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

ANSWER OF STAFF, PUBLIC COUNSEL, PRAXAIR, AGP AND SIEUA TO PROCEDURAL SCHEDULE PROPOSED BY JOINT APPLICANTS

COMES NOW the Staff of the Missouri Public Service Commission (Staff), the Office of the Public Counsel (Public Counsel), and Praxair, Inc. (Praxair), AG Processing, Inc. (AGP) and Sedalia Industrial Energy Users' Association (SIEUA) (Praxair, AGP and SIEUA collectively referred to as Industrial Intervenors) and jointly Answer the separate Replies of (1) Applicants (Great Plains Energy Incorporated (GPE) and Kansas City Power & Light Company (KCPL)), (2) Aquila, Inc. (Aquila) and (3) Black Hills Corporation (Black Hills). The Joint Applicants, in particular Applicant(s) KCPL/GPE, are responsible for the amount of time that it has taken to process this case. They are responsible for the many truly unique terms and issues presented by their proposal for GPE's acquisition of Aquila. Furthermore, KCPL/GPE requested the suspension of the hearings that occurred on December 6, 2007. The Staff, Public Counsel and Industrial Intervenors request that the Commission not limit the evidentiary scope of these proceedings in a procedural schedule as GPE/KCPL has requested.

The purpose of this Answer is to clarify the need for depositions to discover information that will be relevant to the issues in this case, in particular the issue of KCPL/GPE's financial strength and the likelihood of a credit downgrade as a result of the merger. While informal discussions have revealed that KCPL/GPE will not voluntarily produce all of the deponents requested, subpoenas have not yet been applied for and issued and motions to quash have not yet

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been filed. The Staff, Public Counsel, and Industrial Intervenors are filing this Answer to apprise the Commission of the general nature of the information to be sought through depositions and its relevance to the issues in this case. In support of this Answer, the Staff, Public Counsel, and Industrial Intervenors state as follows:

1. On February 20, 2008, the Joint Applicants[1] filed a status report that included recommendations for a procedural schedule culminating in the resumption of the evidentiary hearing on April 21, 2008. On March 4, 2008, the Staff, Public Counsel, and Industrial Intervenors filed a response to that proposal in which, subject to the agreement of the Joint Applicants to cooperate in specified discovery depositions and data requests, they concurred in the resumption of hearings on April 21, 2008 and notified the Commission of a number of depositions to be taken before hearings resume. The primary purpose of these depositions is to verify the accuracy and currency of the information on the Regulatory Plan / Comprehensive Energy Plan (CEP) projects that was provided by the joint applicants to ratings agencies.

2. On March 6, 2008, two of the three Joint Applicants (GPE and KCPL) filed a response in which they generally objected to the scope of the proposed depositions. KCPL/GPE contends that the Staff, Public Counsel and the Industrial Intervenors seek to expand the scope of these proceedings to include an investigation into KCPL/GPE's performance under the Regulatory Plan.[2] The Joint Applicants' assertion is misleading and false. Although a thorough investigation of the Regulatory Plan and the CEP may be called for in a different case, such an expansion was not the intent of Staff, Public Counsel and the Industrial Intervenors. In this case, Staff, Public Counsel and the Industrial Intervenors seek merely to verify that the assurances of

[1] Kansas City Power and Light Company, Great Plains Energy Incorporated, and Aquila, Inc.

[2] The Regulatory Plan is the agreement that was approved by the Commission in Case No. EO-2005-0329. The agreement includes the CEP.

the ratings agencies (referenced in the most recent testimony of Michael Cline and Terry Bassham) were based on accurate, up-to-date information.

