

124 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Westar Energy, Inc.

Docket Nos. ER08-988-000
ER08-989-000
ER08-991-000
ER08-992-000
ER08-993-000
ER08-994-000
ER08-997-000
ER08-998-000
(not consolidated)

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 17, 2008)

1. In Docket Nos. ER08-989-000, ER08-992-000, ER08-994-000 and ER08-998-000¹ Westar Energy, Inc. (Westar) filed what it characterizes as Petitions for Approval of Settlement Agreement (Settlement Agreement) between Westar and various wholesale customers in the State of Kansas² requesting the Commission to approve without condition or modification the Settlement Agreements and associated pro forma rate schedules (Cost-Based Formula Rate Agreements for Full Requirements Electric Service) between the Kansas Customers and Westar (Formula Rate Agreements).³

¹ Docket Nos. ER08-989-000 and ER08-992-000 were filed on May 19, 2008 and Docket Nos. ER08-994-000 and ER08-998-000 were filed on May 20, 2008 and May 21, 2008, respectively.

² The wholesale customers include: 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) (collectively, Kansas Customers).

³ The Formula Rate Agreements contain virtually identical provisions for all of Westar's Kansas Customers.

2. In a companion docket for each Kansas Customer,⁴ Westar also filed proposed revisions to the existing Wholesale Electric Service Agreements (WES Agreements) between Kansas Gas and Electric Company⁵ and Blue Mound, Bronson and Mulberry⁶ to extend the term of each city's WES Agreement for the period that each Formula Rate Agreement is pending before the Commission. Westar also filed proposed revisions to the existing WES Agreement⁷ between Westar and Robinson extending the term of that agreement for the same period of time. In each companion docket, Westar also submitted Notices of Cancellation for each of the WES Agreements.

3. As discussed below, this order accepts the extensions to the WES Agreements and the companion Notices of Cancellation delaying the effectiveness of the previously approved cancellations,⁸ and sets Westar's proposed Formula Rate Agreements for hearing and settlement judge procedures.

I. Background

4. Westar is a public utility primarily engaged in the generation, transmission, distribution and sale of electric energy with its principal office located in Topeka, Kansas. Westar's transmission system is located in eastern and central Kansas and is under the control of the Southwest Power Pool, Inc. (SPP), which is a Commission-approved regional transmission organization. Westar provides firm capacity and energy to the Kansas Customers under the WES Agreements.

5. Blue Mound is a municipality located in Linn County, Kansas. Bronson is a municipality located in Bourbon County, Kansas. Mulberry is a municipality located in

⁴ Docket Nos. ER08-988-000 and ER08-991-000 were filed on May 19, 2008. Docket Nos. ER08-993-000 and ER08-997-000 were filed May 20, 2008 and May 21, 2008, respectively.

⁵ Kansas Gas and Electric Company is a wholly owned subsidiary of Westar providing electric service in south-central and southeastern Kansas.

⁶ The proposed revisions are designated: Second Revised Sheet Nos. 11 and 1 under First Revised Rate Schedule FERC No. 171, to the WES Agreement dated February 1, 1988 with Blue Mound; Second Revised Sheet Nos. 12 and 1 under First Revised Rate Schedule FERC No. 174, to the WES Agreement dated February 1, 1988 with Bronson; and Second Revised Sheet Nos. 8 and 1 under First Revised Rate Schedule FERC No. 173, to the WES Agreement dated September 14, 1987 with Mulberry.

⁷ The proposed revisions are designated Seventh Revised Sheet Nos. 4 and 1 under First Revised Rate Schedule FERC No. 233.

⁸ *See infra* notes 9-11.

Crawford County, Kansas and Robinson is located in Brown County, Kansas. Each Kansas Customer purchases capacity and energy and sells it to its customers within the franchised or certificated retail service territory that it has a statutory or contractual obligation to serve.

