

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

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

RESPONSE TO MOTION TO DISMISS

COMES NOW the Midwest Energy Consumers Group (“MECG”) and for its Response to Motion to Dismiss filed by Great Plains Energy (“GPE” or “Company”) respectfully states as follows:

I. INTRODUCTION

1. On November 22, 2016, MECG filed its First Amended Complaint in this matter. As reflected in that Complaint, MECG alleges that GPE has violated the provisions of a settlement in Case No. EM-2001-464 which provided for the creation of a parent holding company (Great Plains Energy) to hold all of the stock in Kansas City Power & Light Company. In order to address detriments inherent in the creation of a holding company, GPE made a commitment to seek Commission approval of the future acquisition of a public utility by GPE (“GPE Settlement”).

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.¹

¹ *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*, Case No. EM-2001-464, Order Approving

The MECG complaint alleges that GPE is seeking to acquire Westar Energy, the affiliate of a public utility (Westar Generating Inc.) without providing the opportunity for the Commission to find that no detriment would result from the transaction.

2. On December 2, 2016, GPE filed its Answer and Motion to Dismiss the MECG complaint. In its Motion to Dismiss, GPE improperly claims that the MECG Complaint fails “to state a claim upon which relief can be granted.”² Specifically, GPE claims that “[b]ecause this transaction does not involve a Missouri public utility, the Commission has no jurisdiction to approve or disapprove it, and MECG’s Complaint must be dismissed.”³

3. As this response indicates, GPE’s Motion to Dismiss must fail. MECG’s Complaint adequately alleges facts that would constitute a violation of the GPE Settlement. As such, the Motion to Dismiss is misplaced. Instead, pursuant to Section 386.390.2, the Commission must hold a hearing in order to accept facts necessary to address the merits of MECG’s claims.

II. MOTION TO DISMISS STANDARD

4. As the Supreme Court has stated, a Motion to Dismiss is not the appropriate time to determine the merits of a Complaint. Rather, a Motion to Dismiss is simply used to judge the adequacy of the underlying pleading.

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to

Stipulation and Agreement and Closing Case, EFIS Doc. No. 37; *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*, Case No. EM-2001-464, First Amended Stipulation and Agreement, EFIS Doc. No. 26, p. 13.

² *Motion to Dismiss*, page 1.

³ *Id.*

whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.⁴

5. Thus, in judging the GPE Motion to Dismiss, the Commission does not judge the merits of the MECG Complaint. Rather, the Commission simply analyzes the Complaint to determine if it alleges the elements of a cause of action. Section 396.390.1 provides that the Commission shall hear complaints regarding “a violation, of any provision of law, or of any rule or order or decision of the commission.” In this case, the MECG Complaint alleges facts that, if proven to be true, would show that GPE has failed to comply with the terms of the Commission’s Order approving the GPE settlement. Given that the Complaint adequately pleads such a violation, the GPE Motion to Dismiss must fail.

III. ELEMENTS OF CAUSE OF ACTION

6. As indicated, MECG alleges that GPE has violated the GPE Settlement that provides for the Commission approval of any GPE acquisition of a public utility. The order approving that settlement incorporates the following provision:

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.

Thus, the elements of a cause of action alleging failure to abide by this provision appears to be: (1) a GPE acquisition; (2) of a public utility or the affiliate of a public utility where

⁴ *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) (citing to *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993) (emphasis added).

the affiliate has a controlling interest in the public utility; and (3) failure to file for Commission approval of the acquisition.

In this case, MECG has properly alleged each of these elements underlying a violation of this provision of the GPE settlement. Specifically, at paragraph 17, MECG alleges that GPE has entered into a definitive agreement to purchase Westar Energy. At paragraph 13, MECG alleges that Westar Generating, Inc. is a public utility. At paragraph 14 and 15, MECG alleges that Westar Energy is an affiliate of a public utility. At paragraphs 17 and 18, MECG alleges that GPE has not sought Commission approval for its acquisition of Westar Energy. Given that the Complaint adequately sets forth all of the necessary elements, the Motion to Dismiss must fail and MECG must be provided the opportunity to present evidence proving each of the alleged facts.

IV. SECTION 386.390 REQUIRES A HEARING

7. Recognizing that the consideration of a Motion to Dismiss simply considers the adequacy of the underlying Complaint, MECG has intentionally refrained from presenting or arguing facts in this pleading. Instead, since Section 386.390.2 contemplates a hearing regarding the complaint, MECG will save its argument regarding the facts proving its Complaint until that hearing has been held and evidence accepted.

8. Similarly, in its Motion to Dismiss, GPE has raised a number of fact-specific issues. For instance, GPE has alleged that neither Westar Energy, Inc. nor Westar Generating, Inc. is a public utility or an affiliate of a public utility. Both of these allegations are factual in nature.⁵ Just as a hearing will provide MECG with the opportunity to present the evidence to support its alleged facts, that hearing will also

⁵ For instance, see provision C at pages 7-10 of GPE Motion to Dismiss.

provide GPE with the opportunity to present the evidence to support the factual allegations raised in its Motion to Dismiss.

