

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

The Staff of the Missouri Public  
Service Commission,

Complainant,

vs.

KCP&L Greater Missouri Operations  
Company and Kansas City Power &  
Light Company,

Respondents.

**Case No. EC-2009-0430**

**STAFF'S SUGGESTIONS IN OPPOSITION TO RESPONDENTS'  
MOTION FOR DETERMINATION ON THE PLEADINGS**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, pursuant to §§ 386.071 and 386.390.1, RSMo 2000,1 and Commission Rules 4 CSR 240-2.010(6), 4 CSR 240-2.040(1) and 4 CSR 240-2.070(1), and for its Suggestions in Opposition to Respondents' Motion for Determination on the Pleadings, states as follows:

**Introduction**

This matter concerns Respondents'<sup>1</sup> conduct of doing business under an unregistered and unauthorized fictitious name. Staff filed its Complaint on May 29, 2009, seeking a determination that Respondents had operated in violation of the law, an order that Respondents operate lawfully in the future, and authority to

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<sup>1</sup> Respondents are KCP&L Greater Missouri Operations Company, Inc. ("GMO") and Kansas City Power & Light Company, Inc. ("KCPL").

seek monetary penalties in circuit court. Respondents answered on June 26, 2009, and moved for determination on the pleadings.<sup>2</sup>

***The Mendacious Nature of Respondents' Pleading:***

Respondents' Answer and Motion is a masterpiece of misdirection. Its purpose is to direct the Commission's attention anywhere but on Respondents' unlawful conduct. To this end, Respondents' pleading is packed with irrelevant matters. In Paragraph 1, Respondents assert, "Staff would have the Companies continue to operate as though they were not under the common ownership and control of Great Plains Energy Incorporated ("Great Plains"), an argument the Commission rejected in the merger proceeding." Whether or not that assertion is true (it is not), it is certainly irrelevant to the issue of whether the Respondents' are authorized to operate under the fictitious name "KCP&L."

In Paragraph 2, Respondents recount in detail the pains that they have taken to explain to their customers that they are operating as "KCP&L." Again, that is well and good, but is entirely irrelevant to the issue of whether the Respondents' are authorized to operate under the fictitious name "KCP&L." Equally irrelevant is Respondents' assertion that "the Companies told Staff precisely how they intended to use the "KCP&L" brand" in the so-called "Merger Case," Case No. EM-2007-0374. Prior notice to Staff does not equal authorization.

In Paragraph 3, Respondents falsely assert that "virtually every utility in the state uses a brand or service mark shortening its full legal name without such

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<sup>2</sup> Respondents also asserted, as an affirmative defense, the contention that the Complaint failed to state a claim.

authorization or registration.” Even if this claim were true, the “everybody else is doing it” defense simply does not cut it, not in court and not before this Commission.

In Paragraph 4, Respondents assert that Staff has “failed to demonstrate that any meaningful customer confusion has resulted from GMO’s use of the “KCP&L” brand.” Staff believes that the potential for customer confusion is undeniable and, given that the conduct in question is criminal, a showing of actual harm is not necessary to support the cease-and-desist order sought by Staff.

### **Determination on the Pleadings**

Respondents admit that they are indeed doing just what Staff has accused them of doing, which is, operating under an unauthorized name; Respondents nonetheless assert that the conduct is lawful and proper, and, insisting that no material issues of fact remain for hearing, move for determination on the pleadings. Commission Rule 4 CSR 240-2.117(2) authorizes determination on the pleadings and states:

Determination on the Pleadings—Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

Determination on the pleadings is analogous to judgment on the pleadings in civil practice.<sup>3</sup> Judgment on the pleadings may be granted only after the

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<sup>3</sup> See Rule 55.27(b), Mo. R. Civ. Pro.

pleadings are closed.<sup>4</sup> A motion for judgment on the pleadings raises only questions of law and may be granted only when a party is entitled to judgment as a matter of law on the face of the pleadings.<sup>5</sup> In determining the motion, all well-pleaded facts are assumed to be true and the motion must be denied where a genuine issue of material fact remains for trial.<sup>6</sup>

A motion for judgment on the pleadings is essentially indistinguishable from a motion to dismiss for failure to state a claim. Such a motion tests only the legal sufficiency of the complaint.<sup>7</sup> All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.<sup>8</sup> Complainants enjoy the benefit of all reasonable inferences.<sup>9</sup> The complaint should not be dismissed unless it shows no set of facts entitling it to relief.<sup>10</sup> A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.<sup>11</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> For this discussion, see J.R. Devine, *Missouri Civil Pleading and Practice*, § 20-8 (1986).

