BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	)	Case No. EM-2007-0374

POST-HEARING BRIEF OF INDUSTRIAL INTERVENORS

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad Mo. Bar #23966
David L. Woodsmall Mo. Bar #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR INDUSTRIAL INTERVENORS

June 2, 2008

70516.2

NP

TABLE OF CONTENTS

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	)))))))	**EM-2007-0374**

POST-HEARING BRIEF OF INDUSTRIAL INTERVENORS

COME NOW the SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION ("SIEUA"), AG PROCESSING INC A COOPERATIVE ("AGP") and PRAXAIR, INC ("Praxair") (collectively "Industrial Intervenors") and submit their Post-Hearing Brief in this matter.

I. PROCEDURAL BACKGROUND.

On April 4, 2007, Great Plains Energy Incorporated ("GPE"), Kansas City Power & Light Company ("KCPL"), and Aquila, Inc. ("Aquila") filed a Joint Application for approval of a merger of Aquila with a subsidiary of GPE and for other related relief. As proposed, GPE would acquire Aquila's Missouri electric and steam operations, as well as its merchant services operations (primarily the 340 MW Crossroads generating facility in Mississippi and certain natural gas contracts).

The matter was originally set for hearing in early December, 2007. However, after roughly three days of hearing,

during which revelations regarding pre-filing contacts with at least one Commissioner were revealed, a Commissioner announced his own recusal from the case, and the Joint Applicants sought what became an extended recess in the procedural schedule.

In late February, 2008, the Joint Applicants made another filing modifying their proposal and purportedly removing some of its more egregious requests. This "Revised Proposal" was presented at the resumed hearing in April, 2008.

II. THE INDUSTRIAL INTERVENORS.

A. Praxair.

Praxair is a large industrial electric customer of KCPL. Praxair operates a major air liquefaction and constituent gas separation facility in Kansas City, Missouri. Praxair is the successor in interest to the Linde Division of Union Carbide Corporation.

B. Sedalia Industrial Energy Users' Association.

The Sedalia Industrial Energy Users' Association ("SIEUA") is an unincorporated voluntary association consisting of large commercial and industrial users of natural gas and electricity in the Sedalia, Missouri and in the surrounding area. SIEUA was formed for the purpose of economical representation of its members' interests through intervention and other activities in regulatory and other appropriate proceedings. SIEUA members are customers of Aquila.

Current members of SIEUA are: **Pittsburgh Corning Corporation**, a manufacturer of cellular glass insulation at its manufacturing facility in Sedalia, Missouri where roughly 160 workers are employed; **Waterloo Industries**, a manufacturer of tool storage equipment and employer of approximately 650 workers at its manufacturing facility in Sedalia, Missouri; **Hayes-Lemmerz International** employs roughly 800 workers at its Sedalia, Missouri facility where it manufactures automobile wheels; **EnerSys Inc.** employs approximately 500 persons in its industrial battery manufacturing facility in nearby Warrensburg, Missouri; **Alcan Cable Co.** manufactures aluminum electrical conductors and employs 250 persons in its Sedalia, Missouri operation; **Gardner Denver Corporation** employs 320 workers at its Sedalia works where it makes industrial compressors and blowers; **American Compressed Steel Corporation** employs 35 workers in scrap metal recycling at its facility near Sedalia, Missouri; and **Stahl Specialty Company**, a major United States manufacturer of specialty and precision aluminum castings at facilities located in Warrensburg and Kingsville, Missouri, where approximately 1,100 workers are employed. Collectively, these SIEUA members provide gainful employment for approximately 3,815 workers in central Missouri.

C. Ag Processing Inc A Cooperative.

Ag Processing ("AGP") is an agricultural cooperative and is a large manufacturer and processor of soybean meal, soy-related food products, and other grain products throughout the central and upper Midwest, including the State of Missouri. AGP

is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States and the third-largest commercial feed manufacturer in North America.

AGP operates a major processing facility in St. Joseph, Missouri where it is a major industrial electrical and steam customer of Aquila. AGP is among Aquila's largest electric and steam customers in the L&P service territory.

III. POSITIONS OF THE NON-UTILITY PARTIES.

The non-utility parties to this proceeding have not warmly received either the original or the Revised Proposal. In addition to these Intervenors, the Commission Staff has also been opposed to both versions of the package, noting that both result in significant detriment to the public and to ratepayers of the two utilities.

A. Staff's Position.

The Commission's own Staff asserted that the proposed acquisition/merger will cause a net detriment to the public interest because the cost of service on which rates for the Missouri ratepayers of Aquila and KCPL are to be established will be higher as a direct result of the proposed acquisition/merger than otherwise. Among other points, Staff argues that GPE/KCPL has committed to pay too much and is seeking to recover what it is overpaying from Missouri ratepayers.

In brief, Staff has concluded after its analysis of both proposals that the transactions proposed are detrimental to the public interest in that the Commission's approval of the proposed transactions will result in Aquila's Missouri jurisdictional retail ratepayers paying higher rates and will result in KCPL's Missouri jurisdictional retail ratepayers paying higher rates, with no offsetting ratepayer benefits, in the form of

(1) Higher rates that will be required due to the weakened financial condition of GPE and KCPL due to absorption of ailing Aquila;

(2) Weakening of KCPL's financial condition due to affiliation with weakened Aquila during period of significant construction expenditures; and

(3) Aquila's ratepayers will pay higher rates as GPE shifts costs to them that are now being absorbed by Aquila's shareholders.

B. Industrial Intervenors Position.

Industrial Intervenors provided the testimony of Maurice E. Brubaker. Mr. Brubaker has been a consultant in the field of public utilities for over 30 years and has testified in numerous merger cases across the United States. The result of his extensive analysis were presented to the Commission in Exhibit 300. Mr. Brubaker testified that the merger and proposed plan would be highly detrimental to customers.

> Given that Applicants' own numbers show that there would be a detriment to customers from their proposals, the only decision the Com-

> mission can make that is consistent with the testimony and materials provided by the Applicants is to reject the proposed regulatory plan and merger.[1/]

Mr. Brubaker's initial analysis noted that even assuming that 100% of the claimed synergy savings were realized, the merger still represented a detriment. In addition, the Joint Applicants did not propose to track or monitor their achievement of claimed savings thereby placing a high degree of risk on customers regarding these claims of savings. "In contrast," testified Brubaker,

> Applicants have structured the transaction to assure their recovery of transition costs and transaction costs because they are identifiable, hard dollar costs that will be capitalized and added to customer rates over the five-year amortization period. Further, Applicants are certain to benefit from merger savings because 50% of "estimated" savings will be added back to actual costs in setting customer rates. Customers, on the other hand, are not certain of receiving any benefits.[2/]

In effect, the proposals are "front-end-loaded" to attempt to provide recoupment for the utilities, but are very speculative regarding the capture of ratepayer benefits. This has not changed with Joint Applicants' Revised Proposal.

[1/] Ex. 300, pp. 2-3.

[2/] Ex. 300, p. 3.

C. Office of the Public Counsel.

The Public Counsel ("OPC") provided the testimony of James E. Dittmer. Mr. Dittmer, a former PSC Staff auditor, has been employed in the field of regulatory analysis for over 28 years and has testified before numerous commissions an regulatory agencies. He testified that the proposal and accompanying plan would result in a detriment to ratepayers and should be rejected.[3/] Among the defects that he identified were the proposed recovery and handling of transaction and transition costs related to the merger. Significantly, Mr. Dittmer testified:

> Without the guarantee of rate recovery of all incremental costs associated with the transaction, GPE and KCPL will be exposed to downgrades in their credit ratings which would also result in a detriment to ratepayers. It does not appear possible that adequate conditions could be imposed so as to protect ratepayers without creating a risk that GPE and KCPL's securities will be downgraded.[4/]

Mr. Dittmer summarized his position and testimony as follows:

> In short, and in sum, using the Company's own cost and synergy savings estimates without adjustment, and assuming synergy savings are allocated between ratepayers and shareholders as proposed by the joint applicants, the merger along with attendant rate plan is very detrimental to ratepayers for the first five years following consummation of transaction.[5/]

[3/] Ex. 200, p. 4.

[4/] Ex. 200, p. 5.

[5/] Ex. 200, p. 12.

