BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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**

APPLICANTS' OPPOSITION TO MOTION TO DISMISS

Applicants Great Plains Energy Incorporated ("Great Plains Energy"), Kansas City Power & Light Co. ("KCPL") and Aquila, Inc. ("Aquila") state the following in opposition to the Motion to Dismiss of the Office of the Public Counsel ("OPC"):

In an unprecedented attempt to suppress communication between regulated public utilities and Commissioners, OPC has moved to dismiss this proceeding on the basis of mis-stated facts and legal principles irrelevant to the true facts.

Failing to note that executives of Great Plains Energy testified under oath that they "asked for no commitment and we received no commitment from either the Staff or the Commissioners,"[1] OPC has attacked the integrity of three sitting Commissioners without cause.

The motion must be denied.

I. Statement of the Facts

The meetings that are the subject of OPC's Motion to Dismiss occurred in mid-January 2007. The meetings occurred either on January 17 or 24, but, in any event, several weeks before the announcement of the merger by Aquila and Great Plains Energy occurred on February 7, 2007. See Application, ¶ 6; Staff Report at 1 (Oct. 12, 2007). The meetings occurred months before this proceeding was filed on April 4, 2007.

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[1] See Michael J. Chesser Deposition at 40. See also William H. Downey Deposition at 42.

The Commission's ex parte rule 4 CSR 240-4.020, "Conduct During Proceedings," does not apply because no proceedings were pending at the time of these meetings. Because the Commission was not meeting as a deliberative body and because a quorum of the Commission was not present at any time, the meetings were perfectly legal and no prior notice or announcement of their being held was required to be published.

Michael J. Chesser, Chairman of the Board of Directors of Great Plains Energy, testified in his deposition that he advised Commissioners that "we were going to pursue the acquisition of Aquila." See Chesser Dep. at 39. Mr. Chesser was accompanied by William H. Downey, Chief Operating Officer of Great Plains Energy and President of KCPL, and Chris Giles, Vice President of Regulatory Affairs for KCPL. Id. at 38. Mr. Chesser stated that they informed the Commissioners about three primary "support mechanisms" for the transaction, which included a split of synergies for the first five years, with all additional savings thereafter going to the customer; the ability to recover actual interest costs in future rate case; and the use of an amortization mechanism in view of Aquila's investment requirements and the need to maintain Aquila's expected post-merger investment grade credit rating. Id. at 39-40.

In his deposition Mr. Downey stated that the meetings with commissioners were at a "very high level … just simply there to talk more about the fact that we were going to do this." See Downey Dep. at 41. He noted that "[w]e didn't hear any major objections to the overall concept," and the only feedback received from Commissioners was "[a]cknowledgment, appreciation for us coming in and briefing them ahead of time." Id. at 42-43. "We didn't ask for anything, so we wouldn't have gotten a commitment." Id. at 42. No documents were provided to Commissioners during the meetings. Id. at 44. See also Chesser Dep. at 42.

During the bidding process Great Plains Energy was not able to implement a collaborative process with Commissioners and Staff as it did with its Comprehensive Energy

Plan because of the highly sensitive nature of that process and its negotiations. Tr. 150-51, 838-39, 875-77. However, after it was selected as the final bidder, Great Plains Energy and Aquila agreed that discussions with the regulators could take place. Tr. 839, 875-77.[2] Several of the documents cited by OPC were created early in this process and do refer to "informal discussions with regulators." See Ex. 101 (Dep. Ex. 26) at 3, T. Bassham Memorandum to Great Plains Energy Board of Directors (July 19, 2006); Ex. 121 (Dep. Ex. 5) at 3, M. Chesser Final Non-Binding Bid Letter to Lehman Brothers and Blackstone Group (Nov. 21, 2006). As Mr. Chesser noted, that collaborative process did not occur, and instead simple courtesy visits were paid to the Commissioners. Tr. 884.

