STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 5th day of August, 2008.

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**

ORDER DENYING MOTIONS FOR REHEARING, CLARIFYING REPORT AND ORDER, AND DENYING MOTION TO STAY AS BEING MOOT

Issue Date: August 5, 2008 Effective Date: August 6, 2008

Three parties filed applications for rehearing in this matter, the Office of the Public Counsel ("Public Counsel"); the Sedalia Industrial Energy Users' Association (SIEAU"), AG Processing, Inc. ("AGP") and Praxair, Inc. ("Praxair") (collectively "Industrial Intervenors"); and Shirley and Allen Bockelman ("South Harper Residents"). Each allege that the Commission's July 1, 2008 Report and Order in this matter is unjust, unreasonable, arbitrary and capricious, and unlawful for a variety of reasons.

Public Counsel's Application for Rehearing

In paragraph 1 of Public Counsel's motion, counsel cites to pages 2411-2412 of the transcript to argue that the Commission's decision to sustain a single objection not to allow a particular inquiry into Kansas City Power and Light Company's ("KCPL") LaCygne project was in error. Public Counsel maintains that because the LaCygne project is included in Kansas KCPL's Comprehensive Energy Plan ("CEP") that it must be relevant.

When the Commission ruled on Great Plains Energy Incorporated's ("Great Plains") and KCPL's motion to limit the scope of proceeding to evidence relating to whether the merger met the not detrimental to the public interest standard, the Commission limited what was shaping up to be a "fishing expedition" into KCPL's entire CEP. That ruling limited inquires regarding the CEP to the inter-relationship between the Iatan projects and the acquisition of Aquila.[1]

As the transcript reveals, the Regulatory Law Judge did not restrict inquires into all construction projects encompassed by the CEP; the objection was sustained because LaCygne was in no way tied to the merger case by the litigants. Staff stated that LaCygne was part of KCPL's CEP but gave no explanation as to how that project was interrelated to the merger or any issue surrounding the merger.

Public Counsel conveniently leaves out the two pages of the Transcript that follow the passage it cites. In those pages the Commission gives Staff the opportunity to make an offer of proof as to how the LaCygne project is relevant.[2] The Commission, upon hearing an offer of proof or additional explanation could have revisited the objection and the ruling at that time. Staff declined to make such an offer. All of the other parties, including Public Counsel, had the opportunity to revisit this subject matter with the witness being questioned, Mr. Giles. Any of these parties could have further attempted to make the relevance connection or elected to make an offer of proof at the time any objections were raised – none did.

Public Counsel's post-hearing argument that the LaCygne project had a bearing on the financial condition of companies and could indirectly affect the merger cannot

[1] Aquila is a joint owner of the Iatan facilities.

[2] Transcript, pp. 2412-2414.

reform the absence of that argument at the evidentiary hearing. Moreover, Public Counsel's statement that Great Plains and KCPL conceded that Iatan and LaCygne were one in the same is incorrect; at most, from the testimony cited by Public Counsel, witness Giles conceded that LaCygne was part of KCPL's CEP.

A full examination of the transcript, as opposed to Public Counsel's selective citation, reveals that LaCygne is not the same as Iatan. Regardless, at the evidentiary hearing, no party made an argument establishing the relevance of allowing such testimony. The evidentiary ruling at hearing was not in error and this unsupported, isolated, post-hearing argument, when viewed in light of the overwhelming evidence supporting the Commission's decision, fails to establish sufficient reason for granting a motion for rehearing.

In paragraphs 2 through 13 of its motion, Public Counsel lists what it believes are errors with the Commission's April 24, 2008 evidentiary ruling limiting the scope of the evidence it would hear to evidence that was actually relevant to the merger proposal. Public Counsel erroneously believes that: (1) the Commission relied on inapplicable evidentiary standards; (2) Staff's investigation into corporate gifts and gratuities polices was not related to anonymous allegations contained in unsigned letters that were mailed to the Commission during the pendency of the proceedings; (3) the Commission inappropriately excluded all subject matter concerning the anonymous allegations; (4) there was no anonymous allegations issue in this case; and, (5) that the Commission attempted to reform its evidentiary ruling post hearing without giving the parties an opportunity to respond.

Public Counsel seems to be of the impression that well-settled evidentiary precepts applied in other Missouri adjudicatory settings have no bearing on administrative law. Public Counsel also confuses the recitation of the evidentiary standards with their actual application. The facts of every case will necessarily be different and the application of the law to those facts will undoubtedly produce different results. However, this does not change the law as determined by Missouri courts that apply to evidentiary rulings – even in an administrative setting.

The Report and Order is clear with regard to why the Commission found the particular subject matter at issue to be wholly irrelevant. The very first sentence of the section of the Order entitled "Conclusions of Law Regarding Evidentiary Ruling" is: "Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue."[3] The citation includes the reference to the *Cohen* case, which Public Counsel maintains is absent from the order. In fact, the Commission specifically applied that standard when it concluded that:

> Under the relevance standard, the anonymous letters and the testimony about those letters just summarized, are clearly irrelevant and were properly excluded. This purported evidence tends neither to prove nor disprove any fact in issue and does not corroborate any other relevant evidence bearing on the principal issues before the Commission."[4]

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[3] *State v. Liles*, 237 S.W.3d 636, 638-639 (Mo. App. 2007); ***Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005)**; *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004); *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654-655 (Mo. App. 1997); *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. App. 1992)).

