

149 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

State Corporation Commission
of the State of Kansas

v.

Docket No. EL14-93-000

Westar Energy, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued December 18, 2014)

1. In this order, we set for hearing and settlement judge procedures a complaint filed by the State Corporation Commission of the State of Kansas (Kansas Commission) against Westar Energy, Inc. (Westar) alleging that the current 11.3 percent return on equity (ROE) component of Westar's transmission formula rate is excessive (Complaint). Further, we establish a refund effective date of August 20, 2014.

I. Background

2. Westar recovers its transmission revenue requirement through a transmission formula rate included in its Open Access Transmission Tariff (Tariff).¹ Westar's current ROE of 11.3 percent includes a 50 basis point adder for Westar's participation in the SPP Regional Transmission Organization (RTO).² This ROE was established by a settlement in Docket Nos. EL08-31 and ER08-396 that was approved by the Commission on December 2, 2008.³ As discussed below, on August 20, 2014, the Kansas Commission filed the Complaint against Westar alleging that the current 11.3 percent ROE component

¹ Westar's transmission formula rate is on file with the Commission in both Westar's Tariff and the Southwest Power Pool, Inc. (SPP) Tariff.

² See Complaint at 1, n.1.

³ *Westar Energy, Inc.*, 125 FERC ¶ 61,252 (2008).

of Westar's transmission formula rate is unjust, unreasonable, and unduly discriminatory and that a just and reasonable ROE for Westar's transmission formula rate is 9.37 percent.

II. Complaint

3. On August 20, 2014, the Kansas Commission filed the Complaint pursuant to sections 206 and 306 of the Federal Power Act (FPA),⁴ alleging that the current 11.3 percent ROE component of Westar's transmission formula rate is unjust, unreasonable, and unduly discriminatory and that a just and reasonable ROE for Westar's transmission formula rate is 9.37 percent. The Kansas Commission asserts that Westar's current ROE is unjust, unreasonable and unduly discriminatory because it does not accurately reflect current capital costs. The Kansas Commission argues that Westar, like most electric utilities, faced different financial conditions in 2008—when its current ROE was approved—than it now faces in 2014, yet the ROE has remained unchanged, despite significant capital market changes and revised investment long-term and short-term growth projections.⁵

4. The Kansas Commission states that, beginning in early 2014, it began conversations with Westar regarding its intent to develop a process to periodically review the ROE of each electric utility with a Commission-approved transmission formula rate impacting Kansas ratepayers. The Kansas Commission further states that, from April through August 2014, it exchanged correspondence and met with Westar regarding this potential periodic review process and a potential FPA section 205⁶ filing by Westar to voluntarily modify its transmission formula rate ROE. However, the Kansas Commission states that Westar ultimately refused to make such a filing, leaving it no other choice but to file a complaint with the Commission to secure a just and reasonable rate.⁷

5. The Kansas Commission asserts that its expert witness, Mr. Adam H. Gatewood, calculated a just and reasonable ROE for Westar's transmission formula rate using the

⁴ 16 U.S.C. §§ 824e, 825e (2012).

⁵ Complaint at 5.

⁶ 16 U.S.C. § 824d (2012).

⁷ Complaint at 6-7.

most current ROE methodology established by the Commission in Opinion No. 531,⁸ taking into account market conditions. The Kansas Commission states that Mr. Gatewood's calculation found a just and reasonable ROE for Westar of approximately 9.37 percent, inclusive of the adder for RTO membership.

6. To establish an appropriate proxy group, Mr. Gatewood states that he created a national proxy group of 46 electric utilities, which he then reduced to 36 utilities after employing the one-notch above/below corporate credit rating selection criterion, as outlined in Opinion No. 531.⁹ Mr. Gatewood explains that he did not eliminate any utilities from the proxy group upon considering utilities' history of dividend payments over the past six months and announcements of dividend reductions, another Opinion No. 531 selection criterion.¹⁰ Mr. Gatewood then considered whether any utilities had engaged in merger and acquisition activities, which resulted in the removal of four utilities and a final proxy group of 32 electric utilities.¹¹

7. Mr. Gatewood states that he applied Opinion No. 531's three-step process to calculate the six-month average dividend yield and an adjusted dividend yield for each of the 32 utilities in the proxy group.¹² Next, to account for short-term growth projections in the expected growth rate in dividends, Mr. Gatewood obtained five-year forecasts, in

⁸ *Id.* at 5-6; Attachment A at 11 (citing *Martha Coakley, et al. v. Bangor Hydro-Electric Co., et al.*, Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, 149 FERC ¶ 61,032 (2014)).

