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

CITY OF KANSAS CITY'S POST-HEARING BRIEF

Comes now the City of Kansas City, Missouri ("City") and submits its Post-Hearing Brief on the list of issues submitted by the parties in this case on April 16, 2008. The City has limited its brief to the issues on which it has taken a position or on which it has filed and presented testimony.[1]

At the outset, the City reiterates that it generally favors the merger proposed in the application. Nonetheless, while the City does not oppose the merger, it must emphasize that to avoid any detriment to the public interest a Commission order approving the merger should include the conditions described below. In the alternative, the Commission should not grant final approval of the merger unless and until the City's proposed conditions have been satisfied by the applicants.

[1] The City previously briefed the issue of whether Commission approval of the merger should be conditioned upon requiring KCPL/Aquila to fund a comprehensive energy audit by a third party to evaluate the City's opportunities for lower costs, increased efficiency and other benefits. Through written correspondence to the Honorable Colleen M. Dale on April 8, 2008, the City withdrew this issue and the pre-filed testimony of Mr. Stan Harris. With the withdrawal of Mr. Harris' testimony, the City redacts that issue from its Post-Hearing Brief.

<u>Issue VII – Municipal Franchise</u>

1. Should Commission approval of the Joint Application be conditioned upon the negotiation of a single, unitary franchise between KCPL/Aquila and the City of Kansas City within nine (9) months of the Commission's approval of the merger?

A key driver of synergy potential for the proposed merger is the close geographic proximity of Kansas City Power & Light ("KCPL") and Aquila, Inc. ("Aquila"). Indeed, Aquila has noted that the applicants' territories are "contiguous, largely contiguous and in some cases overlapping even within the City limits of the City of Kansas City."[2] Beyond this, the applicants have made it clear that they are seeking to effectuate a *de facto* merger of their operations, leaving a renamed Aquila in place as a virtual shell company. In particular, the applicants plan to operate the greater Kansas City metropolitan area as a single district.[3] Aquila's employees will become KCPL employees and KCPL will operate both distribution systems.[4] A single call center will be created for the entire Great Plains Energy ("GPE") customer base, and there likewise will be "one approach" to the customer billing process.[5] Put simply, there will be no "operational distinction" between KCPL and Aquila whatsoever.[6]

The applicants have invited the Commission to "grant any and all relief necessary to consummate the benefits of the merger."[7] It is within this backdrop that the City - which is uniquely situated along the "fault line" of these combined operations - is seeking to share in the benefits of these synergies through a unified franchise agreement to be negotiated within nine months of merger approval. This agreement would supplant the City's current franchise agreement with Aquila (which is set to expire in January 2009) and its two-page agreement with

[2] Tr. Vol. 2, p. 42, lns 14-16.
[3] Ex. 17, Herdegan Supplemental Direct, p. 11, ln 10.
[4] Ex. 16, Herdegan Direct, p. 3, lns 7-8.
[5] *Id.* at p. 9, lns 6-9 & 17-19.
[6] *See* Tr. Vol. 2, p. 216, lns 3-14.
[7] Tr. Vol. 11, p. 1486, lns 2-6; *see also* Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc., ¶¶ 20-21; Opposition Of Great Plains Energy Inc. and Kansas City Power & Light Co. to Second Motion in Limine of Indicated Industrials, p. 7.

KCPL executed in 1881, resulting in an agreement that would reflect contemporary operational demands and the practical realities on the ground. More importantly, it would allow Kansas City and its citizens to share in the same efficiencies and synergies that KCPL/Aquila selectively claims for itself through this merger. One franchise for a single operational company would benefit the public, the City and the proposed merged entity.

For its part, KCPL claims that a franchise agreement executed in 1881 provides "significant benefits" to its customers.[8] As one of KCPL's largest customers,[9] the City could not disagree more. The manner by which utilities operate, the equipment that is used, and applicable laws and regulations have dramatically changed and evolved since the 19th century. It is time for the public interest to be served through a modern franchise. KCPL's claimed "significant benefits" to customers are belied by the lack of specificity of those benefits. There are none, and the Commission should serve the public interest by conditioning a unitary franchise as part of this merger.

