

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
3
4 TRANSCRIPT OF PROCEEDINGS
5 Oral Argument
6 November 19, 2009
7 Jefferson City, Missouri
8 Volume 2
9
9 The Staff of the Missouri Public)
Service Commission,)
10)
Complainant,)
11)
v.) Case No. EC-2009-0430
12)
KCP&L Greater Missouri Operations)
13 Company And Kansas City Power &)
Light Company,)
14)
Respondent.)
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17 MORRIS L. WOODRUFF, Presiding,
DEPUTY CHIEF REGULATORY LAW JUDGE.
18
19 ROBERT M. CLAYTON III, Chairman,
ROBERT S. KENNEY,
COMMISSIONERS.
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25 Service Commission.

1 P R O C E E D I N G S

2 JUDGE WOODRUFF: This is Case No.
3 EC-2009-0430, which is Staff's complaint against KCPL
4 Greater Missouri Operations and Kansas City Power & Light
5 Company, and we're here today for oral argument on the
6 competing motions for summary determination that have been
7 filed in this case.

8 I anticipate -- well, let's go ahead and
9 first take entries of appearance for Staff.

10 MR. THOMPSON: Thank you, Judge. Kevin
11 Thompson and Jaime Ott of the Staff of the Missouri Public
12 Service Commission, Post Office Box 360, Jefferson City,
13 Missouri 65102, for the Staff.

14 JUDGE WOODRUFF: Thank you. And for Kansas
15 City Power & Light Company.

16 MR. FISCHER: Yes, Judge. Let the record
17 reflect the appearance of James Fischer and Chuck Hatfield
18 appearing on behalf of KCPL Greater Missouri Operations
19 Company and the Kansas City Power & Light Company. Our
20 addresses and telephone numbers are on the written entries
21 of appearance.

22 JUDGE WOODRUFF: Thank you. The way I
23 anticipated this working today is I'll let Staff go first
24 and give a presentation, an argument presentation, then
25 I'll have some questions. The Commissioners have given me

1 some questions. I anticipate there will be other
2 Commissioners here also. And then we'll let Kansas City
3 Power & Light respond also.

4 Staff can proceed.

5 MS. OTT: May it please the Commission?
6 Commissioner, Judge, at first I'd like to introduce
7 myself. I'm Jaime Ott. I've been with the Staff since
8 January, and this is my first time to be able to come
9 before all of you.

10 Today I'm here on behalf of Staff for this
11 motion for summary determination in this named complaint
12 matter. For clarity of this argument, I'm going to refer
13 to KCPL Greater Missouri Operations Company as GMO and
14 KC -- Kansas City Power & Light, Incorporated as KCPL, and
15 then the name that they are both operating under as KCP&L.

16 What brings us here today is this
17 unprecedented matter concerning two contiguous electrical
18 utility companies with separate and distinct tariffs
19 operating under the same service mark. Staff became aware
20 of GMO and KCPL operating under the same name after a GMO
21 customer called the PSC's consumer service department and
22 did not realize that he was a GMO customer. As time went
23 by, Staff collected stories from GMO and KCPL customers
24 experiencing the same situation. Customers were unable to
25 identify by their customer bills who their provider was.

1 It then became clear to Staff that GMO and
2 KCPL's use of a deceptively similar name was creating
3 customer confusion. After Staff established that there
4 was actual and continual customer confusion regarding GMO
5 and KCPL's use of the name KCP&L, it brought this
6 complaint.

7 Parties here arrive here today under cross
8 motions for summary determination after establishing that
9 there was no genuine issue of material fact. Both parties
10 agree that GMO and KCPL are operating under the name
11 KCP&L. You, the Commissioners, are here today to decide
12 whether Staff's position that GMO and KCPL are in
13 violation of Commission order and state statutes is
14 correct and summary determination must be granted in their
15 favor, or if you accept the Respondent's position that GMO
16 and KCPL's use of operating under the same name is valid.

17 Summary determination may be granted if two
18 things are met: First, there is no genuine issue of
19 material fact; and two, it is in the public interest for
20 the Commission to decide summary determination.

21 Here, both parties agree that there is no
22 issue of material fact, and it is in the public interest
23 for you to decide this matter. The only issue here today
24 is whether GMO should be able to continue operating under
25 the same name as its neighboring electrical utility

1 company.

2 When this complaint originated, there were
3 two main violations of the law, Section 417.200 and
4 393.140, which both resulted in customer confusion.
5 Currently, Section 393.140 is still being violated and
6 creating unreasonable and unlawful customer confusion.

7 GMO and KCPL are not denying that -- their
8 use of service mark for both companies. In particular,
9 KCP&L is on both companies' customer bills. This leaves
10 the Commission with only one choice, to find that GMO is
11 unlawfully operating under the same name as another
12 utility.

13 As stated earlier, both KCPL and GMO are
14 operating under the service mark KCP&L. KCPL and GMO have
15 exceeded their authority requested and authority granted
16 by this Commission. KCPL involvement arises from the
17 authority the Commission granted in Case No. EM-2007-0374,
18 in which the Commission authorized KCPL to be the operator
19 for Aquila but denied the authority to change Aquila's
20 name.

21 Subsequently, Aquila filed a name change
22 request with the Commission in Case No. EN-2009-0015. In
23 that case, the Commission recognized the name change of
24 Aquila, Inc., doing business as Aquila Networks - L&P, and
25 Aquila, Inc., doing business as Aquila Networks - MPS, to

1 the new name change of Aquila, Inc., doing business as
2 KCPL Greater Missouri Operations Company.

3 Then, two months later, the entity
4 presently known as GMO filed an application with the
5 Commission to further change its name and stated that it
6 had filed with the Missouri Secretary of State a corporate
7 name change to KCPL Greater Missouri Operations.

8 By Report and Order effective December 3rd,
9 2008, in Case No. EN-2009-0164, the Commission ordered
10 that the name change of Aquila, Inc., doing business as
11 KCPL Greater Missouri Operations, to just KCPL Greater
12 Missouri Operations Company, otherwise GMO.

13 Subsequent to that tariff filing, Aquila's
14 use -- under Aquila's new name GMO, GMO began operating as
15 KCP&L at the discretion of KCPL. This is a violation of
16 the Commission order in Case Nos. EN-2009-0164 and
17 EN-2009-0015.

18 In order for KCPL to use the service mark
19 for both KCPL and GMO using KCP&L, it must seek Commission
20 approval because in accordance to Section 393.140
21 sub 11, a customer should be able to inspect a company's
22 tariffs at any time. As it is now, a customer may be
23 inspecting the wrong company's tariff.

24 Because the utility companies operate as a
25 monopoly, there is regulation. The centerpiece of this

1 regulation is that the Commission must approve tariffs.
2 These tariffs are to be available for public inspection at
3 either the PSC, the company, or more recently they're
4 available online. When two companies with separate and
5 distinct tariffs are operating under the same name, it
6 causes customer confusion, and it is unreasonable that a
7 customer cannot adequately locate or inspect their service
8 provider's tariff.

9 Staff concedes that the filing of the
10 fictitious name KCPL with the Secretary of State violation
11 has been corrected since the commencement of this
12 complaint. That resolves one violation, but there is
13 still additional counts to this complaint that remain
14 unresolved. There is a clear violation of Section
15 393.140, which is still resulting in unreasonable customer
16 confusion. And previously stated, it is still in
17 violation of Commission orders in the named complaint case
18 earlier cited.

19 The filing with the Secretary of State does
20 not excuse GMO and KCPL's behavior during the months prior
21 to filing this complaint. There was a seven-month period
22 when GMO and KCPL were unlawfully operating under the
23 fictitious name KCP&L pursuant to Section 417.200.

24 Staff is simply trying to protect the
25 public so customers can properly inspect their utility's

1 tariffs without being misguided by the utility company
2 operating under the same name as their neighboring utility
3 company. As it is now, a GMO customer is clearly unable
4 to ascertain who their service provider is by looking at
5 their bill. Both GMO and KCPL have the service mark KCP&L
6 on their bill.

7 KCPL could rectify this problem by simply
8 adding three letters to their bill, GMO. However, they
9 have chosen to sit back and do nothing. Staff isn't going
10 as far to say that every operational aspect of GMO and
11 KCPL shall be separate and distinct.

12 However, Staff is saying that it is
13 unreasonable and lawful for a customer to not be able to
14 inspect their utility company's tariff. It should be
15 consistent in company's written communication with
16 customer who their service provider is. However, KCPL
17 sends out materials to both GMO and KCPL customers under
18 the service mark KCP&L.

19 GMO and KCPL's service territories are
20 adjacent, as you can see on the overhead. They are using
21 the same service mark, which makes it deceptively unclear
22 to customers who's actually providing them electrical
23 service, resulting in customer confusion.

