

133 FERC ¶ 61,272  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Westar Energy, Inc.

Docket No. ER11-1994-000

ORDER ACCEPTING AND SUSPENDING REVISED SERVICE AGREEMENTS  
SUBJECT TO REFUND AND ESTABLISHING HEARING AND SETTLEMENT  
JUDGE PROCEDURES

(Issued December 30, 2010)

1. On November 18, 2010, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> Westar Energy, Inc. (Westar) submitted revised agreements for wholesale service with the cities of Herington<sup>2</sup> and Wamego,<sup>3</sup> Kansas. In this order, we accept the Revised Herington and Wamego Agreements, and suspend them, to be effective January 1, 2011, subject to refund, and the outcome of hearing and settlement procedures.

**I. Background**

2. The currently effective partial requirements service agreements with Herington (Herington Agreement) and Wamego (Wamego Agreement) date from the 1980s. Over time, Westar has modified the agreements to, among other things, extend the term of each agreement and add generation deferral service.<sup>4</sup>

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<sup>1</sup> 16 U.S.C. § 824d (2010).

<sup>2</sup> Second Revised FERC Electric Rate Schedule No. 209 (Revised Herington Agreement).

<sup>3</sup> Second Revised FERC Electric Rate Schedule No. 184 (Revised Wamego Agreement).

<sup>4</sup> Under the generation deferral schedule, Westar provided a nominated amount of capacity and energy to Herington and Wamego to supplement their summer needs to the extent those needs were not supplied by the city's own generation.

3. Generation deferral service was replaced by supplemental generation service, which allows Herington and Wamego to purchase supplemental generation (nominated capacity and energy) during the summer period,<sup>5</sup> as made available from contract year to contract year. The energy rate is an incremental rate, and the most recent supplemental service agreement was submitted on April 20, 2010.<sup>6</sup>

4. Under the Wamego and Herington Agreements, Westar provides service to the cities at an average energy rate, subject to a fuel adjustment clause, for all energy delivered and a two-part capacity charge. During the summer period, Westar applies the base capacity charge to the higher of the maximum amount of summer peak capacity<sup>7</sup> supplied to the cities during the billing month or 80 percent of the maximum amount of summer peak capacity in a previous summer month. Westar also applies an excess capacity charge on all non-peak capacity in excess of base capacity billing determinants. Similarly, during the winter period, Westar assesses the base capacity charge on 80 percent of the maximum amount of peak capacity during the previous summer period and the excess capacity charge on any capacity greater than that amount. However, because Wamego has sufficient generation capability to supply its peak load and reserve requirements, it can and has avoided incurring base capacity charges by running its own generation during the peak hours in the summer period. Thus, Wamego generally pays only the excess capacity charge, which is less than the base capacity charge.

5. Both agreements give Westar the ability to make a filing with the Commission under section 205 of the FPA to change the rates paid by the cities under the agreements, providing that:

The rate schedules and any terms or conditions provided therein are subject to changes or substitutions, either in whole or in part, made from time to time by a legally effective filing of [Westar] with, or by order of, the regulatory authority having jurisdiction, and [Westar] reserves the right to seek changes or substitutions, in accordance with law, from such regulatory authority. Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the

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<sup>5</sup> The summer period under the agreements is June 15 through September 15.

<sup>6</sup> See *Westar Energy, Inc.*, Docket No. ER10-1072-000 (June 16, 2010) (delegated letter order).

<sup>7</sup> Peak capacity is all capacity supplied by Westar during the summer period from 10 a.m. to 10 p.m., except Sundays and holidays. All capacity provided during the remainder of the summer period and the entire winter period which is from September 16 through June 4, inclusive, is considered to be non-peak capacity.

Federal Energy Regulatory Commission for a change in rates, charges, classification, or service, or any rule, regulation, or contract relating thereto, under Section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.<sup>8</sup>

6. Westar states that pursuant to the two-year termination notice provision in article IV of the agreements,<sup>9</sup> it advised Wamego and Herington in May 2010 that it would cancel the agreements in 2012.

## II. The Filing

7. Westar states that the rates charged under the Herington and Wamego Agreements have not changed since the agreements became effective in 1987, and therefore, the rates are significantly lower than the rates paid by Westar's other wholesale customers for similar service. Westar adds that to update the rate schedules for the cities so that they pay for the costs they impose on Westar's system, Westar has included a rate schedule that it has used in cost-based agreements for wholesale power sales service from generating assets likely to participate (units most likely agreement) with similarly-situated customers.<sup>10</sup> Westar explains that consistent with the units most likely agreement, the Revised Wamego and Herington Agreements convert the existing, bundled capacity charge to separate charges for power supply, transmission service, and distribution service. In addition, the existing energy cost recovery mechanism will be converted from an average rate with a fuel adjustment clause to an incremental energy cost methodology based on the generating units that are most likely to serve the cities.

