

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

In the Matter of Great Plains Energy, Inc.'s)
Acquisition of Westar Energy, Inc., and)
Related Matters.)

Case No. EM-2016- 0324

STAFF'S REPLY TO GREAT PLAINS ENERGY

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply to Great Plains Energy and Motion for Leave to Late File*, states as follows:

Staff's Motion:

1. On June 1, 2016, Staff filed its *Motion to Open an Investigation* in response to an email sent the previous day by Terry Bassham, CEO of Great Plains Energy, Inc. ("GPE"), advising the Commission and the Staff that GPE and Westar Energy, Inc. ("Westar"), had entered into an agreement for GPE to acquire Westar for \$8.6 billion in cash and stock. In its motion, Staff asked the Commission for authority to investigate the particulars of the transaction announced by Mr. Bassham to determine whether or not GPE had violated a Commission order¹ and whether or not the proposed transaction might be detrimental to the public interest.²

GPE's Response to Staff:

2. On June 2, 2016, GPE filed its *Verified Opposition to Staff's Motion to Open Investigation and Request for Order Declining Jurisdiction*. Therein, GPE states:

¹ The order in question being the Commission's order of July 31, 2001, in Case No. EM-2001-464, by which the Commission granted KCPL and GPE authority to reorganize and approved the *First Amended Stipulation and Agreement*.

² Staff's motion referred to GPE's announced financing plan as a possible detriment and its announced intention to capture synergy savings similar to those realized from its acquisition of Aquila, Inc. – now KCP&L Greater Missouri Operations Company ("GMO") – as another.

Contrary to Staff's Motion, and as explained in detail in Section II hereof, there is no legal basis for the Commission to exercise jurisdiction over this transaction on the basis of the July 31, 2001 First Amended Stipulation and Agreement ("GPE Stipulation"). Staff's interpretation would expand the Commission's jurisdiction to non-Missouri regulated public utilities, and grant the Commission extraterritorial powers never contemplated by Missouri law. Accordingly, the Commission should decline jurisdiction over a transaction involving not a single Missouri public utility.³

GPE goes on to note, first, that declining jurisdiction would be consistent with the Commission's treatment of The Laclede Group's acquisition of Alagasco in 2014 and, second, that "[d]eclining jurisdiction in this matter would also be consistent with longstanding Commission precedent reaching back almost 20 years, where it did not exercise jurisdiction over holding companies that owned Missouri public utilities when they sought to acquire non-Missouri public utility holding companies or non-Missouri public utilities."⁴

3. GPE explains in its *Response* that Westar is a Kansas corporation that operates in Kansas as an electric utility regulated by the Kansas Corporation Commission ("KCC").⁵ GPE asserts, "Westar is not a Missouri public utility subject to the jurisdiction of this Commission."⁶ GPE, which will acquire 100% of the outstanding shares of Westar in the proposed transaction, is a Missouri corporation and a public utility holding company.⁷ Although GPE owns 100% of the shares of two Missouri electric utilities, KCPL and GMO, regulated by this Commission, it asserts that it is not

³ GPE's *Response in Opposition*, ¶ 2.

⁴ *Id.*, ¶ 4.

⁵ *Id.*, ¶ 6.

⁶ *Id.*

⁷ *Id.*, ¶¶ 5, 10.

itself regulated by this Commission.⁸ The cost of the acquisition to GPE will be \$12.2 billion, consisting of \$8.6 billion in “equity” and \$3.6 billion in assumed debt.⁹ GPE plans to borrow \$8.0 billion of this purchase price from Goldman Sachs and an additional \$750 million “mandatorily preferred convertible equity commitment from the Ontario Municipal Employees Retirement System (OMERS), to be funded at the closing of the transaction.”¹⁰

4. GPE goes on to assert that, while the *First Amended Stipulation and Agreement* cited by Staff in its motion does indeed include the specific language relied on by Staff, that language “does not and cannot” mean what Staff understands it to mean:

Contrary to Staff’s suggestion in Paragraph 4 of its Motion, Section II(7) of the GPE Stipulation does not and cannot confer jurisdiction on the Commission to review the Transaction. This provision applies to a “public utility” as defined under Missouri law. Since Westar is neither a “public utility,” an “electrical corporation,” nor an affiliate of a “public utility” under Missouri law, Section II(7) of the GPE Stipulation is irrelevant to the Transaction.¹¹

GPE asks the Commission to deny Staff’s *Motion to Open an Investigation* and to affirmatively decline jurisdiction as expeditiously as possible “[b]ecause regulatory certainty is essential regarding significant financial undertakings like the Transaction, and because it is important for the approval process of such undertakings to occur in a timely fashion, GPE requests that the Commission rule on this matter in the next 30 days.”

