

128 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Westar Energy, Inc.

Docket Nos. ER07-1344-000
ER07-1344-001

ORDER APPROVING CONTESTED SETTLEMENT

(Issued August 21, 2009)

I. Introduction

1. On September 30, 2008, Westar Energy, Inc. (Westar) filed a settlement agreement consisting of a transmittal letter, “Explanatory Statement” and “Settlement Agreement and Offer of Settlement” with an attached “Cost-Based Formula Rate Agreement for Full Requirements Electric Service” (Settlement and Formula Rate Agreement, respectively). Westar filed the Settlement on behalf of itself and the Settling Parties,¹ asserting that the Settlement is intended to resolve all issues in this proceeding. On October 31, 2008, the Settlement Judge filed a report to the Commission stating that the proposed Settlement is contested and forwarded the Settlement to the Commission.² In this order we approve the Settlement and Formula Rate Agreement. We also resolve all remaining motions and a pending request for rehearing in the above captioned proceedings.

¹ Kansas Electric Power Cooperative, Inc. (Kansas Electric); Kansas Corporation Commission (KCC); Sunflower Electric Power Corporation (Sunflower); Mid-Kansas Electric Company, LLC (Mid-Kansas); Prairie Land Electric Cooperative, Inc. (Prairie Land); and the Victory Electric Cooperative Association, Inc. (Victory) (individually a Settling Party and collectively the Settling Parties). Not included among the Settling Parties is Occidental Chemical Corp. (OxyChem) and Occidental Power Marketing, L.P. (OPM) (jointly, Occidental), an intervenor and protestor in this case and the City of Arma, Kansas (City of Arma), a commenter in this case.

² *Westar Energy, Inc.*, 125 FERC ¶ 63,010 (2008).

II. Background

2. This case involves the first of many similar bilateral formula rate agreements between Westar and its individual customers.³ This proceeding stems from Westar's Master Power Purchase and Sale Agreement (MPPSA) with Kansas Electric, entered into in 2003 pursuant to Westar's market-based rate authority.⁴ In 2004, the Commission issued an order implementing new generation market-power analysis and mitigation procedures.⁵ Subsequently, Westar made an updated market-power filing indicating that it failed the wholesale market share screen in its home control area, the Midwest Energy, Inc. control area, and the Aquila Networks-West Plains Kansas control area. The Commission instituted a Federal Power Act section 206⁶ proceeding concerning Westar's market-based rates. In response, Westar proposed to use cost-based measures to comply with the Commission's requirement to mitigate market power.

3. In 2006, the Commission issued an order adopting Westar's proposal to use cost-based rates to mitigate market power, and, as relevant here, requiring Westar's sales with terms of over one year in the mitigated area to be made on an embedded cost-of-service basis.⁷ On August 31, 2007, Westar filed its original formula rate agreement to comply with the Mitigation Order.⁸ On October 30, 2007, the Commission accepted the original filing and set it for hearing and settlement procedures.⁹ The parties negotiated the current Settlement and Formula Rate Agreement for a year and filed it with the Commission on September 30, 2008.¹⁰

³ See, e.g., *Westar Energy, Inc.*, 127 FERC ¶ 61,222 (2009) (setting Westar's April 6, 2009 settlement and formula rate agreement with the City of Troy, Kansas for hearing and settlement judge procedures).

⁴ See *Westar Energy, Inc.*, 121 FERC ¶ 61,108, at P 2-3 (2007) (October 2007 Order) (providing background information).

⁵ *AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 (2004), *order on reh'g*, 108 FERC ¶ 61,026 (2004); *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004), *order on reh'g*, 110 FERC ¶ 61,178 (2005).

⁶ 16 U.S.C. § 824e (2006) (FPA).

⁷ *Westar Energy, Inc.*, 116 FERC ¶ 61,219 (2006) (Mitigation Order).

⁸ Explanatory Statement at 2.

⁹ October 2007 Order, 121 FERC ¶ 61,108, at P 20.

¹⁰ *Westar Energy, Inc.*, 125 FERC ¶ 63,010, at P 1 (2008).

4. Upon consideration of the comments filed by Commission Trial Staff (Trial Staff) and parties, we find that the Settlement is just and reasonable. Based on these findings, we approve the Settlement, as discussed below.

III. Settlement

5. The settlement package contains two agreements, the Settlement with the Formula Rate Agreement filed as an attachment. The primary substantive provisions of both agreements are summarized below.

6. Article I of the Settlement describes the background of this proceeding and states that the Settlement is intended to resolve all matters in this proceeding between the Settling Parties and Westar. Articles I and II explain that Westar is currently operating under the MPPSA and will continue to do so until the Formula Rate becomes effective.¹¹

7. Article II of the Settlement provides that the Formula Rate Agreement shall be effective on the first day of the month following Commission approval of the Settlement.¹² Further, implementation of the Settlement and the Formula Rate Agreement are expressly conditioned upon the Commission's acceptance without condition or modification.

8. Article II also states that the demand charge under the Formula Rate Agreement shall be capped at 110 percent of the prior contract year's demand charge. Any amount above the cap will be recovered in subsequent contract year(s), with interest. The first year's demand charge is \$13.69/kW-month.¹³

9. Lastly, Article II provides for a three-year moratorium beginning on May 2, 2008, under which the Settling Parties (except KCC) agree not to intervene in any of Westar's other cost-based formula rate filings or to comment on or protest any Westar filing involving energy, capacity or ancillary service agreements with current wholesale

¹¹ *Westar Energy, Inc.*, Docket No. ER07-1344-000 (Nov. 20, 2007) (unpublished errata notice to the October 2007 Order noting the effective date); *see also* Settlement at Art. I (the Commission accepted Westar's original formula rate agreement to become effective November 1, 2007; however, because the original formula rate agreement stated that it would not become effective unless the Commission approved it without modification or condition, Westar has continued to operate under its MPPSA).

¹² Article XI of the Formula Rate Agreement also states that United States Department of Agriculture Rural Utilities Service approval is necessary for the agreement to become effective.