In the absence of a unified agreement, the applicants' proposal to combine operations creates the risk that the City will be exposed to a significant disruption in its ability to effectively manage its rights-of-way, which would adversely impact the public welfare. This scenario also would result in a perverse set of circumstances whereby the City would be compelled to renegotiate the expired Aquila franchise with KCPL representatives.[10] As a result of these negotiations, the activities of KCPL employees in the Aquila territory would be governed by a modern franchise agreement, while the activities of KCPL employees in the KCPL territory would be governed by the 1881 agreement. Moreover, in "border" situations, it remains unclear

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[8] Ex. 22, Marshall Surrebuttal, p. 14, ln 2; *see also* Joint Applicants Prehearing Brief, p. 32.
[9] *See* Tr. Vol. 17, p. 2211, lns 15-23 (KCPL witness Marshall stating that the City is either the first- or second-largest customer of KCPL).
[10] *Id.* at p. 2208, lns 3-19 (KCPL witness Marshall stating that attorneys renegotiating the Aquila franchise will work for KCPL).

how the utilities intend to operate.[11] Under one possible scenario, assume that the City requires the relocation of transmission lines that belong to both the Aquila and KCPL legal entities. Would two schedules need to be coordinated? Would two service crews show up on the scene and bring equipment to the site? Will two invoices be processed? Such an outcome would not seem to demonstrate the synergies promised by the applicants.

In this proceeding, City Manager Wayne Cauthen has highlighted the need for consistent measures that could be applied on a citywide basis as opposed to the *ad hoc*, project-by-project negotiations that characterize the parties' working relationship today.[12] The difficulties the City has experienced with the applicants on various matters relating to coordination, transparency, relocations, subordination, extension of service and undergrounding are not being raised - as the applicants postulate – in an effort to "shift some of [the City's] costs of its redevelopment efforts to KCPL's customers."[13] The applicants' Commission-approved tariffs are not a panacea.[14] These tariffs, for instance, merely require the utility to perform in a "reasonably practicable" period of time.[15] While unintended delays are sometimes inevitable on projects, delays that could otherwise be avoided result in extra costs and disputes, and the City often ends up taking the blame (or paying the cost) when the utilities fail to act.[16]

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[11] *See* Tr. Vol. 11, pp. 1494-1495.
[12] *See* Tr. Vol. 17, p. 2155, lns 15-18.
[13] Joint Applicants Prehearing Brief, p. 34.
[14] For example, the City was a party in the "Boulevard Brewery" case that was before the Commission in 2006. *The City of Kansas City, Missouri et al v. Kansas City Power & Light Co.*, Case No. EC-2006-0332, Report and Order (Apr. 2006). The case involved KCPL's refusal to pay for the relocation and undergrounding of its facilities in connection with a special development project that would expand the Boulevard Brewery. The Commission was required to determine whether the project was public or private, and who had to fund facility relocations associated with the project. KCPL was required to relocate its facilities on 28th Street at its own expense, while the City was required to pay for the undergrounding of facilities on Belleview Avenue. The Commission also stated that new tariff provisions could assist in the resolution of similar disputes, and suggested that it would order Staff to evaluate whether new tariffs would be appropriate. *Id.* at 13.
[15] *See* § 15.08, Changes and Removal, Municipal Lighting Service, KCPL General Rules and Regulations, P.S.C. Mo. No. 2 (Tariff Sheets 1.51-52) (1989).
[16] During his oral testimony, City Manager Wayne Cauthen referred to problems the City has experienced with KCPL on the construction of the City's new police academy. *See* Transcript Vol. 17, p. 2154, lns 16-21. On one

A unified franchise agreement will afford the parties to re-set their working relationship and ameliorate these concerns. It is notable that KCPL Witness Herdegan testified about the benefits that KCPL has realized by implementing a common set of rules for safety and operations across the Kansas City metropolitan area.[17] According to Witness Herdegan, "[i]f you're not operating in a consistent manner across contiguous boundaries, then you open yourself up to bigger problems."[18] This observation should apply with equal force to the applicants' working relationship with the City.

KCPL has argued that the City's request for a unified franchise agreement is an attempt to impair its contractual rights under Missouri and federal law.[19] The City has no intention to undo or alter the rights of the applicants in their existing agreements, and the details of a franchise are not at issue in this case. In 1996, the City's attempt to engage KCPL in a cooperative effort to update the parties' working relationship failed when KCPL walked away from a negotiated operating agreement. This experience demonstrates that any meaningful attempt to modernize how the parties should coordinate their activities in the public rights-of-

