

128 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Arma, Kansas v. Westar Energy, Inc.
Westar Energy, Inc.

Docket Nos. EL09-33-000
ER09-680-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued July 28, 2009)

1. On June 10, 2009, Westar Energy, Inc. (Westar) and the City of Arma, Kansas (Arma) (collectively, the Settling Parties) filed an uncontested Settlement Agreement (Settlement) resolving all matters related to Docket Nos. EL09-33-000 and ER09-680-000. The dispute involved the terms and conditions of a new full requirements power service agreement under which Westar would provide Arma capacity and firm energy beginning on March 1, 2009, the date on which the Electric Power Supply Agreement dated February 23, 1988, designated Rate Schedule FERC No. 168 (Existing Agreement) between Westar and Arma was set to terminate.
2. The Commission finds that the Settlement is fair, reasonable, and in the public interest and approves the Settlement. The Commission also accepts the Ten-Year Cost-Based Formula Rate Agreement for Full Requirements Electric Service, Rate Schedule FERC No. 321 (Formula Rate Agreement), dated June 10, 2009, between Westar and Arma.

Background

3. On February 3, 2009, Arma filed a complaint against Westar in Docket No. EL09-33-000, requesting that the Commission delay the effectiveness of the termination of the Existing Agreement between Westar and the Kansas Gas and Electric Company and Arma. In its complaint, Arma argued that it attempted to negotiate with Westar the terms and conditions of a new full requirements power service agreement, but that Westar would offer only one service product for a twenty-year term, to which Arma was unwilling to agree. Arma stated that it had attempted to procure a new source of power supply, but had been unsuccessful. On February 5, 2009, the Commission issued an

order in the complaint proceeding establishing settlement judge procedures and directing that a settlement judge be appointed, and that a settlement conference be convened as soon as practicable.¹ Settlement judge procedures were established only as to the issues raised in the complaint filed by Arma in Docket No. EL09-33-000.

4. On February 6, 2009, Judge Michael J. Cianci was appointed to be the settlement judge for the complaint proceeding in Docket No. EL09-33-000. That same day, Westar submitted an unexecuted Cost-Based Bridge Agreement for Wholesale Power Sales Service between Westar and Arma (Bridge Agreement) in Docket No. ER09-680-000. Westar stated that it was filing the Bridge Agreement unexecuted because Westar and Arma had been unable to agree on terms under which Westar would provide Arma capacity and firm energy after the Existing Agreement terminated. Westar subsequently requested that, in light of a five-month extension of the Existing Agreement agreed upon during the first round of settlement discussions on February 10 and 11, 2009 in Docket No. EL09-33-000, the Bridge Agreement be held in abeyance, to become effective on August 1, 2009.²

5. On April 21, 2009, the Commission accepted Westar's extension of the Existing Agreement, effective March 1, 2009.³ The parties reached an agreement after further settlement discussions and filed the uncontested Settlement resolving all issues in Docket Nos. EL09-33-000 and ER09-680-000.

6. Commission Trial Staff submitted comments supporting the Settlement and Occidental Chemical Corporation and Occidental Power Marketing, L.P. filed limited comments stating that they do not oppose the Settlement. On July 6, 2009, Judge Cianci certified the Settlement to the Commission as uncontested,⁴ and thereafter the settlement judge procedures were terminated.⁵

7. Under the terms of the Settlement, the Settling Parties agree that the Settlement resolves all issues in Docket Nos. EL09-33-000 and ER09-680-000 related to the full requirements power service provided by Westar to Arma. As provided in the Formula

¹ *City of Arma, Kansas v. Westar Energy, Inc.*, 126 FERC ¶ 61,096, at P 4 (2009).

² Westar March 4, 2009 Answer, Docket No. ER09-680-000, at 2.

³ *Westar Energy, Inc.*, 127 FERC ¶ 61,064 (2009).

⁴ 128 FERC ¶ 63,001 (2009).

⁵ Order of Chief Judge Terminating Settlement Judge Procedures, July 14, 2009.

Rate Agreement, Arma shall receive service at Westar's embedded average system costs for the ten-year term. The Formula Rate Agreement provides for a credit for the net margins related to off-system sales as provided in Attachment D to the Formula Rate Agreement. The Settlement also provides that the calculation of the demand charge and variable operations and maintenance for the rate period June 1, 2009 through May 31, 2010 shall be subject to review by Arma and Commission Trial Staff in accordance with the procedures set forth in the demand charge and variable operations and maintenance protocols contained in Attachment E to the Formula Rate Agreement.

8. Further, the Settlement provides that Arma shall file motions to withdraw with prejudice from Docket Nos. ER08-808, ER08-949, ER08-989, ER08-992, ER08-994, ER08-998, ER08-1029, ER08-1031, ER08-1033, ER08-1035, ER08-1037, ER08-1047, ER08-1062, ER08-1149, ER08-1396 and ER09-959 with the Commission within ten days of the first day of the month following the date on which the Commission issues an order approving or accepting the Settlement without condition or modification.

9. Article VIII of the Settlement provides that the standard of review for the Settlement shall be the "just and reasonable" standard of review, provided, however, that Article XII of the Formula Rate Agreement governs the standard of review for the Formula Rate Agreement, and provided that nothing contained in the Settlement shall be construed as precluding the Commission from reviewing the Formula Rate Agreement (which includes, but is not limited to, the attachments, annual updates and the construction work in progress informational filing), on its own initiative under the "just and reasonable" standard of review.⁶

10. Article XII of the Formula Rate Agreement filed with the Settlement provides that the standard of review the Commission shall apply when acting on proposed changes to the Formula Rate Agreement under sections 205 and 206 of the FPA shall be the "just and reasonable" standard of review rather than the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Article XII also provides that:

The Parties expressly agree that the following provisions of this Agreement are not subject to change under Sections 205 or 206, absent the mutual written consent of the Parties and any proposed changes to such provisions of this Agreement absent such mutual written consent shall be subject to the "public interest" standard of review: (a) The rate of return on equity for

⁶ Settlement at Article VIII.

common stock of 10.8% set forth in Attachment D for the three year period commencing on the Effective Date; and (b) The standard of review provisions in this Article XII. Changes proposed by non-contracting third parties to (a) the rate of return on equity for common stock of 10.8% set forth in Attachment D for the three year period commencing on the Effective Date and (b) the standard of review provisions in this Article XII shall be subject to the most stringent standard of review permissible under applicable law while all other changes proposed by non-contracting third parties to this Agreement shall be subject to the just and reasonable standard of review.⁷

In addition, Article XII provides that “[n]othing herein is intended to preclude the [Commission] from reviewing this Agreement, including, but not limited to, the attachments, Annual Updates and CWIP informational filing, on its own initiative under the just and reasonable standard.”⁸ The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006).

Discussion

11. The Settlement resolves all of the issues between the Settling Parties in Docket Nos. EL09-33-000 and ER09-680-000. The Settlement is fair and reasonable and in the public interest and is hereby approved. The revised rate schedule is in compliance with Order No. 614 and is made effective as set forth in the Settlement.⁹ The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

12. Because the Settlement resolves all issues in Docket Nos. EL09-33-000 and ER09-680-000, we hereby dismiss the filings submitted in Docket No. ER09-680-000 as moot.

⁷ Formula Rate Agreement at Article XII.

⁸ *Id.*

⁹ *See Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,096 (2000).

Docket Nos. EL09-33-000 and ER09-680-000

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13. This order terminates Docket Nos. EL09-33-000 and ER09-680-000.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.