¹³ Settlement at Attachment D at 2.

customers within the mitigation areas. Excepted from the moratorium are the Settling Parties' own agreements with Westar and the rights of Sunflower, Mid-Kansas, Victory and Prairie Land to intervene in filings related to the addition of a delivery point to Kansas Electric.¹⁴

10. Article III specifies that the Settlement does not affect any of Westar's pre-existing contracts. It also provides notice procedures for Kansas Electric to follow if Kansas Electric seeks to add particular delivery points.

11. Article IV establishes a rate mechanism that resolves KCC's concerns about a potential subsidy by Westar's retail ratepayers of the wholesale Formula Rate Agreement with Kansas Electric.¹⁵ Under the provision, Westar will forecast the 2009 demand revenue from Kansas Electric and credit that amount to Westar's production costs included in base rates in Westar's 2008 retail rate case. At the end of the year, the actual demand revenue will be trued-up against the forecasted amount and any over/under-recovery flowed through Westar's retail energy cost adjustment rate schedule. The intent of this mechanism is to remove wholesale demand costs from the retail rate base.¹⁶ This mechanism will continue until the retail rate case following Westar's 2008 retail rate case, when it will be subject to review by the parties and may continue with a new base amount used as a credit.

12. Article VI includes Westar's request that the Commission waive any otherwise applicable regulations to the extent necessary to effectuate the Settlement and to allow the Formula Rate Agreement to become effective without condition or modification. Westar also specifically requests waiver of section 35.10(c)¹⁷ of the Commission's regulations to the extent the redline version of the Formula Rate Agreement does not comply with that section.¹⁸

13. Article VII contains the Settlement's standard of review provision, stating that Article XII of the Formula Rate Agreement shall govern the standard of review for the Formula Rate Agreement and that nothing in the Settlement shall affect Westar or Kansas Electric's FPA sections 205 and 206 rights.¹⁹ In addition, it provides that nothing in the

¹⁴ Settlement at Art. III.

¹⁵ See Settlement at Art. IV.

¹⁶ *Id.*

¹⁷ 18 C.F.R. § 35.10(c) (2009).

¹⁸ Transmittal Letter at 2.

¹⁹ 16 U.S.C. §§ 824d-824e (2006).

Settlement is intended to affect the Commission's right to review the Formula Rate Agreement and its attachments, annual updates and informational filings under the just and reasonable standard.

14. The Formula Rate Agreement begins in Article II by stating that it is a full requirements agreement providing for Westar to sell Kansas Electric the capacity and firm energy Kansas Electric needs for its retail member cooperatives, less any generation and purchased power of Kansas Electric. Kansas Electric's monthly charge includes a demand charge, an energy charge (both based on FERC Form No. 1), and a credit for Kansas Electric's resources. Kansas Electric may also elect for Westar to arrange for transmission service, ancillary services and wholesale distribution service; however such costs are not recovered under the Settlement.²⁰

15. Article XI states that the Formula Rate Agreement will continue until December 31, 2045, and thereafter on a year-to-year basis.

16. Article XII of the Formula Rate Agreement describes the standards of review for changes to the Formula Rate Agreement after approval. Westar and Kansas Electric may request a change under section 205 or 206 of the FPA²¹ under the "just and reasonable" standard of review, except as to (1) the rate of return on equity (ROE) of 10.8 percent for a three-year period starting on the effective date, and (2) the standard of review provisions, which are both subject to the public interest standard. Non-contracting third parties seeking to change the Formula Rate Agreement will be subject to the just and reasonable standard except that challenges to the ROE or standard of review provisions will be subject to the most stringent standard of review permissible under applicable law. The provision states that it does not intend to preclude the Commission from reviewing the Formula Rate Agreement under the just and reasonable standard of review.

IV. Discussion

17. On October 20, 2008, Kansas Electric and Westar filed initial comments in support of the Settlement, Trial Staff and the City of Arma filed initial comments that do not oppose the Settlement, and Occidental filed initial comments opposing the Settlement. On October 30, 2008, Kansas Electric, Westar, Trial Staff, the KCC, and Occidental filed reply comments. In a series of follow-up filings, Occidental filed a motion to strike, or in the alternative, motion to respond on November 3, 2008, and on November 13, 2008, Kansas Electric and Westar filed answers to this motion; on November 4, 2008, Occidental filed an answer to Kansas Electric's October 20, 2008

²⁰ Formula Rate Agreement at 11.

²¹ 16 U.S.C. §§ 824d, 824e.

initial comments and motion for expedited action; and on February 18, 2009, Occidental filed a motion to lodge, to which Kansas Electric, Westar, and Trial Staff filed answers on March 5, 2009.

18. The parties have submitted numerous arguments about whether Kansas Electric's rates are priced on an embedded cost-of-service basis and whether it is appropriate to treat Kansas Electric as part of Westar's native load. Occidental maintains that the Settlement has not been shown to result in just and reasonable rates and that material issues of fact remain outstanding such that the Commission should reject the Settlement and set the disputed issues of material fact for evidentiary hearing. Westar states that the protest of Occidental and the City of Arma's comments raise no genuine issues of material fact and that none of Occidental's contentions have merit.

19. The Commission considers the Settlement a contested settlement because of Occidental's opposition, and notes that under our Rules of Practice and Procedure, "the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact."²² Occidental's comments in opposition raise factual issues regarding Kansas Electric's treatment as native load and policy issues of whether the Formula Rate Agreement results in just and reasonable rates. The Commission utilizes the first approach from *Trailblazer Pipeline Co.*,²³ to analyze all of Occidental's arguments and we approve the Settlement because we find that Occidental's contentions lack merit.

20. We find that the Settlement achieves a just and reasonable result. The Settlement resolves outstanding issues after a lengthy negotiation process, it complies with the Mitigation Order by basing rates on the embedded cost of service and it results in lower rates for Kansas Electric. The KCC's comments in support of the Settlement explain that Occidental will not be subsidizing any other parties under the Settlement because of the equitable monitoring and true-up mechanism that removes wholesale demand costs from the retail rate base, and that if this mechanism under-recovers then Occidental may sponsor an adjustment in a retail rate proceeding before the KCC. The Commission discusses Occidental's specific arguments below.