24 Staff filed this complaint after GMO and
25 KCPL were unreasonably using the identical name while

1 the Commission grant Staff's motion for summary
2 determination. Thank you.

3 JUDGE WOODRUFF: Thank you.

4 CHAIRMAN CLAYTON: Judge, how are we going
5 to do this? Are we going to go through -- are we allowed
6 to ask questions now?

7 JUDGE WOODRUFF: Yes, that's what I
8 anticipated, ask questions now and then we'll have KCPL
9 give their presentation.

10 CHAIRMAN CLAYTON: May I ask?

11 JUDGE WOODRUFF: Yes, of course.

12 CHAIRMAN CLAYTON: Thank you. Ms. Ott,
13 welcome. Excellent work on your -- on the argument.

14 I want to walk through a handful of these
15 issues. I've read the motions and the suggestions in
16 support of each of the motions, and I think the first
17 question is I want to be clear. There seems to be kind of
18 a loose stipulation that there is no dispute in fact. Is
19 that correct?

20 MS. OTT: That's correct.

21 CHAIRMAN CLAYTON: I found in reading some
22 of the pleadings that Staff suggests that there have been
23 examples of customer confusion, calls that have been
24 received by the Commission that would somehow suggest
25 customer confusion on inspection of tariffs. Is that

1 accurate?

2 MS. OTT: Yes. Well, not on inspection of
3 tariffs.

4 CHAIRMAN CLAYTON: Not in -- just customer
5 confusion in general?

6 MS. OTT: Correct.

7 CHAIRMAN CLAYTON: And then in KCP&L or GMO
8 or whoever filed on behalf of whomever, there's suggestion
9 that there has been no customer confusion. So it seemed
10 like that may be a question of fact that maybe is looming
11 out there. I guess that's my question, and then
12 secondarily, does it matter?

13 MS. OTT: Well, that would lead -- if KCPL
14 is saying that there is not customer confusion, then that
15 should lead us to a factual hearing in order to determine
16 that today, but I think we both have agreed that there is
17 no dispute in fact. There is customer confusion and
18 there's a violation of the law, and that's why it should
19 be decided today.

20 CHAIRMAN CLAYTON: You're saying KCP&L or
21 Great Plains and the entire family of companies, that they
22 admit that there has been customer confusion, is that what
23 you just said, in regard to the name?

24 MS. OTT: No, but they agreed that there is
25 no genuine issue of fact when filing cross motions for

1 summary determination.

2 CHAIRMAN CLAYTON: Does it matter? Does
3 that factual question, does it even matter in our
4 analysis?

5 MS. OTT: No.

6 CHAIRMAN CLAYTON: How many counts has
7 Staff filed?

8 MS. OTT: I believe four.

9 CHAIRMAN CLAYTON: Can you walk me through
10 each of those counts just very quickly?

11 MS. OTT: The first one is related to
12 customer bills and using the same name. It has created
13 customer confusion. It also leads -- the customer when
14 they look at their bill and see KCP&L and they call, they
15 don't know exactly is it GMO or is it KCP&L.

16 CHAIRMAN CLAYTON: Count 1, does it rely on
17 393.140 or the rule or a Commission Order in terms of a
18 violation?

19 MS. OTT: Both. 393.140 sub 5 gives the
20 Commission the authority to enforce any violation of law
21 or provision, as well as in the Commission's Order they
22 were ordered to operate under the name KCPL Greater
23 Missouri Operations, which they are not doing on their
24 customer bills. So it's a violation of both Commission
25 Order and state law.

1 CHAIRMAN CLAYTON: Okay. Count 2?

2 MS. OTT: That would go to the signage or
3 the plant. GMO is using plant that states KCP&L, so
4 they're using the -- it's the same violation of the
5 Commission Order as well as again 393.140.

6 CHAIRMAN CLAYTON: Count 3?

7 MS. OTT: That is the unreasonable customer
8 confusion. This is kind of -- Count 1, 2 and 4 are kind
9 of the actual violations, and Count 3 is kind of the
10 result of all of those violations that created the
11 customer confusion. And I think that again goes to
12 393.130 -- or 140 in which they're unable to reasonably
13 inspect their tariffs and they're confused on who their
14 actual service provider is.

15 CHAIRMAN CLAYTON: So you say 1, 2 and 4
16 then leads to Count 3, is that what you just said?

17 MS. OTT: Essentially.

18 CHAIRMAN CLAYTON: Okay. So what does
19 Staff have to prove on Count 3 to win its case on that
20 issue? Simply that there is confusion?

21 MS. OTT: Yes, and they're in violation
22 of -- well, and that the Commission has the authority to
23 go after the utility for violating state law.

24 CHAIRMAN CLAYTON: I understand, but what
25 has to be -- what has to be -- on item No. 1, I'm assuming

1 that basically Staff is suggesting that the labeling was
2 incorrect on the bills. On Count 2, labeling was
3 incorrect on the signage and plant associated with their
4 operation. On 3, I'm just trying to get a handle on what
5 do you have to prove to win your case basically?

6 MS. OTT: Can I defer to Kevin Thompson?

7 MR. THOMPSON: Count 3, Mr. Chairman, asks
8 for prospective relief from the Commission in the form of
9 an Order telling them to rectify the situation.

10 CHAIRMAN CLAYTON: Forward-looking?

11 MR. THOMPSON: Yes, sir.

12 CHAIRMAN CLAYTON: Forward-looking. Okay.
13 Analogous to perhaps injunctive relief of some sort?

14 MR. THOMPSON: Exactly.

15 CHAIRMAN CLAYTON: But we wouldn't call
16 that here. All right. No. 4?

17 MS. OTT: That's the violation of the
18 public being able to inspect the tariff, and that's a
19 violation of 393.140 sub 11.

20 CHAIRMAN CLAYTON: So what -- what facts do
21 you have to establish to win Count 4?

22 MS. OTT: That on the customer bills
23 they're using KCP&L, on plant that is disbursed throughout
24 the GMO service territory it says KCP&L, which is not the
25 name or can be reasonably identifiable on their tariff.

1 CHAIRMAN CLAYTON: Let me ask you this
2 question. Does Staff have a position, does it
3 affirmatively state how many customers have tried to
4 review the tariffs associated with any of the Great Plains
5 Energy utilities?

6 MR. THOMPSON: No, sir.

7 CHAIRMAN CLAYTON: No, sir, you have no
8 number or there have been none?

9 MR. THOMPSON: We have no number.

10 CHAIRMAN CLAYTON: Does that equal zero?

11 MR. THOMPSON: That equals zero.

12 CHAIRMAN CLAYTON: Okay. So there actually
13 hasn't been any harm to any customers because no one's
14 asked up to this point; is that correct?

15 MR. THOMPSON: We are not aware of any
16 customers who have been unable to inspect the tariff of
17 their provider or who have sought to inspect it and found
18 the wrong tariff. What we are aware of is customers who
19 don't know who their provider is.

20 CHAIRMAN CLAYTON: Okay. When you said,
21 Ms. Ott, you said that the old Aquila properties and
22 KCP&L, the old KCP&L, the traditional KCP&L are two
23 separate utilities, is that what you said earlier?

24 MS. OTT: I said they operate under
25 separate and distinct tariffs.

1 CHAIRMAN CLAYTON: Okay. But are they --
2 do you consider them two separate utilities?

3 MS. OTT: Well, they're both electrical
4 service providers operating under different tariffs, so
5 they are two different utilities.

6 CHAIRMAN CLAYTON: They're two different
7 utilities. So, for example, Missouri American Water is a
8 water utility that operates under a multitude of tariffs
9 in this state, but isn't Missouri American Water the same
10 utility operating in Jefferson City and Mexico and
11 Parkville and st. Louis County? Isn't that the same
12 utility?

13 MS. OTT: Yes.

14 CHAIRMAN CLAYTON: And if that is true,
15 then why isn't it different that KCP&L operating as GMO in
16 one territory and just traditional KCPL in another
17 territory, why doesn't the same logic flow? They each
18 have separate tariffs, but in the one instance they're one
19 utility, and in this instance you're suggesting that
20 they're two utilities. How is it different?

21 MS. OTT: I think the main difference is
22 that they're contiguous service territories. They are
23 touching. The customer can live fairly close to each
24 other and not know if they are under KCPL's tariff or if
25 they're under GMO's tariff. I'm not 100 percent sure on

1 Missouri American, but I believe their service territories
2 are not all contiguous.

3 CHAIRMAN CLAYTON: So does the same logic
4 apply to the old Aquila properties where you had separate
5 tariffs for the Light & Power service territory in
6 St. Joseph and separate tariffs for the Missouri Public
7 Service territories, which this probably predates your
8 time here at the Commission, but they operate -- the
9 different areas within the Aquila family operated under
10 different tariffs, yet there was no separate corporate
11 structure. Would your argument be that that is one
12 utility operating in two divisions or two utilities
13 operating in different service territories.

