BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Great Plains Energy Incorporated for Approval of its Merger with Westar Energy, Inc.	)))	File No. EM-2018-0012

OFFICE OF THE PUBLIC COUNSEL'S
INITIAL BRIEF

COMES NOW the Office of the Public Counsel ("OPC" or "Public Counsel') and submits its Initial Brief in this case stating:

INTRODUCTION

On October 12, 2016, Great Plains Energy ("GPE"), Kansas City Power & Light (KCPL), and KCP&L Greater Missouri Operations ("GMO") filed an application with the Missouri Public Service Commission ("commission" or "MoPSC") for approval of a merger between Westar and GPE, *See In re Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co. and KCP&L Greater Mo. Operations Co. for a Variance from 4 CSR 240-20.015*, and File No. EE-2017-0113 ("*2016 Variance Application*"). The request was submitted pursuant to the May 29, 2016 Agreement and Plan of Merger, under which GPE and GP Star, Inc. would acquire all of the stock of Westar ("2016 Merger Plan").

In April 2017 the Kansas Corporation Commission ("KCC") denied GPE's application to acquire Westar.[1] Ultimately, GPE withdrew this filing. GPE requested that the Commission dismiss both its Application to acquire Westar (No. EM-2017-0226), as well as the Joint

[1] *In re Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co. and Westar Energy, Inc. for Approval of the Acquisition of Westar Energy, Inc. by Great Plains Energy Inc.*, No. 16-KCPE-593-ACQ (Kan. Corp. Comm'n, Apr. 19, 2017).

Application with KCP&L and GMO for a variance from the Affiliate Transactions Rule (No. EE-2017-0113).[2] On July 26, 2017, the Commission granted GPE's request to dismiss both cases. [3]

After the KCC's rejection of the merger application, GPE and Westar restarted with an attempt to develop a plan which resulted in a different merger agreement which was reached on July 9, 2017 with an Amended and Restated Agreement and Plan of Merger ("Amended Merger Agreement"). On August 31, 2017, the Applicants filed their Application in this proceeding seeking approval of GPE's merger with Westar.[4] Attached to the Application, was the testimony of Darren Ives, which contains "Applicant's Proffered Merger Commitments and Conditions."[5]

As the result of negotiations, two (Non-Unanimous) Stipulations and Agreements were filed in this case, the first on January 12, 2018, and the second, on March 8, 2018.[6] OPC joined the March 8 Stipulation and agreed the March 8 Stipulation . . . "in conjunction with the Stipulation and Agreement filed on January 12, 2018, supports Commission approval of the Merger as conditioned by both of such agreements and a determination that the Merger of GPE and Westar meets Missouri's 'not detrimental to the public interest' standard."[7]

Since these Stipulations are Non-Unanimous,[8] this matter went to hearing on March 12 and March 14.

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[2] Consolidated with EM-2017-0226 *Order Granting Motion to Consolidate* (Mar. 1, 2017)

[3] *Order Granting Motion to Dismiss* (July 26, 2017)

[4] A similar application was filed with the KCC. No. 18-KCPE-095-MER (Kan. Corp. Comm'n, Aug. 25, 2017).

[5] Tr. Vol. 2 p. Exh. 9, Ives Direct, Schedule DRI-1 pp. 1-16.

[6] (Non-Unanimous) Stipulation and Agreement, March 8, 2018, between: Brightergy, LLC -(All); Great Plains Energy Incorporated-Investor(Electric); Kansas City Power & Light Company-Investor(Electric) KCP&L Greater Missouri Operations Company-Investor(Electric); Midwest Energy Consumers Group-(All); Missouri Joint Municipal Electric Utility Commission-Municipal(Electric) MO PSC Staff-(All); Office of the Public Counsel-(All); Westar Energy, Inc.-Investor(Electric).

[7] *Id*. at p. 3, para.13 and para. 14 states: OPC . . . agree[s] to withdraw its objections to the 2018 S&A.

[8] On March 9, KEPCo filed its objection and on March 8, Renew Missouri Advocates filed its objection.

Public Counsel's Initial Brief follows the order of issues as shown in the filed List of Issues.

I. Should the Commission find that GPE's merger with Westar is not detrimental to the public interest, and approve the merger?

As a signatory to the March 8, 2018 Stipulation and Agreement ("March 8 Stipulation"), which, along with the January 12, 2018 Stipulation and Agreement[9] ("January 12 Stipulation") in this case, includes numerous commitments that OPC sought in the last proposed GPE/Westar merger case, OPC supports Commission approval of the merger.[10] Among those commitments OPC sought are the provisions for independent third-party audit of the combined companies' compliance with the Commission's affiliate transactions rule,[11] and corporate social responsibility conditions.