²² 18 C.F.R. § 385.602(h) (2009).

²³ 85 FERC ¶ 61,345, at 62,342 (1998) ("Approach No. 1: Merits Decision on Each Contested Issue ... If each of the contesting party's contentions lacks merit, the Commission can approve the contested settlement on that ground This approach is appropriate, where, as in *Overthrust*, the issues are primarily policy issues"), *order on reh'g*, 87 FERC ¶ 61,110 (1999).

A. Concerns Regarding Kansas Electric's Treatment as Native Load with Rates Based on Westar's Average System Costs

1. Kansas Electric as Native Load

21. Occidental argues that Kansas Electric does not qualify as a captive customer or native load and its rates should be based on Westar's incremental embedded costs rather than average system costs. Occidental argues that Westar has not provided clear evidence that "it planned and constructed its system" to serve Kansas Electric's load.²⁴ Occidental further argues that Westar's statement that it will include Kansas Electric's load in future planning does not justify treating Kansas Electric as captive native load because the Settlement and Formula Rate Agreement will continue to allow Kansas Electric to toggle between other suppliers.²⁵ Finally, Occidental argues that "converting" a non-captive customer to native load will create a subsidy and that Commission precedent requires non-captive wholesale sales to be priced at incremental embedded cost rates so as to prevent captive customers from subsidizing such sales.²⁶

22. Westar, Kansas Electric, and Trial Staff disagree with Occidental's argument that Kansas Electric represents incremental load for which Westar did not plan its system. Westar, Kansas Electric, and Trial Staff all state that Kansas Electric has been a partial requirements customer of Westar or its predecessors for over seventy years and that the Formula Rate Agreement is a long-term (thirty-seven year) firm sale that Westar will have to include in its long-term capacity projections. Kansas Electric asserts that it has not wavered between different procurement options because it only has limited power supply resources of its own and in the Westar supply area these resources have always been dispatched by Westar for the combined load of the two entities.²⁷

23. Trial Staff states that it is the nature of the sale and the seller's obligation that determines whether a rate may be based on an average cost-of-service basis.²⁸ Trial Staff notes that Westar is providing requirements service.

²⁴ Occidental October 20, 2008 Comments at 20, *citing Golden Spread Elec. Coop. v. Southwestern Public Service Co.*, 123 FERC ¶ 61,047 (2008).

²⁵ *Id.* at 19, 23.

²⁶ *Id.* at 20-21, *citing Entergy Servs. Inc.*, 58 FERC ¶ 61,234 (1992).

²⁷ Kansas Electric October 30, 2008 Reply Comments at 9-18.

²⁸ Trial Staff, October 30, 2008 Reply Comments at 5.

Commission Determination

24. We find that the Settlement properly treats Kansas Electric as native load. Native load is described as “commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.”²⁹ Under the Settlement, “Westar Energy shall sell to Customer, and Customer shall purchase from Westar Energy, capacity and Firm Energy sufficient to meet all of Customer’s capacity and Firm Energy needs for its Wholesale Load, less those needs supplied by Customer’s Resources as provided under this Agreement.”³⁰ The needs supplied by Kansas Electric’s resources are specifically limited to certain pre existing resources, and Kansas Electric is explicitly limited under the Settlement from acquiring additional resources to serve its wholesale load.³¹ Moreover, the initial term of the Settlement extends to 2045. As to the suggestion by Occidental that Kansas Electric is a new customer, we note that Westar has been serving the Kansas Electric members for 70 years either directly or indirectly through Kansas Electric.³² Kansas Electric has been a requirements customer of Westar since Westar’s inception in 2002, and before that via Westar’s predecessor companies since at least 1981.³³ Before then, Westar Energy served Kansas Electric’s members in the Westar control area

²⁹ 18 C.F.R. § 33.3(d)(4) (2009) (defining “native load commitments”).

³⁰ Formula Rate Agreement at 10-11.

³¹ *Id.*, citing Attachment F-1.

³² See Trial Staff, October 30, 2008 Reply Comments at 4; Kansas Electric, October 30, 2008 Reply Comments at 10; Westar, October 30, 2008 Reply Comments at 2.

³³ In 1992, Kansas Power and Light Company and Kansas Gas and Electric Company merged, becoming Western Resources. In 2002, the Westar Energy name was introduced. See Westar, October 30, 2008 Reply Comments at Attachment A, Ex. WEI-1 (section 4.18 of a December 28, 1981 Transmission Agreement between Kansas Gas and Electric Company and Kansas Electric required Kansas Electric to annually provide ten year forecasts of its demand requirements to Kansas Gas and Electric and section 4.25 provided for Kansas Gas and Electric to sell firm partial requirements service to Kansas Electric). See also Ex. WEI-2, § 6, 13 (an April 26, 1991 settlement agreement between Kansas Power and Light Company, Kansas Gas and Electric Company and Kansas Electric stating that Kansas Electric will be treated as native load and that approximately 84 percent of Kansas Electric’s power requirements are served by Kansas Power and Light and Kansas Gas and Electric).

(formerly under tariffs and contracts in the names of The Kansas Power and Light Company and Kansas Gas and Electric Company). We find there is substantial evidence in the record to find that Westar has planned its system to serve Kansas Electric and that Kansas Electric is properly being treated as part of Westar's native load.

2. Commission's Intent Regarding Average Costs

25. Occidental argues that the Mitigation Order does not require that Westar's rate be based on system average costs and asserts that the rate for Kansas Electric should be based on the embedded cost of the units that actually will be used to serve Kansas Electric's load (i.e., incremental costs). Occidental states that it is impossible to know under the agreement whether the power sold to Kansas Electric by Westar will be baseload, intermediate, peaking or all of the above, and alleges the cost of fuel required to serve Kansas Electric's load will exceed average fuel costs.³⁴ Occidental states that the average fuel cost methodology in the Settlement will force retail customers to subsidize Kansas Electric's rates.³⁵ Occidental also states that allowing Westar to charge Kansas Electric average embedded costs will cause Occidental's rates to increase by over \$1 million per year because the Agreement will result in Westar's having to build and dispatch additional generating capacity that is more expensive than its current fleet.³⁶ Occidental states that the KCC cannot address its arguments, because once the Formula Rate Agreement under-recovers Westar's costs, the KCC will be preempted from crediting revenues to retail ratepayers in excess of the amount approved by the Commission.³⁷ Occidental cites to precedent that the Commission will protect the interests of captive retail customers from cross-subsidization.³⁸

³⁴ Occidental, October 20, 2008 Comments at 17.

