

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

In the Matter of Great Plains Energy)	Case No. EM-2016-0324
Incorporated's Acquisition of Westar)	
Energy, Inc. and Related Matters)	

**GREAT PLAINS ENERGY INCORPORATED'S
REPLY TO PUBLIC COUNSEL'S RESPONSE AND STAFF'S RESPONSE**

Great Plains Energy Incorporated ("GPE" or "Company") states the following in reply to the Response of the Office of the Public Counsel ("Public Counsel" or "OPC"), as well as the Response of Staff:

1. The responses of Public Counsel and Staff seek to expand the jurisdiction of the Commission beyond the definition of "public utility" under Missouri law to non-Missouri public utilities on the basis of the 2001 First Amended Stipulation and Agreement ("GPE Stipulation"). Staff and Public Counsel argue for this jurisdictional enlargement, even though that Stipulation does not define "public utility" in that way. To the contrary, the GPE Stipulation makes no effort to re-define "public utility" in any way that goes beyond the definition in the Missouri Revised Statutes. Staff itself recognizes that the jurisdiction of the Missouri Public Service Commission ("Commission" or "PSC) cannot be enlarged by agreement. See Staff Response, ¶ 9 & n. 28.

2. Because there is no legal or factual basis for the Commission to adopt such an expansive definition of what is a public utility under its jurisdiction, Staff's motion to open an investigation into GPE's acquisition of Westar Energy, Inc. ("Westar Energy") should be denied.

I. Reply to Public Counsel.

3. Public Counsel cites the statements of counsel for GPE, Staff and OPC during the July 5, 2001 on-the-record presentation that the Commission conducted regarding the GPE

Stipulation. The comments of GPE's counsel, as well as the other lawyers, are entirely consistent with an interpretation that preserves the Commission's jurisdiction over the acquisition by holding companies of Missouri public utilities, not non-Missouri public utilities.

4. Commissioner Murray asked about Section II(7) of the GPE Stipulation and the Commission's 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 Itself into a Holding Company Structure, No. EM-2001-464 (July 5, 2001). Mr. Fischer, representing GPE, stated that this provision was "inconsistent, in my opinion, with your holdings on other holding company mergers of parents." His comment accurately reflects the Commission's previous holding company decisions which had declined to exercise any jurisdiction over a holding company, regardless of whether it was acquiring a Missouri public utility or a public utility in another state. Here, GPE in the 2001 Stipulation agreed to submit to the jurisdiction of the PSC on certain matters as set forth in the Stipulation. However, there is no provision in the 2001 Stipulation where GPE agreed to generally submit all of its affairs to the Commission's jurisdiction. There is certainly no provision related to GPE's potential acquisition of public utilities in other states.

5. Consistent with this approach, Staff Counsel Mr. Dottheim noted 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 the way of coming before the Commission in certain instances." Id. at 33 (emphasis added). 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.

6. Counsel for OPC stated that “we do believe that the Commission does have the ability to exercise jurisdiction over matters relating to public utilities.” Id. She made no reference to “public utilities” in any other context beyond its definition in Missouri law, which is limited to Missouri public utilities. She noted that GPE “can agree to be bound on those matters which are significantly related to Commission jurisdiction and oversight to not oppose our request for just jurisdiction Id. at 34 (emphasis added). Moreover, she properly observed that “the facts of the particular case will continue to control as to whether jurisdiction will be exercised.” Id.

7. There was no discussion regarding the Commission’s exercise of jurisdiction over GPE’s potential acquisition of non-Missouri public utilities. Indeed, there was no discussion at all of what the term “public utility” was intended to mean because the absence of any specific definition of “public utility” in the GPE Stipulation demonstrates that it was to be defined consistent with the Missouri Revised Statutes, as interpreted by the courts. As a result, the statement by GPE’s counsel is entirely consistent with the Commission’s longstanding policy, consistent with its statutory mission, to decline jurisdiction over a merger or acquisition involving entities not regulated by the Commission.

8. Typical of such conclusions was the PSC’s statement that it “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). Such decisions by the Commission stretch back over four decades. See Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp., No. EO-2002-1082 (2002). See also Report & Order, In re Merger of SBC Commun. Inc. and Ameritech Corp., No. TM-96-76 (1998); 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); Order Regarding Jurisdiction and Dismissing Application, In re Communications Central of Georgia, Inc. and Davel Commun. Group Inc. for Approval of Merger and Transfer of Control, No. TM-98-268 (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 (1977); 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 (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 (1999); Order Denying Motion to Reconsider Order Closing Case, In re Proposed Merger between GTE Corp. and Bell Atlantic, No. TM-99-261 (1999); 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).

