

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

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

**INITIAL BRIEF OF
GREAT PLAINS ENERGY INCORPORATED**

Great Plains Energy Incorporated (“GPE” or “Respondent”), pursuant to the January 25, 2017 Order of the Missouri Public Service Commission (“Commission” or “PSC), states the following:

Contrary to the Second Amended Complaint filed by the Midwest Energy Consumers Group (“MECG”), the Commission has no authority to exercise jurisdiction to approve or disapprove GPE’s acquisition of Westar Energy, Inc. (“Westar”) based on the language of the First Amended Stipulation and Agreement that the PSC approved in 2001 when it authorized the establishment of the Respondent’s holding company structure.

MECG’s interpretation of that Stipulation would expand the Commission’s jurisdiction to the acquisition of non-Missouri regulated public utilities by Missouri-based holding companies, and grant the PSC extraterritorial powers never contemplated by Missouri law. Such an interpretation would be contrary to the position that the Commission, as well as Staff and the Office of the Public Counsel have taken with regard to the acquisitions of non-Missouri public utilities by Spire, Inc. and its predecessor, The Laclede Group.

Because GPE's acquisition of Westar does not involve a Missouri public utility, the Commission has no jurisdiction to approve or disapprove it, and MECG's Second Amended Complaint must be dismissed.

A. Burden of Proof

As the Complainant in this case, MECG has the burden of proof to demonstrate by a preponderance of the evidence that GPE has violated the Commission's Order approving the 2001 GPE Stipulation, as it alleges in Paragraph 19 of the Second Amended Complaint. State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 693 (Mo. App. W.D. 2003). In this regard, MECG has the burden of proof on the three issues contained in the Joint Stipulation of Facts and List of Issues presented to the Commission on January 18, 2017. GPE as the Respondent has no obligation to meet any burden of proof. Ag Processing, Inc. v. KCP&L Greater Mo. Operations Co., 385 S.W.3d 511, 516 (Mo. App. W.D. 2012).

MECG must prove: (1) that the term "public utility" in Section II(7) of the 2001 GPE Stipulation applies to any public utility in the United States and, for that matter, the world; (2) that the 2001 GPE Stipulation applies to GPE's acquisition of Westar; and (3) that GPE must obtain the Commission's approval for that acquisition or be in violation of the 2001 Stipulation.

The evidence in this case consists of the orders, pleadings and reports admitted into evidence by the Commission's January 25, 2017 Order. MECG's interpretation of those facts must be supported by a preponderance of the evidence. Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986). Under this standard MECG's evidence must be "of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not." Id. See Spencer v. Zobrist, 323 S.W.3d 391, 399 (Mo. App. W.D. 2010).

B. GPE and Westar

On May 31, 2016 GPE announced that it had reached a definitive agreement to acquire Westar in a transaction valued at approximately \$12.2 billion. Upon closing, Westar will become a wholly-owned subsidiary of GPE. Westar is a Kansas electric public utility.

GPE entered into an Agreement and Plan of Merger on May 29, 2016, pursuant to which GP Star, Inc. (a Kansas corporation whose outstanding equity interests are 100% owned by GPE) will be merged with and into Westar, with Westar emerging as the surviving corporation. Immediately following the merger, GP Star, Inc. will cease to exist, and GPE will acquire all of the capital stock of Westar (“Transaction”). See ¶ 3, Joint Stipulation of Facts (“Jt. Stip.”).

GPE is a Missouri corporation and the holding company for the stock of Kansas City Power & Light Company (“KCP&L”) and KCP&L Greater Missouri Operations Company (“GMO”), both Missouri public utilities regulated by the Commission. GPE is a public utility holding company regulated under the Public Utility Holding Company Act of 2005, which was enacted as part of the Energy Policy Act of 2005. Although GPE is a Missouri corporation, it is not an “electrical corporation” or a “public utility” under Missouri law. See Section 386.020(15) and (43).¹ GPE does not own “electric plant,” as defined in Section 386.020(14), and does not offer electric service to the public as a public utility.