³⁵ *Id.* at 18, 29, *citing* Lesser Aff. ¶ 56-59.

³⁶ *Id.* at 29, *citing* Lesser Aff. ¶ 56, 75, 93.

³⁷ *Id.* at 26, *citing* *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 374 (1988) (“States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.”).

³⁸ *Id.* at 2, *citing* *Detroit Edison Co.*, 95 FERC ¶ 61,240, at 61,823 (2001); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 41-45, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

26. Westar argues that native load requirements customers included in the utility's planning are appropriately charged system average costs.³⁹ Kansas Electric states that the Formula Rate Agreement is consistent with the Mitigation Order because the Commission differentiated between pricing for sales less than a year and over one year.⁴⁰ Kansas Electric argues that when the Commission refers to mitigation for long-term arrangements, it is referring to the system (or average) embedded costs versus the embedded costs of the units expected to provide the service, because the latter is the pricing basis for sales of less than one year. Trial Staff asserts that Westar is complying with the Mitigation Order, which directed that Westar's sales with terms of more than one year should be made on an embedded cost-of-service basis and that Occidental should raise its concerns regarding retail rates to the KCC.⁴¹

27. In reply comments, the KCC states that Occidental's subsidization arguments assume that Westar will have to add new capacity to serve the Kansas Electric load under the Settlement and that such incremental costs should solely be borne by Kansas Electric rather than by all native load customers. The KCC states that it disagrees with Occidental's argument and that it has carefully analyzed the Settlement and believes that it appropriately provides for an equalization of costs, not subsidization.⁴² The KCC states that the Settlement implements a long-term, cost-based formula rate contract that locks Kansas Electric into obtaining service from Westar until 2045. The KCC states that, because Kansas is not a retail choice state, retail customers are also "locked in" for

³⁹ Westar, October 30, 2008 Reply Comments at 7-8, *citing Appalachian Power Co.*, 21 FERC ¶ 61,309, at 61,813 (1982) ("We believe that it is both appropriate, and a common industry practice to assign the highest fuel cost to off-system sales, while lower fuel cost resources are reserved for the benefit of the APCO native load customers who, through their rates, provide for the construction and operation of the generating facilities."), *reh'g denied*, 23 FERC ¶ 61,032 (1983).

⁴⁰ Kansas Electric October 30, 2008 Reply Comments at 22-23, *citing AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018, at P 151, 155 (2004), *order on reh'g*, 108 FERC ¶ 61,026 (2004) ("We adopt default rates tailored to three distinct products, as follows: (1) sales of power of one week or less will be priced at the applicant's incremental cost plus a 10 percent adder; (2) sales of power of more than one week but less than one year will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service; and (3) sales of power for more than one year will be priced on an embedded cost-of-service basis and each such contract will be filed with the Commission for review and approved prior to the commencement of service.").

⁴¹ Trial Staff, October 30, 2008 Reply Comments at 6.

⁴² KCC, October 30, 2008 Reply Comments at 2.

the long term. Therefore, states the KCC, the Settlement treats both Kansas Electric and retail customers the same with potential liability for future generation resources based on the system average, rather than an incremental cost, consistent with Commission standards for cost-based formula rate agreements of this nature.⁴³

28. In reply, Occidental reiterates that its subsidization concerns cannot be addressed by the KCC as a matter of law because the Commission has plenary jurisdiction over the Formula Rate Agreement.⁴⁴

Commission Determination

29. In Order No. 697 the Commission found that it would “continue to require mitigated sellers to price long-term sales on an embedded cost-of-service basis and to file each such contract with the Commission for review and approval prior to the commencement of service.”⁴⁵ In addition, in the Mitigation Order, the Commission accepted Westar’s mitigation plan conditioned on Westar showing that sales made on an embedded cost-of-service basis be cost-justified.⁴⁶ Given our finding that Westar has planned its system to serve Kansas Electric and that the Settlement properly treats Kansas Electric as Westar’s native load, it is entirely appropriate that the requirements service to Kansas Electric be priced on an average system cost basis. The Commission finds that Westar’s pricing of the Formula Rate Agreement at average costs complies with the directives of the Mitigation Order and is just and reasonable.

30. Regarding the Commission’s involvement with retail customers, Occidental cites inapplicable Commission precedent concerning affiliate abuse that favors a utility’s

⁴³ *Id.* at 3.

⁴⁴ Occidental, October 30, 2008 Reply Comments at 2.

⁴⁵ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Service by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 659 (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh’g and clarification*, 124 FERC ¶ 61,055 (2008), *Order on Reh’g*, Order No. 697-B, 73 FR 79610 (Dec. 30, 2008), FERC Stats & Regs. ¶ 31,285, *order on reh’g*, Order No. 697-C, 74 FR 30924 (June 29, 2009), FERC Stats & Regs. ¶ 31,291 (2009).

⁴⁶ Mitigation Order, 116 FERC ¶ 61,219, at P 45 (2006).

shareholders over its captive ratepayers.⁴⁷ As the Commission has previously explained, we do not have jurisdiction over a utility's retail rates and the appropriate forum for such concerns is before the state commission.⁴⁸ We reject Occidental's argument that the KCC is unable to address Occidental's concerns. The Commission notes that it is not clear that Westar's wholesale rates to Kansas Electric will have any effect on Westar's retail rates to Occidental. If the Settlement in fact affects Occidental's retail rates then the KCC has any number of mechanisms and approaches to credit wholesale revenues. Under Article IV of the Settlement, the KCC is not predetermining any retail ratemaking issue by this Settlement and accordingly reserves its rights.

B. Concerns Regarding the Formula Rate

1. Cost Basis of the Formula Rate

31. Occidental argues that the Formula Rate Agreement is not based on established cost-of-service principles as required by the Mitigation Order. Occidental states that the one-year study provided by Westar is insufficient and inaccurate.

