

July 25, 2016, as directed by the Commission in its order of June 8, 2016.⁴ The *Report* discussed various possible detriments to Missouri interests that might result from the proposed acquisition and explained Staff's legal theory supporting Commission jurisdiction over the proposed acquisition.⁵ The report did not discuss any benefits to Missouri interests that might result from the proposed acquisition, an omission that should not be interpreted as reflecting a Staff conclusion that there could be none.

3. About the time Staff filed its investigation report, it entered into discussions with GPE with a view to resolving the matter without the protracted litigation that a complaint would necessarily entail. For that reason, Staff did not file the complaint referenced in its *Report*.

4. On October 11, 2016, the Midwest Energy Consumers Group ("MECG") filed complaints against Westar Energy, Inc. (Case No. EC-2017-0106) and Great Plains Energy, Inc. ("GPE"; Case No. EC-2017-0107).

5. As it typically does in cases in which consumers file a complaint against a regulated utility,⁶ the Commission on October 12, 2016, ordered Staff to file a recommendation in each of these cases.⁷ Staff sought to be relieved of that obligation because these complaints involve sophisticated parties with abundant resources who are manifestly well able to present their legal arguments and supporting evidence before the Commission. Nonetheless, on November 17, 2016, the Commission denied Staff's request, saying:

⁴ *Staff's Investigation Report*.

⁵ *Id.*, *passim*.

⁶ The reason being that consumers generally lack both technical knowledge and financial resources and commonly must present their cases without the assistance of counsel.

⁷ *Midwest Energy Consumers Group, Complainant, v. Westar Energy, Inc., Respondent*, Case No. EC-2017-0106 (*Notice of Contested Case and Order Directing Filing*, issued October 12, 2016) p. 2.

Even though the stipulations and agreements appear to resolve Staff's concerns as to the effect of the transaction on Missouri ratepayers, as set forth in the investigatory report, and assuming *arguendo* that approving the stipulation and agreements would be in the public interest, the Commission must determine whether Westar Energy violated Section 393.190.1, RSMo Supp. 2013. Staff's recommendation will be helpful in making that determination. In addition, as set forth above, the stipulations and agreements in the variance case are not binding on Staff. Therefore, the Commission will deny the motion.⁸

6. On October 28, 2016, the Commission issued its *Order Setting Procedural Conference and Directing Filing* of a procedural schedule by November 22, 2016.⁹

7. The gravamen of MCG's *Complaint* is that Westar, which allegedly owns a 40% share of a generating facility located in Missouri and which allegedly holds a certificate of convenience and necessity ("CCN") from the Commission with respect to that generating plant, failed to seek authority from the Commission before entering into an agreement to transfer its ownership share, a violation of § 393.190.1, RSMo.¹⁰

8. In its *Answer*, filed on October 31, 2016, GPE points out that, in fact, it is not Westar that owns a 40% share of a generating facility located in Missouri and which holds a CCN from the Commission with respect to that generating plant, but a subsidiary named Westar Generating, Inc. ("WGI").¹¹ Westar points out further that it is

⁸ *Midwest Energy Consumers Group, Complainant, v. Westar Energy, Inc., Respondent*, Case No. EC-2017-0106 (*Order Denying Staff's Motion to be Relieved from the Filing of a Recommendation*, issued November 17, 2016) pp. 4-5.

⁹ The Commission, on November 14, 2016, rescheduled the procedural conference to November 22 and changed the date for Staff to file a proposed procedural schedule to November 29, 2016.

¹⁰ *Midwest Energy Consumers Group, Complainant, v. Westar Energy, Inc., Respondent*, Case No. EC-2017-0106 (*Complaint*, filed October 11, 2016) ¶¶ 10-13.

¹¹ *Midwest Energy Consumers Group, Complainant, v. Westar Energy, Inc., Respondent*, Case No. EC-2017-0106 (*Answer*, filed October 31, 2016) pp. 3-4.

the ownership of Westar itself that it has agreed to transfer, not WGI's share of the State Line generating facility.¹²

9. Staff has independently confirmed that the facts stated by Westar in its *Answer* are true by (1) reviewing the Commission's order granting a CCN to Westar; and (2) reviewing the most recent Form 10-K reports filed by Westar and Empire with the United States Securities and Exchange Commission ("SEC"). The Commission's Order in consolidated Case Nos. EM-2000-145 and EA-2000-153 provides, "[t]hat Westar Generating, Inc., is granted a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain electric facilities in Jasper County, Missouri in an area set forth on the maps attached to its Application as Appendix 2. A legal description of the area is attached to Westar's Application as Appendix 3."¹³ The order corroborates GPE's assertion that it is WGI, not Westar, that owns a 40% share of the State Line plant pursuant to a CCN granted by this Commission. Westar's most recent Form 10-K, dated December 31, 2015, lists WGI's 40% share of the State Line plant under Item No. 2, Property.¹⁴ Empire's most recent Form 10-K, dated December 31, 2015, states: "We and Westar Generating, Inc., a subsidiary of Westar Energy, Inc., share joint ownership of a nominal 500-megawatt combined cycle unit, SLCC, at the State Line Power Plant. We are responsible for the operation and maintenance of the SLCC Unit, and are entitled to 60% of the available

¹² *Id.*, p. 4.

¹³ *In the Matter of the Application of the Empire District Electric Company for Permission and Authority to Transfer a Partial, Undivided Interest in Certain Generation Facilities, Land, and Related Property Owned by it to Webstar Generating, Inc. in Accordance with a Contract Dated July 26, 1999*, Case Nos. EM-2000-145 and EA-2000-153 (*Order Approving Application to Transfer Assets and Order Granting Certificate of Convenience and Necessity*, issued on June 1, 2000), p.

¹⁴ Westar Energy, Inc., Form 10-K, dated December 31, 2015, p. 20. The form makes no mention of the intervening ownership of WGI.

capacity and are responsible for approximately 60% of its costs.”¹⁵ Section 10(b) of the Securities Exchange Act of 1934 (“Act”) and SEC Rule 10b-5 make it unlawful to “...make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading...” Various sections of the Act, as well as other federal law, provide for personal liability, administrative penalties and criminal prosecution for violations; the 10-Ks, therefore, are the equivalent of sworn statements. The 10-Ks examined by Staff corroborate that WGI continues to own a 40% share of the State Line plant, as asserted by GPE.

10. It follows that the Commission should grant Westar’s *Motion for Summary Determination* because the facts set out in the *Complaint* are simply not true. Westar has not violated § 393.190.1, RSMo.

WHEREFORE, Staff respectfully recommends that the Commission grant summary determination in favor of Westar; and such other and further relief as it deems just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson

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¹⁵ The Empire District Electric Company, Form 10-K, dated December 31, 2015, p. 10.

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 all counsel of record this 22nd day of November, 2016.

/s/ Kevin A. Thompson