Westar is a Kansas corporation with its headquarters in Topeka, Kansas. It is authorized by the Kansas Corporation Commission (“KCC”) to conduct business as a public utility and holds a Certificate of Convenience and Authority from the KCC to engage in the business of an electric public utility in Kansas. See ¶ 2, Jt. Stip. Westar is not a Missouri public utility subject to the jurisdiction of this Commission. See ¶ 3, Jt. Stip.

¹ All statutory references are to the Missouri Revised Statutes (2000), as amended, unless otherwise noted.

Westar owns 100% of the stock of Westar Generating, Inc. (“WGI”) which owns an undivided 40% share of the State Line Combined Cycle Generating Facility (“State Line”) near Joplin, Missouri. WGI sells all of its portion of the electric energy from State Line to Westar.² See ¶ 4-5, Jt. Stip. Although WGI was granted a certificate of convenience and necessity (“CCN”) in 2000 by the Commission, its order found that WGI did not have any customers in Missouri.³ See ¶ 6-7, Jt. Stip. Importantly, the Commission did not find that WGI was offering electricity “for public use” and did not conclude that WGI was a Missouri public utility under State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918), which holds that an “electrical corporation” is not subject to PSC regulation unless it is offering electricity for public use. Because WGI does not offer electricity or any other service to any member of the public in Missouri, it is not a public utility subject to the jurisdiction of this Commission. See ¶ 8, Jt. Stip.

C. The 2001 GPE Stipulation

On July 9, 2001, GPE, KCP&L, the Staff of the Commission, and the Office of the Public Counsel submitted the First Amended Stipulation and Agreement (“GPE Stipulation”) to the Commission. See In re Application of Kansas City Power & Light Co. for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure, Case No. EM-2001-464. After conducting two on-the-record presentations on July 5 and 27, 2001, at which Commissioners asked numerous questions, the Commission approved the GPE Stipulation. Id., Order Approving Stipulation and Agreement and Closing Case at 4-5, 13-14 (July 31, 2001).

² The remaining 60% of State Line is owned by the Empire District Electric Company which operates the facility.

³ “Indeed WGI does not have any retail customers anywhere in Missouri.” Order at 3, In re Application of Westar Generating, Inc. for a Certificate of Public Convenience and Necessity, No. EA-2000-153 (June 1, 2000).

As a result, a holding company structure for GPE and its subsidiaries was created under the terms of the GPE Stipulation, which contained the following provision related to prospective acquisitions by the Respondent:

Section II (7): Prospective Merger Conditions

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 requested 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. ... [emphasis added] [hereafter referred to as “Paragraph 7”].

The term “public utility” is not defined in the GPE Stipulation, however, the only references to any state law in the stipulation are to Missouri law. Therefore, “public utility” can only be interpreted as it is defined under Missouri law. Since Westar is neither a “public utility,” an “electrical corporation,” nor an affiliate of a “public utility” under Missouri law, Paragraph 7 of the GPE Stipulation has no bearing on the Transaction.

Similarly, WGI is not a “public utility” under Missouri law. It is also not an “affiliate” within the meaning of Paragraph 7 because it has no investments in any subsidiary company and controls no corporation or other business organization. Therefore, it does not have “a controlling interest in a public utility” as required by Paragraph 7.

Section 386.250(1) states that the jurisdiction, supervision, powers and duties of the Commission extend to “the manufacture, sale, or distribution of ... electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; ... [emphasis added].”

Section 386.020(43) defines “public utility” as follows:

(43) "Public utility" includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a

public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter [emphasis added].

Section 386.020(15) defines “electrical corporation” as follows:

(15) "Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others ... [emphasis added].

Section 386.020(14) defines “electric plant” as follows:

(14) "Electric plant" includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power;

Because Westar does not own “electric plant” that is “devoted to a public use” in Missouri, it is not “a public utility within the meaning of the Public Service Commission Act.” State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918). WGI is also not a Missouri public utility because it does not sell electricity or provide any service to a member of the public in Missouri. Its operations are not “devoted to a public use,” and it is not a “public utility” under the Public Service Commission Act. Id.

