BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. EC-2009-0430
	)	
KCP&L Greater Missouri Operations Company and Kansas City Power & Light Company,	)	
	)	
Respondents.	)	

KCP&L AND GMO'S LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION

COMES NOW Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively, the "Companies"), pursuant to 4 CSR 240-2.117(1), by and through its attorneys, and hereby files this Legal Memorandum in Support of Motion For Summary Determination ("Legal Memorandum").

In support hereof, the Companies offer as follows:

INTRODUCTION

The primary thrust of Staff's Complaint is that GMO's use of the "KCP&L" brand is unlawful because "GMO has not sought, and has not obtained, authority from either the Missouri Secretary of State or this Commission to operate under the name 'KCP&L.'"[1] The Companies respectfully disagree. It is lawful and appropriate for GMO to use the "KCP&L" brand and no additional authorization is necessary. The Commission's order in the merger proceeding (Case No. EM-2007-0374) and the name change orders authorizing the change from Aquila, Inc. to KCP&L Greater Missouri Operations Company (Case Nos. EN-2009-0015 and EN-2009-0164) provide all the authorization that is required. Nonetheless, in an attempt to address Staff's

concerns, GMO and KCP&L each submitted a Registration of Fictitious Name form with the Missouri Secretary of State, registering "KCP&L" as a fictitious name. Collectively, those registrations indicate that both KCP&L and GMO are doing business under the fictitious name "KCP&L."[2]

Simplified brand names, such as "KCP&L," allow customers and their utility to communicate without the customers having to have intimate knowledge of the cumbersome and often complex corporate structures of the companies serving them.[3] Significantly, GMO's use of the "KCP&L" brand is consistent with how the Companies explained to their customers they would operate following the close of the merger. Through newspaper ads, billing inserts, and by separate customer mailings, GMO explained to each of its customers that "Aquila is being acquired by Great Plains Energy, ***and will operate under the KCP&L brand***."[4] Moreover, the Companies clearly explained in the merger proceeding that the operations of the two Companies would be integrated, with KCP&L acting as the operator.[5] In fact, the Companies told Staff

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[1] Staff Complaint, at ¶ 14.

[2] *See* Answer, Attachment 1.

[3] For example, to effectively communicate with his electric utility a customer living in St. Joseph, Missouri did not need to know that he was served by "Aquila, Inc., dba Aquila Networks – For Territory Served by Aquila Networks – L&P," a division of Aquila, Inc., a Delaware Corporation, as a result of its merger with St. Joseph Light and Power Company, with Aquila, Inc. as the surviving entity. Instead, the customer simply received a bill from "Aquila" and could contact "Aquila" with any questions or concerns regarding his electric service.

[4] *See* Answer, Attachment 2 (emphasis added).

[5] Merger Order, at p. 226 ("The Application incorporates by reference the prefiled testimony from Great Plains and KCPL's witnesses that fully outline the specifics of the transaction, including the integration of KCPL and Aquila's operations."); Order, at ¶ 571 ("Aquila's employees will become KCPL employees and services will be provided to Aquila from KCPL, GPES and Great Plains."); Merger Order, at p. 250 ("KCPL Vice President of Customer Operations William Herdegen explained KCPL's process and future steps to ensure that customer service and reliability will not deteriorate after the close of the transaction. The strategy is to adopt the KCPL organization design to minimize change as much as possible for combining the two companies' customer service functions."); Merger Order, at ¶ 478 ("KCPL will pool the combined operational workforce to more efficiently address customer needs."); Merger Order, at ¶ 484 ("Currently, both companies serve the Kansas City District from eleven service centers. The combined operation will serve this district from six service centers."); Merger Order, at ¶ 496 ("The[] five operating areas, although different in customer size and area, will be operated as an integrated organization."); Merger Order, at ¶ 529 ("A single call center for the new Great Plains customer base will be created. The call center, referred to as the Customer Care Center, will handle all residential and business customer contacts for time-saving, self-service options for any service or account need including service requests, new construction or service upgrades, billing and account information, payment options, and special programs and services."); Merger Order, at

precisely how they intended to use the "KCP&L" brand.[6] Simply put, the Companies are operating precisely how they told the Commission and their customers they would operate.

With few possible exceptions it would appear that no utility in the state has availed itself of either a formal name change proceeding before the Commission or a fictitious name registration with the Missouri Secretary of State for authorization to use a brand or service mark comprised of a shortened or abbreviated version of the company's full legal name. To the contrary, as detailed below, it would seem that virtually every utility in the state uses a brand or service mark shortening its full legal name without such authorization or registration.[7] It is not at all clear why the use of the "KCP&L" brand by Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company is any different.

Staff has also failed to demonstrate in its Complaint that any meaningful customer confusion has resulted from GMO's use of the "KCP&L" brand. Staff relies upon "more than 30 public comments" that were submitted to the Commission in KCP&L's and GMO's recent rate cases (Case Nos. ER-2009-0089 and ER-2009-0090, respectively).[8] However, none of the comments include a complaint about GMO's use of the "KCP&L" brand. Nor does any comment suggest that the customer encountered customer service or other problems as a result of GMO using the "KCP&L" brand. In nearly all cases, the comments contain only an inference of possible confusion. It is important to keep in mind that the comments on which Staff relies

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¶ 250 ("The post-transactional operational model planned by Great Plains will allow the full range of synergies to be accessed.").

