BEFORE THE PUBLIC SERVICE COMMISSION
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**

STAFF'S PREHEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and for its Prehearing Brief, states as follows:

Introduction

This matter involves the Joint Application filed on April 4, 2007, by Great Plains Energy (GPE), Kansas City Power & Light Company (KCPL), and Aquila, Inc., for authorization for GPE to acquire Aquila.

It is the Staff's analysis that the proposed acquisition/merger will cause a net detriment to the public interest because the cost of service on which rates for the Missouri ratepayers of Aquila and KCPL are to be established based on the proposal of the Joint Applicants will be higher as a direct result of the proposed acquisition/merger than the cost of service would be for the Missouri ratepayers of Aquila and KCPL absent the proposal of the Joint Applicants with no off-setting benefit. Since the fundamental problem with the proposed transaction is that GPE/KCPL is paying too much for Aquila and is seeking to recover what it is overpaying from Missouri ratepayers, the Staff has not proposed any conditions to rectify the defects of the proposed transaction because there are not any conditions that can readily address the detriments of the Joint Applicants' proposal. Indeed, the Staff cannot recommend to the Commission approval of any significant area of the Joint Applicants' proposal.

Generally, the Staff found, in each area of the Joint Applicant's proposal, either a clear detriment to the public interest or a lack of adequate definition or development, which Staff considered in itself to be detrimental to the public interest. Except in one instance, the Staff has not commented on the conditions proposed by other parties, but the Staff reserves the right to do so based on the further development of those issues at the evidentiary hearings.

In brief, Staff has concluded after analysis that the transactions proposed by the Joint Applicants are detrimental to the public interest in that the Commission's approval of the proposed transactions:

> Will result in Aquila's Missouri jurisdictional retail ratepayers paying higher rates, without off-setting benefits, for the following:
>
> - Recovering the higher debt costs related to Aquila's non-jurisdictional operations (Actual Debt Cost Recovery Issue);
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> - Subsidizing Aquila's non-Missouri jurisdictional activities by funding an "additional amortization" to restore Aquila's investment grade debt rating lost through Aquila's failed non-utility endeavors as well as support the building of generation that Staff has asserted should have been already been built and put into service (Additional Amortization Mechanism Issue)
>
> - Funding a 50% cost savings retention based on synergy estimates that will not occur at the level or within the timeframe asserted in the direct or supplemental direct testimony of GPE/KCPL witnesses filed in this case (Synergy Savings Sharing Proposal Issue); and

- Recovering the inclusion of the Aquila transaction cost portion of the acquisition adjustment in the Missouri cost of service (Transaction Costs Recovery Issue).

- Affiliate Transaction Rule Waiver Issues.

- Service Quality Issues.

Will result in KCPL's Missouri jurisdictional retail ratepayers paying higher rates, without off-setting benefits, for the following:

- Funding a 50% cost savings retention based on synergy estimates that will not occur at the level or within the timeframe asserted in the direct or supplemental direct testimony of GPE/KCPL witnesses filed in this case (Synergy Savings Sharing Proposal Issue); and

- Recovering the inclusion of the GPE/KCPL transaction cost portion of the acquisition adjustment in the Missouri cost of service (Transaction Costs Recovery Issue).

- Affiliate Transaction Rule Waiver Issues.

- Service Quality Issues.

Staff's conclusions are based upon the data in the Joint Applicants' own filings. This data shows these detriments (*Staff Report* at 12):

(1) Higher rates that will be required due to the weakened financial condition of GPE and KCPL due to absorbtion of ailing Aquila..

(2) Weakening of KCPL's financial condition due to affiliation with weakened Aquila during period of significant construction expenditures.

(3) Aquila's ratepayers will pay higher rates as GPE shifts costs to them that are now being absorbed by Aquila's shareholders.

The Joint Applicants are seeking permission to charge these costs to ratepayers (*Staff Report* at 13-14):

(1) The costs of the transaction (Transaction and Transition Costs).

(2) Costs from higher interest rates – one condition of the transaction is that Aquila's Missouri rates will be based on Aquila's actual financing

costs, rather than on the present imputed financing costs, which are lower (*Staff Report* 19, 24). These would amount to $24.4 million annually. (*Staff Report* at 24).

(3) Additional amortizations required to boost Aquila's ratings to investment grade -- this feature amounts to subsidization of Aquila's non-regulated activities by ratepayers (*Staff Report* at 20). The amount will vary significantly on an annual basis, from $0 to $40 million (*Staff Report* at 21).

(4) 50-percent merger synergy savings retention from ratepayers, where merger synergy savings may well not be as high as anticipated.

The Joint Applicants' own documents show a net merger savings of only $6.6 million annually, which is less than each company could produce on its own. *Staff Report* at 23. This amount is significantly less than the $24.4 million in additional interest costs that GPE would like to collect from Aquila's ratepayers. *Staff Report* at 24.

Below is a chart, based upon the testimony of OPC witness Dittmer, that shows the calculation of the cost-benefit analysis, revealing a net detriment. Based on the Commission's own understanding of § 393.190.1 and *AG Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732 (Mo. banc 2003), the Commission cannot approve the proposed transaction.

Description	**Amount**
Total merger savings over 1st 5 years as projected by JAs:	$304.6
Less: Transition Costs (100% to ratepayers)	-$45.3
Net Synergy Savings:	$259.3
Less: 50% of savings allocated to shareholders:	-$129.7
Net Synergy Savings remaining for ratepayers:	$129.7
Less: Transaction Costs (100% to ratepayers)	-$95.2
Less: Incremental Actual Interest Costs in Excess of 7.0%:	** **
Net Benefit/(Cost) to Ratepayers for 1st 5 Years:	($79.2)

Dittmer Rebuttal, p. 12.