3. If the credit ratings agencies have been given the most accurate, most up-to-date information about projects under the CEP[3], then it may be possible that KCPL/GPE can avoid a downgrade due to the merger. Similarly, it may be possible that Aquila may be upgraded due to the merger. But as the recent negative outlook announcement from Moody's demonstrates, the Joint Applicants may be skating very close to the edge. If KCPL/GPE has been optimistic rather than realistic in the information it provided to credit rating agencies about the costs and progress of the CEP projects, especially Iatan II, then a KCPL/GPE downgrade as a result of the merger is more likely. The parties and the Commission need to know how the current and realistic information on the CEP projects, especially Iatan II, stacks up against the information provided to credit rating agencies in order to be able to determine whether the merger is not detrimental to the public interest. As the Joint Applicants have stressed throughout this proceeding, maintaining KCPL/GPE's investment grade credit rating after the merger is critical to a finding of no detriment.

4. This comparison of a current, realistic assessment of the costs and progress of the CEP projects to the information provided to the credit rating agencies is the focus of the proposed depositions. Depositions in this case are not expected to go into the same level of detail and same scope as depositions pursuant the CEP alone, but the parties and the Commission must reassure themselves in this case that the merger will not cause a downgrade. It would be disastrous to customers as well as to Joint Applicants to approve a merger that resulted in KCPL

[3] As well as other important factors that may affect KCPL/GPE's credit metrics and credit ratings, including but not limited to the assumptions underlying the proposed inclusion of the Crossroads plant – located in Mississippi – in Aquila's Missouri ratebase, assumptions underlying the timing of and profit from the sale of GPE's Strategic Energy subsidiary, and assumptions underlying the Joint Applicants' recovery of Transaction Costs.

or GPE losing its investment grade ratings just as the largest CEP investments are approaching. In an ideal world, the Commission could simply say that any adverse effects of a downgrade would be borne solely by shareholders and ratepayers would be insulated. But given KCPL/GPE's required expenditures under the CEP, it would be almost impossible for shareholders to absorb all the negative effects of a downgrade; some detriment – likely significant detriment – would inevitably hit ratepayers as well.

5. In its filing on March 6, 2008, KCPL/GPE apparently acknowledges that "inquiry into the CEP" to determine its "hypothetical potential impacts on credit quality" is within the scope of this proceeding.[4] KCPL/GPE also cites with approval prior Commission decisions finding that inquiry into "the applicant's general financial health and ability to absorb the proposed transaction"[5] is proper in a merger case. These are precisely the subjects that Staff, Public Counsel and the Industrial Intervenors seek to explore in depositions.

6. Throughout this case, the Joint Applicants have stressed the importance of maintaining the investment grade credit ratings of KCPL and GPE. It is disingenuous – and a bit alarming – for KCPL/GPE to now urge the Commission to foreclose investigation into whether or not credit rating firms Standard & Poor's and Moody's have current, accurate information on CEP projects. It is particularly disingenuous because the Staff, Public Counsel and Industrial Intervenors have agreed to conduct depositions without any delay in the schedule that Joint Applicants proposed, subject to the Joint Applicants' cooperation with the proposed depositions and deposition schedule. If procedural objections are put forward, handling those objections will consume additional time not provided in the proposed schedule and may require an adjustment.

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[4] Reply Of Applicants To Response Of Staff, Et Al. And Staff's Request For 16 Depositions, filed March 6, 2008, page 3.

[5] *Ibid.*, page 9.

7. As noted above KCPL/GPE refer to themselves as "Applicants" in their Reply; the third Applicant (Aquila) made a separate filing of a Reply. Aquila's Reply filed on March 7, 2008 notes that the merger agreement terminates on August 6, 2008. (Black Hills' Reply filed on March 7, 2008 notes that pursuant to the terms of the asset purchase agreement between the parties, closing must occur within eighteen months of February 6, 2007, that is, not later than August 5, 2008.[6]) Aquila's Reply further states that it has identified for the Staff, Public Counsel and Industrial Intervenors two Aquila individuals (Scott Heidtbrink and Max Sherman) who have knowledge about developments respecting Iatan 1 and Iatan 2 projects and Aquila has agreed to produce these individuals for purposes of sharing their knowledge about developments respecting Iatan 1 and Iatan 2. The KCPL/GPE Reply states that it is willing to produce for depositions the three individuals who filed additional testimony on February 25, 2008, Terry Bassham, Michael Cline and Chris Giles, but not respecting KCPL infrastructure matters relating to the Regulatory Plan / CEP. Thus, there are three individuals that the Staff, Public Counsel, and Industrial Intervenors want to depose that KCPL/GPE apparently will not object to, the three individuals over whom KCPL/GPE contend it has no control.