[6] In a response to a data request from Staff in the merger proceeding asking for presentations made to the Companies' Integration Planning Leadership Team concerning post-merger operations, the Companies provided material clearly indicating that the "KCP&L" brand "will be used Day 1 on KCPL & Aquila Bills, Notices and Letters." The pertinent slides for that presentation are attached to the Answer as Attachment 11.

[7] *See, e.g.*, Ameren UE, Empire, MGE Missouri Gas Energy, Laclede Gas, at&t, verizon.

represent roughly 0.01% of GMO's 300,000 customers. It is also noteworthy that the Commission has received no complaints concerning GMO's use of the "KCP&L" brand or indicating any customer service issues arising from GMO's use of the brand.[9] The substance and quantity of the public comments do not indicate that there is customer confusion. To the contrary, the lack of any substantive comments concerning the name change demonstrates that no meaningful confusion exists and is more likely a testament to the Companies' efforts to explain their post-merger operations to customers. In fact, data suggests that customer satisfaction among GMO's customers has improved since GMO began operating under the "KCP&L" brand. At the time of the merger, J.D. Power ranked Aquila, Inc. 70th out of 121 utilities. Since the merger, the Companies' consolidated ranking has improved from 37th of 121 utilities to 27th of 121 utilities. The Commission recognized the potential for benefits from consolidating operations under KCP&L.[10]

Finally, even assuming some degree of customer confusion exists, efforts to remedy it would likely lead to additional, longer-lasting confusion, and if successful, would only serve to clarify a distinction that is short-lived.[11] Staff noted that "GPE intends at some future date to seek authorization to merge Respondents GMO and KCPL into KCP&L, Inc., with KCP&L, Inc. surviving."[12] As the Companies explained to Staff, KCP&L and GMO anticipate seeking

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[8] Staff Complaint, at ¶ 28. Staff did not include the public comments on which it relies in its Complaint, but provided a list of them to the Companies in response to a data request. As a result, the comments relied upon by Staff are attached to the Answer as Attachment 3.

[9] *See* Answer, Attachment 4, Staff's response to Companies Data Request Nos. 005 and 006.

[10] Merger Order, at ¶ 476 ("With regard to the effect the merger will have on customers and communities served by KCPL and Aquila in Missouri: (1) KCPL ranks in the top tier of performance in nearly every category typically benchmarked by utilities, including production cost, reliability, distribution cost to serve per customer, and is nearing top-tier in customer satisfaction; and, (2) it is Great Plains' and KCPL's objective to combine management practices and resources to achieve significant reduction in costs and further enhance reliability and customer satisfaction, with rates lower than they would have been had the merger not occurred.").

[11] Efforts to educate customers would also be expensive. A post card mailer to GMO's customers, for example, costs in excess of $100,000.

[12] Staff Complaint, at ¶ 16.

authorization to merge in the near term.[13] The exact merger structure that the Companies may propose (that is, whether the Companies will merge into KCP&L, Inc., or will accomplish the merger in another manner) has not been determined.

Practically speaking, to the extent any meaningful customer confusion does exist, efforts to remedy it at this point would likely result in the Companies spending the next few years, or perhaps less, educating customers about the distinction between KCP&L and GMO only to turn around and begin re-educating them about a single, merged company. Given the lack of any adverse impacts attributable to any confusion that might exist, the Companies believe such efforts to distinguish between KCP&L and GMO would cause more harm than good.

In sum, GMO's use of the "KCP&L" brand is lawful, appropriate, and consistent with how the Companies told the Commission and their customers they would operate following the merger. Such use is also consistent with the use of brands or service marks by virtually every utility operating in the state. The Companies concede that GMO is "operating under the 'KCP&L' brand," as the Companies told their customers it would, including use of the brand on customer bills and signage. Such use is the factual basis of Staff's Complaint, and no material issues of fact exist concerning such use. Consequently, this matter is ripe for resolution by the Commission based upon this Motion.

II. ARGUMENT AND LEGAL AUTHORITIES

A. Summary Determination Is Appropriate When There Are No Material Facts In Dispute And The Complaint Raises Only Legal Issues.

Commission rule 4 CSR 240-2.117(1) authorizes the Commission to decide cases or specific issues by summary determination under appropriate circumstances, and provides that

[13] During the merger proceeding, the Companies explained that there were reasons why they were not seeking to merge KCP&L and Aquila, Inc. at that time, *e.g.*, concerns about exposing KCP&L to potential Aquila liabilities, the fact that KCP&L and Aquila were in different RTOs at the time of the merger. Merger Order, at ¶ 135.