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aspect of this project, the City began coordinating with KCPL in November 2005 on relocations required for improvements for the Searcy Creek Parkway. These relocations were delayed by KCPL. KCPL then installed sectionalizers and conduit to the new station and demanded that the City provide KCPL with as-built drawings of what KCPL had just installed. In preparing as-built maps for KCPL, the City realized that KCPL did not install their facilities pursuant to the construction plans, which would require major modifications to future construction plans to Pleasant Valley Road. To keep the contractor working, the City requested that KCPL relocate one pole at the intersection of Searcy Creek Parkway and Pleasant Valley Road so the contractors could start the reconstruction for that intersection, and so other utilities with pole attachments could relocate their lines. KCPL delayed this relocation for three months and required payment in the amount of $3,145 before the relocation would be scheduled. As of August 2007, KCPL was once again requesting that the City provide it with as-built maps of its own facilities, and the City's contractor was working out of sequence just to keep the project moving. Separately, the City's Parks and Recreation Department decided to relocate a transformer from a drainage area to higher ground as part of work to improve the police academy. KCPL's contractor disconnected and removed the transformer. The City's contractor then set the new pad and rewired the conduit to the pad. KCPL returned the next day, replaced the transformer on the new pad, and attached the wires to the transformer. The City paid the contractor, who did most of the work, approximately $22,000, but KCPL charged $71,000 simply for moving the transformer. In this case, the City was able to obtain an itemized bill and learned that KCPL had billed the City for parts in an amount that was five times higher than what it would have cost had the City's contractors purchased them.

[17] *See* Tr. Vol. 17, pp. 2253-2255.

[18] *Id.* at p. 2255, lns 4-6.

[19] Joint Applicants Prehearing Brief, pp. 34-36.

way must start at the legal source: the franchise. During the course of this proceeding, KCPL and Aquila have offered to enter into an operating agreement to address difficulties that might arise in combining their own operations.[20] In a similar fashion, the City is simply asking for the opportunity to sit down with the applicants and negotiate at this important juncture before the merger is found to be in the public interest. The City's requested condition would neither abrogate existing contracts, nor would it order the utilities into a new one; rather, it gives the merging utilities the choice to honor the precondition. In purpose and effect, any conditions agreed to by the applicants in this proceeding would be akin to a consent decree, which is commonplace in merger proceedings before state and federal regulators.[21]

KCPL's claim that the City's request for a unitary franchise unconstitutionally impairs contracts proves too much.[22] Merger reviews that mitigate market power or public interest concerns *always* leave the merging party in a position to choose whether to consummate the merger, or whether to abrogate, modify or enter into specific contractual relationships to remediate the market power and public interest concerns. KCPL's claims of unconstitutional contractual impairment would mean that no conditions can be applied to a merger because all

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[20] *See* Ex. 39, Giles Additional Supplemental Direct, p. 3, lns 4-10; Tr. Vol. 11, p. 1464, lns 1-4 ("The operating agreements would only be relevant in the case of the merger closing, and then we would do an operating agreement potentially, if the Commission so desired, between Aquila and KCPL."); *see also* Opposition of Great Plains Energy Inc. and KCPL to Second Motion in Limine of Indicated Industrials, p. 7.

[21] By way of example, the Federal Communications Commission often imposes "public interest" conditions in its merger review proceedings - either unilaterally or through negotiations with the merging parties - that would arguably "impair" existing contractual rights in the absence of the parties' consent. *See, e.g., In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, FCC 08-66, Memorandum Opinion and Order at ¶ 5 (rel. Feb. 26, 2008) (requiring, *inter alia*, all of the attributable interests connecting DIRECTV-Puerto Rico and Liberty Cablevision of Puerto Rico to be "severed" within one year); *In the Matter of AT&T and BellSouth Corporation Application for Transfer of Control*, FCC 06-189, Memorandum Opinion and Order at App. F (rel. Mar. 26, 2007); *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer and Control*, FCC 05-183, Memorandum Opinion and Order at App. F (rel. Nov. 17, 2005); *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, FCC 04-255, Memorandum Opinion and Order at ¶¶ 251-257 (rel. Oct. 206, 2004) (requiring divestitures of AT&T Wireless operating units and spectrum holdings).

[22] *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (Stevens, J.) ("[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."), *citing W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

conditions in some way affect existing contractual relationships.[23] The Commission – like the Antitrust Division of the United States Department of Justice, the Kansas Corporation Commission,[24] the FCC and the FERC – is not so powerless in its merger review.

<u>Issue VIII – Quality of Service Plan and Earnings Sharing Mechanism</u>

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file an application for a Quality of Service Plan within 90 days of the Commission's final decision in this proceeding?