32. Westar and Kansas Electric counter that the Settlement and Formula Rate Agreement provide adequate cost basis to show that the rates are priced on an embedded cost-of-service basis following traditional cost-of-service principles. Westar cites the workpapers and worksheets it added to the Formula Rate Agreement, and the fact that it included a fully complete formula rate template as part of the Settlement. Kansas Electric argues that the formula rate template is based on Westar's FERC Form No. 1 and accompanying worksheets, and since this is based upon average, embedded costs it is equivalent to a fully-allocated cost-of-service study in that it establishes system average capacity and energy costs based upon cost-of-service principles.

33. Trial Staff disagrees with Occidental's claim that the agreement is not based on established cost-of-service principles. Trial Staff states that it reviewed the formula throughout the settlement negotiations based on traditional cost-of-service principles and the result is a well-founded settlement in this case. Trial Staff also notes the transparency added to the Formula Rate Agreement by Westar's including a fully-populated formula

⁴⁷ See *Detroit Edison Co.*, 95 FERC ¶ 61,240 at 61,823 (2001); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 41-45, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008).

⁴⁸ E.g., *Exelon Corp.*, 127 FERC ¶ 61,161, at P 102 (2009); *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006); *Ameren Corp.*, 111 FERC ¶ 61,055, at P 9-10 (2005).

showing the current rate based on FERC Form No. 1, and worksheets attached to the formula, as both are an improvement over the original filing.

Commission Determination

34. We find that the Formula Rate Agreement relies on established cost-of-service principles and note that it includes a fully-populated formula showing the current rate based on Westar's 2007 FERC Form No. 1 data and data on attached worksheets.⁴⁹ If this were a formula proposed under FPA section 205, we would anticipate the filer requesting a waiver of the requirements to submit cost-of-service statements under section 35.13(d)(1)-(2), section 35.13(d)(5), and section 35.13(h) of the Commission's Rules and Regulations, as in the past we have granted such requests.⁵⁰ We will exercise our discretion here to not require Westar to file Period I and Period II data, workpapers and various related cost-of-service statements. We address more specific arguments made by Occidental *infra*.

2. 10.8 Percent ROE

35. Occidental protests the Settling Parties' agreement to a fixed ROE of 10.8 percent stating that it is not within the zone of reasonableness and that Westar has not provided supporting evidence to justify the ROE relative to utilities with similar risk profiles.

36. Westar, Kansas Electric, and Trial Staff all state that the 10.8 percent ROE is reasonable, pointing to the Commission's approval of a 10.8 percent base ROE in Westar's most recent transmission formula rate case.⁵¹ Trial Staff concludes that the 10.8 percent ROE represents a fair compromise in this case and is a noteworthy improvement over the floating ROE proposed in the original agreement.

Commission Determination

37. We reject Occidental's argument that the 10.8 percent ROE is unreasonable and unjustified. We have recently approved this ROE as a base ROE in Westar's transmission formula rate case.⁵² Moreover, the Commission has explained that, "such

⁴⁹ Formula Rate Agreement at Attachment D.

⁵⁰ *See, e.g., Pub. Serv. Elec. & Gas Co.*, 124 FERC ¶ 61,303, at P 24 (2008).

⁵¹ *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at P 97 (2008).

⁵² *Id.* P 96 (Commission found a zone of reasonableness from 7.65 to 13.33 percent based on a discounted cash flow analysis of Westar and a proxy group of Ameren Corp, American Elec. Power Co. Inc., Empire Dist. Elec. Co., First Energy Corp., and Great Plains Energy Inc.).

comprehensive settlements involve a complex exchange of risks and benefits among the parties,” noting that “[t]he Commission will respect these quid pro quos because the results are in the public interest.”⁵³ We decline to require the detailed support sought by Occidental, as it is within the zone of reasonableness reflected in Westar’s most recent transmission formula rate case.

3. Cost Cap for the Demand Charge and Crediting of Forecasted Demand Revenue from Kansas Electric in Retail Rates

38. Under the Settlement, Kansas Electric will pay a demand charge determined by a formula rate that is capped at 110 percent of the prior contract year’s demand charge. Any amount above the cap will be recovered in the subsequent contract year, with interest determined in accordance with 18 C.F.R. § 35.19a (2008).⁵⁴

39. The Settlement also provides that Westar will use the 2009 forecast demand revenue from Kansas Electric as a credit to its production costs included in base rates in Westar’s 2008 retail rate case. At the end of the year, the actual demand revenue will be determined and trued-up against the amount credited to production costs in Westar’s 2008 retail rate case. The over/under recovery will be flowed through Westar’s retail energy cost adjustment rate schedule to Westar’s customers. This mechanism will remain in place until the retail rate case following Westar’s 2008 retail rate case.⁵⁵

40. Occidental argues that Westar’s 10 percent cap on an annual increase in the demand charge is inconsistent with an embedded cost rate and results in a loan from retail ratepayers to Kansas Electric.⁵⁶ In addition, Occidental faults the crediting of forecasted demand revenues from Kansas Electric to the retail rate base, asserting that this revenue crediting mechanism will not eliminate a cross-subsidy here because the revenues to be credited are less than the actual cost of serving Kansas Electric.⁵⁷ Occidental also comments that the duration of this demand revenue credit is unclear under the Settlement. Occidental further argues that the subsidization by retail ratepayers of a wholesale sale harms wholesale competition and that the KCC cannot address this harm.

⁵³ *El Paso Natural Gas Co.*, 82 FERC ¶ 61,337, at 62,340 (1998); *Southwestern. Public Service Co.*, 124 FERC ¶ 61,232, at P 29 (2008).

⁵⁴ Settlement at Art. II.

⁵⁵ *Id.* Art. IV.

⁵⁶ Occidental, October 20, 2008 Comments at 16-17.

⁵⁷ *Id.* at 30.

