

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of the Joint Applica-	)	
tion of Great Plains Energy Incor-	)	
porated, Kansas City Power & Light	)	
Company, and Aquila, Inc., for	)	EM-2007-0374
Approval of the Merger of Aquila,	)	
Inc., with a Subsidiary of Great	)	
Plains Energy Incorporated and for	)	
Other Related Relief	)	

SECOND STATEMENT OF POSITION AND PREHEARING BRIEF  
OF INDUSTRIALS

COMES NOW the SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIA-  
TION ("SIEUA"), AG PROCESSING INC A COOPERATIVE ("AGP") and  
PRAXAIR, INC ("Praxair") and, pursuant to prior orders respect-  
fully submit their Statement of Position/Prehearing Brief in this  
matter.

In this pleading, Industrials have sought to follow the  
designation and wording of the list of issues submitted by Staff  
as they have been provided to us. As with the Staff pleading,  
this may not prove to a complete list of issues that develop in  
the case and Industrials respectfully reserve the right to submit  
their post-hearing briefs on these or additional issues that may  
arise during the hearing.

Moreover, a series of depositions have only recently  
concluded and review of those deposition transcripts and exhibits  
produced in connection therewith is ongoing but not complete.

Thus, this statement of position is based on information available at this time and numerous positions must be reserved because investigation and preparation is still incomplete. This pleading is also submitted without prejudice to earlier objections to the admissibility of certain testimony.

## **I. Overview of Current Merger Proposal/Policy**

Response: This statement is vague and is not properly stated as an issue in the case, but rather appeared on the most recent iteration of Staff's issue listing. We do not agree that it is an issue in the case and seems intended, rather, to provide the Joint Applicants, principally GPE/KCPL will an opportunity to provide "live" supplemental direct testimony in violation of the Commission's rules regarding prefiled testimony and the various rounds of prefiled testimony that have been set by Commission orders. As such, it is objectionable on several grounds including, but not limited to those stated in our motions in limine. Moreover, the issues that would purportedly be addressed in this "live" testimony are all issues that are developed elsewhere in the procedural schedule and are being advanced here in opposition to the established procedural process under Commission rules and the orders previously issued in this case.

## **II. Merger Synergy Savings Sharing Proposal**

1. Are the estimates of savings from synergies reliable?
  - 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?

Position: Industrials have not made an intensive investigation of the accuracy of Applicants' claims of "synergies." Industrials have, however, reviewed the Applicants' claims of synergies and their own claims of the costs of the transaction as proposed. That investigation has revealed that the transaction as proposed is seriously detrimental to the public interest and should not be approved.

As regards the accuracy of the Applicants' claims of synergies, for the purpose of our analysis, we have ASSUMED for purposes of evaluation only and without conceding their validity, Applicants' claims regarding synergies. However, that assumption should not be taken to validate Applicants' claims, rather, we have depended upon the Commission Staff (Staff) to make that investigation. Because of Staff's position on the scope of the Applicants' request for approval, there does not appear to be convincing

evidence that the claims of synergies are accurate or reliable and therefore such claims must be viewed with considerable skepticism as self-motivated and developed.

Further this statement of position is without prejudice to Industrials' position in alignment with Staff that the Applicants have not sought legal authority to integrate operations between KCPL and Aquila as well as the issues raised in Industrials' First and Second Motions in Limine. Because of their failure to seek such authority, questions concerning the calculations of these "synergies" that are dependent upon such integration is not relevant to the decision that the Commission is requested to make.

**2. Is it likely that 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?**

Response: Based on our analysis and evaluation, they do not. First, see the above discussion. As noted there, solely for the purpose of evaluating Applicants' synergy claims, Industrials ASSUMED without conceding the Applicants' claims. Second, and given that assumption, our evaluation and analysis indicates that

the detriment for the first 5 years averages \$19.1 million per year or over \$95 million total (based on public information) and averages greater than that if information identified as HIGHLY CONFIDENTIAL is considered. Therefore, we have concluded that the proposed transaction is significantly detrimental to the public and should not be approved. However, we have not addressed the question of what constitutes the "actual synergy savings."

Further this statement of position is without prejudice to Industrial's position in alignment with Staff that the Applicants have not sought legal authority to integrate operations between KCPL and Aquila as well as the issues raised in Industrials' First and Second Motions in Limine. Because of their failure to seek such authority, questions concerning the calculations of these "synergies" that are dependent upon such integration is not relevant to the decision that the Commission is requested to make.