[4] *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, Report and Order, p. 24. (hereinafter referred to as the "Order" or the "Report and Order").

Whether or not there was an anonymous allegations issue and whether the companies' gifts and gratuity policies were part of that issue are clearly interrelated. Staff framed this issue, along with two others,[5] as being "Anonymous Public Allegations/Comments Related to Proposed Acquisition."[6] During the evidentiary hearing, Staff acknowledged that three scheduled witnesses were produced to provide testimony regarding the anonymous public allegations in relation to the gifts and gratuity practices.[7] More importantly, however, Public Counsel overlooked the major basis for the ruling that the gifts and gratuities policies were wholly irrelevant, that being because the Commission lacks jurisdiction over such matters.[8]

Public Counsel continues its arguments regarding the anonymous allegations by alleging, post-hearing, that no such issue even existed and that the Commission's Staff's investigation into the subject matter listed under Staff's "Anonymous Allegations" category began before the anonymous letters arrived. The anonymous letters at issue were filed in the docket on January 31, EFIS Docket No. 222 (received on January 28); February 13, EFIS Docket No. 228; March 3, EFIS Docket No. 256, and March 17, EFIS Docket No. 265 (the latter three letters were filed on the same day they were received). While it is true that Staff's cover letter to its request for subpoenas to commence its investigation did not reference the initial anonymous letters, Staff's response to

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[5] As Staff's counsel stated they encompass "the Iatan projects and other matters, merger-related matters" – some of which clearly are matters that were part of KCPL's CEP. Transcript, pp. 2107-2108.

[6] Second List of Issues and Order of Opening Statements, Witnesses and Cross-Examination, EFIS Docket Number 303, filed April 16, 2008.

[7] Transcript, pp. 2102 -2108. Daryl Uffelman, Lynn Fountain and James Rose were being called was to testify regarding the anonymous public allegations. Commission released those witnesses in terms of testifying about the anonymous letters (Transcript, p. 2106); however, later the parties agreed to call James Rose to testify on other issues. Transcript, pp. 2805-2835.

[8] Report and Order pp. 25-26.

GPE/KCPL's motion for a protective order and to quash the subpoenas, filed on March 17 (EFIS Docket No. 263) did.[9] Staff stated:

> The subpoenas duces tecum, as will be related herein, are designed to receive documents and testimony from certain GPE / KCPL individuals to discover information, as quickly as possible, that is relevant to:
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> (a) GPE / KCPL's financial condition and credit worthiness as a result of the proposed acquisition of Aquila by GPE and the construction of environmental enhancement of Iatan 1 and the construction of a second baseload coal-fired unit referred to as Iatan 2 and
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> (b) **matters relating to items set forth in three anonymous letters** filed in Case No. EM-2007-0374 respecting the proposed GPE acquisition of Aquila and these Iatan projects. The Staff will proceed as directed by the Commissioners. (Emphasis added).

Nevertheless, the Commission was careful when issuing its evidentiary ruling not to exclude relevant evidence on the issues that were actually related to the merger application. The Commission heard substantial evidence on these issues, as the record reflects.

The Commission went to great lengths to ensure that appropriate witnesses were available to provide relevant testimony regarding the companies' credit-worthiness and how the Iatan projects, and KCPL's ability to manage those projects, might or might not have affected the companies' credit-worthiness in relation to the merger – **the same exact issues that were brought up in the anonymous allegations**. (Emphasis added). The Commission heard two full days worth of testimony concerning the companies' credit-worthiness and their ability to manage the Iatan projects.[10] The Commission also re-opened the case on June 11, 2008, to hear additional evidence on

[9] GPE/KCPL's motion for the protective order and to quash the subpoenas was filed on March 12, EFIS Docket No. 250.

[10] Transcript, Volumes 19, 20, 21 and 22, pp. 2397-2940.

the management of the Iatan projects in relation to a crane accident that had occurred at the construction site. The parties were allowed to present evidence on the completion deadline, cost effects and credit-worthiness implications the crane accident may or may not have produced.[11]

The extensive testimony on the Iatan projects and the credit-worthiness issues came from sworn, competent witnesses that were subject to cross-examination, and the Commission did not release any essential witnesses.[12] In fact, the witnesses providing the testimony on these subjects were the same witnesses identified by Staff as those that were going to provide testimony regarding the anonymous allegations.[13] The Commission required sworn witnesses to provide direct testimony regarding these subjects and would not rely on testimony about allegations sent to the Commission in the form of anonymous hearsay.[14]

The Commission did not rule that any and all underlying issues or subject matter that may have been touched upon in the anonymous letters and allegations were wholly irrelevant. The ruling encompassed the anonymous letters and allegations, and any

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[11] Transcript, Volumes 25 and 26, pp. 3142-3233.

[12] To ensure that all essential witnesses were available to testify on the relevant issues, GPE/KCPL was required to produce six witnesses that they requested be excused. Transcript, p. 2117.