At the hearing, Mr. Chesser stated that the "primary purpose" was "to educate the commissioners about what was about to happen" with regard to the announcement of the merger. See Tr. 842. He stated that while he "wanted to hear if there were any major objections that we were not aware of to this kind of a deal being considered," during the meetings "I heard nothing, we had no conversation around that." Id. He stated that Great Plains Energy officials did not communicate to the Commissioners that if they had a problem, they should let them know. Id. at 843. "I expected if there was a problem, they would make that known to us." Id. at 844. While the Great Plains Energy officials did not hear anything "significantly negative," Mr. Chesser

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[2] Contrary to OPC's suggestion, the discussions with "regulators" were always meant to include both Commissioners and Staff.

"Q. You said that we met with regulators. Who was it that met with regulators?

A. I believe it was Bill Downey, myself and Chris Giles.

Q. When was that meeting, let's say with the Missouri commissioners? Or Missouri regulators?

A. I believe it was in mid January.

Q. And who was is that you met with specifically?

A. We met with I believe each of the commissioners and key members of the Missouri staff."

See Chesser Dep. at 38. See also Downey Dep. at 38.

clarified that the "depth of discussion did not go to asking or receiving commitments." Id. at 141. "We weren't looking for … specific feedback." Id. at 146.

Mr. Downey testified at the hearing as well, noting that "we were there to educate and to listen carefully to see if there were any reactions of a negative nature that we ought to take and keep in mind as we moved forward." Tr. 911. The meetings were "typical," based upon Mr. Downey's 35-year experience in the industry at KCPL and at Commonwealth Edison Co. Tr. 936-38. When "you're a regulated utility and you're about to embark on something that will have significant impact on the institution" and "ultimately involve the regulator," "you would let them know" your plans. Tr. 977-78. Therefore, "we came over here to brief the Commissioners, and we intended in parallel to brief the Staff …." Id. at 978.

At his deposition Mr. Chesser emphasized: "We asked for no commitment and we received no commitment from either the Staff or the Commissioners." See Chesser Dep. at 40. While Mr. Chesser advised that "we did not get a sense that there were any major objections," "we got into no details, no specifics, we got no commitments." Id. at 38. He continued:

> We got the sense that the devil is in the detail, but conceptually it was a good thing. And conceptually it would be better for Aquila to be acquired by a utility from within the state than a utility from outside the state. That is the sense that I got. [Id. at 38].

Emphasizing that no commitment was sought or offered at the meetings with Commissioners, Mr. Chesser concluded "that they were going to look at the merits of the deal." Tr. at 844.

II. The Commissioners Violated No Legal Standard of Conduct or Ethics in Meeting with Representatives of Great Plains Energy and KCPL

A. The Role of the Members of the Public Service Commission

When the Public Service Commission Act was passed by the General Assembly in 1913, it created a system for the regulation of public utilities that was mainly legislative, not judicial, in

nature. "The design of the Act was to create an administrative agency of the lawmaking power." Lusk v. Atkinson, 186 S.W. 703, 704 (Mo. 1916). The powers of the Commission are derived from the police power of the state, and the Missouri Supreme Court has described it as "an administrative agency or committee of the Legislature." State ex rel. Laundry v. PSC, 34 S.W.2d 37, 42-43 (Mo. 1931).

In reviewing the contents of the new law, the Supreme Court noted that the General Assembly had given the Commission the power of "general supervision" over electrical corporations and other utilities, as well as the power to "investigate" the operations and "the methods" employed by public utilities in carrying out their business. See § 393.140(1)-(2).[3] In an early decision the Court observed that "such regulation, to command respect from patron or utility owner, must in the name of the overlord, the state, and to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service." State ex rel. Barker v. Kansas City Gas Co., 163 S.W. 854, 858 (Mo. 1914). That expansive view of the Commission's responsibilities has continued to the present day. In Borron v. Farrenkopf, 5 S.W.3d 618, 624 (Mo. App. W.D. 1999), the Court of Appeals observed that the Commission "was given sweeping regulatory jurisdiction over various public utilities, including electric power companies" under Section 386.250.

