

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

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

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

**STAFF’S REPLY BRIEF**

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

**INTRODUCTION:**

Pursuant to the procedural schedule set by the Commission, initial briefs were filed by Complainant MCEG, Staff, Respondent GPE, and Amicus Spire.

**MECG:**

MECG’s initial brief makes many of the same arguments as does Staff’s: the purpose of § II(7) of the *First Amended Stipulation and Agreement* is to ensure Commission authority over GPE’s acquisition behavior;<sup>1</sup> KCPL/GPE’s witnesses assured the Commission of as much at the hearing;<sup>2</sup> the same is demonstrated by the fact that § II(7) is unnecessary in the case of acquisitions of Missouri public utilities;<sup>3</sup> § II(7) is not limited to Missouri acquisitions as is clear from the absence of the word

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<sup>1</sup> *MECG Initial Brief*, p. 4.

<sup>2</sup> *Id.*, pp. 6-7.

<sup>3</sup> *Id.*, p. 7.

“Missouri” from its language.<sup>4</sup> Unlike Staff, MECG also makes the argument that Westar is the affiliate of a public utility through its ownership of WGI, which has a CCN from this Commission and owns a share of the Stateline Generating Station near Joplin.<sup>5</sup>

**GPE:**

GPE’s initial brief contends that the Commission has no jurisdiction over GPE, or over Westar, or over the acquisition of Westar by GPE.<sup>6</sup> GPE asserts that the phrase “public utility” as used in § II(7) of the *First Amended Stipulation and Agreement* “can only be interpreted as it is defined under Missouri law.”<sup>7</sup> GPE goes on to assert that neither Westar nor WGI are public utilities for the purpose of Missouri law and are thus not within the jurisdiction of this Commission, which is limited to “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>8</sup> GPE summarizes its argument:

Because Westar does not own “electric plant” that is “devoted to a public use” in Missouri, it is not “a public utility within the meaning of the Public Service Commission Act.” ***State ex rel. M.O. Danciger & Co. v. PSC***, 205 S.W. 36, 40 (Mo. 1918). WGI is also not a Missouri public utility because it does not sell electricity or provide any service to a member of the public in Missouri. Its operations are not “devoted to a public use,” and it is not a “public utility” under the Public Service Commission Act. *Id.*<sup>9</sup>

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<sup>4</sup> *Id.*, pp. 8-9.

<sup>5</sup> *Id.*, pp. 9-11.

<sup>6</sup> *GPE Initial Brief*, pp. 1-2.

<sup>7</sup> *Id.*, p. 5.

<sup>8</sup> *Id.*, quoting portions of § 386.250(1), RSMo.

<sup>9</sup> *Id.*, p. 6.

What about § II(7)? GPE explains that, not only does “public utility” in § II(7) **not** refer to Westar, but even if it did, it would be ineffective because the Commission’s jurisdiction cannot be expanded by “consent or agreement of the parties.”<sup>10</sup> GPE repeats its prior explanation that Commission jurisdiction is limited to utility activities “within the state” and that Westar and WGI are not “public utilities” for purposes of Missouri law, particularly because they do not hold themselves out as willing to serve the Missouri public.<sup>11</sup> GPE next reviews the transcript of the on-the-record presentation held by the Commission when it was considering the *First Amended Stipulation and Agreement*, at which Commissioner Connie Murray inquired in a straightforward manner as to whether § II(7) would give the Commission jurisdiction over the holding company that it would otherwise lack and counsel for KCPL/GPE, OPC and (sadly!) Staff all mumbled non-committal and unhelpful responses.<sup>12</sup> GPE finishes its initial brief by reciting a list of cases in which the Commission has stated that it lacks jurisdiction over public utility holding companies.<sup>13</sup>

**Spire:**

Amicus Spire addressed the questions posed by the list of issues in its initial brief:

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<sup>10</sup> *Id.*, p. 7; quoting *Livingston Manor, Inc., v. Department of Social Services*, 809 S.W.2d 153, 156 (Mo. App., W.D. 1991). Note that the cited case involves DOSS, not the PSC.

<sup>11</sup> *Id.*, 7-8; relying on *State ex rel. M.O. Danciger & Co. v. PSC*, 205 S.W. 36, 40 (Mo. 1918).

<sup>12</sup> *Id.*, pp. 9-10.

<sup>13</sup> *Id.*, pp. 10-12.

