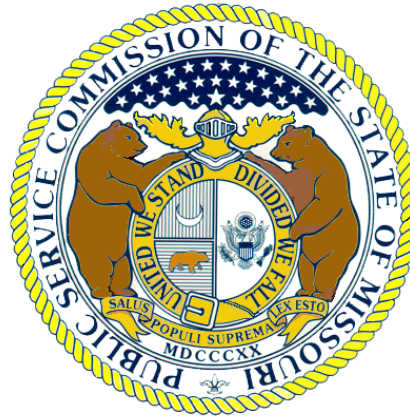


**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 22<sup>nd</sup> day of February, 2017.



Midwest Energy Consumers Group, )  
 )  
Complainant, )  
v. )  
 )  
Great Plains Energy Incorporated, )  
 )  
Respondent. )

File No. EC-2017-0107

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**REPORT AND ORDER**

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**Issue Date: February 22**

**Effective Date: March 4, 2017**

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

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

**REPORT AND ORDER**

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**SENIOR REGULATORY LAW JUDGE: Kim S. Burton**

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

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

**REPORT AND ORDER**

Issue Date: February 22, 2017

Effective Date: March 4, 2017

**PROCEDURAL HISTORY**

On October 11, 2016, the Midwest Energy Consumers Group (“MECG”) filed a complaint with the Missouri Public Service Commission (the “Commission”) against Great Plains Energy Incorporated alleging that the holding company is violating the Commission’s *Order Approving Stipulation and Agreement and Closing Case*, in Case No. EM-2001-464. The Commission issued a *Notice of Contested Case and Order Directing Filing*. Great Plains Energy Incorporated submitted an answer and a motion to dismiss. The Consumers Council of Missouri filed an uncontested application to intervene, which was granted by the Commission on November 9, 2016. On December 21, 2016, the Commission conducted oral arguments on Great Plains Energy Incorporated’s motion to dismiss. The Midwest Energy Consumers Group filed its

*Second Amended Complaint* (hereinafter, the “Complaint”) on December 28, 2016.<sup>1</sup> On January 4, 2017, the Commission issued its *Order Denying Motion to Dismiss and Scheduling Evidentiary Hearing*, which directed Great Plains Energy Incorporated to file an answer to the Complaint and set a February 1 evidentiary hearing date.<sup>2</sup> Great Plains filed its *Answer to Second Amended Complaint and Affirmative Defenses of Great Plains Energy Incorporated*.<sup>3</sup>

On January 18, 2017, MEEG, Great Plains Energy Incorporated, the Staff of the Missouri Public Service Commission (“the Commission’s Staff”), and Consumers Council of Missouri submitted a *Joint Stipulation of Facts and List of Issues, Request to Take Official Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment* (the “Joint Motion”).<sup>4</sup> In the Joint Motion, the signatories stated that based on stipulated facts, they did not intend to call any witnesses or conduct any cross-examination. The four signatories indicated that the Commission could determine the legal questions in the Complaint based on the stipulated facts and matters identified by the parties for official notice by the Commission. In the Joint Motion, the parties also waived their right under Section 386.390, RSMo 2000, to an evidentiary hearing and requested expedited treatment.

Since the Office of the Public Counsel is automatically a party in any action before the Commission,<sup>5</sup> an order was issued setting a deadline for the Public Counsel to submit a response to the Joint Motion. The Commission also set a deadline for

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<sup>1</sup> EFIS Item No. 26.

<sup>2</sup> EFIS Item No. 27.

<sup>3</sup> EFIS Item No. 28, *Answer to Second Amended Complaint and Affirmative Defenses of Great Plains Energy Incorporated*.

<sup>4</sup> EFIS Item No. 29.

<sup>5</sup> 4 CSR 240-2.010(10).

parties to file objections to the admission of the documents identified for official notice in the Joint Motion as exhibits in the record.