6. Under the WES Agreements, Westar provides bundled service at fixed rates to the Kansas Customers. On January 31, 2005, Westar gave Blue Mound and Bronson notice that it was terminating their WES Agreements effective January 31, 2008. On November 16, 2007, Westar, with Blue Mound and Bronson's consent, filed to extend the term of the WES Agreement through May 31, 2008, in order to provide Blue Mound and Bronson the opportunity to secure new sources of supply. As part of the November 16, 2007 filings, Westar also filed to cancel the WES Agreements for Blue Mound and Bronson effective June 1, 2008. The Commission, by delegated letter orders, accepted Westar's filings.⁹

7. On December 31, 2004, Westar gave Mulberry notice that it was terminating the WES Agreement effective December 31, 2007. On November 2, 2007, Westar, with Mulberry's consent, filed to extend the term of the WES Agreement through May 31, 2008 in order to provide Mulberry the opportunity to secure a new source of supply. As part of the November 2, 2007 filing, Westar also filed to cancel the WES Agreement effective June 1, 2008. The Commission, by delegated letter order, accepted Westar's filing.¹⁰

8. On November 28, 2007, Westar, with Robinson's consent, filed to extend the term of the WES Agreement through May 31, 2008 in order to provide Robinson the opportunity to secure a new source of supply. As part of the November 28, 2007 filing, Westar also filed to cancel the WES Agreement effective June 1, 2008. The Commission, by delegated letter order, accepted Westar's filing.¹¹

9. On September 27, 2004, as amended on September 30, 2004, Westar submitted an updated market power analysis in compliance with the Commission's Implementation

⁹ See *Westar Energy, Inc.*, Docket No. ER08-225-000 (January 30, 2008) (unpublished letter order) and *Westar Energy, Inc.*, Docket No. ER08-226-000 (January 30, 2008) (unpublished letter order).

¹⁰ See *Westar Energy, Inc.*, Docket No. ER08-181-000 (December 18, 2007) (unpublished letter order).

¹¹ See *Westar Energy, Inc.*, Docket No. ER08-261-000 (January 10, 2008) (unpublished letter order).

Order.¹² Westar's updated market power filing indicated that it passed the pivotal supplier screen in all markets considered, and that it passed the wholesale market share screen in all of the markets except for its home control area and the Midwest Energy, Inc. (Midwest) and Aquila Networks-West Plains Kansas (WPEK) control areas.

10. On March 23, 2005, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)¹³ concerning the justness and reasonableness of Westar's market-based rates in the Westar, Midwest and WPEK control areas. Westar proposed to use cost-based measures to address the Commission's requirements to mitigate market power. On September 26, 2006, the Commission issued an order, finding that Westar should make sales with terms of more than one year on an embedded cost-of-service basis.¹⁴

11. Westar states that, in light of the anticipated May 31, 2008, termination dates of the WES Agreements and the Commission's findings in the Mitigation Order, it engaged in extensive negotiations with each Kansas Customer regarding the terms and conditions under which Westar would provide capacity and firm energy to them. According to Westar, each proposed Formula Rate Agreement is the result of those discussions. Westar further states that the Formula Rate Agreements, by their terms, do not become effective until the first day of the month following the date that a Commission order becomes final approving, without condition or modification, or accepting, without condition or modification, the Formula Rate Agreements.

II. Description of Filing

12. Under the proposed Formula Rate Agreements, Westar will sell capacity and firm energy to the Kansas Customers. Westar will provide generation-related service at a cost-based formula rate under which (a) the Variable Operations and Maintenance (VOM) component of the Energy Charge and the Demand Charge will change from year

¹² *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (Implementation Order), *order on reh'g*, 110 FERC ¶ 61,178 (2005). The Implementation Order addressed the procedures for implementing the Commission's new interim generation market power analysis and mitigation policy announced in the Commission's April 14, 2004 Order in *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004).

¹³ 16 U.S.C. § 824e (2000).

¹⁴ *Westar Energy Inc.*, 116 FERC ¶ 61,219 (2006) (Mitigation Order), *order on reh'g*, 123 FERC ¶ 61,123 (2008).

to year;¹⁵ and (b) the Energy Charge will change from month to month.¹⁶ Westar will also arrange for transmission, ancillary and distribution services and pass through the costs it incurs for arranging those services. The initial term of each Formula Rate Agreement is for twenty years and shall continue year to year thereafter until cancelled by one of the Parties, with three years prior written notice to the other Party.