D. The GPE Stipulation does not Apply to the Transaction

MECG claims that GPE has violated Paragraph 7 of the GPE Stipulation because it intends to acquire Westar, a Kansas public utility, without seeking this Commission’s approval. See ¶¶ 19-20, Second Amended Complaint. However, because the phrase “public utility” is not defined in the GPE Stipulation (and could not lawfully be defined there to include non-Missouri

public utilities), and because Westar is a public utility only under Kansas law, GPE's acquisition of Westar will not violate Paragraph 7.

The critical portion of the relevant sentence in Paragraph 7 states that "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 utility has a controlling interest in a public utility unless GPE has requested prior approval for such transaction from the Commission ... [emphasis added]." Contrary to MECG's argument, this provision does not and cannot confer jurisdiction on the Commission to approve or disapprove the Transaction under its Section 393.190 merger and acquisition authority, or its Section 393.250 reorganization authority. There is nothing in the Commission's Order approving the 2001 GPE Stipulation that even mentions Paragraph 7, let alone seeks to assert extraterritorial jurisdiction over a future GPE acquisition of a non-Missouri public utility.

It is well established that an "agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties." Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991). However, this lack of jurisdiction to approve the Transaction does not limit the Commission's authority over KCP&L and GMO, and its ability to protect Missouri customers through its retail ratemaking powers.

Section 386.250(1) states that the jurisdiction, supervision, powers and duties of the Commission extend to "the manufacture, sale, or distribution of ... electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same [emphasis added]." Similar "within the state" language is found in other passages in Chapter 386 with regard to Missouri gas corporations, telecommunications companies, water corporations, and sewer systems. See § 386.250(1)-(4). It is these Missouri-based "public utility corporations," collectively referenced in Section 386.250(5), that are subject to the Commission's jurisdiction. Consequently, there is no statutory authority for the PSC to assert

jurisdiction over GPE's acquisition of a Kansas utility. Because Westar is not a "public utility," an "electrical corporation," or an affiliate of a "public utility" under Missouri law, Paragraph 7 of the GPE Stipulation does not apply to the Transaction. Similarly, WGI is not a Missouri public utility because it offers no service to the public in this state. See ¶¶ 2-8, Jt. Stip. It is also not an "affiliate" as defined in Paragraph 7 because it does not have "a controlling interest in a public utility."

Beyond these statutory definitions, the Missouri Supreme Court has held that a public utility must offer its services generally to the public. Otherwise, it is not a public utility under Missouri law and not subject to the Commission's authority. In State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918) ("Danciger"), the Missouri Supreme Court held that an electrical corporation, as defined in Section 386.020(15), is not subject to regulation by the Commission unless it is offering electricity "for a public use, and therefore be coupled with a public interest."⁴ In the absence of offering electricity as a "general public service" in Missouri, an entity is not "a public utility, within the meaning of the Public Service Commission Act." Id. Neither Westar nor WGI offers electricity as a general public service in Missouri. Because Westar is neither a "public utility" nor an "affiliate of a public utility" under Missouri law, Paragraph 7 does not apply to GPE's acquisition of Westar. Paragraph 7 also does not apply to WGI because it is not a public utility within the meaning of Danciger and is not an affiliate that owns a controlling interest in a public utility. Any "other view" would have "far-reaching results" not contemplated by Missouri law. Danciger, 205 S.W. at 42.

⁴The Danciger case has continued to be binding precedent for almost one hundred years. See Hurricane Deck Holding Co. v. PSC, 289 S.W.3d 260, 264 (Mo. App. W.D. 2009); Osage Water Co. v. Miller County Water Auth., Inc., 950 S.W.2d 589, 574 (Mo. App. S.D. 1997); Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227, 232 (Mo. App. W.D. 1995); State ex rel. Cirese v. PSC, 178 S.W.2d 788, 790 (Mo. App. K.C. 1944).