<sup>6</sup> *Id.*

<sup>7</sup> Devine, *supra*, § 20-3.

<sup>8</sup> ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 306 (Mo. banc 1993).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

## **Discussion**

Respondents themselves seek determination on the pleadings herein, asserting that the matter is ripe for determination because no factual questions remain for hearing. Respondents further insist that:

It is lawful and appropriate for GMO to use the “KCP&L” brand and no additional authorization is necessary. The Commission’s order in the merger proceeding (Case No. EM-2007-0374) and the name change orders authorizing the change from Aquila, Inc. to KCP&L Greater Missouri Operations Company (Case Nos. EN-2009-0015 and EN-2009-0164) provide all the authorization that is required.

Staff’s Complaint does three things. It accuses the Respondents of violating both a statute and an order of the Commission by operating GMO under the name “KCP&L” and asks the Commission to so find; it also asks the Commission to order the Respondents to refrain from committing these violations in the future and, finally, it asks the Commission to authorize the General Counsel to seek penalties with respect to the violations that have already occurred. Specifically, Staff’s Complaint alleges that Respondents’ use of the name “KCP&L” has violated:

- (1) The Commission’s Order in Case No. EN-2009-0164; and
- (2) Section 417.200, RSMo.

### ***The Commission’s Order in Case No. EN-2009-0164:***

In its order of November 20, 2008, in Case No. EN-2009-0164, the Commission held that “[t] The name change of Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company is recognized.” In entering this order, the Commission relied upon the fact that the proposed corporate name change had already been registered with the

Secretary of State of Delaware, the state of incorporation, and authority to use the new name had been sought from the Secretary of State of Missouri.

It is worth noting that, in its Report & Order in Case No. EM-2007-0374, the Commission denied Respondents' request to change the name of "Aquila, Inc.," as Respondent GMO was then known. The Commission directed Respondents to pursue a separate name change action under the Commission's practice rules. On July 2, 2008, Respondent GMO filed tariff sheets and initiated a name change proceeding, docketed as Case No. EN-2009-0015, seeking authority for GMO, then still known as Aquila, Inc., and which had been operating as "Aquila Networks – L&P" and "Aquila Networks – MPS," to operate as "Aquila, Inc., doing business as KCP&L Greater Missouri Operations Company." Upon satisfactory proof that the new fictitious name had been duly registered with the Missouri Secretary of State, the Commission granted the requested authority on August 7, 2008, effective August 8, 2008.

The Commission has treated the matter of Respondent's name seriously and has required Respondents to obey the law. Staff here requests that the Commission continue to do so. The Commission twice, at Respondents' request, authorized GMO to operate under the name "KCP&L Greater Missouri Operations Company" and no other name. Respondents admit that GMO operated instead as "KCP&L" and thereby admit violation of the Commission's orders.

***Section 417.200, RSMo:***

Section 417.200, RSMo, provides:

That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as herein required.

This statute is intended to protect the public in the transaction of business<sup>12</sup> and violation is a misdemeanor.<sup>13</sup> There are few reported decisions<sup>14</sup> and the phrase “true name” is nowhere defined. Nonetheless, Staff asserts that, taking the words of the statute in their plain and ordinary meaning, as the canons of construction require,<sup>15</sup> the “true name” of a foreign corporation that is duly authorized to do business in Missouri can only be the name under which it is authorized. In the case of Respondent GMO, that name is “KCP&L Greater Missouri Operations Company.”