14 MR. THOMPSON: One utility, two areas.

15 MS. OTT: Yes, one utility in two areas,
16 and I think the difference there is the areas were not
17 touching. So, therefore, it was easily identifiable in
18 which areas they were in, who their provider -- under what
19 tariff they were operating.

20 CHAIRMAN CLAYTON: So your suggestion now
21 is that the Great Plains Energy subsidiaries are all one
22 utility but operating in separate service territories, but
23 the fact that they are contiguous makes it a different
24 example, is that what you're arguing?

25 MS. OTT: Yes.

1 CHAIRMAN CLAYTON: All right. Is -- how
2 many service territories then would there be within the
3 Great Plains Energy family of companies?

4 MS. OTT: I can't answer. I don't know.

5 CHAIRMAN CLAYTON: Kansas City Power &
6 Light traditional, the old Kansas City proper. You would
7 have -- is there a Light & Power, L&P territory under GMO
8 and a -- and a Missouri Public Service territory? Are
9 there three different tariffs for the electric service
10 providers within GPE? Does that make sense?

11 MS. OTT: Yes. Is it three or four?

12 CHAIRMAN CLAYTON: Excluding the steam. I
13 mean, that's a little different.

14 MS. OTT: I'm going to ask co-counsel.

15 MS. KLIETHERMES: Judge, what Staff's
16 position is is that there are two separate Great Plains
17 Energy utilities operating on the electric side in
18 Missouri. There are actually, I believe, four sets of
19 tariffs. There's what you've been calling the Kansas City
20 Power & Light traditional tariff. There is the GMO L&P
21 area, the GMO MPS area, and there's also, I believe, GMO
22 corporate tariffs that apply to both MPS and L&P.

23 JUDGE WOODRUFF: Ms. Kliethermes, did you
24 enter your appearance at the start?

25 MS. KLIETHERMES: Oh, I'm sorry.

1 JUDGE WOODRUFF: Go ahead and enter it now.

2 MS. KLIETHERMES: Sarah Kliethermes on
3 behalf of Staff.

4 JUDGE WOODRUFF: Okay.

5 CHAIRMAN CLAYTON: So despite there being
6 four tariffs, why does Staff only say that there are two
7 utilities operating?

8 MS. OTT: There's two corporations.
9 There's GMO and there's KCPL.

10 CHAIRMAN CLAYTON: But they are all
11 owned -- are they not each wholly owned subsidiaries of
12 Great Plains Energy?

13 MS. OTT: They are.

14 CHAIRMAN CLAYTON: So the corporate
15 structure plays a role in this as well?

16 MR. THOMPSON: Judge, we brought this
17 complaint because -- it's really a unique situation
18 because there is a potential for customer confusion here
19 that hasn't existed in any other situation where we've had
20 companies operating with similar names, either because
21 they're related companies, for example, Spectra and
22 CenturyTel Missouri, they both operate under CenturyTel,
23 or Missouri American, which is one company with I think
24 it's up to 11 service areas in the state today that
25 largely are not adjacent, not contiguous.

1 Here we have two companies now under single
2 ownership. The problem is that the tariffs are distinct,
3 so it actually makes a difference who your provider is.
4 If the tariffs were identical, it wouldn't matter in a
5 practical sense. And we're not interested in bringing a
6 complaint just for theoretical problems, but only for
7 practical problems.

8 The practical problem is, is that Staff has
9 become aware of customers who are served by one or the
10 other of the Great Plains operating companies who do not
11 know which operating company they're being served by. And
12 in some instances this has led customers to erroneous
13 conclusions about what the costs for various services will
14 be.

15 CHAIRMAN CLAYTON: So the confusion comes
16 down to not understanding what rate structure that a
17 customer will be subject to?

18 MR. THOMPSON: Exactly right.

19 CHAIRMAN CLAYTON: Okay. Well, but in
20 that -- in that line of thinking, if a customer from
21 St. Joe calls up and says, I'm an Aquila customer, I want
22 to review Aquila's tariffs, does that mean that basically
23 Staff knows how to find that for them and direct them in
24 the right way, or would a customer calling in from
25 St. Joe, they wouldn't know to call and say, Aquila

1 Networks, d/b/a Aquila L&P service territory. They
2 wouldn't know to look that up if they were looking through
3 the electronic filing system. So if they wouldn't know
4 that, what's the difference? We didn't require it then.
5 Why should we require it now?

6 MR. THOMPSON: Well --

7 CHAIRMAN CLAYTON: In terms of directly
8 going to the tariffs that are applicable to a particular
9 service territory.

10 MR. THOMPSON: That's certainly a good
11 point. If they were to call, we would direct them to the
12 right tariff. If they were trying to find it on their own
13 on the Internet, that's really where the problem would
14 arise.

15 Our job is to try to enforce and implement
16 the statute that the General Assembly has enacted, and
17 that's what the statute requires.

18 CHAIRMAN CLAYTON: I follow that. I just
19 want to know why -- I'm trying to identify whether there's
20 been an inconsistency in enforcement. Why are we being
21 aggressive in this instance but perhaps there wasn't an
22 aggressive approach to statutory interpretation earlier,
23 or why is it not important for Missouri American Water or
24 with other examples of different operating divisions
25 within a company?

1 MR. THOMPSON: And the answer to that
2 question is that we see this as a unique situation, that
3 the potential for confusion is greater than has existed in
4 the past, because you have two entities with different
5 tariffs operating under the same service mark, short name,
6 whatever you want to call it. As time goes on, we believe
7 more and more examples of actual real world practical
8 confusion are coming to our attention.

9 CHAIRMAN CLAYTON: Okay. All right. I've
10 got more questions. I want to get off this. Come back to
11 Ms. Ott here. Ms. Kliethermes wants in.

12 MS. KLIETHERMES: Commissioner, I misspoke
13 earlier, and I'd like to correct that as quickly as I can.
14 GMO-- or the Great Plains Energy Company, in fact, have
15 two sets of Missouri tariffs on the electric side.
16 There's the KCPL tariff which encompasses all of their
17 service territory. Then there's one set of GMO tariffs,
18 but it has different rate schedules for MPS and L&P, and
19 that was the distinction. There are only two sets of
20 tariffs.

21 CHAIRMAN CLAYTON: Okay. That's helpful.
22 Thank you.

23 Now, KCP&L, the traditional KCP&L
24 territory, you threw in an "and" in there. They're
25 allowed to operate under what names within the KCP&L, the

1 traditional service territory? KCP&L, they can use that,
2 or is it KCPL?

3 MS. OTT: Either one.

4 CHAIRMAN CLAYTON: Okay. Now, in the
5 timing of events, the Commission approved the acquisition
6 or the merger of Aquila and Great Plains, I believe was
7 the actual language in the merger. Would you agree with
8 that --

9 MS. OTT: Yes.

10 CHAIRMAN CLAYTON: -- assertion?

11 And we did not authorize in that Order any
12 change in name for the old property or authorize any use
13 of any material for billing or signage or anything; is
14 that correct?

15 MS. OTT: Yes.

16 CHAIRMAN CLAYTON: In the merger --

17 MS. OTT: Yes.

18 CHAIRMAN CLAYTON: -- order?

19 Okay. So the subsequent filing came in
20 where they -- where there was a request to change the
21 marketing and business name of the old Aquila properties,
22 and that's the case number that you mentioned, 2009-0164,
23 correct?

24 MS. OTT: No. That one's EN-2009-0015.

25 That was the first name change.

1 CHAIRMAN CLAYTON: Okay. Help me
2 understand exactly what we did in that first name change.

3 MS. OTT: They changed the name from Aquila
4 Networks - L&P and Aquila Networks - MPS to the Aquila
5 Networks, doing business as KCPL Greater Missouri
6 Operations Company. You changed the formal name to add a
7 doing business as.

8 CHAIRMAN CLAYTON: Okay. And then the
9 subsequent case?

10 MS. OTT: That's when you dropped the
11 Aquila and they just became KCPL Greater Missouri
12 Operations Company.

13 CHAIRMAN CLAYTON: Is that KCP&L or just
14 KCPL or does it matter?

15 MS. OTT: It has the and.

16 CHAIRMAN CLAYTON: Does it matter? Is the
17 ampersand an important part of this case?

18 MS. OTT: No.

19 CHAIRMAN CLAYTON: No, it's not?

20 MS. OTT: Well, in terms of how they're
21 marketing their service mark, yes, it is, but in terms of
22 how their name was changed, I don't believe it's critical.

23 CHAIRMAN CLAYTON: Now, at that point,
24 Staff expected that the trucks and the bills associated
25 with the old Aquila properties would reference KCP&L slash

1 GMO or hyphen GMO, is that what Staff --

2 MS. OTT: Yes.

3 CHAIRMAN CLAYTON: -- thought was going to
4 happen?

5 I guess I can't ask what Staff thought, but
6 in this case, Staff contends that that's what should have
7 happened, that a GMO reference should have been on the car
8 that pulls up to do work at the house?

