

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

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|------------------------------------|---|-------------------------------------|
| Midwest Energy Consumers Group, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| vs. |) | <u>Case No. EC-2017-0107</u> |
| |) | |
| Great Plains Energy, Incorporated, |) | |
| |) | |
| Respondent. |) | |

STAFF’S RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Recommendation*, states as follows:

1. On May 31, 2016, Terry Bassham, CEO of Great Plains Energy, Inc. (“GPE”), advised the Commission, Staff and the Office of the Public Counsel (“OPC”) by an email, including an attached news release, that GPE and Westar Energy, Inc., had entered into an agreement for GPE to acquire Westar for approximately \$12.2 billion in cash, stock and assumed debt.¹ Mr. Bassham advised the Commission, Staff and OPC that the transaction was scheduled to close in the spring of 2017.²

2. On June 1, 2016, Staff responded to Mr. Bassham’s email by filing its *Motion to Open an Investigation*. The Commission granted Staff’s motion on June 8, 2016, opening Case No. EM-2016-0324.³ Staff filed its *Investigation Report*

¹ *In the Matter of Great Plains Energy, Inc.’s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324 (*Staff’s Investigation Report*, filed July 25, 2016), at p. 2 and Appendix 1 (“*Staff’s Investigation Report*”).

² *Id.*

³ *In the Matter of Great Plains Energy, Inc.’s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324 (*Order Granting Leave to File Reply Late, Granting Staff’s Motion to Open an Investigation, and Directing Filing*, issued June 8, 2016).

on July 25, 2016, as directed by the Commission in its order of June 8, 2016.⁴ The *Report* discussed various possible detriments to Missouri interests that might result from the proposed acquisition and explained Staff's legal theory supporting Commission jurisdiction over the proposed acquisition.⁵ The report did not discuss any benefits to Missouri interests that might result from the proposed acquisition, an omission that should not be interpreted as reflecting a Staff conclusion that there could be none.

3. About the time Staff filed its investigation report, it entered into discussions with GPE. In view of what it judged to be a quite significant litigation risk, Staff sought to avoid protracted litigation that might well be unsuccessful in establishing the Commission's jurisdiction over such acquisitions but nonetheless either would prevent GPE from successfully closing its acquisition of Westar or would permit the transaction to go forward unconditionally. Staff therefore determined that its best course was to obtain by negotiation the sort of conditions and concessions that it would have sought had GPE filed for authority in Missouri. Staff was successful in that effort and a ***Non-Unanimous Stipulation and Agreement*** was filed on October 12, 2016, in Case No. EE-2017-0113. For this reason, Staff did not file the complaint referenced in its ***Report***.

4. On October 11, 2016, the Midwest Energy Consumers Group ("MECG") filed complaints against Westar Energy, Inc. (Case No. EC-2017-0106) and Great Plains Energy, Inc. ("GPE"; Case No. EC-2017-0107). On November 22, MCG filed its *First Amended Complaint*.

⁴ ***Staff's Investigation Report***.

⁵ *Id.*, *passim*.

5. As it typically does in cases in which consumers file a complaint against a regulated utility,⁶ the Commission on October 12, 2016, ordered Staff to file a recommendation in each of these cases.⁷ Staff sought to be relieved of that obligation because these complaints involve sophisticated parties with abundant resources who are manifestly well able to present their legal arguments and supporting evidence before the Commission. Nonetheless, on November 17, 2016, the Commission denied Staff's request, saying:

Even though the stipulations and agreements appear to resolve Staff's concerns as to the effect of the transaction on Missouri ratepayers, as set forth in the investigatory report, and assuming arguendo that approving the stipulation and agreements would be in the public interest, the Commission must determine whether Great Plains violated the reorganization order by failing to seek the Commission's approval for the transaction. Staff's recommendation will be helpful in making that determination. In addition, as set forth above, the stipulations and agreements in the variance case are not binding on Staff. Therefore, the Commission will deny the motion.⁸

6. On October 28, 2016, the Commission issued its **Order Setting Procedural Conference and Directing Filing** of a procedural schedule by November 22, 2016.⁹

7. The gravamen of MCG's **Complaint** is that GPE, an electrical corporation under Missouri law,¹⁰ has, without authorization from this Commission, entered into an

⁶ The reason being that consumers generally lack both technical knowledge and financial resources and commonly must present their cases without the assistance of counsel.

