BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

STAFF'S LEGAL MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Legal Memorandum in Opposition to Respondents' Motion for Summary Determination, states as follows:

Introduction

This matter concerns Respondents'[1] conduct of doing business under an unregistered and unauthorized fictitious name. Staff filed its Complaint on May 29, 2009, seeking a determination that Respondents had operated in violation of the law, an order that Respondents operate lawfully in the future, and authority to seek monetary penalties in circuit court. Respondents answered on June 26, 2009. Thereafter, the Commission adopted a procedural schedule on September 10, 2009, pursuant to which the parties filed their opposing motions for summary

[1] Respondents are KCP&L Greater Missouri Operations Company, Inc. ("GMO") and Kansas City Power & Light Company, Inc. ("KCPL").

determination on October 2, 2009. Also pursuant to the procedural schedule, responses to those motions are due on October 16, 2009.

Summary Determination

Commission Rule 4 CSR 240-2.117(1)(A) authorizes summary determination and states that "[e]xcept in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading . . . ." Rule 4 CSR 240-2.117(1)(E) sets out the standard for resolving such motions: "[t]he 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."

Why Summary Determination lies for Staff

In this case, both sides have moved for summary determination on essentially the same facts. The case turns, therefore, on a question of law – was the conduct in question, in the words of § 386.390.1, RSMo, a "violation, of any provision of law, or of any rule or order or decision of the commission . . ."? If it was, then summary determination must be entered for Staff and penalties under Chapter 386 will lie. Conversely, if the conduct in question was not a violation of any law or Commission rule, order or decision, then summary determination should be entered for Respondents.

Staff's complaint accuses the Respondents of violating both a statute and an order of the Commission by operating GMO under the name "KCP&L" and asks the Commission to so find. Specifically, Staff's complaint alleges that Respondents' use of the name "KCP&L" has violated:

(1) The Commission's Order in Case No. EN-2009-0164; and

(2) Section 417.200, RSMo.

The Commission's Order in Case No. EN-2009-0164:

In its order of November 20, 2008, in Case No. EN-2009-0164, the Commission held that "[t]he name change of Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company is recognized." In entering this order, the Commission relied upon the fact that the proposed corporate name change had already been registered with the Secretary of State of Delaware, the state of incorporation, and authority to use the new name had been sought from the Secretary of State of Missouri.

It is worth noting that, in its Report & Order in Case No. EM-2007-0374, the Commission denied Respondents' request to change the name of "Aquila, Inc.," as Respondent GMO was then known. The Commission directed Respondents to pursue a separate name change action under the Commission's practice rules. On July 2, 2008, Respondent GMO filed tariff sheets and initiated a name change proceeding, docketed as Case No. EN-2009-0015, seeking authority for GMO, then still known as Aquila, Inc., and which had been operating as "Aquila Networks – L&P" and "Aquila Networks – MPS," to operate as "Aquila, Inc., doing business as KCP&L Greater Missouri Operations Company." Upon

satisfactory proof that the new fictitious name had been duly registered with the Missouri Secretary of State, the Commission granted the requested authority on August 7, 2008, effective August 8, 2008.

The Commission has treated the matter of Respondent's name seriously and has required Respondents to obey the law. Staff here requests that the Commission continue to do so. The Commission twice, at Respondents' request, authorized GMO to operate under the name "KCP&L Greater Missouri Operations Company" and no other name. Respondents admit that GMO has instead operated as "KCP&L" and thereby admit violation of the Commission's orders.

Section 417.200, RSMo:

Section 417.200, RSMo, provides:

> That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as herein required.

This statute is intended to protect the public in the transaction of business[2] and violation is a misdemeanor.[3] There are few reported decisions[4] and the phrase "true name" is nowhere defined. Nonetheless, Staff asserts that, taking the words of the statute in their plain and ordinary meaning, as the canons of

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[2] ***Hanten v. Jacobs,*** 684 S.W.2d 433, 437 (Mo. App., E.D. 1984).

[3] Section 417.230, RSMo.

[4] The few reported cases do not consider violation of § 417.200, RSMo, to be a very serious matter. All of them, however, involve possible collateral consequences of violation, such as the validity of a contract made in an unregistered fictitious name.

construction require,[5] the "true name" of a foreign corporation that is duly authorized to do business in Missouri can only be the name under which it is authorized. In the case of Respondent GMO, that name is "KCP&L Greater Missouri Operations Company."

