language in the agreement.²⁵ In this paragraph, the 18-328 Settlement provides, in relevant part, as follows: "In the event Westar ends up negotiating a zero-cost transfer of ownership (defined as \$0 or \$1), Westar is automatically entitled to begin recovering actual NFOM

²³ Order, ¶ 52.

²⁴ Westar PFR, ¶ 7, In its Petition, Westar admits it is not challenging these additional grounds, stating "The Commission also determined that Westar's decision to enter the settlement with MWP and acquire the 8% interest in JEC was not prudent, based *in part* on the Commission's finding that Westar did not act in a timely manner to sufficiently explore other alternatives to the MWP settlement." Emphasis added.

²⁵ Westar PFR, ¶ 14.

expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval."

16. Westar goes on to make various statements about the intended "effect" of the above section.²⁶ Then, based on its re-interpretation of this language, Westar requests the Commission "clarify" that Westar can automatically recover fuel and NFOM costs related to the 8% interest in JEC if it does not seek recovery of the \$3.7 million acquisition price or the \$4.83 million in lease payments.²⁷ Finally, Westar appears to ignore its express commitments in the 18-328 Settlement and opens a new negotiation with the Commission stating: "If the Commission provides the clarification requested by Westar in this pleading, Westar commits that it will not at any time seek recovery of the [lease and purchase costs]."²⁸

17. Westar's request for clarification is flatly inconsistent with the plain language of the 18-328 Settlement. Westar's requested interpretation of the settlement would have the Commission substitute additional language into the agreement, effectively revising it to state: "In the event Westar ends up negotiating a zero-cost transfer of ownership (defined as \$0 or \$1) *or does not seek recovery of any costs of leasing or purchasing the interest*, Westar is automatically entitled to begin recovering actual NFOM expenses and fuel expenses associated with the 8% ownership of JEC without prior Commission approval."

18. It is a basic rule of contract law that the intent of an unambiguous settlement agreement is to be construed solely based on the language in the document.²⁹ And the Kansas Courts have held, "Parties that define their relationship by contract leave no room to apply a legal

²⁶ Westar PFR, ¶¶ 15, 17.

²⁷ Westar PFR, ¶ 16.

²⁸ Westar PFR, ¶ 18.

²⁹ *Carrothers Const. Co. v. City of S. Hutchinson*, 288 Kan. 743, 751, 207 P.3d 231, 239 (2009); *Boos v. Nat'l Fed'n of State High Sch. Associations*, 20 Kan. App. 2d 517, 522, 889 P.2d 797, 802 (1995).

theory that might exist but for an express agreement," and when a "settlement contract has been found to be unambiguous, [the courts] look only to the four corners of the agreement to determine the parties' intent."³⁰

19. Westar does not claim the 18-328 Settlement is ambiguous. Instead Westar simply offers a re-interpretation that ignores the plain language of the document. As noted in KIC's Reply Brief,

"[T]he proposal before the Commission is not a zero-cost transfer. The purchase price, including short-term lease costs, is roughly \$8.5 million. The last sentence of paragraph 29 does not apply. Its condition precedent was not triggered. Thus, Westar has the burden to demonstrate the transaction benefits customers before passing any costs to customers pursuant to paragraph 28 of the Settlement – a burden Westar has not fulfilled."³¹

Westar did not "end up negotiating a zero-cost transfer of ownership" for the 8% interest, as contemplated by the 18-328 Settlement. Westar's hypothetical "commitment" not to seek recovery of certain costs from customers does not change this fact. The "zero-cost transfer" provision is inapplicable.

20. The plain language of the 18-328 Settlement required Westar to seek recovery of all costs associated with the 8% interest if it did not negotiate a zero-cost transfer. Westar apparently agreed with that interpretation (by filing its Application) until its Application was denied. The Commission should reject Westar's request to now "clarify" the 18-328 Settlement Agreement because such clarification is inconsistent with the plain language and meaning of the contract.

³⁰ *Boos v. Nat'l Fed'n of State High Sch. Associations*, 20 Kan. App. 2d 517, 523–24, 889 P.2d 797, 802–03 (1995), citing *First Nat. Bank v. McIntosh*, 72 Kan. 603, 84 P. 535 (1906) and *Brown v. Lang*, 234 Kan. 610, Syl. ¶¶ 1, 2, 675 P.2d 842 (1984); *Wiles v. Wiles*, 202 Kan. 613, 619, 452 P.2d 271 (1969).