The Governing Standard

XII. <u>Legal Issues</u>:

4. Is the net detriment test utilized by the Joint Applicants as the not detrimental to the public interest standard, the criteria required by law for determining whether the proposed acquisition and related transactions are not detrimental to the public interest? Will the proposed merger cause a net detriment to the public interest because the cost of service on which rates for Missouri ratepayers of Aquila and KCPL will be established will be higher as a direct result of the merger than the cost of service would be for Aquila and KCPL absent the proposed transaction?

The Joint Application of GPE, KCPL and Aquila states in its opening paragraph that it is being filed pursuant to §§ 393.180, 393.190, 393.200, 393.210 and 393.220, RSMo 2000, as amended,[1] and 4 CSR 240-2.060, 240-3.020, 240-3.110, 240-3.115, 240-3.120, 3.125, and 240-20.015.

The Staff believes that § 393.190.1 is the appropriate governing statute:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any

[1] All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

purchaser of such property in good faith for value.[2]

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[2] *Black's Law Dictionary* (7th ed. 1999) defines the terms "transfer," "disposition," "control," "consolidation," "works," and "use" as follows:

> **transfer**, *n.* **1.** Any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. . . .
>
> **transfer**, *vb.* **1.** To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. . . .
>
> **disposition**, *n.* **1.** The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>. . . .
>
> **control**, *n.* The direct or indirect power to direct the management and policies of a person or entity whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee <the principal exercised control over the agent>.
>
> **consolidation,** *n.* **1.** The act or process of uniting, the state of being united. . . .
>
> **works.** **1.** A mill, factory, or other establishment for manufacturing or other industrial purposes; a manufacturing plant; a factory. **2.** Any building or structure on land. . . .
>
> **use** (yoos), n. **1.** The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional . . . .

Black's Law Dictionary (6th ed. 1990) defines the term "system" as follows:

> **system.** Orderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle. Any methodic arrangement of parts. Method; manner; mode.

The Commission has taken an expansive view of the word "system: as used in the cited statute. In Case No. EO-92-250 in 1992, KCPL requested a determination from the Commission that a sale or other disposition to a third party of sulfur dioxide (SO2) emission allowances created by the Clean Air Act Amendments of 1990 (CAAA) did not require Commission approval under § 393.190. The Commission held in part as follows:

> The term "works" as supported by KCPL and the other utilities could be limited to a literal meaning of things physical in nature, part of the tangible property used to generate electricity. The same limitation could be placed on the term "system", thus indicating that "system" is almost a redundancy of "works". The Commission does not believe the term "system" is intended to be so literally construed. It is, of course, true that court cases and Commission decisions interpreting Section 393.190 have dealt with tangible property such as generating plants, transmission lines and substations. Those are the issues that have been before the courts and the Commission and concerning which decisions were made. The Commission, though, believes that a utility's system is greater than the physical parts which would be its "works". A utility's system is the whole of its operations which are used to meet its obligation to provide service to its

Section 393.190.1 does not contain an explicit standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules at Rule 4 CSR 240-2.060(7)(D). An application for such authority must state "[t]he reason the proposed sale of the assets is not detrimental to the public interest." *Id.* This standard is a court-made standard, devised by the Missouri Supreme Court in its judicial review of a Commission decision in 1934. *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393 (Mo. banc 1934). The case involved the application of a foreign corporation, not licensed to do business in Missouri, to acquire and hold more than 10% of the stock of two Missouri utilities. In its review, the Court stated that "[t]he owners of this stock [sought to be acquired] should have something to say as to whether they can sell it or not; [t]o deny them that right would be to deny them an incident important to ownership of property"; and that, in such a situation, "[a] property owner should be allowed to sell his property unless it

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> customers. *City of St. Louis* [*v. Public Serv. Comm'n*, 73 S.W.2d] at 400 [(Mo. banc 1934)]. The U.S. Congress has mandated that KCPL meet emission standards. Those standards are based upon KCPL's steam-electric generating units. To enable KCPL to meet the emission limits, Congress created emission allowances which attach to each generating unit. These emission allowances have been made an integral part of KCPL's generating facilities and, thus, an integral part of its generating system. KCPL must utilize these allowances in meeting its obligations to its Missouri ratepayers. The Commission finds that emission allowances are necessary and useful in the performance of KCPL's duties to the public and are part of KCPL's "system", and any sale or transfer of these allowances is void without prior Commission approval.

In the Matter of Kansas City Power & Light Co., 1 Mo.P.S.C.3d 359, 362 (1992).

would be detrimental to the public." *City of St. Louis, supra,* 73 S.W.2d at 400.[3]

A court has said of § 393.190.1, that "[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently. *See e.g. In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220. Only one of these factors is at issue in the present case and that is the ability of GPE and KCPL to absorb the proposed transaction. As shall become apparent, Staff believes that GPE and KCPL are in fact unable to absorb the proposed transaction and, for this reason, have structured it in a way that would impose a significant detriment upon the ratepaying public.

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[3] The Court noted that the state of Maryland has a statute "identical" to the Missouri statute and that the Maryland Supreme Court had determined "not detrimental to the public" to be the appropriate standard:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public'".

City of St. Louis, supra, 73 S.W.2d at 400.

Staff directs the Commission's attention to the most recent decision of the Missouri Supreme Court construing § 393.190.1,[4] and to the Commission's own most recent major decision under § 393.190.1.[5] In *Union Electric,* the Commission understood *AG Processing* to require it to evaluate both the present and future impacts of a transfer at the time it makes its decision to allow the transfer. In the *AG Processing* case, the Commission approved an acquisition and merger by Aquila, Inc. – then called UtiliCorp – that involved an acquisition premium of $92,000,000.[6] Although the Commission rejected Aquila's proposed regulatory plan, under which a portion of the acquisition premium would be recovered in rates, the Commission refused to consider the recoupment of the acquisition premium on the grounds that it was a rate case issue. The Missouri Supreme Court reversed, saying:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.