41. Westar counters that the 110 percent cost cap is one part of a complex agreement negotiated to mitigate potential volatility from an annually adjusted formula rate.⁵⁸ Kansas Electric states that the cap does not negate a cost-based rate, but is only a delay in Westar's recovery.⁵⁹ Westar states that Commission policy allows charging the time-value of money to redress any delay in rate implementation. Westar and Kansas Electric state that Occidental should raise its arguments about the crediting provision and the impact of the formula on retail customers to the KCC because the KCC has authority over the timing of the crediting of the demand revenues.

42. KCC disagrees with Occidental's argument that the amount above the cap would be levied on retail ratepayers, stating that the true-up mechanism ensures that any amount above the cap would pass through the revenue from the demand charge increase the following year.⁶⁰ KCC makes the more specific point that if the cap were triggered in a test year for the demand charge credit then Occidental could sponsor an adjustment in that retail rate proceeding and argue that the Kansas Electric demand revenue should be adjusted to reflect the amount that would have been recovered if the cap had not been in place. The KCC also notes that it is unlikely Westar will have an increase in capacity costs of over ten percent in one year, when it had an eleven percent increase over a three year period in its last rate case before the KCC.

43. As to the concern that the duration of the demand credit is unclear, KCC states that at the next retail rate case, the true-up mechanism will be subject to review by the parties. The same mechanism may be continued with a new base amount, (*e.g.*, Kansas Electric's demand revenue estimate for the projected year of the next rate case), and may be used as a credit to base rate production costs. KCC asserts that there is an equitable monitoring and true-up mechanism in place to ensure that Kansas retail customers are not subsidizing any other parties under the Settlement. The KCC concludes that the crediting of demand revenues under Article IV of the Settlement specifically allays its concerns about subsidization, and that "after careful consideration of Occidental's arguments" the KCC believes the Settlement "should be approved by the Commission because it appropriately protects all Kansas ratepayers, both wholesale and retail."⁶¹

44. While Trial Staff believes that Occidental may have raised a factual issue regarding cross-subsidization in this case, it concludes that nevertheless the Settlement

⁵⁸ Westar, October 30, 2008 Reply Comments at 6.

⁵⁹ Kansas Electric, October 30, 2008 Reply Comments at 4-5.

⁶⁰ KCC, October 30, 2008 Reply Comments at 3-4.

⁶¹ *Id.* at 4.

and Formula Rate Agreement result in a fair allocation of costs to Kansas Electric, and may be approved on that basis.⁶²

Commission Determination

45. We disagree with Occidental's claim that the Settlement's 10 percent cap on annual increases is inconsistent with an embedded cost of service. The purpose of this rate mechanism is strictly to mitigate potential volatility in the demand charge that is determined by a formula; the true-up mechanism includes the time value of money to account for the delay in cost recovery. Finally, we note the KCC's point that if the cap were triggered in a test year for the demand charge credit, Occidental could sponsor an adjustment in that retail rate proceeding and could argue that the Kansas Electric demand revenue should be adjusted to reflect the amount that would have been recovered if the cap had not been in place. And as noted previously, under Article IV of the Settlement, the KCC is not predetermining any retail ratemaking issue by this Settlement and reserves its rights.

46. We also find unpersuasive Occidental's claim that the crediting of demand revenues against Westar's retail base rates would not address a potential cross-subsidy because the revenues to be credited may be less than the actual cost of serving Kansas Electric. Occidental's argument relies on the notion that Kansas Electric's requirements service is not appropriately based on Westar's average system cost but should be based on Westar's incremental cost – because Kansas Electric is not properly considered a native load customer. As stated above, we reject this notion. In addition, as discussed *supra* the KCC may utilize a variety of approaches to balance a utility's costs and revenues in setting retail rates.⁶³

47. Finally, because we find that Occidental has presented no factual issue that retail subsidy of this wholesale service under the Settlement would occur, we dismiss the associated argument that this aspect of the proposal constitutes a threat to wholesale competition.

⁶² Trial Staff, October 30, 2008 Comments at 4. The Commission notes that it is unclear from Staff's Comments which factual issue regarding cross-subsidy has been raised by Occidental.

⁶³ *Arkansas Power & Light v. Missouri Public Service Commission*, 829 F.2d 1444, 1451-52 (8th Cir. 1987).

4. Kansas Electric's Credits

48. The Formula Rate provides that Kansas Electric will receive a credit on its monthly bill to compensate it for capacity and energy from its resources used to serve its own wholesale load during the billing month.⁶⁴ This credit does not include energy that Kansas Electric sells to Westar.⁶⁵

49. Occidental protests the crediting provision for Kansas Electric's resources.⁶⁶ Occidental argues that Kansas Electric may improperly receive credit for peaking resources, resulting in Kansas Electric paying a demand charge below the embedded cost of Westar's generating resources. Occidental further states that the Settling parties have not provided sufficient load shape information to show that Kansas Electric's generation, for which it will receive a credit, provides peaking capacity in proportion to Kansas Electric's loads. Here, Occidental points to the Formula Rate Agreement, Attachment F-1 and states that 182 MW of Kansas Electric's 202 MW of generation are nuclear and hydro "must run" resources and, as such, their contribution to peak load is likely to be "flat" rather than peaking in the summer when Kansas Electric's forecast demand is highest.

50. Kansas Electric replies that it has hydropower resources that it uses to serve base, intermediate and peak requirements.⁶⁷ Westar states that Kansas Electric's resources are integrated into Westar's system to meet Westar's system peaks, including the demands of

⁶⁴ Formula Rate Agreement at Attachment F § I.B.

⁶⁵ *Id.* at I.D.

⁶⁶ Occidental, October 20, 2008 Comments at 13-15.

⁶⁷ Kansas Electric October 30, 2008 Reply Comments at Daniel Aff. ¶ 27 (stating that Occidental's analysis is flawed because it fails to 1) accurately recognize and represent the nature of Kansas Electric's resources and 2) falls into the trap of attempting to use averages based upon energy utilization rather than looking at capacity values); Daniel Aff. ¶ 28 (The hydropower from Southwest Power Administration (SPA) is a peaking resource that only has a guaranteed (i.e., firm) annual availability of 1,200 hours of use per year but that the SPA contract also contains provisions whereby Kansas Electric may receive supplemental energy and surplus when declared available by SPA. The SPA hydro peaking capacity is scheduled by Westar for the benefit of the combined system to serve peak loads, with 95 MW being used in the Westar area. Finally, Kansas Electric's 14 MW, load following Western Area Power Administration hydro resource has approximately a 73% capacity factor and is schedulable on a flexible basis by Westar to meet base, intermediate and peaking requirements.).

