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**

OPPOSITION OF GREAT PLAINS ENERGY INC.
AND KANSAS CITY POWER & LIGHT CO. TO
MOTION IN LIMINE OF INDICATED INDUSTRIALS

Great Plains Energy Incorporated ("Great Plains Energy") and Kansas City Power & Light Co. ("KCPL") state the following in opposition to the Motion in Limine of Indicated Industrials ("Industrials"):

The Motion in Limine simply restates the position taken by Staff that consideration of the $755 million in synergies that result from the consummation of the merger of Aquila, Inc. into a subsidiary of Great Plains Energy should be disregarded because of a hyper-technical reading of Section 393.190.1, Mo. Rev. Stat. (2000). This theory states:

> Staff recommends the Commission find that there are no merger synergies to be realized ... from the proposed transaction contained in the Joint Application since the direct testimony in the case only alleges savings from a merger or consolidation of KCPL and Aquila, which is a transaction outside of the proposed transaction before the Commission in this case.

See Staff Report at 43, sponsored by Schallenberg Rebuttal Testimony at 5.

Although the Industrials have sponsored expert testimony discussing synergies themselves,[1] they now claim that any evidence regarding business combinations, operational integration or other means of achieving efficiencies and synergies apart from a legal merger of KCPL and Aquila is irrelevant and portions of pre-filed testimony by 28 witnesses should be

[1] Brubaker Rebuttal Testimony at 5-11.

excluded before the Commission has an opportunity to question even one of the 28 witnesses providing synergy testimony.

The Industrials admit that they do not address the specifics of the synergies that are part of the Joint Application.[2] While this strategy was their choice, the Industrials are now attempting to prohibit the Commission from looking at the specifics of the synergies. The Industrials don't want the Commission to examine the millions of dollars worth of synergy benefits for Missouri customers that KCPL and Great Plains Energy have proposed. The Commission must retain its ability to examine the synergies in order to determine the interests of Missouri ratepayers.

Finally, if the Commission believes that Section 393.190 gives it the authority to approve the integration transactions between KCPL and Aquila, it can do so in this case. The Joint Applicants have requested the Commission grant such other relief as may be necessary and appropriate to accomplish the purposes of the Merger and the Joint Application. The utilization of synergies between KCPL and Aquila is one of the main purposes of the Merger.

Section 391.190 Does Not Apply to Synergy Transactions between KCPL and Aquila

The Industrials cite no case authority to support their motion to exclude such testimony. They simply argue their interpretation of Section 393.190.1. The Industrials read Section 393.190.1 to prohibit any electrical corporation doing business in this state from attempting "any action, business combination, operational integration, or other indirect or direct means of combination" to improve efficiencies or eliminate duplication without the express approval of this Commission. See Industrials' Motion in Limine at 2. There is no case in Missouri law that supports this unprecedented assertion.

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[2] Brubaker Rebuttal Testimony at 4.

The first part of Section 393.190.1 prevents an electrical corporation from selling, assigning, leasing, transferring, mortgaging, disposing or encumbering the whole or part of its franchise, works or system necessary or useful in the performance of its duties to the public. The synergies described by the Joint Applicants do not require approval under this portion of the statute as Aquila and KCPL will be separate subsidiaries of Great Plains Energy. Aquila will continue to own its power plants, its transmission and distribution facilities and its other assets and will serve its customers under its separate electricity and steam tariffs. See Giles Surrebuttal at 3.

The Commission's rule (4 CSR 240-3.110(E)) regarding asset sales, assignments, leases, or transfers also supports KCPL's and Great Plains Energy's reading of the statute as it requires the applicant to provide a balance sheet and income statement showing the results of the acquisition of the property. Since KCPL is not acquiring any property of Aquila, it did not file such a balance sheet with the Joint Application.

Section 393.190.1 also prevents merger and consolidation of the franchise, works or system of an electrical corporation and another entity. The corporation law of the Missouri Revised Statutes uses the term "merge" in the context of a transaction that results in one corporation. Under Section 351.410 "any two domestic corporations may merge into one of the corporations ...." Similarly, "any two domestic corporations may consolidate into a new domestic corporation ...." See § 351.415. Because the Joint Applicants do not propose to merge or consolidate KCPL with Aquila, no authority has been requested under Section 393.190.1.

The Joint Applicants have chosen to structure the transaction so that Aquila, as an independent corporation, will become investment grade, while KCPL will continue to be investment grade and while they continue to operate under their respective tariffs. See Giles Surrebuttal at 3. Since both entities continue to exist there is no merger or consolidation. Again,

the Commission's rules support Great Plains Energy's and KCPL's interpretation of the statute. 4 CSR 240-3.115, which lists the filing requirements for merger or consolidation applications, requires in subsection (1)(c) that the application contain the balance sheet and income statement of each applicant and a balance sheet and income statement of the surviving corporation. Since KCPL and Aquila will both continue to exist, there is no merger or consolidation before the Commission as contemplated by the Commission's rules.