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[4] The decision is *AG Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732 (Mo. banc 2003) ("*AGP"*).

[5] *In the Matter of Union Electric Co., d/b/a AmerenUE*, Case No. EO-2004-0108 (*Report & Order on Rehearing*), 13 Mo.P.S.C.3d 266 (2005) ("*Union Electric")*.

[6] An acquisition premium is the amount by which the purchase price exceeds the book value of the assets purchased.

AG Processing, supra, 120 S.W.3d at 736 (internal footnotes omitted).

In *Union Electric,* the Commission explained that the Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing,* but rather restated the existing "not detrimental to the public" standard and clarified the analytical use of the standard. The Commission concluded that what is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. *AG Processing* requires the Commission to consider all possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. The Commission stated that "[a]pproval should be based upon a finding of no net detriment." In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission noted in *Union Electric* that its duty is to ensure that the utility provides safe and adequate service to its customers at just and reasonable rates. The Commission concluded:

> 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.

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.

Legal Defects in the Proposed Transaction

XII. Legal Issues:

1. **Have the Joint Applicants, Great Plains Energy, Incorporated, Kansas City Power & Light Company and Aquila, Inc. obtained from their Boards of Directors the authorizations necessary to effectuate actions required to merge, consolidate, combine, or integrate the systems, works and operations of KCPL and Aquila Networks – MPS and Aquila Networks –L&P proposed in the instant case?**

2. **Have the Joint Applicants, Great Plains Energy, Incorporated, Kansas City Power & Light Company and Aquila, Inc., applied to the Missouri Commission for the authorizations necessary to effectuate the merger, consolidation, combination, or integration of the systems, works and operations of KCPL and Aquila Networks – MPS and Aquila Networks – L&P proposed in the instant case?**

The answers to the above questions are "no" and "no." *Staff Report* at 4, 5, 15, 16.

Ratemaking Effects of this Case

XII. Legal Issues:

3. **What is the legal effect for future Commission cases of the present Commission adopting the GPE/KCPL/Aquila proposals contained in their Joint Application filed on April 4, 2007?**

The answer to this question is "None." This Commission cannot bind the ratemaking decisions of a future Commission and administrative decisions are not subject to *stare decisus.* Thus, no matter what disposition the Commission might make in this case with respect to future ratemaking, there is no guarantee that that disposition would be implemented in the future.

It is well-established that there is no *stare decisis* respecting Commission decisions. *State ex rel. GTE North, Inc. v. Public Serv. Comm'n,* 835 S.W.2d

356, 371 (Mo.App. W.D. 1992); *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (Mo.App. W.D. 1976)[7] (*General Telephone*); *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457, 462 (Mo.App. 1987); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985); *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); *Marty v. Kansas City Light & Power Co.*, 259 S.W. 793, 796 (Mo. 1923).

AGP itself is clear that this long-standing rule has not changed:

[7] In the *General Telephone* case, the Court of Appeals held that the Commission's decision in a prior General Telephone Company case had no binding effect in a subsequent General Telephone Company case:

> Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, Administrative Treatise Section 18.09, 605, 610, (1958), as follows:
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> > "* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)
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> Clearly the commission in this case was not bound by the action in the 1962 case.

537 S.W.2d at 661-62.

> . . . In support of its claim that the Applicants were required to submit a market power study, AGP cites several prior PSC decisions in which the PSC required merger applicants to file market power studies. However, an administrative agency is not bound by *stare decisis,* nor are PSC decisions binding precedent on this Court.[18] . . .
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> [18] *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n,* 835 S.W.2d 356, 371 (Mo.App.1992); *Cent Hardware Co., Inc. v. Dir. of Revenue,* 887 S.W.2d 593, 596 (Mo. banc 1994).

Thus, the Joint Applicants know that even if this Commission grants them their requested relief, it cannot guarantee that a future Commission would not take a different action. Equitable estoppel would not be available to the Joint Applicants if this were to happen. *Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434 ((Mo. App. W.D. 1998).

II. <u>Merger Synergy Savings Sharing Proposal</u>

1. Are the estimates of savings from synergies accurate?

A. Could any of the synergy savings be achieved by KCPL or Aquila on a stand-alone basis absent the acquisition/consolidation/ integration?

B. Are any of the identified synergy savings dependent on KCPL and Aquila consolidating/integrating/merging their operations?

2. Do the actual synergy savings exceed the sum of the transaction, transition and incremental interest costs that the Joint Applicants propose to recover over the first five (5) years following the acquisition/merger/consolidation? If not, is the proposed merger not detrimental to the public interest?

The area of synergy savings is the most crucial one for the Commission to subject to a searching scrutiny. After all, it is in the purported merger synergies, the alleged and much-touted savings from economies of scale and elimination of duplicative facilities, functions and personnel, that the proponents of the merger find the financial benefits that they dangle in front of regulators, shareholders and ratepayers alike like carrots in order to secure authorization to go forward. In fact, these financial benefits are most often chimerical and no one, five years after such a transaction, is better off except the highly-compensated executives that concocted the deal.

The proposed transaction that is the subject of this case includes a proposal that 50 percent of the forecast synergy savings be allocated to the shareholders for the first five years following the transaction. This cash payment from the pockets of the ratepayers is, of course, the "sweetener" for the shareholders. However, Staff considers this proposal to be flagrantly unfair to the ratepayers and thus detrimental to the public interest for several reasons.