IV. THE PROPOSED MERGER AND REGULATORY PLAN HAVE BEEN DEMONSTRATED TO HAVE DETRIMENTAL EFFECTS ON THE RATEPAYERS AND, AS SUCH, THEY CANNOT, AND SHOULD NOT, BE APPROVED.

A. Legal Standard.

1. The Legal Standard Under Section 393.190 -- The Absence of Detriment.

The legal standard that has been used by this Commission is stated in terms of a required showing[6/] that the proposed transaction is not detrimental. The requirement is drawn from Section 393.190.2 and 4 CSR 240-2.060(9) and has been consistently enforced by the Commission.[7/] Missouri courts have

---

[6/] In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant. *Id.*, at 79-80.

[7/] *See, e.g., In re American Long Lines, Inc. and Teligent, Inc.*, Case No. TM-2000-770, 2000 Mo. PSC LEXIS 958 (June 28, 2000); *In re Southern Union Company*, Case No. GF-2000-504, 2000 Mo. PSC LEXIS 530 (March 28, 2000); *In re Missouri-American Water Company and United Water Missouri, Inc.*, Case No. WM-2000-222, 2000 Mo. PSC LEXIS 304 (March 16, 2000).

confirmed this standard.[8] Joint Applicants submitted their initiating filings under this regulatory structure.[9]

In past merger cases, through the imposition of conditions, efforts have been made to assure that ratepayers were insulated from any detrimental effects. Commonly, through a "stay-out" or moratorium condition (that the utility would be required to accept as a condition of moving forward with the merger), the risk of non-recovery of the often boundless claims of synergies would be the sole responsibility of the utility. Whether or not the acquiring or combined utility derived enough

---

[8] *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. en banc 1934). Significantly, at page 460, the Court made reference to a Maryland statute as follows:

> The State of Maryland has an identical statute with ours and the Supreme Court of that State in the case of Electrical Public Utilities Co. v. West, 140 Atl. 840, l. c. 844, the court said:
>
> > To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'

Id. at 400.

[9] The Joint Application of GPE, KCPL and Aquila states in its opening paragraph that it is being filed pursuant to §§ 393.180, 393.190, 393.200, 393.210 and 393.220, RSMo 2000, as amended,1 and 4 CSR 240-2.060, 240- 3.020, 240-3.110, 240-3.115, 240-3.120, 3.125, and 240-20.015.

savings to recover transaction and transition costs during the moratorium, it was on their ticket. At the end of the moratorium, further rate cases would be evaluated under traditional cost of service approaches of prudence and customer benefits. That approach ***will not work here*** because of the established set of rate cases for KCPL in connection with its Iatan 2 construction program and the associated regulatory plan.

2. The Commission Must Consider All Issues to Make a Decision on Detriment.

The Commission should consider all possible detriments in evaluating whether to approve the transaction. It may not lawfully shuffle some detriments aside as "something we can protect against later" and skew the analysis in favor of approval. Moreover, arguing that detriment can be prevented by future protective action from the Commission also fails the test.

In Case No. EM-2002-292 concerning the acquisition by Aquila of St. Joseph Light & Power Co., detriment to the steam users and to other ratepayers through UtiliCorp's proposed recoupment of an acquisition premium was dismissed by the Commission by the assertion that the Commission could or would protect ratepayers from adverse future consequences of the merger. Therefore, said the Commission, those potentials did not have to be considered as "detriments." Its decision to approve the merger was appealed and, by process not here relevant, arrived at the Missouri Supreme Court.

Our Supreme Court, in *Ag Processing Inc v. Public Service Commission ("AGP")*[10] reversed the circuit court -- and the Commission -- noting that the Commission

> erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.[11]

The Court ruled that the Commission erred because it had "punted" this issue off to some unknown later case asserting that it could thereby prevent any detriment from occurring by disallowing recovery in that later case.

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger.[12]

Cases directly interpreting Section 393.190 are few and deserve compliance rather than evasive parsing. The Commission

---

[10] 120 S.W.3d 732 (Mo. *en banc* 2003).

[11] *Id.* at 736.

[12] *Id.*

enjoys no presumption of its resolution of legal issues.[13] This direction appears clear and should guide the Commission in this case.

3. Joint Applicants Have Not Fully Disclaimed Their Intentions to Seek an "Additional Amortization" Mechanism For Aquila.

In addition, the Commission should appreciate that, while Joint Applicants have sought to disclaim their earlier effort to obtain additional amortization for Aquila, they have been careful to append the words "in this case" to their statements. For example, note the Supplemental Direct [February] testimony of Mr. Bassham to this effect:

> Q: Are the Joint Applicants requesting that the Commission approve a regulatory or "additional" amortization provision for Aquila in this case?
>
> A: No. The Joint Applicants continue to believe that an amortization provision for Aquila, similar to the provision contained in KCP&L's 2005 Stipulation and Agreement approved by the Commission, is appropriate and helpful in the protection of customers. However, the Joint Applicants withdraw their request for consideration of an additional amortization provision and instead intend to initiate discussions, post-close of the transaction, with interested parties to develop a regulatory plan for Aquila that might include an amortization provision as part of that regulatory plan.[14]

Indeed, evidence was accepted demonstrating GPE/KCPL's intent to seek such special amortization treatment for Aquila in the future.[15] That issue is, thus, before the Commission and the detriment to ratepayers from that approach cannot be ignored by the Commission in evaluating the detriment that would come

---

[13] *Love 1979 Partners v. Public Service Com.*, 715 S.W.2d 482, 486 (Mo. 1986).

[14] Bassham, Ex. 37HC, p. 5.

[15] *See, e.g.*, Ex. 123.

from the transaction. As stated by the Commission in *Union Electric*,[16] *AGP* is thought to require

> the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public.[17]

4. What Is A Detriment?

Section 393.190.1 does not provide an explicit guide, but Commission rules do. An application for such authority must state "[t]he reason the proposed sale of the assets is not detrimental to the public interest."[18] This standard was devised by the Missouri Supreme Court.[19]

---

[16] *In the Matter of Union Electric Co., d/b/a AmerenUE,* Case No. EO-2004-0108 (Report & Order on Rehearing), 13 Mo.P.S.C.3d 266 (2005) ("Union Electric").

[17] *Id.,* at p. 78.

[18] 4 CSR 240-2.060(7)(D).

[19] *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo. *en banc* 1934) where the Court said:

> The owners of this stock [sought to be acquired] should have something to say as to whether they can sell it or not; [t]o deny them that right would be to deny them an incident important to ownership of property . . . . A property owner should be allowed to sell his property unless it would be detrimental to the public.

a. Commission Considerations.

Reviewing courts have confirmed that Section 393.190's purpose is to ensure the continuation of adequate service to the public served by the utility.[20] Consistent with that end, the Commission has considered: the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.[21] Obviously, the ability of GPE/KCPL to absorb the proposed transaction is critical here. Due to GPE/KCPL's present construction-finance-bound circumstances, they have, instead, chosen to structure the proposed transaction to impose a significant detriment upon the ratepaying public -- resulting in the effect previously noted as "front-end-loading" of their proposal.

b. Rate Increases Are Detriments.

The term "detriment" gets tossed around somewhat, but what does it mean? Certainly, a rate increase that otherwise would not have occurred is detriment. Having ratepayers pay more than would otherwise be the case is detriment. A "bootstrapped" rate increase is detriment and even calls into question the

---

[20] *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

[21] *See e.g., In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252, Report and Order, 3 Mo. P.S.C.3rd 216, 220 (October 12, 1994).

Commission's authority to order such in a merger case.[22] No less certainly, approving a merger proposal that sets in motion a chain of events that results in an otherwise unnecessary rate increase is detriment.[23] A detriment to the public interest obviously includes a risk of harm to ratepayers.[24]

c. Threats to the Continued Provision of Safe and Adequate Service Are Detriments.

But a certain and resultant rate increase is not the only component of detriment that should result in rejection of a merger proposal. Quality and adequacy of service also must be considered. Leaving a substantial number of customers in the "hands of a failed utility -- a utility unwilling to provide adequate and safe service to [them]" is detriment.[25] And in reviewing that same Commission decision the court noted:

> The potential for a dramatic rate increase for customers absorbed by MAWC and the stranding of the Cedar Glen customers with a

---

[22] *Envtl. Utils., LLC v. Public Serv. Comm'n.*, 219 S.W.2d 256, 260 (Mo. Ct. App, W.D. 2007) (Failure to obtain a "built in" rate increase was characterized as a "stopping point" for an acquiring water utility.)