⁸ *Id.*

⁹ *Id.*, ¶ 8.

¹⁰ News Release provided to Staff with Mr. Bassham’s email of May 31, 2016.

¹¹ *GPE’s Response in Opposition*, ¶ 12.

What Authority Does the Commission have over the Proposed Transaction?

5. In Paragraph 33 of its *Response*, GPE states:

the Commission should conclude that it has no jurisdiction over the Transaction by virtue of the 2001 GPE Stipulation or that it need not exercise jurisdiction at this time, which would be consistent with longstanding Commission precedent. There is no legal basis to open an investigation into a transaction over which the Commission either lacks or declines jurisdiction.”

This paragraph, remarkably, asks the Commission to take action based on either of two absolutely inconsistent views of the situation. On one hand, it asks the Commission to deny Staff’s *Motion* because the Commission lacks jurisdiction; that is, the legal authority to do anything else. On the other hand, it asks the Commission to deny Staff’s *Motion* because “it need not exercise jurisdiction at this time.”¹² The latter view accepts that the Commission has the legal authority to proceed, but asserts that it should nonetheless choose not to do so. Why would the Commission do that? GPE offers only this in explanation:

Staff notes its “mindfulness” in attempting to draw a parallel between the Transaction and the financial condition of Aquila prior to the sale of its various assets, including the final acquisition of its remaining assets by GPE and Black Hills in 2008. The record is clear that Aquila’s financial issues arose from its significant expansion into unregulated energy markets and the aftermath of the collapse of Enron. In sharp contrast to Aquila, Westar is on solid financial footing and engages primarily in regulated operations. Staff’s comments provide no legitimate basis for the Commission to open an investigation into this Transaction.¹³

6. So, what authority does this Commission have over the proposed acquisition of Westar by GPE? First, Staff points out that the Commission has jurisdiction over the proposed transaction because Westar, contrary to GPE’s

¹² *Id.*, at ¶ 33.

¹³ *Id.*, at ¶ 32. The focus, however, is not Westar’s condition and activities but those of GPE.

assertion,¹⁴ is indeed a Missouri regulated public utility. On May 26, 2000, this Commission granted a Certificate of Convenience and Necessity (“CCN”) to Westar Generating, Inc., authorizing it to “construct, install, own, operate, control, manage and maintain electric facilities in Jasper County, Missouri[.]”¹⁵ On information and belief, Westar Generating, Inc. (“WGI”), is a wholly-owned subsidiary of Westar.¹⁶ WGI owns an undivided forty percent share, with The Empire District Electric Company, of the State Line Generating Station at Joplin, Missouri, which generates power that is sold at retail to consumers in Missouri.¹⁷ In its Form 10-K, filed with the United States Securities and Exchange Commission, Westar discusses the State Line generating facility as one that it owns, with no reference to or acknowledgement of WGI.¹⁸ On its corporate website, Westar lists the State Line Combined Cycle Plant in Joplin, Missouri,

¹⁴ *Id.*, at ¶¶ 6 and 12.

¹⁵ ***In the Matter of the Application of The Empire District Electric Company***, Case Nos. EM-2000-145 and EA-2000-153, (***Order Approving Application to Transfer Assets and Order Granting Certificate of Convenience and Necessity***, issued May 26, 2000) 9 Mo.P.S.C.3d 136.

¹⁶ See Bloomberg at bloomberg.com/research/stocks/private/snapshot, retrieved June 3, 2016. Westar Generating, Inc.’s August 19, 1999, application in Case No. EA-2000-153 before the Commission states “Applicant is a corporation duly organized and existing under the laws of the State of Kansas with its principal place of business located at 818 Kansas Avenue, Topeka, Kansas. . . . Applicant is a wholly-owned subsidiary of Western Resources, Inc., a Kansas corporation that operates its utility operations under its trade name KPL, and its subsidiary KGE, a Kansas corporation.” Western Resources was the former name of Westar Energy, Inc.

¹⁷ The Staff Recommendation filed in Case Nos. EM-2000-145 and EA-2000-153 states: “On August 17, 1999, WGI, a corporation duly organized and existing under the laws of the State of Kansas and a wholly owned subsidiary of Western Resources, Inc., filed an application with the Commission for a certificate of convenience and necessity (“CCN”) to allow it to construct, own and operate the electric generating facilities jointly with Empire. Under its agreement with Empire, WGI is to own a forty percent share of the actual facility and thirty-three percent of the associated common areas. WGI’s application was docketed as Case No. EA-2000-153.”