⁹ Mr. Gatewood considered both Moody's and Standard & Poor's (S&P) ratings, in accordance with Opinion No. 531. Mr. Gatewood states that Westar's current Moody's rating is Baa1, resulting in a one-notch above and below range of Baa2 to A3; Westar's current S&P rating is BBB+, resulting in a one-notch range of BBB to A-. *Id.*, Attachment A at 12-13 (citing Opinion No. 531, 147 FERC ¶ 61,234 at PP 106-107).

¹⁰ *Id.*, Attachment A at 13 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 112).

¹¹ Mr. Gatewood acknowledges that this screen, unlike the one-notch criterion that employs credit ratings, requires a degree of subjectivity. *Id.*, Attachment A at 13-14 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 114).

¹² Mr. Gatewood notes that the six-month average is the historic view of the dividend yield. Mr. Gatewood states that the Commission uses a forward-looking dividend yield in the DCF model by escalating the observed dividend for each company by one-half of the forecasted growth rate. *Id.*, Attachment A at 14-15 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 77).

accordance with Opinion No. 531.¹³ Mr. Gatewood states that he next accounted for long-term growth rate projections, as reflected in long-run forecasts of nominal U.S. gross domestic product (GDP). Mr. Gatewood asserts that his analysis is consistent with the August 4, 2014 long-term forecast of nominal GDP, 4.39 percent that the Commission incorporated in Opinion No. 531.¹⁴

8. Using the Opinion No. 531 methodology, Mr. Gatewood determined that Westar's transmission formula rate ROE should be 9.37 percent, approximately 193 basis points lower than Westar's current ROE. Specifically, Mr. Gatewood estimated that Westar's true base cost of equity capital should be 8.87 percent, based on the median of the proxy group, which ranged from 6.20 to 12.48 percent. The 50 point adder for RTO membership brought the ROE to 9.37 percent, which Mr. Gatewood asserts is acceptable because it does not violate the top-end of the range.¹⁵

9. Further, Mr. Gatewood states that he estimated Westar's annual transmission revenue requirement, using an 11.3 percent ROE, to be \$192,643,063 for calendar year 2013. Using a 9.37 percent ROE, Mr. Gatewood states that this revenue requirement would be reduced by approximately \$15,796,292. The Kansas Commission asserts that this represents an amount that Westar is currently over-recovering from ratepayers each year. The Kansas Commission also argues that this over-recovery will be exacerbated in coming years, given Westar's planned increase in transmission investments.¹⁶

10. The Kansas Commission requests that the Commission: (1) find that Westar's transmission formula rate ROE is unjust, unreasonable, and unduly discriminatory and should be reduced; (2) establish Commission procedures, such as settlement and hearing judge procedures, to determine a just and reasonable transmission formula rate ROE for Westar's transmission formula rate; (3) order Westar to make refunds, with interest at Commission-approved rates, for amounts reflecting the difference between Westar's current transmission formula rate, incorporating an 11.3 percent ROE, and this rate based

¹³ Mr. Gatewood states that he gathered Institutional Brokers' Estimate System data, as reported on *Yahoo!Finance*, on August 5, 2014. *Id.*, Attachment A at 15-16 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 88).

¹⁴ *Id.*, Attachment A at 16-17 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 88; Direct Testimony of Trial Staff Witness Douglas M. Green, Docket No. EL11-66-001 (filed Aug. 4, 2014)).

¹⁵ *Id.*, Attachment A at 2 (citing Opinion No. 531, 147 FERC ¶ 61,234 at PP 26, 144, 164-165).

