BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief	)))))	Case No. EM-2007-0374

STATEMENT RESPONDING TO THE "STATEMENT IN DISSENT TO REGULATORY LAW JUDGES' EVIDENTIARY RULING AND OBJECTIONS TO PROCEDURAL IRREGULARITY"

I file this statement to respond to my fellow Commissioner's "Statement in Dissent to Regulatory Law Judge's Evidentiary Ruling and Objection to Procedural Irregularity" filed on May 13, 2008 ("the May 13 filing"). Given the amount of public scrutiny and controversy generated by this case, I believe it is incumbent upon me to file this statement to correct the record. Regarding the evidentiary ruling[1], I respectfully disagree with my fellow Commissioner. As I will set out below, my opinion is that the Presiding Officer made the correct evidentiary ruling based on the facts and the law.

On April 24, following oral argument at the evidentiary hearing, the Presiding Officer, pursuant to the authority delegated by the Commission[2] ruled as follows:

(1) Purported evidence regarding the anonymous letters is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.

(2) Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.

[1] This statement does not address the portion of the May 15 filing relating to the allegations of procedural irregularities.

[2] See Commission Rules 4 CSR 240-2.110, 2.120 and 2.130.

(3) While the Commission believes that any purported evidence regarding a future plan for regulatory "Additional Amortizations" is irrelevant, it is not wholly irrelevant, and the Commission will preserve this evidence in the record as an offer of proof.

(4) An extensive inquiry into KCPL's Comprehensive Energy Plan ("CEP") as set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects is overly broad and the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.

(5) The witnesses that the Applicant's have requested to be released in this matter will not be released to the extent they can provide testimony on the Applicant's creditworthiness.

(6) Witnesses from Aquila that were to provide testimony solely on the issue of the anonymous communications are released and do not have to appear before the Commission.

No motions for reconsideration of this ruling were filed during the remaining days of the hearing.

My fellow Commissioner's first argument in his May 13 filing is that the issues raised by staff in response to the anonymous letters are important and relevant to the eventual decision in the case. However, my fellow Commissioner does not explain what he means by "relevant". The law requires evidence to be both logically **and legally** relevant in order to be admissible. Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue.[3] Even if logically relevant, the finder of fact has discretion to limit such evidence, or exclude it all together, if

[3] *State v. Liles*, 237 S.W.3d 636, 638-639 (Mo. App. 2007); *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005); *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004): *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654 -655 (Mo. App. 1997); *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. App. 1992)).

the fact-finder believes the evidence is not legally relevant.[4] Legal relevance refers to the probative value of the purported evidence outweighing its risks of unfair prejudice, confusion of issues, delay, waste of time, or cumulativeness.[5] Consequently, even logically relevant evidence may be excluded unless its benefits outweigh its costs.[6]

In reviewing the Applicant's motion and the responses thereto, this Commissioner notes that Staff planned to call 15 witnesses on the Iatan construction issues, and 15 witnesses on the anonymous allegations issue. Staff also proposed to inquire into the regulatory "Additional Amortizations" issue, as well as the possibility of a future regulatory plan for Aquila even though GPE's Chief Financial Officer Terry Bassham had testified that the amortizations issue has been withdrawn from the Joint Applicants' request.[7] Additionally, Staff apparently launched an investigation into the codes of corporate conduct of Great Plains Energy and Aquila, with particular emphasis on the companies' policies regarding gifts and gratuities, absent a directive from the Commission to perform a management audit and apparently out of an interest to explore hearsay allegations contained in anonymous letters directed to the Commission.

With regard to the anonymous letters, the Presiding Officer held that any purported evidence related to these unsolicited and unattributed communications was "wholly irrelevant" to this proceeding and the determination with regard to whether the transaction contemplated is not detrimental to the public interest. Being hearsay, and perhaps being even

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[4] *State v. Liles*, 237 S.W.3d 636, 638 -639 (Mo. App. 2007).

[5] *Id.*

[6] *Id.* Even when evidence is relevant, it is within the discretion of the fact finder to exclude the evidence if its probative value is outweighed by its prejudicial effect. *Stevinson v. Deffenbaugh Industries, Inc.*, 870 S.W.2d 851, 860 (Mo. App. 1993).

[7] See Bassham Add'l Supp. Direct at 4.

beyond hearsay since no proponent of admitting the purported evidence of the out of court/hearing statements has identified the source of these statements, the statements themselves are incompetent, unsubstantiated and cannot be used as the basis of any ruling by this Commission. Moreover, as directed by this State's Supreme Court, conclusions or further speculation about this hearsay does not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision, finding, rule or order of an administrative Officer or body under Article V, Section 22 of the Missouri Constitution.[8] "The rule against hearsay evidence is based on the propriety of the confrontation and the cross-examination of the witness having personal knowledge of the facts adduced, **and his veracity alone.**"[9]

Sworn testimony from other witnesses will not cure the fundamental defect of this purported evidence. Even the fact that the technical rules of evidence do not apply in administrative proceedings does not abrogate this **fundamental** rule of evidence.[10] In fact, soliciting comment or speculation from other individuals regarding these hearsay statements invites double hearsay, speculation and additional statements that cannot be substantiated. Indeed, two of the anonymous letters already involve instances of double hearsay. This merely magnifies the evidentiary incompetence of this entire line of investigation – especially when no such speculative inquiry is warranted.