⁷ **Midwest Energy Consumers Group, Complainant, v. Great Plains Energy, Inc., Respondent**, Case No. EC-2017-0107 (**Notice of Contested Case and Order Directing Filing**, issued October 12, 2016) p. 2.

⁸ **Midwest Energy Consumers Group, Complainant, v. Great Plains Energy, Inc., Respondent**, Case No. EC-2017-0107 (**Order Denying Staff's Motion to be Relieved from the Filing of a Recommendation**, issued November 17, 2016) p. 5.

⁹ The Commission, on November 14, 2016, rescheduled the procedural conference to November 22 and changed the date for Staff to file a proposed procedural schedule to November 29, 2016.

¹⁰ See **Staff's Investigation Report**, pp. 55-74, Staff's Memorandum of Law.

agreement to acquire Westar, which owns a subsidiary that allegedly owns a 40% share of a generating facility located in Missouri and which allegedly holds a certificate of convenience and necessity (“CCN”) from the Commission with respect to that generating plant. MCG charges that GPE has thereby violated the terms of the **First Amended Stipulation and Agreement** executed by GPE and approved by the Commission in the case in which Kansas City Power & Light Company (“KCP&L”) was permitted to reorganize as a holding company owning an electric utility operating company.¹¹ In that **First Amended Stipulation and Agreement**, GPE agreed as follows:

7. Prospective Merger Conditions

GPE agrees that it will not, directly or indirectly, acquire or merge with a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction. In addition, GPE agrees that it will not allow itself to be acquired by a public utility or the affiliate of a public utility, where such affiliate has a controlling interest in a public utility, unless GPE has requested prior approval for such a transaction from the Commission and the Commission has found that no detriment to the public would result from the transaction.¹²

8. In its **Answer**, filed on October 31, 2016, GPE denies that it is an electrical corporation under Missouri law and explains its theory that the **First Amended Stipulation and Agreement** necessarily applies only to acquisitions of Missouri-

¹¹ **Midwest Energy Consumers Group, Complainant, v. Great Plains Energy, Inc., Respondent**, Case No. EC-2017-0107 (**Complaint**, filed October 11, 2016) ¶¶ 7-15; and see **In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure**, Case No. EM-2001-464 (**First Amended Stipulation and Agreement**, filed July 9, 2001).

¹² **In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure**, Case No. EM-2001-464 (**First Amended Stipulation and Agreement**, filed July 9, 2001).

regulated utilities and the affiliates of Missouri-regulated utilities.¹³ Therefore, it moves for either dismissal of the **Complaint** or for summary determination.¹⁴

9. Staff has explained its theory of jurisdiction at length in its memorandum of law included in its **Investigation Report**.¹⁵ Rather than repeat that lengthy memorandum here, Staff incorporates it herein by reference. According to Staff's theory, GPE has violated § 393.190.2, RSMo., as well as the **First Amended Stipulation and Agreement** and the Commission's order approving it.¹⁶ MCG's **First Amended Complaint** also charges that GPE has violated the **First Amended Stipulation and Agreement** and the Commission's order approving it.¹⁷ The **First Amended Complaint**, therefore, is not subject to dismissal for failure to state a claim and GPE is not entitled to summary determination – unless, of course, Staff's theory of jurisdiction is incorrect.

10. Staff notes that it is difficult to predict what an appellate court would make of Staff's theory of jurisdiction. It is founded squarely on the plain language of the Public Service Commission Act,¹⁸ particularly the legislature's use of forms of the word "control" to characterize one of the relationships of an entity to electric plant and the

¹³ **Midwest Energy Consumers Group, Complainant, v. Great Plains Energy, Inc., Respondent**, Case No. EC-2017-0107 (**Answer and Affirmative Defenses of Great Plains Energy Incorporated**, filed October 31, 2016) pp. 2 and 4-6.

¹⁴ GPE has not yet answered the **First Amended Complaint**.

¹⁵ See **Staff's Investigation Report**, pp. 55-74, Staff's Memorandum of Law.

¹⁶ **In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure**, Case No. EM-2001-464 (**Order Approving Stipulation and Agreement and Closing Case**, issued August 15, 2001).