First, it assigns all of the risk to the ratepayers. *Staff Report* at 43. While it is likely that a merger or integration or consolidation of Aquila and KCPL, with their adjacent service areas, would result in synergy savings, the extent of such savings is speculative and cannot either be accurately forecast nor accurately measured. *Staff Report* at 46-48. These purported savings, consequently, are "soft money" in the most egregious sense of that term. *Dittmer Rebuttal,* 14. The sharing proposal, on the other hand, diverts "hard money" into the pockets of the shareholders. There is no mechanism, and in Staff's view, can be no effective mechanism, whereby the "savings" allocated to the shareholders may be varied or reduced based upon the level of savings actually achieved. *Staff Report* at 44, 46, 48; *Brubaker Rebuttal* at 5-6; *Dittmer Rebuttal,* 14.

Several of the testifying experts suggest that the Joint Applicants have overstated the level and amount of savings that will be realized from the transaction. *Staff Report* at 11; *Brubaker Rebuttal,* 10. The Joint Applicants' prediction is high, for example, when compared to the savings realized from other electric industry mergers. *Brubaker Rebuttal* at 4. OPC witness Dittmer characterized the purported synergy savings as overstated and speculative. *Dittmer Rebuttal,* 5. Economies of scale may not produce the level of savings expected. *Dittmer Rebuttal,* 36. The sale of Aquila's headquarters and garage will likely result in a loss of $11.3 million to $15.4 million to be absorbed by Missouri ratepayers. *Dittmer Rebuttal,* 38-40. For this reason, it is Staff's view that the predicted synergy savings are inaccurate and unreliable.

The forecast synergy savings include two types of savings: "enabled savings" and "created savings." *Zabors Supp. Dir.* at 6. Enabled savings are those resulting from efficiencies and the implementation of best practices that could be implemented by Aquila and KCPL whether or not the proposed transaction goes forward. *Id.* Created savings, on the other hand, are those that cannot occur "but for" the implementation of the proposed transaction. *Id.* Of the roughly $305 million of savings forecast for the first five years, fully $59 million have been identified as enabled savings, that is, as savings that the two companies can achieve whether they merge or not. *Dittmer Rebuttal,* Sch. JRD-1. As for the remaining amount, which includes some further but unquantifiable amount of enabled savings, *Dittmer Rebuttal,* 30-32, all are dependent on the merger or integration or consolidation of Aquila and KCPL. *Staff Report* at 7.

In any event, as several witnesses have pointed out in convincing fashion, the synergy savings allocated to the ratepayers over the first five years following the transaction will be dwarfed by the additional costs, interest and other amounts that the ratepayers will be required to pay. *Dittmer Rebuttal,* 7-12; *Brubaker Rebuttal,* 3-4; *Staff Report,* 20. Thus, the proposed transaction will certainly result in a net detriment of many millions of dollars to the ratepayers and it must therefore be rejected.

III. <u>Transaction Cost Recovery</u>

1. Should transaction costs be directly charged to ratepayers through cost of service amortizations? Would the proposed merger be detrimental to the public interest if the Commission did so?

This Commission has never allowed the recovery of an acquisition premium, which is exactly what the so-called "transaction costs" amount to. Transaction costs are legal fees, bank fees and consultant fees necessary to the closing of the transaction. They are normally considered part of the purchase price. They are absolutely not costs incurred in the provision of utility services, consequently, they are not costs appropriate for recovery in rates. The transaction costs should be charged entirely to the shareholders.

The Joint Applicants propose to establish a regulatory asset and amortize into cost-of-service some $95.2 million in transaction-related costs (GPE transaction costs of $68.8 million and Aquila transaction costs of $26.4 million), allocated to KCPL's and Aquila's Missouri-regulated operations and excluding the non-incremental labor costs of the integration team, over a five (5) year period beginning on January 1, 2008, or the month immediately following consummation of the merger, whichever occurs later. (Staff Report, pp. 40, 49).

Transaction costs do not meet the normal criteria for traditional expenses used to establish rates; they are not necessary for the provision of safe and adequate service at just and reasonable rates. These costs are investor costs incurred in the buying and selling of their stock. These are the costs of a non-regulated holding company. (Staff Report, p. 51). GPE/KCPL witness Robert T. Zabors identifies these costs in part as follows:

> . . . Transaction expenses are those costs that are in place to enable Aquila and Great Plains to close this transaction. Examples include banker fees for deal valuation and equity placement and legal fees for agreement review / execution. . . .

(Zabors Supp. Dir., p. 14, ls.15-18). GPE and its Board decided to incur these costs. Recovery of these transaction costs would result in regulated utilities subsidizing their non-regulated parent companies. (Staff Report, p. 51).

The Joint Applicants make a distinction between the terms "acquisition adjustment" and "acquisition premium," based on the inclusion of transaction costs regarding the term "acquisition adjustment" and based on excluding transaction costs regarding the term "acquisition premium." The Joint Applicants characterize the term "acquisition adjustment" as essentially synonymous with the term "goodwill," which refers to the excess of purchase price, including transaction costs, over the fair market value of net identifiable assets acquired. It should be noted that on page 9 above of the instant prehearing brief, the excerpts from the Commission's Second Report And Order in the UtiliCorp – SJLP merger case appears to use the terms "acquisition adjustment" and "acquisition premium" interchangeably. In the first Report And Order in the UtiliCorp – SJLP merger case, the Commission stated: "In addition, UtiliCorp asks the Commission to determine that it will be allowed to recover transaction costs and costs to achieve associated with the merger. Again, UitliCorp argues that such costs are part of the costs that must be incurred to achieve the savings that will result from the merger." 9 Mo.P.S.C.3d at 476. There is a reference to transaction costs in the Missouri Supreme Court's *AGP* decision, in footnote 16:

> . . . While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. [Footnote omitted]. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger.[16] The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the <u>acquisition </u>premium.
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> [16] PSC Staff had also testified that their analysis of the merger demonstrated that the expected rate impact on SJLP and MPS customers would be negative. Merger costs potentially assignable to the ratepayers included **transaction costs**, transition costs and administrative costs. . . .

