

In the Matter of Great Plains Energy Inc.'s )  
Acquisition of Westar Energy, Inc. ) File No. EM-2016-0324  
and Related Matters )

COMES NOW the Office of the Public Counsel (“OPC” of “Public Counsel”) and offers the following *Response*:

1. On May 31, 2016, Terry Bassham, CEO of Great Plains Energy, Inc. (“GPE”), announced to the Missouri Public Service Commission (“Commission”) and OPC by email that GPE and Westar Energy, Inc. (“Westar”), had entered into an agreement for GPE to acquire the Topeka, Kansas-based Westar for \$8.6 billion in cash and stock. GPE indicated it does not intend to seek Commission approval for the acquisition.

2. On June 1, 2016, the Commission's Staff ("Staff") filed its *Motion to Open an Investigation*. The Staff explains GPE's course of action appears to violate the stipulation and agreement, and the Commission's Order approving the stipulation and agreement, in Case No. EM-2001-464 wherein GPE agreed:

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.

*(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, Doc. No. 26, p. 13).*

3. On June 2, 2016, GPE filed its *Verified Opposition to Staff's Motion to Open Investigation and Request for Order Declining Jurisdiction* ("Opposition"). In its Opposition, GPE agrees the holding company structure was created under the terms of the *First Amended Stipulation and Agreement* in Case No. EM-2001-464 (Doc. No. 2, p. 4). Though it acknowledges the merger conditions agreed-to in 2001, GPE now asserts the conditions do not apply to the acquisition of Westar because "Westar is not a 'public utility' or an 'affiliate of a public utility' under Missouri law (Doc. No. 2, pp. 5-6). GPE then lists cases in which the Commission declined to exercise jurisdiction over the holding companies of regulated utilities (*See generally* Doc. No. 2, pp. 7-8). GPE's reliance on these cases is contrary to the plain language of the stipulation and agreement and the assertions of counsel for GPE in 2001 when the stipulation and agreement was signed.

#### Response

4. An examination of the case file in EM-2001-464 reveals the true meaning of the disputed portion of the stipulation and agreement. During an on-the-record presentation, then-Commissioner Murray inquired about the application of Section II (7) of the stipulation and agreement. The transcript is as follows:

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.

MR. DOTTHEIM<sup>1</sup>: And again, different parties can interpret the statute differently. It was an effort to establish in certain areas what arguably the holding company would not contest in the way of coming before the Commission in certain instances.

Of course, the Commission is always free, if it so chooses, to assert that it will not exercise jurisdiction in a particular situation.

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<sup>2</sup>: 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

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<sup>1</sup> Mr. Dottheim, Chief Deputy Counsel, represented the Staff of the Missouri Public Service Commission.

<sup>2</sup> In 2001, Ms. O'Neill served as Legal Counsel for the Office of the Public Counsel.

to public utilities. Our position has been in some – in some cases the Commission’s agreed with us. In some cases the Commission’s disagreed with us, depending on the facts of the particular case.

We believe it is appropriate, however, to include this term with 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.

I suppose the facts of the particular case will continue to control as to whether jurisdiction will be exercised. This, however, does – this agreement does allow Public Counsel and the Staff and the Company to each put forth their opinions regarding whether a particular transaction should be subject to your jurisdiction but requires them to make the initial filing and allows the Commission to make that determination.

*(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, Transcript Vol. 2, Doc. No. 26, pp. 32-35).*

5. The preceding excerpt counters GPE’s points in opposition directly. First, counsel for GPE acknowledged the Commission had not exercised jurisdiction over certain holding company transactions in the past. Then he goes on to say “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.” *Id.* GPE’s recitation of cases supporting its present position is inapposite and contradictory. GPE

was aware of the potential for future dispute over jurisdiction but negotiated that away by agreeing to seek approval of such transactions.

