

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

Midwest Energy Consumers Group,)	
)	
Complainant,)	
)	Case No. EC-2017-0107
v.)	
)	
Great Plains Energy Incorporated,)	
)	
Respondent.)	
)	

**ANSWER TO SECOND AMENDED COMPLAINT AND
AFFIRMATIVE DEFENSES OF GREAT PLAINS ENERGY INCORPORATED**

Great Plains Energy Incorporated (“GPE” or “Respondent”), pursuant to Missouri Public Service Commission (“Commission” or “PSC”) Rule 4 CSR 240-2.070 and the Commission’s January 4, 2017 Order Denying Motion to Dismiss and Scheduling Evidentiary Hearing, submits this Answer and Affirmative Defenses to the Second Amended Complaint (“Complaint”) filed by the Midwest Energy Consumers Group (“MECG” or “Complainant”) on December 28, 2016. In support of its Answer and Affirmative Defenses, the Respondent states as follows:

INTRODUCTION

On May 31, 2016 GPE announced that it had reached a definitive agreement to acquire Westar Energy, Inc. (“Westar”) in a transaction valued at approximately \$12.2 billion. Upon closing, Westar will become a wholly-owned subsidiary of GPE. Westar is a Kansas electric public utility.

Contrary to MECG’s assertions, 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”). See Complaint, ¶¶ 4, 7, 9, 16, 18-19. MECG’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 and dismiss MECG's Complaint.

A. GPE and Westar

GPE is a Missouri corporation and the holding company for the stock of Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO"), both regulated public utilities in Missouri. GPE was established on October 1, 2001, and its stock is traded on the New York Stock Exchange as "GXP." GPE is a public utility holding company regulated under the Public Utility Holding Company Act of 2005, which was enacted as part of the Energy Policy Act of 2005. Although GPE is a Missouri corporation, it is not an "electrical corporation" or a "public utility" under Missouri law. See Section 386.020(15) and (43).¹ 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.

Westar is a Kansas corporation with its headquarters in Topeka, Kansas. It is authorized by the Kansas Corporation Commission ("KCC") to conduct business as a public utility and holds a Certificate of Convenience and Authority from the KCC to engage in the business of an electric public utility in the State of Kansas. Westar is not a Missouri public utility subject to the jurisdiction of this Commission.

Westar owns 100% of the stock of Westar Generating, Inc. ("WGI") which owns an undivided 40% share of the State Line Combined Cycle Generating Facility ("State Line") near Joplin, Missouri. WGI sells all of its portion of the electric energy from State Line to Westar.²

¹ All statutory references are to the Missouri Revised Statutes (2000), as amended, unless otherwise noted.

² The remaining 60% of State Line is owned by the Empire District Electric Company which operates the facility.

Although WGI was granted a certificate of convenience and necessity in 2000 by the Commission, its order found that WGI did not have any customers in Missouri.³ Importantly, the Commission did not find that WGI was offering electricity “for public use” and did not conclude that WGI was a Missouri public utility under State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918), which holds that an “electrical corporation” is not subject to PSC regulation unless it is offering electricity for public use. Because WGI does not offer electricity or any other service to any member of the public in Missouri, it is not a public utility subject to the jurisdiction of this Commission.

B. The Transaction

On May 29, 2016, GPE entered into an Agreement and Plan of Merger, pursuant to which GP Star, Inc. (100% of the outstanding equity interests of which are owned by GPE) will be merged with and into Westar, with Westar emerging as the surviving corporation. Immediately following the merger, GP Star, Inc. will cease to exist, and GPE will acquire all of the capital stock of Westar (“Transaction”).

The aggregate purchase price of the Transaction is \$12.2 billion dollars, including a total equity value of approximately \$8.6 billion, and the assumption of \$3.6 billion of Westar debt existing at the time the Transaction was announced. Westar’s shareholders will receive \$60.00 per share of total consideration for each share of Westar common stock, consisting of \$51.00 in cash and \$9.00 in GPE common stock, subject to a 7.5 percent collar based upon the GPE common stock price at the time of the closing of the transaction with the exchange ratio for the stock consideration ranging between 0.2709 to 0.3148 shares of GPE common stock for each

³ “Indeed WGI does not have any retail customers anywhere in Missouri.” Order at 3, In re Application of Westar Generating, Inc. for a Certificate of Public Convenience and Necessity, No. EA-2000-153 (June 1, 2000).

Westar share of common stock. The consideration mix for the acquisition of Westar's common stock is 85 percent cash and 15 percent GPE common stock. All GPE financing in connection with the Transaction will occur at the holding company level. No KCP&L or GMO debt will be used to finance the Transaction.

The closing of the Transaction is subject to customary conditions, including the approval by the common shareholders of GPE and Westar (which occurred September 26, 2016), and the receipt of certain state and federal regulatory and governmental approvals, including the approval of the KCC, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission. The Transaction is subject to the notification, clearance and reporting requirements of the Hart-Scott-Rodino Act, under which clearance was received in October 2016. Closing is expected to occur in the Spring of 2017. At the closing of the Transaction, Westar will become a wholly-owned subsidiary of GPE and will cease to be a publicly-held corporation.