¹⁶ *Id.* at 7, Attachment A at 18-23.

on the just and reasonable ROE resulting from settlement and/or hearing procedures, with a refund effective date established by the Complaint; and (4) grant further relief, as deemed appropriate by the Commission.¹⁷ The Kansas Commission also requests fast track processing for the Complaint pursuant to Rule 206(h) of the Commission's Rules of Practice and Procedure,¹⁸ given the magnitude of alleged unjust and unreasonable costs being borne by ratepayers.¹⁹

III. Notice and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 79 Fed. Reg. 51,997 (2014), with answers, protests, and interventions due on or before September 9, 2014. On August 25, 2014, Westar filed a motion for extension of time to answer the Complaint up to and including September 29, 2014. On August 26, 2014, the Kansas Commission filed a protest to Westar's motion, and on August 28, 2014, Westar filed a motion for leave to answer and answer to the Kansas Commission's protest. The period for answers, protests, and interventions was subsequently extended to September 29, 2014.²⁰

12. Motions to intervene were filed by the Missouri Joint Municipal Electric Utility Commission, the Kansas Power Pool, the Kansas Electric Power Cooperative, Inc., and the City of Lindsborg, Kansas. The Missouri Public Service Commission (Missouri Commission) filed a notice of intervention and comments. On September 29, 2014, Westar filed an answer to the Complaint and motion for summary disposition. On October 14, 2014, the Kansas Commission filed an answer to the Westar Answer. On October 29, 2014, Westar filed a motion to deny the Kansas Commission Answer and exclude information introduced by the Kansas Commission Answer.

A. Missouri Commission Comments

13. The Missouri Commission supports the Complaint and agrees that Westar's ROE must be reviewed in light of changes in current economic conditions. The Missouri Commission asserts that it is important to apply the most current capital costs to the calculation of ROEs, given the magnitude of capital projects being undertaken within

¹⁷ *Id.* at 12.

¹⁸ 18 C.F.R. § 385.206(h) (2014).

¹⁹ Complaint at 8.

²⁰ *See* Notice of Extension of Time, Docket No. EL14-93-000 (issued Aug. 29, 2014).

SPP. The Missouri Commission states that it agrees with the Kansas Commission that the Westar ROE does not reflect current capital costs.²¹ The Missouri Commission asserts that it is important for the Commission to expedite this proceeding, given the difference between Westar's current ROE and the ROE calculated by the Kansas Commission in the Complaint.²²

B. Westar Answer

14. In its answer to the Complaint, Westar argues that the Kansas Commission has failed to meet its burden of proof under section 206 of the FPA to demonstrate that Westar's existing transmission formula rate base ROE is not just and reasonable and that the Kansas Commission's proposed ROE is just and reasonable. Westar contends that the Kansas Commission's proposed ROE fails to meet the minimum standards set by the Supreme Court²³ and fails to provide adequate assurances that needed transmission investment will occur.

15. Westar claims that the Kansas Commission relies on an erroneous view that Westar is under a statutory obligation to periodically update its ROE. Westar asserts that section 205 of the FPA does not impose a requirement on electric utilities to make periodic updates to their rates on file with the Commission; rather, it gives them a right to file rates and terms for services rendered with its assets.²⁴ Westar states that the Kansas Commission has a statutory right under section 206 of the FPA to challenge Westar's currently-effective rate, but that the Kansas Commission bears the burden of showing that Westar's currently-effective ROE is not just and reasonable. Westar contends that the Kansas Commission's demand for a required periodic review and update of Westar's ROE contrasts with the Commission's policy that ROE remains a fixed component in the formula rate, unless and until a section 205 or section 206 filing is made to change the ROE. Westar argues that requiring a formal periodic review of its ROE would degrade a utility's section 205 rights by setting the intervals at which the utility must make a section 205 filing.²⁵

²¹ Missouri Commission Comments at 3.

²² *Id.* at 4.

²³ Westar Answer at 2 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope*); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (*Bluefield*)).

²⁴ *Id.* at 8.

²⁵ *Id.* at 9-10.

16. Westar asserts that Mr. Gatewood's conclusion that an 8.87 percent base ROE is appropriate does not mean that Westar's existing 10.8 percent base ROE is not just and reasonable. Westar alleges that Mr. Gatewood's application of the DCF methodology, without any additional analyses or benchmarks to inform the just and reasonable placement of Westar's ROE within the zone of reasonableness, is not consistent with Commission precedent. Westar states that, in Opinion No. 531, the Commission concluded that mechanical application of the DCF methodology would result in an ROE that does not satisfy the requirements of *Hope* and *Bluefield*.²⁶ Westar argues that, despite this, Mr. Gatewood's analysis selects the median of his determined zone of reasonableness without addressing the other factors the Commission found relevant in Opinion No. 531.