13. Under each proposed Formula Rate Agreement, the Demand Charge and VOM Charge will not exceed Westar's average embedded cost. The Energy Charge includes the VOM Charge and fuel-related costs.

14. The Demand Charge for each contract year, except the final contract year, will be the lesser of (a) the latest Demand Charge produced by the formula rate template included on Appendix 1 to Attachment D; or (b) 110 percent of the prior contract year's Demand Charge.¹⁷ Westar proposes to derive the return on equity (ROE) annually under a formula that adds 535 basis points to the average of the daily Moody's Investors Service's Long-Term Baa Corporate Bond Index for December, subject to a floor and a ceiling of 9 percent and 18 percent, respectively. Under the proposed Formula Rate Agreements, a "public interest" standard of review will govern any proposed changes to the proposed ROE methodology.¹⁸

15. In order for the WES Agreements to remain in effect while each Formula Rate Agreement is pending before the Commission, Westar requests that the Commission accept the proposed extensions of the term of the WES Agreements effective May 31, 2008, and allow the proposed Notices of Cancellation to take effect at the same time that each Formula Rate Agreement takes effect. Westar states that it will notify the Commission of the effective dates of the cancellation of the agreements within ten days of the date that the Formula Rate Agreements are no longer pending before the Commission.

III. Notice of Filing and Responsive Pleadings

16. Notices of Westar's filings were published in the *Federal Register*, 73 Fed. Reg. 31,083 (2008), 73 Fed. Reg. 31, 855 (2008) and 73 Fed. Reg. 32,321 (2008), with

¹⁵ The components of these charges are set forth in Appendix 1 to Attachment D of the Formula Rate Agreement.

¹⁶ The Energy Charge will be subject to a true-up set forth in Attachment D of the Formula Rate Agreement.

¹⁷ The Demand Charge for the final contract year will be the latest Demand Charge produced by the formula rate template.

¹⁸ Article XII.2 of the Formula Rate Agreement.

interventions and protests due on or before June 9, 2008, June 10, 2008 and June 11, 2008, respectively. Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, Occidental) filed identical timely motions to intervene, motions to consolidate and protests in each proposed Formula Rate Agreement docket. The City of Arma, Kansas (Arma) filed a Motion to Intervene Out of Time and Protest addressed to each of these dockets.

17. Occidental argues that Westar incorrectly filed each Formula Rate Agreement under Rule 207(a)(5) of the Commission's Rules of Practice and Procedure.¹⁹ Occidental explains that Westar's rate filings are for new service with an existing customer and contends that Westar's filing must comply with the requirements set forth in section 35.13 of the Commission's Regulations.²⁰ Occidental maintains that Westar has failed to comply with these regulations.

18. Occidental states that Westar's proposed rate of return on common equity is not cost-based and is unjust and unreasonable. Occidental asserts that Westar has not explained its rationale for applying the 535 basis point adder, nor has it shown it is an appropriate measure of Westar's risk profile now or in the next 20 years under each Formula Rate Agreement. Lastly, Occidental asserts that Westar's proposed cap on Demand Charge increases is inconsistent with the embedded cost rate for long term sales as determined in the Mitigation Order.

19. Occidental asserts that Westar has failed to provide any incremental cost information or any assurance that captive customers will not subsidize the cost of serving the Kansas Customers. Specifically, Occidental contends that Westar failed to provide any assurance that its customers without caps on increases in their charges will not subsidize service to the Kansas Customers if Westar's costs exceed the Demand Charge under the Formula Rate Agreements due to the 10 percent cap on Demand Charge increases. Occidental contends that, because the Formula Rate Agreements may involve a subsidy from captive customers, they may unjustly support Westar's wholesale sales activity, thus frustrating competition by giving Westar an unduly competitive advantage.

20. Occidental asks the Commission to either reject Westar's filings or set them for hearing. Occidental further requests that the Commission direct Westar to file all of the information required by section 35.13 of the Commission's regulations.