³¹ KIC Reply Brief, ¶ 15.

ii. Westar's Request for "Clarification" is Inconsistent with the Commission's Findings and Seeks to Reverse the Commission's Decision on Westar's Application.

21. To be clear, Westar's request for clarification is a request to recover the vast majority of deferred and ongoing costs associated with the 8% interest in JEC. KIC estimated the subject costs at approximately \$138 million, while the Commission conservatively estimated the costs at \$93 million.³² If granted, Westar's request would directly reverse the Commission's express finding that those costs should not be recovered from retail customers.³³

22. Through this request for clarification, Westar is continuing to argue the Commission is only allowed to examine the purchase price in this proceeding. Westar's new interpretation of the 18-328 Settlement would allow it to recover all NFOM, fuel, capital, and decommissioning costs, regardless of the Commission's findings in this proceeding. This position was, of course, expressly (and correctly) rejected by the Commission.

23. In its Order, the Commission found the "zero-cost" transfer language to be inapplicable to the present transaction.³⁴ The Commission further found it had authority under paragraphs 28-29 of the 18-328 Settlement to disallow recovery of all costs associated with ownership of the 8% interest (including fuel and NFOM costs).³⁵ In these portions of its Order, the Commission expressly rejected Westar's arguments, finding those positions "would effectively preclude the Commission from saying 'no' to Westar's request to recover NFOM costs," which would not be consistent with the 18-328 Settlement.³⁶

³² KIC Initial Brief, ¶ 5; Order, ¶ 57. These estimates did not include deferred NFOM and fuel costs associated with the 8% interest in JEC.

³³ For example, as cited above, the Commission found customers should not pay for generation they do not need, customers should not pay for the costs of the 8% interest without a corresponding PPA, and purchasing the 8% interest unjustifiably increases retail rates.

³⁴ Order, ¶ 22.

³⁵ Order, ¶ 29.

³⁶ Order, ¶ 24.

24. Westar's request for clarification would now reach the exact same result as its prior rejected positions. If granted, Westar's request would mean the Commission was never allowed to deny cost-recovery for any costs other than the lease and purchase costs. Indeed, such a request would leave portions of paragraphs 28 and 29 in the 18-328 Settlement entirely meaningless. For instance, why would paragraph 28 of the 18-328 Settlement require Westar to request recovery of NFOM costs if the Commission is only capable of disallowing purchase and lease costs? And why, in paragraph 29, would the parties provide for Westar to retain wholesale sales revenues "in the event the Commission denies Westar's filing" if the Commission has no ability to deny recovery of all future ownership costs of the 8% interest? Under Kansas law, a contract should never be interpreted in a manner rendering certain terms of the contract meaningless,³⁷ but that is precisely the result of Westar's proposed re-interpretation and "clarification."

25. Westar's request for clarification is wholly inconsistent with the plain language of paragraphs 28 and 29 of the Settlement, as the Commission has already recognized, and should be rejected a second time.

WHEREFORE, KIC respectfully requests the Commission deny Westar's Petition for Reconsideration or Clarification in its entirety.

³⁷ *Guss v. Fort Hays State Univ.*, 38 Kan. App. 2d 912, 921, 173 P.3d 1159, 1166 (2008).

Respectfully submitted,

/s/ **Andrew J. French**

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VERIFICATION


STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

Andrew J. French, being duly sworn upon his oath, deposes and states that he is the Attorney for the Kansas Industrial Consumers Group, Inc., that he has read and is familiar with the foregoing *Response of Kansas Industrial Consumers Group to Westar Petition for Reconsideration or Clarification* and the statements therein are true to the best of his knowledge, information, and belief.



Andrew J. French

SUBSCRIBED AND SWORN to before me this 7th day of October, 2019.



Notary Public

My Appointment Expires:



CERTIFICATE OF SERVICE

I hereby certify a true copy of the foregoing was served by electronic mail (when available) or regular U.S. mail (unless otherwise noted), the 7th day of October, 2019, to the parties below:

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