This is consistent with how all other state and federal commissions were established. "Regulatory commissions have been characterized as quasi-judicial and quasi-legislative." See Charles F. Phillips, Jr., The Regulation of Public Utilities at 152 (1993). Contrary to the concept

[3] All statutory references are to the Missouri Revised Statues (2000), as amended.

of separation of powers, "a commission assumes the tasks of administrator, judge and legislator." Id. A former member of the Massachusetts Commission has characterized these responsibilities:

> To be familiar with the history of regulation; to understand the meaning of objectivity in the light of the dual capacity of a public utility commissioner as a party and as judge, and to cultivate in his own judgments this quality; to become familiar with the fundamental characteristics of the industries over which he exercises control; to exercise a wide discretion over the procedures followed before the commission, having in mind the basic guides of fairness to the parties and uniformity of application; …. [Id. at 140, quoting David M. Brackman, Public Utilities Fortnightly 66 (Dec. 22, 1960)]

Missouri law recognizes the ability of Commissioners to "confer in person, or by correspondence, by attending conventions, or in any other way, with members of the public," as well as other state and federal public utility commissions "on any matter relating to the performance of its duties." See § 386.210.1. This is exactly what Commissioners were doing in January 2007 when they met with representatives of Great Plains Energy and KCPL with regard to the proposed merger of Aquila, a matter that had not yet been publicly announced and that was not the subject of a proceeding before the Commission until April.

It is clear that Commissioners acting "in an adjudicative capacity" must follow procedural due process requirements to insure a fair hearing occurs and, like judicial officers, "they must be free of any interest in the matter to be considered by them." State ex rel. Ag Processing, Inc. v. Thompson, 100 S.W.3d 915, 919-20 (Mo. App. W.D. 2003); Union Elec. Co. v. PSC, 591 S.W.2d 134, 137 (Mo. App. 1979). However, it is equally clear that they are not strictly bound by the Code of Judicial Conduct of Supreme Court Rule 2 and its Canons because they are not simply judges.

Commissioners have duties and responsibilities delegated to them by the Legislature that go far beyond the limited role of a judge. As a result, this Motion to Dismiss must be analyzed

in the context of the particular purposes of the Public Service Commission Act and the unique role that Commissioners play under that law which is to be "liberally construed." See § 386.610.

B. OPC's Argument Lacks Both Factual and Legal Support

OPC's Motion to Dismiss argues that the Commissioners' conversations were "*ex parte* on what would be the contested issues in this case ...." See Motion to Dismiss at 10. However, OPC fails to note that the ex parte rules contained in 4 CSR 240-4.020, entitled "Conduct During Proceedings," do not apply because there was no proceeding. Given the fact that there was no case or proceeding, there was no ex parte conversation and certainly no conversation or meeting that was prohibited by law. Indeed, OPC concedes on the first page of its Motion to Dismiss that the meetings were permitted under the Sunshine Law, a tacit admission that the State of Missouri never intended to prohibit or even regulate conversations between Commissioners, public utilities, the Staff of the Commission, Office of the Public Counsel or any other member of the public if there was no pending case. See Motion to Dismiss at 1, n. 2. See also § 610.010(4)-(5). Indeed, the recent Motion for Proposed Rulemaking filed on December 19, 2007, Case No. AX-2008-0201, confirms that the meetings Commissioners held with Great Plains Energy are not the subject of any existing statute, rule or other protocol, and were entirely proper.

Lacking any legal authority to support its attack on the Commissioners' conversations, OPC retreats to a discussion of cases that address situations where judges or judicial officers allegedly conducted ex parte conversations in the course of a judicial proceeding. None of those cases bears the slightest relevance to the facts of this case or the conduct of the Commissioners in question.