A violation of § 417.200, RSMo, requires a showing that (1) Respondent engaged in or transacted business (2) under a name other than its "true name," (3) which name was not registered. Respondents admit both that GMO transacted business under the name "KCP&L" and that the name was not duly registered until ***after*** Staff filed this complaint. The remaining element presents only a legal question, namely, what did the legislature intend by its use of the phrase "true name" in § 417.200? Staff suggests that it has already pointed out the only possible answer to that question.

Section 393.130(5), RSMo:

Section 393.130(5), RSMo, authorizes the Commission "after a hearing . . . [to] determine and prescribe . . . the just and reasonable acts and regulations to be done and observed[.]" In its complaint, Staff prays that the Commission will, under the authority of this statute, direct Respondent GMO to operate prospectively only under its "true name" of "KCP&L Greater Missouri Operations Company" or such other name or names as may have been duly authorized.

Penalties:

Section 386.570.1, RSMo, imposes penalties for violating or failing to comply with any statute or rule or order of the Commission; § 386.600, RSMo,

[5] ***Sermchief v. Gonzales,*** 660 S.W.2d 683, 688-89 (Mo. banc 1983).

authorizes the Commission's General Counsel to sue for penalties in Missouri courts; and § 386.071, RSMo, requires that the General Counsel act at the Commission's direction.

If the Commission determines that one or more violations, as alleged by Staff, did occur and grants summary determination to Staff, then it should also authorize and direct its General Counsel to seek penalties.

Why Summary Determination does NOT lie for Respondents

Respondents' position is that the conduct in question is not a violation of anything. They state:

> 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.

This position is demonstrably wrong. The violation of § 417.200, RSMo, previously described, was blatant and undeniable. Respondents admit that they operated GMO as "KCP&L" and that "KCP&L" was not a registered fictitious name of GMO until after Staff had filed its complaint. For this reason alone, the Commission cannot grant summary determination to Respondents.

Respondents' defense is subtle. They seek to misdirect the Commission by characterizing "KCP&L" as a "brand" rather than a fictitious name. They seek to cast doubt on Staff's enforcement efforts by insisting that every other Missouri utility engages in the same conduct. They insist that they are only doing what they announced they would do in the Merger Case, No. EM-2007-0374, as though the public announcement of an intention to break the law somehow

immunizes one from the consequences.

What's in a name?

Respondents maintain that "KCP&L" is simply a brand or service mark, a convenient, simplified version of the official corporate name. They point out that the use of such brand names by corporations is common and widespread, even among other Missouri utilities. Finally, they note that a corporation – like an individual – can use any name it wants to, so long as there is no fraud involved.

Respondents ignore the specific circumstances that make their use of the "KCP&L" brand unique and problematic. It is not just GMO that is operating as "KCP&L," it is both GMO and Kansas City Power & Light Company ("KCPL"). GMO and KCPL are contiguous but distinct public utilities. Their tariffs are not identical, so it is important for everyone concerned to be able to identify the specific company that is serving a given customer.

For example, Staff became aware just last week of a GMO customer who was erroneously advised, by employees of Respondents, that there would be no line extension charges under KCPL's tariff with respect to a house the customer planned to build. When construction reached the point that it was appropriate to begin electric service, the customer discovered that he was actually served by GMO and that charges of as much as $11,000 would apply to the line extension under GMO's tariff. The customer was left in a precarious position because he had not arranged for construction financing sufficient to cover the unexpected charges.[6] Not only are Respondents' customers unable to figure out who their

[6] Affidavit of Gay Fred, attached.

utility is, and thus which of the tariffs applies to them, Respondents' employees can't, either.

As long as KCPL and GMO are distinct legal entities with different tariffs, they must be required to operate under distinct names. The public interest demands no less.

Customer confusion

The unfortunate situation described above illustrates the sort of customer confusion that has motivated Staff's complaint. It is traditional in utility regulation that tariffs be publically available for inspection. Missouri law requires as much. Section 393.140(11), RSMo. Customers of GMO and KCPL, both of whom are operating as "KCP&L," are not likely to know which tariff to examine. This point may seem petty but, as the above situation demonstrates, it may have dire consequences on customers.

Respondents make a point in their pleadings to minimize and discount Staff's efforts to show that customer confusion has resulted from Respondents' conduct. However, like cracks in a poorly built foundation, the evidence of customer confusion will grow slowly over time.

Again, as long as KCPL and GMO are distinct legal entities, each with its own tariff, they must be required to operate under distinct names. The public interest demands no less.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will enter summary determination for it on its Complaint and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail on this **16th day of October, 2009,** upon counsel for each of the parties hereto according to the attached service list maintained for this case by the Secretary of the Commission.

/s/ Kevin A. Thompson