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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS
Oral Arguments
December 21, 2016
Jefferson City, Missouri
Volume 2

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

DANIEL R.E. JORDAN, Presiding,
SENIOR REGULATORY LAW JUDGE.

DANIEL Y HALL, Chairman
STEPHEN M. STOLL,
WILLIAM KENNEY,
SCOTT T. RUPP,
COMMISSIONERS.

REPORTED BY:
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1 P R O C E E D I N G S

2 (WHEREUPON, the oral arguments began
3 at 10:47 a.m.)

4 JUDGE JORDAN: Good morning,
5 everyone. The Commission is taking up the action
6 in File No. EC-2017-0107. This action is styled
7 Midwest Energy Consumers Group, Complainant versus
8 Westar Energy, Inc., Respondent.

9 We're here for oral argument on the
10 question of the Commission's jurisdiction in this
11 action, and that subject is also involved in the
12 pending motion to dismiss for failure to state a
13 claim.

14 I'm Daniel Jordan. I'm the
15 Regulatory Law Judge assigned to this action. I
16 will take entries of appearance, and while I'm
17 doing that, I'll ask everyone to science your cell
18 phones. You don't have to turn them off, but
19 please do silence them.

20 So let's begin with the Complainant.

21 MR. WOODSMALL: David Woodsmall on
22 behalf of the Midwest Energy Consumers Group.

23 JUDGE JORDAN: Thank you. And for
24 the Respondent.

25 MR. ZOBRIST: Carl Zobrist, Robert J.

1 Hack and James M. Fischer on behalf of Great Plains
2 Energy, Incorporated.

3 JUDGE JORDAN: Thank you. For the
4 Staff of the Commission.

5 MR. THOMPSON: Thank you, Judge.
6 Kevin A. Thompson for the Staff of the Missouri
7 Public Service Commission, Post Office Box 360,
8 Jefferson City, Missouri 65109.

9 JUDGE JORDAN: Thank you. For the
10 Office of Public Counsel.

11 MS. SHEMWELL: Good morning, and
12 thank you. Lera Shemwell representing the Office
13 of the Public Counsel and the public, 200 Madison
14 Street, Suite 650, Jefferson City, Missouri 65109.
15 Thank you.

16 JUDGE JORDAN: Thank you. And for
17 the intervener Consumer Council of Missouri.

18 MR. COFFMAN: John B. Coffman. Do
19 you need my address?

20 JUDGE JORDAN: Or you can give it to
21 the court reporter, which I assume everyone else
22 who has not recited their address has done or will
23 do.

24 MR. ZOBRIST: That's correct, Judge,
25 on behalf of Great Plains Energy.

1 JUDGE JORDAN: Well, the first thing
2 I'd like to take up is the sequence of
3 presentations. I understand that the parties have
4 an arrangement they would like the Commission to
5 adopt for the presentation of arguments.

6 MR. ZOBRIST: Judge, I can go first
7 as the movant. Great Plains Energy, Incorporated
8 will proceed with a motion to dismiss. I'll be
9 doing the oral argument. We will then be followed
10 by Mr. Woodsmall as counsel for MECG and then
11 Mr. Coffman, and then Mr. Thompson on behalf of the
12 Staff will make any argument or comments that he
13 wishes to make. I understand the Office of the
14 Public Counsel has waived any argument. Then
15 Mr. Woodsmall will have an opportunity to respond
16 to anything stated by Staff, and then I will close
17 on behalf of Great Plains Energy in rebuttal.

18 JUDGE JORDAN: I just heard that the
19 Office of the Public Counsel is waiving a
20 presentation?

21 MS. SHEMWELL: That is correct, Judge
22 Jordan. Public Counsel is waiving oral argument
23 this morning.

24 JUDGE JORDAN: Thank you.

25 MS. SHEMWELL: Thank you.

1 JUDGE JORDAN: And is the Commission
2 okay with that sequence?

3 CHAIRMAN HALL: Absolutely.

4 JUDGE JORDAN: Very good, then. I
5 understand we have some presentations by computer.
6 I believe those are all loaded up, is that correct,
7 for Great Plains?

8 MR. ZOBRIST: That's correct, Judge.

9 JUDGE JORDAN: And also for MECG?

10 MR. WOODSMALL: It is, and I've given
11 handouts to the Commissioners.

12 JUDGE JORDAN: Very good. Anything
13 else before we begin with the presentation of Great
14 Plains Energy, Incorporated? Not hearing anything,
15 so Great Plains Energy, Incorporated.

16 MR. ZOBRIST: May it please the
17 Commission? Carl Zobrist on behalf of Great Plains
18 Energy.

19 My oral argument is based upon the
20 motion to dismiss which we filed about two weeks
21 ago asserting that the Commission does not have
22 jurisdiction to either approve or disapprove Great
23 Plains Energy's acquisition of Westar Energy, a
24 Kansas public utility.

25 The basis of our motion is premised

1 on the basis of the complaint, which is the 2001
 2 GPE stipulation by which it received authority from
 3 the Commission to operate as a holding company.
 4 That stipulation does not extend or enlarge PSC
 5 jurisdiction to approve or disapprove GPE's
 6 acquisition of a non-Missouri public utility.
 7 There is no commission or judicial decision that
 8 has found jurisdiction under similar facts. None
 9 has been found by us and none has been cited by
 10 MECG. Therefore, the Commission (sic) must be
 11 dismissed for lack of jurisdiction.

12 Now, the transaction briefly was
 13 valued at \$12.2 billion when it was announced.
 14 Westar, if the transaction carries forward, will
 15 become a wholly-owned subsidiary of GPE under the
 16 May 29, 2016 agreement and plan of merger. KCPL
 17 and GMO will remain regulated Missouri public
 18 utility subsidiaries of GPE, and then Westar will
 19 be a comparable subsidiary. And the expected
 20 closing is to be the string of 2017.

21 Now, the motion to dismiss is based
 22 upon the status of GPE and Westar. This requires a
 23 technical application of Missouri law. Under the
 24 law, Great Plains Energy is not an electrical
 25 corporation and it is not a public utility. It

1 does not own electric plant. It owns two
 2 corporations. GPE does not offer service to the
 3 public.

4 In contrast, Westar is a Kansas
 5 regulated provider of electric service, but it is
 6 not a Missouri electric corporation and it is not a
 7 Missouri public utility, and it does not offer
 8 service to the public generally in Missouri.

9 Now, the interesting wrinkle in this
 10 case is MECG's citation to a subsidiary of Westar
 11 called Westar Generating, Incorporated, referred to
 12 as WGI. WGI is a wholly-owned subsidiary of
 13 Westar. It owns an undivided 40 percent interest
 14 of the State Line combined cycle facility in
 15 Joplin, Missouri. The other 60 percent is owned by
 16 Empire District Electric Company. 100 percent of
 17 the output of WGI is sold to Westar. WGI has no
 18 Missouri customers.

19 In May 2006, WGI did request a CCN,
 20 and a CCN, a certificate of convenience and
 21 necessity was granted by the Commission in an order
 22 that was issued back in 2000 (sic). But the
 23 Commission remarked that WGI has no Missouri
 24 customers and, therefore, under Missouri law and
 25 under the seminal Danciger case, which I'll talk

1 about later, a Missouri Supreme Court case decided
2 in 1918, while WGI may have a CCN, it's not a
3 public utility in Missouri because it does not
4 offer electricity for public use. And that's
5 critical as we analyze the complaint filed by MECG
6 in this case.

7 Now, the background of the GPE
8 stipulation is that it was approved in July of 2001
9 under a Stipulation & Agreement. There were two
10 on-the-record presentations at that time where
11 Commissioners asked counsel a variety of questions.
12 The provision that is at issue in this case is
13 Section II(7) that we all call Section 7, which
14 talks about prospective merger conditions. And
15 I'll show you that language in a minute. It
16 applies to acquisitions or mergers, quote, with a
17 public utility, closed quote.

18 Public utility is not defined in the
19 stipulation. The only way it can be defined by
20 this Commission or by a court looking at that
21 document in Missouri is for it to be consistent
22 with Missouri law.

23 JUDGE JORDAN: Counselor, I hate to
24 interrupt. I really do. I'm going to have to ask
25 you to pause. We're having an audio problem and

1 I've asked for technical help. I haven't got it
2 yet. So I'm just going to go into recess until we
3 have this audio problem fixed. So sorry to
4 interrupt.

5 (A BREAK WAS TAKEN.)

6 JUDGE JORDAN: We are back on the
7 record after a brief interruption due to technical
8 difficulties. Great Plains Energy, Incorporated
9 was in the midst of its presentation, and we will
10 resume. Counselor.

11 MR. ZOBRIST: Thank you, Judge. Just
12 before the break, I was beginning to set the stage
13 for looking at the language of the 2001 Great
14 Plains Energy stipulation.

15 The courts have held that the
16 Commission's jurisdiction is limited to Missouri.
17 The Supreme Court said in 2003 that the PSC is a
18 state agency established by the general assembly to
19 regulate public utilities operating within the
20 state. And as we have argued, Westar is not a
21 Missouri public utility. WGI may have a CCN. It
22 may even be an electrical corporation, but it is
23 not a public utility because it has no customers in
24 the state.

25 Now, the language of Section 7, this

1 is the language that is critical to the discussion
2 at hand, provides that GPE agrees that it will not
3 directly or indirectly acquire or merge with a
4 public utility or an affiliate of a public utility
5 where such affiliate has a controlling interest in
6 a public utility unless GPE has requested the
7 permission of -- the prior approval of the
8 Commission.

9 And so the question has to be, what
10 does this document mean as far as a public utility
11 or an affiliate of a public utility? The affiliate
12 is not just a general affiliate. It has to be an
13 affiliate where it has a controlling interest in a
14 public utility. So that can't be WGI because WGI
15 simply owns 40 percent undivided interest of the
16 State Line plant.

17 So the question is, what does public
18 utility mean? Well, the courts have held that the
19 Commission's jurisdiction is confined by the
20 statute and that the agency's subject matter can't
21 be enlarged or conferred by consent or agreement of
22 the parties. So even if the parties wanted to
23 expand the Commission's jurisdiction, which we
24 don't think they intended to do in the GPE
25 stipulation, they cannot do so as a matter of law.

1 The jurisdiction of the Commission is
2 set forth in Chapter 386, subsection 250, which
3 states with regard to electrical corporations that
4 the jurisdiction and supervision of the PSC extends
5 to the manufacture, sale or distribution of
6 electricity within the state. And there's similar
7 within the state language for other entities and
8 facilities that are mentioned in Chapter 386.

9 This is the Danciger case. This
10 added, and the Commission has recognized this, that
11 it added a test to the statutes that said you're
12 not a public utility unless you offer your services
13 for public use. And in the Danciger case it was an
14 electric case. And, therefore, you must be coupled
15 with a public interest.

16 And so beyond the statutory language,
17 Danciger has said if you do not offer your services
18 to the public in Missouri, you're not a public
19 utility. This is durable precedent for almost
20 100 years. It is, in essence, our Marbury v
21 Madison. If you remember your constitution,
22 Marbury v Madison established the doctrine of
23 judicial review. Judicial review is not in the
24 U.S. Constitution. It is a doctrine that was
25 crafted by the Supreme Court.