"the commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." 4 CSR 240-2.117(1)(E)[14]. The Commission's rule for summary determination is 'similar to judgment on the pleadings," and is designed to "make litigation before the Commission more efficient and less costly for each entity and each person involved." *In the Matter of the Proposed Rulemaking 4 CSR 240-117*, Case No. AX-2002-159, Order Finding Necessity for Rulemaking, September 27, 2001. The Commission has previously held that the public interest favors resolution of a case or an issue by summary determination when possible so as to avoid the time and cost required to hold hearings on a matter. "Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing inasmuch as '[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.'"[15]

Summary determination or judgment on the pleadings is appropriate where the moving party has clearly established that no material issue of fact remains to be resolved and "if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law." *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122,134 (Mo. banc 2000).

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[14] *See e.g.*, Order Granting CenturyTel's Motion For Summary Determination, *CenturyTel of Missouri, LLC v. Socket Telecom, LLC*, Case No. IC-2008-0068 (September 9, 2008); Order Granting Summary Determination And Dismissing Application, *Re Application of Wasatch Investments, LC, for Change of Supplier*, Case No. EO-2008-0031, pp. 5-6 (June 8, 2008; Order Granting Summary Determination, *Re Missouri Coalition for Fair Competition v. Laclede Gas Company*, Case No. GC-2007-0169 (April 19, 2007).

[15] *Missouri Coalition for Fair Competition*, Case No. GC-2007-0169, Order Granting Summary Determination, April 29, 2007, p. 2.

As discussed in the Motion, counsel for Staff and the Companies have agreed that there are no material factual issues that need to be resolved by the Commission in this matter. (Motion, p. 4)(*See also* Tr. 4-5). Since there are no material issues of fact that remain unresolved, it is appropriate that the Commission resolve the remaining legal issues without the need for a hearing. As discussed below, the Companies believe that the remaining legal issues raised by the Staff's Complaint should be resolved in favor of the Companies.

B. Companies' Response To Count I: GMO's Use Of The "KCP&L" Brand On Customer Bills Is Lawful And Appropriate.

Staff alleges that GMO's use of the "KCP&L" brand on customer bills is unlawful because such use purportedly violates (i) the Commission's name change order in Case No. EN-2009-0164 and (ii) Section 417.200 concerning the use of fictitious names by companies doing business in Missouri.[16] The Companies respectfully disagree. Although GMO does use the "KCP&L" brand on its bills, it is entirely lawful and appropriate to do so under both the Commission's name change order and Section 417.200. Such use is also consistent with how virtually every utility in the state does business.[17]

In Case Nos. EN-2009-0015 and EN-2009-0164, the Commission authorized GMO to change the names of both "Aquila, Inc. dba Aquila Networks – L&P" and "Aquila, Inc. dba Aquila Networks – MPS" to "KCP&L Greater Missouri Operations Company." Consistent with that authorization, GMO is operating under the brand, "KCP&L," a shortened version of

[16] Staff Complaint, at ¶¶ 19 and 20.

[17] The Companies sought information from Staff concerning Staff's understanding of how other utilities use brands or service marks in Data Request No. 016, which asked "Is Staff aware of any utility operating in Missouri, including, telephone, natural gas, water, or electric utilities that does not use a brand or service mark to communicate with and bill its customers? If so, please provide the names of those utilities." Staff objected, stating that the data request "seeks a response that is overly broad and burdensome. Staff is aware of many utilities operating in Missouri that do not use a brand name or service mark to communicate with and bill customers. A listing of such utilities is an overly broad and burdensome request. Such information is available on EFIS, which is equally available to respondents, and is available in EFIS as a production of business records."

company's full legal name, KCP&L Greater Missouri Operations Company. Use of such a shortened name is entirely consistent with past practices before the Commission concerning the necessity of formal name change proceedings. Moreover, in the merger proceeding, the Companies explained their intent to have uniform, integrated billing.[18] GMO's use of the "KCP&L" brand is consistent with the name change authorizations it received in Case Nos. EN-2009-0015 and EN-2009-0164.

In addition, no Missouri Court has held that it is necessary under Section 417.200 to register a fictitious name to use a brand or service mark that shortens or abbreviates a company's full legal name. The purpose of fictitious name registration statutes like Section 417.200 is to ensure fair dealing and prevent fraud or deceit.[19] There is no allegation here of fraud or deceit. Nor has there been a suggestion of a lack of fair dealing between GMO and its customers. To the contrary, the Companies have been completely open about how they intended to operate the Companies and about GMO's use of the "KCP&L" brand. Through billing inserts and separate mailings, GMO explained to literally each and every one of its customers that "Aquila is being acquired by Great Plains Energy, ***and will operate under the KCP&L brand***."[20] The Companies also publicized that message in several area newspapers. GMO's use of the "KCP&L" brand is therefore consistent with Section 417.200.