As a Signatory OPC concurs with the provisions of paragraph 19: "This Stipulation is being entered into for the purpose of disposing of all issues in this case. The Signatories represent that the terms of this Stipulation constitute a fair and reasonable resolution of the issues addressed herein, in a manner which is not detrimental to the public interest."

Additionally, OPC believes that the merger will not be detrimental to the public interest, and represents an improvement from the acquisition proposed in 2017, in which GPE would have incurred substantial debt to acquire the system.[12] Public Counsel supports Commission approval of the Merger, with the conditions in both the Stipulations and Darin Ives' Direct[13] testimony. Along with the other Signatories, OPC recommends the Commission may make a determination

[9] OPC was not a signatory to this Stipulation and Agreement.

[10] EM-2017-0226, *In the Matter of the Application of Great Plains Energy Inc. For Approval of its Acquisition of Westar Energy, Inc*.

[11] Commission Rule 4 CSR 240-20.15.

[12] Exh. 350, Marke Rebuttal, p. 4.

[13] Exh. 9, Ives Direct, Schedule DRI-1 pp. 1-16, *Applicant's Proffered Merger Commitments and Conditions*.

that the Merger of GPE and Westar meets Missouri's 'not detrimental to the public interest standard.'"[14]

II. Should the Commission condition its approval of GPE's merger with Westar and, if so, how?

The Commission should condition its approval on all of the conditions contained in Exh. 9, Ives Direct, Schedule DRI-1 pp 1-16, titled *Applicant's Proffered Merger Commitments and Conditions* as well as the conditions contained in the two Stipulations and Agreements filed in this case.

The Commission may include any conditions it chooses in its Report and Order. Since the March 8 Stipulation and Agreement is not unanimous, it, by Commission rule, it becomes the Signatories Statements of Positions. Because of this, OPC expects the Commission will issue its usual Report and Order, with recognition of the terms of the Stipulation.

The terms of the March 8 Stipulation, however, provide that: "[t]his Stipulation has resulted from negotiations and the terms hereof are interdependent. In the event the Commission does not adopt this Stipulation in total, then this Stipulation shall be void and no Signatory shall be bound by any of the agreements or provisions hereof."

In testimony at hearing, on behalf of the Staff, Natelle Dietrich responded to a question by Renew Counsel, Timothy Opitz, about Staff's position on "a most favored nation" provision. Ms. Dietrich responded:

> In my surrebuttal testimony, I noted that Dr. Marke expressed some concerns. He called it equal outcomes.[15] And then also I was summarizing the KCC staff testimony, and they had expressed some concerns about anything that the Missouri Commission might do that would affect the Kansas situation or the Kansas ratepayers. And so my recommendation was that this Commission condition its approval on the concept that there would be no detriment to

[14] March 8, Stipulation and Agreement p. 7, para 13.

[15] As a part of the March 8 Stipulation, OPC agreed to withdraw its request contained in Dr. Geoff Marke's Rebuttal testimony filed in Case No. EM-2018-0012 for an 'equal outcome' provision."

> Missouri ratepayers from anything that the KCC might do. I think Mr. Thompson characterized that as the possibility of the Commission holding off on its decision until after the KCC reaches its decision.[16]

Ms. Dietrich went on to state that it was not her intention the Commission wait, but that the Commission should "make a statement that anything that the KCC might do that would harm Missouri ratepayers would be considered. I think it's likely that that [consideration] would be in a future rate case . . . ,"[17] which would possibly be the Companies' current rate case.[18]

OPC endorses the Commission's adoption of the terms of both of the Unanimous Stipulations without reservation. But while supporting the Stipulations, Public Counsel also encourages the Commission to fully appreciate the implications of the settlement filed with the KCC. The Kansas Non-Unanimous Settlement Agreement ('Kansas Settlement") was filed on March 7, 2018. The Signatories include: Westar Energy, Inc. and Kansas Gas and Electric Company (referred to herein as "Westar"), Great Plains Energy Incorporated ("Great Plains Energy" or "GPE"), Kansas City Power & Light Company ("KCP&L'), the Staff of the Kansas Corporation Commission, the Citizens' Utility Ratepayer Board ("CURB"), Sunflower Electric Power Corporation ("Sunflower"), Mid-Kansas Electric Company, Inc. ("Mid-Kansas"), Kansas Power Pool ("KPP"), Midwest energy; Inc. ("Midwest"), and Brightergy, LLC ("Brightergy").