1 Similarly, here public use may be
2 embedded in the statutes, but it's not explicit.
3 But the Supreme Court held this in 1918, and this
4 has been durable precedent for almost 100 years.

5 So the conclusion has to be that
6 Westar, not being a Missouri public utility or an
7 electrical corporation, not being an --

8 CHAIRMAN HALL: Mr. Zobrist, I have a
9 question. Your discussion of Danciger just a
10 moment ago, do you believe that that is consistent
11 with this Commission's order in the ATXI case in
12 August of 2015 where we -- where the Commission
13 plainly stated that, contrary to ATXI's assertion,
14 there is no requirement that the alleged public
15 utility indiscriminately provide electric service
16 to the general public at retail?

17 MR. ZOBRIST: Well, I would say,
18 Chairman, first of all, that's a transmission case
19 and here we're dealing with a generation case. But
20 the offer of those kinds of services by ATXI as I
21 understand it, that it will have customers, and so,
22 therefore, its service will be for the public use.
23 And I think that is consistent with Danciger.

24 In other words, a transmission
25 company, you know, by definition will typically

1 offer its services either through a vertically
2 integrated company like KCP&L or GMO or Ameren
3 Missouri or it will offer it on a wholesale matter.
4 Here we're talking about Danciger as it relates to
5 WGI, which is the point that MECG is making. And
6 we're saying in the instance of WGI as it relates
7 to Westar, that is not a public utility. It may be
8 an electrical corporation, but it's not a public
9 utility. And its status as an entity that holds a
10 CCN does not extend your jurisdiction to GPE's
11 acquisition of Westar Energy.

12 CHAIRMAN HALL: Okay. I may have a
13 few more questions on that. I'll let you continue.

14 MR. ZOBRIST: Sure. Sure. And going
15 on here to WGI, it is not a public utility under
16 Danciger because it doesn't serve the interests of
17 the public and it doesn't offer services for public
18 use in Missouri. WGI sells its output directly
19 into Westar into Kansas which serves Kansas
20 customers. Westar is not an affiliate of a
21 Missouri public utility. And WGI to the extent it
22 holds a CCN is not an affiliate under paragraph 7
23 because it does not have a controlling interest in
24 a public utility.

25 Now, MECG's complaint stands in the

1 face of almost 20 years of Commission orders where
2 the Commission has consistently found that it does
3 not have jurisdiction over transactions at the
4 holding company level. And that's really what
5 we're talking about here because GPE as a holding
6 company proposes to acquire Westar Energy. The
7 Commission has not asserted jurisdiction over the
8 mergers of non-regulated parent companies, and
9 there are no Commission decisions that deviate from
10 those line of cases that we cite in our pleadings.

11 An analogous situation has arisen
12 with the Laclede Group, now known as Spire,
13 Incorporated. They are subject to a similar
14 stipulation that was entered about two weeks after
15 the GPE stipulation. Their language is pretty
16 similar to those in our case.

17 The Laclede Group similarly agreed
18 that it would not directly or indirectly acquire or
19 merge with a public utility or the affiliate of a
20 public utility where the affiliate has a
21 controlling interest a public utility. That
22 language is, I believe, exactly the same as GPE.
23 There's some other provisions that are different,
24 but that critical language is exactly the same.

25 And over the last two years the

1 Laclede Group and then its successor Spire,
 2 Incorporated had made acquisitions of out-of-state
 3 utilities. In 2014 it acquired Alabama Gas
 4 Company, which is a regulated public utility in
 5 Alabama. No PSC approval was sought or granted.
 6 No complaint was filed.

7 And then earlier this year Spire
 8 acquired Energy South and its gas utility Mobile
 9 Gas, an Alabama public utility, and Willmut Gas, a
 10 Mississippi public utility. No PSC approval was
 11 sought or granted. No complaint was filed. The
 12 Office of the Public Counsel requested that an
 13 investigation be opened. The Commission closed
 14 that on September 7th of this year. Like the GPE
 15 stipulation, public utility is not defined.

16 And if we take a look at federal law,
 17 we see that it does not permit a state public
 18 utility commission to extend its jurisdiction
 19 beyond its borders. The most recent case we have
 20 is this North Dakota versus Heydinger case where
 21 the Minnesota Public Utility Commission was
 22 implementing a Minnesota state law that prohibited
 23 power sales that would contribute to carbon dioxide
 24 emissions.

25 And both the Federal District Court

1 in Minnesota and then the Eighth Circuit earlier
 2 this year affirmed the District Court's
 3 invalidating that Minnesota law, stating that it
 4 had an extraterritorial effect with, quote, the
 5 practical effect of controlling conduct beyond the
 6 borders of the state, close quote.

7 CHAIRMAN HALL: Mr. Zobrist, I have a
 8 question. If KCP&L itself was purchasing Westar,
 9 do you believe there's any question that it would
 10 need to come to this Commission for approval of the
 11 transaction?

12 MR. ZOBRIST: Because KCPL is a
 13 public utility and an electrical corporation, it
 14 would have to come before the Commission.

15 CHAIRMAN HALL: So then I'm confused
 16 about reconciling that answer with your comments a
 17 moment ago about why -- why state line around
 18 Missouri matters so much, because clearly we do
 19 have jurisdiction, as admitted a moment ago, we
 20 have do have jurisdiction concerning the purchase
 21 of an out-of-state corporation by an in-state
 22 corporation.

23 MR. ZOBRIST: Not an in-state
 24 corporation. A Missouri public utility. A
 25 Missouri public utility. Great Plains Energy is

1 not a Missouri public utility.

2 CHAIRMAN HALL: I understand that
3 argument, but I also don't -- but I don't
4 understand how you reconcile that position with
5 your discussion a moment ago about how federal law
6 prohibits the reach of this Commission.

7 MR. ZOBRIST: Well, because you would
8 be controlling a transaction that only applies to a
9 non-Missouri corporation by a public -- by a
10 non-public utility over which you only have limited
11 jurisdiction. The Commission has, you know,
12 decided in about 19, 18 cases over the last 20
13 years that at the holding company level it doesn't
14 have jurisdiction. Now, what the --

15 CHAIRMAN HALL: But that's a separate
16 issue from whether or not the Commission has
17 jurisdiction outside of the state of Missouri. It
18 sounds to me like you're saying sometimes we do,
19 sometimes we don't.

20 MR. ZOBRIST: Well, what I'm saying
21 is that under this circumstance here, what we're
22 talking about the acquisition of a non-Missouri
23 utility by a non-public utility, a holding company,
24 you don't have statutory authority there, and
25 that's what the Commission decision has recognized.

1 CHAIRMAN HALL: That's a more nuanced
2 position than the one you made a moment ago where
3 it seemed to me that you were making the argument
4 that federal law is clear that this Commission does
5 not have jurisdiction outside the state of Missouri
6 concerning sales or purchases of assets outside the
7 state of Missouri, and that's clearly not true.

8 MR. ZOBRIST: Well, what I would say
9 is this is a backdrop. This is an example. This
10 is not the major point that we are making. What we
11 are saying is our argument is consistent with the
12 fact that this Commission needs to be very careful
13 when it extends its jurisdiction to a transaction
14 outside of its borders.

15 CHAIRMAN HALL: Absolutely. We
16 should be very careful.

17 MR. ZOBRIST: And there are cases
18 that say that a state statute that may go beyond
19 the border under certain circumstances may be
20 perfectly proper. But in this Minnesota case, here
21 was a Minnesota state law that was attempting to
22 follow certain renewable energy principles and
23 barred the import of power from outside the state,
24 and the state Minnesota thought it had the power to
25 do that, and the federal court said in this case

1 this extraterritorial effect violated the
2 Constitution. We're not making a constitutional
3 argument in this case except to provide this as
4 background to the Commission.

5 CHAIRMAN HALL: We also have the
6 Eighth Circuit case, Southern Union Company versus
7 Missouri Public Service Commission, 2002 case which
8 clearly says that the statute that requires
9 approval of a purchase of a non-Missouri entity by
10 a Missouri regulated entity, and that's your issue
11 right there, but that approval under the statute is
12 constitutional.

13 MR. ZOBRIST: Well, the Southern
14 Union case is different than this one here because
15 Missouri Gas Energy was not a Missouri public
16 utility. Southern Union Company, because MGE was
17 just a division of Southern Union, it was a
18 Missouri --

19 CHAIRMAN HALL: And I merely intend
20 this inquiry to allow us to further get to the
21 specific issue because I don't think we need to
22 talk about the reach -- the unconstitutional
23 inappropriate long arm reach of this Commission.
24 The issue really is Westar Energy, or perhaps it's
25 Westar Generating and I'm not sure about that, is

1 that entity a public utility?

2 MR. ZOBRIST: Right. And I agree
3 with you 100 percent. This is simply backdrop.
4 We're not raising a constitutional argument here.
5 We're simply saying that should the Commission
6 consider whether it has jurisdiction, this
7 extraterritorial backdrop is something that forms a
8 piece of the puzzle.

9 CHAIRMAN HALL: And then let me just
10 make this clear in my head. And that is an issue
11 that is separate and distinct from -- at least in
12 my head it is, separate and distinct from the
13 Section 7 provision in the 2001 stipulation.
14 Because we've got one issue statutorily, do we
15 have -- does the Commission have jurisdiction over
16 this transaction under application of Missouri
17 statutes? And then the second issue is, under the
18 condition, the Section 7 condition which you
19 mentioned earlier, does that require Great Plains
20 to come to this Commission for approval?

21 MR. ZOBRIST: Right. I agree with
22 both those points.

23 CHAIRMAN HALL: Okay. Thank you.

24 MR. ZOBRIST: You start with the
25 statute. If there's no jurisdiction under the

1 statute, and we don't think there is, then you go
2 to the stipulation and you look at the language of
3 the stipulation. Public utility is not defined.
4 We say that does not enhance the Commission or it
5 does not grant the Commission the ability to
6 approve or disapprove this transaction.

7 So the question then -- let's see. I
8 meant to go -- no. I guess I'm already there.
9 Thank you.

10 Let me say briefly what MCEG says in
11 response. MCEG says we really don't want to
12 discuss these cases or these facts because that's
13 not the purpose of the motion to dismiss. You
14 should just take a look at the complaint. But
15 we're not introducing extraneous facts. We're
16 relying upon the decisions of this Commission, the
17 facts that are discussed by this Commission in
18 those decisions, and by the statute and by the
19 language of the stipulations that were approved in
20 GPE's case in 2001 and then, by analogy, in the
21 Laclede Group case.

22 MCEG concedes in its response to our
23 motion to dismiss, as does Consumers Council of
24 Missouri, that its interpretation of the
25 stipulation is not based on Missouri law or on the

1 PSC statutory jurisdiction. That concession is
2 really fatal in our view as to the viability of the
3 complaint. It runs counter to the principle that's
4 been set forth in many cases that this Commission
5 is purely a creature of statute. There is no
6 ability of this Commission to enhance its
7 jurisdiction or its powers beyond what was granted
8 to it by the General Assembly.

9 MECG notably dismissed a similar
10 complaint that it filed against Westar, we presume
11 for similar reasons, recognizing that assertion of
12 jurisdiction against Westar would not be sustained
13 under a jurisdictional analysis of the Commission's
14 jurisdiction.