[13] Mr. Schallenberg from Staff was one additional witness listed to testify regarding the topic of the companies' credit worthiness, and he provided that testimony. With exception of that one additional witness the witness lists for the topics of credit worthiness and the anonymous letters were identical and included: Michael Chesser, William Downey, Terry Bassham, Steve Jones, Lora Cheatum, Stephen Easley, John Grimwade, Brent Davis, Terry Foster, Chris Giles, Scott Heidtbrink, Max Sherman, James Rose, Daryl Uffelman, and Lynn Fountain.

[14] The Commission released three witnesses, the ones scheduled to testify about the allegations made in anonymous letters concerning the companies' gifts and gratuities policies. Those three witnesses, as were previously identified, were James Rose, Daryl Uffelman and Lynn Fountain. One of those witnesses, James Rose, did provide testimony regarding another issue in the case. See Transcript pp. 2805-2835. Three other witnesses were released after Staff announced that it elected not to call them (i.e. Scott Heidtbrink, Steven Jones and John Grimwade). Transcript, pp. 2103-2104 and 2402.

testimony about those letters and allegations with regard to the specific issues as framed by Staff in its proposed list of issues.[15]

Public Counsel states that, as part of Staff's investigation, it and the Industrial Intervenors participated in taking depositions of KCPL and Aquila employees in which the progress of the CEP projects was a major point of inquiry. Indeed, a number of the witnesses who testified at the evidentiary hearing were also deposed, and no party utilized any portion of those depositions at hearing to add relevant evidence to the record, to impeach a witness, or for any other purpose. The Commission can only assume that the parties understood the evidentiary ruling and chose not to offer the deposition testimony.[16]

No party filed a motion for clarification and no party filed a motion for reconsideration of the evidentiary ruling. Indeed, near the conclusion of the hearing, Public Counsel admitted on the record: "Then apparently I did misunderstand your ruling from last week."[17]

Public Counsel also misstates and mischaracterizes Commission's order when claiming the Commission concluded that the irrelevant anonymous letters would have contained only a small portion of relevant evidence. The Commission stated on page 25 of the Report and Order that even if it found that there was some minutia of relevant evidence buried in the incompetent evidence, that it would have been repetitive to hear

[15] See Transcript, pp. 2074-2120 (see in particular p. 2109) and 3082-3086. The Commission points out there was an error in the transcript that was corrected by order on June 9, 2008 – see Order Correcting Transcript; EFIS Docket No. 471.

[16] The depositions may have focused solely on the anonymous allegations as opposed to any relevant information in relation to any relevant issue that may have been underlying those allegations, or simply the parties may not have elicited any competent relevant evidence. The Commission has no way of knowing since they were not offered into evidence.

[17] Transcript, p. 3084.

it since the parties had a full and fair opportunity to present all relevant and competent evidence concerning the valid issues in this matter. Public Counsel attempts to tie this statement into its argument that the Commission was attempting to reform its evidentiary ruling post-hearing without allowing for responses.

The Commission relied on its ruling that the purported evidence in question involving the anonymous letters was wholly irrelevant.[18] The Commission needs no further reason to support its ruling, although there are other grounds that support the ruling and upon which to affirm the ruling.[19] For clarification, however, the Commission notes that in the pages referenced by Public Counsel, the Commission was not attempting to make additional rulings with regard to the evidentiary ruling it made on April 24, 2008. The Commission was merely noting that there were additional grounds, beyond what the Commission earlier held, that supported the ruling. To the extent that any party misunderstood the passage in the Report and Order, the Commission so clarifies.

Additionally, Public Counsel seeks an explanation as to what the Commission meant by use of the term "undue delay." While it is true the Commission referenced the "clock ticking" on the merger, the Commission was not referencing the time that would be consumed by the presentation of the irrelevant evidence as much as it was referring to the unnecessary proffering of irrelevant testimony that would have obstructed and hindered the quasi-judicial process – especially given the time that had elapsed for the

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[18] The "Gifts and Gratuity" policy issue was addressed separately in the in Commission's Report and Order.

[19] The Commission notes that it is well-settled law that an appellate court will uphold evidentiary rulings if proper on any ground, even if not the ground asserted. *Foster v. Barnes-Jewish Hosp.,* 44 S.W.3d 432, 438 (Mo. App. 2001); *Payne v. Cornhusker Motor Lines, Inc*., 177 S.W.3d 820, 840 (Mo. App. 2005). The fundamental rules of evidence applicable to civil cases also are applicable in administrative hearings. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003).

parties to appropriately develop their cases in chief and articulate and support their positions in this matter.

Although Missouri courts frequently reference the evidentiary standard, the concept of "undue delay" or being "unduly long" is not well defined. It has not only been equated with the concept of there being inadequate time to spend on irrelevant evidence, but has also been equated simply to the offering of such evidence that lacks probative value as being purely a "waste of time."[20]

Specifically, the word "undue" is defined as "exceeding what is appropriate or normal, excessive; not just, proper or legal;"[21] or as being "more than necessary; not proper; illegal."[22] The word "delay" is defined as "to postpone until a later time, defer; to cause to be later or slower than expected or desired;"[23] or "to retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; or interpose obstacles."[24]

The Commission does not believe it is sound public policy to allow parties to engage in tactical legal manipulation of cases. In this instance, the Commission was referencing that to hear this irrelevant and incompetent evidence would hinder or obstruct the quasi-judicial process.[25]

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[20] *Govreau v. Nu-Way Concrete Forms, Inc*., 73 S.W.3d 737, 742 -743 (Mo. App. 2002).