17. Westar asserts that its witness, Mr. Adrien M. McKenzie, has supplemented Mr. Gatewood's record with additional analyses and benchmarks that the Commission found informative in Opinion No. 531. Westar argues that Mr. McKenzie's testimony, which factors in these alternative analyses and benchmarks, shows that Westar's current ROE remains just and reasonable.

18. Mr. McKenzie states that his testimony demonstrates that the results of analyses conforming to the Commission's recent findings in Opinion No. 531 confirm the continued reasonableness of the 10.8 percent base ROE for Westar. Mr. McKenzie adjusted the dividend yield component of Mr. Gatewood's DCF analysis, which resulted in a DCF range of 6.19 to 12.51 percent.²⁷ Based on this, Mr. McKenzie determined that a 10.7 percent base ROE, which falls at the middle of the top end of the Kansas Commission's adjusted DCF range, is consistent with the Commission's recent findings and warranted in light of continued anomalous capital market conditions.²⁸ Specifically, Mr. McKenzie's testimony contends that current capital market conditions are not

²⁶ *Id.* at 14 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 142).

²⁷ *Id.*, Exhibit No. WES-100 at 25. Mr. McKenzie alleges that, in arriving at the dividend yield component, Mr. Gatewood employed the weighted average growth rate, which is a composite of the short-term growth estimate that applies to the coming year, as well as the long-term growth rate for the more distant future; however, Mr. McKenzie asserts that consistency with the assumptions of the Commission's two-step method dictates that the short term growth rate alone should be used to reflect growth over the coming year.

²⁸ *Id.*, Exhibit No. WES-100 at 3.

representative of what investors expect in the future and that investors do not anticipate that current low interest rates will continue.²⁹

19. Westar states that Mr. McKenzie also analyzed the following alternative benchmarks that the Commission found informative in Opinion No. 531: (1) the Capital Asset Pricing Model; (2) the risk premium approach; and (3) the expected earnings approach. According to Westar, each of these alternative benchmarks demonstrates that the Kansas Commission's proposed ROE is too low to satisfy the requirements of *Hope* and *Bluefield* and supports Mr. McKenzie's recommendation that Westar's current ROE remains just and reasonable.³⁰

20. In addition, Mr. McKenzie evaluated his results by reference to the following additional alternative benchmarks: (1) a risk premium approach based on ROEs authorized by state regulators; (2) the empirical Capital Asset Pricing Model, which is a derivative of the traditional Capital Asset Pricing Model; (3) Commission-approved ROEs for natural gas pipelines; and (4) a DCF analysis based on a select group of low risk non-utility firms.³¹ Westar asserts that these additional alternative benchmarks demonstrate that, given the facts and circumstances that apply to Westar, retaining Westar's current ROE is just and reasonable.³²

21. Westar also alleges that Mr. Gatewood's zone of reasonableness understates Westar's cost of equity because he did not include an adjustment for flotation costs associated with issuing new equity securities. Westar states that Mr. McKenzie calculated that a flotation cost of 13 to 36 basis points is appropriate for Westar.³³

22. Westar contends that the Kansas Commission's proposal to reduce its ROE undermines Westar's ability to attract capital, in violation of *Hope* and *Bluefield*. Westar asserts that, in Opinion No. 531, the Commission expressed concern that decreasing a formula rate's ROE by 175 basis points, which is 18 basis points less than the decrease in Westar's ROE proposed by the Kansas Commission, could undermine the ability of transmission owners to attract capital for new investments.³⁴ Westar further argues that,

²⁹ *Id.*, Exhibit No. WES-100 at 18-20.

³⁰ *Id.* at 20.

³¹ *Id.*, Exhibit WES-100 at 2.

³² *Id.* at 22.

³³ *Id.* at 25.