15 What we are relying upon in this
16 case, *Great Plains Energy*, is the language of the
17 stipulation and the facts in your decisions and in
18 court decisions.

19 MECG essentially argues that the
20 Commission need not analyze the legal basis of its
21 complaint, but where a complaint on its face
22 asserts theories that fail to establish subject
23 matter jurisdiction, Missouri law is clear that the
24 dismissal of the motion is -- the dismissal of the
25 complaint is appropriate.

1 So then the question is what does the
2 GPE stipulation provide? What it does provide is
3 that this Commission has the right to approve GPE's
4 acquisition or merger with a non-regulated
5 Missouri-based holding company. The Commission's
6 previous discussions did not recognize that. So,
7 for example, in 1999 when American Waterworks,
8 which owned Missouri American Water Company, merged
9 with a company called National Enterprises, which
10 was the indirect owner of St. Louis County Water,
11 the Commission said it didn't have jurisdiction.

12 And then about nine months later, in
13 a similar situation where Lyonnaise American
14 acquired a company called United Water Resources,
15 which again was the indirect owner of a Missouri
16 public utility, the Commission said it did not have
17 jurisdiction.

18 The 2001 GPE stipulation would
19 provide jurisdiction for the Commission to review
20 that kind of a transaction.

21 CHAIRMAN HALL: Another question,
22 Mr. Zobrist. I do apologize for the frequent
23 questioning during your presentation. But if
24 public utility in Section 7 included -- you're
25 saying it does include non-regulated Missouri

1 utilities, correct?

2 MR. ZOBRIST: Non-regulated holding
3 companies.

4 CHAIRMAN HALL: Non-regulated holding
5 companies?

6 MR. ZOBRIST: In other words, if GPE
7 were to acquire -- I mean, if it would acquire a
8 Missouri public utility, that utility would have to
9 come to you and seek.

10 CHAIRMAN HALL: Right. And so if we
11 were talking exclusively about Missouri regulated
12 public utilities, this provision would mean nothing
13 because that type of acquisition would already be
14 before us?

15 MR. ZOBRIST: Correct. That's
16 393.190.

17 CHAIRMAN HALL: So you're trying to
18 figure out -- it has to mean something more than
19 that, but you don't want it to mean an out-of-state
20 public utility. So this is the middle ground that
21 you've chosen, and tell me again.

22 MR. ZOBRIST: Well, you can phrase it
23 as a middle ground, but this -- I mean, how are you
24 going to define public utility? If not defined, it
25 has to be defined consistent with Missouri law. So

1 it must be a Missouri public utility. But if
2 you --

3 CHAIRMAN HALL: Well, consistent with
4 Missouri law, I mean, Missouri law asks us to use
5 reasonable interpretation to give some meaning to
6 the language, right?

7 MR. ZOBRIST: Right.

8 CHAIRMAN HAL: I mean, it's not just
9 go to Missouri statute and look up the words there
10 and if there's a definition there, we have to use
11 it. I mean, it's not that simple.

12 MR. ZOBRIST: No, but you have to
13 decide how to define public utility.

14 CHAIRMAN HALL: Correct.

15 MR. ZOBRIST: So what I would say is
16 the first thing to do is to interpret that phrase
17 consistent with Missouri law. Now, to the extent
18 the Commission found that it did not have
19 jurisdiction in the St. Louis County Water
20 acquisition or the United Missouri Water case, you
21 would have that now because you've got holding
22 companies, you know, that do business in Missouri
23 that own public utilities. So our view is that it
24 would provide a jurisdictional basis for the
25 Commission to review those kinds of cases.

1 CHAIRMAN HALL: Okay. Those kind of
2 cases, is that not expending Missouri statute as
3 well? Because we don't currently have jurisdiction
4 over those entities.

5 MR. ZOBRIST: I think if you look at
6 the statutes, because there is some flexibility in
7 there, and because you're dealing with Missouri
8 public utilities. In this Westar case you're not
9 dealing with --

10 CHAIRMAN HALL: But either way you're
11 possibly expanding the jurisdiction of this
12 Commission, and you're telling us we can't do that.

13 MR. ZOBRIST: Well, what I would say
14 is there is a certain amount of debate on the
15 language. I don't think that debate extends to the
16 Westar Energy acquisition. But in the St. Louis
17 County Water case, Commissioner Schemenauer
18 dissented. It was a four to one decision, and he
19 said, I think this language could be stretched to
20 deal with this case because we're talking about the
21 sale of a Missouri public utility, St. Louis County
22 Water and then the other county water.

23 So I think there's a clear Missouri
24 nexus there that would give you the power under
25 this stipulation to --

1 CHAIRMAN HALL: Constitutional power
2 or the statutory power?

3 MR. ZOBRIST: Statutory power, under
4 the statute.

5 CHAIRMAN HALL: Okay.

6 MR. ZOBRIST: Our conclusion is that
7 the GPE stipulation was not intended to expand or
8 enlarge the Commission's jurisdiction to the
9 acquisition of non-Missouri public utilities. We
10 don't think if GPE in some future case were to
11 acquire Green Mountain Power or Vermont or Public
12 Service Company in New Mexico or someplace like
13 that that they would need to come in and seek your
14 jurisdiction.

15 There is no language in the
16 stipulation or in the Commission's order saying
17 that this was the objective or the purpose, that if
18 you look at the stipulation, it was obviously
19 designed to deal with public utility holding
20 company issues and the loss of state jurisdiction
21 to federal entities.

22 CHAIRMAN HALL: If that's the case,
23 then I'm not sure that I'm going to view
24 reorganizations such as the one that set up Great
25 Plains Energy the same way, because if Great Plains

1 Energy didn't exist and it was just KCP&L coming in
2 here and asking for approval of the transaction,
3 that is a significant amount of authority that this
4 Commission would enjoy looking out for the benefit
5 of ratepayers. After the reorganization, under
6 your interpretation, this Commission loses all
7 ability to look at such transactions and determine
8 whether or not they're in the best interests of
9 ratepayers.

10 MR. ZOBRIST: Well, Chairman, I would
11 disagree with that. What I would say is what this
12 stipulation did is say that you have clear
13 jurisdiction over acquisitions by holding companies
14 that directly affect the sale of Missouri public
15 utilities. There's nothing in there to indicate,
16 there's nothing in the public record that indicates
17 that this was to have an effect, you know,
18 throughout the 48 or 50 states.

19 But to the degree that Missouri
20 public utilities are being bought or sold by a
21 holding company, the GPE Section 7 does give you
22 that power, and I think that is consistent with the
23 spirit of Section 393.190.

24 As we said, we've quoted the law that
25 indicates that under standard principles the

1 jurisdiction of an administrative agency has to be
2 limited to the authority granted by the
3 Legislature. And the motion to dismiss must be
4 granted because it has no jurisdiction to approve
5 the acquisition of a non-Missouri public utility by
6 a Missouri-based holding company which is not
7 itself a Missouri public utility or an electrical
8 corporation.

9 Thank you. And if there are no more
10 questions, I'll turn the mic over to Mr. Woodsmall.

11 CHAIRMAN HALL: Well, I do have a
12 couple more questions. I'm confident that there
13 may be a few others.

14 Looking at Section 7, if the
15 Commission were to determine that the use of the
16 term public utility does include out-of-state
17 utilities such as Westar Energy but it may -- but
18 it doesn't include Westar Generating, which is the
19 theory in the First Amended complaint, what do you
20 recommend that the Commission do? Should we still
21 dismiss the complaint?

22 MR. ZOBRIST: Yes.

23 CHAIRMAN HALL: Why?

24 MR. ZOBRIST: Well, I think I
25 disagree with the first part of your --

1 CHAIRMAN HALL: I'm sure you do.

2 MR. ZOBRIST: Yeah. WGI really in
3 our view has nothing to do with this case. WGI is
4 a CCN that for some reason the Commission, quoting
5 Danciger and saying, you know, if you could --
6 saying, you know, it doesn't have any Missouri
7 customers. It's not really a Missouri public
8 utility, but it comes in and asks for a CCN.
9 Empire already has a CCN for this plant and they're
10 going to sell 40 percent. I don't know what that
11 CCN really means, but it has a CCN. I admit that,
12 but it's not a public utility. Westar Energy is
13 not a Missouri public utility.

14 CHAIRMAN HALL: But if we were to
15 determine that it was a public utility as that term
16 is used in Section 7, that would be inconsistent
17 with the legal theory in the complaint. What do we
18 do with the complaint, in your opinion?

19 MR. ZOBRIST: Well, we think the
20 complaint now as it has been explained by counsel
21 for MECG falls because it says we're not basing
22 this is statutory authority and we're basing it on
23 what we view this language is. Therefore, if this
24 language extends your statutory authority beyond
25 what the General Assembly gave you, I mean, it's

1 per se invalid.

2 So, I mean, my view is if you would
3 interpret public utility in that fashion, Chairman,
4 it would be reversible error upon review by the
5 appellate court, but that's argue. We don't think
6 you have the power to do that. There's nothing in
7 the record that indicates the public utility was
8 intended to be interpreted in such an expansive
9 fashion.

10 CHAIRMAN HALL: I have no further
11 questions. Gentlemen?

12 JUDGE JORDAN: Thank you, counselor.
13 MECG.

14 MR. WOODSMALL: Thank you. And I'm
15 going to try to get this all set up. Good morning.
16 David Woodsmall on behalf of the Midwest Energy
17 Consumers Group. As most of you know, MECG
18 represents numerous large commercial and industrial
19 customers of KCP&L and GMO. As such, MECG is
20 vitally interested in this docket.

21 Before I get started in my
22 presentation, I want to talk about three quick
23 things in response to what Mr. Zobrist said. First
24 off, GPE wants to talk about many other commission
25 decisions. They talk about St. Louis County Water,

1 United Water, all these other decisions where the
2 Commission didn't assert authority over a holding
3 company transaction.

4 The important thing to remember in
5 all those cases, those companies didn't have a
6 stipulation like we're looking at today. The
7 Commission didn't assert authority there because
8 they didn't have the stipulation that gave them
9 that authority. So you can throw all those
10 decisions out the window.

11 The crux of GPE's argument is two
12 things.

13 CHAIRMAN HALL: Well, I'm sorry.
14 I've got to hop on that for a second because I
15 don't think we can throw them out the window,
16 because I think there's two potential bases for the
17 Commission to determine whether or not approval was
18 required for consummation of the transaction.

19 One is simply Section 7, but there is
20 a statutory argument that GPE as a holding company
21 is subject to our jurisdiction, and it's laid out
22 fairly well in Staff's investigation. There is
23 that argument. And so I -- and there's numerous
24 prior decisions of the Commission and there are --
25 well, there are prior decisions of the Commission

1 that are consistent with the interpretation and
2 argument set forth by Mr. Zobrist that we don't
3 have jurisdiction over the transaction on that
4 basis.

5 So I don't think we should throw them
6 all out. Now, it could be distinguishable from the
7 case here because have this additional condition.

8 MR. WOODSMALL: Absolutely. I'm
9 saying that those aren't on point. So they are not
10 definitive on the issues that we're talking about
11 today.