21. In its motions to consolidate, Occidental requests that the Commission consolidate these proceedings with the ongoing proceeding in Docket No. ER08-808-000, stating that

¹⁹ See 18 C.F.R. § 385.207(a)(5) (2008).

²⁰ See 18 C.F.R. § 35.1(c) (2008).

such consolidation will promote administrative efficiency by saving time and resources.²¹ Further, Occidental emphasizes that consolidation will ensure that the issues are considered in a comprehensive manner, at one time, without the need for multiple successive proceedings.

22. Arma's protest raises concerns regarding its inability to evaluate the economics of the formula rate proposal due to lack of cost or financial information from Westar. Arma further notes concerns on the proposed non-rate terms, including, but not limited to, the twenty year term, lack of credit for customer generation, an ability to participate in generation (Westar's or other), the standard of review for certain items, and renewable portfolio standards. Finally, Arma notes a provision in one of the agreements²² under which the subject city would be prohibited from even intervening in any case involving Westar for at least the next twenty years.

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Occidental's timely, unopposed motions to intervene serve to make it a party to these proceedings. We will grant the Motion to Intervene Out of Time of Arma, in each docket. Arma may raise its issues during the hearing and settlement judge process.

B. Hearing and Settlement Judge Procedures

24. Occidental's arguments that Westar incorrectly filed the Formula Rate Agreements because it did not comply with the requirements of section 35.13 of the Commission's Regulations amounts to an argument that Westar's filing is patently deficient. Having evaluated Westar's filings, we find that they minimally satisfy our threshold filing requirements and are not patently deficient. Therefore, we shall deny the requests for rejection.

²¹ On June 6, 2008, the Commission issued an order establishing hearing and settlement judge procedures in Docket No. ER08-808-000, wherein Westar proposed an almost identical Formula Rate Agreement with the City of Mindenmines, Missouri. *See Westar Energy, Inc.*, 123 FERC ¶ 61,252 (2008).

²² The referenced agreement involves the City of Burlingame, Kansas in Docket No. ER08-1037-000 and is not the subject of this order.

25. Westar's proposed Formula Rate Agreements 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.

26. We agree with Occidental that Westar has not adequately supported the proposed formula-based ROEs. Westar's reliance on *Indiana Michigan Power Co.*²³ is misplaced. *Indiana Michigan Power Co.* is an unpublished letter order and does not constitute legal precedent binding on the Commission.²⁴ Notwithstanding *Indiana Michigan Power Co.*, the Commission's policy is that ROEs must be supported through a discounted cash flow (DCF) analysis subject to review by this Commission and that increases in cost-based ROEs must be accompanied by individual filings under FPA section 205.²⁵ The standard to deviate from this general policy is very high. To be specific, in order for the Administrative Law Judge to approve the formula-based ROE, Westar must provide unequivocal evidence indicating that the proposed ROE is just and reasonable,²⁶ despite our policy to the contrary.

27. In addition, in light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), the Commission may not accept the standard of review as currently written with regard to third parties in these new agreements. As such, the standard of review provision in each Formula Rate Agreement is accepted conditioned on the parties revising the standard of review applicable to third parties consistent with the Commission's decision in *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201, at P 10 & n.10 (2008). Westar should, within thirty days of the date of this order, file revised standard of review provisions consistent with this precedent. Thus, the standard of review is not set for hearing.

²³ *Indiana Michigan Power Co.*, Docket No. ER06-140-000 (Feb. 15, 2006) (unpublished letter order).

²⁴ See e.g., *Idaho Power Co.*, 95 FERC ¶ 61,482 (2001); *Cambridge Electric Light Co.*, 95 FERC ¶ 61,162 (2001).

²⁵ See e.g., *Southern California Edison Co.*, 92 FERC ¶ 61,070, at 61,262-63 (2000); *Midwest Independent Transmission System Operator, Inc.*, 100 FERC ¶ 61,292 (2002), *order affirming initial decision*, 102 FERC ¶ 61,143 (2003), *reh'g denied*, 106 FERC ¶ 61,302 (2004), *order on remand, Public Serv. Comm'n of the Commonwealth of Kentucky v. FERC*, 397 F.3d 1004 (2005); and *New England Power Co.*, 31 FERC ¶ 61,378, at 61,841-42 (1985).

