

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Midwest Energy Consumers Group,)	
)	
Complainant,)	
)	
v.)	File No. EC-2017-0107
)	
Great Plains Energy, Inc.)	
)	
Respondent.)	

**PROPOSED FINDINGS OF FACT OF
MIDWEST ENERGY CONSUMERS' GROUP**

COMES NOW the Midwest Energy Consumers' Group ("MECG"), pursuant to Commission Rule 4 CSR 240-2.140(5), and hereby submits its Proposed Findings of Fact:

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Midwest Energy Consumers Group,)	
)	
Complainant,)	
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v.)	File No. EC-2017-0107
)	
Great Plains Energy, Inc.)	
)	
Respondent.)	

APPEARANCES

KANSAS CITY POWER & LIGHT COMPANY:

Robert J. Hack and **Roger W. Steiner**, Kansas City Power & Light Company, 1200 Main Street, 16th Floor, Kansas City, Missouri 64105.

Karl Zobrist and **Joshua Harden**, Dentons US LLP, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111.

James M. Fischer, and **Larry W. Dority**, Fischer & Dority P.C., 101 Madison St., Suite 400, Jefferson City, Missouri 65101.

STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:

Kevin A. Thompson, Chief Staff Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

OFFICE OF THE PUBLIC COUNSEL:

Timothy Opitz, Assistant Public Counsel, PO Box 2230, Jefferson City, Missouri 65102.

MIDWEST ENERGY CONSUMERS GROUP:

David L. Woodsmall, Woodsmall Law Office, 308 E. High St., Suite 204, Jefferson City, Missouri 65101.

CONSUMERS COUNCIL OF MISSOURI:

John B. Coffman, 871 Tuxedo Blvd., St. Louis, Missouri 63119-2044.

SENIOR REGULATORY LAW JUDGE: Kim S. Burton

REPORT AND ORDER

THE COMPLAINT

On October 11, 2016, the Midwest Energy Consumers' Group ("MECG") filed its Complaint against Great Plains Energy Incorporated ("GPE"). On November 22, 2016, MECG filed its First Amended Complaint. On December 28, 2016, MECG filed its Second Amended Complaint.

Section 386.390.1 provides that the Commission may hear complaints related to any violation "of any rule or order or decision of the commission."

As contained in its Second Amended Complaint, MECG alleges that GPE violated the terms of the Commission's *Order Approving Stipulation and Agreement and Closing File* in Case No. EM-2001-464 ("Reorganization Order"). That Reorganization Order, authorized KCPL to reorganize into a holding company whereby KCPL would become a wholly-owned subsidiary of GPE. Specifically, MECG alleges, in two counts, that GPE violated the terms of the Reorganization Order by failing to seek Commission approval for its announced acquisition of Westar Energy, Inc.

THE PARTIES

MECG is an incorporated entity created for the purpose of representing large commercial and industrial customers before the Public Service Commission and in the General Assembly.

GPE is a Missouri corporation and the publicly traded holding company. GPE is the sole shareholder of the stock of KCPL and KCP&L Greater Missouri Operations Company ("GMO"), both regulated public utilities in Missouri. GPE was established on

February 26, 2001. GPE's business address is 1200 Main Street, Kansas City, Missouri 64105.

Consumers Council of Missouri ("CCM") is a non-governmental, nonpartisan, nonprofit corporation that is dedicated to educating and empowering consumers statewide and to advocating for their interests. On October 23, 2016, filed its Application to Intervene in this matter. On November 9, 2016, the Commission issued its order granting CCM's intervention.

The Office of the Public Counsel ("OPC") is a state agency, created pursuant to Section 386.700, to represent and protect the interests of the public in any proceeding before or appeal from the Public Service Commission.

The Staff of the Public Service Commission consists of various professionals including attorneys, economists, accountants and engineers. The Staff is charged with providing an objective position on matters pending before the Commission.

PROCEDURAL STATUS

On October 11, 2016, the MECG filed its Complaint against GPE. On November 22, 2016, MECG filed its First Amended Complaint. On December 28, 2016, MECG filed its Second Amended Complaint.

On October 31, 2016, GPE filed its Answer to MECG's original Complaint as well as its Motion to Dismiss and Suggestions in Support. On December 2, 2016, GPE responded to the First Amended Complaint and on January 10, 2017, GPE responded to MECG's Second Amended Complaint.

On December 12, 2016, MECG filed its Response to GPE's Motion to Dismiss. On December 21, 2016, the Commission held an oral argument for purposes of

considering GPE's Motion to Dismiss. On January 4, 2017, the Commission issued its Order Denying Motion to Dismiss and Scheduling Evidentiary Hearing. That order denied GPE's Motion to Dismiss and scheduled an evidentiary hearing in this matter for February 1, 2017.