12 CHAIRMAN HALL: They're not
13 definitive, but they -- on all the issues here
14 today, but they do -- they are definitive or at
15 least they provide significant direction on one of
16 the two possible ways that we could exert
17 jurisdiction over this transaction.

18 MR. WOODSMALL: I'm going to get to
19 that. There are two -- the crux of GPE's argument
20 is twofold. First off, GPE's argument is based
21 upon trying to convince you to insert a word into
22 the stipulation. They want to convince you to
23 insert the word Missouri in front of public utility
24 in the stipulation. That's not there. So I'm
25 going to talk about that later. That's an

1 important point.

2 The second thing is they want to
3 convince you that there is no statutory authority
4 for what I'm asking you to do. That's not true
5 either. I will show you later Section 393.250.3
6 gave you that authority.

7 So let's move on. This morning I
8 want to address five specific things. First off,
9 I'm going to talk about some general aspects of the
10 GPE/Westar merger.

11 COMMISSIONER KENNEY: Mr. Woodsmall,
12 can I just ask you one question? Since you brought
13 it up, Mr. Zobrist mentioned the Spire acquisitions
14 and their language. How is that different than the
15 language or the acquisitions in this case?

16 MR. WOODSMALL: The language is
17 slightly different, but the outcome would not be
18 different. And I will talk later about that. Your
19 decision here will have a great effect on that
20 decision. That's why Laclede is here. They know
21 your decision here dismissing this opens them up to
22 do acquisitions without coming to you. So I will
23 talk about that later. It's a good point.

24 Five things I want to talk about.
25 Some general discussion about the merger. I want

1 to talk about the second thing, the standard for
2 motions to dismiss and the adequacy of my
3 complaint. The third thing, I want to talk about
4 the importance of this settlement provision and the
5 fact that it preserves Commission jurisdiction. It
6 didn't create jurisdiction. It preserved
7 jurisdiction. Fourth thing I want to talk about is
8 the problem with GPE's interpretation. Finally, I
9 want to talk about the problems that the Kansas
10 staff found with this just last Friday.

11 So Slide 3. On this slide I want to
12 show you some key statistics underlying this
13 merger. As you know, GPE consists of both KCP&L
14 and Greater Missouri Operations, while Westar
15 consists of Westar Energy and Kansas Gas and
16 Electric.

17 As you can see from this slide, by
18 all metrics Westar is as big or slightly bigger
19 even than GPE. This isn't GPE buying a small
20 utility. This isn't an insignificant transaction.
21 GPE is buying a company as big or bigger than they
22 are.

23 Slide 4. On this side I'll go
24 through real quick. Mr. Zobrist talked about it.
25 Purchase price of \$12.2 billion payable in cash of

1 \$60 per share. You see there \$51 is in cash. The
2 other is in GPE stock.

3 The important part that Mr. Zobrist
4 failed to talk about, though, is the acquisition
5 premium, and that's driving the concern not only
6 that I have and my clients have but Kansas has.
7 They've paying \$4.9 billion acquisition premium.
8 There's no new revenue streams, no new customers
9 coming in as a result of this case, but they are
10 taking on \$4.9 billion of acquisition premium.

11 Slide 5. So how are they financing
12 this? The \$8.6 billion purchase price is
13 3.1 billion of preferred stock and 1.3 billion of
14 common equity, but they are taking on \$4.4 billion
15 in new GPE debt. As I said, there's no revenue
16 streams, no new customers, but they're taking on
17 all this debt.

18 How are they going to pay this debt?
19 They don't have any customers other than regulated
20 customers. So if they can't pay it somehow, they
21 will be coming to regulated customers to find a way
22 to pay this \$4.4 billion.

23 As a result of the \$4.4 billion,
24 GPE's capital structure will go from a 49.9 percent
25 equity ratio to 41 percent. Here are the

1 comparable companies that GPE's witness is using in
2 the KCP&L rate case. These are comparable
3 companies. You can see post transaction GPE's
4 capital structure will be at the very bottom,
5 second to the bottom. I'm sorry. The average is
6 49 percent. GPE will now be 41 percent.

7 So we have a situation, and as a
8 result of this debt GPE's credit rating is
9 currently Baa2 by Moody's. They have -- it's
10 expected to be downgraded as a result. S&P has put
11 all three companies on negative outlook.

12 So I just want to point out some
13 basic conclusions of this. GPE is buying a utility
14 that's as large or larger than they are. They're
15 paying a large acquisition premium, and they're
16 financing that with a lot of debt. That's going to
17 cause their equity ratio to go down, more interest
18 expense and no place to get it other than the
19 regulated utilities.

20 So let's get on to the meat of this
21 case. GPE's motion to dismiss. As I indicated in
22 my responsive pleading, a motion to dismiss is
23 simply a test of the plaintiff's position. Did the
24 complaint allege facts that would support a cause
25 of action?

1 In my complaint I alleged that GPE
2 has violated this stipulation. So what did the
3 stipulation say? Here you say the language of the
4 stipulation, and I'm sure you've all seen it, so I
5 won't read it to you. But what would be the
6 elements underlying a GPE violation of this
7 condition? First you must have a GPE acquisition.
8 Second, that acquisition must be of a public
9 utility or an affiliate of a public utility.
10 Third, GPE has not sought Commission approval.

11 Did my complaint allege those? As
12 you can see here, paragraph 17 addresses point
13 number one. Paragraphs 13 through 15 address point
14 number two. And paragraphs 17 and 18 address point
15 number three.

16 Remember, we're not judging evidence
17 at this point. We are simply judging the adequacy
18 of the complaint. Clearly the MECG's complaint --
19 clearly the MECG complaint properly pleads a
20 violation of this Commission order. Therefore,
21 GPE's motion to dismiss must be denied. I'm not
22 along in this conclusion.

23 CHAIRMAN HALL: Mr. Woodsmall, I have
24 a question. On slide -- it's on page 6 here, the
25 three elements that you claimed are necessary to

1 sustain the complaint, the second of which is that
2 the acquisition was of a public utility -- well, or
3 an affiliate of a public utility. What facts would
4 you present to support that allegation?

5 MR. WOODSMALL: Well, first off, and
6 I'll get to --

7 CHAIRMAN HALL: And are those facts
8 already in the record?

9 MR. WOODSMALL: There is no record.
10 That's what I'm saying. You can't determine the
11 merits at this point. It's just a judgment of my
12 pleading. But what I'll show, and I'll talk about
13 this later, is there is nothing -- and this goes to
14 your point from earlier. There's nothing that
15 limits this provision to just Missouri public
16 utilities.

17 CHAIRMAN HALL: Isn't that a legal
18 determination as to what public utility means as
19 opposed to a fact-based investigation as to what
20 public utility means?

21 MR. WOODSMALL: It's a legal
22 determination as far as what the definition is, but
23 then the question then becomes does Westar meet
24 that definition, and that's a factual
25 determination. So if you say that this provision

1 only applies to Missouri public utilities, then
2 Westar doesn't meet it. If you say the provision
3 includes all public utilities, then my evidence
4 that I'll show is Westar is a public utility.

5 CHAIRMAN HALL: You don't think that
6 could be stipulated to?

7 MR. WOODSMALL: The meaning of public
8 utility in that provision?

9 CHAIRMAN HALL: No. If public
10 utility is not limited by state line, then is there
11 any question that Westar Energy is a public
12 utility?

13 MR. WOODSMALL: I think they have
14 already stipulated that Westar is a public utility,
15 albeit a Kansas public utility.

16 CHAIRMAN HALL: So I'm still trying
17 to figure out what factual issues remain.

18 MR. WOODSMALL: Those type of things.
19 I think a lot of them could be stipulated to, but
20 that is not the point of a motion to dismiss. I
21 think we can wrap that part up pretty quickly.

22 CHAIRMAN HALL: I guess what I'm
23 trying to understand, and I've been thinking about
24 this for a while and I still don't know the answer,
25 is --

1 MR. WOODSMALL: So have I.

2 CHAIRMAN HALL: -- is your use of the
3 term public utility in your motion to dismiss. If
4 that is a term that the Commission can define based
5 upon its interpretation of Missouri law, then there
6 is no need for a fact-based investigation as to
7 what a public utility means, and if we were to
8 determine that it does not include Westar, then no
9 amount of facts that you could present would be
10 relevant.

11 MR. WOODSMALL: If you take Westar
12 out of the equation and say it's only Missouri
13 public utilities, then my evidence is going to be
14 that Westar Generating is a Missouri public utility
15 and that Westar is an affiliate of a Missouri
16 public utility.

17 CHAIRMAN HALL: Isn't that a legal
18 analysis as to whether Westar Generating is a
19 public utility?

20 MR. WOODSMALL: It's a legal analysis
21 as far as the definition. Then the question then
22 becomes does Westar Generating meet that, which is
23 a factual determination. If you come out and
24 say -- I'll give you three different ways that I
25 see this can play out. You can say Westar -- the

1 provision applies to all public utilities. It's
2 not limited to Missouri. Then I can show Westar is
3 a public utility.

4 If you say it means Missouri public
5 utility, putting aside Danciger, I can show that
6 Westar Generating is -- they have a certificate.
7 They're a public utility, electrical corporation.

8 If you say that it's Missouri law as
9 referenced by Danciger, putting aside your ATXI
10 decisions earlier, then I have to show that it's
11 for public use, and that's where the certificate
12 comes in.

13 So depending on those three
14 scenarios, how you define public utility, it will
15 change what facts are stipulated or what facts I
16 have to prove.

17 CHAIRMAN HALL: Okay.

18 MR. WOODSMALL: So I'm not the only
19 one that says the motion to dismiss must fail.
20 Staff filed their pleading at the Commission's
21 request on November 22nd and said GPE is not
22 entitled to summary determination on this.
23 Basically, that I've alleged facts that support a
24 cause of action and that this has to go to
25 complaint.

1 So now that I've finished discussing
2 the motion to dismiss --

3 JUDGE JORDAN: If I may interrupt
4 while you're grabbing your water bottle. I noted
5 in the quote Staff's position that Great Plains
6 Energy, Incorporated is not entitled to summary
7 determination. Summary determination is not an
8 issue in this motion, is it?

9 MR. WOODSMALL: I agree. I don't
10 know why they use that term instead of motion to
11 dismiss, and maybe Mr. Thompson will clarify that.
12 Summary determination is usually after I present my
13 evidence. So I don't know. I would note that on
14 the O106 case when it was still alive, Westar asked
15 for a summary determination. So maybe that's -- I
16 don't know.

17 JUDGE JORDAN: Okay. Just wanted to
18 clarify.

19 MR. WOODSMALL: You're right.
20 Procedurally we're at a motion to dismiss. A
21 summary determination doesn't come around till my
22 case in chief is presented.

23 So let's talk about the settlement
24 provision. This condition was created because it
25 preserves Commission jurisdiction. It's important

1 to recognize that this wasn't simply given to the
2 Commission as some type of additional authority.
3 It preserves jurisdiction. It was imposed by the
4 Commission because it preserved jurisdiction that
5 existed prior to the creation of GPE. This was the
6 Commission's jurisdiction that would have been lost
7 if the condition hadn't been imposed.