²⁶ *New England Power Co.*, 31 FERC ¶ 61,378, at 61,841-42 n.11 (discussing limited exceptions to the general policy against automatically adjustable rates).

28. Our preliminary analysis indicates that Westar's proposed Formula Rate Agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will set Westar's proposed Formula Rate Agreements (filed as *pro forma* rate schedules) for hearing and settlement judge procedures.²⁷

29. Based on the record before us, it is unclear whether the common questions of law or fact are such that consolidation of these matters with Docket No. ER08-808-000 will result in administrative efficiencies. Therefore, we will reserve the issue of whether to grant Occidental's motions to consolidate these matters for determination in the course of the hearing or 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 the 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 of the Commission's Rules of Practice and Procedure.²⁸ 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.²⁹ 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.³⁰ 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

²⁷ Ultimately, actual tariff sheets for each of the Kansas Customers would need to be filed to replace the pro forma tariff sheets.

²⁸ 18 C.F.R. § 385.603 (2008).

²⁹ 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 the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

³⁰ The issues in this matter may bear significant relationship to those posed in Docket No. ER07-1344-000. On May 5, 2008, the Settlement Judge in that matter submitted a Status Report indicating that it appeared that a settlement may be forthcoming in that docket. The parties and Chief Judge should be aware of the status of those proceedings in determining whether or when to initiate hearing procedures here. If a settlement is filed in Docket No. ER07-1344-000, the Chief Judge should consider deferring initiation of hearing procedures here pending Commission action on the settlement.

assigning the case to a presiding judge. Should the settlement judge ultimately determine that a hearing is warranted, Westar shall file a full case in chief pursuant to the Commission's regulations to support its proposed rate structure at hearing.

31. In order to ensure continued service to the Kansas Customers, we will accept the extensions of the terms of the WES Agreements so that they may remain in effect while each Formula Rate Agreement is pending. We will also accept Notices of Cancellation of the WES Agreements delaying the cancellation of the WES Agreements until Westar notifies the Commission of the dates of cancellation, which it must do within ten days of the date that the Formula Rate Agreements are no longer pending before the Commission.

The Commission orders:

(A) Second Revised Sheet No. 11 and Second Revised Sheet No. 1 to Westar's Rate Schedule FERC No. 171, Second Revised Sheet No. 12 and Second Revised Sheet No. 1 to Westar's First Revised Rate Schedule FERC No. 174, Second Revised Sheet No. 8 and Second Revised Sheet No. 1 to Westar's First Revised Rate Schedule FERC No. 173 and Seventh Revised Sheet No. 4 and Seventh Revised Sheet No. 1 to Westar's First Revised Rate Schedule FERC No. 233 are accepted for filing as discussed in the body of this order.

(B) Westar is directed to file revised standard of review provisions, as discussed in the body of the order, within thirty (30) days of the date this order issues.

(C) 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 proposed Formula Rate Agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in these proceedings 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 or conferences 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.

(E) 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 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.

(F) 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 or conferences in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference or conferences shall be held for the purpose of establishing procedural schedules. 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. Commissioners Wellinghoff and Kelly dissenting in part with a joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
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(Issued July 17, 2008)

WELLINGHOFF and KELLY, Commissioners, dissenting in part:

The parties to the Agreements before us request that the Commission apply a just and reasonable standard of review with the exception of certain specific provisions. In those instances, including future changes to the return on equity and standard of review provisions, the parties request that the Commission apply the “public interest” standard of review to changes sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,¹ the Commission may not accept the parties’ proposed standards of review. The majority sets the other provisions of the Agreements for hearing, but accepts the standard of review provisions, conditioned upon the parties revising them to be consistent with the Commission’s decision in *Duke Energy Carolinas, LLC*.²

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC* and *Westar Energy, Inc.*,³ we respectfully dissent in part.

Jon Wellinghoff
Commissioner

Suede G. Kelly
Commissioner

¹ 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).