There is a heightened risk of service quality degradation when utility operations and functions are integrated.[25] When a utility has an incentive to cut capital expenditures to improve its earnings picture - which occurs quite frequently in merger situations - it is incumbent upon the Commission to ensure that merger savings do not come at the expense of service quality. With this in mind, the City is proposing a condition that would require the applicants to initiate a docket and file an application with the Commission for a Quality of Service Plan ("QSP") within ninety days of the final decision in this proceeding. The City is not insisting on the specific details of a QSP at this time. Instead, the applicants should devise a framework that would be

[23] The applicants overstate the import of *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 966 (E.D. Mo. 2002), and the internal citation therein to *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 14 S.W. 974 (Mo. 1890). Neither decision contemplated the Commission's authority to condition approval of merger transactions to avoid detriment to the public interest. Indeed, application of the *XO Missouri* case as misinterpreted by the Joint Applicants would virtually bar the Commission from applying *any* merger conditions. Moreover, blanket application of the *Laclede* decision offered by the Joint Applicants in p. 36 of their prehearing brief has been expressly overridden by the Missouri Supreme Court. *See City of Fulton v. Pub. Serv. Comm'n*, 204 S.W. 386, 386 (Mo. 1918). More recently, the Missouri Court of Appeals held that contractual impairment arguments do not apply to franchise agreements subject to Commission authority. *See Missouri ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 283, 286 (Mo. Ct. App. 1989) ("A franchise under these constraints and limitations [*i.e.*, municipal and Commission approval pursuant to Mo. Rev. Stat. § 393.170] cannot be transfigured into a contract subject to impairment . . . Only in Commission dicta explaining its holding in *Re Union Electric Company*, 3 Mo. PSC (N.S.) 157 (1951) does the notion of contract rights get mistakenly introduced and tied to the franchise concept.").

[24] *See* Ex. 406, Kansas Corporation Commission, Joint Motion and Settlement Agreement, Att. 1 (Feb. 27, 2008) (requiring KCPL to issue a "Quality of Service Refund" in the event that KCPL fails to meet quality of service metrics established under the stipulation agreement, which would undoubtedly be an "impairment" of KCPL's existing contractual rights).

[25] *See* Tr. Vol. 13, pp. 1877-78.

developed in cooperation with the Commission (much like they have done in the State of Kansas as part of a settlement agreement).[26]

The City recognizes that the Commission has recently adopted reliability monitoring and reporting rules for electrical corporations.[27] These rules require, among other things, the annual reporting of monthly SAIFI, CAIFI, SAIDI and CAIDI data to the Commission, as well as an annual report on reliability improvement programs. As City witness Robert Hix testified, basic measures of performance are very helpful in setting a foundation for reporting and establishing metrics.[28] However, in the context of this merger proceeding, it also will be critical to establish utility-specific metrics that have some teeth and allow for reparations to consumers if the utility fails to perform up to these standards.[29]

KCPL has represented to the Commission that "all stakeholders" bear a "shared risk" of service quality degradation if the merger is approved.[30] This should not, and need not, be the case. The current rates that customers pay reflect a certain level of service. Reparations or bill credits for past periods of poor performance are not penalties, but return money to customers that have already paid for an expected level of performance.[31] The Commission's new rules were not designed to address the specific service quality concerns stemming from this merger application, so the Commission should go one step farther and require the applicants to file a QSP to avoid detriment to the public interest here.

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[26] *See* Ex. 406, Kansas Corporation Commission, Joint Motion and Settlement Agreement, Att. 1-3 (Feb. 27, 2008); *See also* Ex. 404 (citing quality of service plans in other states).
[27] *See* Rule Transmittal from Colleen M. Dale to the Honorable Robin Carnahan certifying Commission adoption of 4 CSR 240-23.010 (May 12, 2008).
[28] *See* Tr. Vol. 17, p. 2173, lns 3-21.
[29] *See generally id.* at pp. 2171-72.
[30] *See* Tr. Vol. 4 at pp. 327-28.
[31] *See generally* Tr. Vol. 17, p. 2173, lns 9-21.

2. Should Commission approval of the Joint Application be conditioned upon establishment of an Earnings Sharing Mechanism that returns to customers excess earnings of KCPL/Aquila above an authorized level.

The proposed merger will be detrimental to the public interest unless the Commission requires the applicants to commit to an Earnings Sharing Mechanism ("ESM") that returns a portion of excess earnings above the Commission's authorized rate of return to customers. In this case, KCPL has made a number of assertions regarding its cost picture that may or may not be true.[32] Presumably, one of the motivations for GPE in proposing this merger is the opportunity to realize more profit. As a matter of basic mathematics, if one were to look at the respective costs for two entities and then merge those entities while cutting costs and maintaining the same level of revenue, the combined entity's earnings picture will improve. The applicants simply ignore the possibility of increased revenues as a result of an improved cost structure.