[23] *Id.*

[24] *In the Matter of Aquila, Inc.*, Case No. EF-2003-0465 (Report & Order, issued Feb. 24, 2004) pp. 6-7.

[25] *Supra,* note 22, at 261 where the court said:

> . . . as proposed by Williams and MAWC, would leave a substantial number of customers in the hands of a failed utility -- a utility unable or unwilling to provide adequate and safe service to the Cedar Glen customers.

distressed utility led the Commission to conclude the Application was detrimental to the public interest.[26/]

d. Application of These Considerations to This Case Should Result in Rejection of the Proposal.

Here the Commission confronts the proposed acquisition of a below-investment-grade utility [Aquila] by a utility holding company [Great Plains] upon whose credit a major operating utility that is in the midst of a major construction program [KCPL] relies. KCPL has made recourse already to two rate-case infusions of "additional amortization" to maintain its credit rating. While there [obviously] are many arguments that have been made to justify this acquisition, it might well be the "right" utility but the "wrong" time. Despite Joint Applicants' herculean efforts to contend otherwise, KCPL/GPE are already financially strained to do no more than continue and complete the Iatan 2 plant construction along with the environmental upgrades to Iatan 1 and LaCygne. Adding the acquisition of a below-investment-grade utility to that burden -- the effects of which will not be covered by the "safety net" provisions of KCPL's regulatory plan, results in leaving dependent customers -- hundreds of thousands of them in this case -- in the hands of a

[26/] [26/] *Id.* at 263.

distressed utility. In the Commission's own words, "[s]uch a result cannot be in the public interest."[27/]

In rationalizing its reversal in *AGP*, the Commission explained in *Union Electric*[28/] that *AGP* did not announce a new standard for asset transfers. Instead the Court restated and clarified the existing "not detrimental to the public" standard and its analytical use. The Commission concluded that what is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. *AGP* requires consideration of all possible benefits and detriments and a determination whether the proposed transaction is likely to be a net benefit or a net detriment to the public. The Commission stated that "[a]pproval should be based upon a finding of no net detriment." In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission noted in *Union Electric* that its duty is to ensure that the utility continues to provide safe and adequate service to its customers at just and reasonable rates. The Commission concluded:

> ***A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable.*** The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is

---

[27/] *Id.* at 263 quoting from the Commission's order.

[28/] *Supra,* note 16.

> not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.[29/]

e. Detriment under Section 393.190 Is A Broad Concept.

Detriment is thus a broader concept than just a future predictable rate increase, although that is certainly one component. Other components require the Commission to weigh the impact on quality and adequacy of service. Indeed, approving a transaction that results in a financially viable utility being stressed to the point that it begins the inexorable downward spiral that requires rate increases and extraordinary relief to repair -- all at ratepayer cost -- certainly "cannot be in the public interest."

As was said in the opening days of the hearing, Aquila unquestionably has financial problems, but one can pay too much to "fix" them. No matter how eager the Commission is to make the Aquila problem disappear, the Commission should not be decoyed into approving a package where GPE agreed to pay too much and now seeks to cover its error on the backs of KCPL and Aquila ratepayers.

[29/] *Id.*, at 79 (emphasis added).

B. The Scope of the Application.

1. The Joint Applicants Have Not Sought Authorization to Merge, Combine or Integrate The Operations of KCPL and Aquila.

This proceeding was commenced by and is limited by the Application submitted by Great Plains Energy ("GPE") and Aquila Networks ("Aquila"). Their Application plainly states that the only merger authority sought is the acquisition of Aquila by GPE through the mechanism of a merger with a wholly-owned subsidiary of GPE. No request has been submitted to authorize a merger, combination, integration, either direct or indirect, between Kansas City Power & Light Company ("KCPL") and Aquila. As a result, there are no "synergies" to be derived from this merger that have relevance for the Commission's consideration.

The controlling statute, in relevant part, provides:

> 393.190. 1. 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, ***nor by any means, direct or indirect***, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same ***shall be void***. (Emphasis added)

It is not seriously questioned or disputed that both KCPL and Aquila are "electrical corporations" and are within the

scope of this statute. Accordingly, no action, business combination, operational integration, or other indirect or direct means of combination of KCPL and Aquila may be implemented without authorization from this Commission. That authorization has not been requested by the Joint Applicants.

2. The Joint Applicants Did Not Seek Authority to Merge the Two Operating Utilities Because They Wanted To Avoid FERC Authority and Market Power Review.

Throughout this case, the failure of Joint Applicants to request authorization for the full combination of these utilities that they state that they want to implement has been puzzling. It appears to be a disingenuous effort to attempt a piecemeal merger, avoiding triggering Federal Energy Regulatory Commission (FERC) market power review by applying for joint dispatch authority, while at the same time trying to do everything but that before the Missouri Commission. This is "merger by accretion" and is as though someone at GPE strategized that "if we do this slowly and in bites, no one will notice." Well, they did "notice."

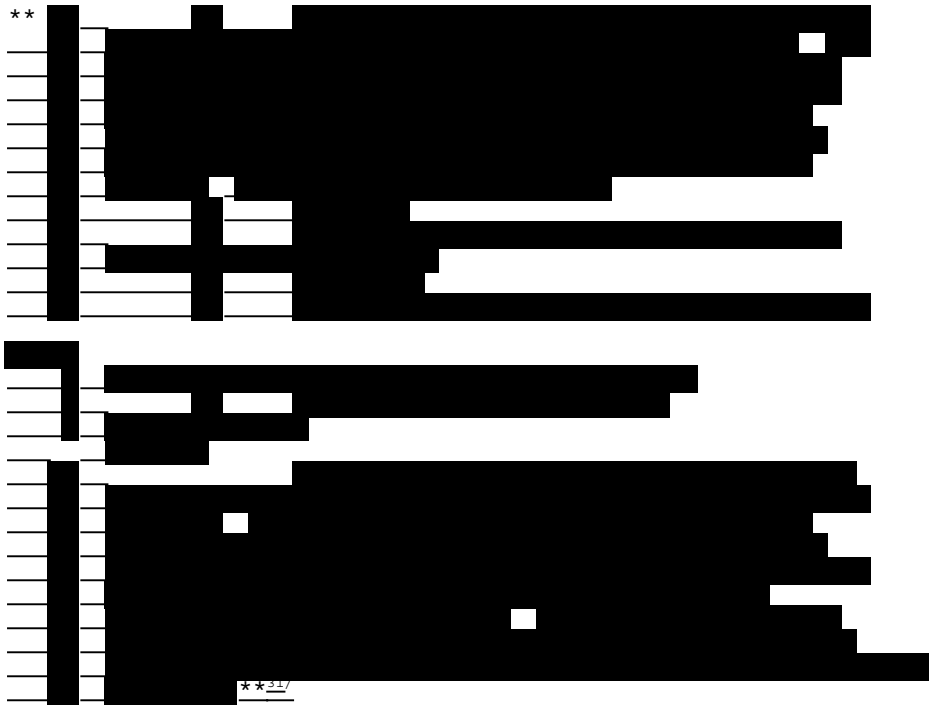
Little by little, the strategy was disclosed. Early in the proceeding, Counsel Riggins stated in his opening:

> A third reason for not immediately merging the two was that we assessed, and it turns out it was correct, that the FERC's market power concerns would be lessened if we didn't immediately merge the control areas of the two companies.[30/]

[30/] Tr. 32.

Later, Messrs. Giles and Bassham appeared to variously confirm and undercut this story. Indeed, others appeared to have been confused by the GPE strategy. Referring to Exhibit 124, the

**[redacted]



If there was nothing in the [redacted] that were disclosed to the rating agencies, what conceivably would have spawned their confusion?[32] Yet, in public testimony, Mr. Bassham appeared to disclaim having made any such proposal, anywhere, anytime, to anybody.

> 22 Q. Mr. Bassham, in response to a question
> 23 from Commissioner Murray, I think you indicated that
> 24 there were legal reasons for keeping the legal
> 25 entities separate?
>
> 01324

[31] Bassham, Tr. 1359-60 [in camera transcript]. Emphasis added.

[32] The exclusion of joint dispatch from a merger proposal, simply from the perspective of synergy claims, is odd.

A. There were -- there were legal reasons for us to structure the transaction that way in the beginning, yes.

. . . .