C. The 2001 GPE Stipulation

On July 9, 2001, GPE filed the First Amended Stipulation and Agreement ("GPE Stipulation") with the Commission. See In re Application of Kansas City Power & Light Co. for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure, Case No. EM-2001-464. The GPE Stipulation was approved by the Commission. Id., Order Approving Stipulation and Agreement and Closing Case (July 31, 2001). As a result, a holding company structure for GPE was created under the terms of the GPE Stipulation, which contained the following provision related to prospective acquisitions by GPE:

Section II(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. ... [emphasis added].

Contrary to MECG's argument, Section II(7) of the GPE Stipulation does not and cannot confer jurisdiction on the Commission to approve or authorize 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.

Similarly, WGI is not a "public utility" under Missouri law. It is also not an "affiliate" within the meaning of Section II(7) because it has no investments in any subsidiary company and controls no corporation or other business organization. Therefore, it does not have "a controlling interest in a public utility" as required by Section II(7).

Section 386.250(1) states that the jurisdiction, supervision, powers and duties of the Commission extend to "the manufacture, sale, or distribution of ... electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; ... [emphasis added]."

Section 386.020(43) defines "public utility" as follows:

(43) "Public utility" includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter [emphasis added].

Section 386.020(15) defines "electrical corporation" as follows:

(15) "Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not

for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others ... [emphasis added].

Section 386.020(14) defines “electric plant” as follows:

(14) "Electric plant" includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power;

In the GPE Stipulation, Great Plains Energy Incorporated agreed that it would not 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” without the approval of the Commission. Because neither Westar nor WGI are a public utility or an affiliate of a public utility under the GPE Stipulation, the Commission has no jurisdiction to approve the Transaction.

In State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918), the Missouri Supreme Court held that an electrical corporation is not subject to regulation by the Commission unless it is offering electricity “for public use.” In the absence of offering electricity as a public service in Missouri, an entity is not “a public utility, within the meaning of the Public Service Commission Act.” Id. Accord Hurricane Deck Holding Co. v. PSC, 289 S.W.3d 260, 264 (Mo. App. W.D. 2009); Osage Water Co. v. Miller County Water Authority, Inc., 950 S.W.2d 569, 574 (Mo. App. S.D. 1997); State ex rel. Cirese v. PSC, 178 S.W.2d 788, 790-91 (Mo. App. K.C. 1944).

In the context of this complaint case, neither Westar nor WGI is a “public utility” or an “affiliate of a public utility” under Missouri law. Therefore, Section II(7) of the GPE Stipulation

has no relevance to GPE's acquisition of Westar and there is no jurisdictional basis for MECG's Complaint.

ANSWER

Except as specifically admitted herein, the Respondent denies each and every allegation of the Complaint, and specifically denies it has violated the 2001 GPE Stipulation.

1. Respondent denies the allegations of Paragraph 1 except to admit that the Commission issued its Order Approving Stipulation and Agreement and Closing Case on July 31, 2001 in Case No. EM-2001-464 and that, as described above, GPE has entered into an Agreement and Plan of Merger to acquire Westar.

2. Respondent admits the allegations of Paragraph 2 of the Complaint.

3. Respondent admits the allegations of Paragraph 3 of the Complaint.

4. Respondent denies the allegations of Paragraph 4 of the Complaint.

5. Respondent admits that in Paragraph 5 MECG has quoted certain portions of Section 386.390.1, but denies that the Commission has jurisdiction over the Transaction and this Complaint.

6. Respondent admits that in Paragraph 6 MECG has quoted portions of Commission Rule 4 CSR 240-2.070(4), but denies that the Commission has jurisdiction over the Transaction and this Complaint.

7. Respondent denies the allegations of Paragraph 7 of the Complaint.

8. Respondent admits the allegations of Paragraph 8 as MECG has not directly contacted the Respondent regarding the matters raised in the Complaint.

COUNT ONE

9. Respondent denies the allegations of Paragraph 9 except to admit that Commission issued its Order Approving Stipulation and Agreement and Closing Case on July 31, 2001 in Case No. EM-2001-464, and that MECG has quoted Section II(7) of the GPE Stipulation.

10. Respondent denies the allegations of Paragraph 10 except to admit that MECG has quoted Ordered Paragraph 4 of the Commission's Order Approving Stipulation and Agreement and Closing Case of July 31, 2001 in Case No. EM-2001-464.

11. Respondent denies the allegations of Paragraph 11 except to admit that MECG has quoted a portion of Section 386.020(42).

12. Respondent denies the allegations of Paragraph 12 except to admit that MECG has quoted a portion of Section 386.020(15).

13. Respondent denies the allegations of Paragraph 13 except to admit that MECG has quoted a portion of Section 386.020(14).