6. GPE's argument its agreement only applies to Missouri-based utilities defies logic as statute already requires Commission-approval for such transactions. There would be no need to agree to the jurisdiction under the terms of a settlement. Importantly, Section II(7) of the stipulation and agreement does not contain GPE's desired limitation and so GPE's arguments contrary to the plain language of the agreement should fail.

7. The Commission has recognized it has authority to examine any utility actions that could have a detrimental impact on ratepayers. *See In the Matter of the Application of the Kansas Power and Light Company and KCA Corporation for approval of the acquisition of all classes of the capital stock of Kansas Gas and Electric Company, to merge with Kansas Gas and Electric Company, to issue stock, and incur debt obligations*, Case No. EM-91-213, 1 Mo. P.S.C. 3d 150 (1991). In that case, the Commission examined a merger involving an out-of-state utility. After having found the potential for a detrimental effect on Missouri ratepayers from the merger through increased A&G and Capital costs the Commission attached conditions to protect ratepayers before approving the merger. *Id.* The Commission concluded the basis of its jurisdiction could be found at Sections 393.180, 393.190, and 393.200, RSMo.

8. As pointed out in the Staff's *Motion to Open an Investigation*, GPE's financing of the present acquisition could potentially impact Missouri ratepayers negatively (*See* Doc. No. 1, pp 3-5). Such a potential detriment was confirmed when S&P Global Ratings affirmed the present credit ratings for GPE and subsidiaries Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company but *revised the outlook to "negative"* from "stable" for all three entities on May 31, 2016. The potential negative impact on the regulated utilities' credit

ratings merits further investigation and, if necessary, the imposition of Commission-ordered conditions to shield Missouri ratepayers from harm.

9. Additionally, this is a matter where all relevant parties agreed that GPE would submit to the jurisdiction of the Commission. It may be that the Commission chooses not to assert its jurisdiction but that should be left to its discretion and not to the discretion of parties for whom such a decision would be self-serving and in conflict with a long-standing contractual agreement.

10. In defense of its present position, GPE informs the Commission “[t]he Laclede Group is subject to a stipulation strikingly similar to the GPE Stipulation, which this Commission approved two weeks after it approved the GPE Stipulation.” (Doc. No. 2, p. 6). The existence of an agreement made by the Laclede Group is irrelevant to GPE’s obligations under its own stipulation and agreement. Rather than acquiesce to GPE’s position that the Commission is powerless, the Commission should enforce the agreements made by each respective company in order ensure the interests of the Missouri customers are protected. The OPC would urge this Commission to review any pending mergers and acquisitions of other holding companies that executed similar agreements.

11. The Commission is empowered to act as a result of the 2001 Stipulation and Agreement. GPE incorrectly argues “there is no legal basis for the Commission to exercise jurisdiction over this transaction on the basis of the ... First Amended Stipulation and Agreement[.]”(Doc. No. 2, p. 1). But this ignores the statutory provisions whereby the Commission can assert its authority over a regulated utility restructuring into a holding company. *See* Mo. Rev. Stat. § 393.190. Section 393.250.1 RSMo. further governs the reorganization of electrical corporations and provides broad supervisory authority to the Commission, stating “no such reorganization shall be had without authorization of the Commission.”

12. When the Commission permitted a regulated utility to reorganize itself as a holding company, this was approved contingent upon conditions negotiated among Staff, OPC, Kansas City Power & Light Company and GPE. Those conditions were intended to protect the utility's Missouri customers with a specific condition that GPE would seek Commission approval and show no public detriment before acquiring or merging with a public utility (*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, Doc. No. 37, p.7). However, now GPE attempts to rewrite history as well as its own agreement by stating the Commission is powerless to enforce its prior order. The Commission should reject GPE's invitation to limit its own authority and consider asserting its jurisdiction consistent with the stipulation and agreement.

WHEREFORE Public Counsel submits its *Response*.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 7<sup>th</sup> day of June 2016:

/s/ Tim Opitz