Q. Did you have any market power concerns respecting your application for approval before the FERC for the transaction?

A. Well, we were required to file all that information, and they looked at it. So I mean, concerns in the sense that we had to follow through that process to get approval, we did that and there were no issues.

01325

Q. No issues based ***upon the present proposal that you presented?***

A. ***True.***[33/]

In still other public testimony, Mr. Giles confirmed GPE's cloyness:

A. He lists about four items in his opening statement. The first one was, it was important protection for Kansas City Power & Light based on the numerous significant potential liabilities related to Aquila.

He also indicated that there was an operational issue in that KCPL is in the SPP and Aquila is not. There's some debate about that issue of which my -- whether Aquila will join MISO or SPP and that matter's before the Commission now.

His third item was that ***potential concerns with FERC market power would be lessened if we didn't merge the control areas*** of the two companies. And finally, he listed a series of administrative closing issues that had to do with contracts and various other assignments and finances.

Q. Okay. With respect to the question of a

00253

FERC finding of market power issues, on what was -- what are the advantages to the present structure -- presently proposed structure as opposed to the straightforward merger with respect to market power issues?

A. Well, ***under a merger***, we probably would have had to merge the control areas, and that was the reason why we didn't, or that's the issue with FERC. As it turns out, FERC approved the transaction as we filed it, and frankly, I'm not sure there is a significant concern from FERC about market power issues. To err on the side of caution, we took the approach we did.

Q. Was there some concern that some parties to the regulatory plan would view that, view a straightforward merger as a reason to void the regulatory plan?

A. I believe Mr. Riggins mentioned that, and that also was a subject of debate, whether that would, in fact, occur, and it was a concern as well.[34/]

[33/] Tr. 1324-25 (emphasis added).

[34/] Tr. 252-53 (emphasis added).

Parenthetically, the reference to "under a merger" at Tr. p. 253, l. 5 is particularly intriguing in that Mr. Giles appears to distinguish between this filing and a "merger" which is contrary to his earlier and often-voiced contentions.

And finally, Mr. Giles revealed GPE's strategy in not placing the issue before FERC.

> A third reason was the market power issues. We did not believe we had market power issues if we were to consolidate the two companies, but to be on the safe side and get a rapid FERC approval, we thought it would be better to not.[35/]

What this course of conduct shows is an effort to avoid the inquiry at the FERC level regarding market power that would result if a real "merger" application had been filed there. It is recalled that a much earlier attempted merger between these same two companies (that was ultimately broken up by Western Resources) had difficulties regarding market power.

3. Scope of the Proceeding Is Established By the Joint Applicants' Applications, Not By Consent, and They Can Receive No More than Requested in Their Application.

The scope of this proceeding is necessarily established by the Application and the relief requested therein. Other parties have understandably based their presentations on the scope established by the application. Permitting irrelevant evidence to be used for decisional purposes prejudices them and affects their rights to due process. Through two Motions *in Limine* and through objections throughout, these Intervenors have

---

[35/] Tr. 1487.

made clear that they do not "consent" to the hearing of these issues by the Commission. Joint Applicants cannot rely on a purported "amendment by consent" to modify their Application. Repeatedly, these intervenors have made clear that they do not consent to such trial and have consistently objected through these means to the admission of irrelevant evidence. Equally consistently the Commission has overruled these objections, stating in one instance:

> JUDGE STEARLEY: All right. Thank you. The objection will be overruled. The Commission recognizes this has been sort of an unusual case posture in the way that the proceedings have been suspended. The proposal has changed, and ***the Commission's going to need all available information in its record as to all the changes that have been proposed.*** And so we give the Commissioners an opportunity to ask those witnesses questions, and the parties obviously have the opportunity to cross-examine those witness. So that objection will be overruled.[36/]

However, the time comes to make a decision. The Commission may not lawfully ignore these objections and may not assert that this Application has been amended by "consent," for there is no such consent.

Joint Applicants appear to want to fuzz their words and their terminology is imprecise. At times they appear to argue that this expansion should be permitted because other transactions have "slipped through." This assertion was shown to be without foundation, but regardless, it does not justify a viola-

---

[36/] Tr. 1211-12 (emphasis added). The bench ruling appears somewhat strained in that the initial Motion *in Limine* was filed with respect to the ***original*** proposal, not with respect to the "changes that have been proposed."

tion. Two wrongs don't make a right. It does not work to tell the Highway Patrolman that "officer, I've always driven that fast on this stretch of road." They also attempt to argue that "merger" under the statute doesn't mean "integration" and that "combination" or "consolidation" are not the same as a "merger." These arguments are defeated by the very language the General Assembly selected for Section 393.190. The statute makes clear that NO such business combination "whether direct or indirect" may be implemented without approval and that any such implementation without that approval is ***void***, not voidable. This is strong language. The General Assembly plainly intended to prohibit evasions or "end runs" around the statute. Achieving the result of combined operations by ***any means, direct or indirect***, requires Commission authorization and are void -- not "voidable" -- in the absence of that approval. Joint Applicants' arguments, like Lewis Carroll's Jabberwocky,[37/] are no more than sophomoric efforts to "make words mean what I want them to mean." That may work in nursery tales but it does not work here. The plain language of the statute means what it says and it prohibits Commission approval of this transaction.

[37/] "Twas brillig, and the slithy toves
Did gyre and gimble in the wabe;
All mimsy were the borogoves,
And the mome raths outgrabe."

From Lewis Carroll's *Through the Looking Glass*.

C. A Major Detriment Results From Damage to Great Plains/KCPL Credit-worthiness Such That They Are Unable to Complete Existing Projects.

1. A Statement of the Concern.

Throughout this proceeding, Joint Applicants have made the unsubstantiated claim that this transaction would result in two utilities with investment grade credit ratings. In an effort to support this claim, Joint Applicants solicited opinions from Standard & Poors ("S&P") and Moody's Investors Service ("Moody's"). As part of the evaluation service offered by these credit rating agencies, the Joint Applicants are required to provide certain key assumptions and financial determinants. These assumptions and determinants provided by the Joint Applicants form the underpinnings of the S&P and Moody's credit opinions. As with all opinions, however, the opinion is only as good as the underlying assumptions. In this light, S&P notes:

> This evaluation is both preliminary and confidential. It is preliminary in that it is based on hypothetical information recently presented to us. You understand that Standard & Poor's will not review, modify or surveil this information. Subsequent information or changes to the information previously provided could result in final conclusions that differ from the preliminary proposed conclusions. ***Please note the conclusions provided herein are based on assumptions you and your team have provided to us. To the extent that these assumptions change, the rating implications could also change.***[38/]

[38/] Ex. 125, page 4. (emphasis added). Similarly, Moody's notes that "the ratings determined herein are point in time (continued...)

The on-time and on-budget completion of the Iatan 2 station is not only of concern to customers of KCPL, but also of concern to customers of Aquila and Empire District. AGP and SIEUA are Aquila customers and are potentially impacted by its fuel adjustment clause should the plant be delayed or become far more costly than originally projected. Praxair also has facilities in Empire District's service territory and, in its current rate case, Empire has also sought a fuel adjustment clause.

2. Joint Applicants' Assertions Regarding Retaining Credit-Worthiness Are Faulty.

The record evidence indicates that the assertions made by the Joint Applicants are faulty on two grounds. *First*, contrary to the assertions of the Joint Applicants, S&P and Moody's have not offered optimistic outlooks for the credit ratings of Aquila and KCPL. As will be shown, the Joint Applicants' assertions are based upon their refusal to dig into the substance of the S&P and Moody's opinions. Contrary to the Joint Applicants' assertions, the S&P and Moody's opinions paint grim pictures of the combined companies' financial position. *Second*, the evidence reveals that the grim financial pictures

---

[38/] (...continued)
assessments and based upon a set of assumptions presented by the company with regard to the structure of the proposed transaction. Additional facts and industry specific circumstances including potentially different regulatory outcomes could change the overall assessment of the ratings. As such, Moody's retains the right to change its rating and rating outlook if circumstances surrounding, but not limited to, the transaction, the company's financial profile, or the industry change. (Ex. 124, page 5).

painted by S&P and Moody's are, nevertheless, a best case scenario. That is, despite their negative outlook, these opinions are perceived by the Joint Applicants as "cheerful" because of the overly optimistic assumptions provided by the Joint Applicants as well as resulting from their somewhat "rose-colored glasses" regarding the transaction. One cannot help but be reminded of the Titanic whose captain's single-minded dedication to setting a new speed record between Liverpool and New York City resulted in disregarding the potential danger of icebergs along the selected route. Aquila certainly has had its share of questionable management decisions. Perhaps the disease is contagious.