On January 20, 2017, the Office of the Public Counsel filed a response stating that it did not object to the request to cancel the hearing set for February 1, 2017. No objections to the admission of identified documents as exhibits were received. The Commission canceled the previously scheduled hearing set for February 1, 2017,<sup>6</sup> admitted exhibits into the record, and set a briefing schedule for the parties.<sup>7</sup> Great Plains Energy Incorporated, MEGG, and the Commission's Staff filed their initial briefs on January 31, 2017. That same day, Spire, Inc. filed its *Petition of Spire, Inc. for Leave to File Amicus Curiae Brief*.<sup>8</sup> MEGG and the Commission's Staff filed reply briefs on February 6, 2017.<sup>9</sup> The Commission issued its *Order Granting Petition for Leave to File Amicus Curiae Brief* on February 8, 2017.<sup>10</sup>

The case was submitted on stipulated facts and briefs.

## **FINDINGS OF FACT**

1. Kansas City Power & Light Company ("KCPL") is a vertically integrated public utility that generates, transmits, and sells electrical energy to residential customers in Missouri.<sup>11</sup>

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<sup>6</sup> EFIS Item No. 33, Order Canceling Hearing.

<sup>7</sup> EFIS Item No. 34, Order Admitting Exhibits and Setting Briefing Schedule.

<sup>8</sup> EFIS Item No. 44.

<sup>9</sup> EFIS Items No. 47 and 48.

<sup>10</sup> EFIS Item No. 50.

<sup>11</sup> Exhibit 2, pg. 5.

2. In 2001, KCPL filed an application with the Commission seeking approval to reorganize into a holding company structure, with Great Plains Energy, Incorporated (“GPE”) becoming the new holding company, and KCPL existing as its subsidiary.<sup>12</sup>

3. The Commission conducted two on-the-record hearings on KCPL’s uncontested application.<sup>13</sup> During the July 5, 2001 hearing, representatives for KCPL and GPE testified regarding KCPL’s proposed reorganization.<sup>14</sup> Commissioners also questioned attorneys for the parties about the terms of the *First Amended Stipulation and Agreement* (the “2001 Agreement”), a settlement agreement reached by the Commission’s Staff, the Office of the Public Counsel (“OPC”), GPE, KCPL and Great Plains Power, Incorporated.<sup>15</sup>

4. The 2001 Agreement included a section captioned “Prospective Merger Conditions” (hereinafter, “Section 7”), which stated the following:

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 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.<sup>16</sup>

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<sup>12</sup> Case No. EM-2001-464.

<sup>13</sup> Exhibits 3 and 4.

<sup>14</sup> Exhibit 3.

<sup>15</sup> Exhibit 1. Other parties to the case did not joint in signing the 2001 Agreement, but did not object to its approval either.

<sup>16</sup> Exhibit 1.

5. During the July 5, 2001 hearing, the following interaction occurred between Commissioner Connie Murray, James Fischer, Counsel for KCPL and GPE, and Ruth O'Neill, Counsel for OPC:

*Commissioner Murray:* All right. My last question is somewhat related, I suppose. It's Section 7, prospective merger conditions where GPE agrees, and I would like to know if the parties believe that that gives the Commission jurisdiction over an unregulated holding company that it would otherwise not have?

*Mr. Fischer:* Your Honor, from the Company's perspective, I would say it's inconsistent, in my opinion, with your holdings on other holding company mergers of parents. However, again, as a negotiated item, in order to get a stipulation between the Staff, the Public Counsel and the Company, we have agreed to this provision.

...

*Commissioner Murray:* Before you respond, Ms. O'Neill, I just have a quick follow-up for Mr. Fischer. Who has the authority to bind GPE?

*Mr. Fischer:* Your Honor, I failed to also enter my appearance on behalf of GPE. I'm speaking on behalf of the Great Plains Energy Company as well.

*Commissioner Murray:* Thank you. Go ahead, Ms. O'Neill.