9 MS. OTT: Not --

10 MR. THOMPSON: Yes, sir.

11 CHAIRMAN CLAYTON: Go ahead, if you want to
12 finish your thought.

13 MS. OTT: We're really concerned about the
14 written communication. If they decide to use the same
15 truck with Kansas City Power & Light, then we would say
16 that the service provider coming up should have an
17 identification that says they're Greater Missouri
18 Operations. They need some way to be able to distinguish
19 themselves from one service territory to the other.

20 On their bill, by adding GMO, it is clear
21 when a customer calls up and I'm a KCPL customer, does
22 your bill say GMO? Yes. Okay, we know what tariff
23 applies to you. We're not going as far as to say that
24 everything has to be separate and distinct, but we are
25 saying that written communications and there needs to be a

1 way to identify which is their actual service provider.

2 CHAIRMAN CLAYTON: When did -- well, let me
3 scratch that question. Come back.

4 When did Staff raise this concern with
5 Great Plains with the possible confusion on the name going
6 out on bills, written communication? When did it raise a
7 concern, do you recall?

8 MS. OTT: I'm going to have to defer. I
9 don't believe I was here when that happened.

10 MS. KLIETHERMES: Somewhere around the end
11 of May 2009. That would be somewhere around the end of
12 May 2009. I can find a date, but it might take a minute
13 or two.

14 CHAIRMAN CLAYTON: So May of this year
15 there was contact by the Staff and the company. When was
16 this complaint filed?

17 MS. OTT: It was filed in June of 2009.

18 MR. THOMPSON: Complaint was filed on
19 May 29th, Mr. Chairman.

20 CHAIRMAN CLAYTON: May 29th?

21 MR. THOMPSON: Yes, sir.

22 MS. OTT: I misspoke.

23 CHAIRMAN CLAYTON: Well, it was probably a
24 holiday weekend. Probably at the beach somewhere.

25 Okay. So that's when the four-count

1 complaint was filed was in May?

2 MS. OTT: Correct.

3 CHAIRMAN CLAYTON: Let's talk about what
4 relief Staff is requesting on each of the counts. On
5 Count 1, you're alleging violations of Commission Order
6 and statute and potentially a rule for potential
7 miscommunication on customer bills. What relief is the
8 Staff asking for on Count 1?

9 MS. OTT: Finding of a violation and the
10 authority to seek penalties.

11 CHAIRMAN CLAYTON: Okay. Count 2?

12 MS. OTT: The same, finding of violation
13 and authority to seek penalties.

14 CHAIRMAN CLAYTON: Okay. Count 3?

15 MS. OTT: The same, finding of a violation
16 and authority to seek penalties.

17 CHAIRMAN CLAYTON: Isn't Count 3 the
18 different one, it's the prospective?

19 MS. OTT: Correct. To order them to stop
20 operating under the same name.

21 CHAIRMAN CLAYTON: So that's less of a
22 finding of -- less of a finding of a past violation;
23 rather it's finding the current situation inappropriate or
24 unlawful and ordering a change in signage or written
25 communications, is that what the relief is?

1 MS. OTT: Correct.

2 CHAIRMAN CLAYTON: And Count 4?

3 MS. OTT: That would be the finding of
4 violation and authority to seek penalties.

5 CHAIRMAN CLAYTON: Okay. Last set of
6 questions. I'm going to turn it over to Commissioner
7 Kenney. What -- so from Staff's perspective, if KCP&L
8 slapped GMO on all their bills, their cars, their workmen
9 and women, any other written communication, does that fix
10 the problem?

11 MS. OTT: Yes.

12 CHAIRMAN CLAYTON: Okay. Alternatively,
13 could KCP&L come in and ask for a name change or ask for
14 authority to operate under the letters KCP&L without the
15 GMO?

16 MS. OTT: They could come in and ask for
17 Commission approval.

18 CHAIRMAN CLAYTON: Is it possible to ask
19 whether Staff would be agreeable or not agreeable to such
20 a request? Can I read into this that Staff would not
21 be -- would not be willing to agree to that sort of relief
22 by nature of this?

23 MR. THOMPSON: We're not able to answer
24 that question because there's other Staff departments
25 involved, and frankly, I don't know what their position

1 would be.

2 CHAIRMAN CLAYTON: That's no problem. Is
3 there any other way that the Staff concerns could be
4 addressed in a way to avoid customer confusion aside from
5 those prior two examples, either applying letters to the
6 signage or seeking permission? Are those the only two
7 ways of getting what Staff wants on a going-forward basis?

8 MR. THOMPSON: Another way would be if the
9 tariffs were modified so that they were identical.

10 CHAIRMAN CLAYTON: So you completely change
11 the rate structure and -- or basically merge the two
12 tariffs?

13 MR. THOMPSON: Yes, sir.

14 CHAIRMAN CLAYTON: Is Staff agreeable to
15 that?

16 MR. THOMPSON: Again, I can't --

17 CHAIRMAN CLAYTON: Be surprised if you'd be
18 willing to say that. Okay. All right. Great. Thank you
19 very much.

20 MS. OTT: Thank you.

21 JUDGE WOODRUFF: Commissioner Kenney.

22 COMMISSIONER KENNEY: Ms. Ott, thank you.
23 I don't have too many questions. I don't want to repeat a
24 lot of what Commissioner Clayton already asked. I want to
25 be clear. Customer confusion in and of itself isn't the

1 issue; it's customer confusion that would ultimately
2 impede a customer's ability to inspect the tariff,
3 correct?

4 MS. OTT: Correct.

5 COMMISSIONER KENNEY: So if we have
6 customer confusion but no indication that an actual
7 customer has been impeded or prohibited from inspecting
8 the tariff, do we have an injury in fact?

9 MS. OTT: No.

10 COMMISSIONER KENNEY: My -- and then this
11 is an adjunct to Chairman Clayton's question. If KCP&L
12 did come in and just ask to not add GMO but just ask us to
13 operate under that name, would that effectively cure the
14 customer confusion component of your complaint?

15 MR. THOMPSON: It would be authority for
16 them to do what they're doing. If the Commission granted
17 that authority, then obviously Staff would respect the
18 Commission's decision. What I can't tell you is whether
19 Staff would oppose it if they did ask you for that
20 authority.

21 COMMISSIONER KENNEY: Counts 1 and 2 if I'm
22 reading this correctly are primarily predicated on
23 violations of 417, the fictitious registration component,
24 correct?

25 MR. THOMPSON: That's part of the

1 predication, but the other part is the Commission's Order
2 authorizing the name change to KCP&L Greater Missouri
3 Operations Company.

4 COMMISSIONER KENNEY: But you would
5 concede, then, though, that now that they have registered
6 with the Secretary of State, any complaints that are
7 predicated on 417 are gone?

8 MR. THOMPSON: They're gone as of the
9 moment they got that registration, yes, sir.

10 COMMISSIONER KENNEY: And then secondarily,
11 if they did come in and ask our permission to operate
12 under KCP&L and we granted it, then Counts 1 and 2 would
13 effectively be disposed of in their entirety, correct?

14 MR. THOMPSON: Yes, sir.

15 COMMISSIONER KENNEY: The only remaining
16 component would be whether there is confusion that does,
17 in fact, lead to a prohibition on inspecting the tariff,
18 correct?

19 MR. THOMPSON: If you grant them authority
20 to operate under the same service mark, then Staff would
21 be content. I think the entire complaint would be gone
22 from Staff's point of view. Whether this would result in
23 confusion only time would be able to tell.

24 COMMISSIONER KENNEY: Okay. That concludes
25 my questions. Thank you.

1 MS. OTT: Thank you.

2 JUDGE WOODRUFF: I have a few questions
3 also based on conversations I've had with some of the
4 Commissioners who aren't here today.

5 First of all, does the Staff -- or excuse
6 me, does the Commission need to determine the amount of
7 any penalty in this action or would that be decided by the
8 Circuit Court?

9 MS. OTT: That would be decided by the
10 Circuit Court.

11 JUDGE WOODRUFF: So the Commission would
12 just say go seek penalties, and the Circuit Court would
13 decide how much?

14 MR. THOMPSON: I think the Commission can
15 qualify the authority that it gives to the General Counsel
16 in terms of the amount of penalties the General Counsel's
17 authorized to seek.

18 JUDGE WOODRUFF: Okay. Does the Commission
19 need to hear evidence about the effect on customers in
20 order to make a determination on the amount of penalties
21 that would be appropriate?

22 MR. THOMPSON: I believe that would be
23 appropriate in a penalty phase if the Commission
24 determines there are violations.