Given the time that has passed since the issuance of the S&P and Moody's opinions, many of the assumptions provided by the Joint Applicants have inevitably been proven true or false. In this case, the passage of time readily reveals that the Joint Applicants are incapable of accurately assessing the future finances and operations of the combined company. Most glaring is the Joint Applicants' inability to accurately budget and schedule major capital construction projects. This inability to budget and schedule has put further financial strain on the financial condition of both utilities; strain that will inevitably be reflected in the companies' credit ratings.

In following portions of this brief, Industrial Intervenors will discuss two sets of credit opinions offered by S&P and Moody's. Despite the passage of time and the change in the requests made by the Joint Applicants, both sets of credit

opinions are relevant. The January 2008 credit opinions are relevant in that they represent the latest consideration by S&P and Moody's of the proposed transaction, despite the fact that they are based on obviously flawed assumptions, The January 2007 credit opinions are relevant in that they reflect a similar grim forecast despite the assumption that the Joint Applicants would be granted their entire regulatory plan wish list; a regulatory wish list that has since been largely abandoned. As will be shown, even if the Joint Applicants were granted their ***entire*** regulatory plan wish list, Moody's still opined that KCPL's credit rating would be **[redacted]**. That said, Mr. Chesser plainly admitted that preserving the credit rating was more important than doing "this deal."[39/]

3. The January 2007 Credit Opinions.

In its initial Direct Testimony in this proceeding, the Joint Applicants repeatedly emphasized the importance of its credit ratings. "Maintaining high credit quality is vital to debt and equity investors, banks, and rating agencies. . . [I]nvestors need to have confidence in a company's credit strength and financial strength to feel comfortable making capital available on attractive terms, particularly given the number of investment alternatives otherwise available to them."[40/]

[39/] Tr. 820-21.

[40/] Ex. 1, p. 13.

a. The 2007 Credit Opinion.

Consistent with the stated need to "maintain high credit quality," the Joint Applicants sought guidance from S&P as well as Moody's in order to determine whether the Joint Applicants would achieve or maintain an investment grade credit rating following the closing of the acquisition. Based upon the assumptions provided by the Joint Applicants, S&P provided a tentative opinion that GPE and KCPL would **[redacted]**[41] S&P emphasized its **[redacted]** opinion of the companies by pointing to a **[redacted]** outlook for the combined company.

[redacted][42]

Further, S&P noted, [redacted]

[redacted]**[43]

---

[41] *Id.* at p. 2.

[42] Ex. 8, MWC-4, p. 2.

[43] *Id.* at p. 6 (emphasis added).

While certainly not optimistic, S&P's opinion was more promising than that offered by Moody's. In their opinion, Moody's foresaw a certain ** [redacted] ** in KCPL's credit rating.[44] Moody's opinion was that [redacted] **[45] Like the intervenors in this case, Moody's even questioned the anticipated amount of operational synergies. [redacted] *[46]

b. The Assumptions For the January 2007 Credit Opinion.

Despite the negative nature of the S&P and Moody's opinions, time has proven that those opinions are unreasonably cheerful given the overly optimistic nature of the assumptions provided by the Joint Applicants. Among the key assumptions, provided by the Joint Applicants to S&P and Moody's, were:

1. Transaction closes in 4th quarter of 2007;

---

[44] Ex. 8, MWC-5, p. 3.

[45] *Id.*

[46] *Id.* at p. 4 (emphasis added).

2. Sale of Aquila's Crossroads peaker generation facility for [redacted]**;

3. The issuance of $250 million of hybrid securities;

4. The extension of the accelerated amortization mechanism to Aquila;

5. Recovery of Aquila's actual debt cost;

6. Aquila receives a 2007 rate increase of 14.1%;

7. Aquila and KCPL capital budgets for 2008-2011 of **[redacted]** and **[redacted]** respectively; and

8. Strategic Energy contributes between [redacted]** in funds from operations through 2010.[47/]

Since the time that the S&P and Moody's opinions were released, each of these assumptions has been proven false.

1. Transaction closes in 4th quarter of 2007 - As a result of the Joint Applicants' requested postponement of this proceeding, the transaction was unable to close in the 4th quarter of 2007. At best, the transaction will now close six months later in late 2nd quarter 2008 or possibly early 3rd quarter.

2. Sale of Aquila's Crossroads peaker generation facility for [redacted]** - Joint Applicants were not able to find a purchaser for the Crossroads peaking facility and now propose to include that facility in Aquila's rate base despite their inability to locate a path on which to transmit energy from Mississippi to Aquila's Missouri service territory.

[47/] Ex. 8, MWC-4, p. 3.

3. The issuance of $250 million of hybrid securities - As a result of "turmoil" in the financial markets and "KCPL's inability," Great Plains Energy and KCPL were unable to issue the hybrid securities.[48/]

4. The extension of the accelerated amortization mechanism to Aquila - Despite being characterized as a key assumption underlying their claims that the Joint Applicants would achieve or retain an investment grade credit rating, when faced with questions regarding the legality of the amortization mechanism, Joint Applicants withdrew their proposal ("in this case," of course) to seek the extension of the additional amortization mechanism to Aquila.[49/]

5. Recovery of Aquila's actual debt cost - Despite being characterized as a key assumption underlying their claims that the Joint Applicants would achieve or retain an investment grade credit rating, Joint Applicants no longer seek recovery of Aquila's actual debt cost.[50/]

[48/] *See*, Case No. EO-2008-0224, Response of Kansas City Power & Light Company to Staff's Recommendation / Status Report and the Comments of Other Parties, filed March 3, 2008, at page 5. See also, Case No. ER-2007-0291, Report and Order, issued December 6, 2007, at page 40 ("However, given the financial turmoil of recent months and KCPL's inability to fulfill its plan to issue a large amount of hybrid debt because of unfavorable market conditions, the amount of short-term debt - $259 million - was material and its costs were properly included in the Additional Amortizations calculation."). Ex. 37, page 4.

[49/] Ex. 37, p. 4.

[50/] *Id.* at pp. 2-3.

6. Aquila receives a 2007 rate increase of 14.1% - As a result of the Commission's decision in Case No. ER-2007-0004, Aquila was only authorized an electric rate increase of 11.9%.[51/]

7. Aquila and KCPL capital budgets for 2008-2011 of [redacted]** respectively - The capital budgets reflected in the key assumptions were based upon the originally budgeted costs for Iatan 1 and 2. Since that time, a reforecast of the Iatan 1 and 2 budgets has been undertaken with a projected increase in budget of 33% and 19% respectively.[52/]

8. Strategic Energy contributes between [redacted]** in funds from operations through 2010 - As a result of the recent sale of Strategic Energy, it will no longer be able to contribute revenues or earnings to Great Plains Energy.[53/]

The effect of the Joint Applicants' failure to provide accurate assumptions is obvious.

**[redacted]

[51/] Case No. ER-2007-0004, *Report and Order*, issued May 17, 2007. This decision is subject to pending appeal in the Cole County Circuit Court.

[52/] Ex. 305.

[53/] Ex. 139, p. 2.

[redacted]**[54]

c. The Conclusion.

Despite their claims that the merger would result in investment grade credit ratings for all of the Joint Applicants, it is apparent that both S&P and Moody's have differing opinions. Under the best case scenario (*i.e.*, all key assumptions come to fruition), S&P opined that Great Plains would be a *[redacted]** BBB company and offered a *[redacted]** outlook for its future. Less optimistic, Moody's stated outright that KCPL's credit rating would be **[redacted]**. Again, these opinions were best case scenarios. Time has proven that each of the assumptions offered by the Joint Applicants were faulty and that the actual credit rating is likely to be worse than the negative opinions offered by S&P and Moody's.

4. The January 2008 Credit Opinions.

As a result of the postponement of this proceeding and the fundamental changes underlying the requested Regulatory Plan associated with the approval of this acquisition, the Joint Applicants again sought opinions from S&P and Moody's in January 2008.

---

[54] *Id.*

a. The 2008 Opinions.

In its report, S&P offers this grim forecast.

** [redacted] **[55]

Moody's opinion is equally bleak for both Great Plains and KCPL.

** [redacted]

[55] *Id.*

**[56]

b. The Assumptions For the January 2008 Opinions.