8 It's important to remember, this
9 condition was agreed to by GPE and was imposed by
10 the Commission in order to get approval for the
11 creation of the GPE holding company. It's
12 important to understand where this condition came
13 from, because this goes to GPE's argument there's
14 no statutory authority.

15 Prior to the creation of GPE, there
16 was only KCP&L, the regulated entity. At that time
17 Section 393.180 granted the Commission the
18 authority to approve all KCP&L financing, both
19 equity and debt financing. So if KCP&L was to
20 acquire another utility, it would have had to get
21 Missouri Commission approval for the underlying
22 acquisition.

23 This is important, going to
24 Commissioner Hall's, Chairman Hall's point. If
25 KCP&L was around as a standalone company and it

1 sought to acquire Westar prior to the existence of
2 GPE, it would have had to seek Commission approval.
3 The condition that the Commission imposed was so
4 they didn't lose that authority.

5 Once GPE came in existence, they
6 wanted to maintain that authority, so it was put in
7 there. Section 393.250.3 gives you the authority
8 to impose reasonable conditions. That's the
9 statutory authority.

10 You have statutory authority, despite
11 what GPE says, to impose conditions on the creation
12 of a holding company, and this was the condition.
13 You imposed it to preserve your authority, and GPE
14 agreed to it. They didn't have to agree to it.
15 You could have imposed that condition and GPE said,
16 no, that's way too onerous, we're just not going to
17 do it.

18 The Order says we impose this
19 reasonable condition under 393.250.3 and they said
20 done, and they accepted it, and they gave you the
21 jurisdiction. They preserved that jurisdiction
22 that you had before.

23 Again, the Commission needed to keep
24 this jurisdiction to protect Missouri ratepayers
25 from these types of acquisitions.

1 So how do we know that the condition
2 was designed to preserve the Commission's
3 jurisdiction? Because KCP&L executives at the time
4 told you so. There's a couple of statements from
5 the transcript that KCP&L executives made on the
6 record.

7 First -- and this isn't in your
8 pamphlet. I put this in later. First Chris Giles,
9 the VP of Regulatory Affairs, stated, quote, The
10 other comment I wanted to make, and I'll be glad to
11 answer any other questions you may have, absolutely
12 nothing changes from the Commission's standpoint on
13 this transaction. The Commission has every bit as
14 much authority under this restructure as it does
15 today.

16 You had the authority before to
17 approve an acquisition of Westar, but they're
18 saying you don't now. So who was wrong? Are they
19 wrong now or were they telling you something else
20 that you relied upon then and you didn't have the
21 authority?

22 Then their chief executive officer
23 Bernie Beaudoin got up and said this second part:
24 Certainly this holding company structure adds, if
25 anything, another layer of regulation that we must

1 submit to, but we are willing to undergo that for
2 the ability to run our businesses along the
3 business lines that we've outlined in this case.
4 We feel that this structure respects the
5 responsibilities of the Commission to our
6 ratepayers.

7 They don't want to give you that
8 authority now. What they told you then was this
9 provision preserves your jurisdiction.

10 So now that we understand why the
11 merger approval condition was necessary in order to
12 preserve Commission jurisdiction, let's take a look
13 at GPE's interpretation, and now there's been two
14 of them. I want you to see how their position has
15 changed.

16 Initially, in its Motion to Dismiss
17 filed on December 2nd, GPE said that this merger
18 approval only provided authority to approve
19 acquisitions, but that authority was only limited
20 to a GPE acquisition of a Missouri utility. So
21 their first statement was, this provision only
22 applies to Missouri utilities.

23 Earlier this week, however, GPE
24 changed its stance. Now GPE claims that this
25 merger approval condition gives the Commission no

1 jurisdiction. Instead, since GPE claims the
2 Commission jurisdiction can only come from
3 statutes, the condition in this order provides you
4 no authority. So despite what they may have agreed
5 to in that settlement, GPE now claims it's not
6 worth the paper that it was written on. Simply,
7 GPE postulates that under the provision it cannot
8 confer jurisdiction on the Commission. Under
9 either interpretation GPE is wrong, and I'll show
10 you that.

11 Let's look at GPE's first
12 interpretation, and this is something Chairman Hall
13 latched upon. The first interpretation was that it
14 only applied to Missouri utilities. That would
15 make this provision simply redundant of the
16 authority that already exists under Missouri
17 statutes.

18 Section 393.190.1 says that any
19 Missouri public utility that sells has to get
20 Missouri Commission approval. So why would we need
21 this provision if it only applies to Missouri
22 public utilities? You would already have that
23 authority. This would be completely redundant.

24 CHAIRMAN HALL: How do you respond to
25 Mr. Zobrist's response to that, which is that it

1 includes non-regulated Missouri public utilities?

2 MR. WOODSMALL: Frankly, I

3 couldn't --

4 CHAIRMAN HALL: I don't think I'm

5 phrasing that right. Mr. Zobrist, could you

6 please -- and I apologize.

7 MR. ZOBRIST: Yeah. What I was

8 referring to was Missouri-based public utility

9 holding companies that are not public utilities.

10 CHAIRMAN HALL: Okay. How do you

11 respond to the argument that that's what public

12 utility means?

13 MR. WOODSMALL: The statute uses the

14 word control, and so those Missouri holding

15 companies that have control --

16 CHAIRMAN HALL: But we're not talking

17 about a statutory interpretation here. We're

18 talking about what -- actually, finish your

19 statement. I'm sorry.

20 MR. WOODSMALL: Okay. What my point

21 was, is that under this interpretation, this

22 provision would be pointless. You already have the

23 authority under the statutes. Even under his

24 scenario, you already have that authority. A

25 Missouri public holding company controls a utility.

1 The statute uses control. That's the term it uses
2 is the word control. So whether it's the public
3 utility or the holding company, you still have that
4 authority.

5 CHAIRMAN HALL: Of course, arguably
6 this provision could be viewed as meaningless
7 because under that same provision, 386.250, we
8 could conclude that --

9 MR. WOODSMALL: 393.250.

10 CHAIRMAN HALL: 386.250. We could
11 conclude that Great Plains as a holding company in
12 that it controls GMO and KCP&L is under our
13 jurisdiction. And if that was the case, then the
14 Section 7 would, in fact, be surplusage right?

15 MR. WOODSMALL: Right. So basically,
16 the point of this was that you already have
17 authority over the sale of Missouri public
18 utilities. This would -- given their first
19 interpretation, this would be just simply
20 surplusage. It would be redundant of authority you
21 already have.

22 And basic rules of construction say
23 that you don't find things. You have to give
24 meaning to both provisions. The only way to give
25 this meaning is to find it has to involve something

1 more than just Missouri public utilities.

2 Think about this a little bit. It
3 only makes sense that it involves more than just
4 Missouri public utilities. Why would the
5 Commission or the parties then have been concerned
6 with only GPE's acquisition of the Missouri public
7 utility? Harm isn't caused just by when they
8 bought Missouri public utilities. It could be
9 caused when they bought anybody. Why would anybody
10 limit their jurisdiction to only a specific type of
11 harm?

12 The provision is broader than that.
13 It's meant to give the Commission authority to
14 protect against harm no matter where the
15 acquisition is from. Common sense tells you that
16 this has a meaning broader than what they tell you.

17 So let's move on to their second
18 point, their second interpretation, that this
19 merger condition has no independent meaning, that
20 you can't rely upon it, that you have to have
21 statutory authority.

22 GPE claims that you have to find a
23 statute, that this merger condition can't provide
24 you the jurisdiction that I'm claiming. Again, GPE
25 is wrong. The Commission's authority to impose

1 this condition is absolute. Section 393.250.3
2 gives the Commission broad authority to, quote,
3 impose such condition or conditions as it may deem
4 reasonable and necessary, unquote, for its approval
5 of a utility restructuring. They came in and asked
6 for this restructuring. You have the statutory
7 authority to impose any condition that you find
8 reasonable and necessary, and the Commission's
9 order in that case says that you approve it subject
10 to this condition.

11 The Commission's jurisdiction under
12 this merger approval condition is rock solid. So
13 you have statutory authority to rely upon that
14 settlement provision.

15 Under any scenario, GPE is estopped
16 for making its current argument. There is an
17 equitable doctrine known as equitable estoppel.
18 Missouri courts have held that Missouri estoppel is
19 an absolute avoidance of GPE's affirmative defense
20 regarding lack of jurisdiction.

21 As phrased by Missouri courts, quote,
22 the principle of estoppel declares that a party who
23 makes a representation that misleads another person
24 who then reasonably relies on that representation
25 to his detriment may not deny that representation.

1 GPE claimed then that you had
2 jurisdiction. Put aside any statutes. I tell you
3 there statutory authority. Put aside those
4 statutes. They told you you had jurisdiction.
5 Equitable estoppel says they can't come in now and
6 say, sorry, you don't have jurisdiction. You
7 relied upon it. The other parties relied upon it.
8 They can't make that argument. And I'd like to see
9 them take this to court because they won't win
10 that.

11 Now that I've shown that GPE's
12 interpretation of the merger approval condition is
13 faulty, let's turn to the implications of a
14 Commission order adopting GPE's position. What
15 will happen? What will be the chaos that comes
16 about if you accept their provision, if you accept
17 their motion to dismiss?

18 A foremost concern, you're not going
19 to see any future settlements with GPE that have
20 any ongoing commitments. If we can't rely upon GPE
21 to stand by their settlements, why will anybody
22 ever agree to a settlement with them again? My
23 clients felt burned when GPE asked for an FAC when
24 they knew it was premature. They got it. My
25 clients felt burned. Now we see it again. We see

1 them asking their way out of another stipulation.
2 We may settle rate cases, but we're not going to
3 settle things that have ongoing commitments from
4 the company. We can't rely upon that. So we're
5 asking you, give this some meaning. Be very
6 careful when you start undermining settlements.

7 What's the other effect of you
8 adopting their position? Well, one, it's
9 guaranteed that you'll never have authority to
10 review any future acquisitions that GPE has.
11 What's to stop them next from going out and buying
12 Duke Power, the largest utility in the nation? You
13 can't look at it. It's a holding company
14 acquisition. They can go out and buy whatever they
15 want. They can't -- you can't do anything about
16 it.

17 So your decision here is not only a
18 Westar decision, it affects your ability, future
19 Commission's ability to look at all future
20 transactions.

21 Finally, as Commissioner Kenney was
22 talking about, it affects Laclede transactions.
23 That's why Laclede was here. If you grant their
24 interpretation, you not only don't get to approve
25 GPE acquisitions, you don't get to approve Laclede

1 acquisitions. They have a similar provision. Your
2 interpretation in this case will affect anything
3 that happens in that case. So it's a big deal. If
4 affects a lot of things. Don't take this lightly,
5 and I know you won't.

6 So let's move on quickly. I want to
7 address some Kansas findings just so you understand
8 how big a deal this is and why we're asking you to
9 look at it. The foremost finding that Kansas staff
10 said was that staff cannot recommend approval of
11 the merger even with conditions. Merger conditions
12 cannot remedy several fundamental flaws within the
13 transaction as proposed.

14 These fundamental flaws are, the
15 purchase price of \$12.2 billion is too high because
16 it results in GPE and its subsidiary being in a
17 significantly weaker financial position post
18 acquisition. Kansas Staff said, we can't fix this.