8. Furthermore, Westar states that consistent with the units most likely agreement, the Revised Wamego and Herington Agreements utilize a demand rate that is based upon data from Westar's 2009 FERC Form 1. Thus, Westar contends, the demand rates are consistent with the Commission's Mitigation Order, because they represent the embedded

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<sup>8</sup> Herington Agreement, Article II, section 2 and Wamego Agreement, Article II, section 2.

<sup>9</sup> Herington Agreement, Article IV and Wamego Agreement, Article IV.

<sup>10</sup> Westar states that the Commission has accepted the units most likely agreement in *Westar Energy Inc.*, Docket No. ER10-175-000 (Dec. 23, 2009) (delegated letter order); *Westar Energy Inc.*, Docket No. ER10-916-000 (May 20, 2010) (delegated letter order); *Westar Energy Inc.*, Docket No. ER10-1007-000 (May 28, 2010) (delegated letter order); and *Westar Energy Inc.*, Docket No. ER10-1237-000 (July 9, 2010) (delegated letter order).

costs of the units most likely to serve Herington and Wamego.<sup>11</sup> Westar states that the energy rate is based upon the energy cost incurred to serve the Herington and Wamego loads, as located in the dispatching sequence on an hour-by-hour basis, immediately after Westar's retail load, generation rate agreement customers, and participation power agreement customers.

9. Westar states that the transmission charge was calculated using Westar's transmission formula rate that was accepted by the Commission in Docket No. ER08-396-000, *et al.*<sup>12</sup> Westar also contends that it determined the ancillary services charges and wholesale distribution service charges applicable to the cities by using information and following procedures in the Southwest Power Pool, Inc. (SPP) open access transmission tariff.

10. Westar requests an effective date for the Revised Herington and Wamego Agreements of January 1, 2011.

### **III. Notice of Filing and Responsive Pleadings**

11. Notice of Westar's filing was published in the *Federal Register*, 75 Fed. Reg. 68,777 (2010), with interventions and protests due on or before November 22, 2010. On November 22, 2010, the City of Wamego (Wamego) filed a motion to intervene and protest and comments were filed by USD 320 Wamego Public Schools (Wamego Public Schools) and Highland Community College. On November 24, 2010, out-of-time comments were filed by the City of Herington (Herington). Westar filed an answer on December 2, 2010.

#### **A. Comments and Protests**

12. Herington submitted comments noting that it does not contest any calculated rate formulas used by Westar or any historical information filed by Westar. However, Herington requests a January 1, 2012 effective date for the new rate increase and new contract. Herington requests the January 1, 2012 date because its 2011 budget has been set and a rate increase during this budget year may cause hardship.

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<sup>11</sup> Westar Filing, Oakes Test. at 5 (citing *Westar Energy, Inc.*, 116 FERC ¶ 61,219, at P 48 (2006) (Mitigation Order), *reh'g denied*, 123 FERC ¶ 61,123 (2008) (requiring Westar to implement cost-based mitigation for wholesale sales to customers in the Westar balancing authority area, as well as the Midwest Energy and the former Aquila Networks-West Plains Kansas balancing authority areas)).

<sup>12</sup> *Id.* at 4.

13. On November 22, 2010, Wamego Public Schools and Highland Community College filed comments opposing the rate increase for Wamego. Generally, they contend that it is unreasonable to impose an increase of the magnitude Westar is proposing due to the financial hardship it will cause for businesses and consumers in the community, because they have made budgeting decisions based on the current rates.

14. Wamego also urges the Commission to reject Westar's filing because it claims that Westar has not demonstrated that the proposed rates are just and reasonable. Wamego contends that the Revised Wamego Agreement is an attempt by Westar to terminate the existing Wamego Agreement prematurely under the guise of an FPA section 205 filing in order to unbundle the rate components and impose new and significantly higher costs for new services that are specifically, and permissibly, avoidable under the current Wamego Agreement.<sup>13</sup> Wamego also asserts that the Revised Wamego Agreement will convert Wamego's stated energy rate into an incremental rate, with the result that charges for all of the energy Wamego purchases would be based upon the highest of Westar's energy costs because of Wamego's position in the "stack" of customers, even though Wamego has been and remains a long-term customer. According to Wamego, currently only short-term, supplemental energy is priced on an incremental basis.<sup>14</sup>