Prior to that evidentiary hearing, the parties filed their Joint Stipulation of Facts and List of Issues, Request to Take Official Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment. On January 24, 2017, the Commission cancelled the February 1, 2017 evidentiary hearing. On January 25, 2017, the Commission issued its Order Admitting Exhibits and Setting Briefing Schedule.

On January 31, 2017, MECG, GPE and Staff filed Initial Briefs. On February 6, 2017, MECG, GPE and Staff filed Reply Briefs.

THE REORGANIZATION ORDER

On February 26, 2001, KCPL filed for Commission approval to reorganize itself into a holding company structure. Under the plan, KCPL would become a wholly-owned subsidiary of Great Plains Energy. On July 9, 2001, the parties executed their First Amended Stipulation and Agreement. Relevant to the immediate proceeding, that Agreement contained the following stipulation:

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has request prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.¹

¹ Exhibit 1. *First Amended Stipulation and Agreement*, Case No. EM-2001-464, at page 13; Section 7. Hereinafter referred to as "Reorganization Condition".

On July 5 and 27, 2001, the Commission held an on-the-record presentation to consider the Stipulation and Agreement. On July 31, 2001, the Commission issued its Order Approving Stipulation and Agreement and Closing File. Pursuant to the authority provided by Section 393.250.3, the Commission's Order adopted the conditions contained in the First Amended Stipulation and Agreement.

IT IS THEREFORE ORDERED:

(3) That the First Amended Stipulation and Agreement, filed on July 9, 2001, is deemed to be unanimous. Further, the Commission finds the First Amended Stipulation and Agreement to be reasonable and approves the same. Kansas City Power & Light Company, Great Plains Energy, Inc., and Great Plains Power, Inc., are directed to comply with its provisions.

(4) That Kansas City Power & Light Company is authorized to reorganize as described in its application referred to in Ordered Paragraph 2, above, subject to the conditions contained in the First Amended Stipulation and Agreement referred to in Ordered Paragraph 3.²

COUNT ONE: FINDINGS OF FACT / CONCLUSIONS OF LAW

In Count One of its Second Amended Complaint, MECG alleges that Westar Generating, Inc. is a public utility within the meaning of the Reorganization Condition. MECG alleges that Westar Generating, Inc. is a corporation "owning, operating, controlling or managing any electric plant." Specifically, MECG points out that Westar Generating, Inc. owns 40% of the State Line Combined Cycle Plant in Joplin, Missouri. As a result of the fact that it owns, operates, controls or manages the State Line Combined Cycle Plant, MECG alleges that Westar Generating, Inc. is an electrical corporation within the definition of Section 386.020(15) and therefore, a public utility within the definition of Section 386.020(42).

² Exhibit 1, page 13.

MECG then alleges that Westar Energy, Inc. is an affiliate of Westar Generating, Inc., a public utility. Specifically, since Westar Energy, Inc. has a controlling interest in Westar Generating, Inc., a public utility, any acquisition of Westar Energy by GPE would fall within the scope of the Reorganization Condition. As such, GPE must receive Commission approval prior to that acquisition.

The parties have stipulated that GPE has entered into an Agreement and Plan of Merger under which GPE will ultimately acquire all of the capital stock of Westar Energy, Inc.³ Furthermore, the parties have stipulated that GPE has not sought Commission approval to acquire Westar Energy.⁴

Given these stipulated facts, the only issue relevant to Count One is whether GPE is acquiring or merging with a public utility or the affiliate of a public utility. Relevant to the decision on this issue, the parties have stipulated to other facts:

Westar Energy owns 100% of the stock of Westar Generating, Inc.⁵

Westar Generating owns an undivided 40% share of the State Line Combined Cycle Generating Facility located within the State of Missouri near Joplin.⁶

Westar Generating holds a Certificate of Convenience and Necessity granted by this Commission in Case Nos. EM-2000-145 and EA-2000-153.⁷

The Commission finds that Westar Generating, Inc. is a public utility within the scope of the Reorganization Condition. As the parties have stipulated, Westar Generating owns a 40% share of the State Line Combined Cycle Generating Facility. Given this, the Commission concludes that the State Line Combined Cycle Generating Facility is

³ See Stipulated Fact #1 (*Joint Stipulation of Facts and List of Issues, Request to Take Official Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment*).

⁴ See, Stipulated Fact #10.

⁵ See, Stipulated Fact #4.

⁶ See, Stipulated Fact #5.

⁷ See, Stipulated Facts #6 and 7.