At the hearing where the GPE Stipulation was presented, Commissioner Murray inquired about Paragraph 7, asking whether “the parties believe that that [provision] gives the Commission jurisdiction over an unregulated holding company that it would otherwise not have.” See Tr. 32, Vol. 2, In re Application of Kansas City Power & Light Co. for an Order Authorizing its Plan to Reorganize itself into a Holding Company Structure, No. EM-2001-464 (July 5, 2001). Counsel for GPE stated that this provision was “inconsistent” with past Commission decisions “on other holding company mergers of parents.” Id. This comment properly referred to prior Commission decisions that declined to exercise any jurisdiction over a holding company, even when it was acquiring a Missouri public utility. Although GPE agreed to submit itself to the jurisdiction of the PSC on certain matters where permitted by Missouri law, there is no provision in the Stipulation where GPE agreed to seek Commission approval if it acquired public utilities operating outside of Missouri.

Consistent with this approach, Staff counsel advised that “different parties can interpret the statute differently,” and that the GPE Stipulation “was an effort to establish in certain areas what arguably the holding company would not contest in a way of coming before the Commission in certain instances.” Id. at 33. He observed that “the Commission is always free, if it so chooses, to assert that it will not exercise jurisdiction in a particular situation.” Id. (emphasis added). Staff did not claim that GPE’s acquisition of a non-Missouri public utility would require Commission approval.

Similarly, the Office of the Public Counsel (“OPC”) did not assert in 2001 that the GPE Stipulation required the Company to seek Commission approval regarding the acquisition of a non-Missouri public utility. OPC properly noted that “the facts of the particular case will continue to control as to whether jurisdiction will be exercised.” Id. at 34.

MECG's interpretation of Paragraph 7 must be rejected because it would have the practical effect of allowing this Commission extraterritorial jurisdiction over a holding company that is not a public utility in Missouri. It would permit the Commission to control commercial activity by a corporation that is not a Missouri public utility which is taking place outside Missouri.

E. No Commission or Judicial Decisions Support the Legal Basis of the Complaint

Missouri law contains not one decision -- of either this Commission or a court -- that has construed the provisions of Chapter 386 or Chapter 393 to exercise jurisdiction to approve or disapprove the acquisition of a non-Missouri public utility by a Missouri public utility holding company.

There are almost a dozen cases where the Commission "has consistently found that the Commission does not have jurisdiction over transactions at the holding company level." See Order Dismissing Application for Lack of Jurisdiction, In re Advanced TelCom, Inc. and Shared Commun. Services, Inc., No. XM-2005-0111 (2004).

The Commission has held steady to this position over many years, regardless of whether the holding companies owned telecommunications, electrical, gas, or water and sewer corporations. When SBC Communications acquired Ameritech in 1998, the PSC found that "there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies." In re Merger of SBC Commun., Inc. and Ameritech Corp., Report and Order, No. TM-99-76, 1998 Mo. PSC LEXIS 48 (Oct. 8, 1998). Accord In re Proposed Merger of Verizon Commun., Inc. and MCI, Inc., No. TM-2005-0370 (May 3, 2005). Similarly, when Ameren Corporation acquired Cilcorp, Inc., a holding company that owned Central Illinois Light

Company, an Illinois public utility, the Commission declined to exercise jurisdiction over the transaction. It specifically rebuffed Staff's invitation to review joint dispatch issues. See Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp., No. EO-2002-1082 (June 13, 2002).

A variety of other holding company transactions by telecommunications, water and sewer companies is consistent with these orders. See Order Closing Case, In re Proposed Acquisition of Mo.-Am. Water Co. and Am. Water Works Co. by the German Corp. RWE AG, No. WO-2002-206 (2001); Order Closing Case, In re United Water Mo., Inc. for Authority for Lyonnaise American Holding, Inc. to Acquire the Common Stock of United Water Resources, Inc., No. WM-2000-318 (Dec. 7, 1999); Order Dismissing Application for Lack of Jurisdiction, In re Joint Application for Transfer of Control of Eclipse Telecomm. Inc., IXC Comm. Serv. Inc. and Telecom One, Inc. to Cincinnati Bell, Inc., No. TM-2000-85 (Oct. 28, 1999); Order Denying Motion to Reconsider Order Closing Case, In re Proposed Merger between GTE Corp. and Bell Atlantic, No. TM-99-261 (Apr. 22, 1999); Order Regarding Jurisdiction and Dismissing Application, In re Commun. Central of Georgia, Inc. and Davel Commun. Group Inc. for Approval of Merger and Transfer of Control, No. TM-98-268 (Jan. 22, 1998); Order Dismissing Application, In re Application of ALLTEL Commun. Inc. to Merge with Certain Wholly Owned Subsidiaries of ALLTEL Mobile Commun., Inc., No. TM-98-153 (Dec. 24, 1997).