*Ms. O'Neill:* Yes. We recognize that the Commission has taken certain positions regarding jurisdiction on some other cases. However, we do believe that the Commission does have the ability to exercise jurisdiction over matters relating to public utilities....We believe it is appropriate, however, to include this term within this agreement. We believe that GPE, who is a signatory to this agreement, can agree to be bound on those matters which are significantly related to Commission jurisdiction and oversight to not oppose our request for jurisdiction and not impede our ability to challenge any claim that there isn't jurisdiction.<sup>17</sup>

6. In its July 31, 2001 *Order Approving Stipulation and Agreement and Closing File*, the Commission approved KCPL's application to reorganize and establish GPE as a publicly traded holding company, with KCPL becoming a wholly-owned

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<sup>17</sup> Exhibit 3, pg. 33, ln. 14 - pg. 35, ln. 6.



subsidiary of GPE.<sup>18</sup> The Commission also approved the 2001 Agreement<sup>19</sup> and directed KCPL and GPE to comply with its terms. The *Order Approving Stipulation and Agreement and Closing File* was not appealed.<sup>20</sup>

7. Presently, GPE is a Missouri corporation and the parent holding company for the stock of Missouri-based public utilities KCPL and KCP&L Greater Missouri Operations Company (“GMO”).<sup>21</sup>

8. On May 29, 2016, GPE entered into an *Agreement and Plan of Merger*, whereby GPE will acquire all of the capital stock of Westar Energy, Inc. (“Westar”) in a transaction valued at approximately \$12.2 billion, which is expected to close in the Spring of 2017.<sup>22</sup>

9. Westar is a Kansas corporation headquartered in Topeka, Kansas. Westar is authorized to conduct business by the Kansas Corporation Commission as an electric public utility in the State of Kansas.<sup>23</sup> Westar is not a Missouri-based public utility, nor is it regulated by the Missouri Public Service Commission.<sup>24</sup>

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<sup>18</sup> Exhibit 2, Order Approving Stipulation and Agreement and Closing File in Case No. EM-2001-464.

<sup>19</sup> Exhibit 1.

<sup>20</sup> Case No. EM-2001-464.

<sup>21</sup> EFIS Item No. 28, Answer to Second Amended Complaint and Affirmative Defenses of Great Plains Energy Incorporated, pg 2.

<sup>22</sup> EFIS Item No.29; Joint Stipulation of Facts and List of Issues, Request to Take Office Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment. ¶1. See also, EFIS Item No. 15; Motion to Dismiss of Great Plains Energy Incorporated and Suggestions in Support. Statement of Facts, pg. 3.

<sup>23</sup> EFIS Item No. 28, Answer to Second Amended Complaint and Affirmative Defenses of Great Plains Energy Incorporated, pg 2.

<sup>24</sup> EFIS Item No. 29; Joint Stipulation of Facts and List of Issues, Request to Take Office Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment. ¶ 2 and 3. Although Westar is not a public utility regulated by this Commission, it does own 100% of the stock of Westar Generating, Inc., which in turn owns an undivided 40% share of the State Line Combined Cycle Generating Facility located within the State of Missouri near Joplin. This Commission granted Westar Generating, Inc., a Certificate of Convenience and Necessity for the State Line Combined Cycle Generating Facility. However, Westar Generating, Inc. does not sell electricity to or provide any service to a member of the public in Missouri. See also, EFIS Item No. 28, Answer to Second Amended Complaint and Affirmative Defenses of Great Plains Energy Incorporated, pg 1.

10. On May 31, 2016, GPE's President and Chief Executive Officer Terry Bassham, notified the Commission and OPC via email of GPE's *Agreement and Plan of Merger*. Mr. Bassham informed the Commission that GPE did not believe the proposed merger with Westar was subject to the Commission's approval since it would occur at the parent corporation/holding company level by entities that are not electrical corporations in Missouri subject to the Commission's jurisdiction.<sup>25</sup>

11. Midwest Energy Consumers Group ("MECG") is an incorporated entity that represents large commercial and industrial power customers.<sup>26</sup> MECG filed a Complaint alleging GPE's failure to seek the Commission's approval of the Westar merger is a violation of the terms of the 2001 Agreement.<sup>27</sup>

12. As of the time of this order, GPE has not sought the Commission's approval to acquire Westar.<sup>28</sup>

### **CONCLUSIONS OF LAW**

Based in Topeka, Kansas, Westar is a public utility that provides electricity to customers in the State of Kansas. The parties agree that while Westar is a Kansas-based public utility, subject to the oversight of the Kansas Corporation Commission,<sup>29</sup> Westar is not regulated by this Commission. MECG's Complaint asserts that under the terms of the 2001 Agreement, GPE is required to obtain the Commission's approval

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<sup>25</sup> EFIS Item No. 29; Joint Stipulation of Facts and List of Issues, Request to Take Office Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment, ¶9.