19 Here's another one. The acquisition
20 creates an unacceptably high financial risk for
21 both current and future customers. And finally,
22 another finding.

23 So given all this, what am I asking
24 you to do? I'm not asking you to reject the Westar
25 transaction. Let's be real clear what we're doing

1 here. You're not being asked to approve or reject
2 a transaction. That's not before you yet. All
3 this docket is about is you telling GPE we have
4 jurisdiction. File an application. Let us look at
5 it. I'm not even telling you if we got that far
6 that I would oppose it. We've never opposed
7 another transaction that I know of.

8 We -- Empire case, when they were
9 bought by Algonquin, it settled. The Aquila
10 transaction went through. These things typically
11 get reviewed and typically they get approved. I
12 don't know what will happen. I haven't prejudged
13 this. All we're doing here -- don't look at this
14 as me saying reject the transaction. All I'm
15 asking you to do is say, we have jurisdiction, we
16 want to review this and protect our ratepayers.

17 In conclusion, I want to leave you
18 with a quick story. In the summer of 1991 I was an
19 intern in the Commission's general counsel's
20 office. The Chairman at the time, Bill Steinmeier,
21 came in to see me on my very first day. I'm just
22 an intern. He told me that the number one rule of
23 representing the Commission is to preserve the
24 Commission's jurisdiction.

25 That is all I'm asking you to do

1 today, preserve your jurisdiction, preserve the
 2 Commission's jurisdiction going forward. I'm not
 3 asking you to reject the transaction. GPE asked
 4 that you punt away your jurisdiction, punt away
 5 your jurisdiction to look at this transaction, punt
 6 away your jurisdiction to look at any future GPE
 7 transactions, punt away your jurisdiction to look
 8 at any future Laclede transactions. Basically,
 9 they want to punt away your jurisdiction to
 10 consider any utility acquisitions, period. I ask
 11 for something more.

12 Missouri courts have held that the
 13 Commission's foremost purpose is to protect the
 14 customers from the monopoly ratepayers. It is
 15 impossible for you to protect those customers if
 16 you give away your jurisdiction. Preserve your
 17 jurisdiction and simply reject GPE's motion to
 18 dismiss.

19 I have a response to one question
 20 that you asked. You asked, given my complaint is
 21 based upon WGI, what should you do if you find that
 22 the settlement provision extends to all public
 23 utilities? Did I phrase your question right?

24 CHAIRMAN HALL: Close enough.

25 MR. WOODSMALL: Okay. There's two

1 answers to that. When I was looking at this
2 yesterday and preparing, I was sitting there, I got
3 struck by the same question, the same issue, and I
4 almost filed an amended complaint this morning to
5 plead the complaint in two alternative theories,
6 one being the WGI that I pled, the other being
7 Westar being a public utility as used in that
8 phrase. I can do that. I may go ahead and just
9 cover my butt and go ahead and do that and give you
10 an amended complaint with competing theories.

11 The second thing is, the statute
12 allows you to issue complaints sua sponte on your
13 own motion. So in the order you can say, we
14 dismiss the motion to -- we grant the motion to
15 dismiss. That said, under our authority, under our
16 complaint authority, we issue our own complaint
17 finding that the Commission has authority over an
18 acquisition of a public utility, and GPE, you file
19 this application.

20 So either way I can file an amended
21 complaint or you can do it sua sponte. Any further
22 questions?

23 COMMISSIONER RUPP: No questions.

24 Thank you.

25 MR. WOODSMALL: Thank you very much.

1 JUDGE JORDAN: No questions. Thank
2 you, counselor.

3 I do note that we have passed the
4 noon hour. Does anyone need a break or are the
5 parties and the Commission happy to continue? Well,
6 then, let's hear from the Consumers Council of
7 Missouri.

8 MR. COFFMAN: Good morning or
9 afternoon. I'm John Coffman. I'm here today
10 representing the Consumers Council of Missouri.
11 And my client, the Consumers Council, is very
12 concerned about the Commission's jurisdiction, and
13 we believe that this case is -- has far-reaching
14 implications. It has serious ramifications.

15 And I would say above all it's the
16 ability for the Commission to resolve cases through
17 stipulations and through conditions. If this case
18 is dismissed at this point, it will have a ripple
19 effect, I think discouraging settlement at the
20 Commission in a number of other cases. And I think
21 that stipulations are often very good. They let
22 the parties come up with creative solutions and
23 resolve things.

24 And nothing -- nothing makes me
25 angrier, frankly, as a practitioner in this area

1 when you have an agreement worked out with a
2 regulated entity and then down the road they
3 decide, well, you know, we don't really want to
4 live up to our commitment and, you know, you don't
5 have jurisdiction, or let's come up with a
6 different way to interpret that phrase.

7 Well, I was here in 2001, and I don't
8 know how many people here were here when the
9 discussions were going on about the creation of
10 Great Plains Energy. I remember Steve Dottheim and
11 Bob Schallenberg and I think maybe the
12 distinguished Mr. Thompson was actually sitting in
13 the ALJ's seat in this case. So some folks might
14 remember it.

15 I don't know -- it's probably not
16 proper for me to discuss the negotiations, but I
17 can tell you what my thought was on behalf of at
18 that time the Office of Public Counsel. There was
19 a lot of discussion at that time about what are
20 these new holding companies going to do? Are they
21 going to let these utilities do an end run around
22 the Commission's jurisdiction? Is the Commission
23 going to give up its ability to do a no detriments
24 review of these merger cases? And there was a back
25 and forth about it. And still as of this day,

1 there's no definitive legal opinion about that.
2 The Commission has taken that position in a number
3 of cases. They're not legally binding. There's no
4 court case that says.

5 I for one believe that the statute
6 393.190 still has that. I mean, it's worded as
7 with regards to mergers and acquisitions that the
8 regulated entity cannot do it directly or
9 indirectly. So this discussion was going around at
10 that -- in 2001 there was a concern that maybe a
11 utility would make the argument that they're making
12 today, that you lose jurisdiction at the holding
13 company level over the ability to present Missouri
14 consumers.

15 So a solution was drafted that we
16 thought would preserve the Commission's
17 jurisdiction, and it isn't limited by Missouri
18 utility. It doesn't include that limitation in it.
19 And I would just urge you to take a look at the
20 plain language of that stipulation.

21 It was not meant to merely restate
22 the law as far as it relates to Missouri public
23 utilities. It was designed to preserve the
24 Commission's authority to have reviews of mergers
25 and transactions going forward because we were

1 being reassured that that would not change.

2 So I think that putting aside the
3 argument of whether or not the Commission has
4 jurisdiction directly under 393.180, which I'm not
5 conceding, I think that the Commission has clear
6 statutory jurisdiction here under 393.250,
7 subsection 3, as Mr. Woodsmall claimed, which
8 clearly states that in these reorganization cases,
9 which was the 2001 case that created Great Plains
10 Energy, that the Commission has the authority to
11 put whatever conditions on that request are
12 necessary to remove any detriments to the
13 rate-paying public. And that's what this condition
14 was.

15 In fact, the Commission could come up
16 with a variety of conditions that otherwise it
17 would not have the authority to do, but if that was
18 what was necessary to remove the public detriment,
19 then it could. So the Commission has jurisdiction,
20 I think, as well here carried forward from that
21 2001 case.

22 No one challenged that the Public
23 Service Commission had the authority to allow the
24 creation of Great Plains Energy at that time, and
25 it was presented, the First Amended Stipulation &

1 Agreement was presented as these are the conditions
2 that will be necessary to eliminate potential
3 detriments. And that paragraph 7 was extremely
4 important to the parties representing the public
5 interest at that time.

6 And so that Stipulation & agreement
7 is still in effect, and I believe that independent
8 of 393.190 requires Great Plains Energy to come
9 forward and make an application for a no-detriments
10 review. That doesn't mean that you would deny it.
11 That doesn't mean that you would agree to any
12 suggested conditions in the case, but you would
13 have the right to stand up for Missouri's
14 interests, just like the Kansas Corporation
15 Commission is in this particular situation.

16 And that's another thing that
17 concerns me. I'd like to see Missouri asserting
18 jurisdiction at least as much as Kansas is and
19 making sure that our interests vis-a-vis Kansas are
20 being protected.

21 So the stipulation has to mean
22 something. I told you what I believe it was when I
23 agreed to it, and I think that it's just really
24 important that the message is sent that when the
25 parties agree to these stipulations and they're

1 approved by the Commission, that they have meaning
2 going forward and they are still in effect.

3 My clients have -- the merger and
4 acquisition cases that they've got involved in, any
5 of the no-detriment reviews we've been able to
6 resolve through conditions. And so I would hope
7 that the Commission would at least let this go
8 forward and consider that there would need to be, I
9 guess, after the motion to dismiss is rejected,
10 that there is some role for a review of this
11 merger. It doesn't have to be as long as normal
12 mergers, and I wouldn't expect that it would --
13 90 percent of these matters are resolved creatively
14 amongst the parties.

15 But if this -- if this complaint is
16 dismissed, I think it will cast a question over
17 stipulations in general, not just in merger and
18 acquisition cases. I think it will make the
19 ability to resolve these cases more difficult if
20 parties can't trust these stipulations to be in
21 effect going forward and that future commissions
22 might simply reject it based on some new
23 interpretations of those.

24 So that's my perspective, and I
25 support generally everything that Mr. Woodsmall

1 said and urge you to deny the motion to dismiss and
2 let this discussion go forward. Any questions?

3 CHAIRMAN HALL: No questions. Thank
4 you.

5 COMMISSIONER RUPP: No questions.
6 Thank you.

7 JUDGE JORDAN: Thank you, counselor.
8 The Staff of the Commission.

9 MR. THOMPSON: Thank you, Judge. May
10 it please the Commission?

11 Staff doesn't have a lot to say.
12 This is not Staff's fight. Staff didn't bring a
13 complaint against Great Plains because Staff
14 instead entered into a Stipulation & Agreement with
15 Great Plains. That Stipulation & Agreement is
16 pending in the related EE case, a variance case,
17 and Staff would again urge the Commission to
18 approve that Stipulation & Agreement and direct the
19 parties to comply with it.

20 That said, Staff agrees with much of
21 what Mr. Woodsmall and Mr. Coffman said and,
22 unfortunately, very little of what Mr. Zobrist
23 said. Legally the complaint presents a charge that
24 Great Plains has violated an Order of the
25 Commission and is therefore subject to penalties,

1 the Order of the Commission being the Order in the
2 EM-2001, I think it was 464 case which approved the
3 restructuring and which adopted the Stipulation &
4 Agreement, specifically the First Amended
5 Stipulation & Agreement that the parties had
6 entered into in that case, which there's been a
7 great deal of discussion of so far today.

8 At this stage, I think you have to
9 deny the Motion to Dismiss, which is asserting that
10 the complaint fails to state a claim upon which
11 relief can be granted. The Commission can
12 certainly enforce its Order. The Commission can
13 certainly punish a party that disobeys a Commission
14 Order. And I think that's the situation that's in
15 front of you today.

