

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

COMES NOW the City of St. Joseph, Missouri (hereinafter referred to as “St. Joseph”), by and through counsel, and submits its proposed Findings of Fact, Conclusions of Law and Ordered Section language in this matter.

The City of St. Joseph has raised the issue of whether Aquila is in possession of a valid, current municipal franchise from St. Joseph. St. Joseph requests that the Commission condition its approval of the Joint Application upon a demonstration by the post-merger entity that it possesses the “required consent of municipal authorities” in the form of valid, current city franchises. (*Post-Hearing Brief of City of St. Joseph*, at 6.) St. Joseph also requests that Commission approval of the Joint Application be conditioned upon Aquila (and/or Greater Missouri Operations) negotiating a new municipal franchise with the City of St. Joseph within nine (9) months of the Commission’s approval of the merger. (*Post-Hearing Brief of City of St. Joseph*, at 6.) In this regard, St. Joseph’s request tracks that of the City of Kansas City for a merger-approval condition that a single, unitary franchise between KCPL/Aquila and Kansas City be negotiated within nine (9) months of Commission approval of the merger. St. Joseph

supports that proposal by Kansas City. ((*Post-Hearing Brief of City of St. Joseph*, at 1.)

St. Joseph offered Exhibit 1200 in evidence. Exhibit 1200 is a sworn affidavit by the City Attorney of the City of St. Joseph, Ms. Lisa Robertson, attesting to the fact “that a franchise is required to do business within the City” and that “neither Aquila nor Great Plains Energy has any current valid franchise from the City of St. Joseph that authorizes operation within the City or in the City’s rights-of-way.” (Exhibit 1200, Paragraph 2.) The affidavit further states that “Aquila is not in compliance with the lawful requirements for operating within the rights-of-way in the City of St. Joseph and has refused demands to obtain a franchise as required by law.” (*Id.*)

The letter attached to Exhibit 1200, from Dan Vogel to Renee Parsons, counsel for Aquila, summarizes the legal basis for St. Joseph’s position regarding the Aquila franchise issue. The last two pages of Exhibit 1200 (which also constitute Exhibit 1201) document the requirements and limitations of the St. Joseph City Charter. St. Joseph is a home-rule municipality and its charter expressly prohibits franchises in excess of twenty years in duration. (Exhibit 1200, page 3; Exhibit 1201, *St. Joseph City Charter Section 13.2.*)

Aquila and KCPL/GPE objected to Exhibit 1200, arguing that they should have an opportunity to cross-examine Ms. Robertson and Mr. Vogel. In their Post-Hearing Brief, Joint Applicants argue that the affidavit was not “authenticated” at hearing and so lacks a proper foundation. However, the notarization of the affidavit authenticates the document. Joint Applicants, in their brief, also raise issues concerning the Procedural Order in this case and Section 536.070(12), RSMo. Those objections were not made at hearing and are belated. In addition, the Commission is not bound by the technical rules of evidence.

Section 386.410, RSMo. Moreover, the affidavit includes matters that may be taken by official notice, such as the City's Charter provisions.

After the merger, the current Aquila properties will be renamed and will operate under the name, "KCPL Greater Missouri Operations." (Exhibit 22, John Marshall Surrebuttal, p. 16, ll. 16-19; T-2221, ll. 10-22.) Black Hills will retain the name "Aquila" in other states, and the Missouri Aquila entity will become "KCPL Greater Missouri Operations." (T-2221, l. 24-T-2222, l. 4.) There is no evidence in the record that this post-merger entity, "KCPL Greater Missouri Operations" or "Aquila d/b/a KCPL Greater Missouri Operations," has any municipal franchises in any such name, nor that it has the authority or consent to operate through assignment from any other municipal franchises.

Exhibit 1200 demonstrates that legitimate questions exist as to whether Aquila or KCPL Greater Missouri Operations have "received the required consent of the proper municipal authorities" as required by Section 393.170, RSMo. (*Post-Hearing Brief of City of St. Joseph*, at 4.) It is Aquila that has the burden to prove that it, in fact, has a franchise with the City as required by law. No evidence was presented by Joint Applicants concerning any franchise with St. Joseph.

In light of the court's ruling in *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. Ct.App. 2005), Aquila is certainly on notice of the significance of the franchise authority in conducting business within a jurisdiction. Further, it is clear that Aquila has been on notice of St. Joseph's contention for some time (Exhibit 1200), but Aquila has offered no evidence that it has rectified the problem or has otherwise obtained the required franchise approval, or that the post-merger entity would have franchise authority to do business within the City.

The objections to Exhibit 1200 are overruled, and Exhibit 1200 is received in evidence. The Commission finds and concludes that its approval of the instant

merger should be conditioned upon the post-merger entity (Aquila d/b/a KCPL Greater Missouri Operations, or whatever name is ultimately adopted) having a franchise in its own name with the City of St. Joseph, and upon evidence of such being provided to the Commission within nine (9) months of the effective date of this Report and Order.