While the City acknowledges that the applicants are making significant investments in Missouri, there is an expectation that additional investments should yield additional revenues. If excess revenues do not occur in the future, this does not imply that an Earnings Sharing Mechanism would be a wasteful process. The evaluation of earnings would be performed regularly by the Commission, but the mechanism does not require the time and effort of a rate case to glean the earnings picture of the utility.

By way of review, City witness Robert Hix has recommended an ESM that would include a "reverse taper" in determining rewards for customers and the utility.[33] This methodology utilizes the authorized return on equity (ROE) as the threshold above which excess

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[32] *See* Ex. 15, Giles Surrebuttal, pp. 13-14.

[33] The City has offered examples of earnings sharing mechanisms in other states. *See* Ex. 404; *see also* Missouri Public Service Commission, *In Re Union Electric Co.*, Case No. EM-96-149, 176 P.U.R. 4th 201, 205 (Mar. 4, 1997) (where the Commission, in approving the merger between Union Electric Company and Central Illinois Public Service Company, approved a stipulation agreement that included an earnings sharing grid for Union Electric as part of its Experimental Alternative Regulation Plan).

earnings are either retained by the utility or returned to customers. In light of the fact that the easiest earnings to achieve are the next several dollars above the authorized level, the reverse taper returns to customers a greater share of those dollars. After greater excess earnings are achieved, more is retained by the utility. For example, if KCPL's authorized ROE is 11.25%, any earnings above 11.25% and up to 12.25% receive a distribution of 65% to customers and 35% to KCPL. Excess earnings above 12.25% up to 14.25% are split 50% each to customers and KCPL. The next 1% of excess ROE is allocated 35% to customers and 65% to KCPL. Finally, all excess earnings over 15.25% are retained 100% by KCPL. The City submits that the ESM should stay in effect until the conclusion of at least two rate cases.

Finally, the City acknowledges Staff's statement that the Commission does not have the authority to unilaterally impose an alternative regulation plan.[34] This is the law in a number of states. The City's proposal would therefore require cooperation from the applicants that has not been forthcoming to date. Based on this record, the City urges the Commission to deny the application if the applicants are unwilling to accept an ESM. Accordingly, the City would urge the Commission to consider postponing its approval of this merger until the utilities agree to an ESM.

Issue IX – Future Rate Case

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file a comprehensive rate case with respect to the merged operations within three (3) years of the Commission's approval of the merger?

As discussed above, the applicants intend to integrate most of their operations if the merger is approved. However, financial operations and the reporting of costs and revenues for

[34] *See* Staff's Updated Prehearing Brief, p. 44.

the combined entity will remain segregated until some unknown time in the future.[35] The applicants have made it clear that they have no concrete plans to integrate rates, and they will file a joint rate case at their whim. Rates could therefore be out of synch for a long time, despite the fact that the service territories of the applicants are contiguous. Moreover, while a stated goal of the merger is reduced costs for all customers, one possible outcome is that costs are increased for one set of customers and reduced for others. This set of circumstances would belie statements by the applicants that they will operate as "one" from the perspective of consumers.[36]

In short, it would be notionally irresponsible to not re-baseline the financial snapshot of the entire company if the merger is approved. Indeed, for the Commission meaningfully to regulate the merged entity going forward, it must order a rate case to understand the cost structure, debt and equity makeup and systems plan for the unified utility. There is simply too much opportunity for regulatory hijinks without the Commission ordering a unified rate case, and there is no compelling reason not to re-baseline the merged utility.

The Commission should therefore order the company to track costs and organizational changes and file a comprehensive rate case for the approved merger within a reasonable period of time. The City supports the Office of Public Counsel's recommendation that if the application is approved, both KCPL and Aquila should be required to file a consolidated rate case proceeding consistent with the timing required in the Regulatory Plan for KCPL (Case No. EO-2005-0329) with respect to Rate Filing #4.[37]

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[35] *See* Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc., ¶ 37.
[36] *See* Ex. 15, Giles Surrebuttal, p. 15, ln 12.
[37] *See* Updated Prehearing Brief of the Office of Public Counsel at 7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served via email upon the parties identified on the attached service list on this 2nd day of June, 2008.

/s/ Mark W. Comley

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