Every one of the cases cited by OPC dealt with a member of the judiciary who was alleged to have made inappropriate statements or engaged in questionable conduct during the course of a proceeding. Two of the cases relate to Missouri's procedures that permit a party to

move for a change of judge without stating any facts alleging bias or prejudice. State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943-44 and n.1 (Mo. 1986), concerned the procedure to remove a probate judge through the timely objection of a party in interest under Section 472.060. Similarly, State ex rel. McNary v. Jones, 472 S.W.2d 637, 640 (Mo. App. E.D. 1971), related to the change of judge process in criminal cases under Missouri Rule of Civil Procedure 32.06 (formerly Rule 30.12), and its civil counterpart in Rule of Civil Procedure 51.05. None of these statutes or rules are applicable to Commission proceedings.

Several of the cases cited by OPC held that the judge did not need to recuse himself from the case being heard. See Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1413 (5th Cir. 1994)(sanctions imposed on movants); Graham v. State, 11 S.W.3d 807, 814 (Mo. App. S.D. 1999)("insufficient facts to form a basis for recusal"); Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238, 249-50 (Mo. App. W.D. 1999).

The remainder of OPC's cases relate to clear instances of a judge in the course of a lawsuit making remarks or engaging in conduct that indicated a bias or prejudice. One decision was the infamous case of U.S. District Judge Miles W. Lord and his long-running feud with a mining company in Duluth, Minnesota. In Reserve Mining Co. v. Lord, 529 F.2d 181, 188 (8th Cir. 1976), the Court of Appeals excoriated Judge Lord for "a deliberate denial of due process of the parties, a gross bias exhibited against defendant Reserve Mining Company, and an intentional violation of the mandate of this court …." The remaining Missouri cases are equally distinguishable from this proceeding. See Moore v. Moore , 134 S.W.3d 110, 114-15 (Mo. App. S.D. 2004)(Family court commissioner receiving ex parte investigative report during custody case); McPherson v. U.S. Physicians Risk Retention Group, 99 S.W.3d 462, 487-91 (Mo. App. W.D. 2003)(judge's statements to special deputy receiver during course of receivership proceedings and related litigation); Williams v. Reed, 6 S.W.3d 916, 923-24 (Mo. App. W.D.

1999)(judge's wife serving as a material witness); State v. Garner, 760 S.W.2d 893, 902, 906 (Mo. App. S.D. 1988)(judge receiving ex parte evidence of the guilt of the accused); State v. Lovelady, 691 S.W.2d 364, 368 (Mo. App. W.D. 1985)(judge's "blunt and unnecessary" criticism of defense counsel requiring recusal).

None of these cases presents any relevant legal authority to question, much less condemn, the meetings that occurred with Commissioners in January 2007 -- months before a filing was made. To the contrary, the evidence demonstrates that these meetings were courtesy visits conducted in a professional and respectful manner, without any hint of seeking commitments or approvals.

C. There is no Legal or Factual Support for the Motion to Dismiss

It goes without saying that any party to a proceeding before the Commission is entitled to a fair and impartial ruling. However, the only factual basis contained in OPC's Motion to Dismiss is the suggestion that statements by Great Plains Energy somehow tainted this proceeding, even though there is absolutely no evidence that Commissioners Murray, Appling and Clayton prejudged any facts or gave any assurances to anyone.

Under Missouri law "the test for recusal when the judge's impartiality is questioned is 'whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court.'" Moore v. Moore, 134 S.W.3d 110, 115 (Mo. App. S.D. 2004)(emphasis added). It is, therefore, a factual analysis that must occur to determine whether recusal is necessary under the guidance provided by the case law.

"A presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption." State ex rel. Ag Processing, Inc. v. Thompson, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003). Moreover, a commissioner or a judge "has an affirmative duty not to disqualify

himself unnecessarily." Helton Constr. Co. v. Thrift, 865 S.W.2d 419, 422 (Mo. App. S.D. 1993).