16 Any questions, I'll be happy to
17 answer those as best I can.

18 CHAIRMAN HALL: Good afternoon.

19 MR. THOMPSON: Good afternoon, sir.

20 CHAIRMAN HALL: I'm curious as to
21 whether Staff believes that there is any policy
22 rationale for interpreting public utility as it's
23 used in Section 7, is there any policy rationale
24 for interpreting that as excluding out-of-state
25 utilities?

1 MR. THOMPSON: Well, as an attorney,
2 I would approach that in this way: That agreement
3 was adopted and incorporated by the Commission in
4 its Order, and Commission Orders are subject to
5 plain language interpretation and construction,
6 just like Missouri statutes. So I would say you
7 would look to the plain language of the provision
8 and interpret those words in their plain and
9 ordinary meaning.

10 And I think that Great Plains is
11 urging you to essentially read the word Missouri
12 into that wherever the word public utility occurs,
13 and that's not what the language says.

14 And if you think about the concerns
15 that were driving Staff and the other parties at
16 the time that agreement was made, as Mr. Woodsmall
17 pointed out, your concern -- their concern was with
18 any acquisition that was made wherever the company
19 being acquired might be because the debt that was
20 being taken on to fund the acquisition would be
21 right here in Missouri on the books of the Missouri
22 company that was making itself into a public
23 utility holding company.

24 CHAIRMAN HALL: So based on that
25 statement, you don't think that there is a policy

1 rationale for distinguishing between the purchase
2 of a Missouri company versus the purchase of a
3 non-Missouri company?

4 MR. THOMPSON: That is correct.

5 CHAIRMAN HALL: The concern is the
6 same?

7 MR. THOMPSON: That is correct.
8 Public utility is public utility.

9 CHAIRMAN HALL: And you heard
10 Mr. Woodsmall's discussion of what is the
11 appropriate action of the Commission if the
12 Commission were to determine that public utility in
13 Section 7 might include Westar Energy but for
14 whatever reason does not include Westar Generating.
15 What do you believe would be the appropriate?

16 MR. THOMPSON: Okay. Westar
17 Generating is a subsidiary of Westar. Westar
18 Generating has a certificate. It owns a portion of
19 a generating facility that is in Missouri on the
20 state line, and it's been made clear that it
21 doesn't sell any electricity into Missouri for the
22 use of Missouri ratepayers, but I think that the
23 energy produced there is sold into Kansas for the
24 use of Kansas ratepayers. I think WGI is certainly
25 a public utility.

1 CHAIRMAN HALL: But what would the --
2 what would you recommend to the Commission if we
3 were to determine that it is not a public utility
4 as that term is used here but Westar Energy is,
5 even though that is inconsistent with the theory
6 set forth in the First Amended Complaint?

7 MR. THOMPSON: I apologize. I've
8 already indicated that I think the motion to
9 dismiss must be denied. The question of whether a
10 particular entity is or is not a public utility is
11 what's called a mixed question of law and fact.
12 You have to have both. You have to have a
13 particular array of facts. As the courts have
14 said, the question of whether something is a public
15 utility depends on what it does. That's factual.

16 CHAIRMAN HALL: But do you believe
17 that there are any facts related to that that could
18 not be stipulated to?

19 MR. THOMPSON: No. I think the facts
20 are plain.

21 CHAIRMAN HALL: If the Commission
22 were to deny the Motion to Dismiss, what does Staff
23 believe would be the appropriate process to
24 expedite a resolution of this matter?

25 MR. THOMPSON: To set a hearing

1 promptly.

2 CHAIRMAN HALL: An evidentiary
3 hearing?

4 MR. THOMPSON: Yes, sir.

5 CHAIRMAN HALL: Even if all of the
6 facts could be stipulated to?

7 MR. THOMPSON: Well, I believe that
8 diligent counsel would file motions for summary
9 determination, cross motions for summary
10 determination, absolutely.

11 CHAIRMAN HALL: And do you believe
12 that the matter could be resolved in that manner?

13 MR. THOMPSON: If there were no
14 material facts outstanding, yes, and frankly, I
15 don't think there would be.

16 CHAIRMAN HALL: But that's getting --
17 okay. And you don't believe there would be?

18 MR. THOMPSON: No, I do not.

19 CHAIRMAN HALL: Because I'll tell
20 you, I mean, I don't know where I want to go and I
21 certainly don't know where the Commission wants to
22 go, but if we were to determine that the motion
23 should be dismissed, I personally want to try to
24 resolve this matter quickly because unnecessary
25 delay is inappropriate.

1 So you believe that if we deny the
2 motion to dismiss, that we could set a hearing, but
3 before that require cross motions for summary
4 determination, and you believe that the issue could
5 be resolved through that process?

6 MR. THOMPSON: Yes, sir, I do. As I
7 think has been said, it's basically a legal
8 question. Either there's jurisdiction or there's
9 not.

10 CHAIRMAN HALL: Thank you.

11 MR. THOMPSON: Thank you.

12 JUDGE JORDAN: No other questions.

13 MR. THOMPSON: Thank you.

14 JUDGE JORDAN: Thank you, counselor.

15 Next we will hear again from MECG.

16 MR. WOODSMALL: I'm going to be real
17 quick, responding to just three things that
18 Mr. Thompson and Mr. Coffman said.

19 As far as your last questions to
20 Mr. Thompson, I believe he's right that it would
21 require a hearing, but I would hope that we could
22 stipulate a number of facts. I agree with you
23 about expediting this. I think it could be a live
24 hearing. We don't need discovery. We could have
25 no prefiled testimony. We just walk in, like they

1 do in real court, and I put a witness on or
2 whatever and I give you my facts. So I don't see
3 this taking months. I think -- I want to get this
4 done.

5 CHAIRMAN HALL: So you don't believe
6 it could be resolved through cross motions for
7 summary determination?

8 MR. WOODSMALL: I would hope so, but
9 I don't know. But in either case, a hearing
10 doesn't need to drag this out months. It doesn't
11 need to drag it out weeks. I think the statute
12 says that you need to give ten days notice of a
13 hearing. Let's do it.

14 Finally, Mr. Thompson made a couple
15 of comments about penalties for not complying with
16 the Commission Order. Let's be real clear. I'm
17 not asking for penalties. All I'm asking for is
18 that you assert jurisdiction. You assert
19 jurisdiction, tell them to file the application, no
20 harm, no foul. So I don't want penalties.

21 Finally, Mr. Coffman made a comment
22 about Kansas and Kansas asserting authority over
23 this. Let's understand what may happen here if you
24 don't assert authority. You run into a situation
25 where Kansas is asserting authority and they're

1 saying that this thing is doomed, that it can't be
2 fixed. You come out and you deny authority, what's
3 going to happen? They're going to go out there and
4 offer Kansas whatever they need to offer to get
5 them to approve it, whether it's rate freezes,
6 whether it's rate moratoriums, rate decreases.
7 Kansas extracted I think a five-year rate freeze
8 from Empire in their acquisition.

9 What's going to -- what's going to
10 stop Kansas from asking for many of these jobs to
11 be located in Kansas and not Missouri? Why would
12 they -- why would this company care? They'll give
13 Kansas whatever is necessary, and you won't be able
14 to stop it if you don't assert authority.

15 You need to be there to assert
16 authority and protect Missouri and keep all these
17 matters from being determined in Kansas' favor. So
18 just another reason to assert authority in this
19 case.

20 CHAIRMAN HALL: One other question.
21 How do you respond to GPE's ripeness argument?

22 MR. WOODSMALL: The ripeness
23 argument, that nothing can be done until they've
24 closed this transaction and then you can -- then I
25 can file a complaint saying they didn't comply with

1 the provision? I found that to be a little crazy
2 because it says -- the provision says seek
3 approval. You can't seek approval once a thing's
4 done. It can't be unwound. So approval
5 necessarily by its very nature has to come before
6 the action.

7 It kind of reminds me of the old
8 phrase, better to ask for forgiveness than to seek
9 permission. That's what they want. What's your
10 authority going to be then? You can't unwind it.
11 What can you say? Okay. We're going to fine you a
12 thousand dollars a day forever and ever in
13 perpetuity? That's only \$365,000 a year. I bet
14 you they'd write that check right now.

15 So the ripeness argument I find to be
16 a little laughable because definitely approval has
17 to come before an action. Thank you.

18 JUDGE JORDAN: And Great Plains
19 Energy, Incorporated.

20 MR. ZOBRIST: Thank you. I know
21 we're running late, but I want to make a couple
22 points.

23 First of all, these scare tactics
24 about saying you don't have any power over the
25 regulated entities, Kansas Power & Light and KCP&L

1 Greater Missouri Operations Company, to oversee
2 their operations and how this holding company deals
3 with these utilities that are fully under your
4 jurisdiction have no bearing on this case. You
5 will retain all of those powers. You've got a rate
6 case pending before you right now by one of these
7 companies. You can make any rulings with regard to
8 assessing the operations of that company as you do
9 in any rate case. So that is not a threat that you
10 should take seriously because you have plenary
11 jurisdiction over both KCP&L and KCPL GMO.

12 And, you know, Mr. Woodsmall and I
13 think Mr. Coffman as well talked about Section
14 393.250.3. That's the reorganization statute.
15 They seemed to read it as if you can impose
16 retroactively and tack on to the Order that you
17 issued in 2001 new restrictions and stipulations on
18 that reorganization.

19 What it says is the Commission may by
20 its order impose such condition or conditions as it
21 may deem reasonable and necessary. Well, you did
22 that in 2001. You had two on-the-record
23 presentations. There was an amended -- there was a
24 first stipulation, then there was an amended
25 stipulation. That was what you did in 2001.

1 You cannot now 15 years later decide,
2 oh, well, we'd like to turn the notch one more
3 time. So that provision really has to relevance to
4 what we're talking about today.

5 CHAIRMAN HALL: I've got to ask you
6 about that. To say it has no relevance, I think
7 the point is that there's no question that the
8 Commission had jurisdiction over the reorganization
9 under that statutory provision, Section 3 of which
10 says that the Commission can attach reasonable
11 conditions.

12 I think the argument is that
13 Section 7, as interpreted by the complainant, is
14 that reasonable condition.

15 MR. ZOBRIST: That is true, and if
16 that was the argument, I agree with it 100 percent.

17 CHAIRMAN HALL: That's what I heard.

18 MR. ZOBRIST: Right. But to the
19 extent somebody's saying, well, this is what that
20 really means, and to the extent the language wasn't
21 clear or the language was not there, you can begin
22 to extend or you can rewrite it, you can't do that.

23 CHAIRMAN HALL: I would agree with
24 that.

25 MR. ZOBRIST: If that was the

1 argument, then I agree with it. You know, what
2 Mr. Beaudoin and Mr. Giles were saying was that
3 this preserves this Commission's jurisdiction over
4 Kansas City Power & Light Company. That's what
5 they were talking about. At that point in time, in
6 public utility history, a number of holding
7 companies, many holding companies were being re--
8 were being established.

9 And what they were saying is,
10 Commission, you should understand, your
11 jurisdiction over these regulated entities will
12 remain tomorrow after this order goes into effect
13 today. That's what they were talking about. And
14 again, there was no provision in that jurisdiction
15 that established any particular type of financing
16 obligations upon GPE except as are set forth in the
17 stipulation.