If the Commission were going to depart from these precedents, it might have done so when two holding companies that each owned regulated Missouri public utilities sought to merge. But, in an order that declined to review the merger of the holding companies that owned Missouri-American Water Co. and St. Louis County Water Co., the Commission agreed with Staff's position that since "the Commission has not asserted jurisdiction over mergers of non-regulated parent companies," "... the Commission should follow this practice now, and decline

to assert jurisdiction.” See Report & Order, In re Merger of American Water Works Co. with Nat’l Enterprises Inc. and the Indirect Acquisition by American Water Works Co. of St. Louis Water Co., No. WM-99-224, 1999 Mo. PSC LEXIS 183 at *3 (Mar. 23, 1999).

Based on these precedents, it is understandable that no complaint has been filed in similar situations where The Laclede Group (now doing business as Spire, Inc.), a Missouri-based holding company governed by a comparable stipulation,⁵ acquired non-Missouri public utilities in 2015 and 2016. Notably, the Commission did not direct Staff to file a complaint, but instead closed its file after Staff initiated an investigation. See Order Closing File, In re Spire, Inc.’s Acquisition of EnergySouth, Inc., No. GM-2016-0342 (Sept. 7, 2016). Significantly, no entity took any action before this Commission regarding Spire, Inc.’s acquisition of EnergySouth, Inc., even though Staff had alleged that the acquisition was subject to a requirement of prior Commission approval, and the closing of that transaction was known to be imminent. There is no reason why GPE should be treated any differently.

Given the absence of any Missouri judicial precedent, or any order by this Commission or any other Missouri administrative agency that supports the exercise of PSC jurisdiction to approve or disapprove GPE’s acquisition of a non-Missouri public utility, the legal premise of the Complaint must be dismissed.

F. Conclusion

There is no legal or factual basis for the Commission to exercise jurisdiction to approve or disapprove GPE’s acquisition of Westar Energy. If the intent of the 2001 GPE Stipulation was to extend the Commission’s jurisdiction over the acquisition of non-Missouri public utilities, it

⁵ Order Approving Stipulation and Agreement, and Approving Plan to Restructure, In re Application of Laclede Gas Co. for an Order Authorizing its Plan to Restructure Itself into a Holding Company, Regulated Utility Company, and Unregulated Subsidiaries, No. GM-2001-342 (Aug. 14, 2001).

would have contained clear and precise language saying so. If the Commission had intended to exercise such authority, it too would have said so in the Report & Order approving the GPE Stipulation. Furthermore, there is no basis to infer factually from the provisions of the Stipulation or the other matters admitted into evidence that MECG's expansive interpretation of "public utility" and other terms was intended to extend the Commission's jurisdiction to the acquisition of non-Missouri utilities.

Finally, no stipulation and no Commission decision can create jurisdiction which does not exist under Missouri statutes. Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991). "As a basic tenet of administrative law, an administrative agency has only such jurisdiction that may be granted by the legislature." Tetzner v. Department of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) (citations omitted). Since extraterritorial jurisdiction has not been granted to the Commission to approve or disapprove the acquisition of non-Missouri public utilities by Missouri-based public utility holding companies, no stipulation approved by this Commission can grant such power.

WHEREFORE, Respondent Great Plains Energy Incorporated asks that the Second Amended Complaint be dismissed.

/s/ Robert J. Hack

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the below named parties by email or U.S. mail, postage prepaid, this 31st day of January, 2017:

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