Kansas Electric. Thus, it is fair for Kansas Electric to receive a monthly demand credit based on Westar's system average costs for the energy Kansas Electric consumes from its own resources and for Kansas Electric to be billed for the balance of its energy usage.

Commission Determination

51. We find that there is sufficient evidence in the record that the Kansas Electric resources listed in Attachment F-1, for which Kansas Electric would be able to receive a demand credit, may provide baseload, intermediate and peaking energy for the combined system. Accordingly, we find that the provision of a demand credit is just and reasonable.

5. Future Coal-Fired Plant

52. The Settlement states that "Customer shall have an option to acquire and receive credit for a minority interest in future coal-fired generation constructed by Westar Energy, subject to the Parties reaching mutual agreement as to the terms and conditions of such minority interest."⁶⁸

53. Occidental argues that Kansas Electric's option to participate in a future coal-fired plant constructed by Westar is not consistent with the cost-based nature of the Agreement.⁶⁹ Occidental argues that this procurement option enables Westar to pay the lower of embedded cost or the market cost, thereby subsidizing wholesale customers at the expense of captive retail customers.

54. Westar states the Settlement does not give Kansas Electric an option, it just states that Kansas Electric and Westar may negotiate this in the future under mutually agreeable terms.⁷⁰

Commission Determination

55. We find that this language in the proposed Settlement provides for no rates, terms, or conditions of wholesale service. This language merely expresses the intent of the parties to negotiate in the future. The Commission would consider the rate impacts of an additional plant if, and when, Westar files with the Commission an amendment to the Formula Rate Agreement providing credit for Kansas Electric's participation in the future plant.

⁶⁸ Formula Rate Agreement at Art. II.

⁶⁹ Occidental, October 20, 2008 Comments at 36.

⁷⁰ Westar, October 30, 2008 Reply Comments at 10-11.

C. Additional Concerns Regarding the Potential for Cross-subsidization and Arbitrage

56. Under the proposed Settlement, Kansas Electric grants to Westar the right to call, schedule, and purchase energy from Kansas Electric's 20 MW Sharpe resource in order to meet its own load or engage in off-system sales.⁷¹ The energy price for such transactions shall be Kansas Electric's commercially reasonable anticipated fuel and operations and maintenance cost and may be adjusted as needed by Kansas Electric with a prior four hour notice to Westar.⁷²

57. Occidental argues that Westar is providing a subsidy to Kansas Electric because Westar provides energy to Kansas Electric at average fuel costs, but when Westar purchases energy from Kansas Electric's Sharpe facility it pays incremental fuel costs.⁷³ Occidental further questions whether Westar's option to purchase power from Kansas Electric in combination with the crediting mechanism for Kansas Electric's resources mentioned previously enables Westar to engage in hourly arbitrage.⁷⁴ Occidental states that Westar could purchase the power off-peak and resell it to Westar's own captive customers with a credit to Kansas Electric exceeding the value of the power, or during peak hours Westar could opt not to credit Kansas Electric and resell the power off-system.

58. Kansas Electric dismisses the subsidization argument stating that it receives no credit when Westar purchases energy from the callable Sharpe resource at cost and Kansas Electric will not profit from this sale since it only recovers its out of pocket variable costs – there is no credit.⁷⁵ Westar states that it would only buy peaking power at cost from Kansas Electric's Sharpe resource if it is economic to do so, meaning the cost is below or equal to other supply alternatives.⁷⁶

⁷¹ Formula Rate Agreement, Attachment F at 2-3 and Attachment F-1.

⁷² *Id.*

⁷³ Occidental, October 20, 2008 Comments at 18.

⁷⁴ *Id.* at 34-35.

⁷⁵ *See* Formula Rate Agreement, Attachment F at 2-3.

⁷⁶ Westar, October 30, 2008 Comments at 10.

Commission Determination

59. At the outset, we find that Occidental incorrectly describes Westar's option under the Settlement to call upon the 20 MW Sharpe resource. Kansas Electric is reimbursed at cost where this capacity is called; it receives no credit.⁷⁷ Occidental's posited arbitrage scenario fails. Thus, it appears that we are left with a concern that Westar would purchase 20 MW from Sharpe at incremental cost while providing energy to Kansas Electric at average fuel cost. Where such capacity is purchased to serve Westar's load commitments, Occidental and other Westar native load customers would benefit from the purchase because the capacity — albeit purchased at incremental cost — is either economic or needed for reliability purposes. Where such capacity is purchased to serve off-system load, the question of how the revenues for such sale are treated in retail rates would be an issue for the KCC to address and is not properly before this Commission.

D. Remaining Issues

1. Standard of Review for Occidental

60. In its reply comments Occidental protests that the Settlement does not specify the standard of review for non-settling parties. Occidental points out that non-contracting parties are subject to the most stringent standard of review and Occidental argues that it must be subject to the just and reasonable standard.⁷⁸

Commission Determination

61. Occidental is a non-settling party, and as such it falls into the category of non-contracting parties under the Settlement. As discussed above, non-contracting third parties seeking to change the Formula Rate Agreement will be subject to the just and reasonable standard, except that challenges to the ROE or standard of review provisions will be subject to the most stringent standard of review permissible under applicable law. The Commission will determine the most stringent standard of review permissible under

⁷⁷ See Formula Rate Agreement, Attachment F at 1 (“Westar shall provide Customer a credit on the monthly bill to compensate Customer for Energy from Customer’s Resources used to serve Customer’s Wholesale Load during the Billing Month; *provided, however, the credit shall not include Energy from Customer’s Resources which Customer sells to Westar as provided in Section I.D. below.*” (emphasis added)).

⁷⁸ Occidental, October 30, 2008 Reply Comments at 3-4, *citing Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *pet. for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008).

applicable law if and when a non-contracting party seeks changes to the limited provisions of the Formula Rate Agreement to which that standard of review provision is relevant.