[21] *The American Heritage College Dictionary*, 3rd Edition, Houghton Mifflin Company, 1997, p. 1473.

[22] *Black's Law Dictionary*, 6th Edition, West Publishing Co., 1990, p. 1528.

[23] *The American Heritage College Dictionary*, 3rd Edition, Houghton Mifflin Company, 1997, p. 366.

[24] *Black's Law Dictionary*, 6th Edition, West Publishing Co., 1990, p. 425.

[25] The Commission further notes that legal relevance is determined by "weigh[ing] the probative value of the evidence against its costs," including unfair prejudice, confusion of the issues, undue delay, waste of time, or cumulativeness. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App. 2004). Thus, even logically relevant evidence can be excluded if its costs outweigh its benefits. Consequently, if evidence is erroneously admitted or excluded, an appellate court will reverse only if the error results in "substantial and obvious injustice." *Id*. "Where evidence is excluded, the issue is not whether the evidence was

In paragraph 14 of its motion, Public Counsel takes exception with the witness credibility ruling the Commission made with regard to its witness, Mr. Dittmer. The Commission, as fact-finder, is appropriately allowed considerable deference with regard to its evidentiary and witness credibility rulings because it is in the best position to evaluate the composure, demeanor and presentation of witness testimony. The Commission's findings of fact are clear with regard to Mr. Dittmer; some of his testimony was credible, some was not, some of it was less credible in comparison to other expert testimony.[26] The Commission has comprehensively supported its findings of facts regarding witness testimony throughout the Report and Order.

In paragraph 15 of its motion, Public Counsel claims the Commission's approval of the merger is unlawful because it was not made by a majority of the Commission. Pursuant to Section 386.130, a majority of the Commissioners must be present to transact Commission business. A majority of five Commissioners is three Commissioners. Three Commissioners participated in this case, three Commissioners were present to conduct the Commission's business when the vote was taken on this case, and a majority of the Commissioners participating, i.e. two out of three, appropriately decided the matter. There is no legal error as Public Counsel alleges and no Missouri case so holds.

Philipp Transit Lines, Inc., referenced by Public Counsel, involved the use of a circulating notational voting system, as opposed to the Commission taking a public vote

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'admissible,' it is whether the trial court abused its discretion in excluding it." *Govreau v. Nu-Way Concrete Forms, Inc.*, 73 S.W.3d 737, 742-743 (Mo. App. 2002).

[26] See Findings of Fact Numbers 21-101. See in particular Findings of Fact Numbers 101, 282, 294, 295, 299, 300, 301, 303, 306-308, 311-312, and 403-409.

with a quorum present.[27] The closest a Missouri court has come to ruling on this specific issue was in *State ex rel. Centropolis Transfer Co. v. Public Service Commission*, 472 S.W.2d 24, 8 (Mo. App. 1971). In *Centropolis*, similar to this case, the Commission's report and order was approved by two commissioners, one commissioner dissented, and two did not participate. The court declined to reach the issue as to whether there was a majority vote or not.

As the Joint Applicants correctly noted in their response to the applications for rehearing:

> Longstanding authority in both Missouri and in the federal courts holds that in the absence of a contrary statutory provision, a majority of a quorum -- that is, a simple majority of a quorum -- of an administrative agency is authorized to act for the body. *Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179, 183-84, 189, 88 S. Ct. 401, 404, 407 (1967); *State ex rel. Kiel v. Riechmann*, 142 S.W. 304, 312 (Mo. 1911); Hardesty v. City of Buffalo, 155 S.W.3d 69, 74 (Mo. App. 2004). See 2 Am. Jur. 2d, Administrative Law § 82 (2004); General Counsel Opinion No. 97-1, Mo. P.S.C. (Feb. 18, 1997).

In paragraph 16 of its motion, Public Counsel claims the Commission erred for failing to grant its December 13, 2007 motion to dismiss this action. The Commission provided a full legal analysis of this issue in its "Order Denying Motion to Dismiss," issued on January 2, 2008.[28] The Commission has not changed its position on this issue. Moreover, the Commission did not adopt any particular standard as Public Counsel alleges, it applied the correct legal standard to the facts of this case.

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[27] *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696, 700 -701 (Mo. Banc 1977).

[28] Further analysis regarding the appropriate application of the appearance of impropriety standard and the Judicial Canons may be found in "The Chairman's Report on a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statutes," Case No. AO-2008-0192, issued on January 15, 2008 (See pages 7-35).