9. OPC's concedes that the Commission lacks jurisdiction over the Transaction under Missouri law. "GPE's argument [that] its agreement only applies to Missouri-based utilities defies logic as statute already requires Commission-approval for such transactions. There would be no need to agree to the jurisdiction under the terms of a settlement [emphasis added]." See Public Counsel Response, ¶ 6. OPC's plainly stated position that the Commission's jurisdiction was enlarged beyond the state's borders by the GPE Stipulation is contrary to well established Missouri case law. Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991) (An "agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties"). The parties to the 2001

Stipulation could not lawfully expand the PSC's jurisdiction, whether it defies logic or not. GPE's interpretation of Section II(7) of the Stipulation clarifies jurisdiction regarding GPE's acquisition or merger with a Missouri public utility.

10. The other points made by Public Counsel are equally irrelevant to GPE's acquisition of Westar. For example, Public Counsel cites the proposed acquisition by Kansas Power & Light Co. ("KPL") of Kansas Gas and Electric Company in 1991. However, in that case KPL, as a Missouri public utility and gas corporation subject to the Commission's jurisdiction, was obligated under Section 393.190¹ which requires Commission authorization. Similarly, OPC's citation to Sections 393.180, 393.190, 393.200 and 393.251.1 are irrelevant to holding companies. Each of those statutes refers only to "electrical corporation" or other corporations explicitly subject to PSC jurisdiction.

11. Public Counsel dismisses The Laclede Group acquisition of Alagasco, an Alabama public utility, over which this Commission made no effort to exercise its jurisdiction. Although The Laclede Group stipulation also referred to it having to obtain "prior approval" from this Commission if it were to "acquire or merger with ... a public utility," OPC simply dismisses that agreement as "irrelevant." See Public Counsel Response, ¶ 10. Clearly, The Laclede Group case is relevant and indicates that the term "public utility" must be interpreted consistent with Missouri law.

12. Given that there is no discussion in the public record of the GPE Stipulation case that even suggests the parties or this Commission would extend PSC jurisdiction to the acquisition of non-Missouri public utilities, it is Public Counsel that attempts to rewrite history, not GPE.

¹ All statutory citations are to the Missouri Revised Statutes (2000), as amended.

II. Reply to Staff's Response.

13. Staff argues that because Westar Energy owns the stock of Westar Generating, Inc. ("WGI") which, in turn, owns a share of the State Line Generating Station near Joplin, Missouri, Westar Energy is therefore a Missouri regulated public utility. See Staff Reply, ¶6. Although it is true that the Commission granted WGI a line certificate of convenience and necessity under Section 393.170.1 in 2000, that does not make WGI a Missouri public utility.

14. Indeed, the Commission noted in that proceeding that WGI did not request authority to provide retail service in Missouri, and that it did not have any retail customers "anywhere in Missouri," which "raises the question of whether or not WGI should be required to apply for a certificate of convenience and necessity." See Order Approving Application to Transfer Assets and Order Granting Certif. of Convenience and Necessity, In re Westar Generating, Inc., No. EA-2000-153, 2000 Mo. PSC LEXIS 975 (2000).

15. There the Commission observed that in State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36 (Mo. 1918), "the Missouri Supreme Court added a requirement to the statutory definition [of electrical corporation and electrical plant] by finding that an electric corporation is not subject to regulation by the Commission unless it is offering electricity for 'public use.'" Id. *3. The Commission never answered that question, but simply granted WGI's application without comment. It found that WGI's CCN application was "necessary and convenient for the public service and should be approved." It never reached the issue of whether WGI was a Missouri public utility.

16. In this case, the evidence is clear that Westar Energy is not a Missouri public utility, and there are no facts that indicate that the generating facilities owned by WGI offer electricity "for public use," as required by Danciger. WGI does not have an effective tariff on file at the Commission, and does not file annual reports with the Commission. The PSC's 2015

Annual Report does not list WGI as an electric utility in Missouri. See 2015 Mo. Pub. Serv. Comm’n Annual Report at 21. Because neither WGI, nor Westar Energy offers electricity as a public service in Missouri, neither corporation is a “public utility within the meaning of the Public Service Commission Act.” Danciger, 205 S.W. at 40. Consequently, Section II(7) of the GPE Stipulation is irrelevant to GPE’s acquisition of Westar Energy because that section applies only in the case of the acquisition by GPE of a “public utility” or an “affiliate of a public utility.”

17. Contrary to Staff’s argument in Paragraphs 7-8 of its Response, as well as OPC’s argument in Paragraph 6 of its Response, GPE’s reading of Section II(7) does not “render any terms meaningless” or “provide nothing beyond what is already required by Missouri law.” The Commission has repeatedly held that acquisitions of a holding company owning the stock of a Missouri public utility do not require prior Commission approval, as discussed in Paragraphs 7-8, above. That precedent is changed for GPE because Section II(7) requires prior Commission approval of a GPE acquisition of a holding company that owns the stock of a public utility regulated by the Commission. GPE would not be required to obtain such approval absent Section II(7) of the GPE Stipulation.