<sup>26</sup> EFIS Item No. 26.

<sup>27</sup> The Complaint was later amended to the Second Amended Complaint on December 28, 2016, which will be referred to as the "Complaint" throughout this order. EFIS Item No. 26.

<sup>28</sup> See EFIS Item No.29;Joint Stipulation of Facts and List of Issues, Request to Take Office Notice, Motion to Cancel Hearing and Oral Argument and to Establish Briefing Schedule, and Motion for Expedited Treatment, ¶10.

<sup>29</sup> The Kansas Corporation Commission is the state agency tasked with regulating public utilities in the State of Kansas.

before it can acquire Westar (the “Westar Merger”). GPE, on the other hand, maintains that MECG’s position would improperly expand the Commission’s jurisdiction to include the acquisition of non-Missouri regulated utilities by Missouri-based holding companies. This, GPE contends, would grant the Commission a power never contemplated by Missouri law. For the reasons set forth below, the Commission disagrees with GPE’s position.

### ***Commission’s Jurisdiction to Consider Complaint***

At its most basic level, this case is a complaint alleging failure to comply with a prior Commission order. The Commission is an agency created by the legislature.<sup>30</sup> It possesses only those powers expressly granted or necessarily implied by statute.<sup>31</sup> Section 386.390.1, RSMo,<sup>32</sup> authorizes a complaint to be made by any person, corporation, or commercial association that sets forth any act done or omitted to be done by a corporation, person, or public utility, in violation of any law or order of the Commission.<sup>33</sup> MECG is invoking the Commission’s jurisdiction under this general complaint statute to determine if a violation of a previously issued Commission order occurred.

MECG argues that GPE violated the Commission’s order directing GPE to comply with the terms of the 2001 Agreement.<sup>34</sup> More specifically, MECG argues that GPE violated and continues to violate the conditions set in Section 7 by failing to file an

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<sup>30</sup> See Section 386.010, Public Service Commission Law.

<sup>31</sup> *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943).

<sup>32</sup> All statutory references are to the 2000 Missouri Revised Statutes, as cumulatively supplemented.

<sup>33</sup> Section 386.390.1, RSMo. All statutory references are to the 2000 Missouri Revised Statutes, as cumulatively supplemented.

<sup>34</sup> Exhibit 2. July 31, 2001 Order Approving Stipulation and Agreement and Closing File in Case No. EM-2001-464

application for the Commission's approval of the Westar Merger. By statute, the Commission is authorized to hear MECG's Complaint.

For this reason, the Commission will determine if, as asserted by the Complaint, GPE violated the Commission's directive to comply with the terms of the 2001 Agreement by failing to file an application for Commission-approval of the Westar Merger. As the complainant, MECG bears the burden of proof.<sup>35</sup>

### ***Commission's Authority to Approve KCPL's Reorganization***

Before determining what obligations exist under the terms of the 2001 Agreement, we must first consider the Commission's authority to order GPE's compliance. GPE correctly states that the Commission's jurisdiction cannot exceed what is statutorily authorized and that subject matter jurisdiction cannot be conferred by consent or agreement of the parties.<sup>36</sup> Simply put, the inclusion of a condition in an agreement does not in and of itself create within the Commission enforcement authority.<sup>37</sup>

Absent statutory authority to place conditions on GPE's potential merger actions, GPE's prior consent to Section 7 would be unenforceable by the Commission.<sup>38</sup> However, as MECG correctly points out, the Commission has the requisite authority to enforce Section 7 through its ability to set conditions on the reorganization of KCPL in 2001.

It is undisputed that KCPL was (and remains) an electrical corporation regulated as a public utility. In 2001, when KCPL wanted to become the subsidiary of a newly

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<sup>35</sup> *State ex rel. GS Technologies Operating Co., v. Public Service Comm'n*, 116 S.W.3d 680, 693 (Mo.App. 2003).