25 JUDGE WOODRUFF: So the Commission --

1 you're saying the Commission can grant summary
2 determination to Staff on the liability and then come back
3 and do a separate penalty complaint --

4 MR. THOMPSON: Absolutely.

5 JUDGE WOODRUFF: -- hearing?

6 Okay. I think you got into this with
7 Commissioner Kenney, but I'll ask it also. Is Staff still
8 seeking prospective relief, to order KCPL and GMO to
9 operate only under an authorized name since they have now
10 registered to use KCPL as a d/b/a? Do we still need to
11 order them --

12 MR. THOMPSON: We --

13 JUDGE WOODRUFF: -- to use the authorized
14 name?

15 MR. THOMPSON: I think we do, because, you
16 know, the area of company name changes and names is one
17 that becomes controversial only very rarely here, and I
18 really want to stress that Staff sees this as a unique
19 circumstance, because even with the -- that service mark
20 or name, whatever you want to call it, is now registered,
21 absolutely, with the Secretary of State, but the potential
22 for customer confusion still exists because you still have
23 two contiguous companies using the same name with
24 different tariffs.

25 So Staff believes it still has to be

1 considered by the Commission and either authorized or
2 prohibited by this Commission with the public interest in
3 mind. Those are simply considerations that the Secretary
4 of State does not make in authorizing the use of a
5 particular fictitious name.

6 JUDGE WOODRUFF: Now, you talked about a
7 violation of the Order in EN-2009-0164, and that's
8 entitled a Report and Order Recognizing Name Change. Does
9 that Order actually order KCPL to do anything or does it
10 just recognize the name change?

11 MR. THOMPSON: It states that it recognizes
12 the name change.

13 JUDGE WOODRUFF: Okay. So how can there be
14 a violation of an order recognizing a name change?

15 MS. OTT: Because they're not operating
16 under the name that they changed to.

17 JUDGE WOODRUFF: The Order doesn't tell
18 them you shall use this name; is that correct?

19 MR. THOMPSON: That's correct, Judge, but
20 it gives them authority to use that name. It doesn't give
21 them authority to use any other name.

22 JUDGE WOODRUFF: And their tariff says
23 KCP&L Greater Missouri Operations Company?

24 MR. THOMPSON: That is correct.

25 JUDGE WOODRUFF: Okay. The Commission has

1 also -- or the complaint also suggests that there's been a
2 violation of 417.230, the state statute. Does the
3 Commission have authority to enforce that section of the
4 statute, or where do you derive your authority from?

5 MS. OTT: The authority derives from
6 393.140 sub 5 which says if there's any violation of law,
7 the Commission can enforce it.

8 MR. THOMPSON: Also 386.390.

9 JUDGE WOODRUFF: Now, this is kind of a
10 practical question, but KCPL -- or KCP&L Greater Missouri
11 Operations Company was recognized in the Order under that
12 name. Would Staff believe that when they're sending out
13 their trucks, sending out their bill, they would have to
14 use the full name on the truck rather than KCPL GMO?

15 MR. THOMPSON: I think they can use GMO. I
16 think they can use a short version of the name, a
17 trademark or a service mark, a trade name, as long as it's
18 not unduly confusing with respect to what company is
19 involved. So if they want to call --

20 JUDGE WOODRUFF: They can't shorten it to
21 KCP&L, they can --

22 MR. THOMPSON: That's exactly what we're
23 here over is that they did shorten it to KCP&L.

24 JUDGE WOODRUFF: Okay. I believe that's
25 all the questions I have.

1 MR. THOMPSON: Thank you, sir.

2 MS. OTT: Thank you.

3 JUDGE WOODRUFF: Thank you. We'll move on
4 over to KCPL/KCPL GMO response.

5 MR. FISCHER: Thank you, Judge. Before I
6 start my remarks, though, I'd like to check my technology
7 if that would be all right.

8 JUDGE WOODRUFF: Go right ahead.

9 MR. FISCHER: Daniel told me how to do
10 this.

11 MR. THOMPSON: He also said he was only a
12 short phone call away.

13 MR. FISCHER: Okay. Great. I am
14 technology challenged sometimes.

15 MR. THOMPSON: Okay. You got there.

16 MR. FISCHER: Thank you very much for your
17 help.

18 May it please the Commission? My name is
19 Jim Fischer. Today Chuck Hatfield and I will be
20 representing the Respondents, KCPL Greater Missouri
21 Operations Company, which I also am going to refer to as
22 GMO, and its sister company, Kansas City Power & Light
23 Company. I'm going to talk about both of these
24 corporations together as just the companies.

25 But before I get into some prepared

1 remarks, I'd like to take just a second to answer a couple
2 questions and clarify a couple things that came out from
3 the Bench.

4 Judge Kenney, you asked about customer
5 confusion and whether if there's no customer confusion
6 that leads to a problem inspecting the tariffs in the
7 case, it sounds like it goes away. I'd point out, I think
8 you're right. And the company's tariffs are tariffed
9 under the name KCPL Greater Missouri Operations Company at
10 the top of the tariff, and Kansas City Power & Light
11 Company for the Kansas City Power & Light Company area.

12 On every customer's bill, whenever you
13 receive your bill, you receive a rate code that identifies
14 which exact tariff you're being billed under. So if you
15 have a question, you can call the company or call the
16 customer services folks here and under -- for example,
17 under the St. Joe rate tariff, it's tariffed with an MO 9,
18 or under the Missouri Public Service, MO No. 6. There's a
19 rate code that identifies on your bill exactly what tariff
20 you're being billed under. So you can go directly to the
21 company and ask.

22 When you call from your home, it comes up
23 on the company's screen as the specific address that
24 you're calling from, and we know exactly what customer,
25 what area you're from. So I don't think there's any

1 customer confusion related to the ability to inspect your
2 tariffs, because clearly the tariff we're using in both
3 companies' cases has the corporate name, the full
4 corporate name.

5 What we're talking about here is not a
6 corporate name. We're talking about a service mark, and
7 I'd like to get into that, and this is certainly not a
8 unique situation.

9 As the Commission knows, both GMO and
10 Kansas City Power & Light Company are owned by Great
11 Plains Energy, Incorporated, and they're integrated and
12 jointly operated pursuant to the Commission's merger
13 order, which was Case No. EM-2007-274. By integrating the
14 companies' operations, the companies have achieved
15 efficiencies and synergies that lower the costs to the
16 customers.

17 Now, GMO's use of the KCPL brand is
18 consistent with how the companies explained to the
19 Commission in that merger proceeding that they were going
20 to integrate these two companies, with Kansas City Power &
21 Light Company being the ultimate operator of the
22 companies.

23 The companies also told Staff precisely how
24 they were going to use that KCPL brand. They indicated
25 from day one on the KCPL and Aquila bills, notice and

1 letters we would be using that KCPL brand. And then in
2 addition, the use of the KCPL brand is also consistent
3 with how the companies explained to their customers that
4 they would be operating following the close of the merger.
5 Through newspaper ads, through billing inserts and through
6 separate customer billings, GMO explained to its customers
7 that, and I'm going to quote here, Aquila is being
8 acquired by Great Plains Energy and will operate under the
9 KCP&L brand, unquote.

10 Simply put, the companies are operating
11 exactly and precisely how they told the Commission, the
12 Staff, and their customers that they would following close
13 of the merger.

14 Now, in this case, the primary thrust of
15 the Staff's complaint is that GMO's use of this KCP&L
16 service mark or trade name is unlawful because GMO has not
17 sought and has not obtained authority from either the
18 Missouri Secretary of State or this Commission to operate
19 under the name KCPL.

20 Commissioner Clayton asked, when did we
21 first become aware of this complaint? Well, the Staff
22 initially provided the companies with a draft complaint
23 while we were in the middle of the negotiations in the
24 last Kansas City Power & Light Company and GMO rate cases.
25 These were the same rate cases that you'll recall that

1 Staff asserted they didn't have the time and the resources
2 to complete their rate case audits.

3 Now, after the settlements were reached in
4 those cases, we had assumed the Staff's threat to file
5 this case would be dropped. So the companies were
6 shocked, surprised, and I have to say a bit disappointed
7 when Staff finally decided to file this complaint,
8 especially in light of the fact that the Staff had not
9 ever filed a similar complaint against any of the other
10 public utilities in this state that operate under similar
11 service marks.

12 Of course, this complaint case is also
13 being litigated at the same time the Staff is now
14 completing their construction audits of Iatan 1, Sibley
15 and the Jeffrey Energy Stations. The Commission's ordered
16 that those audits be done by the end of the year.

17 Now, in this case, the company's issued
18 Data Requests to the Staff to better understand their
19 position, why are they filing this complaint? However,
20 the Staff objected to 12 out of 16 Data Requests. But the
21 companies did determine based on the few DRs that the
22 Staff was willing to answer that no customer complaints
23 have been filed formally or informally about the use of
24 the KCPL brand or service mark. The customers themselves
25 have not raised this issue with the Staff.