¹⁸ Form 10-K filed with the SEC by Westar Energy, Inc., on or about February 16, 2016, for the fiscal year ended December 31, 2015. At p. 7: “Unless the context otherwise indicates, all references in this Annual Report on Form 10-K to ‘the company,’ ‘we,’ ‘us,’ ‘our’ and similar words are to Westar Energy, Inc. and its consolidated subsidiaries. The term ‘Westar Energy’ refers to Westar Energy, Inc., a Kansas corporation incorporated in 1924, alone and not together with its consolidated subsidiaries.” At p. 9: “we use natural gas as a primary fuel . . . at the State Line facility.” At p. 20, a table enumerating the assets of Westar includes the entry: “State Line (40%): Combined Cycle . . . Joplin, Missouri.” At p. 77, under “7. JOINT OWNERSHIP OF UTILITY PLANTS,” is the entry “State Line,” with the note, “Jointly owned with Empire District Electric Company.”

as one of its generating facilities, owned 40 percent by Westar and 60 percent by Empire.¹⁹ Through its ownership of the State Line generating facility, therefore, Westar is a Missouri public utility subject to regulation by this Commission and Westar must seek authority from this Commission to enter into and conclude its proposed transaction with GPE.

7. Second, there is the language cited by Staff in its *Motion* from the *First Amended Stipulation and Agreement* from Case No. EM-2001-464. According to GPE, the language of this stipulation does not mean what it seems to say; according to GPE, its scope is limited to Missouri acquisitions by GPE.²⁰ However, a review of the actual language of the *First Amended Stipulation and Agreement* fails to disclose any limiting language such as GPE now contends should be read into it:

7. Prospective Merger Conditions

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction. In addition, GPE agrees that it will not allow itself to be acquired by a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility, unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.²¹

¹⁹ <https://www.westarenergy.com/natural-gas>. Retrieved on June 7, 2016.

²⁰ *GPE's Response in Opposition*, ¶ 12.

²¹ In Case No. EM-2000-464, there were two on-the-record presentations. At the first on-the-record presentation on July 5, 2001, Commissioner Connie Murray inquired about ¶ 7:

COMMISSIONER MURRAY: All right. My last question is somewhat related, I suppose. It's Section 7, prospective merger conditions where GPE agrees, and I would like to know if the parties believe that that gives the Commission jurisdiction over an unregulated holding company that it would otherwise not have?

MR. FISCHER: Your Honor, from the Company's perspective, I would say it's inconsistent, in my opinion, with your holdings on other holding company mergers of

Nowhere in ¶ 7 of the *First Amended Stipulation and Agreement* does the word “Missouri” appear as a limitation on the scope of the obligation willingly undertaken therein by GPE and KCPL in order to obtain authority from this Commission to reorganize as a holding company with a wholly-owned public utility operating company.²² A stipulation, like any other settlement agreement, must be construed using the ordinary rules of contract construction.²³ A contract must be construed as a whole so as to not render any terms meaningless, and a construction that gives a reasonable meaning to each phrase and clause and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense.²⁴ GPE’s reading of ¶ 7 of the stipulation is contrary to the plain meaning conveyed by its language and should therefore be discarded.²⁵ As a creature of Missouri statute, GPE is necessarily subject to Missouri regulation.

parents. However, again, as a negotiated item, in order to get a stipulation between the Staff, the Public Counsel and the Company, we have agreed to this provision.

MR. DOTTHEIM: And again, different parties can interpret the statute differently. It was an effort to establish in certain areas what arguably the holding company would not contest in the way of coming before the Commission in certain instances.

Case No. EM-2000-464, Transcript Vol. 2, p. 33, ln. 14 – p. 34, ln. 5.

²² Perhaps the Commission should, in the future, view with some skepticism the promises made by utilities seeking authority from the Commission.

²³ *State ex rel. Riverside Pipeline Co., L.P. v. PSC*, 215 S.W.3d 76, 84 (Mo. banc 2007) (“*Riverside II*”); *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993).

²⁴ *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

²⁵ As with any contract, the terms are read to “ascertain the intention of the parties and to give effect to that intent.” See *Kohner Properties, Inc. v. SPCP Group VI, LLC*, 408 S.W.3d 336, 342 (Mo. App., E.D. 2013) (quoting *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003)). The terms of the contract are read together as a whole to determine the intention of the parties, giving each term its plain, ordinary, and usual meaning. *Kohner*, 408 S.W.3d at 342. In doing so, the reader attributes “a reasonable meaning to all of the provisions of the agreement” and refrains from leaving “some of the provisions without function or sense.” *Id.* at 342–43.