The "KCPL" brand by KCP&L Greater Missouri Operations Company is analogous to the situation addressed in the case of *Williams v. Nuckolls*, 644 S.W.2d 670 (Mo. App. E.D. 1982) wherein the Court of Appeals found "there is no violation of this statute when Mel

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[18] Merger Order, at ¶ 530. ("KCPL will evaluate the approaches each company is taking to payment options, to the delivery and printing of bills, and to the information flow from its meter systems ***with the intent of creating one approach to the bill process that customers will understand, regardless of geographic location***." (emphasis added)). In addition, the Commission expressly recognized that "for ratemaking purposes, separate rate bases will be maintained" for KCP&L, GMO (MPS), and GMO (L&P). Merger Order, at ¶ 252. This is how the Companies have operated—one-approach billing under the different rate schedules of KCP&L, GMO (MPS), and GMO (L&P).

[19] *Hanten v. Jacobs*, 684 S.W.2d 433, 437 (Mo. Ct. App. E.D. 1984); 57 Am. Jur. 2d Name § 68.

Nuckolls does business under the name Mel Nuckolls Auto Sales." In other words, Mr. Nuckolls (like GMO) was not using a fictitious name because he was using his true name.

A utility's use of a shortened brand or service mark such as "KCP&L" is also consistent with the past practices of GMO's predecessor, Aquila, Inc., as well as the current practices of virtually every other utility operating in Missouri. Prior to the acquisition of Aquila, Inc. by Great Plains, Aquila, Inc. used the "Aquila" brand to serve its electric customers in two distinct service territories under the rate schedules of "Aquila, Inc., dba Aquila Networks – For Territory Served by Aquila Networks – MPS" and "Aquila, Inc., dba Aquila Networks – For Territory Served by Aquila Networks – L&P." Aquila, Inc. had no express authorization from the Commission to do so. Nor had it submitted a fictitious name registration with the Missouri Secretary of State. That practice was in place for several years without incident or complaint. In fact, Staff indicated in response to a data request that "it is not aware of any instances, prior to its acquisition by Great Plains Energy, of Aquila, Inc. operating under an unauthorized or unregistered name."[21]

Similarly, as Staff notes in its Complaint, Kansas City Power & Light Company "has not been authorized, by either the Missouri Secretary of State or this Commission, to operate under the fictitious name 'KCP&L,'"[22] a practice that has been in place for roughly 100 years without incident or complaint. However, Staff indicated in a response to a data request that "prior to the instances set forth in its Complaint, Staff was not aware that [Kansas City Power & Light Company] operated under an unauthorized or unregistered name."[23] Staff goes on to suggest that it might amend its complaint concerning Kansas City Power & Light Company's use of the

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20 *See* Answer, Attachment 2 (emphasis added).
21 Staff Response to Companies Data Request No. 011. *See* Answer, Attachment 5.
22 Staff Complaint, at ¶ 15.
23 Staff Response to Companies Data Request No. 014. *See* Answer, Attachment 6.

"KCP&L" brand. The Companies would of course contend that KCP&L's use of the "KCP&L" brand is lawful and appropriate.

The use of brands or service marks is not limited to the Companies or their predecessors. The Empire District Electric Company uses the "Empire" brand[24] to serve the customers of two distinct but as here affiliated companies, "The Empire District Electric Company" and "The Empire District Gas Company" under separate rate schedules. "Missouri Gas Energy, a Division of Southern Union Company" holds itself out simply as "MGE," or in some cases "MGE-Missouri Gas Energy."[25] "Laclede Gas Company" uses the brand "Laclede Gas."[26] None of these companies have sought the Commission's approval of this practice. Nor have they submitted a fictitious name registration with the Missouri Secretary of State.

Ameren Corporation uses the "AmerenUE" brand[27] to serve customers under the rate schedules of "Union Electric Company Electric Service" and "Union Electric Company Gas Service." The company did not seek or obtain formal authorization from the Commission to do so. Union Electric Company did, however, file a fictitious name registration with the Secretary of State to do business as "AmerenUE." That has little bearing on this instant case because Union Electric Company's submission is consistent with the practice to file such a registration when the fictitious name is wholly unrelated to the legal name, that is, "AmerenUE" is not a shortened or abbreviated version of "Union Electric Company."

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24 EMPIRE SERVICES YOU COUNT ON.

25 MGE MISSOURI GAS ENERGY.

26 Laclede Gas.

27 AmerenUE Connecting Missouri.

Nearly universally, utilities have used Registration of Fictitious Name submissions following a merger or some other corporate restructuring where the utility did not formally change its legal name.[28] In the present case, GMO did formally change its legal name.[29] Consequently, a Registration of Fictitious Name was not required. However, as previously noted, in an effort to address Staff's concerns, the Companies have each submitted a Registration of Fictitious Name with the Missouri Secretary of State, indicating each of their intent to do business as "KCP&L."[30]

As detailed in footnote 28, numerous companies whose full legal name includes "AT&T" operate under the "AT&T" brand,[31] and several companies whose name includes "Verizon" operate under the "Verizon" brand.[32] As above, these companies use such simplified brands or