“electrical plant” within the definition set forth at Section 386.020(14). Given this, the Commission concludes that Westar Generating, Inc. is an “electrical corporation” within the definition set forth at Section 386.020(15). Furthermore, the Commission concludes that Westar Generating, Inc. is a “public utility” within the definition contained at Section 386.020(42).

GPE argues that Westar Generating, Inc. is not a public utility by virtue of the fact that Westar Generating does not sell electricity to or provide any service to a member of the public in Missouri.⁸ GPE directs the Commission’s attention to Missouri Supreme Court’s decision in *State ex rel. M.O. Danciger & Co. v. Public Service Commission*.⁹ In that case, the Court held that an electrical corporation is not subject to the Commission’s regulation unless it is offering electricity “for a public use, and therefore be coupled with a public interest.”¹⁰

GPE fails to recognize that Danciger decision is not on point. Certainly, Danciger would indicate that Westar Generating is not subject to the Commission’s regulation. MECG’s Complaint, however, does not allege that Westar Generating is subject to the Commission’s jurisdiction. Rather, MECG alleges that Westar Generating is a “public utility” within the scope of the Reorganization Condition.

The Commission has primary jurisdiction to interpret the meaning of its order adopting the Reorganization Condition and to determine whether GPE has complied with that order. “Missouri has long recognized the doctrine of primary jurisdiction. Under this doctrine, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision.”

⁸ See, Stipulated Fact #8.

⁹ 205 S.W. 36 (Mo. 1918).

¹⁰ *Id.* at page 40.

MCI Metro Access Transmission Services v. City of St. Louis, 941 S.W.2d 634 (Mo.App. 1997) (citing to *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo.banc 1991)). See also, *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo.banc 1940).

The Commission reaches its decision that Westar Generating, Inc. is a “public utility” within the scope of the Reorganization Condition for several reasons. First, Westar Generating clearly fits the definition of a public utility contained at Section 386.020(42). Second, at the on-the-record presentation at which the Commission considered the Stipulation that provided for the Reorganization Condition, a senior representative for KCPL indicated that “[t]he Commission has every bit as much authority under this restructure as it does today.”¹¹ It is unquestioned that, by virtue of its authority to approve public utility financings, the Commission would have had jurisdiction over the acquisition of Westar Energy prior to the reorganization. Given that KCPL has assured the Commission that it would have “every bit as much authority under this restructure as it does today” and that the Commission relied upon such assurances, the Commission interprets the phrase “public utility” to include Westar Generating, Inc.

Having found that Westar Generating, Inc. is a public utility within the scope of the Reorganization Condition, and by virtue of the stipulation that Westar Energy owns 100% of the stock of Westar Generating, Inc., the Commission finds that Westar Energy is an affiliate having controlling interest in a public utility.¹² Specifically, the Commission has previously defined “affiliate” as “any person who, directly or indirectly, controls or is controlled by or is under common control with a public utility.”¹³ Recognizing that Westar Energy controls Westar Generating, a public utility, any

¹¹ Exhibit 3, page 75.

¹² See, Stipulated Fact #4.

¹³ 4 CSR 240-14.010(6)(A)

acquisition of Westar Energy would fall within the scope of the Reorganization Condition.

Given this, GPE's failure to seek Commission approval for its acquisition of Westar Energy, and given its announced belief that this transaction is not subject to the Commission's jurisdiction, the Commission finds that GPE has violated the Commission's *Order Approving Stipulation and Agreement and Closing File* in Case No. EM-2001-464.

COUNT TWO: FINDINGS OF FACT / CONCLUSIONS OF LAW

In Count Two of its Second Amended Complaint, MECG alleges that Westar Energy, Inc. is a public utility within the meaning of that phrase in the Reorganization Condition. As such, MECG alleges that any acquisition of Westar Energy by GPE would fall within the scope of the Reorganization Condition. As such, GPE must receive Commission approval prior to that acquisition. In contrast, GPE claims that the Reorganization Condition was only intended to extend to GPE's acquisition of Missouri public utilities. Recognizing that Westar Energy is not a Missouri public utility and does not serve any customers in Missouri,¹⁴ GPE asserts that its acquisition of Westar Energy does not fall within the scope of the Reorganization Condition. The Commission disagrees.

As indicated, *supra*, the Commission has primary jurisdiction to interpret the meaning of its order adopting the Reorganization Condition and to determine whether GPE has complied with that order. In finding that Westar Energy falls within the scope of "public utility" as used in the Reorganization Condition, the Commission is guided by several points.

¹⁴ See, Stipulated Facts #2 and #3.