120 S.W.3d at 736. On remand, the Commission in its February 10, 2005 Second Report and Order in Case No. EM-2000-0292 did not authorize Aquila to collect in rates any additional costs. Thus, the Commission did not authorize Aquila to recover transaction costs in the UtiliCorp – SJLP merger case.

IV. <u>Actual Debt Cost Recovery</u>

1. Should the Commission require GPE/KCPL to continue protecting ratepayers from the activities and results of Aquila's non-regulated businesses by setting rates based on a "regulatory cost of debt" rather than Aquila's actual cost of debt? Would the proposed merger be not detrimental to the public interest if the Commission did not do so?

It is Staff's view that the proposed transaction is significantly detrimental to the public interest and that no set of conditions exists that can be imposed and thereby render it acceptable. With respect to the question set out above, it is absolutely Staff's position that the Commission should require GPE/KCPL to continue to protect ratepayers from the financial ill-effects of Aquila's unregulated activities. Aquila's actual cost of debt is outrageously high. The Commission has used an investment-grade, imputed cost of debt in recent Aquila rate cases in order to ensure that ratepayers do not subsidize Aquila's unregulated activities by paying the full cost of Aquila's debt. Nothing has changed such that it would be equitable or lawful to impose the actual cost of this debt on captive ratepayers.

The proposed GPE acquisition of Aquila through a merger of Aquila with the GPE wholly-owned subsidiary Gregory Acquisition Corp. is detrimental to the public interest in that GPE is seeking to improve its situation as a shareholder of Aquila over the current shareholders at the expense of Aquila's ratepayers by shifting the responsibility for existing liabilities from Aquila's shareholders to Aquila's ratepayers. There are no direct benefits and the Merger Savings section herein shows that there are no net benefits. One of the condition's of GPE's acquisition of Aquila is that Aquila's Missouri rates be based upon Aquila's actual financing costs when currently those rates are based upon imputed debt rates that are lower than actual debt rates, pursuant to a long-standing commitment of Aquila. Aquila's long-standing commitment is to not seek recovery in rates of costs it incurred and incurs related to its non-Missouri retail jurisdictional business activities. Due to this commitment, Aquila's current Missouri jurisdictional retail customers are not paying in rates financing costs based on Aquila's loss of investment-grade debt ratings. (Staff Report, p. 19). The Staff believes that the not detrimental to the public interest standard would require that Missouri ratepayers should continue to not bear the costs associated with Aquila's non-jurisdictional investments. (*Id.* at 57.)

In Missouri Public Service's 1990 electric rate increase case, the Commission noted the commitment given by Mr. Richard C. Green, Jr., Chairman of the Board, Chief Executive Officer, and President of UtiliCorp that Missouri Public Service's ratepayers would be insulated from all downside risks associated with UtiliCorp's acquisition and merger strategy and that all benefits of any acquisition and merger would be flowed to the ratepayers. The Commission did this in addressing the specific issues of (1) UtiliCorp's corporate office / merger and acquisition expense and (2) the MPS capital structure:

> The evidence indicates that Company has removed from its A&G costs most of the known expenses associated with M&A activities. The Commission believes that UtiliCorp's expenses for M&A activities should be removed from the expenses reflected in MPS's rates. When UtiliCorp was formed Company assured the Commission that the ratepayers would suffer no detriment from UtiliCorp's activities but would experience the benefits associated with UtiliCorp's activities. The Commission believes that it is inconsistent with this pledge to include M&A costs in the expenses reflected in MPS's rates. The Commission is of the opinion that it is inappropriate for MPS's ratepayers to pay for these activities which have little to do with MPS's goal, of providing safe and adequate electric service in Missouri. Therefore, the Commission finds that the $70,280 of additional costs for M&A activities should be excluded from the cost of service. Finally, the Commission is concerned that Company has not been accounting for these costs separately. Accordingly, the Commission will direct Company to account for M&A costs separately so that they can be readily

> excluded in future rate cases from A&G costs reflected in MPS's rates.

Re Missouri Public Service, division of UtiliCorp United Inc., Case Nos. ER-90-101, et al., Report And Order, 30 Mo.P.S.C.(N.S.) 320, 350-51 (1990).

> Company opposes Staff / Public Counsel's capital structure as nonrepresentative because MPS has a different risk profile than the other divisions and subsidiaries comprising UtiliCorp. Company contends that a consolidated capital structure will not shield MPS's ratepayers from risk as promised by MPS at the time UtiliCorp was formed. . . .

Id. at 352.

. . . .

> The Commission determines that the capital structure proposed by Staff / Public counsel, as modified hereinafter, should be adopted in this case. . . . The Commission finds that it is more reasonable to use the consolidated capital structure for MPS than it is to assign a hypothetical capital structure to MPS. . . .
>
> The Commission determines that the use of a consolidated capital structure in this instance will not, per se, expose MPS's ratepayers to any adverse consequences arising from UtiliCorp's other activities any more than the use of a hypothetical, assigned capital structure will insulate them from these consequences. As stated by Staff / Public Counsel's witness, the present capital structure of UtiliCorp is not harmful to MPS's ratepayers. However, an adjustment would need to be made in future rate cases should UtiliCorp develop a capital structure that would subject MPS's ratepayers to adverse consequences arising from UtiliCorp's other activities.