This Commissioner notes that the Applicants filed their initial merger request over one year ago, on April 4, 2007. The parties have had more than sufficient time, through discovery and other procedural devices, to develop and present actual competent evidence on the exact

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[8] *State ex rel. De Weese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949); *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 842 (Mo. App. 2004);

[9] *State ex rel. De Weese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949).

[10] *Id.*

same subject matter as encompassed in the anonymous letters. The Commission has heard testimony from multiple subject matter experts, presented by multiple parties, regarding the provision of the proposed transactions. In his May 13 filing, my fellow Commissioner seems to have overlooked the fact that volumes of competent evidence was appropriately offered into the record addressing **the very same subject matter** of the anonymous letters—the Applicant's financial ability to effectuate the proposed merger. Indeed, many of these witnesses were the same witnesses that Staff had listed to provide testimony on the anonymous letters. The transcripts in this case further show that the Presiding Officer gave much latitude to the parties' counsels to explore the subject matter with witnesses. Having sworn competent testimony in the record is undisputedly superior to any anonymous hearsay letters or testimony surrounding them. Even if some minuscule piece of relevant evidence is buried in this incompetent evidence, given the facts that the same witnesses Staff sought to examine with regard to the anonymous letters already provided competent evidence on the same subject matter, then any ferreting out of this information would be unduly repetitious – another reason for denying the offer of proof. The "let it all in and we will sort it out later" approach advocated by my fellow Commissioner is, thankfully, not the legal standard for the admission of evidence in contested cases. It was the Presiding Officer's duty to screen out the evidence that is not sufficiently reliable to form the basis for the findings of fact in this case.

In his May 13 filing, my fellow Commissioner's second argument is that the Presiding Officer's evidentiary ruling is inconsistent with this Commission's prior evidentiary rulings. In my view, no such inconsistency exists. He cites as his only example the Industrial Intervenor's (Praxair, Inc., Sedalia Industrial Energy Users' Association, and Ag Processing, Inc.) Motion in Limine in this case to exclude evidence about synergy savings because of how

the case was pleaded. The Motion in Limine in no way relates to any anonymous letters. Thus, the example does not support his argument. In fact, the Commission has faced this identical issue before and ruled exactly as the Presiding Officer ruled here. In KCPL's application for authority to issue certain debt securities, Case No. EF-2008-0214, Praxair, Inc. sought to have the Commission address an anonymous letter when making its decision in the case.[11] The Commission concluded that: "Given that this case constitutes a contested case under §536.010(4) RSMo 2000, the Commission declines to consider the letter in question. An anonymous letter not supported by a sworn witness who is subjected to cross-examination constitutes mere hearsay and should not be considered by the Commission in reaching a decision in a contested case."[12] Moreover, this Commission and other administrative bodies have had their decisions overturned for ignoring this basic precept of law, and I believe that we should not err again and create an opportunity for our final decision to be reversed because of such an error.[13]

Under the relevance standard, the anonymous letters and the testimony about those letters are clearly irrelevant and the Presiding Officer properly excluded them. This purported evidence tends neither to prove nor disprove any fact in issue and does not corroborate any other relevant evidence bearing on the principal issues before the Commission. If the excluded evidence does not tend to prove or disprove a fact in issue or corroborate other

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[11] See *Application of Kansas City Power & Light Company for Authority to Issue Debt Securities*, Order Approving Financing, Case No. EF-2008-0214, issue February 14, 2008.

[12] See *Application of Kansas City Power & Light Company for Authority to Issue Debt Securities*, Order Approving Financing, Case No. EF-2008-0214, issue February 14, 2008.

[13] *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949); *Dickinson v. Lueckenhoff*, 598 S.W.2d 560, 561-62 (Mo. App. 1980); *Wilson v. Labor and Indus. Relations Comm'n*, 573 S.W.2d 118, 120-21 (Mo. App. 1978); *Bartholomew v. Bd. of Zoning Adjustment*, 307 S.W.2d 730, 733 (Mo. App. 1957); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763 (Mo. App. 1955); *Dittmeier v. Missouri Real Estate Comm'n*, 237 S.W.2d 201, 206 (Mo. App. 1951); and *State ex rel. Marco Sales, Inc. v. Public Service Com'n*, 685 S.W.2d 216, 220-221 (Mo. App. 1984).

relevant evidence which bears on the principal issue, then a Commission decision made in the absence of such evidence does not render the Commission's decision arbitrary, capricious, unreasonable or an abuse of discretion.[14]

With regard to denying the offer of proof on this purported evidence, finding that this purported evidence is wholly irrelevant and repetitious to valid and competent testimony eliminates the requirement for an offer of proof.[15] Further, it is not a due process violation to exclude an offer of proof when purported evidence that a party wishes to offer is wholly irrelevant, repetitious, privileged, or unduly long.[16]

Even if the information was relevant, it is not competent, and the Presiding Officer ruled correctly to exclude it on that basis alone. More importantly, the parties in fact did introduce pages and pages of sworn testimony on the exact same subject matter addressed in the anonymous letters.

For the foregoing reasons, I believe that the Presiding Officer's evidentiary ruling was correct based on the facts and the law, and is entirely consistent with past Commission decisions. Therefore, I respectfully disagree with my fellow Commissioner's May 13 filing.

Respectfully Submitted,

Terry M. Jarrett

Terry M. Jarrett, Commissioner

Dated at Jefferson City, Missouri,
on this 16th day of May, 2008.

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[14] *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654-655 (Mo. App. 1997).

[15] See Section 536.070(7) and Commission Rule 4 CSR-240-2.130(3).

[16] *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004).