18 And I finally have to chuckle that
19 Mr. Woodsmall tells us, you know, you don't -- you
20 don't need to -- or we need to have a hearing on
21 all these facts and, of course, what he is saying
22 is that my motion to dismiss is not well taken
23 because I have alleged adequate facts in my
24 complaint and you don't need to go beyond that. Of
25 course, I think he spent half his time telling you

1 about what Kansas staff is doing and what's going
2 on in Kansas. Again, that has no relevance to the
3 decision with regard to our Motion to Dismiss.

4 What we are saying here is that you
5 only need to look at your Orders. To the extent
6 you've got questions about WGI, we don't need to
7 have an evidentiary hearing. Look at your Orders
8 which stated, and the pleadings there, which stated
9 what WGI does and what it does not do. You don't
10 need to go beyond that.

11 What the stipulation does do is
12 clarifies the muddiness that affected some of your
13 decisions back in the early 2000s and 1999 with
14 those water companies in particular where the
15 Commission said, we've looked at the statute, we've
16 decided we're not sure we have jurisdiction and so
17 we decline it.

18 What Section 7 says is you've got
19 authority on that based upon the statute. Based
20 upon the statute. You can't enlarge the statute
21 itself.

22 And Mr. Woodsmall said, you know,
23 that he and his clients felt burned when the
24 Commission said that the fuel adjustment clause was
25 appropriately given to KCPL after I think it was

1 ten years. I mean, these are decisions that you
2 make. Nobody's feeling burned about it. We're
3 making an argument here that says if Section 7
4 meant to expand the jurisdiction over utility
5 acquisitions by this holding company, GPE, which is
6 not a public utility, it's not an electrical
7 corporation to every corner of the globe, won't you
8 have thought that the stipulation would have said
9 that? Wouldn't you have thought a Commissioner
10 would have raised that issue? Wouldn't you have
11 thought that the parties would have discussed that
12 in detail? They did not, and this is not an
13 appropriate time to rewrite the Stipulation &
14 Agreement.

15 Thank you.

16 CHAIRMAN HALL: I do have one --
17 well, one question, and it's not directly
18 related -- actually, it's not related at all to a
19 ruling on the Motion to Dismiss, but it's a
20 question I have, and I don't have many
21 opportunities to ask it, so I'm going to use this
22 one.

23 And that is, would there be any harm
24 to Great Plains Energy, KCP&L or GMO if there was a
25 merger or acquisition application filed by GPE,

1 KCP&L and GMO with the ultimate resolution being
2 some type of stipulation similar to the one that is
3 in existence in the affiliate transaction case and
4 then approved by the Commission? Is there some
5 harm there that I'm missing?

6 MR. ZOBRIST: Well --

7 CHAIRMAN HALL: And I know you don't
8 believe that you need that approval, so please
9 don't go there. I want to know if there's harm if
10 that was the process that --

11 MR. ZOBRIST: Chairman, honestly, I'm
12 GPE's counsel here before the Commission in
13 Missouri, and I'm not intimately familiar with the
14 negotiations that led to the transaction. So I'm
15 not in a position on behalf of Great Plains Energy
16 to respond to that.

17 What I can tell you is, I think -- I
18 think we all know just as relatively sophisticated
19 business people that the marketplace may react in
20 such a fashion that could cause harm. I don't have
21 knowledge of the facts. We haven't pleaded that
22 here because we think that this complaint is not
23 well grounded.

24 But all I can say is I don't think
25 you should worry about that because I think what

1 you should look at are your statutes and look at
2 the stipulation and a decision can -- in our view
3 may easily be made on that basis.

4 MR. HACK: If I may, I can answer
5 that question.

6 JUDGE JORDAN: Please approach the
7 podium and enter your appearance, if you would.

8 MR. HACK: Robert Hack on behalf of
9 GPE, Great Plains Energy, Incorporated.

10 Chairman, the answer would be yes,
11 and I would -- yes, there would be harm by that,
12 and let me explain. It's a longer term harm in
13 terms of the position it would place GPE relative
14 to similarly situated companies. For example,
15 Ameren Corporation when it acquired SIL Corp back
16 in the early '90s, no Commission approval. Ameren
17 Corporation does not have this stipulation
18 language.

19 In the course of ongoing M&A
20 activity, consolidation is coming. It's an
21 everyday fact in the electric business. It's
22 certainly possible for GPE to be competing with
23 others for future transactions. If we in the
24 future must come before this Commission and that
25 other party does not, that puts us at a distinct

1 disadvantage in those transactions.

2 CHAIRMAN HALL: But you are coming
3 before us in a related case, and arguably that
4 exact same case would occur going forward in
5 connection with every subsequent transaction. So
6 what is the difference between doing the -- doing
7 the analysis of the acquisition in a merger case
8 versus the analysis of the acquisition in an
9 affiliate transaction case?

10 MR. HACK: I can point you to Spire
11 today. They have effectuated the acquisition of
12 three utilities in the past two years without
13 Commission authorization. Those are done. The
14 affiliate transaction rule variance that we have
15 requested in Docket No. EE-2017-113 would not be
16 necessary, for example, for a company like Ameren
17 who provides shared services from a services
18 organization.

19 GPE and KCP&L need that variance
20 because, as we are currently structured, KCP&L
21 provides the lion's share of the shared services.
22 If KCP&L going forward became a services --
23 structured itself so that shared services were
24 provided from a services company, that affiliate
25 transaction rule variance very well would not

1 likely be necessary in future transactions.

2 Another example. Algonquin is a
3 holding company, Canada based. Owns Empire
4 District Electric Company now. When Algonquin goes
5 forward and purchases other utility companies
6 across the country, as it almost certainly will,
7 ask yourself the question, must Algonquin come
8 before this Commission and ask for authority for
9 those transactions? The answer is no. There is no
10 provision, no requirement, no expectation for
11 Algonquin to do this.

12 So that is the kind of harm going
13 forward that we are -- we believe would happen and
14 we're trying to avoid.

15 CHAIRMAN HALL: Thank you.

16 MR. HACK: Yes.

17 MR. WOODSMALL: Mr. Chairman, since
18 it's kind of descended into a free for all with
19 another attorney, can I respond to that for one
20 minute? What Mr. Hack is asking for is he wants
21 all utilities to be treated the same. Well, the
22 only way we get to that is if every state has same
23 statutes. You know, what's happened is they
24 transact business in Missouri. They have to abide
25 by Missouri statutes. If that puts them at a

1 disadvantage relative to other states, the answer
2 is to change things in the Legislature. These are
3 the laws in Missouri. These are the statutes.
4 These are the stipulations that they've agreed to,
5 and they have to abide by those.

6 We'd like to help them if it puts
7 them at a disadvantage. We don't want to see that.
8 But those are the rules of the road right now.

9 MR. ZUCKER: Commissioners, if I
10 may --

11 MR. WOODSMALL: Your Honor, they're
12 not even a party to the case.

13 MR. ZUCKER: We are not a party to
14 the case.

15 MR. WOODSMALL: Am I going to get to
16 respond to this.

17 MR. ZUCKER: I'm requesting on --

18 JUDGE JORDAN: Hang on.

19 MR. ZUCKER: -- behalf of Laclede Gas
20 and MGE whether there'll be briefing and if we
21 could do an amicus brief, and if there's not,
22 whether we could do an amicus argument. Our name
23 has been brought up repeatedly in this argument,
24 and our presence has been given meaning, and we
25 would like an opportunity to speak if there's not

1 going to be any other opportunity to participate.

2 JUDGE JORDAN: First things first.

3 Will counsel enter his appearance.

4 MR. ZUCKER: Yes. Rick Zucker,
5 Z-u-c-k-e-r, on behalf of Laclede Gas Company and
6 MGE.

7 JUDGE JORDAN: Second, I think the
8 Commission would entertain, though how it will rule
9 I do not know, a motion to file amicus suggestions,
10 and the Commission will rule on that motion when it
11 receives it. I think a motion to intervene would
12 most likely be required first, but I'm not sure
13 about that.

14 MR. ZUCKER: This would just be an
15 amicus, not an attempt to intervene in the
16 substance of the case.

17 JUDGE JORDAN: Okay.

18 MR. ZUCKER: Can I make this motion
19 orally now?

20 JUDGE JORDAN: It kind of sounds like
21 you have.

22 MR. WOODSMALL: Your Honor, I'm going
23 to want an opportunity to respond to this. First
24 off, are we going to have briefs? The procedural
25 schedule didn't contemplate briefs. Chairman Hall

1 indicated he was hoping for an expeditious
2 decision, and I agreed with him. As I said, ten
3 days, let's have a hearing and wrap this thing up.
4 So I don't see a need for briefs. I certainly
5 don't see a need for Laclede to bringing in a bunch
6 of other facts that I'm not familiar with and can't
7 have an opportunity to respond to. So this case
8 has been going on for two months. Where have they
9 been?

10 MR. ZUCKER: Chairman Hall has asked
11 a number of questions today that I think --

12 JUDGE JORDAN: Hang on. Since
13 counsel is making further arguments, please use the
14 podium.

15 MR. ZUCKER: Thank you, your Honor.
16 The Chairman and other Commissioners have asked
17 some excellent questions today that I think that we
18 could add to the record. I'm not here to insert
19 facts. I know Mr. Woodsmall did give you a bunch
20 of facts, but I consider this to be a legal
21 argument, and we believe we could add to the legal
22 issue.

23 MR. ZOBRIST: Judge, just on behalf
24 of Great Plains Energy, we would not oppose
25 Spire's -- you can become an amicus curiae without

1 intervening. I believe those are the rules. We
2 would not oppose that.

3 MR. WOODSMALL: The only reason I
4 would oppose is I want to get this thing done, as
5 the Chairman does. If we have briefing, then are
6 we going to have reply briefing? We're months down
7 the road. They want to get this thing done by
8 first quarter 2017. I want to as well. So, you
9 know, I don't want briefing.

10 COMMISSIONER RUPP: If you wouldn't
11 have been sitting in this audience, you wouldn't
12 have known your name would have been brought up
13 anyway. So I don't think that it probably is going
14 to have a huge bearing. I didn't hear Apollo
15 wanting to come in and say while we were all
16 inferring what happened in the Ameren and the
17 Noranda cases.

18 MR. WOODSMALL: I just got a text
19 from another lawyer saying, can I speak?

20 COMMISSIONER RUPP: I'm glad you're
21 here. We love to see you. You got brought up. So
22 be it.

23 JUDGE JORDAN: Anything else on that
24 motion that's been made on the record?

25 MR. WOODSMALL: Just to be clear, are

1 we having briefing?

2 JUDGE JORDAN: The schedule does not
3 provide for any briefing. So here's how it looks
4 to me. Mr. Zucker can file whatever he pleases. I
5 don't know that it will disrupt our schedule at
6 all.

7 MR. ZUCKER: Thank you, your Honor.

8 JUDGE JORDAN: You're quite welcome.
9 Any further questions from the Commission? Well,
10 with that, thank you for your arguments. With
11 that, we will adjourn. We're going to adjourn and
12 we will go off the record. Thank you.

13 (WHEREUPON, the oral arguments
14 concluded at 12:45 p.m.)

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C E R T I F I C A T E

STATE OF MISSOURI)

) ss.

COUNTY OF COLE)

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