<sup>36</sup> *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69 (Mo. 1982).

<sup>37</sup> *Livingston Manor, Inc. v. Department of Social Services*, 809 S.W.2d 153, 156 (Mo.App. W.D. 1991).

<sup>38</sup> *Tetzner v. Department of Social Services*, 446 S.W.3d 689, 692 (Mo.App. W.D. 2014).

formed holding company, it was statutorily required to first obtain the Commission's consent. Section 393.250, RSMo, states as follows:

1. Reorganizations of...electrical corporations...shall be subject to the supervision and control of the commission, and no such reorganization shall be had without the authorization of the commission.
- ...
3. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the Commission. **The Commission may by its order impose such condition or conditions as it may deem reasonable and necessary.** (Emphasis added.)

The Commission is tasked with acting in the public interest.<sup>39</sup> The Commission's ability to impose "reasonable and necessary" conditions on the reorganization of an electrical corporation was the Legislature's way of ensuring the Commission could accomplish that task. Reorganizing the corporate structure of a public utility can impact the debt structure and cost of capital for the resulting companies well past the closing of the transaction. Review of proposed public utility reorganizations by the Commission is needed to minimize the potential risks to both present and future ratepayers. GPE does not challenge the Commission's ability to set "reasonable and necessary" conditions. GPE does, however, argue that the Commission's authority under Section 393.250 can never extend to an electrical corporation located outside of Missouri. GPE's argument confuses the Commission's authority over KCPL – the electrical corporation at issue in the 2001 reorganization case – with authority over Westar. Ultimately, the Commission's ability to enforce the terms of the 2001 Agreement does not depend on the location of

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<sup>39</sup> *State ex rel. Gulf Transport Co. v. Public Service Com'n*, 658 S.W.2d 448, 456 (Mo.App. 1983).

GPE's acquisition, but rather, whether the conditions included in Section 7 were "reasonable and necessary" under Section 393.250.3.

When KCPL sought Commission approval to adjust its corporate structure, it was statutorily obligated to seek approval for the type of merger currently contemplated by GPE.<sup>40</sup> Setting a requirement to obtain Commission approval on prospective mergers was both a reasonable and necessary way of ensuring that KCPL – through its future iterations – would not evade the level of Commission scrutiny mandated by Section 393.190, RSMo. It was a reasonable and necessary way to protect the ratepaying public from harmful acquisitions at the holding company level.<sup>41</sup>

The Commission cannot enforce, construe or annul contracts,<sup>42</sup> nor can it declare or enforce principles of law or equity.<sup>43</sup> However, the "Commission is entitled to interpret its own orders and to ascribe to them a proper meaning and, in so doing, the Commission does not act judicially but as a fact-finding agency."<sup>44</sup> Section 7 was a Section 393.250.3 condition agreed to by the parties and fixed by the Commission before approval was granted for KCPL's reorganization in 2001. Therefore, the Commission is not exceeding its authority by enforcing the reasonable and necessary conditions of Section 7.

### ***Principles of Contract Construction Apply to the 2001 Agreement***

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<sup>40</sup> Section 393.190, RSMo, requires an electrical corporation to secure the Commission's authority before it can directly or indirectly merge or consolidate with any other corporation, person or public utility.

<sup>41</sup> Under Section 386.510, RSMo 2000, parties at the time the July 31, 2001 Order Approving Stipulation and Agreement and Closing File in Case No. EM-2001-464 was issued were able to request a rehearing before appealing the order. However, no parties requested a rehearing or appealed that Commission order.

<sup>42</sup> *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971).

<sup>43</sup> *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 547 (Mo. App. 2008).

<sup>44</sup> *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980).

In the 2001 Agreement, GPE agreed in Section 7 that it would not directly or indirectly acquire or merge with a public utility or the affiliate of a public utility unless it had requested prior approval for the transaction from the Commission. Since the Commission has the statutory authority to enforce the 2001 Agreement, the Commission must determine if the Westar Merger is subject to the conditions set in Section 7. It is undisputed that GPE has yet to file an application for Commission-approval of the Westar Merger.

