

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

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

**REPLY OF GREAT PLAINS ENERGY INCORPORATED
TO MECG AND CCM RESPONSES TO MOTION TO DISMISS**

Great Plains Energy Incorporated (“GPE” or “Respondent”) states the following in reply to the Response of the Midwest Energy Consumers Group (“MECG”) to GPE’s Motion to Dismiss, as well as to the Response filed by Consumers Council of Missouri (“CCM”):

1. The Commission needs no more proof of the validity of GPE’s Motion to Dismiss than MECG’s stark admission that its interpretation of the 2001 GPE Stipulation¹ “is not relying upon [Missouri] statutory authority.” See Response to Motion to Dismiss, ¶ 12 at 6. MECG concedes that under its theory “the Commission would be relying upon authority that GPE voluntarily ceded to the Commission” regarding the formation of GPE. Id.

2. Similarly, CCM admits that the GPE Stipulation was designed “to operate and be enforceable, *with or without independent statutory authority.*” See CCM Response to Motion to Dismiss at 4 (original emphasis). Given their concessions that the MECG Complaint is not

¹ See Order Approving Stipulation and Agreement and Closing Case, In re Application of Kansas City Power & Light Co. to Reorganize Itself into a Holding Company Structure, No. EM-2001-464 (July 31, 2001), and attached First Amended Stipulation and Agreement (filed July 9, 2001) (“GPE Stipulation”).

premised on the Commission's jurisdiction as prescribed by statute, GPE's Motion to Dismiss must be granted.

3. The Missouri Supreme Court has long held that the Commission "is purely a creature of statute" with its "powers ... limited to those conferred by" the Public Service Commission Law, "either expressly, or by clear implication as necessary to carry out the powers specifically granted" State ex rel. Utility Consumers' Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 49 (Mo. en banc 1979) (striking down Commission-approved fuel adjustment clause not authorized by the legislature) ("UCCM"). See State ex rel. Mo. Cable Telecomm. Ass'n v. PSC, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996) ("The PSC is a creature of statute and limited thereby.").

4. The Supreme Court held long ago that neither "convenience" nor "expediency" are "proper matters for consideration in the determination of" whether an act of the Commission is "clearly authorized by the statute. We say clearly authorized because the statutory origin and administrative character of the Commission render it necessary that its power be warranted by the letter of the law or such a clear implication flowing therefrom as is necessary to render the power conferred effective." State ex rel. Kansas City v. PSC, 257 S.W. 462, 462-63 (Mo. en banc 1923). Accord UCCM, 585 S.W.2d at 49.

5. The jurisdiction of the Commission is confined to the State of Missouri, not beyond. The Supreme Court has declared: "The PSC is a state agency established by the Missouri General Assembly to regulate public utilities operating within the state." State ex rel. Atmos Energy Corp. v. PSC, 103 S.W.3d 573, 756 (Mo. en banc 2003). Consequently, state administrative agencies like the Commission have "only such jurisdiction as may be granted by the legislature." Livingston Manor, Inc. v. Department of Social Services, 809 S.W.2d 153, 156

(Mo. App. W.D. 1991) (“Livingston Manor”). Missouri appellate courts have uniformly held: “If an administrative agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction. The agency’s subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.” Id.,

6. This is the situation that the Commission faces in this proceeding where MECG claims that GPE “voluntarily gave the Commission jurisdiction over the approval of GPE’s acquisition of other public utilities,” and admits that its Complaint is based on the premise that the Commission would “*not [be] relying upon statutory authority*.” Instead, the Commission would be relying upon authority that GPE voluntarily ceded to the Commission in order to address concerns with the creation of the GPE holding company.” See MECG Response to Motion to Dismiss, ¶ 12 at 6 (emphasis added). CCM echoes this point, arguing that the 2001 GPE Stipulation “was designed to operate and be enforceable, *with or without independent statutory authority*” and “to address a situation where statutory authority may be in question.” See CCM Response to Motion to Dismiss at 4 (original emphasis).

7. GPE disputes this was the intent of the 2001 Stipulation, but even if it were, “subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.” Livingston Manor, 809 S.W.2d at 156. “Without subject matter jurisdiction, the agency can take no action other than to dismiss the proceeding.” St. Charles County Ambulance Dist., Inc. v. Missouri Dep’t of Health & Senior Services, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008).

8. MECG’s claim that GPE has raised questions of fact requiring an evidentiary hearing is a red herring. Rather, GPE’s Motion to Dismiss, consistent with long-standing Commission and judicial precedent, shows that there is nothing in the Commission’s 2001 Order

approving the GPE Stipulation that suggests the PSC intended to approve or disapprove the acquisition of a non-Missouri public utility by GPE. Any facts that are relevant to an analysis of the Complaint and the Motion to Dismiss were established in the Commission's final orders and those of Missouri appellate decisions that govern the exercise of the Commission's regulatory authority.

9. For example, MECG's Complaint contends that Westar Generating, Inc. ("WGI") is a "public utility," and cites the Commission order that granted WGI a certificate of convenience and necessity. See MECG Complaint, ¶ 13 at p. 5 & n.3, Order Granting Certificate of Convenience and Necessity, In re Westar Generating, Inc., No. EA-2000-153 (May 26, 2000) ("WGI Order"). But the Commission did not conclude that WGI was a public utility, given its finding that WGI had no customers in Missouri. The Commission then cited the seminal Danciger case that established the principle that the PSC only has jurisdiction over entities that are "devoted to a public use" and, therefore, "a public utility within the meaning of the Public Service Commission Act." State ex rel. M.O. Danciger & Co. v. PSC, 205 S.W. 36, 40 (Mo. 1918). The WGI Order was not appealed and is now final. The Commission's determinations are, therefore, binding in this collateral proceeding as a matter of law, pursuant to Section 386.550.² Consequently, it is clear that WGI is not a public utility under Missouri law. MECG's attempt to dispute that fact has no legal basis and provides no grounds for the Commission to conduct a hearing.