Again, the S&P and Moody's opinions were based upon key assumptions developed by the Joint Applicants. As the reports expressly point out, the opinions are only as good as the underlying assumptions provided by the Joint Applicants.
In this light, it is important again to analyze the assumptions developed by the Joint Applicants and underlying the opinions provided by S&P and Moody's in January 2008. In its testimony,

[56] Ex. 124, pp. 2-3.

and the accompanying credit rating agency reports, there is a comprehensive list of assumptions. Foremost among these assumptions are the following:

1. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]**[61]

As with the assumptions underlying the January 2007 credit rating reports, each of these assumptions have been proven faulty.

1. **[redacted]

[redacted]**[62]

---

[57] Ex. 38, MWC-18, p. 9.

[58] Ex. 125, p. 1.

[59] *Id.* at p. 3.

[60] *Id.*

[61] Ex. 38, MWC-18, p. 15.

[62] Tr. 2555.

2. **[redacted]

[redacted]** This issue cannot be wished away.

4. **[redacted]

[63/] Ex. 305.

[64/] Tr. 2551.

[redacted]**[65]

Again, the effect of the Joint Applicants' failure to provide accurate assumptions is obvious. The transaction **[redacted]**[66]

c. The Conclusion.

The Joint Applicants take a very superficial and cavalier view of the opinions provided by S&P and Moody's. While those opinions provide some indication that current credit ratings will be maintained, they also forecast ominous warnings for the future financial condition of the companies. S&P and Moody's both note the weakened financial condition of the companies. This weakened financial condition leave the companies less able to withstand the impacts of future events - events that are inevitable given the size of their current capital programs. Absent offsetting benefits, this weakened financial condition is a detriment and dictates the rejection of this transaction.

---

[65] Tr. 2550.

[66] *Id.*

D. The Proposed Recovery of Transaction Costs by the Joint Applicants Is a Certain Detriment Without Any Offsetting Ratepayer Benefit.

1. The Missouri Public Service Commission Has Never Forced Ratepayers to Pay Transaction Costs.

In their Application, Joint Applicants ask that the Commission allow it establish a regulatory asset for all transaction costs and to recover that regulatory asset over a five year period.[67/] Unlike many other utility expenses, however, transaction costs are not a necessary expense for the provision of safe and adequate service. As OPC Witness Dittmer points out:

> It should be recognized that transaction costs consist of cost incurred by both the acquiring company as well as the acquired company to simply complete the transaction. Transaction costs consist of items such as legal, banking and consulting fees directly related to closing the transaction. Inasmuch as these costs are only incurred to facilitate consummation of the transaction - and not to facilitate the provision of utility service - such costs are properly considered to be part of the purchase price of the acquisition.[68/]

2. The Transaction Costs Here Were Incurred by Great Plains and Not By a Regulated Utility; They Have and Can Confer No Ratepayer Benefit.

Transaction costs do not meet the normal criteria for traditional expenses used to establish rates; they are not necessary for the provision of safe and adequate service at just

---

[67/] Joint Application, p. 18.

[68/] Ex. 200, page 43.

and reasonable rates. These costs are investor costs incurred in the buying and selling of their stock. These are the costs of a nonregulated holding company.[69] GPE/KCPL witness Robert T. Zabors identifies these costs in part as follows:

> . . . Transaction expenses are those costs that are in place to enable Aquila and Great Plains to close this transaction. Examples include banker fees for deal valuation and equity placement and legal fees for agreement review / execution. . . .[70]

---

[69] Ex. 100HC, Staff Report, p. 51.

[70] Ex. 31, Zabors Supp. Dir., p. 14, ls. 15-18.

In this light, then, transaction costs in this case are no different than merger and acquisition ("M&A") in any other proceeding. Historically, the Commission has refused to allow for recovery of such M&A costs.

> The Commission believes that UtiliCorp's expenses for M&A activities should be removed from the expenses reflected in MPS' rates. When UtiliCorp was formed Company assured the Commission that the ratepayers would suffer no detriment from UtiliCorp's activities but would experience the benefits associated with UtiliCorp's activities. ***The Commission believes that it is inconsistent with this pledge to include M&A costs in the expenses reflected in MPS' rates. The Commission is of the opinion that it is inappropriate for MPS' ratepayers to pay for these activities which have little to do with MPS' goal of providing safe and adequate service in Missouri.***[71]

The reasons for disallowing transaction costs are numerous. As Staff Witness Schallenberg notes:

> Transaction costs do not meet the normal criteria for traditional expenses used to establish rates. These costs are not used or useful nor necessary for the provision of safe and adequate service. These costs are investor costs incurred in the buying and selling of their stock. These costs are the fees stockholders incurred when buying or selling stock. These are the costs of a non-regulated holding company. GPE and its Board decided to incur these costs. KCPL and its Board made no decision to be involved in this transaction as already discussed. Recovery of these transaction costs would result in regulated utilities subsidizing their non-regulated parent companies.[72]

---

[71] *Report and Order*, Case No. ER-90-101, 30 Mo.P.S.C. (N.S.) 320, 350 (1990) (emphasis added).

[72] Ex. 100, p. 51.

GPE and its Board decided to incur these costs. GPE is not a regulated utility.[73] Recovery of these transaction costs would result in regulated utilities subsidizing their non-regulated parent companies.[74] There is no ratepayer benefit from these expenditures. Arguments that they are necessary to "unlock" alleged synergies are no different than in any other merger case where they have been uniformly and properly rejected.

The transaction costs should be charged entirely to the shareholders of GPE. The transaction costs created no benefit for the customers of either KCPL or Aquila.

3. The Rule Against Recovery of Transaction Costs in Mergers is Uniform.

The rule against recovery of transaction costs is so widespread as to be virtually absolute. When researching the recovery of transaction costs, one is struck by the uniformity among public utility commissions in disallowing the recovery of such costs. As the Illinois Commission notes:

> The Commission notes that the parties agree that the transaction costs at issue are incurred solely to accomplish CSC's acquisition of HHI. The Commission also notes that the Petitioners gave no indication that these business costs are directly associated with HHUI's operations. The Commission agrees with Staff's assertion that, if HHUI was allowed to recover these costs, ratepayers would be required to subsidize shareholder responsibilities. Accordingly, the Commission rejects HHUI's request to hold ratepayers responsible

---

[73] Tr. 1320.

[74] Ex. 100HC, p. 51.

> for the reorganization's transaction costs.[75/]

The logic against recovery of such costs is so apparent that in most instances, the utility voluntarily foregoes any opportunity to seek such recovery.[76/]

[75/] *In re: Utilities, Inc., Holiday Hills, Inc., Community Service Corporation Application*, Illinois Commerce Commission, 2001 Ill. PUC LEXIS 680.

[76/] *See, e.g.,* In the matter of the Reorganization of Unisource Energy Corporation, Arizona Corporation Commission, Ariz. PUC LEXIS 1.

IN THE MATTER OF THE JOINT APPLICATION OF KINDER MORGAN, INC., ROCKY MOUNTAIN NATURAL GAS COMPANY, K N WATTENBERG TRANSMISSION LLC, AND KINDER MORGAN RETAIL UTILITY HOLDCO LLC FOR AUTHORIZATION AND APPROVAL OF THE TRANSFER OF PUBLIC UTILITY ASSETS, FACILITIES AND ASSOCIATED PROPERTIES OF KINDER MORGAN, INC., INCLUDING ALL CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY RELATED THERETO, TO SOURCE GAS DISTRIBUTION LLC AND, THEREAFTER, AUTHORIZING THE TRANSFER OF OWNERSHIP AND CONTROL OF SOURCE GAS DISTRIBUTION, LLC, ROCKY MOUNTAIN NATURAL GAS COMPANY AND K N WATTENBERG TRANSMISSION, LLC TO SOURCE GAS, LLC AND SOURCE GAS, INC., Colorado Public Utilities Commission, 2007 Colo. PUC LEXIS 189; 256 P.U.R.4th 177.

JOINT APPLICATION OF ENERGY EAST CORPORATION AND CTG RESOURCES, INC. FOR APPROVAL OF A CHANGE OF CONTROL, Connecticut Department of Public Utility Control, 2000 Conn. PUC LEXIS 22.

