

125 FERC ¶ 61,301
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

December 18, 2008

In Reply Refer To:
Westar Energy, Inc.
Docket Nos. ER08-808-001
ER08-949-002
ER08-989-002
ER08-992-002
ER08-994-002
ER08-998-002
ER08-1029-001
ER08-1031-001
ER08-1033-001
ER08-1035-001
ER08-1037-001
ER08-1047-001
ER08-1062-001
ER08-1149-002
(Not Consolidated)

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Dear Ms. Dennis and Ms. Dinges:

1. On July 8, 2008, August 11, 2008, August 15, 2008, August 18, 2008 and September 19, 2008, Westar Energy, Inc. (Westar) filed alternate *pro forma* sheets to multiple Westar *pro forma* Formula Rate Agreements for Full Requirements Electric Service (Cost-Based Formula Rate Agreements) between Westar and various wholesale

customers in Kansas and Missouri.¹ Westar filed the alternate *pro forma* sheets in compliance with the Commission's Orders Establishing Hearing and Settlement Judge Procedures.²

2. Westar's alternate *pro forma* sheets each contains a revised standard of review provision consistent with the precedent set forth in *Duke Energy Carolinas LLC*.³ 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 Commission would find acceptable a substitute provision that imposes on non-contracting third parties 'the most stringent standard permissible under applicable law.'" Westar has included such language.

3. Notice of the filing was published in the *Federal Register*, 73 Fed. Reg. 43,215, 49,179, 50,806 and 56,812, with interventions, comments and protests due on or before July 29, 2008, September 2, 2008, September 5, 2008, September 8, 2008 and October 9, 2008, respectively. Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, Occidental) filed a protest in each docket.

4. A footnote in Westar's respective transmittal letters 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. In its protests, Occidental states that the Commission should not endorse Westar's interpretation, contained in a footnote in its transmittal letters, 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

¹ The wholesale customers include the following: the City of Mindenmines, Missouri (Mindenmines); the City of Blue Mound, Kansas (Blue Mound); the City of Bronson, Kansas (Bronson); the City of Mulberry, Kansas (Mulberry); and the City of Robinson, Kansas (Robinson); the City of Elsmore, Kansas (Elsmore); the City of La Harpe, Kansas (La Harpe); the City of Vermillion, Kansas (Vermillion); the City of Savonburg, Kansas (Savonburg); the City of Burlingame, Kansas (Burlingame); the City of Moran, Kansas (Moran); the City of Elwood, Kansas (Elwood); and Kaw Valley Electric Cooperative (Kaw Valley); Doniphan Electric Cooperative (Doniphan); and Nemaha-Marshall Electric Cooperative (Nemaha) (collectively, Kansas Cooperatives).

² See, *Westar Energy, Inc.*, 123 FERC ¶ 61, 252, at P 21 (2008); *Westar Energy, Inc.*, 124 FERC ¶ 61, 057, at P 27 (2008); *Westar Energy, Inc.*, 124 FERC ¶ 61, 090, at P 25 (2008); and *Westar Energy, Inc.*, 124 FERC ¶ 61,171, at P 22 (2008).

³ *Duke Energy Carolinas L.L.C.*, 123 FERC ¶ 61,201, at P 10 & n.10 (2008) (Duke Energy).

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 respective dockets and not in these compliance filings.

5. We note that the footnote that Occidental objects to is only contained in the transmittal letters submitted by Westar to accompany its Cost-Based Formula Rate Agreement compliance filings, and is not repeated in the alternate *pro forma* sheets. Given that the statements contained in the footnote are not made a part of Westar's Cost-Based Formula Rate Agreement, we need not address them. Accordingly, our acceptance of the *pro forma* sheets should not be construed as either acceptance or rejection of Westar's interpretation of *Duke Energy*.⁴

6. We accept Westar's compliance filings containing an updated standard of review provision for each of the Cost-Based Formula Rate Agreements.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

⁴ See *Gas Transmission Northwest Corp. v. Federal Energy Regulatory Commission*, 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.)