9. MECG wants to be very clear that it has refrained from arguing the GPE factual allegations simply because those matters are not properly placed before the Commission in a Motion to Dismiss. MECG believes that GPE's allegations are factually incorrect and will argue those matters at the proper time. MECG simply wants to alert the Commission that it would be legally and procedurally incorrect for the Commission, at this time, to judge either the facts alleged in the MECG Complaint or the GPE Motion to Dismiss. Instead, the Commission will have that opportunity once it has conducted the hearing contemplated by Section 386.390 and evidence has been introduced.

V. OTHER ARGUMENTS RAISED BY GPE

10. In its Motion to Dismiss,⁶ GPE also argues that the MECG Complaint is premature ("not ripe") because "GPE has not acquired or merged with Westar. Presumably, under GPE's misplaced argument, a Complaint could only be filed once the transaction has taken place. GPE's argument is misplaced. Clearly, the GPE settlement contemplates that approval will occur prior to the acquisition.⁷ Moreover, GPE has announced, in letters to the Commission and others that it does not intend to seek Missouri Commission approval for the acquisition. Certainly, it would be ludicrous for the Commission to wait until the acquisition has occurred, and it is rendered powerless to protect the public from the detrimental effects of the acquisition, before it exercises the authority vested by the GPE settlement.

⁶ See, paragraph B (pages 6-7) of Motion to Dismiss; paragraph 4 of Affirmative Defenses.

⁷ "GPE agrees that it will not, directly or indirectly, acquire. . . unless GPE has required prior approval for such a transaction." (emphasis added).

11. At Paragraph D (pages 10-12), GPE argues that the Commission's exercise of jurisdiction over this acquisition would violate the Commerce Clause. MECG agrees that such an argument may be well placed if the Commission exercised jurisdiction over the acquisition absent the authority provided by the GPE settlement. It is important to remember, however, that GPE voluntarily gave the Commission jurisdiction over the approval of GPE's acquisition of other public utilities in order to address concerns implicit in the creation of the GPE holding company. As such, concerns that the Commission is engaging in activities that are beyond the scope of its statutory authority, or actions that are in conflict with federal law, are misplaced.

12. Similarly, at paragraph E (pages 12-13), GPE argues that MECG has failed to provide any decisions demonstrating that the Commission has previously exercised jurisdiction over the "acquisition of a non-Missouri public utility by a Missouri public utility holding company." Again, MECG agrees that such an argument may be well placed if the Commission were exercising such jurisdiction based entirely on statutory authority. In this case, however, it is important to remember that the Commission is not relying upon statutory authority. Instead, the Commission would be relying upon authority that GPE voluntarily ceded to the Commission in order to address concerns with the creation of the GPE holding company. As such, GPE's arguments that are based entirely on the scope of the Commission's statutory authority are misplaced. Instead, the analysis needs to focus on the authority vested in the Commission by the GPE settlement.

13. Furthermore, GPE alleges that the MECG Complaint must fail because MECG allegedly is not "aggrieved by any alleged violation." Such an allegation fails to

consider that Section 386.390.3 states that “the Commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.” Furthermore, MECG states that it, as well as all KCPL and GMO customers will be damaged in the form of higher rates caused by the detrimental impact of the Westar acquisition.

14. In addition, GPE again argues that the MECG Complaint must fail because MECG has “not alleged that it has any interest different from that of the general public.”⁸ GPE then asserts that MECG does not have standing to bring this Complaint. GPE fails to provide any support for this argument. Section 386.390.1 provides that a complaint may be brought by “any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation.” Contrary to GPE’s current argument, nothing in that statutory section requires an interest different from that of the general public.

15. Finally, GPE argues that MECG is estopped / has waived its right to bring this complaint. As with many other arguments, such an argument involves a factual determination. Nevertheless, GPE’s argument represents a fundamental lack of understanding of the doctrine of estoppel / waiver. All decisions to participate in litigation involve many considerations including budget, resources and likelihood of prevailing. The decision to pass on previous litigation involving other companies does not waive the ability to pursue such points at this time. Finally, it should be noted that MECG, as a formal entity, has only been in existence for less than six months. As such, MECG was not even in existence at the time that the previous fact patterns referenced by

⁸ See, paragraph 5 of affirmative defenses.

GPE were of concern. Certainly, MECG could not be found to waive concerns based upon matters that occurred prior to its existence.

WHEREFORE, MECG respectfully requests that the Commission deny Great Plains Energy's Motion to Dismiss and find that it has jurisdiction over the Great Plains Energy acquisition of Westar and order Great Plains to file an application for approval of that acquisition or, in the alternative, set this matter for an evidentiary hearing for the purpose of receiving evidence in order to determine facts necessary to find such jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties of record as reflected on the Commission's service list.



David L. Woodsmall

Dated: December 12, 2016