The nature of the conversations conducted with the three Commissioners was informational and educational. See Tr. 911 (Downey: "We were there to educate"). Although the elements of a proposal that would be contained in a filing made several months later were communicated, it is clear that the Commissioners made no commitment to either Mr. Chesser or Mr. Downey. When Mr. Chesser was pointedly asked during the hearing whether he received "a negative commitment" from Commissioners, Mr. Chesser stated: "I walked away with a sense that they were going to look at the merits of the deal." See Tr. at 844. As Mr. Chesser explained:

> Actually, this was not intended to have them look at the merits of the deal. This was to make sure they weren't surprised, as I said, in ... similar processes I followed in other mergers [in other jurisdictions] where we make sure the regulators are advised ahead of time before it's announced in the press. [Tr. 862]

Having testified that he had not heard anything "significantly negative" from the Commissioners, he was asked: "Did you hear anything insignificantly negatively?" His response: "I heard nothing." See Tr. 864.

Mr. Downey similarly stated that the meetings with Commissioners were "an effort on our part to outline the transaction that was about to be announced." See Tr. 977. He elaborated:

> I would describe it as typical whenever -- in my experience in our industry -- if you're a regulated utility and you're about to embark on something that will have significant impact on the institution and will ultimately involve the regulator, that you would let them know.
>
> It's always our desire not to surprise either the Commissioners or the Staff with anything significant. [Tr. 977-78]

In response to Commissioner Appling's question whether "those meetings took place as a matter of courtesy and respect for the regulatory process," Mr. Downey stated: "Absolutely." Id. at 978.

The evidence of record contains nothing to indicate that any improper communication occurred between representatives of Great Plains Energy and Commissioners Murray, Appling or Clayton. Clearly, there was no ex parte communication because there was no pending proceeding, much less one that had been set for hearing. See 4 CSR 240-4.020(7).[4]

Missouri courts have held that when the record reflects facts indicating potentially improper extra-judicial communications, a judge should err on the side of caution and "make a statement on the record as to the pertinent facts showing no objectively reasonable concern as to bias." Sewell-Davis v. Franklin, 174 S.W.3d 58, 63 (Mo. App. W.D. 2005).

Even though the record in this proceeding contains no evidence that any of the three Commissioners displayed bias or prejudice, or is otherwise is unfit to act in this matter, a statement by the Commissioners that places the pertinent facts on the record of this case would serve to assist and inform any party or member of the public who has a contrary view. Such a response to a petition for disqualification recently occurred before the Kansas Corporation Commission.

In a proceeding entitled In re Westar Energy, Inc., Docket No. 08-WSEE-309-PRE, Chairman Thomas E. Wright and Commissioner Michael C. Moffet filed individual responses that demonstrated their ability to consider the facts in that case "with an open mind and with fairness and impartiality to all parties, not only CURB's [Citizens' Utility Ratepayer Board]

[4] "These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing."

clients." See Id., Response of Chairman Thomas E. Wright to Petition for Disqualification at 3 (Nov. 29, 2007); Response of Commissioner Michael C. Moffet to Petition for Disqualification at 2 (Nov. 29, 2007).

III. Conclusion

It is always a serious matter when a party attacks the integrity of a Commissioner and the regulatory process. Here the record was fully developed, both in discovery through the production of documents and the taking of depositions, as well as at the hearings of December 3-6, 2007. Whatever "smoke" may exist to suggest the possibility of impropriety or bias, there is no factual "fire."

The decision by any Commissioner to recuse herself or himself because of a courtesy briefing by utility officials that occurred months before a filing would radically change the nature of regulator-utility communications in the State of Missouri. Clearly, such a reaction is not required by law. Recusal in this case would not only have a chilling effect upon communications with regulated utilities. It would put them in deep freeze.

Given the lack of factual and legal authority to support OPC's Motion to Dismiss, the Commission should not hesitate to deny the motion.

WHEREFORE, Applicants Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc. ask that the Motion to Dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document have been mailed, hand delivered, transmitted by facsimile or emailed this 26th day of December, 2007, to all counsel of record.

/s/ Karl Zobrist
Karl Zobrist