8. GPE reads the *First Amended Stipulation and Agreement* to provide nothing beyond what is already required under Missouri law. GPE's acquisition of a Missouri public utility would necessarily require authorization from this Commission even in the absence of ¶ 7.²⁶ What value is ¶ 7 as a mere promise to obey the law? That is already required. Clearly, the signatories to the *First Amended Stipulation and Agreement* expected thereby to acquire something beyond what they already had.²⁷

9. Of course, the Commission cannot acquire subject matter jurisdiction by agreement.²⁸ However, the Public Service Commission Law expressly authorizes the Commission to impose conditions on reorganizations.²⁹ Those conditions, consequently, are enforceable once ordered by the Commission.

10. Nothing in Missouri law exempts public utility holding companies from Commission regulation. GPE's interpretation of the Public Service Commission Law is overly narrow; the scope of the law's plain language is broader and extends to and encompasses public utility holding companies like GPE. An "electrical corporation" is "every corporation . . . owning, operating, controlling or managing any electric plant . . ."³⁰ To this spare definition, the Missouri Supreme Court has instructed, must be added

²⁶ Compare, for example, GPE's acquisition of Aquila, Case No. EM-2007-0374.

²⁷ The signatories were, in addition to KCPL, GPE and Great Plains Power, Inc., the Staff and the Office of the Public Counsel. Other parties were the Missouri Joint Municipal Electric Utility Commission, Utilicorp United, Inc., the City of Independence, Jackson County, The Empire District Electric Company, and the Missouri Energy Group. Although these parties did not sign the *First Amended Stipulation and Agreement*, they effectively joined it by not objecting.

²⁸ ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 72 (Mo. banc 1982). Note that the situation is different in other states, see e.g. ***PG&E Corporation v. Public Utilities Commission of California***, 118 Cal.App.4th 1174 (Cal. App., 2004)

²⁹ Section 393.250.3, RSMo.

³⁰ Section 386.020(15), RSMo.

the activity of holding itself out to supply electricity to the public.³¹ GPE asserts, “GPE does not own “electric plant,” as defined in Section 386.020(14), and does not offer electric service to the public as a public utility.”³² However, the Missouri Supreme Court recognized long ago that a corporation and its subsidiary can together constitute an “enterprise” whose activities render it subject to regulation by the Commission.³³ GPE wholly owns two public utilities that operate in Missouri subject to regulation by this Commission, Kansas City Power & Light Company (“KCPL”) and KCP&L Greater Missouri Operations Company (“GMO”). Through these “instrumentalities,” GPE undeniably owns and controls electric plant and provides electric service to the general public in Missouri. GPE’s ownership and control of KCPL and GMO is absolute; the three corporations together form an economic unity such that their activities should be considered to be those of a single entity. Ironically, just as was the case considered by the Missouri Supreme Court in *May Department Stores*, GPE here asserts its separate identity from its subsidiaries for the improper purpose of evading Commission

³¹ *Hurricane Deck Holding Co. v. PSC*, 289 S.W.3d 260, 264 (Mo. App., W.D. 2009): “Although the relevant statutory definitions contain no explicit requirement that an entity be operated for a public use in order for it to constitute a ‘public utility,’ the Missouri Supreme Court long ago held that such a ‘public use’ requirement was intended:

While the definitions quoted supra [of “electric plant” and “electrical corporation,” found now at §§ 386.020(11) and (12),] express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words “for public use” are to be understood and to be read therein. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.

State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm’n, 275 Mo. 483, 205 S.W. 36, 38 (1918) (citations omitted). The statutory provisions on which *Danciger* relied remain largely unchanged today, and more recent decisions continue to cite and follow *Danciger’s* holding that facilities must be ‘devoted to a public use before [they are] subject to public regulation.’ See *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 574 (Mo. App., S.D. 1997); *Khulusi v. SW Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. W.D., 1995).”

³² *GPE’s Response in Opposition*, ¶ 5.

³³ *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 324-328, 107 S.W.2d 41, 53-56 (Mo. 1937).

regulation. Staff asserts, and the Commission should conclude, that its statutory jurisdiction extends to and encompasses the activities of GPE and its subsidiaries as a unified enterprise.

11. GPE also raises the acquisition in 2014 of an Alabama natural gas utility, Alagasco, by The Laclede Group.³⁴ GPE asserts that The Laclede Group is subject to a similar obligation to that imposed by ¶ 7 of the *First Amended Stipulation and Agreement*.³⁵ Staff responds that Laclede's acquisition of Alagasco is irrelevant to this matter. The Commission should ignore this red herring.

