BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

REPLY POSTHEARING BRIEF OF MIDWEST ENERGY CONSUMERS' GROUP

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February 6, 2017

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COMES NOW the Midwest Energy Consumers' Group ("MECG") and hereby submits its Reply Post-Hearing Brief. This brief responds to the Initial Briefs filed by Great Plains Energy and the Staff of the Public Service Commission.[1]

1. Missouri Law As Well As KCPL / GPE Executives Contemplated That the Commission Would Assert Jurisdiction Over the Westar Acquisition.

At page 1 of its Initial Brief, GPE asserts that "MECG's interpretation of that Stipulation would expand the Commission's jurisdiction to the acquisition of non-Missouri regulated public utility by Missouri-based holding companies, ***and grant the PSC extraterritorial powers never contemplated by Missouri law***."[2] As demonstrated in MECG's initial brief, GPE's argument that the GPE Reorganization Condition "grants the PSC extraterritorial powers never contemplated by Missouri law" is misplaced for three reasons. ***First***, Missouri law clearly contemplated the PSC authority that the

[1] Spire sought leave to file an amicus brief. As detailed in MECG's February 4, 2017 objection to the motion for leave to file an amicus brief, the Spire brief extends well beyond the scope of this proceeding. Specifically, the Spire amicus brief relies on alleged facts not in the record in this proceeding to raise issues unique to Spire that were not implicated by the scope of this proceeding. Given the irrelevant nature of the Spire amicus brief and the fact that the Commission has not granted leave for Spire to file such a brief, MECG has sought to limit this brief to the relevant initial briefs filed by GPE and Staff.

[2] GPE Initial Brief, page 1 (emphasis added).

MECG complaint asks that the Commission exert. As spelled out at pages 3-4 of the MECG Initial Brief, absent the KCPL reorganization, the Commission would have had authority to approve GPE's acquisition of Westar. Specifically, Section 393.180 provides the Commission with the authority to approve the issuance of stocks and bonds. Thus, prior to the reorganization, the Commission would have had the authority to approve the financing vehicle that made the Westar acquisition, and other extra-territorial transactions, possible. Following the reorganization, however, those financing activities now occur at the GPE holding company level. For this reason, the parties included the Reorganization Condition as part of the settlement authorizing the KCPL reorganization. As such, contrary to GPE's current argument, Missouri law did contemplate that the PSC would have the power to approve GPE's acquisition of a non-Missouri public utility.

Second, Section 393.250.3 provides the Commission with the authority to "impose such condition or conditions as [the Commission] may deem reasonable and necessary." Given this broad grant of authority, it is clear that Missouri law did contemplate that the Commission would seek to assert authority over Missouri-based holding companies.

Third, in addition to Missouri law contemplating that the Commission would assert this authority, KCPL officials also contemplated that it would assert such authority. As KCPL's Senior Director of Regulatory Affairs and Risk Management stated: "The other comment I wanted to make -- and I'll be glad to answer any other questions you have – absolutely nothing changes from the Commission's standpoint on this transaction. ***The Commission has every bit as much authority under this restructure as it does***

today."[3] Given that the Commission would have had authority to approve the financing which makes the Westar acquisition possible prior to the reorganization, given this commitment it is reasonable to expect that the Commission should also have such authority after the reorganization.

For all of these reasons, it is clear that not only did Missouri law contemplate that the Commission would have authority over Missouri-based holding companies, and the acquisitions undertaken by those holding companies, it is also clear that KCPL / GPE once contemplated that the Commission would also have that authority. Only now, when it is inconvenient, does GPE feign surprise that the Commission would actually exercise such authority.

2. GPE Seeks to Limit the Scope of the Reorganization Condition After the Fact

As the Commission is well aware, the Reorganization Condition extends to GPE's acquisition of "a public utility." Without any citation or legal analysis, GPE now claims that "public utility can only be interpreted as it is defined under Missouri law." Based upon this misplaced argument, GPE then seeks to not only apply the definitions contained in Section 386.020, but also seeks to apply a holding from a court case from 1918.[4] Relying on this convenient interpretation, GPE continues to assert that the Reorganization Condition only applies to public utilities currently serving customers in Missouri.[5]

[3] Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 75 (emphasis added).
[4] Interestingly, the utilities in this case can't even agree on the scope of "public utility" as contained in the Reorganization Condition. While Spire simply claims that the Reorganization Condition must be interpreted consistent with Section 386.020, GPE goes even further and claims that it must also be interpreted consistent with the 1918 *Danciger* holding. Such inconsistencies between utilities are not important. As shown, as GPE executives clearly indicated at the time that it agreed to the Reorganization Condition, this provision should be applied broadly such that the "Commission has every bit as much authority under this restructure as it does today."
[5] GPE Initial Brief, pages 4-6.

As detailed in the MECG Initial Brief, GPE's convenient, after the fact interpretation, fails for four reasons.[6] ***First***, as indicated, *supra*, KCPL executives informed the Commission at the time that "***[t]he Commission has every bit as much authority under this restructure as it does today***."[7] Recognizing that GPE's current interpretation would lead to significant less authority for the Commission than it had prior to the reorganization, the GPE interpretation directly contradicts the statements made by GPE at that time.