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[28] For example, Southern Union Company registered the fictitious name "Missouri Gas Energy" following that acquisition. The company has not registered the brand "MGE" as a fictitious name. See Answer, Attachment 7. The mergers, acquisitions, and consolidations in the telecommunications area provide numerous additional examples. AT&T Corp. registered the fictitious name "AT&T Advanced Solutions." BellSouth Communication Systems, LLC registered the fictitious name "AT&T Communication Systems Southeast." SBC Internet Services, Inc. registered the fictitious name "AT&T Internet Services." TCG Kansas City, Inc. and TCG St. Louis, Inc. both registered the fictitious name "AT&T Local Network Services." SBC Long Distance, LLC registered the fictitious name "AT&T Long Distance." BellSouth Long Distance, Inc. registered the fictitious name "AT&T Long Distance Service." SNET America, Inc. registered the fictitious name "AT&T Long Distance East." Southwestern Bell Telephone Company registered the fictitious name "AT&T Southwest." Southwestern Bell Telephone registered the fictitious name "AT&T Missouri." New Cingular Wireless PCS, LLC registered the fictitious name "AT&T Mobility." See Answer, Attachment 8. All of those companies operate under the "AT&T" brand. MCImetro Access Transmission Services registered the fictitious name "Verizon Access Transmission Services." MCI Communications Services, Inc. registered the fictitious name "Verizon Business Services." Bell Atlantic Communication, Inc. registered the fictitious name "Verizon Long Distance." GTE Midwest Incorporated registered the fictitious name "Verizon Midwest." Verizon Wireless (VAW) LLC, Cellco Partnership, and CyberTel Cellular Telephone Company each registered the fictitious name "Verizon Wireless." *See* Answer, Attachment 9. All of those companies operate under the "Verizon" brand. However, neither AT&T nor Verizon registered its brand or service mark as a fictitious name under Section 417.200. Nor did they seek Commission approval.

[29] With its name change filing in Case No. EN-2009-0164 GMO included the formal documents evidencing the name change from Aquila, Inc. to KCP&L Greater Missouri Operations Company, as submitted to the Delaware Secretary of State, as well as its foreign business registration, as submitted to the Missouri Secretary of State. See Answer, Attachment 10.

[30] *See* Answer, Attachment 1.

[31] at&t

[32] verizon

service marks without authorization from the Commission[33] and without registration with the Secretary of State.[34]

In fact, the Companies are unaware of a single instance in which a Missouri utility submitted an application for a name change authorization under the Commission's rules for the purpose of obtaining Commission authorization to use a brand or service mark that shortened or abbreviated the full legal name of the company, as Staff contends GMO should have done here. Staff was unwilling to provide any examples in response to a data request by the Companies.

There is nothing nefarious or harmful about utilities using simplified brands or service marks. To the contrary, the use of such a brand makes it easier for a utility to communicate with its customers, thereby reducing confusion, not creating it. An "AmerenUE" customer, for example, is no better served knowing that he or she is served by Ameren Corporation pursuant to the tariffs of Union Electric Company, as filed with the Commission. Brands or service marks help utilities communicate with their customers. It is for this reason that their use appears to be nearly universal among public utilities operating in Missouri.

In GMO's case, the Companies are also able to reduce their operating expenses by billing customers identically under the "KCP&L" brand. Common billing stock bearing the "KCP&L" brand is presently used for the Companies' approximately 800,000 customers. Requiring GMO to use separate billing stock for its roughly 300,000 customers would result in additional and in the Companies' opinion unnecessary cost. The Companies believe that given the choice of lower

[33] In Case Nos. CN-2007-0449, IN-2006-0232, XN-2006-0268, XN-2006-0308, XN-2007-0426, the Commission authorized several utilities to change their names to various company names that contain "AT&T," *e.g.*, "BellSouth Long Distance, Inc., d/b/a AT&T Long Distance Service," "Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri," "SBC Long Distance, LLC d/b/a AT&T Long Distance," and "SBC Advanced Solutions, Inc. d/b/a AT&T Advanced Solutions." In Case Nos. LN-2006-0276, XN-2006-0275, XN-2009-0328, XN-2009-0329, the Commission authorized several different utilities to change their names to various company names that contain "Verizon," *e.g.*, "MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services," "MCI Communications Services, Inc. d/b/a Verizon Business Services," "Verizon Enterprise Solutions LLC," and "Verizon Long Distance LLC."

rates or having this allegedly confusing situation remedied customers would chose lower rates. In addition, it is not as though the Companies' bills are indistinguishable, or that they do not tie back to the Companies' respective Commission-approved rate schedules. To the contrary, KCP&L and GMO maintain different rate schedule codes in their Commission-approved tariffs. KCP&L's codes are referenced on the bills it sends its customers. GMO's codes are referenced on the bills it sends its customers. Consequently, distinguishing between a KCP&L bill and a GMO bill is a simple matter.