The Commission has an ongoing responsibility to ensure that the public utilities it regulates maintain compliance with the franchise requirement of Section 393.170, RSMo. In light of the franchise issues raised by Kansas City and St. Joseph in this case and the court's ruling in *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. Ct.App. 2005), the post-merger entities will also be ordered to demonstrate to the Commission, within nine (9) months of the effective date of this Report and Order, that they hold a franchise or other consent in their own name or by assignment in all other municipalities in which such consent is required by law.

Proposed Conclusions of Law:

Section 393.170, RSMo, provides that before a certificate of convenience and necessity shall be issued to an electrical corporation by the Commission, the corporation must file municipal franchises with the Commission "showing that it has received the required consent of the proper municipal authorities." The Commission has an ongoing responsibility, under its broad jurisdiction and authority, to ensure that the public utilities it regulates maintain compliance with this, and all other, statutory requirements. See, for example, Section 386.040 and Section 393.140 (1) and (5), RSMo. In light of the court's ruling in *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. Ct.App. 2005), Aquila is certainly on notice of the significance of the franchise authority in conducting business within a jurisdiction.

Therefore, it is reasonable to require, as a condition of merger approval, that the post-merger entity demonstrate to the Commission that it has obtained a current, valid municipal franchise in the post-merger entity's own name from the City of St. Joseph, within nine (9) months of the effective date of this Report and Order. The post-merger entities should also demonstrate to the Commission, within nine (9) months of the effective date of this Report and Order, that they hold a franchise or other consent in their own name or by assignment in all other municipalities in which such consent is required by law.

Joint Applicants cite *State ex rel. Electric Co. of Missouri v. Atkinson*, 204 S.W. 897 (Mo. 1918) for the proposition that the Commission does not have the authority to judge the validity of a franchise. (*Post-Hearing Brief of Joint Applicants*, at 31.) In that aged and venerable case, the Missouri Supreme Court upheld an Order of the Public Service Commission granting a certificate of convenience and necessity to Western Power & Light Company ("Western"), which had a franchise from the City of Maplewood, Missouri (in St. Louis County). Electric Company of Missouri ("Electric Company"), the appellant, was an intervenor in the Commission proceeding. Electric Company was, and had been prior to Western coming on the scene, providing electricity service in Maplewood and other cities. Electric Company did not have a franchise from Maplewood, although it did have a franchise issued by the St. Louis County court before Maplewood was incorporated. Maplewood asked for competing bids for the provision of electric service and, when Western submitted the winning bid, Maplewood granted Western a franchise and Western sought the PSC certificate that was the subject of the appeal. While the Supreme Court held that the PSC had no jurisdiction to determine the validity of the franchise granted to Electric Company by St. Louis County, that was not determinative. The Court upheld the

Commission's grant of a certificate of public convenience and necessity to Western.

In the instant case, the Commission need not directly address the complaint that Aquila has no current franchise from St. Joseph. The Commission does conclude that Joint Applicants have not shown that they have "received the required consent of the proper municipal authorities" as to the City of St. Joseph, or other municipalities in which they serve, as required by Section 393.170, RSMo. That question is clearly within the Commission's jurisdiction and is the basis for requiring a franchise to be entered into, or demonstrated, as ordered herein as a condition of approval of the merger.

Proposed ORDERED Section:

ORDERED: That the post-merger Aquila entity shall file documentation with the Commission demonstrating that it has obtained a current, valid municipal franchise in the post-merger entity's name from the City of St. Joseph, within nine (9) months of the effective date of this Report and Order. The post-merger entities shall also file documentation with the Commission, within nine (9) months of the effective date of this Report and Order, demonstrating that they hold a franchise or other consent in the post-merger entity's name or by assignment in all other municipalities in which such consent is required by law.

WHEREFORE, the City of St. Joseph submits its Proposed Findings of Fact, Conclusions of Law and Ordered Section Language in this case.

Respectfully submitted,

/s/ William D. Steinmeier

William D. Steinmeier, MoBar #25689

Mary Ann (Garr) Young, MoBar #27951

WILLIAM D. STEINMEIER, P.C.

2031 Tower Drive

P.O. Box 104595

Jefferson City, MO 65110-4595

Phone: 573-659-8672

Fax: 573-636-2305

Email: wds@wdspsc.com

COUNSEL FOR THE CITY OF
ST. JOSEPH, MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has caused a complete copy of the attached document to be electronically filed and served on the Commission's Office of General Counsel (at gencounsel@psc.mo.gov) and the Office of Public Counsel (at opcservice@ded.mo.gov), and to be served electronically or by U.S. Mail on counsel of record, on this 6th day of June 2008.

/s/ William D. Steinmeier

William D. Steinmeier