8. Counsel for KCPL/GPE has related that David Price, Terry Murphy, and Jeff Fleenor are no longer in the employ of KCPL/GPE and cannot be produced by KCPL/GPE for depositions. The Staff will seek to find these individuals, but the Staff will not seek to delay these proceedings for depositions of these individuals. Thus, KCPL/GPE will not produce the

[6] Black Hills' reply confirms that it will have no interest whatsoever in Missouri regulatory affairs nor Missouri customers after its transaction is implemented. It asserts in support of the transaction that several other jurisdictions, all outside Missouri, have approved the transaction, and that it has expended funds to perform its obligations under private agreements it has made with the Joint Applicants. Black Hills' reply may be disregarded because of its disinterest in issues to captive customers that will remain in Missouri and which are the concern of this Commission and these parties.

following eight individuals for depositions at all: Michael Chesser, Michael Downey, Stephen Easley, Lori Cheatum, John Grimwade, Brent Davis, Terry Foster and Steve Jones.

9. At page 3, paragraph 3 of KCPL/GPE's Reply, KCPL/GPE assert that the Staff, Public Counsel and Industrial Intervenors appear to be engaged in "an effort to attack collaterally the Commission's 2005 decisions in Case No EO-2005-0329, which approved a lengthy and detailed Stipulation And Agreement . . ." Thus, KCPL/GPE try to shift the focus from its conduct to an assertion that the Staff, Public Counsel and Industrial Intervenors are attacking the Commission. The Staff, Public Counsel and Praxair were signatories to the Case No. ER-2005-0329 Stipulation And Agreement and remain vitally interested in it. We are concerned that GPE's ill-conceived acquisition of Aquila and fatally structured effort to combine KCPL and Aquila will draw GPE and KCPL from addressing problems involving the Regulatory Plan / CEP. The Staff, Public Counsel and Industrial Intervenors are concerned that the KCPL/GPE construction cost and schedule controls regarding Iatan 1 and Iatan 2[7] activities have proved ineffective and KCPL/GPE no longer have reliable estimates and will not have reliable estimates for months. KCPL/GPE have taken the novel and alarming approach that because this information is relevant for another case, it cannot also be relevant for the instant case.

10. At page 9, paragraph 18 of its March 6, 2008 Reply, KCPL/GPE states that in considering whether to approve a proposed acquisition/merger "the Commission has previously considered such factors as 'the applicant's experience in the utility industry; the applicants 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 asset safely and efficiently.'" *In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure,* Order

[7] Iatan 1 and Iatan 2 are mentioned in paragraphs 4 and 39 of the Joint Application filed on April 4, 2007.

Approving Stipulation And Agreement And Closing Case, Case No. EM-2001-464, 10 Mo.P.S.C.3d 394, 400 (2001), citing *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Report And Order, Case No. GM-94-252, 3 Mo.P.S.C.3d 216, 220 (1994); emphasis supplied. This is precisely the point that the Staff, Public Counsel and the Industrial Intervenors are seeking to make.

11. At paragraph 4, page 3 of its March 6, 2008 Reply, KCPL/GPE states that "[t]o the extent that the Commission and/or parties to this case have questions regarding the expected credit quality of Great Plains Energy and/or KCPL post-transaction, given expected ongoing operating and capital expenditures, Messrs. Bassham and Cline are the appropriate witnesses to address those issues." In actuality, KCPL/GPE are seeking that the Commission rule that matters relating to: (1) whether KCPL's Regulatory Plan / CEP is off-schedule and over-budget, and (2) if that is the case, whether GPE will be able to maintain its investment grade credit rating, while acquiring Aquila, are not relevant for this case.