In a much more recent case, in *Re Aquila, Inc.*, Case No. EF-2003-0465, Report And Order, 12 Mo.P.S.C.3d 375, 378-79 (2004), the Commission denied Aquila the authority it sought to encumber its Missouri regulated assets stating as follows: "The unreasonable risk of harm includes the possibility that Missouri's regulated assets alone would support Aquila's $430 million dollar [sic] loan. That loan includes money for Aquila's non-regulated businesses. Aquila's Missouri ratepayers alone might shoulder the burden of Aquila's financial difficulty, including a potential default on the note, or even bankruptcy. That burden could include a loss of service, since the loan agreement arguably allows the creditor to bypass the Commission, and immediately foreclose upon and sell the assets. In contrast, Aquila would receive little, if any benefit. . . . The Commission finds that Missouri ratepayers would suffer a detriment if Aquila used its Missouri regulated assets to support debt for its riskier, unregulated operations."

Within nine months prior to GPE/KCPL and Aquila's April 4, 2007 Joint Application in the instant case, Aquila in two separate cases told this Commission that it was continuing its commitment to insulate its Missouri ratepayers from the costs of its prior unregulated activities and the deleterious results that had occurred.

On July 3, 2006, Aquila filed an electric rate increase case for both Aquila Networks – MPS, its MPS division (formerly Missouri Public Service), and Aquila Networks L&P, its L&P division (formerly St. Joseph Light & Power). Aquila filed the direct testimony of Jon R. Empson, Senior Vice President, Regulated Operations, who stated Aquila's commitment to protect the customers of its regulated utility operations from the financial effects of its non-Missouri retail jurisdictional by, among other things, charging its Missouri retail customers rates based on debt costs for comparable utilities with a BBB investment grade rating. (Staff Report, p. 55).

On March 16, 2005, Public Counsel filed a Motion To Open A New Case To Conduct A Management Audit Of Aquila, Inc. initiating Case No. EO-2006-

0356, expressing its concern that Aquila is being mismanaged to the detriment of its ratepayers, and requesting that the Commission order a management audit of Aquila to evaluate the quality of Aquila's management. After receiving responses from Staff and Aquila, the Commission scheduled a conference. The Staff subsequently filed a Report with the Commission respecting the conference, indicating that the Staff, Public Counsel and Aquila had agreed upon the scope of a Staff audit as well as a time frame. The Commission in a June 13, 2006 Order Requiring A Management Audit Of Aquila, Inc. And Specifying The Issues To Be Addressed accepted how the Staff, Public Counsel and Aquila proposed to proceed except the Commission directed the Staff to investigate four additional issues. Two of the four additional areas were the following: "7) decisions that Aquila has made to invest in unregulated activities" and "8) decisions that Aquila has made related to efforts to protect its regulated activities from the company's involvement unregulated activities." Part of the procedure that was proposed was that Staff estimated that it would submit to Aquila and Public counsel on September 15, 2006 a final draft of the Report and Aquila will have until October 16, 2006 to submit comments to the Staff. The Staff would then file a final Report with the Commission by October 31, 2006.

The Staff provided Aquila a final draft of the Report. Chapter 9 of the Staff's final draft of the Report bears the title "Decisions Aquila Made To Protect Its Regulated Activities From The Company's Involvement In Unregulated Activities." Aquila provided comments respecting the Staff's final draft of the Report attached to a cover letter from Dennis R. Williams, Vice President –

Electric, Regulatory Services, Aquila Networks, dated October 13, 2006. The Aquila comments are included in the Staff's October 12, 2007 filing of its Rebuttal Testimony and its Report.

Aquila's comments contain a section titled "Chapter 9 – Protections For Regulated Activities From Participation In Unregulated Activities." The Staff cites below excerpts from those comments. The pages of the Aquila response are not numbered but the excerpts appear in the order that they appear in the Aquila document. They are being cited to show that as late as October 13, 2006, i.e., six (6) months prior to the filing of the Join Application, Aquila was proclaiming to the Commission that its Missouri ratepayers would not pay in rates for the results of its unregulated activities:

> . . . Aquila does not believe that the Staff report has fully discussed the decisions made by management to protect regulated activities from unregulated activities. . . .
>
> . . . .
>
> Aquila offers the following points of clarification to ensure that the record is complete:
>
> 1. Aquila acknowledges that its corporate structure limited the options available to provide a pure "ring-fencing" protection for its utilities from the unregulated businesses. . . . Aquila maintains that its intent has always been clear – to protect its regulated customers from the activities of its other businesses to the greatest extent possible.
>
> . . . .
>
> 3. In March 2003, Aquila developed a "Debt Reduction and Restructuring Plan." In that plan, Aquila reconfirmed its focus on three key business principles:
>
>   a. Protect utility customers from potential adverse financial impacts.
>
> . . . .

Price new/replacement debt to utility divisions at comparable BBB credit rating

. . . .

b. Maintain quality customer service

. . . .

c. Enhance regulatory transparency

. . . .

This confirmation was another clear statement by Aquila that while the challenges of repositioning might be externally viewed as a potential distraction for management, the commitment to protect the regulated customers was the highest priority.

. . . .

This concerted effort to heighten the importance of further enhancing customer service was symbolic of Aquila's commitment to protect its regulated customers from the activities related to the unregulated businesses.