A violation of § 417.200, RSMo, requires a showing that (1) Respondent engaged in or transacted business (2) under a name other than its “true name,” (3) which name was not registered. Respondents admit both that GMO transacted business under the name “KCP&L” and that the name was not duly registered. The remaining element presents only a legal question, namely, what did the legislature intend by its use of the phrase “true name” in § 417.200? Staff suggests that it has already pointed out the only possible answer to that question.

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<sup>12</sup> **Hanten v. Jacobs**, 684 S.W.2d 433, 437 (Mo. App., E.D. 1984).

<sup>13</sup> Section 417.230, RSMo.

<sup>14</sup> The few reported cases do not consider violation of § 417.200, RSMo, to be a very serious matter. All of them, however, involve possible collateral consequences of violation, such as the validity of a contract made in an unregistered fictitious name.

<sup>15</sup> **Sermchief v. Gonzales**, 660 S.W.2d 683, 688-89 (Mo. banc 1983).

***Section 393.130(5), RSMo:***

Section 393.130(5), RSMo, authorizes the Commission “after a hearing . . . [to] determine and prescribe . . . the just and reasonable acts and regulations to be done and observed[.]” In its Complaint, Staff prays that the Commission will, under the authority of this statute, direct Respondent GMO to operate prospectively only under its “true name” of “KCP&L Greater Missouri Operations Company” or such other name or names as may have been duly authorized.

Given that Respondents admit that GMO has operated under the unregistered and unrecognized name of “KCP&L,” it seems unreasonable for them to assert that Staff has failed to state a claim under § 393.130(5), RSMo, or that determination on pleadings lies against Staff. In support of this prayer, Staff suggests in its Complaint that Respondents have caused unnecessary customer confusion by operating both Respondent GMO and Respondent KCPL under the unregistered and unrecognized fictitious name “KCP&L.”

***Penalties:***

Section 386.570.1, RSMo, imposes penalties for violating or failing to comply with any statute or rule or order of the Commission; § 386.600, RSMo, authorizes the Commission’s General Counsel to sue for penalties in Missouri courts; and § 386.071, RSMo, requires that the General Counsel act at the Commission’s direction.

If the Commission determines that one or more violations, as alleged by Staff, did occur, then it may authorize the General Counsel to seek penalties. The action for penalties is necessarily a subsidiary action; it does not lie until the



Commission has determined that violations have occurred. This count may only be summarily determined at this stage if the Commission dismisses, or grants determination on the pleadings to Respondents, with respect to the charged violations themselves.

### **Conclusion**

The Commission should not grant Respondents' motion for judgment on the pleadings because, accepting all well-pleaded factual allegations in the Complaint as true, liberally construing the pleaded facts to support the complaint,<sup>16</sup> and giving Staff the benefit of all reasonable inferences,<sup>17</sup> it is undeniable that the Complaint is legally sufficient.<sup>18</sup> The complaint should not be dismissed, nor should determination on the pleadings be granted to Respondents, because it cannot be said that the Complaint shows no set of facts entitling Staff to relief.<sup>19</sup> Staff's Complaint fairly presents for determination matters which fall within the jurisdiction of the Commission and, therefore, it is sufficient.<sup>20</sup>

On account of all the foregoing, Staff prays that the Commission will deny Respondents' motion for judgment on the pleadings and motion to dismiss for failure to state a claim.

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<sup>16</sup> *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

<sup>17</sup> *Id.*

<sup>18</sup> Devine, *supra*, § 20-3. A motion for judgment on the pleadings is essentially indistinguishable from a motion to dismiss for failure to state a claim; such a motion tests only the legal sufficiency of the complaint.

<sup>19</sup> *Id.*

<sup>20</sup> ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

Respectfully submitted,

s/ Kevin A. Thompson\_\_\_\_\_

**KEVIN A. THOMPSON**

Missouri Bar Number 36288

General Counsel

Missouri Public Service Commission

P.O. Box 360

Jefferson City, MO 65102

573-751-6514 (Voice)

573-526-6969 (Fax)

kevin.thompson@psc.mo.gov

Attorney for the Staff of the Missouri  
Public Service Commission.

**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 **16<sup>th</sup> day of July, 2009**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson\_\_\_\_\_