### **III. Transaction Cost Recovery**

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

Response: No to the initial portion of the stated issue and yes to the second portion. Transaction costs such as those identified by the Applicants are entirely the responsibility of the shareholders of the respective companies. These shareholders, through their elected boards of directors, have incurred (or will) these expenses. Ratepayers are customers and were not asked for their approval before the Applicants moved forward to incur these expenses.

#### **IV. Affiliate Transactions Rule Waiver/Variance**

- 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?**

Response: No. The purpose of the affiliate rule is to protect against transactions that are not arms' length and based in an unregulated model of arms' length transactions. Permitting these costs to be directly charged to captive customers significantly distorts the nature of the transactions and also creates the opportunity for "gaming" of the system wherein significantly more effort is directed to the concealment or justification for the affiliate transaction and deflected from the effort needed to identify and negotiate the best price.

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?

Response: Industrials have taken no testimonial position on this issue and reserve our position depending on the evidence that is adduced in the hearing.

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?

Response: Industrials have taken no testimonial position on this issue and reserve our position depending on the evidence that is adduced in the hearing.

#### V. 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?

Response: While Industrials have not taken a direct testimonial position on service quality issues, it is clear that the proposed transaction is significantly detrimental to the public interest. Given that, the Applicants will be under great financial pressure to reduce the costs associated with maintenance of service quality and will do so based on historic evidence. At the same time, they can be expected to claim that there will be no degradation in service quality. This should be included as a detriment in the analysis and should prevent approval of the proposed business transaction.

## VI. Transmission and RTO/ISO Criteria

1. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of their intent to have Aquila participate in the Midwest ISO rather than SPP?



2. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of potential joint dispatch of the combined companies' generation resources, including the impacts on transmission and interconnection availability?
3. Should Commission approval of the Joint Application be conditioned upon Aquila being required to join and operate its generation and transmission facilities under the auspices of the Southwest Power Pool (SPP) Regional Transmission Organization (RTO) with KCPL within four (4) months of approval of the merger.
4. Should Commission approval of the Joint Application be conditioned upon Aquila and KCPL being required to consolidate their balancing authority areas within six (6) months of approval of the merger.

Response: Industrials have not taken a direct testimonial position on this group of issues, but nevertheless believe that access to the grid should be preserved and that the failure to do so adequately constitutes a detriment to the public that should result in the disapproval of the proposed transaction. Some of these issues impinge upon the claims of "synergies" by the Applicants, but those synergies cannot result without a combina-

tion or integration of operations between KCPL and Aquila. Applicants have not sought to obtain the required authorization for such integration of operations.

## **VII. Municipal Franchise**

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?

Response: Industrials have taken no testimonial position on this group of issues and reserve our position depending on the evidence that is adduced in the hearing.

## **VIII. Quality of Service Plan and Earnings Sharing Mechanism**

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?
2. Should Commission approval of the Joint Application be conditioned upon establishment of an Earnings Sharing Mecha-

nism that returns to customers excess earnings of  
KCPL/Aquila above an authorized level.

Response: Industrials have taken no testimonial position on this group of issues and reserve our position depending on the evidence that is adduced in the hearing.

#### **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?

Response: Industrials have taken no testimonial position on this group of issues and reserve our position depending on the evidence that is adduced in the hearing. In addition, see above discussion regarding the authorization to merge that the Joint Applicants have sought and objections to evidence that goes beyond that application.

#### **X. Additional Amortization Mechanism**

Is the credit worthiness of KCPL and Aquila as a result of the GPE acquisition of Aquila dependent on the expectation that GPE/KCPL will seek and the Commission will authorize a regulatory plan similar to that contained in the KCPL Stipu-

lation and Agreement in Case No. EO-2005-0329 subsequent to Commission authorization of GPE's acquisition of KCPL?

1. If yes, will KCPL's credit worthiness, and thereby the purpose of the KCPL Regulatory Plan, be negatively affected if Aquila is unable to obtain such a Regulatory Plan?

2. Is the current expected cost and schedule outcome relating to KCPL's infrastructure commitments from the Case No. EO-2007-0329 Regulatory Plan an indication of GPE and KCPL's ability to complete the acquisition transaction in a manner that is not detrimental to the public interest?

3. Is KCPL's creditworthiness affected by GPE's decision not to seek recovery from Missouri ratepayers of any of the debt repurchase costs of Aquila's existing debt that GPE will refinance post-closing?