1 Apparently this case is being prosecuted
2 because of Staff's upper management interested for their
3 own reasons for pursuing this matter, not because the
4 customers in any way have raised the complaint formally or
5 informally with the Commission Staff.

6 Now, on the legal issues raised in this
7 complaint, the companies must respectfully disagree with
8 the Staff's position stated in their pleadings. It's
9 lawful and appropriate for the companies to use the KCP&L
10 service mark or trade name on the customer bills, on the
11 trucks, on the signage, on the power plants and other
12 facilities without the filing of a fictitious name
13 registration.

14 Section 417.005 subsection 5 of the Revised
15 Statutes, Missouri statutes, defines a service mark as a
16 mark used in the sale or advertising of services to
17 identify the services of one person and distinguish them
18 from the services of others. A trade name is defined by
19 the Missouri statutes as any word, name, symbol or device
20 or combination thereof adopted by a person to identify his
21 business, vocation or occupation and distinguish it from
22 the business, vocation and occupation of others. That's
23 subsection 7.

24 I'd like to show you a slide here of the
25 particular KCPL service mark that's in dispute in this

1 case. There we go. This is the particular service mark
2 we're talking about. It's been registered with the United
3 States Patent and Trademark Office, and as we've discussed
4 in our legal memorandum, many of the public utilities in
5 the state utilize similar service marks or trade names for
6 communicating with their customers and the public.

7 For example, the Empire District Electric
8 Company and the Empire District Gas Company, two separate
9 companies, utilize that same logo, Empire, Services You
10 Count On. The Empire Electric Company uses the Empire
11 brand despite the fact that its tariffs bear the name the
12 Empire District Electric Company. And the Empire District
13 Gas Company also uses that same Empire brand despite the
14 fact that its tariffs bear the name the Empire District
15 Gas Company.

16 I don't see anything unique here from the
17 Kansas City Power -- KCPL perspective. It's the same
18 situation. These companies have not requested permission
19 from the Commission to use this brand or registration the
20 fictitious name of Empire with the Missouri Secretary of
21 State.

22 Here's the one that Laclede uses. Laclede
23 uses this service mark or trade name to communicate with
24 its customers and the general public. Laclede uses this
25 service mark, Laclede Gas, despite the fact that its

1 tariffs bear the name Laclede Gas Company. It's not
2 registered Laclede Gas as a fictitious name.

3 Southern Union Company uses this service
4 mark or trade name to communicate with its customers and
5 the general public. Southern Union uses the MGE brand or
6 in some cases MGE Missouri Gas Energy despite the fact
7 that its tariffs use the name Missouri Gas Energy, a
8 Division of Southern Union Company. However, Southern
9 Union Company has not registered a fictitious name MGE or
10 MGE Missouri Gas Energy.

11 The Union Electric Company uses this
12 service mark or trade name to communicate with its
13 customers and the general public. Union Electric Company
14 uses the service mark AmerenUE despite the fact that it
15 provides electric and gas service under the rate schedules
16 the Union Electric Company Electric Service and, for the
17 gas side, the Union Electric Company Gas Service.

18 In addition to using the AmerenUE service
19 mark or trade name, Union Electric Company has filed a
20 fictitious name registration with the Secretary of State
21 to do business as AmerenUE. Of course, unlike the KCPL
22 situation, the KCPL service mark or trade name, which is a
23 shortened version of the corporate name, AmerenUE is not a
24 shortened version of the corporate name Union Electric
25 Company.

1 If you go to the telephone side, numerous
2 companies under the Commission's jurisdiction that use
3 the -- that have AT&T in their name communicate with their
4 customers and the general public using this logo, AT&T.
5 And there are several more Verizon companies that operate
6 under various corporate names that all use the Verizon
7 service mark or logo or trade name.

8 These companies use such service marks and
9 trade names without formal authorization from the Missouri
10 Public Service Commission and without registering them as
11 fictitious names with the Secretary of State.

12 Since virtually all the public utilities in
13 this state use some service mark, our clients frankly
14 don't understand why the Staff is pursuing this case with
15 Kansas City -- KCPL Greater Missouri Operations Company
16 and Kansas City Power & Light Company. As I said, GMO and
17 the Kansas City Power & Light Company don't believe the
18 use of a service mark or a trade name constitutes the same
19 thing as the use of a fictitious name under Section
20 417.200.

21 My co-counsel, Mr. Hatfield, was the Deputy
22 Attorney General with the Missouri Attorney General's
23 Office. That office is charged with enforcing the
24 fictitious name registration statute. I'd like to ask him
25 to address the issues related to that particular statute.

1 JUDGE WOODRUFF: Very well.

2 MR. HATFIELD: Thank you. We weren't sure
3 who was going to go first since these are cross motions,
4 so we kind of had things prepared. Since I'm last, I
5 think I can speed this along. I was going to talk about
6 417.200. I'm not -- to be honest, I'm not sure exactly
7 where we are given the discussion. I think Ms. Ott's
8 saying that there were violations of 417.200 prior to the
9 registration of the fictitious name. As I understand it,
10 Staff's still requesting some authority to seek penalties
11 on that. Perhaps you-all can clarify if that's not the
12 case.

13 But 417.200 in analysis, I think all these
14 questions have drawn it all to a point, because here's the
15 issue. What is transacting business versus what is
16 advertising, sales, operating? Ms. Ott has used the
17 phrase operating many times, and I'm not sure that that's
18 a good phrase to use.

19 The statutes and all the case law discuss
20 transacting business. Well, what's transaction of
21 business? Transaction of business in this case is the
22 filing of a tariff, which is the contract between the
23 customers and the company. It's the legal operating
24 document that governs what the customer's going to be
25 charged, governs what the tariff is, et cetera.

1 Mr. Fischer's covered how in the
2 transaction of business Kansas City Power & Light has
3 fully complied with all of the laws and all of the
4 statutes.

5 In the context of 417.200, Staff has cited
6 you a case that I think is a great one from the Missouri
7 Court of Appeals Eastern District, and that's Hanton vs.
8 Jacobs. In Hanton v. Jacobs somebody fell down in a
9 grocery store and hurt themselves, and they brought a tort
10 action.

11 In the course of the tort action, they
12 discovered that the name -- the person they were suing was
13 operating under a fictitious name that was not registered
14 with the Secretary of State, and they added a count to
15 their claim and they said, we want damages, we want some
16 sort of per se negligence claim, I guess, because they
17 were under a fictitious name. We were extremely confused
18 in this litigation, your Honor. We didn't know who to
19 sue. It took extra attorney's fees. We have real damages
20 because there was great confusion over what the name of it
21 was, just like we have here.

22 The court said, plaintiff's underlying
23 cause of action was not dependent upon the identity of the
24 landowner. It didn't really matter who it was, which I
25 think is similar here. You don't have an option to go to

1 another electric company. You're going to be served by
2 the same one.

3 But here's what they said: The statute
4 deals with fair dealing, fraud, enforcement of business
5 agreements and credit, and these were not relevant
6 considerations in this cause of action. That's what the
7 statute deals with is the transaction of business.

8 The service mark statute which Mr. Fischer
9 talks about deals with sales or advertising. That's what
10 the statute says. The Legislature's drawn a distinction
11 between the two. Transaction of business has to do
12 with -- doesn't have anything to do with placing of
13 signage in front of the building. It doesn't have
14 anything to do with what name's on the side of my truck.
15 It has to do with the contracts, with the credit
16 extensions, et cetera, and there's no -- this case is
17 exactly like Hanton on that issue.

18 So the first fallacy in Staff's legal
19 position is this is not transaction of -- we're not
20 talking about transaction of business here in any way.

21 The second fatal flaw that Mr. Fischer's
22 alluded to is that this is not, KCP&L is not a fictitious
23 name as a matter of law. Now, I can't find any Missouri
24 cases that specifically address it. The Ohio Supreme
25 Court has said that somebody who operates under the name

1 Duress Enterprises when his name was Duress, that that's
2 not a fictitious name. And the reasoning of that, as one
3 of you alluded to, you can figure out who Duress is. It's
4 not a deceptive name. It's not like cases I saw in the
5 Attorney General's Office where you're doing business as
6 Jones Brothers and your name isn't Jones and they can't
7 figure out who to sue when there's bad repairs to your
8 bathroom or whatever it is.

9 A shortened version of one's true name is
10 simply not fictitious. Several other courts have
11 addressed this, including the Supreme Court of Nevada in
12 Loomis vs. Whitehead, 183 Pacific 3rd, which said the
13 purpose of the statute is to prevent fraud and to give the
14 public information about the entities with which they are
15 conducting business.

16 In that case, if the people already know
17 who they're dealing with, we're promoting form over
18 substance. When a customer can look at a bill and find a
19 rate code that directs them exactly to the tariff, all
20 we're doing is providing form over substance.