14. Respondent denies the allegations of Paragraph 14, except to admit that the Commission granted a certificate of convenience and necessity to Westar Generating, Inc. ("WGI") in Case No. EA-2000-153 on June 1, 2000, and that WGI owns 40% of the State Line plant.

15. Respondent denies the allegations of Paragraph 15 except to admit that MECG has quoted a portion of 4 CSR 240-14.010(6)(A) regarding an "affiliate."

16. Respondent denies the allegations of Paragraph 16.

17. Respondent denies the allegations of Paragraph 17 except to admit that the 2001 GPE Stipulation contains Section II(7) regarding “Prospective Merger Conditions,” and to admit that the Commission does not have jurisdiction over the Transaction and this Complaint.

18. Respondent admits the allegations of Paragraph 18, further stating that Mr. Bassham advised the Commission and the Office of the Public Counsel that GPE’s position is that the Transaction is not subject to approval by the Commission because it will be effectuated at the parent corporation/holding company level by entities that are not subject to the Commission’s jurisdiction.

19. Respondent denies the allegations of Paragraph 19.

20. To the extent that Paragraph 20 contains allegations, the Respondent denies those allegations and specifically denies that it is in violation of the 2001 GPE Stipulation.

COUNT TWO

21. To the extent that Paragraph 21 contains allegations, the Respondent denies those allegations.

22. Respondent admits the allegations of Paragraph 22.

23. Respondent denies the allegations of the second and apparently mis-numbered Paragraph 22, set forth on page 7 of the Second Amended Complaint.

24. Respondent denies the allegations of Paragraph 23 except to admit that the 2001 GPE Stipulation contains Section II(7) regarding “Prospective Merger Conditions,” and to admit that the Commission does not have jurisdiction over the Transaction and this Complaint.

25. Respondent admits the allegations of Paragraph 24, further stating that Mr. Bassham advised the Commission and the Office of the Public Counsel that GPE’s position is that the Transaction is not subject to approval by the Commission because it will be effectuated

at the parent corporation/holding company level by entities that are not subject to the Commission's jurisdiction.

26. Respondent denies the allegations of Paragraph 25.

27. To the extent Paragraph 26 contains allegations, Respondent denies those allegations and specifically denies that it is in violation of the 2001 GPE Stipulation.

AFFIRMATIVE DEFENSES

1. Respondent denies each and every allegation contained in the Complaint unless specifically admitted herein, and incorporates by reference each and every answer set forth above in response to MECG's allegations in Paragraphs 1 through 26.

2. The Complaint fails to state a claim upon which relief can be granted.

3. The Complaint fails to comply with 4 CSR 240-2.070(1) since MECG does not claim that it is aggrieved by any alleged violation of any tariff, statute, rule, order or decision within the Commission's jurisdiction.

4. The Complaint is not ripe for review since GPE has not acquired or merged with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility.

5. MECG has not alleged that it has any interest different from that of the general public and that may be adversely affected by any alleged violation of any tariff, statute, rule order or decision within the Commission's jurisdiction. As a result, MECG does not have standing to bring the Complaint.

6. The Complaint's claims are barred by the doctrine of waiver in that MECG has not objected to and/or failed to seek Commission review of similar transactions by Missouri-based public utility holding companies in the past.

7. The Complaint's claims are barred by the doctrine of estoppel in that MECG has not objected to and/or failed to seek Commission review of similar transactions by Missouri-based public utility holding companies in the past.

8. The relief sought by MECG would be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S. Code Section 1983, as well as Article I, Section 2 of the Missouri Constitution as it would result in the Respondent being treated unreasonably and irrationally in comparison with other public utility holding companies operating in the State of Missouri who have engaged in similar transactions under similar circumstances and conditions.

WHEREFORE, having fully answered the allegations of the Complaint, Respondent Great Plains Energy Incorporated asks that the Complaint be dismissed.

/s/ Robert J. Hack

Robert J. Hack, MBN 36496
Roger W. Steiner, MBN 39586
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2791
rob.hack@kcpl.com
roger.steiner@kcpl.com

Karl Zobrist, MBN 28325
Joshua Harden, MBN 57941
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Phone: (816) 460-2400
Fax: (816) 531-7545
karl.zobrist@dentons.com
joshua.harden@dentons.com

James M. Fischer, MBN 27543
Larry W. Dority, MBN 25617
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Phone: (573) 636-6758
Fax: (573) 636-0383
jfischerpc@aol.com

Attorneys for Great Plains Energy Incorporated

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the below named parties by email or U.S. mail,
postage prepaid, this 10th day of January, 2017.

David L. Woodsmall
308 E. High Street, Suite 204
Jefferson City, MO 65101
david.woodsmall@woodsmalllaw.com
Attorney for the Midwest Energy Consumers Group

Kevin A. Thompson
Chief Staff Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
kevin.thompson@psc.mo.gov

James Owen
Timothy Opitz
Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
James.owen@ded.mo.gov
Timothy.opitz@ded.mo.gov

John B. Coffman
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net
Attorney for Consumers Council of Missouri

/s/Robert J. Hack
Attorney for Great Plains Energy Incorporated