18. Staff also relies upon May Dep’t Stores Co. v. Union Elec. Light & Power Co., 107 S.W. 2d 41, 53-56 (Mo. 1936), which has no relevance to a holding company like GPE and a non-Missouri public utility like Westar Energy. The facts in that case related to Union Electric and its subsidiary, Cupples Station Light, Heat & Power Company. The Supreme Court found “a clear case of electricity and steam being produced and sold by Union, but being collected for at rates Union is not authorized to charge, through preserving the corporate entity of Cupples.” Id. at 55. GPE’s acquisition of Westar Energy has nothing to do with a case where rate regulation is being “evaded or preferences granted by use of subsidiary corporation.” Id. at 56.

19. Contrary to Staff's view today, the whole point of the Section II(7) of the 2001 GPE Stipulation was to submit GPE to the Commission's jurisdiction on a limited basis with regard to the acquisition or merger with a public utility subject to the jurisdiction of this Commission. If there were an effort by the parties to that case to subject GPE to the jurisdiction of this Commission for an acquisition of public utility in Kansas, Oregon, Alabama or any state other than Missouri, the intent of the parties would have been expressed to make that quite clear. Such expressions are entirely absent from the GPE Stipulation.

20. Just like Public Counsel, Staff also urges the Commission to ignore The Laclede Group's acquisition of an Alabama natural gas utility, despite the almost identical language to the relevant sentence of Section II(7) of the GPE Stipulation. In so urging, however, Staff wholly fails to offer any principled reason why the Commission should treat GPE differently from The Laclede Group. Given that Westar Energy is not a Missouri public utility, and that WGI owns an "electric plant" in Missouri that is not dedicated to the "public use" under Danciger, there is no basis under the GPE Stipulation for the Commission to exercise jurisdiction.

21. Staff and OPC also cite Standard & Poors' ("S&P") recent credit outlook for GPE, noting that S&P did not change the investment grade credit rating of GPE or its subsidiaries, but revised the outlook from "stable" to "negative." Such a revision is commonplace whenever any publicly traded company like GPE becomes a party to a major acquisition or merger, and is subject to shareholder and/or regulatory approvals.

22. Finally, in offering an apology for its misrepresentations regarding GPE's acquisition of Aquila and the workforce issues, Staff offers an excerpt from its post-hearing brief in that case. Regrettably, Staff continues to exaggerate the actual employee impacts on Day 1 of the close of that transaction. Staff is fully aware that the synergy analysis for that transaction

was conducted using a base year of 2006. See Report & Order at 282, ¶6(c), In re Great Plains Energy Inc., No. EM-2007-0374 (2008). Staff is also fully aware that the Aquila transaction did not close until July 14, 2008. As stated in GPE's Opposition to Staff's Motion to Open Investigation, less than 5% of Aquila's total work force that was in place on July 13, 2008 received severance packages at closing. This reality is in stark contrast to the continuing inflammatory allegations by Staff on this topic. When that transaction finally came before the Commission, Staff's objections to GPE's acquisition of Aquila, Inc. were rejected in their entirety. See Report & Order, In re Great Plains Energy Inc., No. EM-2007-0374 (2008), aff'd, State ex rel. Praxair, Inc. v. PSC, 344 S.W.3d 178 (Mo. en banc 2011).

III. Conclusion

23. There is no legal basis for the Commission to exercise jurisdiction over GPE's acquisition of Westar Energy. Similarly, there are no facts that support the Commission granting Staff's Motion to Open an Investigation regarding this acquisition. Had the 2001 Stipulation been intended to extend the Commission's jurisdiction in an extraterritorial fashion, it would have been clear. In any event, such an agreement cannot give this Commission jurisdiction which it does not have under Missouri statutes. See Livingston Manor, Inc. v. Dep't of Soc. Serv., 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. Dep't of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) (citations omitted).

24. Given the significance of the acquisition of Westar Energy, GPE will keep the Commission fully advised of important developments with regard to this transaction. Consistent with its reporting obligations under the 2001 Stipulation, GPE will provide the Commission, Staff and Public Counsel with its business plans and respond to reasonable inquiries regarding the Westar Energy acquisition. As the Commission may request, GPE will appear before and

engage the Commission in discussions regarding this acquisition, both before and after the acquisition is closed.

25. Finally, GPE stands ready to appear before the Commission to present its position and to respond to questions Commissioners may have.

WHEREFORE, Great Plains Energy Incorporated requests that Staff's Motion to Open Investigation be denied, and that the Commission decline to exercise jurisdiction regarding the Company's acquisition of Westar Energy, Inc.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the below named parties by email or U.S. mail, postage prepaid, this 7th day of June 2016.

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