The Staff asked in Staff Data Request No. 324: "What is KCPL's current estimate of the difference between the interest costs Aquila will be seeking from its Missouri customers annually for the period 2008 through 2012 if the transaction proposed by GPE/KCPL and Aquila in this case closes minus the amount Aquila would seek from these customers over the same time period if the transaction does not close?" KCPL's calculation is based on Aquila's long-standing commitment to Missouri regulators not being honored, i.e., Aquila post-merger charging its Missouri retail ratepayers its actual financing costs as a result of its non-Missouri jurisdictional retail investments. The Staff performed its own calculation of what would be Aquila's interest costs over the same five year period if Aquila's long-standing commitment to Missouri regulators were continued to be honored. The difference between GPE's cost of debt of ** $______ ** and Staff's cost of debt of ** $______ ** is ** $______ ** of additional interest costs GPE expects Missouri ratepayers to be liable for, if the proposed transaction closes. The difference between GPE's cost of debt of ** $ ______ ** and Staff's cost of debt of ** $ ______ ** is ** $ ______ ** of additional interest costs GPE expects Missouri ratepayers to be liable for, even if the proposed transaction does not close. Staff notes that none of this analysis includes expenses associated with the issuance of GPE's projected hybrid securities. (Staff Report, pp. 54-60). GPE/KCPL witness Mr. Cline responded in his Surrebuttal Testimony at page 14, lines 10-19 that the Staff's calculation is too high: "Page 59 of the Staff Report indicates that if actual costs were included in rates, Missouri customers would be liable for an additional amount of $205.9 million in pre-tax interest over the five-year period following the merger. . . .comparing Staff's amount to the Company's equivalent amount shown in Schedule MWC-13 indicates that Staff's estimate of the impact to ratepayers is over $90 million higher over the 5-year period ($205.9 million - $113.7 million.)"

V. <u>Additional Amortization Mechanism</u>

1. Should the Commission allow Aquila to implement "Additional Amortization to Maintain Financial Ratios" similar to those negotiated by KCPL with stakeholders in Case No. EO-2005-0329? If not, is the proposed merger detrimental to the public interest? If yes:

> **A. Has Aquila proposed a plan in which the additional amortizations are balanced by provisions favorable to ratepayers and other stakeholders? If not, is the proposed additional amortization device detrimental to the public interest?**
>
> **B. Will the additional amortizations shift the risks of the costs of Aquila's unregulated activities from Aquila to its ratepayers? If yes, is the proposed merger detrimental to the public interest?**
>
> **C. Is the additional amortization device proposed by the Joint Applicants set out in a sufficient level of detail to be able to be understood and effectively administered?**

The Staff identified four reasons why the GPE/KCPL/Aquila proposed additional amortizations mechanism is detrimental to the public interest. There are no direct benefits and the Synergy Savings Sharing Proposal section herein shows that there are no net benefits. GPE seeks Commission approval to require an "additional amortization" from Aquila's ratepayers to provide debt rating agencies the level of assurance these agencies have indicated that they require to restore Aquila to an investment grade debt rating. (Staff Report, p. 19). The first reason for rejection is the same as for rejection of the Joint Applicants' actual debt cost recovery proposal because acceptance of this proposal would cause Aquila's Missouri retail customers to pay costs for Aquila's non-regulated activities that Aquila for many years and even most recently committed to this Commission that Aquila's ratepayers would not be asked to pay. Aquila's own documents show that it knew the reaction that this proposal would engender:

**

:

[redacted] **[8]

(Staff Report, pp. 33-34, 62).

The second reason for rejection of the proposed additional amortization is that the additional amortization is not being used to support acknowledged prudent improvements in infrastructure as was the case with the additional amortizations negotiated respecting KCPL in Case No. EO-2005-0329 and respecting The Empire District Electric Company (Empire) in Case No. EO-2005-0263. The additional amortizations in this proceeding are designed to provide the supporting economics of this acquisition of Aquila and related merger of the Aquila and KCPL systems and operation by providing assurance that the rating agencies need not be concerned about that reliability of the ** [redacted] ** (Staff Report, pp. 62-63).

The third reason for rejection of the proposed additional amortization is that there is no evidence that the additional amortization is necessary for Aquila to provide utility service to its Missouri customers at current safe and adequate service levels and at current just and reasonable rates. The only need for the

[8] Aquila Response to Staff Data Request No. 282 asking for access to documents provided to or received from members of Aquila's Board of Directors related to GPE's acquisition of Aquila.

additional amortization is to support the terms of the acquisition and merger. (Staff Report, p. 63).

The fourth reason for rejection of the proposed additional amortization is an inappropriate use of additional amortizations. The development of the additional amortizations mechanism by the very terms of the Stipulation And Agreement in Case No. EO-2005-0329 respecting KCPL, Section III.B.10.b. at page 52 and Section III.B.10.d. at page 53, and the Stipulation and Agreement in Case No. EO-2005-0263 respecting Empire, Section II.G.2. at pages 30-31 and Section III. G.4. at page 31, were intended to address unique circumstances and were not intended to have precedential effect as regulatory mechanisms to be imposed by the Commission with no base of support other than the utilities that have proposed its use. (Staff Report, pp. 63-64).

VI. <u>Affiliate Transactions Rule Waiver/Variance</u>

1. **Should GPE/KCPL and Aquila be granted a waiver/variance from the provisions of the affiliate transactions rule under 4 CSR 240-20.015 as it might pertain to transactions between Aquila and KCPL? Will the proposed merger be not detrimental to the public interest if the Commission does so?**

2. **Have GPE/KCPL and Aquila complied with the Commission's rules regarding a request for a waiver or variance from the affiliate transactions rule, such as the requirement regarding making a showing of good cause?**

3. **Have GPE/KCPL and Aquila provided adequate details for there to be clarity respecting what provisions of the affiliate transactions rule that GPE/KCPL and Aquila are seeking relief from?**

The Joint Application filed on April 4, 2007 in the "Wherefore" subsection (j) requests that the Commission issue an Order "[g]ranting KCPL and Aquila a waiver from the affiliate transaction rule to the extent deemed necessary. The

Join Applicants have subsequently asserted that the only transactions that they are seeking a waiver from the Affiliate Transaction Rule 4 CSR 240-20.015 for are transactions between KCPL and Aquila – both public utilities. The Joint Applicants contend that 4 CSR 240-20.015 does not apply to transactions between KCPL and Aquila because they both will be regulated utilities. Although KCPL and Aquila will be both regulated utilities, they both will be owned and operated by GPE which is not regulated and the present Aquila, Inc., and previously under the name UtiliCorp United, Inc., engaged in unregulated activities.