First, during the on-the-record presentations in which the Commission was considering the KCPL Reorganization, GPE witnesses repeatedly told the Commission that the Reorganization would not reduce the Commission's jurisdiction. For instance, the KCPL's Senior Director of Regulatory Affairs and Risk Management stated: "The other comment I wanted to make -- and I'll be glad to answer any other questions you have -- absolutely nothing changes from the Commission's standpoint on this transaction. *The Commission has every bit as much authority under this restructure as it does today.*"¹⁵ In addition, KCPL's Chief Executive Officer pointed out:

Certainly the holding company structure adds, if anything, another layer of regulation that we must submit to, but we are willing to undergo that for the -- for the ability to run our businesses along the business lines that we've outlined in our application. We feel that this structure respects the responsibilities of the Commission to our ratepayers as well as respects the responsibilities of our management to our investors.¹⁶

While KCPL was eager to tell the Commission that it would have "every bit as much authority under this restructure as it does today" and that it "respect[ed] the responsibilities of the Commission to our ratepayers", its current interpretation fails to provide for this jurisdiction. As indicated, the Commission's has authority to approve public utility financings under Section 393.180. Given this, the Commission would have had authority to approve the financing underlying the acquisition of Westar Energy prior to the reorganization. In order to provide it "as much authority under this restructure", the Commission finds that the term "public utility" needs to be interpreted so as to provide it with the ability to approve GPE's acquisition of Westar Energy.

Second, contrary to GPE's current interpretation, it would be meaningless to have included a Reorganization Condition that only extended Commission authority to the

¹⁵ Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 75 (emphasis added).

¹⁶ *Id.* at pages 15 and 37.

approval of acquisitions involving Missouri public utilities. Specifically, Section 393.190 already requires that any Missouri utility seek Commission approval prior to selling or merging the company.

No. . . electrical corporation. . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public. . . without having first secured from the commission an order authorizing it so to do.

Recognizing that any Missouri public utility would have to seek Commission approval before selling the utility, it would be redundant and unnecessary to require GPE, as the purchasing utility to seek Commission approval as well. As Staff points out, “[a] construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense.”¹⁷ The only way to give meaning to such a provision is to interpret it to require GPE to seek Commission approval for its purchase of any public utility, not simply Missouri public utilities.

Third, it is clear that the Reorganization Condition is designed to allow the Commission to protect ratepayers from harmful acquisitions undertaken by GPE at the holding company level. In fact, during the on-the-record presentation in the reorganization case, GPE admitted that the settlement “respects the responsibilities of the Commission to our ratepayers.”¹⁸

Given the consumer protection nature of the Reorganization Condition, it would be counter-productive to limit that condition to only acquisitions of Missouri public utilities. After all, harm to ratepayers comes not only from the acquisition of Missouri

¹⁷ *Dunn Industries Group, Inc. v. City of Sugar Creek*, 112 S.W.2d 421, 428 (Mo. banc 2003).

¹⁸ Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 37.

public utilities; harm can also come from the acquisition of non-Missouri public utilities. In light of the consumer protection nature of the Reorganization Condition, that condition should be interpreted in a manner that protects consumers from acquisitions with non-Missouri as well as Missouri public utilities.

Fourth, had GPE truly intended for the Reorganization Condition to apply only to its acquisition of only Missouri public utilities, it would have been simple for GPE to have limited the condition in such a manner. Specifically, all GPE would have had to do was to include the word “Missouri” in front of public utilities. Given this simple clarification, GPE’s failure to include such a description was likely a result of the fact that none of the parties intended the condition to be so limited. On the other hand, recognizing that the other parties intended for the condition to have a broad meaning, they included the phrase “public utilities” in a broad manner. Again, recognizing GPE’s failure to object to the use of such a broad term, when a clarification was readily at hand, dictates that this customer protection condition should be interpreted in a manner that preserves the maximum jurisdiction for the Commission to protect customers.

For all these reasons, the Commission finds that Westar Energy is a public utility within the scope of the Reorganization Condition. As such, GPE’s failure to seek Commission approval for its acquisition of Westar Energy, and given its announced belief that this transaction is not subject to the Commission’s jurisdiction, the Commission finds that GPE has violated the Commission’s *Order Approving Stipulation and Agreement and Closing File* in Case No. EM-2001-464.

THE COMMISSION ORDERS THAT:

1. Great Plains Energy, Inc. shall file an application seeking Commission approval for its acquisition of Westar Energy, Inc.

Respectfully submitted,

WOODSMALL LAW OFFICE



David L. Woodsmall
Woodsmall Law Office
308 E. High Street, Suite 204
Jefferson City, MO 65101
Phone: 573-636-6006
Fax: 573-636-6007
david.woodsmall@woodsmalllaw.com

ATTORNEY FOR MIDWEST ENERGY
CONSUMERS GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: February 6, 2017