In sum, Staff's position is that GMO's use of the "KCP&L" brand is unlawful because GMO did not (i) get specific authority from the Commission under 4 CSR 240-2.060(5) to use the "KCP&L" brand or (ii) file "KCP&L" as a fictitious name with the Missouri Secretary of State, which both Companies have recently done. As described above, such steps are not a prerequisite for GMO to use the "KCP&L" brand. Neither the Commission's name change orders, nor Section 417.200 require it. In fact, nearly universally, utilities operating in Missouri use a brand or service mark that shortens or abbreviates the company's full legal name without such authorization or registration. Consequently, if Staff's allegations against the Companies have merit, it would appear that nearly every utility in the state is operating illegally. The level of granularity Staff suggests is not only unnecessary in that it would provide no benefit to customers but it would likely only serve to create confusion and increase costs. For all of these reasons, GMO's use of the "KCP&L" brand on customer bills is lawful and appropriate, and the Commission should dismiss Count I of Staff's Complaint.

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[34] *See infra*, note 28 concerning the Fictitious Name Registrations of the various AT&T and Verizon entities.

C. Companies' Response To Count II: GMO's Use Of The "KCP&L" Brand On Signage Is Lawful And Appropriate.

Using the same rationale as applies to Count I, Staff alleges that GMO's use of the "KCP&L" brand on signage at GMO-owned facilities is unlawful because such use again purportedly violates (i) the Commission's name change order in Case No. EN-2009-0164 and (ii) Section 417.200 concerning the use of fictitious names by companies doing business in Missouri.[35] Again, the Companies respectfully disagree. Although GMO does use the "KCP&L" brand on signage, it is entirely lawful and appropriate for the Company to do so under both the Commission's name change order and Section 417.200. As explained above, such use is also consistent with how virtually every Missouri utility does business.

The Companies explain above why it is lawful and appropriate under both the name change order in Case No. EN-2009-0164 and Section 417.200 for GMO to operate under the "KCP&L" brand. The Companies will not repeat those arguments here but will incorporate them by reference.

As discussed above, Missouri utilities universally operate using a brand or service mark that contains only an abbreviated or shortened version of the company's full legal name. Such simplified communication is particularly important on signage, where it would be particularly impractical and would almost always adversely impact the intent of posting signage if a company were required only to use its full legal name. More significantly and as previously explained, GMO expressly notified its customers that "Aquila is being acquired by Great Plains Energy, and ***will operate under the KCP&L brand***."[36] Signage bearing the "KCP&L" brand on GMO-owned facilities is entirely consistent with that statement.

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35 Staff Complaint, at ¶¶ 24 and 25.

36 *See* Answer, Attachment 3 (emphasis added).

GMO's use of the "KCP&L" brand on signage is also consistent with the authorization granted by the Commission in the merger proceeding for the two Companies to consolidate operations.[37] Staff opposed in the merger proceeding the Companies' proposal to consolidate operations. The Commission ruled against Staff, finding "that the operational integration of KCPL and Aquila will produce substantial benefits for their respective customers."[38] The Complaint continues Staff's argument against the consolidated operation of KCP&L and GMO. As the Commission rejected that argument in the merger proceeding, it should reject it again here.

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[37] Merger Order, at p. 226 ("The Application incorporates by reference the prefiled testimony from Great Plains and KCPL's witnesses that fully outline the specifics of the transaction, including the integration of KCPL and Aquila's operations."); Merger Order, at p. 222 ("Although Aquila and KCPL will remain separate legal entities, many of the companies' operational functions will be integrated and centralized after the merger closes."); Merger Order, at ¶ 568 ("Although Aquila and KCPL will remain separate legal entities, many of the companies' operational functions will be integrated after the merger closes."); Merger Order, at ¶ 571 ("Aquila's employees will become KCPL employees and services will be provided to Aquila from KCPL, GPES and Great Plains."); Merger Order, at ¶ 476 ("With regard to the effect the merger will have on customers and communities served by KCPL and Aquila in Missouri: (1) KCPL ranks in the top tier of performance in nearly every category typically benchmarked by utilities, including production cost, reliability, distribution cost to serve per customer, and is nearing top-tier in customer satisfaction; and, (2) it is Great Plains' and KCPL's objective to combine management practices and resources to achieve significant reduction in costs and further enhance reliability and customer satisfaction, with rates lower than they would have been had the merger not occurred."); Merger Order, at p. 250 ("KCPL Vice President of Customer Operations William Herdegen explained KCPL's process and future steps to ensure that customer service and reliability will not deteriorate after the close of the transaction. The strategy is to adopt the KCPL organization design to minimize change as much as possible for combining the two companies' customer service functions."); Merger Order, at ¶ 478 ("KCPL will pool the combined operational workforce to more efficiently address customer needs."); Merger Order, at ¶ 482 ("The combined service territory will be divided into geographic areas known as districts. Within each district employees will operate from multiple service centers."); Merger Order, at ¶ 484 ("Currently, both companies serve the Kansas City District from eleven service centers. The combined operation will serve this district from six service centers."); Merger Order, at ¶ 496 ("The[] five operating areas, although different in customer size and area, will be operated as an integrated organization."); Merger Order, at ¶ 529 ("A single call center for the new Great Plains customer base will be created. The call center, referred to as the Customer Care Center, will handle all residential and business customer contacts for time-saving, self-service options for any service or account need including service requests, new construction or service upgrades, billing and account information, payment options, and special programs and services.").