10. The positions of MECG and GPE require no findings of fact in an evidentiary sense. They simply require the Commission to review the pertinent decisions that it has made,

² "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." See § 386.550, Mo. Rev. Stat. (2000), as amended.

the language in the stipulations and agreements that it has approved, and to apply well established principles of Missouri law.

11. MECG’s view of the legal standard to be applied to a motion to dismiss would likely result in a petition or complaint never being dismissed. While there is no weighing of facts as evidence, the legal sufficiency of a complaint is always subject to evaluation. For example, where a petition brought in Circuit Court attempted to circumvent the PSC’s primary jurisdiction, it was dismissed. Evans v. Empire Dist. Elec. Co., 346 S.W.3d 313, 317 (Mo. App. W.D. 2011). The Court of Appeals declared that a motion to dismiss for failure to state a claim is proper “when it appears from the face of the petition that an affirmative defense is applicable.” Id. GPE’s Answer and its Affirmative Defenses specifically contend that the Complaint fails to state a claim upon which relief can be granted because the Commission has no jurisdiction over the Complaint. See Answer to First Amended Complaint and Affirmative Defenses, Answer ¶¶ 6, 16 & Affirmative Defenses ¶¶ 1-2.

12. In a different context, where a petition sought to bring a nuisance claim against municipal authorities where it was obvious the potential nuisance was attributable to a private party, the petition was dismissed for failure to state a claim. Bush v. City of Cottleville, 411 S.W.3d 860, 865-66 (Mo. App. E.D. 2013). Nothing in Missouri law prevents the Commission from judging the legal sufficiency of the Complaint’s allegations and finding that they are inadequate as a matter of law.

13. There is also nothing in Section 386.390 that requires the PSC to conduct a hearing on any complaint that is filed before it. Although a hearing may be contemplated under the statute when a complaint is filed, there must be a sufficient jurisdictional basis to proceed. Without the foundation of subject matter jurisdiction, an “agency can take no action other than to

dismiss the proceeding.” St. Charles County Ambulance Dist., Inc. v. Missouri Dep’t of Health & Senior Services, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008).

14. Other affirmative defenses raised by GPE and disputed by MECG need not be addressed at this stage because, as the cases make clear, a case cannot proceed without subject matter jurisdiction.

15. In another situation, MECG’s failure to respond substantively to GPE’s Motion to Dismiss might be considered the usual posture of a plaintiff attempting to avoid a premature discussion of the facts supporting its case. However, MECG’s surprising admission that its theory of the case is premised on undisclosed legal principles that enlarge or extend beyond the Missouri statutes that govern the PSC’s regulatory authority shows why MECG is so anxious to avoid discussing the legal sufficiency of its Complaint.

16. The plain truth is that there is no legal basis for MECG’s Complaint, and MECG fails to cite any other complaint filed in the history of this Commission that successfully extended the jurisdictional reach of the PSC beyond the borders of Missouri.

17. Allowing MECG’s Complaint to go forward would be contrary to Missouri law which contains not one decision -- of either this Commission or a court -- that has construed the provisions of Chapter 386 or Chapter 393 to allow the PSC to exercise jurisdiction to approve or disapprove the acquisition of a non-Missouri public utility by an entity that is not a public utility under Missouri law. GPE, which owns the stock of two Missouri public utilities, is not itself a public utility under Missouri law.

18. As discussed in the Motion to Dismiss, there are almost a dozen cases where the PSC “has consistently found that the Commission does not have jurisdiction over transactions at the holding company level.” See Order Dismissing Application for Lack of Jurisdiction, In re

Advanced TelCom, Inc. and Shared Commun. Services, Inc., No. XM-2005-0111 (2004). GPE's acquisition of Westar Energy, Inc. is similar to the case where the PSC declined to exercise jurisdiction to approve or disapprove the acquisition by Ameren Corporation, a holding company that is not a public utility under Missouri law, of Cilcorp, Inc., a holding company that owned an Illinois public utility. See Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp., No. EO-2002-1082 (2002).

19. Given the absence of any Missouri judicial precedent, or any order by this Commission or any other Missouri administrative agency that supports the exercise of PSC jurisdiction to approve or disapprove GPE's acquisition of a non-Missouri public utility, the legal premise of the Complaint must be rejected. No stipulation and no Commission decision can create jurisdiction that does not exist under Missouri statutes. Livingston Manor, 809 S.W.2d at 156. "As a basic tenet of administrative law, an administrative agency has only such jurisdiction that may be granted by the legislature." Tetzner v. Department of Social Services, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) (citations omitted). Since extraterritorial jurisdiction has not been granted to the Commission to approve or disapprove the acquisition of non-Missouri public utilities by a holding company that is not a public utility under Missouri law, no stipulation approved by this Commission can grant such power.

WHEREFORE, Respondent Great Plains Energy Incorporated asks that the First Amended Complaint be dismissed.

/s/ Robert J. Hack

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the below named parties by email or U.S. mail,
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