12. Furthermore as the Staff, Public Counsel and Industrial Intervenors indicated in their March 4, 2008 filing, KCPL/GPE are seeking to withhold workpapers. The Commission's June 19, 2007 Order Adopting Procedural Schedule at pages 2-3 and 8 adopted the parties agreement that "workpapers . . . should be submitted to each party within 2 business days following the filing of the particular testimony." KCPL/GPE did not provide to the parties certain workpapers that the Staff, Public Counsel and Industrial Intervenors believe are, among other things, the basis for the following additional supplemental surrebuttal testimony of Terry Bassham, at page 5, line 17 to page 6, line 2, and Michael W. Cline, at page 4, lines 20-23, filed on February 25, 2008:

Terry Bassham:

Q: Have Great Plains Energy and KCP&L considered the impact the withdrawals of these requests will have on the credit quality of Great Plains Energy, KCP&L, and Aquila?

A: Yes, as explained in the Additional Supplemental Direct Testimony of Michael W. Cline, Great Plains Energy vetted the withdrawals summarized herein with the credit rating agencies. ** _____ _____ _____ _____ **

Michael W. Cline:

Q: In your Supplemental Direct Testimony, you discussed the recovery of actual interest and the net debt reduction that would have resulted from the refinancing strategy you outlined as being key factors in achieving Great Plain Energy's objective of attaining an investment grade credit rating for Aquila post-closing. With these elements no longer part of your proposal, what is the expected impact on the credit ratings of Great Plains Energy, KCP&L, and Aquila?

A: In January 2008, Great Plains Energy asked Standard & Poor's ("S&P") and Moody's to evaluate, through their Ratings Evaluation Service ("RES") and Ratings Assessment Service ("RAS"), respectively, a regulatory proposal reflecting the revised approach to interest described above, along with other components described in the Additional Supplemental Direct Testimonies of Terry Bassham and Chris Giles. Copies of our Presentations to S&P and Moody's are attached as Schedules MWC-18 (HC) and MWC-19 (HC), respectively. ** _____ _____ _____ _____ **

KCPL/GPE are evidently claiming that the relevant documents from S&P's and Moody's were provided to the Staff, Public Counsel and Industrial Intervenors during settlement discussions and therefore are protected as such. The case law is clear respecting other privileges and immunities. If a party seeks to rely on the information in question, the party cannot withhold it. The Western District Court of Appeals held as follows respecting the attorney-client privilege in *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n,* 645 S.W.2d 44, 55 (Mo.App.

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W.D. 1982) and the Western District Court of Appeals noted the Eastern District Court of Appeals' decision in another Commission case:

> Bell claims, however, that there is presented a special legal issue here concerning the Commission's disallowance of antitrust legal fees. During the test year, AT & T was engaged in extensive antitrust litigation and allocated a portion of those expenses to each of its subsidiaries. The Commission staff requested access to certain supporting records in order to determine the reasonableness of the claimed charges and allocation. Bell declined to furnish those records on the grounds that they were protected by the attorney-client privilege. The staff thereupon recommended that the claimed antitrust expenses be disallowed because of the refusal to produce the supporting records in question. Bell now challenges the Commission's adoption of that staff recommendation.
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> The issue here is akin to that presented in *State ex rel. Util. Consumers Council v. Pub. Serv. Com.,* 562 S.W.2d 688, 694 (Mo.App.1978) where a utility company declined to furnish certain information on the ground that the data was entitled to protection as being "proprietary." The Eastern District of this court rejected that defense, holding:
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> > "Though the court acknowledges that in some circumstances the proprietary nature of information may shelter it from examination, the Company here cannot hide behind the proprietary nature of the information. The Company proffered testimony and exhibits based on proprietary information. If it seeks to rely on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose...."