JOINT APPLICATION OF ENERGY EAST CORPORATION AND CONNECTICUT ENERGY CORPORATION FOR APPROVAL OF A CHANGE OF CONTROL, Connecticut Department of Public Utility Control, 1999 Conn. PUC LEXIS 429.

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, CONECTIV COMMUNICATIONS, INC., POTOMAC ELECTRIC POWER COMPANY, AND NEW RC, INC., FOR PERMISSION TO TRANSFER CONTROL OF DELMARVA POWER & LIGHT COMPANY AND CONECTIV COMMUNICATIONS, INC. UNDER THE PROVISIONS OF 26 DEL. C. §§ 215 AND 1016, Delaware Public Service Commission, 2002 Del. PSC LEXIS 151; 217 P.U.R.4th 142.

IN THE MATTER OF THE JOINT APPLICATION OF PEPCO AND THE NEW RC, INC. FOR AUTHORIZATION AND APPROVAL OF MERGER TRANSACTION, District of Columbia Public Service Commission, 2002 D.C. PUC

(continued...)

[76/](...continued)
LEXIS 375; 217 P.U.R.4th 100.

In the Matter of the Application of THE GAS COMPANY, LLC, HGC HOLDINGS, LLC, K1 VENTURES LIMITED, and MACQUARIE GAS HOLDINGS LLC For Approval of the Transfer of Upstream Membership Interests and Related Matters, Hawaii Public Utilities Commission, 2006 Haw. PUC LEXIS 260.

Utilities, Inc., Holiday Hills, Inc., Community Service Corporation Application for (1) authorization to carry out the terms of a Purchase Agreement between Utilities, Inc. and Community Service Corporation providing for the acquisition by the former of all of the assets of the latter cancellation of the Certificate of Public Convenience and Necessity currently held by Community Service Corporation and authorization for it to abandon its public utility business (3) issuance to Holiday Hills Utilities, Inc. of a certificate of Public Convenience and Necessity for the properties and assets to be transferred to it under the Purchase agreement and the service area currently served by Community Service Corporation; (4) authorization for Holiday Hills Utilities, Inc. to adopt for the services area presently applicable in that area; (5) authorization for Holiday Hills Utilities, Inc. to enter into a service contract with Water Service Corp., a subsidiary of Utilities, Inc., for the furnishing of certain administrative, engineering, operation, accounting, legal, construction, billing and customer relations services by Water Service Corp., Illinois Commerce Commission, 2001 Ill. PUC LEXIS 680.

Illinois Power Company Proposed Revisions to delivery services tariff sheets and other sheets, Illinois Commerce Commission, 2002 Ill. PUC LEXIS 366.

Citizens Communications Company, Global Crossing North America, Inc., Frontier Subsidiary Telco Inc., Frontier Communications of Illinois, Inc., Frontier Communications of Lakeside, Inc., Frontier Communications of Mt. Pulaski, Inc., Frontier Communications of DePue, Inc., Frontier Communications of Orion, Inc., Frontier Communications - Midland, Inc., Frontier Communications - Prairie, Inc., and Frontier Communications - Schuyler, Inc. Joint Application for Approval of the Reorganization of Frontier Communications of Illinois, Inc., Frontier Communications of Lakeside, Inc., Frontier Communications of Mt. Pulaski, Inc., Frontier Communications of DePue, Inc., Frontier Communications of Orion, Inc., Frontier Communications - Midland, Inc., Frontier Communications - Prairie, Inc., and Frontier Communications - Schuyler, Inc. in accordance with Section 7-204 of the Public Utilities Act and for all other appropriate relief, Illinois
(continued...)

[76/](...continued)
Commerce Commission, 2000 Ill. PUC LEXIS 993.

Global Crossing LTD., Frontier Corporation, Frontier Communications of Illinois, Inc., Frontier Communications of Lakeside, Inc., Frontier Communications of Mt. Pulaski, Inc., Frontier Communications of De Pue, Inc., Frontier Communications of Orion, Inc., Frontier Communications - Midland, Inc., Frontier Communications - Prairie, Inc., and Frontier Communications - Schuyler, Inc. Joint Application for approval of the reorganization of Frontier Communications of Illinois, Inc., Frontier Communications of Lakeside, Inc., Frontier Communications of Mt. Pulaski, Inc., Frontier Communications of De Pue, Inc., Frontier Communications of Orion, Inc., Frontier Communications - Midland, Inc., Frontier Communications - Prairie, Inc., and Frontier Communications - Schuyler, Inc. and in accordance with Section 7-204 of the Public Utilities Act and for all other appropriate relief, Illinois Commerce Commission, 1999 Ill. PUC LEXIS 703.

In the Matter of the Joint Application of Aquila, Inc., d/b/a Aquila Networks -- KGO, Black Hills Corporation and Black Hills/Kansas Gas Utility Company, LLC ("BH Kansas Gas"), Joint Applicants, for an Order Approving the Transfer to BH Kansas Gas of Aquila's Certificates of Convenience and Necessity and Franchises With Respect to All of Aquila's Kansas Natural Gas Business, Including Its Transmission and Distribution Facilities Located in the State of Kansas, and for Other Related Relief In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Acquisition of Aquila, Inc. by Great Plains Energy Incorporated, Kansas Corporation Commission, 2008 Kan. PUC LEXIS 903.

CENTRAL MAINE POWER COMPANY Request for Approval of Reorganization Acquisition of Energy East Corporation and Iberdrola, S.A., Maine Public Utilities Commission, 2008 Me. PUC LEXIS 45.

In the Matter of the Joint Application of Cass County Telephone Company, Limited Partnership, LEC Long Distance, Inc., d/b/a CassTel Long Distance, FairPoint Communications, Inc., FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications, and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance for Authority to Transfer and Acquire Cass County Telephone Company, Limited Partnership's and LEC Distance, Inc.'s Facilities or Systems Located in the State of Missouri; 2) for Issuance of Certificates of Service Authority to FairPoint Communications Missouri, Inc., d/b/a FairPoint Communications and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance; and 3) to Designate FairPoint Communications Missouri,
(continued...)

[76/](...continued)
Inc., d/b/a FairPoint Communications as a Telecommunications Carrier Eligible to Receive Federal Universal Service Support, Missouri Public Service Commission, 2006 Mo. PSC LEXIS 698

Iberdrola, S.A., Energy East Corporation and New Hampshire Gas Corporation Joint Petition for Approval of Stock Acquisition Prehearing Conference Order, New Hampshire Public Utilities Commission, 2007 N.H. PUC LEXIS 66.

IN THE MATTER OF THE JOINT PETITION FOR APPROVAL OF THE ACQUISITION BY CONSUMERS NEW JERSEY WATER COMPANY OF A CONTROLLING INTEREST IN MAXIM SEWERAGE CORPORATION, AND THE RESULTING MERGER OF MAXIM SEWERAGE CORPORATION INTO CONSUMERS NEW JERSEY WATER COMPANY, AS PART OF THE STOCK PURCHASE OF AQUASOURCE UTILITY, INC. BY PHILADELPHIA SUBURBAN CORPORATION IN THE MATTER OF THE PETITION OF MAXIM SEWERAGE CORPORATION DOING BUSINESS AS AQUASOURCE UTILITY-NJ FOR APPROVAL TO CLOSE AN EXISTING OFFICE, New Jersey Board of Public Utilities, 2003 N.J. PUC LEXIS 175.

PETITION OF ATLANTIC CITY ELECTRIC COMPANY, CONECTIV COMMUNICATIONS, INC. AND NEW RC, INC. FOR APPROVAL UNDER N.J.S.A. 48:2-51.1 AND N.J.S.A. 48:3-10 OF A CHANGE IN OWNERSHIP AND CONTROL, New Jersey Board of Public Utilities, 2002 N.J. PUC LEXIS 291; 219 P.U.R.4th 235.

IN THE MATTER OF THE PETITION OF MIDDLESEX WATER COMPANY FOR APPROVAL OF AN INCREASE IN ITS RATES FOR WATER SERVICE AND OTHER TARIFF CHANGES, New Jersey Board of Public Utilities, 2001 N.J. PUC LEXIS 52.

Joint application of Equitable Resources, Inc., and The Peoples Natural Gas Company, d/b/a Dominion Peoples, for approval of the transfer of all stock and rights of The Peoples Natural Gas Company to Equitable Resources, Inc., and for the approval of the transfer of all stock of Hope Gas, Inc., dba Dominion Hope, to Equitable Resources, Inc., Pennsylvania Public Utility Commission, 2007 Pa. PUC LEXIS 32.