[38] Merger Report and Order, p. 258. *See also*, Merger Order, at ¶ 250 ("The post-transactional operational model planned by Great Plains will allow the full range of synergies to be accessed."); Merger Order, at p. 234 ("Based upon the Commission's findings of fact, the total operational synergies projected to result from the proposed transaction are $305 million over the first 5-year period. The total synergies created through the first ten years are $755 million. On a Missouri jurisdictional basis, the total synergies are equal to $549 million for 10 years, with $222 million expected during the first 5 years."); Merger Order, at p. 238 ("the resulting synergies from the operational integration of KCPL and Aquila will afford substantial benefits to the companies' customers.").

GMO's operation under the "KCP&L" brand is consistent with how it told its customers it would operate, how the Commission authorized it to operate in the merger proceeding and name change orders. Such use is also consistent with the requirements of Section 417.200. For these reasons, GMO's use of the "KCP&L" brand on signage is lawful and appropriate, and the Commission should dismiss Count II of Staff's Complaint.

D. Companies' Response To Count III: GMO's Use Of The KCP&L Brand Is Not an "Unjust" or "Unreasonable" Act Under Section 393.130(5).

Staff alleges that GMO's use of the "KCP&L" brand is "unjust and unreasonable" in violation of Section 393.130(5) because such use allegedly causes customer confusion.[39] Staff requests the Commission to "order that Respondent GMO operate henceforward as 'KCP&L Greater Missouri Operations Company,' and that Respondent KCPL henceforward operate GMO as 'KC&L Greater Missouri Operations Company,' unless lawful authority is duly sought and obtained to operate under some other name."[40]

As a preliminary matter, the Companies would note that both KCP&L and GMO now have on file with the Missouri Secretary of State Fictitious Name Registrations indicating that both intend to operate under the fictitious name, "KCP&L."[41] Such registration constitutes the "lawful authority" Staff asserts the Companies require and therefore renders moot Staff's request for relief in Count III of its Complaint.

More important, however, is the fact that Staff provides no evidence of the type of customer confusion that would render GMO's use of the "KCP&L" brand "unjust and unreasonable." Missouri courts have not opined on the types of acts that would be unjust or unreasonable under Section 393.130(5). Historically, however, the requirements of Section

39 Staff Complaint, at ¶¶ 28-30.
40 Staff Complaint, at p. 9.
41 *See* Answer, Attachment 1.

393.130 have been enforced to address more tangible issues, such as a utility charging rates other than those authorized by the Commission or to address a utility's undue discrimination among similarly situated customers.[42] In no case, has a Missouri court interpreted Section 393.130(5) to prohibit a utility from using a brand or service mark. Nor has the Commission. Without prior guidance from the courts or the Commission, one must consider the language of the statute, its intended purpose, and common sense. Presumably, an act is only "unjust" or "unreasonable" under Section 393.130(5) if it has a material or adverse impact on customers. Neither is the case here. There is no evidence of meaningful confusion among GMO's customers and there is no evidence of any harm to GMO's customers.

Staff's sole basis for the alleged confusion is "more than 30 public comments" submitted in KCP&L's and GMO's recent rate cases, Case Nos. ER-2009-0089 and ER-2009-0090, respectively, in which a GMO customer referenced "KCP&L."[43] What the comments say is interesting, but what they do not say is perhaps more noteworthy. The comments do not include complaints about GMO's use of the "KCP&L" brand being confusing. They do not include complaints about customer service issues arising from GMO's use of the "KCP&L" brand. In fact, they do not contain any complaints about GMO's use of the "KCP&L" brand whatsoever. In nearly all cases, Staff's allegation of confusion is based simply on a GMO customer's reference to "KCP&L." Such references to "KCP&L" do not demonstrate confusion, but rather demonstrate that the Companies' message has gotten through that GMO is being operated under the "KCP&L" brand. It is also worth repeating that the public comments represent about 0.01%

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[42] *City of Joplin v. Missouri Pub. Serv. Comm.*, 186 S.W.3d 290 (Mo. Ct. App. WD 2005); *GS Technologies Operating Co., Inc. v. Missouri Pub. Serv. Comm.*, 116 S.W.3d 680 (Mo. Ct. App. WD 2003); *Marco Sales, Inc. v. Missouri Pub. Serv. Comm.*, 685 S.W.2d 216 (Mo. Ct. App. WD 1984); *Ashcroft v. Missouri Pub. Serv. Comm.*, 674 S.W.2d 660 (Mo. Ct. App. WD 1984).

[43] Those comments in their entirety were attached as Attachment 3 to Answer.

of GMO's customers, hardly evidence of the type of confusion that would render GMO's actions "unjust and unreasonable."

KCP&L and GMO now have on file with the Missouri Secretary of State Fictitious Name Registrations indicating that both intend to operate under the fictitious name, "KCP&L," which satisfies Staff's request that GMO seek and obtain lawful authority to operate under the "KCP&L" brand. Moreover, there is no evidence of customer confusion that would warrant such use being treated as an unjust or unreasonable act. For these reasons, the Commission should dismiss Count III of Staff's Complaint.

