

127 FERC ¶ 61,190  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

May 28, 2009

In Reply Refer To:  
Westar Energy, Inc.  
Docket No. ER08-1396-001

Jeanne M. Dennis, Esq.  
Winston & Strawn, L.L.P.  
1700 K Street, N.W.  
Washington, DC 20006

Cathryn J. Dinges, Esq.  
Westar Energy, Inc.  
818 S. Kansas, P.O Box 889  
Topeka, KS 66601

Dear Ms. Dennis and Ms. Dinges:

1. On October 15, 2008, Westar Energy, Inc. (Westar) filed an alternate *pro forma* sheet No. 30 to the Westar *pro forma* Formula Rate Agreement for Full Requirements Electric Service (Cost-Based Formula Rate Agreement) between Westar and the City of Wathena, Kansas (Wathena). Westar filed the alternate *pro forma* sheet to comply with the Commission's October 10, 2008 order in this proceeding establishing hearing and settlement judge procedures.<sup>1</sup>

2. Westar's alternate *pro forma* sheet contains a revised standard of review provision consistent with the precedent set forth in *Duke Energy Carolinas LLC*.<sup>2</sup> In *Duke Energy*, the Commission found that "to the extent contracting parties file new provisions that seek to impose a 'public interest' standard of review on non-contracting third parties, the

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<sup>1</sup> See *Westar Energy, Inc.*, 125 FERC ¶ 61,027, at P 23 (2008).

<sup>2</sup> 123 FERC ¶ 61,201 (2008) (*Duke Energy*).

Commission would find acceptable a substitute provision that imposes on non-contracting third parties ‘the most stringent standard permissible under applicable law.’”<sup>3</sup> Westar has included such language.

3. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 63, 957 (2008) with interventions, comments and protests due on or before November 5, 2008. Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, Occidental) filed a protest.

4. A footnote in Westar’s transmittal letter indicates its interpretation that *Duke Energy* requires non-contracting parties to meet the public interest standard in order to overcome the presumption that contract provisions are just and reasonable.<sup>4</sup> In its protest, Occidental states that the Commission should not endorse Westar’s interpretation, contained in a footnote in its transmittal letter, of what the quoted language in *Duke Energy* signifies in light of the Supreme Court’s recent opinion in *Morgan Stanley*. Occidental states that it recognizes that Westar is entitled to express its interpretation; however, Occidental is concerned that Westar will construe Commission silence as an implicit endorsement of its interpretation. In order to eliminate potential uncertainty, Occidental requests that the Commission explicitly state that it does not endorse Westar’s interpretation of the language. Further, Occidental requests that an interpretation of the quoted language in *Duke Energy* be addressed in the hearing and settlement judge procedures established in the root docket and not in the compliance filing.

5. We note that the footnote that Occidental objects to is only contained in the transmittal letter submitted by Westar to accompany its Cost-Based Formula Rate Agreement compliance filing, and is not repeated in the alternate *pro forma* sheet. Given that the statement contained in the footnote is not part of Westar’s Cost-Based Formula Rate Agreement, we need not address it. Accordingly, our acceptance of the *pro forma* sheet should not be construed as either acceptance or rejection of Westar’s interpretation of *Duke Energy*.<sup>5</sup>

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<sup>3</sup> *Duke Energy*, 123 FERC ¶ 61,201, at P 10 & n.10.

<sup>4</sup> Westar’s Filing at 2 & n.2 (citing *Morgan Stanley Capital Group Inc., v. Public Utility District No. 1 of Snohomish County et al.*, 123 S. Ct. 2733 (2008) (*Morgan Stanley*)).

<sup>5</sup> See *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (noting that the Commission’s acceptance of tariff sheets does not turn every provision of the tariff into policy or precedent).

6. We accept Westar's compliance filing containing an updated standard of review provision for Westar's Cost-Based Formula Rate Agreement with Wathena.

By direction of the Commission.

Kimberly D. Bose,  
Secretary.