Application of UGI Utilities, Inc. UGI Utilities Newco, Inc., and Southern Union Company for approval of: 1) the transfer by sale of all property used or useful in providing natural gas service to the public to UGI Corporation; 2) the immediate retransfer of all such property, by UGI Corporation, including gas supply and pipeline and storage capacity contracts, by UGI Corporation to UGI Newco Utilities, Inc., 3) the initiation by UGI Utilities Newco, Inc. of natural gas service in all territory in this Commonwealth where Southern Union Company does or may provide natural gas service; 4) the abandonment by Southern Union Company
(continued...)

[76/](...continued)
of all natural gas service in this Commonwealth; and 5) the transfer by UGI Corporation of all of the stock of UGI Utilities Newco, Inc. to UGI Utilities, Inc., Pennsylvania Public Utility Commission, 2006 Pa. PUC LEXIS 63.

Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH for all approvals required under the Public Utility Code in connection with a change in control of Pennsylvania-American Water Company, Pennsylvania Public Utility Commission, 2002 Pa. PUC LEXIS 31; 221 P.U.R.4th 487.

Joint Petition of Green Mountain Power Corporation, Northern New England Energy Corporation (NNEEC), a subsidiary of Gaz Metro of Quebec, and Northstars Merger Subsidiary Corporation (Northstars) for approval of: (1) the merger of Northstars into and with Green Mountain Power; (2) the acquisition by NNEEC of the common stock of Green Mountain Power; and (3) the amendment to Green Mountain Power's Articles of Incorporation, Vermont Public Service Board, 2007 Vt. PUC LEXIS 74; 256 P.U.R.4th 66.

WEST VIRGINIA-AMERICAN WATER COMPANY and THAMES WATER AQUA HOLDINGS GmbH Joint Petition for Consent and Approval of the sale by Thames Water Aqua Holdings GmbH of the outstanding common stock of American Water Works Company, Inc., West Virginia Public Service Commission, 2007 W. Va. PUC LEXIS 255.

Joint Application of WPS Resources Corporation, Wisconsin Public Service Corporation, WF&L Acquisition Corp. and Wisconsin Fuel & Light Company for Consent and Approval of the Acquisition and Merger of Wisconsin Fuel & Light Company, Public Service Commission of Wisconsin, 2001 Wisc. PUC LEXIS 302

Application of Wisconsin Energy Corporation for Approval to Acquire the Stock of WICOR, Inc., Public Service Commission of Wisconsin, 2000 Wisc. PUC LEXIS 57.

IN THE MATTER OF THE JOINT APPLICATION OF SOURCE GAS LLC, SOURCE GAS DISTRIBUTION LLC, KINDER MORGAN, INC. AND KM RETAIL UTILITY HOLDCO LLC FOR APPROVAL OF A TRANSFER OF UTILITY ASSETS AND CERTIFICATE AUTHORITIES FROM KINDER MORGAN, INC. TO SOURCE GAS DISTRIBUTION LLC AND REORGANIZATION OF SOURCE GAS DISTRIBUTION LLC AS A WHOLLY OWNED SUBSIDIARY OF SOURCE GAS LLC, Wyoming Public Service Commission, 2007 Wyo. PUC LEXIS 121

IN THE MATTER OF THE JOINT APPLICATION OF CHEYENNE LIGHT FUEL AND POWER COMPANY AND BLACK HILLS CORPORATION FOR AUTHORITY TO TRANSFER ALL OF THE ISSUED AND OUTSTANDING STOCK IN CHEYENNE LIGHT, FUEL AND POWER COMPANY TO BLACK HILLS CORPORATION, Wyoming
(continued...)

The Missouri Commission has historically followed the logic adopted by other commissions in rejecting recovery of transaction costs. In addition to the previously referenced UtiliCorp United proceeding, the Commission has: (1) expressly rejected the recovery of transaction costs; (2) rejected regulatory plans which contained such a provision or (3) approved a stipulation which precluded recovery of such costs in numerous other proceedings.

In the case at hand Joint Applicants fail to offer any valid reason that the Commission should break with the policy of disallowing recovery of transaction costs.

4. The "Pie in the Sky By and By" Argument Should Be Rejected; If Even Minimal Portions of the Averred Synergies Do Not Materialize, Ratepayers Incur A Detriment.

It may also be argued that, some day, there will be a great benefit to the ratepayers from this transaction. This is the "pie in the sky by and by" argument, is specious and speculative reasoning and is rejected by the principles of the *AGP* case and by the Commission's own decision in *Union Electric*. The Commission must assess the liklihood of such events ever coming to pass.

That liklihood is not high and the margins are thin, ineed. When pressed, Mr. Giles acknowledged that his Exhibit

---

[76/](...continued)
Public Service Commission, 2004 Wyo. PUC LEXIS 291.

Schedule CBG-1 to his February Supplemental Testimony[77] so demonstrated.

> Q. All right. I think I understand that. Let's see if I am following you. If you were to assume, instead of the assumption that you indicate that you were making here in 2008 here, if you were to assume that instead of 30 million it was 25 million, let's say, then I would see half of that in the 2009 column?
> A. Correct.
> Q. Which would be 12 and a half; am I right?
> A. Correct.
> Q. And so would the transition and transaction costs also go down in that case?
> A. No.
> Q. And in that case, you'd have 12 against 12 and a half, so your assumed customer benefit here on
>
> 01452
>
> that 2009 column would only be half a million, right?
> A. That's exactly right.
> Q. And correspondingly, the assumption on the synergies -- well, let's just pick a number. Customer retained synergies, pick a column, 2010 were tracked across, then that would be 25 there, and so that would pretty well take care of that customer benefit, right --
> A. Yes.[78]

Thus, if the claimed synergies are delayed or are never realized to any significant degree, the claimed ratepayer benefit disappears.

These thin margins are confirmed by Mr. Cline's February testimony, Schedule MWC-19, at page 14.[79] The lower portion of the chart, summarized below, confirms that -- even with the Joint Applicants' favorable view -- the benefits to the ratepayers are virtually non-existent. It deserves note that this chart is a part of the Joint Applicants' Suppemental filing of February 25, 2008 and reflects the adjustments that they contend were "customer-favoring." Mr. Cline's chart shows that

---

[77] Exhibit 39, Schedule CBG-1.

[78] Tr. 1451-52.

[79] Ex. 38HC, MWC-19.

after the offset of transaction and transition costs desired by Joint Applicants, if even a minor portion of the claimed synergies evaporate, ratepayers receive a detriment. The Joint Applicants have cut it "thin" to assure their own benefit. Although the laging 50% offset from NFOM savings is as little as $15 million less than claimed, the asserted benefits not only disappear, they reverse and become detriments.[80/]

5. Joint Applicants Discount the Need for Transaction Cost Recovery.

Mr. Bassham, one of KCPL's principal witnesses, appeared to discount the importance of recovery of transaction costs to KCPL's credit rating.

> Q. Now, with respect to your understanding of the -- the -- the positions on the rating agencies that -- that Commissioner Clayton asked you about, have you done sensitivity analyses such that you would have an opinion as to what the rating agencies
>
> would do if, for example, the -- the transaction was approved but transaction costs were disallowed?
> A. We've not -- we've not done that specific analysis, but we've done other analyses which would take into effect the size of that difference.
> Q. And in your opinion, if this Commission were to approve the transaction but disallow recovery of transaction costs, would that have an impact on -- on your ratings?
> A. Well, it would obviously have an impact on us. It would be, you know, forty -- $47.2 million we wouldn't recover. All other things being equal, only disallowing those dollars over a five-year period in and of itself would not change our rating, I don't believe.[81/]

[80/] *Id.*

[81/] Tr. 1322-23.

V. CONCLUSION.

This proposed transaction should be rejected as detrimental to the public interest and the interests of KCPL and Aquila ratepayers generally. Given the status of the record and the proposal, it is not possible to propose conditions that would permit the transaction to be approved while avoiding the detriments to the public. Accordingly there is no reasonable choice save the rejection of the proposal.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad MBE #23966
David L. Woodsmall MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION, AG PROCESSING INC A COOPERATIVE, AND PRAXAIR, INC. [INDUSTRIAL INTERVENORS]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Pleading by U.S. mail, postage prepaid or by electronic mail addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.

Stuart W. Conrad

Dated: June 2, 2006