E. Companies' Response To Count IV: GMO's Use Of The "KCP&L" Brand Is Not Contrary To Its Rate Schedules On File With The Commission.

Staff alleges that GMO's use of the "KCP&L" brand is inconsistent with its filed tariffs. Specifically, Staff asserts that GMO's use of the "KCP&L" brand is unlawful because "the schedule of rates of Respondent GMO is not maintained under the name 'KCP&L'; nor are any rates maintained under that name."[44] The Companies respectfully disagree. The statute and Commission regulation cited by Staff, Section 393.140(11) and 4 CSR 240-3.145, require a utility to have its tariffs on file with the Commission. GMO has done so. Significantly, neither Section 393.140(11) nor 4 CSR 240-3.145 prohibit GMO from using the "KCP&L" brand to communication with its customers.

The Companies are not aware of a public utility operating in Missouri that only communicates with its customers using the formal name provided on the utility's tariffs. Prior to the merger, for example, Aquila, Inc. used the "Aquila" brand to communicate with its customers despite the fact its tariffs bore the names "Aquila, Inc. dba Aquila Networks – L&P" and "Aquila, Inc. dba Aquila Networks – MPS." In addition, Ameren Corporation presently uses the

[44] Staff Complaint, at ¶ 35.

"AmerenUE" brand to communicate with its customers despite the fact its tariffs bear the names "Union Electric Company Electric Service Missouri Service Area" and "Union Electric Company Gas Service Missouri Service Area." The Empire District Electric Company uses the "Empire" brand despite the fact its tariffs bear the name "The Empire District Electric Company." The Empire District Gas Company also uses the "Empire" brand despite the fact its tariffs bear the name "The Empire District Gas Company." Southern Union Company uses the "MGE" brand, or in some cases "MGE-Missouri Gas Energy," despite the fact its tariffs bear the name "Missouri Gas Energy, a Division of Southern Union Company." Laclede Gas Company uses the brand "Laclede Gas" despite the fact its tariffs bear the names "Laclede Gas Company." It is not at all clear how GMO's use of the "KCP&L" brand is any different when its tariffs bear the name "KCP&L Greater Missouri Operations Company" (emphasis added).

There is no requirement that utilities only communicate with their customers using the formal name provided on the utilities' tariffs. In fact, it would appear that no utility in the state does so. The Commission should therefore dismiss Count IV of Staff's Complaint.

F. Companies' Response to Count V: Even if the Commission Ultimately Concludes That GMO's Use of the "KCP&L" Brand Is Somehow Unlawful, Penalties Are Not Called For.

Even if the Commission ultimately concludes that GMO's use of the "KCP&L" brand somehow violates Missouri law, use of the brand does not constitute the type of malfeasance that warrants a penalty. The Companies acted in good faith based upon how they believed the Commission authorized them to operate in the name change orders and merger proceeding. Moreover, there is no allegation here of fraud or deceit. Nor has there been a suggestion of a lack of fair dealing between GMO and its customers. In fact, the Companies have operated precisely how they told their customers they would operate, with GMO operating under the

"KCP&L" brand. As detailed above, GMO's use of the "KCP&L" brand is also consistent with how other Missouri utilities communicate with their customers.

Perhaps most importantly, there is no evidence of customers being harmed in any way by GMO's use of the "KCP&L" brand. There is no evidence of customer service issues that have resulted from GMO's use of the brand. In fact, there is no evidence of any meaningful confusion. Staff's allegation of confusion is premised solely upon "more than 30 public comments" in which a GMO customer makes reference to "KCP&L." Such references do not demonstrate confusion, but rather demonstrate that GMO is being operated under the "KCP&L" brand, which in fact it is.

Neither the intent behind nor the impact of GMO's use of the "KCP&L" brand warrant the imposition of penalties. The Companies acted in good faith and there is no harm to customers. Simply put, there is none of the bad acts or effects that penalties are designed to address.

For these reasons, the Commission should reject Staff's request to authorize its General Counsel to proceed in Circuit Court to seek penalties.

III. PRAYER FOR RELIEF

There are no material issues of fact concerning GMO's use of the "KCP&L" brand. Precisely as it explained to its customers, GMO is operating under the "KCP&L" brand. Therefore, the question before the Commission is a legal one, not a factual one, *i.e.*, is GMO's use of the "KCP&L" brand lawful? As explained above, GMO's use of the "KCP&L" brand is not only lawful, but is consistent with how virtually every utility in the state operates. This matter is ripe for Commission resolution by granting the Companies' Motion For Summary Determination, as provided for in 4 CSR 240-2.117(1), and the Companies respectfully request

that the Commission find that GMO's use of the "KCP&L" brand is lawful and deny Staff the relief it seeks.

Respectfully submitted,

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Dated October 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Legal Memorandum was served via e-mail or first class mail, postage pre-paid, on this 2nd day of October, 2009, upon:

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