The parties disagree on the meaning of the term “public utility” within Section 7. MECG asserts that, as used in the agreement, “public utility” is not limited to entities located within Missouri. Therefore, Westar is considered a public utility for which GPE must seek Commission approval before acquiring. GPE contends that, as used in the 2001 Agreement, the term “public utility” can only mean a public utility based in Missouri, since by statute, the Commission’s authority only applies to a public utility within the state.

GPE relies on the definitions used in the Public Service Commission Law, specifically, Section 386.020. GPE contends that even though the term “public utility” is not defined in the 2001 Agreement, the only reference to any state law in the agreement is to Missouri law. This, according to GPE, means that “public utility” can only be interpreted as it is meant in Missouri statutes. Specifically, the Commission, as a creature of statute, only has jurisdiction over “the manufacture, sale, or distribution of...electricity for light, heat and power, *within the state*, and to persons or corporations owning, leasing, operating, or controlling the same....” (Emphasis added).<sup>45</sup> However,

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<sup>45</sup> Section 386.250(1), RSMo.

settlement agreements are not akin to rules or regulations, which routinely rely on statutes to define terms or phrases.<sup>46</sup> Unless an agreement expressly defines the meaning of a term, the Commission will use the principles of contract law to interpret the agreement's meaning.<sup>47</sup>

Under principles of contract construction, the Commission first examines the plain language of the agreement to determine whether it is clear or if an ambiguity exists. When contract language is clear, we discern intent from the document alone.<sup>48</sup> The 2001 Agreement does not state that as used in the agreement, terms would have the same meaning as they do under Missouri law. GPE's argument that the statutory definition of "public utility" should apply ignores the cardinal rule for interpreting an agreement – to ascertain and give effect to the parties' intentions.<sup>49</sup> This is accomplished by giving words their plain, ordinary, and usual meaning.<sup>50</sup> That is, the meaning that a person of average intelligence, knowledge, and experience would deem reasonable.<sup>51</sup>

Webster's Third New International Dictionary defines "public utility" as "a business organization deemed by law to be vested with public interest usually because of monopoly privileges and so subject to public regulation such as fixing of rates, standards of service and provision of facilities."<sup>52</sup> The term "public utility" does not

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<sup>46</sup> *Union Elec. Co. v. Dir. Of Revenue*, 425 S.W.3d 118 (Mo.banc 2014) Stating that terms in rules and regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes.

<sup>47</sup> *Withers v. City of Lake St. Louis*, 318 S.W.3d 256, 261(Mo.App. E.D. 2010).

<sup>48</sup> *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973).

<sup>49</sup> *Park Lane Medical Center of Kansas City, Inc. v. Blue Cross/Blue Shield of Kansas City*, 809 S.W.2d 721 (Mo.App.W.D. 1991).

<sup>50</sup> *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013).

<sup>51</sup> *Farmland Industries, Inc. v. Republic Insurance Company*, 941 S.W.2d 505, 508 (Mo. banc 1997).

<sup>52</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (1986).



distinguish entities based on locale. Westar is a public utility under the laws of the State of Kansas. Consequently, it is reasonable to conclude that, by its plain language, the term “public utility” clearly and unambiguously encompasses all public utilities, including those in the State of Kansas. However, were the Commission to conclude an ambiguity exists, GPE’s argument would still fail.

Unless the context of an agreement makes clear that a technical or special meaning was intended or the words have a special meaning in the parties’ trade or business, the Commission interprets the words used as having their common and ordinary meaning.<sup>53</sup> GPE may argue that the term “public utility” *did* have a technical or special meaning to the parties who drafted the 2001 Agreement, since the parties were aware of the statutory restriction placed on the Commission’s jurisdiction as being over the sale or distribution of electricity within the state, and to persons or corporations owning, leasing, operating, or controlling the same. However, GPE’s argument would fail for two reasons. First, it is not supported by the stated intentions of the parties at the time the agreement was entered. Second, it would render the Section 7 condition at issue meaningless.