21 Black's Law Dictionary says that a
22 fictitious name is an alias, a counterfeit, a feigned or
23 pretended name taken by a person differing in essential
24 particular from the true name. It has to be a different
25 name.

1 Finally, and related to that, in Staff's
2 motion for summary judgment, they say there are three
3 elements to be proved in fictitious name. I think it
4 applies to everything here. They say first you have to
5 engage in or transact, do business, and I think we've
6 talked about that. Two, it has to be other than the true
7 name; and three, it's not registered. And I think that's
8 a misstatement of the elements.

9 There is a fourth element, which is
10 addressed in the case of Ditsel vs. Shoecraft, which is an
11 old case, but it's never been overruled, 275 SW 880, that
12 says, the law contemplates that there must be some bad
13 faith in the use of the name. This statute is a
14 misdemeanor, the fictitious name statute. There must be
15 some mens rea. There must be some intent.

16 The court also went on to say, by the way,
17 in relation to one of the questions you asked, Judge,
18 about whether this Commission has authority to proceed
19 under that statute or to enforce that statute, that case
20 says, quote, it seems evident to us that the intent of the
21 Legislature was to restrict the penalty for the violation
22 of this statute to a fine or imprisonment or both, but
23 that those violating the act were not to be further
24 punished in any way.

25 So if some prosecutor believes that there

1 was intentional fraud, intentional deception, they have a
2 right to bring an action on that, but I don't think this
3 Commission should interpret this statute in a way that
4 would say there's no bad faith requirement because there
5 simply is.

6 I wanted to address just a couple things to
7 speed through this. It is perfectly legal in this state
8 for two companies to operate using the same name. The
9 fictitious name statute specifically says that registering
10 your fictitious name does not preserve that name for you.
11 I could operate under it and you could operate under it,
12 too. Now, I might get sued civilly for violating your
13 trademark or some other action, but it is perfectly legal
14 for companies to operate under the same name, and they do
15 it all the time.

16 As we've addressed, the company filed the
17 fictitious name registration in this case. We thought
18 that would be the end of the complaint, but apparently
19 Staff has gone on -- has decided to go forward with it.

20 I want to address customer confusion
21 briefly, but I guess what I want to make clear when the
22 Commission and the Judge reads the case law here and what
23 has happened is that Staff is asking this Commission to
24 interpret the fictitious name statute in a way that no
25 enforcement agency of the State of Missouri has ever

1 interpreted it before. And we've covered that, I think,
2 pretty well in the brief, and we would urge the Commission
3 not to accept that invitation, not to take that invitation
4 because it's wrong on the law and it sends the wrong
5 message to the regulated community.

6 Confusion. Confusion in itself is not a
7 violation of the law. The fact that you're confused about
8 what I said does not mean that I did anything wrong. If
9 the Staff proved confusion straight up, that would not
10 satisfy, that would not prove any violation of the law.

11 Staff says that you should find the actions
12 of the company unreasonable because someone might be
13 confused. I want to make sure and point something out on
14 this, that we're in a summary judgment stage right now.
15 The company does -- Mr. Fischer and I talked about this.
16 If you adopt our theory of the case, there is no dispute
17 of fact because customer confusion is irrelevant. If you
18 adopt Staff's theory of the case, as I understand it,
19 there is a dispute of fact because customer confusion
20 would be relevant and you need to proceed to the hearing.

21 What you have right now is one affidavit,
22 that is incidentally triple hearsay if you read it, I
23 heard that somebody told us that somebody at KCPL told
24 them that they were in a different service area, that you
25 should not consider, and you have these 30 public

1 comments, none of which specifically address the confusion
2 issues. And I'm not going to get into a long discussion
3 about it. You can read it and look at it.

4 It is not appropriate to grant summary
5 judgment based on customer confusion. Indeed, as
6 Mr. Fischer discussed, there is none. Staff's complaint
7 is a solution in search of a problem here, and there is
8 absolutely no evidence of customer confusion. In fact,
9 the data suggests that customers are more -- I'm sorry,
10 that customer satisfaction has improved under the JD Power
11 rankings since the merger. The company's consolidated
12 ranking has actually improved from 37th of 121 utilities
13 to 27th of 121 utilities.

14 Customers being confused simply does not
15 violate the law. If there are questions about this, I
16 think Mr. Fischer and I also wanted to talk about some of
17 the problems with what the Staff is asking you to do. As
18 Staff has said, the company will request authority to
19 merge these companies in the future. So what Staff
20 suggests is that we go out and tell everybody these are
21 two separate companies, and then we'll have to turn around
22 and tell them, well, they're all one company again now.
23 So I think the problem -- or the solution may be worse
24 than the problem in that particular case.

25 But either one of us will be happy to

1 answer any questions that you have.

2 JUDGE WOODRUFF: Mr. Chairman?
3 Commissioner Kenney?

4 COMMISSIONER KENNEY: I don't have any
5 questions. Thanks.

6 CHAIRMAN CLAYTON: Is Great Plains Energy
7 in terms of all the subsidiaries, are you-all suggesting
8 that you are not aware of any examples of customer
9 confusion as it relates to understanding which set of
10 tariffs serves customers by particular service territory?

11 MR. HATFIELD: That's correct. We're aware
12 of no evidence of customer confusion. We're aware of the
13 affidavit that was filed.

14 CHAIRMAN CLAYTON: Explain to me how
15 communications with use of something you refer to as a
16 rate code, or maybe Mr. Fischer said --

17 MR. HATFIELD: Yes, the rate code.

18 CHAIRMAN CLAYTON: -- a rate code, explain
19 to me how that works. If a customer receives a
20 communication, a bill or any other type of communication,
21 are they directed to this rate code? Is it highlighted?
22 Is there information which describes why it is there and
23 how a customer should use it?

24 MR. FISCHER: Well, Judge, I've got a copy
25 of a customer's bill, and on the second page of the bill

1 where your -- where your reading is, right above the meter
2 number that you have is the electric service -- electric
3 meter service with the rate code MO 910. In this
4 particular case, it identifies me as a metered electric
5 customer and the -- each of the companies, like I
6 mentioned earlier, have a particular tariff number. Like
7 Missouri 9 would suggest that that is a St. Joe customer,
8 where if you have an MPS customer it would be under the MO
9 6 rate code in most instances, and then there's a separate
10 rate code for a KCP&L, for a Kansas City Power & Light
11 Company customer.

12 CHAIRMAN CLAYTON: Forgive me. There would
13 be three different rate codes --

14 MR. FISCHER: Yeah. There would be more --

15 CHAIRMAN CLAYTON: -- MPS, L&P and --

16 MR. FISCHER: Well, those are the tariffs.
17 There are actually -- as you know, every tariff has a
18 multitude of types of service.

19 CHAIRMAN CLAYTON: Let's start with just a
20 basic residential customer. How many rate codes would you
21 have for residential customers?

22 MR. FISCHER: You would have many, because
23 you would have the -- like, an all-electric customer would
24 have an all-electric rate code. A general standard
25 customer would have a standard rate code. You would have

1 some for commercial, some for industrial.

2 CHAIRMAN CLAYTON: Stay residential. I
3 knew you were going to get off on those. But if you stay
4 residential, how many rate codes would you have? All
5 electric?

6 MR. FISCHER: You would have one for each
7 of the different residential tariffs that are available
8 under that particular service area.

9 CHAIRMAN CLAYTON: So in KCP&L traditional,
10 you would have an all-electric and a standard rate?

11 MR. FISCHER: I'm informed really there
12 would be four because we have time of use, we have water
13 heating, we have a separate meter rate and a standard
14 rate.

15 CHAIRMAN CLAYTON: And that's just within
16 the KCP&L tariff?

17 MR. FISCHER: That's correct.

18 CHAIRMAN CLAYTON: So within the GMO
19 tariff, would you have double that amount?

20 MR. FISCHER: Yes.

21 CHAIRMAN CLAYTON: You'd have those four
22 different rates for L&P, four different rates for Missouri
23 Public Service?

24 MR. FISCHER: I'm told that there are other
25 pieces, other services available under that particular

1 tariff, so there could be more rate codes. But each --
2 but each of your bills, the point is, has that number on
3 it, and you can go to it. So you call the company and
4 say, I've got electric meter service MO 910. Could you
5 check that rate? Is that right? And they'll be able to
6 say, yes, we can check it.

7 CHAIRMAN CLAYTON: Well, that's helpful.
8 Looking at it from the customer standpoint, they receive a
9 bill. They have a question. They've got a concern. The
10 bill is higher than what they anticipated. So they call
11 the 1-800 number, the local number, whatever it is, and
12 when they call in, does the protocol from the customer
13 service department say, well, give me your rate codes?
14 Are they directed to that for identification?

15 MR. FISCHER: Initially they will ask, are
16 you calling from your home? And if you're calling from
17 your home, our customer folks will know exactly your
18 address and exactly what your rate code is.

