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**

PREHEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

This brief will address the issues as set forth in the List Of Issues And Order Of Opening Statements, Witnesses and Cross-Examination. The issues are shown in bold font with Public Counsel's position following each issue.

II. Merger Synergy Savings Sharing Proposal

1. Are the estimates of savings from synergies accurate?

No. The estimates fail to accurately account for the sale of the 20 West Ninth property, include a significant amount of savings that could (and should) be achieved without the merger (i.e., "enabled" synergies), and are based on unverifiable assumptions. Even the so-called "created" synergy savings, or the savings which can *only* be achieved as a result of the merger, are merely estimates that cannot be accurately predicted. In particular, it is difficult to reasonably predict what corporate overhead cost savings, if any, can be achieved in this specific merger given that the Missouri electric properties are already owned in conjunction with a number of other electric and gas properties owned by Aquila. Thus, the typical overhead cost savings that one expects with the merger of two stand alone utilities is speculative and suspect in this case.

A. Could any of the synergy savings be achieved by KCPL or Aquila on a stand-alone basis absent the acquisition/consolidation/integration?

Yes. Much of the projected savings is for "enabled" savings. By definition, enabled savings are savings that could be achieved by KCPL or Aquila on a stand-alone basis. The enabled savings are at least $59 million of the total estimated savings.

B. Are any of the identified synergy savings dependent on KCPL and Aquila consolidating/integrating/merging their operations?

Yes. As noted by Staff witness Schallenberg:

> A KCPL/Aquila merger is not contained in the transaction described in the Joint Application. While not contained in the proposed transaction, nearly all of the benefits required to offset the aforementioned cost detriments contained in the proposed transaction are alleged to occur from a merger or consolidation of portions of KCPL and Aquila's respective systems.
> (Staff Report, page 15).

2. Do the actual synergy savings exceed the sum of the transaction, transition and incremental interest costs that the Joint Applicants propose to recover over the first five (5) years following the acquisition/merger/consolidation? If not, is the proposed merger not detrimental to the public interest?

No, the synergy savings do not exceed the costs of the transaction. Public Counsel witness Dittmer stated:

> In other words, the $246 million of remaining synergy savings is overstated, if for no other reason, because they include additional "enabled" savings that could occur absent the merger.
>
> Further, of the remaining $246 million of savings estimated by the joint applicants, such savings are just that – estimates. There is no way at the present time, even with adequate resources, to verify how much of such savings are achievable, and further, how much of the estimated savings could be achieved absent the merger. Further, I believe it will be impossible to track merger savings being achieved after the fact. Thus, the joint applicants' rate plan envisions hard transaction and transition costs being offset by, or "paid for" with, soft estimates of savings. Utilizing the joint applicants' own estimates, it is observed that true merger savings (i.e., total claimed merger savings minus "enabled" merger savings) are less than the sum of hard transition, transaction and incremental interest costs the joint applicants envision incurring and passing on to ratepayers over five years following consummation of the transaction.

(Public Counsel witness Dittmer Rebuttal, page 14).

Because the sum of transaction, transition and incremental interest costs will exceed the savings by a significant amount, the merger with its attendant condition is detrimental to the public interest.

III. Transaction Cost Recovery

1. Should transaction costs be directly charged to ratepayers through cost of service amortizations? Would the proposed merger be detrimental to the public interest if the Commission did so?

Public Counsel's primary position is that the merger and attendant rate plan should be rejected as they will result in a detriment to ratepayers. But even if the Commission decides to approve the proposed merger, transaction costs should not be directly charged to ratepayers through cost of service amortization as proposed by the joint applicants in this proceeding. With such amortization, the proposed merger would be detrimental to the public interest.

IV. Actual Debt Cost Recovery

1. Should the Commission require GPE/KCPL to continue protecting ratepayers from the activities and results of Aquila's non-regulated businesses by setting rates based on a "regulatory cost of debt" rather than Aquila's actual cost of debt? Would the proposed merger be not detrimental to the public interest if the Commission did not do so?

The Commission should require GPE/KCPL to continue protecting ratepayers from the activities and results of Aquila's non-regulated businesses by setting rates based on a "regulatory cost of debt" rather than Aquila's actual cost of debt. Public Counsel witness Dittmer stated:

> As already noted, in Aquila's last Missouri electric rate case, Aquila's rates were established by considering a *regulatory* interest rate of approximately seven percent (7.0%) - which is far below Aquila's current actual cost of debt.
> ...

> Thus, Aquila's Missouri retail electric rates are not currently recovering Aquila's actual interest costs being incurred. Rather, they are designed to recover only interest rates expected for "investment grade" securities so as to protect ratepayers from remaining high costs attributable to Aquila's failed non-regulated business operations.
>
> Any acquiring company should be aware of the earnings shortfall for Aquila's regulated utility property investment that currently exists, and will continue to exist, so long as the cost of Aquila's actual non-investment-grade debt securities significantly exceeds that amount of *regulatory* interest costs being collected within Aquila's Missouri electric properties' retail rates. All other items and events held constant, the anticipated shortfall in earnings attributable to the under recovery of Aquila's interest costs would suggest that a buyer should significantly discount below net book value the amount that it was willing to pay for regulated utility assets being acquired.
>
> (Dittmer Rebuttal, pages 21-22).

Aquila has previously adopted a policy of not requesting Missouri retail electric customers to pay for high cost debt that is attributable solely to Aquila's failed unregulated business operations. If the Commission allowed rates to be set based on Aquila's actual cost of debt that indisputably includes the cost of Aquila's failed unregulated operations, the proposed merger would be detrimental to the public interest.