Second, recognizing that Section 393.190 would already grant the Commission authority over GPE's acquisition of Missouri public utilities, it would be redundant and unnecessary to include such a provision as a condition for approval of any KCPL reorganization. Certainly, this provision should be interpreted in a manner so that it is not rendered meaningless.[8] Such meaning comes from extending it to include GPE's acquisition of all public utilities. This would provide meaning to this provision and give the Commission the same authority today as it had prior to the KCPL reorganization.

Third, harm to ratepayers does not come simply from a GPE acquisition of a Missouri public utility. Instead, ratepayer harm can come from the acquisition of any public utility. It would be entirely inconsistent with the Commission's statutory duty to protect customers to limit its power to approve acquisitions only to GPE's acquisition of Missouri public utilities.

Fourth, had GPE actually intended to limit the Reorganization Condition in the manner that it now claims, it would have been easy for GPE to have include the word "Missouri" to modify "public utility" in the Reorganization Condition. The fact that such

[6] MECG Initial Brief, pages 6-9.
[7] Exhibit 3, Transcript (Volume 2), Case No. EM-2001-464, pages 15 and 75 (emphasis added).
[8] Staff agrees. See, Staff Initial Brief, pages 7-8.

a clarification was readily available and not utilized by GPE certainly leads to the conclusion that the Reorganization Condition was not intended to be so limited.

3. The Holding in *Danciger* Is Not Applicable to the Interpretation of the Reorganization Condition.

At pages 4, 6, and 8-9, GPE argues that Westar Generating, Inc. is not a public utility by virtue of the fact that Westar Generating does not sell electricity to or provide any service to a member of the public in Missouri.[9] GPE directs the Commission's attention to the Missouri Supreme Court's decision in *State ex rel. M.O. Danciger & Co. v. Public Service Commission*.[10] In that case, the Court held that an electrical corporation is not subject to the Commission's regulation unless it is offering electricity "for a public use, and therefore be coupled with a public interest."[11]

GPE fails to recognize that Danciger decision is not on point. Certainly, it can be argued that Danciger would indicate that Westar Generating is not subject to the Commission's regulation. MECG's Complaint, however, does not allege that Westar Generating is subject to the Commission's jurisdiction. Rather, MECG alleges that Westar Generating is a "public utility" within the scope of the Reorganization Condition.

The Commission has primary jurisdiction to interpret the meaning of its order adopting the Reorganization Condition and to determine whether GPE has complied with that order. "Missouri has long recognized the doctrine of primary jurisdiction. Under this doctrine, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision." *MCI Metro Access Transmission Services v. City of St. Louis*, 941 S.W.2d 634 (Mo.App.

[9] See, Stipulated Fact #8.
[10] 205 S.W. 36 (Mo. 1918).
[11] *Id.* at page 40.

1997) (citing to *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo.banc 1991). See also, *State ex rel. Cirese v. Ridge,* 138 S.W.2d 1012 (Mo.banc 1940).

The Commission reaches its decision that Westar Generating, Inc. is a "public utility" within the scope of the Reorganization Condition for several reasons. First, Westar Generating clearly fits the definition of a public utility contained at Section 386.020(42). Second, at the on-the-record presentation at which the Commission considered the Stipulation that provided for the Reorganization Condition, a senior representative for KCPL indicated that "[t]he Commission has every bit as much authority under this restructure as it does today."[12] It is unquestioned that, by virtue of its authority to approve public utility financings, the Commission would have had jurisdiction over the acquisition of Westar Energy prior to the reorganization. Given that KCPL has assured the Commission that it would have "every bit as much authority under this restructure as it does today" and that the Commission relied upon such assurances, the Commission interprets the phrase "public utility" to include Westar Generating, Inc.

4. The Commission's Reorganization Order Clearly Conditions Its Approval On Its Ability to Approve GPE Acquisition of Public Utilities.

At page 7 of its Initial Brief, GPE claims that the Reorganization Condition does not grant any authority to the Commission.

> [T]his provision [the Reorganization Condition] does not and cannot confer jurisdiction on the Commission to approve or disapprove the Transaction under its Section 393.190 merger and acquisition authority, or its Section 393.250 reorganization authority. There is nothing in the Commission's Order approving the 2001 GPE Stipulation that even mentions Paragraph 7, let alone seeks to assert extraterritorial jurisdiction over a future GPE acquisition of a non-Missouri public utility.

[12] Exhibit 3, page 75.

Contrary to GPE's current assertions, the Reorganization Condition was authorized by Missouri law and was properly imposed as part of the Commission's approval of the KCPL / GPE Reorganization.

Section 393.250 provides the Commission with the authority to approve reorganizations of public utilities. Subsection 3 provides the Commission with the authority to withhold its approval of such reorganization subject to those conditions the Commission "may deem reasonable and necessary."