Response: The Additional Amortization mechanism was specifically designed to allow KCPL to preserve its investment grade credit metrics from any downgrade that might be caused by KCPL's Iatan 2 Construction Program and other limited items described in the Regulatory Plan. It was not designed for Aquila and, even for KCPL, does not encompass downgrades that may result from activities other than the construction expenditures associated with the projects specified in the Plan. This was an extraordinary

measure, obtained through extended negotiation for which value was asked and given and has been approved by the Commission as a stand alone plan and might be in violation of Missouri law but for the agreement of the signatory parties not to pursue legal challenges to the plan. Its terms disclaim precedential value and also deny the Commission the authority to modify the terms and conditions of the Regulatory Plan, which restriction the Commission accepted by approving the Plan.

**XI. Anonymous Public Allegations/Comments Related to Proposed Acquisition**

- (a) Is the application of GPE/KCPL's gift and gratuity practice to Aquila detrimental to the public interest?
- (b) Does KCPL have adequate control of the Iatan projects to be able to operate the non-dispatch functions of Aquila in addition to those of KCPL in a manner not detrimental to the public interest?
- (c) Does the Commission have adequate information to determine whether the public allegations/comments it has received regarding GPE/KCPL are accurate and such conduct in the operation of the non-dispatch functions of Aquila would be detrimental to the public interest?

Response: These issues have arisen as a result of disclosures in other proceedings and in connection with the additional discovery that was undertaken, analysis of which is not complete. Given that a public utility should function as a public trustee, any practice that results in purchases that are of questionable prudence merits intense scrutiny. Such activities may impact the credibility of utility witnesses and may infuse the entire process with a perception of public mistrust. Industrials have taken no testimonial position on this group of issues and reserve our position depending on the evidence that is adduced in the hearing.

These parties have serious concerns regarding whether full and complete disclosure of information regarding the status of the Iatan project and the related environmental retrofits at other generating stations are successfully progressing on their indicated schedules and are expected to be put on line within their respective budgets. It is presently unclear whether the Commission and the other parties, including parties to the regulatory plan, have been provided with sufficient, accurate, and reliable information to make these evaluations. The absence of such information raises serious questions about the ability of KCPL to continue to perform in accordance with the regulatory plan which raises similar concerns about detriment that may result from the approval of this proposal.

## XII. Legal Issues

The Staff chose to raise in its Report, which is appended to the Rebuttal Testimony of Staff witness Robert E. Schallenberg, certain legal issues, which GPE/KCPL has responded to in the Surrebuttal Testimony of Chris B. Giles. It is anticipated that these issues also will be addressed in briefs and/or other pleadings. Other parties may have chosen, or may choose, to raise legal issues solely through pleadings. The Staff also asks below whether the net detriment test being used by the Joint Applicants is the actual legal standard that is applicable in Missouri. Finally, KCPL has raised the legal issue that appears last in the list that follows:

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?

Response: Based on the responses to data requests that we have reviewed, it does not appear that the respective Boards have been requested for approval to combine, integrate or otherwise share

their operations. Moreover, inspection of the Application does not reveal that such required authority has been requested.

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?

Response: No.

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
  - (a) Future regulatory plan additional amortization
  - (b) Future ratemaking treatment for transaction and transition costs.

Response: While the Commission could approve the acquisition of Aquila by GPE, it should not do so because the transaction is clearly detrimental to the public interest. Moreover, the claims of "synergies" for the most part result from proposals the required legal authority to do has not been requested by the Applicants and, therefore, such claims of synergies are irrele-



vant to the transaction for which approval has been requested. Moreover, the Commission may not under Missouri law attempt an "end run" or "punt" around the statute by statements that it will "protect ratepayers" in "future cases." If the transaction is detrimental, it should be rejected.

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?

Response: Yes, this appears to be the proper standard. That test shows a net detriment to the public interest from the proposed transaction and, therefore, it should not be approved. Indeed, the Commission cannot under the law reach forward and approve a transaction that is shown to be detrimental to the public on the representation that future commissions will "protect" the public from such adverse effects.

5. Does the Affiliate Transactions Rule, 4 CSR 240-20.015, apply to transactions between regulated electrical corporations that are wholly owned by the same parent company?

Response: Yes. Please see the discussion above.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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ATTORNEYS FOR SEDALIA INDUSTRIAL  
ENERGY USERS' ASSOCIATION, AG PRO-  
CESSING INC A COOPERATIVE, AND  
PRAXAIR, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Pleading by U.S. mail, postage prepaid or by electronic mail addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.

  
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Stuart W. Conrad

Dated: April 16, 2008