OPC supports this these Stipulations, and is not recommending additional conditions. OPC negotiated and agreed to the terms of the March 8 Stipulation without the benefit of knowing what would be filed in Kansas or when any such filing would be made. The Commission is positioned to consider information of circumstance unavailable to the signatories of the Stipulations in this

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16 Tr. Vol. 3, pp. 270:25 to 271:15.
17 Tr. Vol. 3, p. 271:15 to 272:3.
18 *Id*.

case; as such it is of particular importance that the Commission in this case have a full understanding all of the provisions offered in the KCC Settlement Agreement.

In that regard, when asked by KEPCo Counsel, Andrew Schulte for his recommendation as to whether the Commission should wait to make its decision until after the KCC issues its order, Dr. Marke cautioned restraint: "Out of an abundance of caution, I think it would probably -- if I was the Commission – that would make sense.[19]

III. Should the Commission grant the limited request for variance of the affiliate transaction rule requested by Applicants?

Yes, OPC supports the waiver subject to the proposed conditions in the Stipulations and Agreement including those proposed by OPC. OPC has no indication this waiver would be detrimental to Missouri customers, and can only imagine there might be the possibility of a detriment if there were a significant imbalance between KCP&L, GMO and Westar purchases of goods or services. In other words, if the levels and type of transactions were not generally reciprocal, an imbalance could potentially create a detriment.

OPC entered into this Stipulation with the understanding this waiver only applies to Westar's KCC regulated retail operations, and to KCP&L and GMO's regulated retail utility operations and does not incorporate or involve any affiliates including, but not limited to, Westar's transmission owning affiliate and KCP&L and GMO's transmission and marketing affiliates.

At hearing, Chairman Hall mentioned an additional condition to its approval of the waiver, indicating he was considering: "[s]omething along the lines of expressly saying that this waiver does not in any way limit any party from asserting that a particular transaction is imprudent or limit the Commission's capacity to make such a finding."[20] The Chairman further noted that:

[19] Tr. Vol. 3, p. 321:7-13.
[20] Tr. Vol. 3, p. 414:2-7.

"[a]gain, I think that is consistent with the parties' intent, but I might support making that express."[21] OPC does not disagree with the Chairman's thoughts.

IV. How should the bill credits proposed by Applicants be allocated between and within the various KCP&L and GMO rate classes?

OPC supports approval of the January 12, and March 8 Stipulations, which identifies approximately $29 million of upfront bill credits to the Missouri retail customer share. The Signatories to the Stipulations agree that the Applicants will allocate the total amount of these upfront bill credits to KCP&L-MO's customers in the amount of $14,924,840 and to GMO's customers in the amount of $14,205,828. These bill credit amounts shall be paid in one lump sum within one hundred and twenty (120) days of the closing of the Merger. The Signatories' agreed allocations are:

Allocation of bill credit amounts between rate classes - The Signatories agree that the allocation of the bill credit amounts among the rate classes shall be as follows:

KCP&L – Missouri:

Residential:	$5,116,317.62
Small Gen SVC:	$869,296.24
Med. Gen SVC:	$2,131,583.25
Large Gen SVC:	$3,648,156.67
Large Power:	$2,990,585.17
MO Lighting:	$168,955.05
	$14,924,894.00

Greater Missouri Operations:

Residential:	$6,627,570.28
SGS:	$1,811,667.78
LGS:	$2,260,908.37
LPS:	$3,298,276.57
Lighting:	$195,531.49
Thermal:	$10,970.24
TOD:	$903.27
	$14,205,828

Allocation of bill credit amounts within rate classes - The allocation of the bill credit sums between the customers within the rate classes shall be as follows:

KCP&L – Missouri:

Residential:	Divided equally among the customer class by customer account
Small Gen SVC:	Divided equally among the customer class by customer account
Med. Gen SVC:	Divided equally among the customer class by customer account
Large Gen SVC:	Based on each customer's energy usage within the customer class

[21] Tr. Vol.3, 414:1-7.

Large Power:	Based on each customer's energy usage within the customer class
MO Lighting:	Divided equally among the customer class by customer account

Greater Missouri Operations:

Residential:	Divided equally among the customer class by customer account
SGS:	Divided equally among the customer class by customer account
LGS:	Based on each customer's energy usage within the customer class
LPS:	Based on each customer's energy usage within the customer class
Lighting:	Divided equally among the customer class by customer account
Thermal:	Divided equally among the customer class by customer account

WHEREFORE Public Counsel recommends the Commission approve the January 12 and the March 8 Stipulations. Public Counsel also suggests the Commission review any potential effects of the KCC Settlement prior to approval of the Stipulations to assure nothing in the KCC agreement is potentially detrimental to Missouri customers.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 30th day of March, 2018.

/s/ Hampton Williams