On February 26, 2001, KCPL filed for Commission approval to reorganize itself into a holding company structure. Under the plan, KCPL would become a wholly-owned subsidiary of Great Plains Energy. On July 9, 2001, the parties executed their First Amended Stipulation and Agreement. Relevant to the immediate proceeding, that Agreement contained the following stipulation:

> 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 request 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.[13]

Contrary to GPE's current assertions, the Commission's adoption of this condition, as part of its authority under Section 393.250.3 is crystal clear in its order.

> IT IS THEREFORE ORDERED:
>
> (3) That the First Amended Stipulation and Agreement, filed on July 9,, 2001, is deemed to be unanimous. Further, the Commission finds the First Amended Stipulation and Agreement to be reasonable and approves the same. Kansas City Power & Light Company, Great Plains Energy, Inc., and Great Plains Power, Inc., are directed to comply with its provisions.

[13] Exhibit 1. *First Amended Stipulation and Agreement*, Case No. EM-2001-464, at page 13; Section 7. Hereinafter referred to as "Reorganization Condition".

(4) ***That Kansas City Power & Light Company is authorized to reorganize as described in its application referred to in Ordered Paragraph 2, above, subject to the conditions contained in the First Amended Stipulation and Agreement referred to in Ordered Paragraph 3***.[14]

5. Prior Court and Commission Decisions Regarding the Commission's Jurisdiction Over Holding Companies is Irrelevant In that Those Decisions Did Not Involve Commission Jurisdiction Based Upon a Condition Imposed Under the Commission's Section 393.250.3 Reorganization Authority.

At page 10, GPE claims:

> Missouri law contained not one decision – of either this Commission or a court – that has construed the provisions of Chapter 386 of Chapter 393 to exercise jurisdiction to approve or disapprove the acquisition of a non-Missouri public utility by a Missouri public utility holding company.

GPE then references numerous irrelevant cases in which it claims that the Commission "has consistently found that the Commission does not have jurisdiction over transactions at the holding company level."[15]

GPE's conclusion regarding Commission statutory authority over holding company acquisitions is not on point with the current situation. Specifically, ***none*** of the decisions referenced by GPE concerns a situation where the Commission had retained authority over holding company acquisitions as a condition to its approval of a corporate reorganization under Section 393.250.

As indicated, given that the Commission had authority over this transaction prior to the KCPL reorganization it was reasonable for the Commission to retain such authority as a condition to its approval of the reorganization. Furthermore, it is reasonable and incumbent that, once retained, the Commission should assert such jurisdiction in order to protect ratepayers from the detrimental impact of the Westar acquisition.

[14] Exhibit 1, page 13 (emphasis added).
[15] See, GPE Brief, at pages 10-12.

6. Conclusion

Ultimately, Staff and MECG agree on the outcome of this case, the Commission has authority over GPE's acquisition of Westar. Specifically, Staff characterizes GPE's current arguments as "specious"[16] Staff then points out that the Reorganization Condition "was certainly intended to apply to GPE's extraterritorial adventures in order to empower the Commission to protect Missouri ratepayers from exactly the sort of situation that confronts the Commission in this case."[17]

Staff also points out that the Commission's assertion of jurisdiction over this matter is not simply a matter of law, it is also a question of fundamental fairness.

> In exchange for an authority that it sought [the KCPL / GPE reorganization], GPE voluntarily promised the Commission and the parties to Case No. EM-2001-464 that it would seek prior authorization from the Commission whenever it might seek to acquire a public utility. The Commission accepted GPE's promise and, as a condition of the authority sought by GPE and granted by the Commission, ordered GPE to comply with the promise that it had made. That is the order that MECG now seeks to enforce.[18]

Staff then points out that "the Commission should not permit GPE to deny the effect of [the Reorganization Condition." Recognizing that parties, including the Commission, relied on GPE's promise to seek Commission approval of its acquisition of a public utility, Staff points out that GPE "is estopped from evading it now." Ultimately, Staff questions GPE's integrity and ponders whether GPE "ever intended to comply with [its promises]."[19]

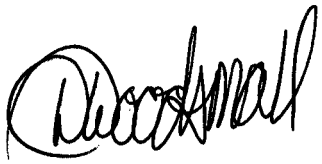
On these points, MECG agrees with Staff. GPE made promises in order to effectuate the receipt of Commission approval for its reorganization. Recognizing that

[16] Staff Initial Brief, page 6.
[17] *Id.* at page 11.
[18] *Id.* at pages 11-12.
[19] *Id.* at page 12.

other parties relied upon these promises, GPE is estopped from denying the clear meaning of its promise. The Commission should be appalled by the ease with which one of its public utilities makes promises for the purpose of effectuating a short-term goal and then retreats from those promises. In order to address bigger issues that will undoubtedly confront the various stakeholders, customers need to be assured that the Commission will require its public utilities to stand by its word.

Respectfully submitted,

WOODSMALL LAW OFFICE



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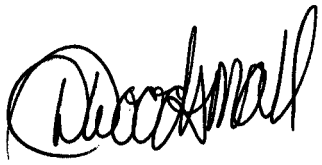
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: February 6, 2017