³⁴ *Id.* at 14 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 150).

in Opinion No. 531, the Commission expressed concern that reducing a transmission owner's ROE below the level set by state commissions for electric utilities within their jurisdiction would put interstate transmission investments at a competitive disadvantage in the capital market.³⁵ Westar states that the ROE advanced by the Kansas Commission falls below most state-approved ROEs for electric utilities, including Westar's Kansas Commission-approved 10.0 percent approved ROE. Westar also argues that a reduction in ROE like the one proposed by the Kansas Commission could reduce investor confidence in Westar. Westar further asserts that the Kansas Commission's claims of harm to Kansas retail customers and windfall profits for Westar are exaggerated because they are premised on a faulty DCF analysis that recommends an unreasonably low ROE in contravention of the *Hope* and *Bluefield* standards.³⁶

23. In addition to Mr. McKenzie's testimony, Westar provides testimony from Mr. Kelly B. Harrison, which Westar argues refutes the Kansas Commission's allegations and demonstrates that there is no harm to Kansas retail customers. Westar explains that this testimony also discusses the potential adverse impact and unintended consequences that would result if the Commission lowers Westar's ROE. Westar also provides testimony from Mr. Anthony D. Somma that discusses the impact a lower ROE could have on Westar's credit rating and, according to Westar, the need for Westar to maintain its currently-approved ROE in order to remain competitive and to attract investment capital to fund its transmission projects.³⁷

24. Additionally, Westar requests that the Commission grant summary disposition and dismiss the Complaint. Westar argues that there are no material facts in dispute because even the Kansas Commission's own expert's analysis, when corrected, shows that Westar's currently-approved base ROE is within his zone of reasonableness. Westar asserts that the Kansas Commission has not presented any evidence to show that the currently approved ROE is not just and reasonable.

C. Kansas Commission Answer

25. The Kansas Commission argues that Westar: (1) incorrectly states that there is not a single genuine issue of material fact in dispute in this proceeding; (2) inaccurately alleges that the Kansas Commission has failed to meet its burden of proof; (3) inaccurately claims that the Kansas Commission filed the Complaint to impose a process to periodically review Westar's ROE, and that the Kansas Commission has

³⁵ *Id.* at 15.

³⁶ *Id.* at 15-16.

³⁷ *Id.* at 3.

somehow usurped the Commission's authority to review and establish ROEs; (4) inaccurately alleges that Mr. Gatewood merely mechanically applied the Commission's ROE tests, without providing real world analysis; (5) incorrectly states the Commission's ROE policy by claiming that an ROE that is anywhere within the zone of reasonableness is therefore just and reasonable; and (6) inaccurately alleges that any ROE below the top end of the zone of reasonableness represents an attempt by the Kansas Commission to put Westar at a gross disadvantage in attracting capital for transmission improvements.³⁸

26. The Kansas Commission argues that Westar's answer introduces large quantities of new evidence and raises substantive arguments challenging the numerous genuine issues of material fact that were raised in the Complaint. The Kansas Commission argues that these genuine issues of material fact must be addressed by the Commission prior to summarily dismissing the Complaint.³⁹

27. The Kansas Commission asserts that Westar has inaccurately characterized the Complaint as not presenting sufficient evidence to establish a *prima facie* case that Westar's ROE is unjust and unreasonable, emphasizing that the Complaint included detailed, expert testimony that Westar's ROE was approximately 193 basis points above a just and reasonable ROE. The Kansas Commission requests that the Commission set the subject issues for an evidentiary hearing or settlement process, similar to precedent in many other section 206 proceedings that have challenged the ROE of a utility.⁴⁰

28. The Kansas Commission disputes Westar's claims that the Kansas Commission believes that Westar has a statutory obligation to review and periodically revise its transmission formula rate ROE. The Kansas Commission asserts that it never stated that Westar had a legal obligation to modify its Tariff to impose a periodic ROE review process, but merely offered to establish such a periodic review process as part of a settlement process. The Kansas Commission argues that this offer to voluntarily settle the issues and avoid litigation did not come close to usurping the Commission's ratemaking jurisdiction, as Westar alleges.⁴¹

29. The Kansas Commission also takes issue with Westar's claim that the Kansas Commission's witness merely mechanically applied the relevant DCF criteria without

³⁸ Kansas Commission Answer at 3.

³⁹ *Id.* at 3-4.