True, the "Purpose" clause of 4 CSR 240-20.015 states, "This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. . . . The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities." Nonetheless, the definitions "affiliated entity, "affiliate transaction," and other terms are not limited to regulated utilities. The published Order Of Rulemaking[9] relates, in part, as follows:

> COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. . . .

In the Matter of 4 CSR 240-20.015 Proposed Rule – Electric Utilities Affiliate Transactions, Case No. EX-99-442, Order Of Rulemaking (1999); 25 MoReg at

[9] The rulemaking for 4 CSR 240-20.015 was docketed as Case No. EX-99-442 and the Order of Rulemaking appears at 25 MoReg 55-59 (January 3, 2000).

55 (2000). The Actual Debt Cost Issue and Additional Amortizations Issue involve the Joint Applicants shifting to ratepayers the costs that are the direct results of unregulated activities.

VII. Service Quality

1. **Can service quality problems resulting from a merger/ consolidation/ acquisition of a works or system necessary or useful in the performance of duties to the public preclude the merger/consolidation/acquisition from being not detrimental to the public interest?**

2. **Has GPE/KCPL taken adequate measures to ensure that its proposed post-consolidation/post-merger/post-acquisition operations will not be detrimental to the public interest by precluding service quality issues arising from the consolidation/merger/acquisition?**

The Staff is very concerned about how KCPL's and Aquila's service quality will fair as a result of the proposed transaction. In acquisitions and mergers, utility operations are consolidated / integrated / combined in an effort to wring savings out of the transactions to meet projected efficiencies or synergies. (Staff Report, pp. 68-69). It is Staff's experience that service quality is placed at risk in the context of an acquisition or merger and the depth and the breadth of these likely disruptions are generally not anticipated or planned for. (*Id*. at 71). There is the notable case of Southern Union Company's acquisition of Western Resources Inc.'s Missouri local distribution gas properties now called Missouri Gas Energy in 1993, *Re Western Resources, Inc., d/b/a Gas Service and Southern Union Co., d/b/a Southern Union Co.*, Case No. GM-94-40, Report And Order, 2 Mo.P.S.C.3d 598 (1993). Numerous and very serious customer service problems occurred for several years after that acquisition. Workforce reductions was one of the factors. (*Id*. at 71-72). The different or previously separate entities have different processes, practices, systems, procedures, cultures, organizational structures and workforces. (*Id*. at 68). New or different ways of operating, while determined to be desirable, disrupt or disturb stability, security of systems, operations and staffs. (*Id*. at 69). While Aquila and KCPL's actual service quality performance appears to be very similar in the metrics identified, Aquila's performance is presently superior to that of KCPL's on those specific metrics. (*Id*. at 73). After the UtiliCorp – SJLP merger and Aquila's nonregulated operations encountered financial difficulties, Aquila started to staff its Raytown call center with temporary workers as a means to reduce costs. Aquila encountered a decline in call center performance, which was reversed when Aquila returned to recruiting, selecting, and hiring its own call center staff and staffing at higher levels. (*Id*. at 69).

In paragraph 32 of the Joint Application, the Joint Applicants state that "[a]s a consequence, existing Aquila customers will continue to experience quality day-to-day service at just and reasonable rates without incident or interruption." Such a statement regarding the probability of no incident or interruption of service is probable for the Gregory/Aquila merger needed to effectuate GPE's acquisition of Aquila. The statement is not likely to be true if, within the same time frame the conceptual KCPL/Aquila merger or consolidation designed to include such activities as the transfer of all permanent Aquila employees to KCPL, move all Aquila 20 West 9th corporate employees into the same space presently occupied by KCPL employees under KCPL's 1201 Walnut

St. lease, and integration and enhancement of information technology of systems is effectuated. (Staff Report, p. 16).

Additional Issue -- Authority or Lack of Authority for Alternative Regulation Proposed by Kansas City

The Commission has previously held that it does not have the authority to impose an alternative regulation plan; the utility must agree to the alternative regulation plan. *Re Southwestern Bell Tel. & Tel. Co.*, Case Nos. TC-93-224, et al., 2 Mo.P.S.C.3d 479, 572, 583-85 (1993):

> . . . The Commission has concluded that it has the necessary authority to approve a reasonably structured alternative regulation plan, as described in this Report And Order, and that **a company may voluntarily agree to operate under such a plan**.

Id. at 572; Emphasis added.

Senate Bill No. 179 did not grant the Commission any greater authority respecting adopting incentive-based or performance-based plans. Section 386.266.8 Cum Supp. 2006 (S.B. 179):

> In the event the commission lawfully approves an incentive- or performance-based plan, such plan shall be binding on the commission for the entire term of the plan. This subsection shall not be construed to authorize or prohibit any incentive- or performance-based plan.

WHEREFORE, Staff prays that the Commission will reject the proposed transaction and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson
KEVIN A. THOMPSON
General Counsel
Mo. Bar No. 36288

/s/ Steve Dottheim
STEVE DOTTHEIM
Chief Deputy General Counsel
Mo. Bar No. 29149

Attorneys for the Staff of the Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
573-751-6514 (voice)
573-751-7489 (voice)
573-526-6969 (FAX)
kevin.thompson@psc.mo.gov
steven.dottheim@psc.mo.gov

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on all of the parties of record or their representatives as set out on the attached service list on this **27th day of November, 2007**, either by hand delivery, electronic mail, facsimile transmission, or First Class United States Mail, postage prepaid.

/s/ Kevin A. Thompson