In paragraph 17 of its motion, Public Counsel contends that the Commission erred by finding the "'public interest' necessarily must include the interests of both the ratepaying public and the investing public…."[29] In this instance, Public Counsel mischaracterizes the Commission's decision through selective quotation. The entire paragraph at issue in the Report and Order reads:

> The public interest is a matter of policy to be determined by the Commission.[30] It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.[31] Determining what is in the interest of the public is a balancing process.[32] In making such a determination, the total interests of the public served must be assessed.[33] This means that some of the public may suffer adverse consequences for the total public interest.[34] Individual rights are subservient to the rights of the public.[35] The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

The Commission is charged with the legal authority to determine what comprises the public interest and the Commission makes clear that determining the public interest is a balancing process considering the "total public interest." Any individual interest, as

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[29] Report and Order, page 234.

[30] *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

[31] *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

[32] *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

[33] *Id*.

[34] *Id*.

[35] *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

stated clearly in the order, including interests held by the ratepaying public or the investing public, are subservient to the rights of the public in general.

Moreover, the Commission notes that the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.[36] To the extent the Commission neglected to include this case citation, among the ones it already referenced in its Report and Order, the Order is so clarified.

In paragraph 18 of its motion, Public Counsel asserts that the Commission improperly shifted the burden of proof when finding "there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger." Again, Public Counsel mischaracterizes and misconstrues the Commission's Report and Order.

The Commission concluded that the Joint Applicants met their burden to prove that the proposed merger was not detrimental to the public interest. The Commission applied the appropriate standard and provided a thorough analysis of the balancing test on pages 255-261 of the Report and Order. The Commission addressed the credit-worthiness issue in specific detail on pages 241-250 of the Order prior to applying the not detrimental to the public interest standard.

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[36] In *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393 (Mo. banc 1934), a case involving the sale of stock, and thus partial ownership, of two Missouri public utility corporations to a Virginia Corporation, the Missouri Supreme Court held: "The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public." *Id.* at 400.

The not detrimental to the public interest standard does not require a party to demonstrate that there will be a benefit to a given transaction, it requires the applicants, in order to meet their burden of proof, to demonstrate that there will be no detriment to the public interest. As the Report and Order stated on pages 231 and 232:

> A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

The Applicants met their burden with regard to this particular issue because they established that there was no competent evidence in the report that there would be any public detriment in relation to the companies' credit-worthiness. The Commission's conclusion that "there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger," is merely a correct statement regarding the evidence in this case. The Commission did not require any party to demonstrate that there would be a downgrade in the credit ratings of the companies. The Commission merely concluded that there was no competent evidence in the record that demonstrated such.

The Applicants established that, with regard to the companies' credit ratings, there was no competent evidence to establish that there would be any direct or indirect effect of the transaction that tended to make the power supply less safe or less adequate, or that tended to make rates less just or less reasonable. The Applicants met

their burden of proof. To the extent that the Report and Order was not clear on this point, it is so clarified.

The Commission further notes that even though the Applicants met their burden on this issue, the Commission still, out of an abundance of caution to protect the ratepayers, conditioned the order so that if any potential ill effects on the credit-worthiness of the companies did occur as a result of the merger, they would have to be borne by the shareholders and not the ratepayers. The Commission appropriately determined what the 'public interest" was, and what the public interest required, and made the investor's rights subservient to the rights of the public in general. Public Counsel objects to the Commission's authority to consider the interests of the investing public in Paragraph 17 of its application for rehearing, while it advocates, in its brief, that the Commission should consider the interests of the investing public and condition the merger to make their interests subservient if the Commission approved the merger.[37] The Commission acted, as it happens, in accordance with Public Counsel's request.

In paragraph 19 of its motion, Public Counsel asserts that the Commission failed to appropriately analyze the risk associated with a possible downgrade of the companies' credit worthiness that could occur if the merger was approved.[38] The Commission thoroughly evaluated the evidence with regard to the effects the merger

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[37] *Initial Brief of the Office of the Public Counsel*, p. 22, filed June 2, 2008, EFIS Docket No. 440.

[38] When referencing witness Dittmer's testimony as part of its argument that the Commission failed to appropriately analyze the risk, Public Counsel makes the statement that: "If a downgrade occurs, the uncontroverted evidence is that a "death spiral" is possible." However, stating that some piece of evidence is uncontroverted (which the Commission does not concede in this instance) is not the end of the inquiry. The Commission "may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it." *Veal v. Leimkuehler* , 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949). The Commission's credibility findings in relation to Mr. Dittmer's testimony are fully delineated in the Report and Order.

might possibly have on the credit-worthiness of the companies and reached the appropriate legal conclusions based upon the competent and substantial evidence on the record as a whole. As previously noted, the Commission conditioned approval of the merger so any risk of credit downgrade, even if not substantiated at hearing, would be borne by the shareholders of the companies – thus, protecting the ratepayers. The Report and Order, specifically the sections already referenced with regard to this issue, speaks for itself.[39]

Finally, in paragraph 20 of its motion, Public Counsel claims the commission erred "in making its 285-page Report and Order effective only ten days after its issue date, allowing only six business days to evaluate it in the context of the entire record and prepare an application for rehearing." Public Counsel's assertions are simply incorrect. The order bore a ten-day effective date and the Commission extended that date by another three days.