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6-8.

considering real world facts. The Kansas Commission asserts that its witness addressed a variety of real world criteria including relevant long-term forecasted growth rates, real world bond rates, and the evaluations of investor rating services. The Kansas Commission also argues that Westar's witness failed to consider the changed circumstances that have occurred since 2008 because he refused to base his recommendation on existing capital markets, instead admitting that his recommendation was based on his consideration that current capital market conditions are not representative.⁴²

30. The Kansas Commission contends that Westar attempts to justify its ROE by asserting that it must be just and reasonable as long as it is anywhere within the zone of reasonableness. The Kansas Commission claims that determining a zone of reasonableness is just one step in the process of determining a just and reasonable ROE. The Kansas Commission states that the Westar Answer devotes little attention to Mr. Gatewood's expert testimony which documented why the Westar ROE should be set at the median, rather than at the upper end of the zone of reasonableness.⁴³ The Kansas Commission further asserts that Westar has produced no convincing evidence that it would be unable to acquire necessary capital if its ROE was reduced to the median of the zone or reasonableness or that its shareholders would not receive equitable compensation for deciding to invest in Westar.⁴⁴

D. Westar Motion to Deny

31. Westar requests that the Commission deny the Kansas Commission's motion for leave to answer, reject the answer, and exclude information introduced by the Kansas Commission Answer. Westar argues that the Kansas Commission Answer does not offer additional clarification of the Complaint or the record in this proceeding and therefore should be rejected.

32. Westar alleges that the Kansas Commission mischaracterizes the Complaint, witness testimony, and the Westar Answer. Westar contends that the Kansas Commission does allege, in support of its Complaint, that Westar has failed, in essence, to periodically review and update its ROE in violation of section 205. Westar also claims that, contrary to statements in the Kansas Commission Answer, the Westar Answer and

⁴² *Id.* at 8-9.

⁴³ *Id.* at 9-10.

⁴⁴ *Id.* at 11-12.

supporting documentation do not assert that an ROE anywhere within the zone of reasonableness must be just and reasonable.⁴⁵

33. Westar argues that the Kansas Commission Answer should be rejected because, as the complainant, the Kansas Commission must establish the facts necessary to support its Complaint in the Complaint itself, rather than through subsequent, unauthorized pleadings. Westar asserts that the Kansas Commission should not be permitted to circumvent this process by supplementing its Complaint via an answer.⁴⁶

IV. Discussion

A. Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

35. Rule 213(a)(2) of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers in this case because they provided information that assisted us in our decision-making process. Accordingly, we will deny Westar's motion to deny the Kansas Commission Answer.

B. Substantive Matters

36. We find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

37. 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 of the Commission's Rules of Practice and Procedure.⁴⁷ If the parties desire, they may,

⁴⁵ Westar Motion to Deny at 2-3.

⁴⁶ *Id.* at 4-5. Westar also takes issue with assertions made by the Kansas Commission in footnote 48 of the Kansas Commission Answer, which rely on information submitted in an unrelated, contested docket pending before the Commission.

⁴⁷ 18 C.F.R. § 385.603 (2014).

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.⁴⁸ 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.

38. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁴⁹ we will establish the refund effective at the earliest date possible, i.e., August 20, 2014.

39. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by December 31, 2015. Thus, we estimate that, if the case were to go to hearing immediately, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by October 31, 2016.

40. The Commission may grant summary disposition only where “there is no genuine issue of fact material to the decision of a proceeding.”⁵⁰ Where there are significant

⁴⁸ 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>).

⁴⁹ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh’g denied*, 47 FERC ¶ 61,275 (1989).

⁵⁰ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs., et al.*, 135 FERC ¶ 61,177, at P 53 (2011) (citing 18 C.F.R. § 385.217(b); *Iroquois Gas Transmission Sys., L.P.*, 68 FERC ¶ 61,048, at 61,164 (1994) (“under Rule 217 of the

material facts in dispute, “summary disposition is not appropriate.”⁵¹ As discussed above, genuine issues of material fact exist regarding the issues raised in the Complaint that cannot be resolved based upon the record before us. Accordingly, we find that summary disposition is not warranted.

The Commission orders:

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

(B) Pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), 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.

(C) 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.

(D) 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

Commission’s Rules of Practice and Procedure summary disposition may be appropriate only if there are no genuine issues of material fact in dispute”).

⁵¹ *Id.* (citing *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,047, at P 44 (2009); *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344, at P 69 (2003) (“if an issue of material fact is in dispute, then summary disposition is not appropriate”).

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.

(E) The refund effective date in Docket No. EL14-93-000, established pursuant to section 206(b) of the FPA, is August 20, 2014, as discussed in the body of this order.

(F) Westar's motion for summary disposition and motion to reject the Kansas Commission Answer are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.