- What is the meaning of the phrase “public utility” in § II(7) of the *First Amended Stipulation and Agreement*? Spire responds that it is the same meaning it has in § 386.020.<sup>14</sup>
- Does the *First Amended Stipulation and Agreement* apply to GPE’s acquisition of Westar? “No,” Spire responds. “Those who argue otherwise must rely on an unsustainable and wholly unreasonable construction of the law and the 2001 GPE Stipulation.”<sup>15</sup>
- Is GPE required to obtain Commission approval of its proposal to acquire Westar? Again, Spire responds “no.” “GPE is not required to obtain Commission approval for its proposal to acquire Westar because the Commission does not have the statutory power or jurisdiction to approve GPE’s proposed acquisition of Westar.”<sup>16</sup>

Spire goes on to point out that stipulations and agreements often include provisions that restate existing law, stating colorfully: “It is a canard of the highest order, however, to suggest that provisions are only added to Stipulations and Agreements before the Commission in order to do something more than just restate the law.”<sup>17</sup> Thus, Spire contends, there is no reason to suppose that § II(7) was intended to do

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<sup>14</sup> *Spire’s Initial Brief*, p. 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, p. 6. For entirely unclear reasons, Spire quotes Governor Greitens’ recent executive order anent agency rulemakings. This authority is less than helpful in interpreting a stipulation and agreement signed in 2001.

<sup>17</sup> *Id.*, pp. 6-7.

anything but restate the law.<sup>18</sup> Spire points out that regulated utilities may lawfully engage in unregulated businesses or acquire unregulated businesses.<sup>19</sup>

What would be the sensible rationale to restrict the holding company of a gas corporation like Laclede or the holding company of an electric corporation like KCP&L from acquiring an out-of-state utility, a lower risk business in which they have considerable expertise, while at the same time allowing them to buy, without any Commission supervision or approval whatsoever, a diamond mine in Wyoming, or open a chain of restaurants in Wisconsin? There is no such rationale.<sup>20</sup>

Finally, Spire argues that Missouri law favors “the free exercise of commerce” and should be so construed.<sup>21</sup>

#### **ARGUMENT:**

***Section II(7) of the 2001 GPE Stipulation was intended to make clear to all participants that the Commission would scrutinize any acquisitions by GPE, whether inside or outside of Missouri.***

Staff suggests that there really is no uncertainty at all about what § II(7) of the *First Amended Stipulation and Agreement* means – it means just what it plainly says. Any acquisition of a public utility by GPE is subject to prior Commission approval.

As Staff has pointed out already, the legal basis for this requirement is found at § 393.190, RSMo., subsections 1 and 2. This statute is applicable to GPE, first, by virtue of § 386.250(1), which imposes the Commission’s jurisdiction on “the manufacture, sale or distribution of . . . electricity for light, heat and power, within the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, p. 7.

<sup>20</sup> *Id.* The point of this argument is unclear. Section II(7) focuses on the acquisition of public utilities, not diamond mines or restaurants.

<sup>21</sup> *Id.*, pp. 7-8.

state,<sup>22</sup> and to persons or corporations . . . controlling the same; and to . . . electric plants, and to persons or corporations . . . controlling the same,”<sup>23</sup> and, second, by virtue of § 393.250.1, RSMo., which authorizes the Commission to impose conditions on reorganizations. The Commission did just that by its order authorizing KCPL’s reorganization.

No Missouri appellate court has addressed either the limits of the Commission’s power to impose conditions on reorganizations granted at § 393.250.1, RSMo., or the meaning of the word “control” in § 386.250(1), RSMo. Staff suggests that those provisions bring GPE – and Spire, too, for that matter – squarely within the scope of the Commission’s authority. That this result may impede these companies’ future acquisitive impulses should not deter the Commission, given that there is little evidence that these activities are good for ratepayers or good for Missouri.

### **CONCLUSION:**

The Commission has jurisdiction over GPE’s activities, both within Missouri and without, pursuant to Missouri statutes.<sup>24</sup> Section II(7) of the *First Amended Stipulation and Agreement* emphasized and reaffirmed that jurisdiction. Alternatively, § II(7) serves as a basis of jurisdiction, as specifically authorized by the general assembly at § 393.250.3, RSMo., as a condition upon KCPL’s reorganization. Either way, GPE must submit its planned acquisition of Westar to the Commission for approval or disapproval.

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<sup>22</sup> To clear up a misinterpretation by GPE and Spire, GPE is within this provision because it is within the state, as are the electric utility assets it controls.

<sup>23</sup> Emphasis added.

<sup>24</sup> See *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) pp. 55-74. Staff hereby incorporates this report by reference herein for all purposes.

**WHEREFORE**, on account of all the foregoing, Staff prays that the Commission will resolve the issues herein as Staff has advised; approve the non-unanimous *Stipulations and Agreements* now pending in Case No. EE-2017-0113; and grant such other and further relief as is just in the premises.

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 6<sup>th</sup> day of February, 2017.

**/s/ Kevin A. Thompson**