The Commission discussed the upcoming order, the probable conditions that would be included in the order, the probable vote on the order and the length of the order at two separate, open public Agenda meetings prior to issuing the order.[40] Public Counsel was represented at these meetings.

Public Counsel's complaint also seems to be partially based upon not desiring to be inconvenienced during the 4th of July Holiday weekend. The timing of the order was not intended to disrupt any persons' or parties' personal time. The order was issued

[39] The Commission notes that despite all of the speculation without factual support made by various parties during this proceeding concerning the unsubstantiated potential of a credit downgrade, when the Applicants filed their Notice of Closing on July 18, 2008, they included the post-merger reports from the credit rating agencies. These reports demonstrate that no negative downgrade has occurred, and in fact demonstrate that the companies' ratings either remained stable or improved. See *Notice of Closing*, filed on July 18, 2008, EFIS Docket No. 495.

[40] Agenda Meeting on June 12 and June 26, 2008.

following the Commission's standard practice, a practice that has been sanctioned by the courts of Missouri.[41]

At any time following the issuing of the Report and Order on July 1, 2008, any party could have sought a stay from the Commission. Public Counsel did not file such a request. Only the Industrial Intervenors filed such a request and they filed it approximately 39 hours prior to when the order became effective. (The Commission will address that motion separately in a later part of this order.)

The Commission extended the time for filing motions for rehearing, yet Public Counsel's motion was filed two days prior to the expiration of the deadline. It is difficult for the Commission to comprehend Public Counsel's complaint that the ten day effective date, extended by an additional three days, was insufficient when Public Counsel requested no stay of the Order and did not utilize the entire extension of time granted by the Commission.

The Industrial Intervenors' Application for Rehearing

In paragraphs 1-3, 6-10 and 41-42 of its motion, the Industrials put forth several variations, and the application thereof, of the argument it raised during the pendency of these proceedings that the Commission erred in approving a merger that authorized an operational combination of Aquila, Inc. and KCPL. These arguments make specific claims regarding: the Commission's application of Section 393.190; the

[41] Section 386.490.3 says an order of the PSC shall "become operative thirty days after the service thereof, except as otherwise provided." The Commission may fix a reasonable time in lieu of the said thirty day period and ten days has been determined to be reasonable. *State ex rel. Office of Public Counsel v. Public Service Com'n*, 236 S.W.3d 632, 636 (Mo. banc 2007)(Public Counsel argued ten days was reasonable); *State ex rel. Alton Railroad Co. v. Public Service Co.,* 348 Mo. 780, 155 S.W.2d 149, 154 (Mo. 1941); *State ex rel. Kansas City, Independence & Fairmount Stage Lines Co. v. Public Service Com'n*, 333 Mo. 544, 557, 63 S.W.2d 88, 93 (Mo. 1933). See also the "Joint Response of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc. in Opposition to Motion for Extension of Effective Date, filed July 8, 2008, EFIS Docket No. 487.

board of directors' approvals of the transaction; the proper pleading by the Joint Applicants to effectuate their requested relief; the need for a joint operating agreement; the partial variance granted from the Commission's affiliate transaction rule; and consideration of merger synergies. The Commission addressed these arguments in the conclusions of law section of the July 1 Report and Order.[42]

In paragraphs 4 and 5 of its motion, the Industrials apparently seek clarification of the Commission's use of terms when describing the merger. Paragraph 4 takes issue with the referenced customer count that Great Plains "serves through" KCPL, which the Commission believes is self-explanatory, and paragraph 5 objects to use of the terminology of "newly merged company." To the extent that the words "newly merged company" require clarification, the Commission points to its full description of the merger and the relationship described between the surviving entities appearing in the Report and Order.[43]

In paragraphs 11 and 30 of its motion, the Industrials make vague allusions to the Commission ignoring bias on the part of Great Plains Energy's and KCPL's witnesses. However, these conclusory statements do not identify any specific alleged error. The Commission evaluated the witnesses' demeanor and credibility and made appropriate findings with regard to their testimony. Consequently, these allegations do not present a cognizable legal argument that could provide sufficient reason to grant a rehearing.

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[42] See pages 219-280. See also the respective findings of fact sections that relate to each specific conclusion of law section.

[43] Findings of Fact 121-163.

In paragraphs 12-22 and 45 of its motion, the Industrials take issue with the Commission's April 24, 2008 evidentiary ruling. In several of these paragraphs the Industrials misconstrue the evidentiary ruling. In others, they simply fail to state a cogent legal argument as they provide no specifics for any alleged error. The Commission has already addressed these arguments.[44]

In paragraphs 27, 28, 33, 35, and 36 of its motion, the Industrials take issue with the Commission's weight and credibility rulings with regard to Staff's testimony and the Report Staff attached to its testimony. These arguments claim the Commission erred for: (1) directing its Staff to use the Report format; (2) placing extreme importance and credibility findings upon the prior appearance of a witness (not identified by the Industrials) in the proceeding; (3) failure to hold the Joint Applicants' evidence to the same standard as it holds its own Staff's evidence; and, (4) evaluating Staff Witness Schallenberg's expertise.