When interpreting the 2001 Agreement, the Commission will consider what the parties were attempting to accomplish.<sup>54</sup> GPE argues that at the time the agreement was created the parties intended for the Section 7 condition to only apply to Missouri public utilities. However, this contradicts the statements made at the on-the-record hearing before the Commission. In the reorganization case, counsel for KCPL and GPE acknowledged that the Commission would maintain jurisdiction over prospective

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<sup>53</sup> *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859-60 (Mo. banc 2006).

<sup>54</sup> *Glass v. Mancuso*, 444 S.W.2d 467 (Mo. 1969).

mergers involving the holding company and a public utility.<sup>55</sup> Attorneys for Staff and the Office of the Public Counsel agreed with that pronouncement. Normally, unsworn statements by counsel are not evidence of the facts asserted, unless the facts are conceded to be true by other parties.<sup>56</sup> Counsel for OPC and Staff did not disagree on the meaning of Section 7. As counsel for KCPL and GPE admitted, “as a negotiated item, in order to get a stipulation between the Staff, the Public Counsel and the Company, we have agreed to this provision.”<sup>57</sup>

In circumstances such as these, where the parties are disputing the terms of a settlement agreement, the statements by counsel for KCPL and GPE regarding the meaning of Section 7 and why it was included in the 2001 Agreement establishes the intent of the parties when drafting the agreement. Therefore, it weakens the credibility of GPE’s current claims that the term “public utility” was never meant to apply to entities outside of Missouri, because at the time of the agreement, GPE’s attorney acknowledged it was a condition negotiated by the parties for settlement purposes.

Furthermore, Section 393.190.1 already requires a regulated electrical corporation obtain the Commission’s approval before selling, transferring, or merging its system with any other corporation, person or public utility.<sup>58</sup> This statute grants the Commission authority to review the merger of any Missouri regulated electrical

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<sup>55</sup> Exhibit 3, pg. 33, ln. 14 - pg. 35, ln. 6.

<sup>56</sup> *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo.App. S.D. 1997).

<sup>57</sup> Staff’s brief also makes a credible equitable estoppel argument, based on the reliance of the parties in the 2001 KCPL reorganization case on the statements of KCPL, GPE and their representatives. There are three elements to equitable estoppel: an admission, statement, or act inconsistent to claim afterwards asserted; action by other party in reliance upon such admission, statement or act; and injury to that other party as result of allowing first party to contradict admission, statement, or act. *Pinnell v. Jacobs*. 873 S.W.2d 925, 927 (Mo.App. E.D. 1994).

<sup>58</sup> Section 393.190.2 also requires Commission approval before an electrical corporation directly or indirectly acquires the stock or bond of other corporations engaged in the same or similar business. The statutory requirement to obtain Commission approval also applies to a gas corporation, water corporation, and sewer corporation.

corporation with GPE. GPE's interpretation of Section 7 - that it only applies to Missouri-based public utilities - would merely result in a duplication of the Commission review for a merger transaction under Section 393.190. It is unreasonable to assume the parties that negotiated Section 7 only intended for GPE to replicate what is already statutorily required, Commission approval for the merger of GPE and a Missouri-based public utility.<sup>59</sup> The terms of the 2001 Agreement should be construed to avoid a result that renders terms meaningless.<sup>60</sup> For this reason, GPE's arguments are not persuasive.

*Prior Commission Decisions Concerning Public Utility Holding Companies*

GPE points out that, in the past, the Commission has consistently found that it does not have jurisdiction over transactions at the holding company level. Even if true, it has no import in this case. The manner in which the Commission has in the past or may in the future handle holding company merger cases is not relevant to the specific facts before us.

Moreover, the examples referenced by GPE in its *Initial Brief* are not comparable to the facts presented here. GPE cites cases where the Commission stated that nothing in the statutes conferred jurisdiction over the merger of two non-regulated parent corporations.<sup>61</sup> The current case is distinguishable from those examples because this dispute involves the Commission's authority to enforce the terms of a prior Commission order and a settlement agreement in a reorganization case where Section 393.250 required Commission approval. For reasons already discussed, the Commission does have statutory authority to enforce its prior orders and the 2001 Agreement.