12. GPE also directs the Commission to various instances in the past in which it declined to assert jurisdiction over activities at the holding company level.³⁶ These examples are perhaps useful as historical illustrations of past Commission action, but they are not controlling and, therefore, not relevant. They do not require further discussion.

13. Finally, GPE asserts that no investigation is necessary because "GPE here states unequivocally that it will honor all of the commitments set forth in Section II(6) of the Stipulation related to "Financial Conditions."³⁷ GPE acknowledges the Commission's authority to investigate its compliance with the *First Amended Stipulation and Agreement*, but asserts that "the mere announcement of the Transaction does not provide a factual basis for such an investigation, which would be entirely premature at

³⁴ *GPE's Response in Opposition*, ¶¶ 18-21.

³⁵ *Id.*, ¶¶ 19 and 20.

³⁶ *Id.*, ¶¶ 22-26.

³⁷ *Id.*, ¶ 28. This "unequivocal" statement does not apply, evidently, to all of the commitments set forth in II(7), however.

this time.”³⁸ Staff notes that investigation after the proposed transaction is complete might well be far too late for any effective remedy in case one is needed. Already, Standard and Poors (“S&P”) has revised its credit outlook for GPE, KCPL and GMO to “negative” from “stable” based entirely on the announced transaction.³⁹ Wall Street, at least, seems to think that the “mere announcement” provides a factual basis for an investigation.

14. GPE states in ¶ 30:

Staff notes in Paragraph 8 of its Motion that GPE has stated that it expects savings to be generated by the Transaction that will benefit both customers and shareholders. In support of that statement, GPE stated that its acquisition of Aquila, Inc. is evidence of its ability to deliver such benefits. Regrettably, in Paragraph 9 Staff claims that the savings derived from the acquisition of Aquila were accomplished “chiefly through the termination of almost all of the employees of Aquila, Inc.” There are absolutely no facts to support that irresponsible and inflammatory allegation.

In reply, Staff offers this excerpt from its Post Hearing Brief in Case No. EM-2007-0374,

GPE’s acquisition of Aquila:

Non-fuel O&M Departmental Budget Reductions:

In this area, savings of \$87 million are predicted from reduction of payroll, economies of scale and reductions in non-labor spending. Some 355 jobs out of Aquila’s total of 1,254 will be eliminated on Day 1, with another 56 eliminated by the end of the first five years, for a total of 411. The surviving members of Aquila’s workforce will all become employees of KCPL.

There is no question but that firing 411 people will result in savings -- those salaries just won’t be paid anymore. The Commission should ask itself, in this regard, whether it is in the public interest that 411 Missouri workers should lose their jobs in difficult economic times. Another inescapable albeit unintended consequence of mass terminations is a failure of service quality. The estimated savings from economies of scale

³⁸ *Id.*, ¶ 29.

³⁹ S&P Global Ratings, Ratings Direct Research Update: Great Plains Energy, May 31, 2016.

and elimination of redundancies may not be as great as predicted because Aquila's Kansas City-area electric utility operation is already a component in a larger concern.⁴⁰

Staff did overstate the number of jobs lost due to the Aquila acquisition. It was not “almost all of the employees of Aquila, Inc.,” it was only one out of three. Staff apologizes for the error.⁴¹

Motion for Leave to Late File:

15. Staff recognizes that this *Reply* is filed over an hour later than the deadline set by the Commission on June 2, 2016. Staff moves for leave to late-file and explains that the concurrent activities in the pending Empire rate case, ER-2016-0023, prevented the undersigned from focusing his full attention on this matter.

WHEREFORE, Staff renews its prayer that the Commission will open a docket pursuant to Chapters 386 and 393, RSMo., for the investigation of the announced acquisition of Westar Energy, Inc., by Great Plains Energy, Inc., to determine whether or not the proposed transaction is likely to be detrimental to the public interest and the interests of Missouri ratepayers, and grant such other and further relief as the Commission deems just in the circumstances.

⁴⁰ *In the Matter of the Joint Application of Great Plains Energy, Incorporated, et al.*, Case No. EM-2007-0374 (*Staff's Post Hearing Brief*, filed June 3, 2008) p. 65.

⁴¹ A useful exercise might be an audit to determine the actual realized value of those promised synergies from the Aquila acquisition.

Respectfully submitted,

s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, **on this 7th day of June, 2016**, on the Public Counsel and on counsel for GPE, KCPL and GMO.

s/ Kevin A. Thompson