19 CHAIRMAN CLAYTON: I call from my cell
20 phone.

21 MR. FISCHER: If you call from your cell
22 phone --

23 CHAIRMAN CLAYTON: I call from my brother's
24 cell phone.

25 MR. FISCHER: -- they are trained to go

1 through a series of --

2 CHAIRMAN CLAYTON: It's actually his
3 girlfriend's phone.

4 MR. FISCHER: -- series of questions to get
5 you to that address and then again they will get to that
6 rate code.

7 CHAIRMAN CLAYTON: So eventually the
8 customer service person will -- they're trained to ask for
9 that rate code information?

10 MR. FISCHER: Exactly.

11 CHAIRMAN CLAYTON: All right. Now, let's
12 say I call from my brother's girlfriend's cell phone and I
13 call the Missouri Public Service Commission.

14 MR. FISCHER: Yes.

15 CHAIRMAN CLAYTON: I call and say, I'm not
16 happy about this rate. The bill is too high. For
17 whatever reason they're unhappy with the bill. And the
18 Commission needs to find out what company they're dealing
19 with. Does the Commission -- is there a communication
20 from Great Plains that describes what each of these rate
21 codes means so that the Commission Staff can clearly
22 identify on which tariffs they would be operating?

23 MR. FISCHER: Yeah. Just like say Missouri
24 Water customer that has -- you have five or six districts
25 around the state, the Staff, I assume, has been trained to

1 ask what address do you have and to elicit other
2 information that would give them the opportunity to get to
3 the right rate. Now, if they ask just what's your rate
4 code, they can do it just by going directly to the tariff.

5 CHAIRMAN CLAYTON: Sure. Well, if you're a
6 customer, you call and say I'm from Brunswick, they're not
7 going to look at the St. Louis County tariff. But in this
8 instance, what is your address? I have a Kansas City,
9 Missouri address. Well, that could be any number of
10 places depending on zip code. Maybe you can look it up by
11 zip code. But has KCP&L or GMO or Great Plains
12 communicated what those rate codes mean?

13 MR. FISCHER: Yes. Yes. And I mean, Staff
14 would have to speak, I guess, to whether they have
15 confusion about that.

16 CHAIRMAN CLAYTON: I'm asking about what
17 you-all have communicated.

18 MR. FISCHER: We've talked with the Staff
19 about that, about the problems that potentially could be
20 there and how to resolve them and how the Staff could
21 check with rate code.

22 CHAIRMAN CLAYTON: Okay. Now, you put up a
23 bunch of slides here that had a bunch of names, fictitious
24 names, operating names, everything else. Which of these
25 companies do you claim is operating in violation of

1 393.140?

2 MR. FISCHER: Absolutely none of them.

3 CHAIRMAN CLAYTON: You weren't throwing
4 somebody under the bus?

5 MR. FISCHER: Not a bit, your Honor. We're
6 all under the bus together.

7 CHAIRMAN CLAYTON: Or a more egregious
8 example of --

9 MR. FISCHER: No, Judge. There's no
10 violation of any of these companies. It's all -- they're
11 all operating properly under their service marks as far as
12 I know.

13 CHAIRMAN CLAYTON: Why doesn't KCP&L want
14 to add GMO to the communications, or does it not? Maybe
15 I'm interpreting wrong. Staff says GMO on the labeling
16 would be helpful. Why not do it?

17 MR. FISCHER: Well, part of the reason,
18 Judge, is just we don't want to create confusion with our
19 customers. We are headed toward eventually asking this
20 Commission for a merger of those companies. We've been
21 operating to the greatest extent we can jointly and
22 integrating our operations. It would only encourage
23 customer confusion if we're trying to distinguish between
24 the two.

25 We don't want to have, for example, only a

1 GMO truck being able to go serve a GMO customer whenever
2 he goes by a Kansas City Power & Light Company customer.
3 We don't want to lose any of the synergies and
4 efficiencies that this whole merger was designed to
5 encourage, and that is the principal reason. We don't
6 want to lose the synergies, and we don't want to confuse
7 our customers whenever we're really operating jointly and
8 integrated operations throughout the company.

9 CHAIRMAN CLAYTON: Why did KCP&L --
10 obviously if this is privileged communication, but why not
11 ask for specific permission to use the KCP&L name, or do
12 you believe you've been given specific permission from
13 this Commission to use the KCP&L name in the GMO
14 territory?

15 MR. FISCHER: We have been given specific
16 authorization to use KCPL Greater Missouri Operations
17 Company on our tariffs from this Commission. That's
18 what's at the top of our tariff. We don't believe the
19 Commission has -- there's any need to ask for the use of a
20 service mark. That's not under the Commission's
21 jurisdiction, and that's -- just like all these other
22 companies, no one else has asked for that specific
23 approval. We're using a service mark, KCPL, just like
24 Verizon is using their Verizon service mark or Empire is
25 using its Empire service mark.

1 So we've asked for the corporate change,
2 which has been approved, to use KCPL Greater Missouri
3 Operations Company, and that's the corporate name, and
4 that's the name we're doing business under as Mr. Hatfield
5 has explained, all our contracts, all our deeds of trust,
6 and we've gone through that exercise.

7 We thought we could surely find a way by
8 filing that fictitious name registration that would make
9 the case go away, but that didn't turn out to the case.
10 And I mean, you look at what they're asking for, Judge,
11 they're suggesting that every customer bill that has a
12 KCPL logo on it for 300,000 GMO customers that gets a bill
13 every month 12 months a year, the subject to the separate
14 fine, if you look at the statutes, the maximum I think is
15 \$2,000, potentially there's \$7.2 million of fines there.
16 That is just uncalled for under the situation. I mean --

17 CHAIRMAN CLAYTON: Sounds like a stimulus
18 plan.

19 MR. FISCHER: It sure does.

20 CHAIRMAN CLAYTON: Thank you very much,
21 Mr. Fischer.

22 JUDGE WOODRUFF: Commissioner Kenney?

23 COMMISSIONER KENNEY: No questions. Thank
24 you.

25 JUDGE WOODRUFF: I don't have any

1 additional questions.

2 MR. FISCHER: Thank you, Judge. We
3 appreciate your time today.

4 JUDGE WOODRUFF: Thank you.

5 CHAIRMAN CLAYTON: Can I go back to Staff?

6 JUDGE WOODRUFF: Go ahead.

7 CHAIRMAN CLAYTON: Can I go back to
8 Ms. Ott? Thought you were going to be off the hook here.
9 Does Staff believe that any other utilities are violating
10 any of the applicable statutes?

11 MS. OTT: No.

12 CHAIRMAN CLAYTON: So even though there may
13 be various tariffs used by different companies, there are
14 no other examples that would suggest a need for some sort
15 of Staff prosecution?

16 MR. THOMPSON: That's correct,
17 Mr. Chairman. Staff's concern, as I stated before, is a
18 practical one. When Mr. Hatfield was presenting, he used
19 the phrase you can figure out who to sue. That goes
20 exactly to the heart of Staff's concern here, two
21 contiguous companies using identical service marks, how
22 can the customer figure out who to sue?

23 We're not aware of any other company or
24 series of related companies where the customer is left
25 unable to figure out who to sue. This is the one. And as

1 I said, we consider this to be both a rare and unique
2 circumstance, which is why we brought this complaint.

3 CHAIRMAN CLAYTON: Well, are Empire
4 District Gas and Empire District Electric separate
5 corporations?

6 MR. THOMPSON: Frankly, I don't know the
7 answer to that. They said --

8 CHAIRMAN CLAYTON: If they are separate
9 corporations, then wouldn't that be a suggestion for
10 customer confusion?

11 MR. THOMPSON: Except that one's gas, one's
12 electric. Presumably the customer knows which service
13 they're getting.

14 CHAIRMAN CLAYTON: Missouri American, do
15 each of its jurisdictions, service territories, are they
16 simply one corporation or are they various corporations?

17 MR. THOMPSON: They're one corporation.

18 CHAIRMAN CLAYTON: They are one. Okay. I
19 don't think I have any other questions. Thank you, Judge.

20 JUDGE WOODRUFF: Well, thank you all for
21 coming today, and with that we are adjourned.

22 WHEREUPON, the oral argument in this case
23 was concluded.

24

25

1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3) ss.
4 COUNTY OF COLE)

5 I, Kellene K. Feddersen, Certified
6 Shorthand Reporter with the firm of Midwest Litigation
7 Services, do hereby certify that I was personally present
8 at the proceedings had in the above-entitled cause at the
9 time and place set forth in the caption sheet thereof;
10 that I then and there took down in Stenotype the
11 proceedings had; and that the foregoing is a full, true
12 and correct transcript of such Stenotype notes so made at
13 such time and place.

14 Given at my office in the City of
15 Jefferson, County of Cole, State of Missouri.

16

17 _____
18 Kellene K. Feddersen, RPR, CSR, CCR
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