2. City of Arma

62. The City of Arma filed comments stating that it does not oppose the Settlement between Westar and Kansas Electric, but that small municipals like the City of Arma must be able to negotiate different terms with Westar for issues specific to municipals. Trial Staff responded by agreeing that the Settlement does not resolve all issues in the other pending Westar proceedings, and that this settlement should only be a basic outline for settlement discussions in other similar cases.⁷⁹

Commission Determination

63. The City of Arma has recently reached a settlement with Westar and thus its comments are moot.⁸⁰ Nonetheless, the Commission recognizes that Westar is currently negotiating other formula rate agreements, which may have different issues that will need to be fully addressed in those negotiations.

3. Occidental's Motion to Strike

64. Occidental asked to strike portions of Westar and Kansas Electric's reply comments stating that information supporting the Settlement should have been presented when the Settlement was filed on September 30, 2008.⁸¹ Specifically, Occidental protests Westar and Kansas Electric's inclusion of three affidavits with their reply comments, new information on (1) the ROE,⁸² (2) treatment of Kansas Electric as native load,⁸³ and (3) the demand credit.⁸⁴ Alternatively, Occidental asked for leave to

⁷⁹ Trial Staff October 30, 2008 Reply Comments at 8.

⁸⁰ *City of Arma, Kansas v. Westar Energy Inc.*, 128 FERC ¶ 61,094 (2009).

⁸¹ Occidental, November 3, 2008 Motion to Strike at 2-3, *citing* 18 C.F.R. § 385.602(c) (2008).

⁸² *Id.* at 4-5, *citing* Kansas Electric, October 30, 2008 Reply Comments Aff. of Stephen Page Daniel.

⁸³ *Id.* at 5-6, *citing* Westar, October 30, 2008 Reply Comments Aff. of Grant Wilkerson; Kansas Electric October 30, 2008 Reply Comments Aff. of Robert D. Bowser (containing information Westar's planning for Kansas Electric's requirements for over 70 years).

respond to Westar and Kansas Electric's new evidence by November 19, 2008, to explain how the rates are not priced on an embedded cost-of-service basis and that native load treatment for Kansas Electric is inappropriate.

65. Westar states that its reply comments with accompanying affidavits are allowed under the Commission's rules.⁸⁵ Further, Westar states that its reply comments are simply responses to Occidental's initial comments and that ROE justification is not necessary in a black box settlement resulting from arm's-length negotiations.⁸⁶ Kansas Electric argues that its reply comments are not new evidence because Occidental knew about the ROE precedent since it was a party to that proceeding and that the native load information was in previous filings.⁸⁷ Kansas Electric also states that Occidental's initial comments had a new argument regarding the demand credit, and Kansas Electric's reply comments responded to that new argument.

Commission Determination

66. We deny Occidental's motion to strike the affidavits attached to Kansas Electric and Westar's reply comments. The Kansas Electric affidavit supplied on reply brief was essential to support the proposed credit for Kansas Electric's generation – *see supra*. Further, the Commission's Rules of Practice and Procedure specify that reply comments may include responding affidavits.⁸⁸ Occidental's alternative request to respond to Westar and Kansas Electric's affidavit is moot because Occidental did not file an answer by November 19, 2008.

4. Occidental's Motion to Lodge

67. On February 18, 2009, Occidental filed a Motion to Lodge the unexecuted Cost-Based Bridge Agreement proposed for wholesale power sales from Westar to the

⁸⁴ *Id.* at 6, *citing* Kansas Electric, October 30, 2008 Reply Comments Aff. of Stephen Page Daniel (describing Kansas Electric's resources are a combination of base load, load-following and peaking resources).

⁸⁵ Westar, November 13, 2008 Answer in Opposition at 2, *citing* 18 C.F.R. § 385.602(f)(4) (2008) ("Reply comments may include responding affidavits.").

⁸⁶ *Id.* at 3, *citing* *Southwest Public Service Commission*, 124 FERC ¶ 61,232 at P 29 (2008) ("[S]uch comprehensive settlements involve a complex exchange of risks and benefits among the parties.").

⁸⁷ Kansas Electric, November 13, 2008 Comments at 2-3.

⁸⁸ 18 C.F.R. § 385.602(f)(4) (2009).

City of Arma,⁸⁹ and Westar's answer to the City of Arma's complaint.⁹⁰ Occidental argues that these filings show that Westar has changed its position regarding the pricing of wholesale power sales. Trial Staff, Westar, and Kansas Electric filed answers urging the Commission to reject Occidental's motion because it improperly seeks to import filings from another proceeding.

Commission Determination

68. The Commission rejects Occidental's motion to lodge because it involves two filings that are not appropriate additions to the Westar/Kansas Electric record. Westar's proposed agreement with the City of Arma is *sui generis* and not relevant to the Commission's assessment of the justness and reasonableness of the Settlement in this proceeding.

5. Request for Rehearing

69. On November 29, 2007, Kansas Electric filed a request for rehearing of the October 2007 Order, arguing that the Commission erred in concluding that the Agreement should be set for hearing. Restating arguments from its answer to the protests addressed in the October 2007 Order, Kansas Electric argues that the record is complete and that the Commission erred by failing to reject the arguments raised by protestors summarily and approve the original Formula Rate Agreement.

Commission Determination

70. Because the original formula rate agreement has been superseded by the Settlement and Formula Rate Agreement at issue here, Kansas Electric's request for rehearing is moot and is dismissed.

The Commission orders:

(A) The Settlement and Formula Rate Agreement are hereby accepted.

(B) Westar is to notify the Commission of the effective date of the Formula Rate Agreement within 30 days and file a conforming copy of the Formula Rate Agreement.

(C) Occidental's motion to strike is denied.

⁸⁹ Westar, Unexecuted Cost-Based Bridge Agreement, Docket No. ER09-680-000 (filed Feb. 6, 2009).

⁹⁰ Westar, Answer, Docket No. EL09-33-000 (filed Feb. 13, 2009).

(D) Occidental's motion to lodge is denied.

(E) Kansas Electric's request for rehearing is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.