There is nothing in the record of this case to establish that the Commission may have recommended a Report format to its Staff for presenting certain evidence. Assuming it did, however, the Commission certainly did not instruct its Staff to submit a legally deficient report, nor did it instruct its Staff to proffer an insufficient number of subject matter experts to defend the content of its Report. With regard to the referenced "prior witness," the Industrials fail to identify any specific witness, witness testimony, or credibility findings that the Commission is alleged to have made in error and consequently this conclusory argument does not present a cognizable legal argument that could provide sufficient reason to grant a rehearing. Moreover, to the

[44] See the Transcript, pp. 2074-2120, the Report and Order, pp. 14-30, and the Commission's responses to Public Counsel's Paragraphs 2-13.

extent that the Commission relied on any particular witness' testimony for any particular issue in this matter, the Commission's reasoning is supported in its Report and Order.

The Commission's witness credibility findings are supported in the record and were based, in part, upon the parties' examination of the witnesses. The Industrials claim the Commission failed to attack the credibility of certain witnesses, but apparently forget that they were litigants in this matter and had full opportunity to cross-examine the witnesses and challenge their credibility and expertise.

No witness is required to be an expert in all specialties, but the Commission would expect a witness to be an expert in the areas in which he or she is proffered to testify as an expert. In making the findings regarding Witness Schallenberg's expertise, the Commission merely relied upon Mr. Schallenberg's on-the-record admissions. Mr. Schallenberg was Staff's only witness and claimed to be responsible for the Staff's Report – composed by, as testified to by Mr. Schallenberg, a mixture of subject matter experts in subject areas in which Mr. Schallenberg admittedly had no expertise. The findings are clear in this regard and the Commission cites to the relevant testimony provided by Mr. Schallenberg to support its findings in the Report and Order.

In paragraphs 29, 37-39 of its motion, the Industrials take exception with the Commission's findings with regard to the evidence concerning the companies' credit-worthiness. The Industrials specifically contend the Commission erred when: (1) making its witness credibility findings on witnesses testifying on credit-worthiness; (2) not automatically deferring to its Staff's position on this evidence; (3) relying upon hearsay (that the Industrials fail to identify); and (4) using descriptive terms with regard to the evidence presented.

The Commission notes that the well settled Missouri Law holds that not only does the qualification of a witness as an expert rest within the fact-finder's discretion,[45] but witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."[46] An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.[47] With regard to the specific assertion that the Commission must always defer to its Staff, the Commission addressed this argument in Footnote Number 400 on pages 110 and 111 of the Report and Order.

The Commission relied on substantial and credible evidence in the record as a whole to support its conclusions of law in relation to this evidence and the Industrials do not identify any specific "hearsay evidence from persons not in attendance and which could not be produced as witnesses by KCPL," nor is it apparent that the Industrials lodged any appropriate objections to any of this alleged hearsay evidence. Hearsay testimony may be considered if no objection is made.[48] Without further specifics, the

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[45] *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.,* 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh,* 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

[46] *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl,* 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel,* 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell,* 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark,* 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

[47] *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); In the Interest of A.H., 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of the State of Mo.*, 37 S.W.3d 287(Mo. App. 2000); *State ex rel. Midwest Gas Users' Ass'n. v. Public Service Com'n of the State of Mo.*, 976 S.W.2d 485(Mo. App. 1998); *State ex rel. Conner v. Public Service Com'n*, 703 S.W.2d 577 (Mo. App. 1986).

[48] *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 842 (Mo. App. 2004).

Industrials do not even present a cognizable legal argument that could provide sufficient reason to grant a rehearing.

The Commission made appropriate findings and conclusions concerning the credit-worthiness evidence that are supported by competent and substantial evidence on the record as a whole.[49] Moreover, the Commission conditioned approval of the merger so that if any credit downgrade occurred in relation to the merger, the shareholders would have to bear those effects as opposed to the ratepayers.

In paragraphs 31, 32, and 34 of its motion, the Industrials again attack the credibility rulings of the Commission with regard to Great Plains Energy's and KCPL's witnesses. The Industrials point to what they allege are inconsistencies in testimony and specifically focus on the testimony of Mr. Cline in regard to certain schedules included with his pre-filed testimony.

The Industrials apparently fail to understand the difference between the witnesses updating their testimony, taking into account the changes they made in their merger proposal and the compensatory modifications they made to what were described as key and necessary elements of those respective proposals, and true inconsistencies where witnesses make contradictory statements in conjunction with the same subject matter thereby diminishing their credibility. Indeed, several witnesses in this case failed to update or revise their testimony when the proposed merger plan changed, and as the Commission found, this failure, and the inability of these witnesses to present a full analysis of the revised plan, damaged their credibility.

[49] See Report and Order, pp. 128-157, 241-250, and 255-262.

With regard to the specific testimony witness Cline, the Commission addressed this issue in Footnote 565, on page 146 of the Report and Order. The Industrials fail to consider the purpose for certain evidence and corroborating evidence. The Industrials also fail to address the interplay between the topics of various testimony and the overall comparative value of that subject-specific testimony as it is utilized to render conclusions of law.