645 S.W.2d at 55. The Staff, Public Counsel and Industrial Intervenors note additional supportive language found in *State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm'n*, 562 S.W.2d 688, 694 ((Mo.App. StL.D. 1978) regarding their position in this case that KCPL/GPE must disclose supporting workpapers respecting its testimony filed on February 25, 2008:

> . . . Appellant inquired about the specific amounts and the timing of future rate increases and the projected net operating income of the Company. The Company objected on the ground that public disclosure of the figures was prevented by the Securities Act of 1933, 15 U.S.C.A. § 77e(c), since the Company had registered an issuance of securities with the Securities and Exchange Commission. The objection was sustained. As with the proprietary information, the Commission erred in sustaining this objection.

Id. at 695-96.

13. KCPL/GPE state at paragraph 5, page 4 of its March 6, 2008 Reply that they will object to Staff data requests received that very day as "irrelevant to this proceeding" and KCPL/GPE request that the Commission resolve "the scope issue."[8] In the March 6, 2008 letter in which KCPL/GPE did object to Staff Data Request Nos. 369-386, KCPL/GPE state, in part, that it will not respond to the Staff's data requests pending a ruling by the Commission on the scope issue:

> As you may know, GPE and KCPL (Applicants) filed on March 6, 2008, a Reply Of Applicants To Response To Staff, Et Al. And Staff's Request For 16 Depositions. In this pleading, the Applicants have requested that the Commission explicitly rule that any issues related to the details of KCPL's Comprehensive Energy Plan will not be addressed in this proceeding. Pending a ruling on this request, KCPL must respectfully object to the above-referenced data requests on the grounds that such discovery is not reasonably calculated to lead to the discovery of admissible evidence and is not relevant to the subject matter of this action. . . .

14. KCPL/GPE has objected to Staff inquiries and data requests respecting (1) relevant matters relating to Iatan and the acquisition of Aquila raised by anonymous letters filed in the GPE – Aquila acquisition case; (2) the state of KCPL/GPE's financial condition; (3) the current ability of GPE to absorb Aquila without negative financial consequences; (4) the consequences of the payment of the cash value of Aquila's non-Missouri utility to Aquila shareholders versus the use of these funds to finance Aquila's current Missouri utility infrastructure needs; (5) the current GPE position regarding the likelihood that GPE can produce

[8] It is premature for the Commission even to consider objections to notices to take depositions that have not been issued. Assuming that such notices and other discovery are the subject of procedural motions, those motions will have their own time frames for response and will present issues in the appropriate context. Of course, such actions may necessitate further delays in the schedule that are now not presented. That said, these parties would note that the scope of discovery in Missouri is considerably broader than that suggested by Joint Applicants.

enough synergies[9] while avoiding service deterioration to ensure the proposed transaction will not be detrimental to the public interest; (6) the GPE utility experience relative to the fulfillment of its prior utility commitments and producing actual results beneficially comparable to its initial estimates regarding those commitments; (7) the GPE culture relative to its code of conduct, ethics, integrity, transparency compared to the existing Aquila culture; and (8) the effect of the Iatan 1 and Iatan 2 projects on KCPL/GPE's financial conditions as well as GPE's ability to execute all of the purported merger/consolidation commitments without detrimental results.

15. Missouri ratepayers will bear the burden of the detriments of the proposed transactions among GPE, KCPL, Aquila and Black Hills, regardless of whether the Joint Applicants are seeking the appropriate authorization from this Commission. After Aquila's sale to Black Hills of Aquila's utility operations in Colorado, Iowa, Kansas and Nebraska, Aquila will continue to bear some common costs previously recovered through rates charged to Aquila's non-Missouri utility customers which will have negative impacts on Aquila's financial condition until eliminated or recovered from Aquila's Missouri customers. This Commission should take no solace from settlements and the approval of settlements in other jurisdictions as those settlements are likely beneficial to some degree in other jurisdictions because of detriments assigned to Missouri ratepayers if the transaction pending before this Commission is approved as presently proposed by the Joint Applicants.