The purpose of Section 393.190.1 "is to ensure the continuation of adequate service to the public served by the utility." State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980). Because the applicants have proposed to continue Aquila's public utility service as a wholly-owned subsidiary of Great Plains does not diminish that purpose. The fact that Great Plains Energy proposes to leverage the relevant expertise of KCPL to improve Aquila operations, as well as to use Aquila expertise to improve KCPL's performance cannot be viewed either legally or factually as a reason to strike testimony that supports the creation of synergies, the promotion of efficiency, and the elimination of duplication.

Furthermore, for the Commission to inject itself into Great Plains Energy's plans to manage its regulated subsidiaries would clearly overstep its regulatory authority under Chapters 386 and 393, and impermissibly inject itself into the general management of these utilities. See State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 900 (Mo. App. S.D. 1995); State ex rel. Laclede Gas Co. v. PSC, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

The plain language of Section 393.190.1 must be the Commission's guidepost. Although it does prohibit the "indirect" merger or consolidation of "franchise, works or systems" without Commission approval, there is no language that requires Commission approval for the integration or coordination of the activities of regulated utilities or a holding company's utility subsidiaries.

A Motion in Limine is not an appropriate Remedy in This Case

A motion in limine is a procedural device used to suppress evidence, typically with the salutory purpose of pointing out evidence which may not be only objectionable but sufficiently prejudicial that if presented to a jury would warrant the declaration of a mistrial. See Robbins v. Jewish Hospital, 663 S.W.2d 341, 348 (Mo. App. E.D. 1983). There is nothing inherently prejudicial or inflammatory about the synergies evidence in this case. Indeed, other parties to the case acknowledge that real synergies will occur if the transaction is approved. See Dittmer Rebuttal at 49;

Motions in limine with regard to essential elements of an applicant's case are particularly inappropriate for administrative proceedings where there is no jury and where legal decisions, such as a construction of Section 393.190.1, will occur as part of the Commission's final decision. See Rhodes v. Blair, 919 S.W.2d 561, 564 (Mo. App. S.D. 1996) (motion in limine properly denied where party argued it was the equivalent of a motion for summary judgment).

Given the importance of the testimony offered by Great Plains Energy and KCPL on the issue of synergies, and the clear absence of any prohibition in Section 393.190.1 that forbids electrical corporations from integrating, cooperating or otherwise working together to achieve those synergies, the Motion in Limine must be denied.

Alternatively, the Joint Application Requests the Necessary Approval

In their Joint Application, Great Plains Energy, KCPL and Aquila invoke Section 393.190. They request that the Commission authorize Great Plains Energy and Aquila "to perform in accordance with the terms and conditions of the Agreement and Plan of Merger" and "other transaction-related instruments," as well as "to take any and all other actions that may be reasonably necessary and incidental to the performance of the Merger." See Joint Application at

20. The Commission is explicitly requested to permit Aquila to be merged into a wholly-owned subsidiary of Great Plains Energy, with Aquila as the surviving corporation. Id.

In concluding the request, the Joint Applicants ask that the Commission grant "such other relief as may be necessary and appropriate to accomplish the purposes of the Merger and this Joint Application, and to consummate the Merger and related transactions in accordance with the Agreement and Plan of Merger and this Joint Application." Id. at 21. Clearly, the Joint Applicants have requested that the Commission exercise its authority under Section 393.190.1 to approve the Merger and to issue any additional orders to ensure that the purposes of the Merger be achieved. As the testimony has noted, the major purpose of the transaction is to achieve synergies and efficiencies between KCPL and Aquila, operating beneath Great Plains Energy, while maintaining safe and reliable service at just and reasonable rates. See Downey Direct at 4-5.

The Joint Application specifically notes on page 19 that shared services and other transactions between KCPL and Aquila will result in efficiencies that will benefit KCPL's and Aquila's retail customers. These transactions would not be possible without the Merger between Aquila and Great Plains Energy. These shared services and transactions are the key drivers of the Merger and are clearly related to the Merger.

Thus, if the Commission accepts the Industrials' and Staff's hyper-technical reading of Section 393.190.1, the Joint Applicants have requested the necessary Commission approval for any transactions between KCPL and Aquila that effectuate the synergies. In order to make its decision regarding the transactions between Aquila and KCPL, the Commission must review the very testimony which the Industrials seek to exclude. Therefore, the Motion in Limine must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 2nd day of December, 2007, to all counsel of record.

/s/ Karl Zobrist
Karl Zobrist