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<sup>59</sup> Section 393.190, RSMo.

<sup>60</sup> *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

<sup>61</sup> See Initial Brief of Great Plains Energy Incorporated, pg. 10.

GPE is the holding company for two Missouri public utilities, KCPL and GMO. An acquisition of the magnitude of the Westar Merger may have far-reaching financial ramifications on current and future customers of both KCPL and GMO. The merger scenario at issue is the type of transaction anticipated by Section 7 for Commission review.

### ***Public Policy***

GPE's position is troublesome from a public policy perspective. At the time of the 2001 Agreement, the Commission and the parties relied on KCPL's and GPE's assurances that Section 7 authorized the Commission's oversight over the future holding company. The Commission ordered the parties to comply with the terms of the agreement. Were the Commission to agree with GPE's analysis, it would render the terms of a negotiated stipulation and agreement meaningless and unenforceable; a result that should be avoided. For public policy reasons, all sides have a vested interest in maintaining trust in the settlement process. Parties must be confident that when they enter into a settlement agreement, each party can be relied upon to comply with the terms included, and that the Commission will indeed enforce all conditions. Should trust in the settlement process falter, the ultimate victims will be the ratepayers who will be forced to pay for the resulting lengthy litigation.

### **Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties. Applying law to the facts in reaching its conclusion, the Commission finds that based on competent and substantial evidence, MECG met its burden of proof. GPE violated the terms of the 2001 Agreement and the Commission

order approving the 2001 Agreement by failing to seek Commission approval for the Westar Merger.

GPE did submit a joint application for a variance from the Commission's affiliated transactions rule.<sup>62</sup> However, that filing is not sufficient to meet the public detriment review required by Section 7. The public detriment standard is higher than the "for good-cause" showing required before the granting of a variance from a Commission rule. Moreover, in the variance case, GPE and its subsidiaries KCPL and GMO request the regulatory restrictions on transactions with Westar be waived *after* Westar becomes an affiliate. This would not permit the Commission to evaluate the potential public detriment before the merger is authorized. It would only allow the Commission to grant relief after the Westar Merger is a *fait accompli*.

The Commission will direct GPE to comply with the terms of Section 7 of the 2001 Agreement and file an application for prior approval of the Westar Merger, requesting the Commission's determination that the Westar Merger is not detrimental to the public interest.

The purpose of this decision is not to impede GPE's potential merger, which is expected to occur in the Spring of 2017.<sup>63</sup> The parties requested an expeditious determination on the Complaint.<sup>64</sup> For this reason, the Commission will allow this order to become effective in less than thirty days. This will allow time for GPE to make the necessary filing, and after proper notice is given, a hearing can be held promptly.

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<sup>62</sup> File No. EE-2017-0113; 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.

<sup>63</sup> EFIS Item No. 7; Motion to Dismiss of Great Plains Energy Incorporated and Suggestions in Support, Statement of Facts.

<sup>64</sup> EFIS Item No. 15; Proposed Procedural Schedule.

**THE COMMISSION ORDERS THAT:**

1. The Commission finds that GPE is in violation of the Commission's July 31, 2001 *Order Approving Stipulation and Agreement and Closing File*, issued in Case No. EM-2001-464.

2. No later than March 4, 2017, GPE shall file an application for the Commission's approval of the *Agreement and Plan of Merger* and a determination on whether the Westar Merger is detrimental to the public interest

3. This order shall go into effect on March 4, 2017.

**BY THE COMMISSION**



A handwritten signature in black ink that reads "Morris L. Woodruff". The signature is written in a cursive style.

Morris L. Woodruff  
Secretary

Hall, Chm., Stoll, Kenney, Rupp, and  
Coleman, CC., concur.

Burton, Senior Regulatory Law Judge.

**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

**WITNESS** my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 22<sup>nd</sup> day of February 2017.



  
Morris L. Woodruff  
Secretary

**MISSOURI PUBLIC SERVICE COMMISSION**

**February 22, 2017**

**File/Case No. EC-2017-0107**

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**Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).**

*Sincerely,*

  
**Morris L. Woodruff**  
**Secretary**

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Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.