15. Wamego asserts that if the Commission does not reject the filing, it should suspend the effective date for the full five-month period permitted under the FPA and set the matter for hearing.<sup>15</sup> Wamego contends that a five-month suspension is warranted because the proposed rates in the Revised Wamego Agreement, which represents a 124 percent increase, are substantially excessive and because extraordinary circumstances exist in that Westar is essentially seeking to terminate the Wamego Agreement without providing the two-year notice of termination required by the Wamego Agreement and in violation of Commission precedent.<sup>16</sup>

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<sup>13</sup> Wamego Protest at 6 and 8, noting that Westar issued a notice of termination of the Wamego Agreement on May 28, 2010, which establishes the contract termination date of May 31, 2012.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 30-31 (citing *West Texas Utilities Company*, 18 FERC ¶ 61,189, at 61,374-76 (1982) (*West Texas Utilities*) (stating that a five-month suspension would be ordered if more than ten percent of the increase appeared to be excessive, and that cases in which increased revenues do not appear to excessive, other extraordinary factors indicating irreparable harm warrant a five-month suspension)).

<sup>16</sup> *Id.* at 32 and 21 (citing *Louisiana Power & Light Company*, 17 FERC ¶ 61,230, at 61,442 (1981); *Gulf States Utilities Company*, 5 FERC ¶ 61,066, at 61,098-99 (1978)  
(continued...)

16. Wamego asserts that the Revised Wamego Agreement should also be rejected because Westar's filing does not contain sufficient cost support to meet Part 35 of the Commission's filing requirements.<sup>17</sup> Wamego claims that Westar's cost support compares the current rates and the proposed rates based on information from different periods<sup>18</sup> and improperly includes supplemental sales in the projected period analysis.<sup>19</sup>

17. Wamego disputes Westar's claim that the Revised Wamego Agreement is consistent with the Commission's Mitigation Order for pricing of long-term sales, because in Order No. 697, the Commission did not propose to change the default pricing for sales of one year and greater from the utility's embedded cost.<sup>20</sup>

18. In regard to Westar's claims that Wamego is not paying its share of Westar's costs, Wamego argues that the current Wamego Agreement provides for generation deferral service, whereby Wamego supplies its own capacity needs from its own resources and avoids higher capacity charges. Wamego claims that Westar has acknowledged that it too benefits from this arrangement.<sup>21</sup> Therefore, Wamego contends

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(recognizing that one of the basic purposes of a notice provision is to enable utilities to properly plan their systems)).

<sup>17</sup> *Id.* at 16 (citing 18 C.F.R. § 35.13 (2010)).

<sup>18</sup> *Id.* (citing Ex. RFO-3 at 3-4 (the current rates represent the 12-month period ended August, 2010, and the proposed rates are based on a projected 12-month period ended ending December, 2011)).

<sup>19</sup> *Id.* at 17 (citing Ex. RFO-3 at 3-4).

<sup>20</sup> *Id.* at 25 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 659, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010)).

<sup>21</sup> *Id.* at 11-12 (citing the "First Amendment" to the Wamego Agreement (providing that "Westar receives benefits from the [generation deferral] service which include incremental revenues from the service that would not otherwise be realized, a temporary market for short term capacity, and enhanced generation planning. Under the service, Westar will incur no increased long term obligation to provide on peak capacity, nor will Wamego incur any long term responsibility to purchase base capacity."))).

that it has not avoided paying its share of Westar's capacity costs, but rather, it has placed few demands on Westar's capacity resources.

19. Finally, Wamego identifies additional errors and omissions that it claims also warrant rejection of Westar's Revised Wamego Agreement. These include: (1) improper practice of generically seeking waiver of filing requirements; (2) non-existent justification for the proposed demand charge calculation; (3) insufficient detail about how the proposed energy charge has been calculated or the basis for charge; (4) failure to explain the basis for the \$3.00 credit against the demand charge; and (5) failure to explain how an interruptible demand provision for bundled retail customers is applicable to an unbundled partial requirements service agreement for wholesale customers.<sup>22</sup>

**B. Answer**

20. In its answer, Westar asserts that its filing is merely a proposed rate change under section 205 of the FPA, and neither *Louisiana Power & Light* nor *Gulf States Utilities Company* is applicable to Wamego's argument.<sup>23</sup> Westar also notes that two of Wamego's retail customers, Wamego Public Schools and Highland Community College, complain that they did not receive sufficient notice for purposes of their budget planning. Westar explains that, because those entities are retail customers of Wamego, not Westar, Wamego bore the responsibility for making them aware of the impending rate increase.<sup>24</sup>

21. Westar contends that it is not seeking to impose new costs for services that are avoidable under the current rate structure and disagrees with Wamego's claim that the Revised Wamego Agreement would "require Wamego to purchase capacity every month based upon Wamego's non-coincident peak, with no allowance for Wamego's internal generation."<sup>25</sup> Westar notes that Wamego purchases power from Westar every month of the year under the current arrangement, and when Wamego purchases power outside of the peak period, Wamego pays for the capacity providing the service. Therefore, while Westar agrees that Wamego has avoided incurring base capacity charges by running its own generation during peak periods, Westar notes that Wamego incurs some capacity

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<sup>22</sup> *Id.* at 29.