¹⁷ *Id.*

¹⁸ **Gash v. Lafayette County**, 245 S.W.3d 229, 232 (Mo. banc 2008), quoting **State ex rel. Burns v. Whittington**, 219 S.W.3d 224, 225 (Mo. banc 2007): "The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute."

sale of electric power that subject it to regulation.¹⁹ “Controlling” is different from “owning,” “leasing” and “operating” and must be construed to describe some relationship other than those described by the other listed verbs.²⁰ On the other hand, Staff’s theory requires recognition of a basis for regulation that has gone unnoticed for over a hundred years and which the Commission itself has, in past cases, denied.²¹ It was in view of these considerations that Staff determined that the most prudent course was to negotiate an acceptable agreement with GPE rather than to seek a litigated result.

11. Staff achieved a **Stipulation and Agreement** with GPE and its operating subsidiaries, KCP&L and KCP&L Greater Missouri Operations Company (“GMO”), which imposed various conditions upon those entities with respect to the Westar transaction.²² The Office of the Public Counsel (“OPC”) also reached an agreement with GPE and its operating subsidiaries that incorporated the **Staff Stipulation**.²³ The **OPC Stipulation** added additional conditions. The conditions set out in the two stipulations are intended to protect Missouri interests in the event that GPE’s acquisition of Westar is consummated.

¹⁹ **Spradlin v. City of Fulton**, 982 S.W.2d 255, 262 (Mo. banc 1998): “Traditional rules of statutory construction require every word of a legislative enactment be given meaning.” See §§ 386.020, (14) and (15), 386.250(1), RSMo.

²⁰ **BLACK’S LAW DICTIONARY**, *q.v.* (Minneapolis, MN: West, 7th ed., 1999). None of these words is listed as a synonym for any of the others.

²¹ **Foremost-McKesson, Inc. v. Davis**, 488 S.W.2d 193, 197 (Mo. banc 1972): “The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.”

²² **In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for a Variance from the Commission’s Affiliate Transactions Rule, 4 CSR 240-20.015**, Case No. EE-2017-0113 (**Stipulation and Agreement**, filed October 12, 2016). (Hereinafter “the **Staff Stipulation**”).

²³ **In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for a Variance from the Commission’s Affiliate Transactions Rule, 4 CSR 240-20.015**, Case No. EE-2017-0113 (**Stipulation and Agreement**, filed October 26, 2016). (Hereinafter “the **OPC Stipulation**”).

12. MECG objected to both the **Staff Stipulation** and the **OPC Stipulation**.²⁴

The Commission, in its order of November 17, 2016, determined that MCG's objections were effective under Rule 4 CSR 240-2.115(2)(D) to require the Commission to treat both stipulations as non-unanimous, saying: "[a] nonunanimous stipulation to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it."²⁵

13. Staff recommends that the Commission take up and approve the **Staff Stipulation** and the **OPC Stipulation** in order to preserve the negotiated conditions and concessions contained therein. Additionally, if the Commission determines after hearing that GPE violated § 393.190.2, RSMo., and/or the **First Amended Stipulation and Agreement** and the Commission's order approving it,²⁶ Staff recommends that there be no penalties.

WHEREFORE, Staff prays that the Commission will accept its **Recommendation**.

²⁴ *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for a Variance from the Commission's Affiliate Transactions Rule, 4 CSR 240-20.015*, Case No. EE-2017-0113 (*Objection to Stipulation and Request for Hearing of Midwest Energy Consumers Group*, filed October 18, 2016) and *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for a Variance from the Commission's Affiliate Transactions Rule, 4 CSR 240-20.015*, Case No. EE-2017-0113 (*Objection to Stipulation of Midwest Energy Consumers Group*, filed November 3, 2016).

²⁵ *Midwest Energy Consumers Group, Complainant, v. Great Plains Energy, Inc., Respondent*, Case No. EC-2017-0107 (*Order Finding that Stipulations and Agreement Have Been Objected to and Directing the Parties to File a Proposed Procedural Schedule*, issued November 17, 2016) pp. 2-3.

²⁶ *In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure*, Case No. EM-2001-464 (*Order Approving Stipulation and Agreement and Closing Case*, issued August 15, 2001).

Respectfully submitted,

/s/ Kevin A. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on all counsel of record this 22nd day of November, 2016.

/s/ Kevin A. Thompson