16. Since the hearings were suspended on December 6, 2007, there have been three anonymous letters filed in this case dealing in part with purported synergies. These anonymous letters contain allegations that KCPL is pressuring individuals to support synergy estimates that are not realistic. Some of the depositions proposed by the Staff relate to these purported

[9] The Staff, Public Counsel and Industrial Intervenors do not necessarily agree that there will be any significant synergy savings from the transaction for which the Joint Applicants have sought Commission approval.

synergies. At paragraph 34, pages 14-15 of the Joint Application filed on April 4, 2007, GPE stated that "[t]otal pre-tax synergies for KCPL and Aquila are estimated to reach approximately $500 million over a five-year period (2008 – 2012)," which GPE represented that it did not anticipate would change significantly, but it would provide an update in August 2007. Despite GPE's initial assurances, Mr. Bassham's February 25, 2008 testimony at page 3 states that the synergies are now expected to be $305 million during the first five years. These results represent an approximately 40% reduction in benefits. KCPL/GPE have failed to include in its testimony the caveats and disclaimers regarding these synergies that it provided in its filings with the U.S. Securities and Exchange Commission.

17. The $305 million level of synergies was bolstered by KCPL/GPE substantially increasing alleged savings from supply chain (procurement) activities. ** _____

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_____ ** The procurement area represents approximately one-third of the alleged benefits that KCPL/GPE contends will result from the acquisition of Aquila. The $80 million increase over the initial synergy estimate for this area is significant as GPE is acknowledging a $200 million reduction in its prior synergy estimates. Some of the depositions that the Staff intends to conduct will inquire into these matters.

17. It should go without saying that when the Commissioners have considered a truly significant case or issue they have taken as much time as they deemed necessary in order not to be rushed to judgment. The March 6, 2008 Reply of KCPL/GPE is electronically signed by a former Chairman of the Commission. In 1996-1997, when that individual was Chairman, the

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Commission took almost an additional six months to consider the Stipulation And Agreement respecting the merger of Union Electric Company and Central Illinois Public Service Company because after the September 5, 1996 on the record presentation of the Stipulation And Agreement,[10] the Commission issued a September 25, 1996 Order in which it stated "the Commission requests the parties to submit additional testimony, either individually or jointly, regarding the market power which will be created in Ameren Corporation, the proposed new holding company which will own Union Electric Company (UE), Central Illinois Public Service Co., and a non-utility investment company if the merger is approved." Additional testimony was submitted, and the Commission approved the proposed Stipulation And Agreement in a Report And Order issued on February 21, 1997.[11]

Wherefore the Staff, Public Counsel, and Industrial Intervenors submit their Answer and request that the Commission not limit the evidentiary scope of these proceedings in a procedural schedule as GPE/KCPL has requested.

Respectfully submitted,

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[10] No party opposed the proposed merger.

[11] AGP in *State ex rel. A.G. Processing v. Public Serv. Comm'n*, 120 S.W.3d 732, 735-36 (Mo. banc 2003) (*AG Processing*) argued, among other things, that the Commission impermissibly shifted the burden of proof of §393.150 from the applicants to the intervenors by failing to require the applicants to submit a market power study. The Missouri Supreme Court held that the §393.150.2 burden of proof pertains to rate cases and not mergers; the Commission, as an administrative agency, is not bound by *stare decisis*, nor are PSC decisions binding on the judiciary; and AGP failed in its burden to show by clear and satisfactory evidence that applicants were required to submit a market power study.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been mailed, hand-delivered, transmitted by facsimile or electronically served to all counsel of record this 10th day of March, 2008.

/s/ Steven Dottheim