<sup>23</sup> Westar Answer (citing *Louisiana Power & Light Company*, 17 FERC at 61,442; *Gulf States Utilities Company*, 5 FERC at 61,098-99). Westar asserts that these cases dealt with utilities' needs for advance notice of changes in the amount of load they were required to serve, not the rates a customer will be charged.

<sup>24</sup> *Id.* n.6.

<sup>25</sup> *Id.* at 3 (citing Wamego Protest at 7).

charges under the Wamego Agreement. According to Westar, the only way that Wamego could avoid all capacity charges and incremental cost charges would be to self-supply all of its requirements every hour of the year, which it has not done. Thus, Westar contends that Wamego has incurred and paid charges for capacity used to serve it under the current agreement, and Westar's proposal merely seeks to revise the price of the capacity used to serve Wamego based on Westar's current costs.<sup>26</sup>

22. Westar claims that the features of its proposal discussed by Wamego are largely unchanged. Westar asserts that Wamego will continue to be assessed a capacity charge for generation, and that the transmission charge is not a change in service, but rather the unbundling of costs incurred to serve Wamego based on Westar's current costs. In addition, Westar notes that both the capacity charge and the transmission charge will be assessed based on Wamego's billing capacity for the month.<sup>27</sup> Furthermore, Westar asserts that like the current rate, the proposal provides for an increased capacity charge in the event that the city elects not to follow a curtailment order. Westar also notes that if Wamego can meet SPP's requirements to self-supply ancillary services, Westar has no objection and is willing to modify its proposal accordingly.<sup>28</sup>

23. Westar contends that changing the energy charge from an average system cost to an incremental charge is consistent with updating the rate and making it consistent with service to other Westar partial requirements service customers. Furthermore, according to Westar, a rate based on system average capacity cost for a city with operating characteristics of Wamego would be greater than the proposed rate.<sup>29</sup>

24. Westar argues that the units most likely pricing methodology is clearly designed on an embedded cost-of-service basis from costs reported in Westar's 2009 FERC Form 1 data, and therefore, is consistent with Westar's mitigation obligations.

25. Westar claims that Wamego has overstated the impact of the rate increase, noting that the actual increase when considering service under the supplemental generation provisions is approximately 62 percent.

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5. Westar states that billing capacity is measured at the point of delivery and shall be the average kW load during the sixty-minute period of maximum use during the month, increased by 4.33 percent to account for transmission and distribution losses, less any capacity from third-party resources delivered to the municipality.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.* at 6 (citing Oakes Test. at 4 and Ex. RFO-4).

#### IV. Discussion

##### A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely unopposed motions to intervene serve to make the entities that filed them parties to the proceeding. Wamego Public Schools and Highland Community College did not file motions to intervene, as required by 18 C.F.R. § 385.214 (a)(3)(2010), and therefore will not be made parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits answers to protests or to answers unless otherwise ordered by the decisional authority. We will accept Westar's and Wamego's answers because they provided information that assisted us in our decision-making process.

##### B. Commission Determination

28. Westar's revised rate schedules raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

29. Our preliminary analysis indicates that Westar's revised rate schedules have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. In addition, we deny Wamego's request for a five-month suspension. In *West Texas*, the Commission explained that, when the Commission's preliminary analysis indicates that proposed rates may be unjust and unreasonable and substantially excessive, the Commission will generally impose a maximum suspension (i.e., five months).<sup>30</sup> In the instant proceeding, our preliminary analysis indicates that the proposed rates may not be substantially excessive. Therefore, we accept Westar's proposed rate schedules for filing, suspend them for a nominal period, make them effective January 1, 2011, subject to refund, and set them for hearing and settlement judge procedures.

30. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603

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<sup>30</sup> *West Texas Utilities Co.*, 18 FERC at 61,374-75 (the Commission will suspend a proposed rate for the maximum period, five months, if the proposed rate increase is found to be substantially excessive); *Tucson Elec. Co.*, 76 FERC ¶ 61,235, at 62,147 & n.25-26 (1996).

of the Commission's Rules of Practice and Procedure.<sup>31</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>32</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Westar's revised service agreements are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2011, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Westar's proposal to revise the service agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status

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<sup>31</sup> 18 C.F.R. § 385.603 (2010).

<sup>32</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.