The Industrials, in their attempt to contrast witness Schallenberg's testimony with that of Mr. Cline's, also fail to acknowledge the issue of the quality of any particular witness' answers to questions. As the Commission appropriately found in Finding Number 101:

> Additionally, the Commission finds that regardless of the general credibility findings made in Findings of Facts Numbers 21 through 100, a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony.[50]

Answering all questions does not mean they were answered well or completely, or that a different witness' testimony was not superior and, consequently, given more weight.

In paragraphs 23, 24, 25, 40, 43, 44, 46 and 51 of its motion, the Industrials raise arguments that were also raised by Public Counsel involving LaCygne, alleged burden shifting, alleged insufficient participation by the Commissioners, Public

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[50] As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl,* 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel,* 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell,* 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark,* 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc*., 782 S.W.2d 170, 173 (Mo. App. 1990).

Counsel's December 13, 2007 motion to dismiss this action and the effective date of the Report and Order. The Commission has already addressed these arguments in its Report and Order and/or in this order.[51]

In paragraph 26 of its motion, the Industrials argue the Commission erred for not making a decision regarding a nonexistent "Additional Amortization" plan that was not submitted as part of this case. The Commission addressed this argument in its Report and Order.[52] The Commission also preserved in the record an offer of proof regarding the so-called issue about "Additional Amortizations." No party moved the Commission to reconsider its ruling regarding the Additional Amortization following the offer of proof.

In paragraphs 47, 48, 49 and 50 of its motion, the Industrials claim the Commission misidentified the public interest and applied the wrong standard for approving the merger application. The Commission appropriately analyzed what constitutes the public interest and applied the correct standard.[53]

In paragraph 52 of its motion, the Industrials "incorporate by reference as though fully set forth herein the provisions and issues that are identified by the Office of Public Counsel in its Application to Intervene [sic]." The Commission assumes the Industrial Intervenors were referring to Public Counsel's Application for Rehearing, since Public Counsel did not file an application to intervene. Recognizing the settled law that the technical rules of pleading are not applicable to applications or pleadings filed with

[51] The Commission notes that the Industrials filed their Motion for Rehearing at 8:30 a.m. on July 12th, (39 ½ hours prior to the deadline).

[52] See pages 26-29, 48-49, 154-155, and 247-248.

[53] See the conclusions of law section of the Report and Order.

the Commission,[54] and that such pleadings are to be liberally construed,[55] the Commission recognizes the Industrials were attempting to incorporate, by reference, those issues identified in Public Counsel's Application for Rehearing. In response, the Commission directs the parties to the Commission's responses to the Public Counsel's arguments, *supra*.

The South Harper Residents' Application for Rehearing

Shirley and Allen Bockelman, members of the South Harper Residents, also filed a motion for rehearing in this matter; however, their four arguments[56] were already addressed by the Commission when responding to the arguments made by Public Counsel and the Industrials.

Conclusion and the Industrial Intervenors Motion to Stay

Section 386.500 provides that the Commission shall grant a rehearing "if in its judgment sufficient reason therefor be made to appear." The Commission finds no sufficient reason in the motions for rehearing filed by Public Counsel, the Industrial Intervenors or the Bockelman's to grant rehearing and consequently, the motions shall be denied. Because, there was no reason to expeditiously rule on the Industrial's motions for rehearing and to stay the Commission's Report and Order, Commission shall overrule the Industrials' requests to expedite and stay the Order as being moot.

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[54] *State ex rel. Crown Coach Co. v. Public Service Com'n*, 179 S.W.2d 123, 126 (Mo. App. 1944). See also *State ex rel. M., K. & T. R. Co. v. Public Service Com'n*, 210 S.W. 386 (Mo. 1919); *State ex rel. Kansas City Terminal R. Co. v. Public Service Com'n*, 272 S.W. 957 (Mo. 1925).

[55] *Id*. See also Section 386.610.

[56] The four arguments claimed the Commission erred by: (1) approving a business and operational combination between Aquila and KCPL; (2) refusing to apply the burden of proof upon the joint applicants to show that the proposed transaction would be "not detrimental" to the public interest, and instead placing the burden of proof on other parties; (3) issuing a Report and Order that was approved by less than a majority of the five Public Service Commissioners; and, (4) denying the Public Counsel's Motion to Dismiss, filed on December 13, 2007.

IT IS ORDERED THAT:

1. The points of clarification delineated in the body of this order that relate to the Report and Order issued in this matter on July 1, 2008, are hereby adopted.

2. The Application for Rehearing filed by the Office of the Public Counsel on July 11, 2008, is denied.

3. The Application for Rehearing filed by the Sedalia Industrial Energy Users' Association, AG Processing, Inc. and Praxair, Inc. (the Industrial Intervenors) on July 12, 2008, is denied.

4. The Application for Rehearing filed by Shirley and Allen Bockelman on July 13, 2008, is denied.

5. The Industrial Intervenors' Motion for Stay of Report and Order of July 1, 2008, and Request for Expedited Consideration of Motion for Stay, filed on July 12, 2008, are both overruled as being moot.

6. This order shall be effective on August 6, 2008.

7. This case shall be closed on August 7, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Murray and Jarrett, CC., concur;
Clayton, C., dissent;
Davis, Chm., and Gunn, C., absent.

Stearley, Regulatory Law Judge