V. Additional Amortization Mechanism

1. Should the Commission allow Aquila to implement "Additional Amortization to Maintain Financial Ratios" similar to those negotiated by KCPL with stakeholders in Case No. EO-2005-0329? If not, is the proposed merger detrimental to the public interest? If yes:

The Commission should not allow Aquila to implement "Additional Amortization to Maintain Financial Ratios" similar to those negotiated by KCPL with stakeholders in Case No. EO-2005-0329. If the Commission were to allow these amortizations, the merger would be detrimental to the public interest.

A. Has Aquila proposed a plan in which the additional amortizations are balanced by provisions favorable to ratepayers and other stakeholders? If not, is the proposed additional amortization device detrimental to the public interest?

No. Public Counsel witness Trippensee listed many of the protections contained in the KCPL Regulatory Plan:

> The Regulatory Plan contained multiple provisions that provided assurance to KCPL and protections to the ratepayers. Ratepayer protections included:
> * KCPL would not take advantage of any single issue rate mechanism allowed under SB 179 or other change in state law that allows riders or surcharges or changes in rates outside a general rate case based upon a consideration of less than all relevant factors prior to June 1, 2015.
> * The rate for Allowance for Funds Used During Construction would reflect a 250 basis point reduction in the return on equity rate as compared to the overall return on equity rate authorized for KCPL for any AFUDC calculated on the Iatan II unit until the in-service date of the Iatan II unit.
> * Off-System Sales would be treated above the line for ratemaking purposes and KCPL specifically agreed to not propose any adjustment that would remove any portion of its off-system sales from its revenue requirement.
> * Transmission Related Revenues would be treated above the line for ratemaking purposes and KCPL specifically agreed to not propose any adjustment that would remove any portion of its off-system sales from its revenue requirement.
> * Resource Plan would be actively monitored by KCPL for all major factors and circumstances which would influence the need for and economics of all elements of the Resource Plan contained in the Regulatory Plan.
> * The rate base offset resulting from the Additional Amortizations would be reflected in the rates of KCPL for a minimum of ten years not withstanding changes in Chapters 386 and 393 RSMo.
> * Rate Moratorium was put in place.
> * Rate Case process was put in place.
> * Rate Design changes were limited during the construction of Iatan II to the first and last rate case of four contemplated case with cases 2 & 3 reflecting only the necessary increase in revenue anticipated.
> * Demand Response, Efficiency, and Affordability Programs were to be adopted.
> * Customer Service Standards were addressed and monitoring procedures implemented.
>
> (Public Counsel witness Trippensee Rebuttal, pages 7-8).

If the Commission were to allow these amortizations, the merger would be detrimental to the public interest.

B. Will the additional amortizations shift the risks of the costs of Aquila's unregulated activities from Aquila to its ratepayers? If yes, is the proposed merger detrimental to the public interest?

Yes. Staff points out in its report that:

> Currently, Aquila shareholders have borne the costs and consequences of Aquila's non-regulated missteps. GPE/KCPL and Aquila are now seeking to use this acquisition and proposed merger to shift these costs from Aquila shareholders to Aquila ratepayers when GPE becomes the new sole shareholder of Aquila.
> The second reason the GPE-Aquila proposed additional amortization should be rejected is that it is not being used to support acknowledged prudent improvements in infrastructure. The additional amortizations in the separate KCPL and Empire regulatory plans were designed to serve this purpose. The additional amortizations in this case are being requested to support an acquisition designed with a fast track debt rating upgrade from junk bond status contingent on regulatory assurance that ratepayers will pay the rates necessary to maintain the investment grade rating.
> (Staff Report, pages 62-63).

As proposed by KCPL/Aquila, application of the Additional Amortization mechanism to Aquila rates, at a minimum, would result in the Additional Amortization for Aquila being increased to provide interest coverage for debt costs above "regulatory cost of debt".

If the Commission were to allow these amortizations, the merger would be detrimental to the public interest.

C. Is the additional amortization device proposed by the Joint Applicants set out in a sufficient level of detail to be able to be understood and effectively administered?

No. The proposal set out in the testimony of KCPL witness Cline references Case No. ER-2006-0314 when discussing Commission approval of the Additional Amortization for Aquila. KCPL has changed its position on how the Additional Amortization should be calculated for KCPL in Case No. ER-2007-0291, thus it is unclear what proposed method of calculating the Additional Amortization for Aquila is being proposed. Public Counsel opposes KCPL's position in ER-2007-0291.

VI. Affiliate Transactions Rule Waiver/Variance

1. Should GPE/KCPL and Aquila be granted a waiver/variance from the provisions of the affiliate transactions rule under 4 CSR 240-20.015 as it might pertain to transactions

between Aquila and KCPL? Will the proposed merger be not detrimental to the public interest if the Commission does so?

No. As noted below, GPE/KCPL and Aquila have not presented any facts or reasons that demonstrate good cause for such a waiver. Further, GPE/KCPL's proposal to begin to charge Missouri retail ratepayers for high cost debt that indisputably was caused by Aquila's unregulated operations demonstrates the reasonable expectation that there will be a fundamental change in ownership philosophy regarding protecting ratepayers from affiliate abuse. If anything, it re-enforces the need for compliance with affiliate transaction rules.

2. Have GPE/KCPL and Aquila complied with the Commission's rules regarding a request for a waiver or variance from the affiliate transactions rule, such as the requirement regarding making a showing of good cause?

No. As noted below, GPE/KCPL and Aquila have not presented any facts or reasons that demonstrate good cause for such a waiver.

3. Have GPE/KCPL and Aquila provided adequate details for there to be clarity respecting what provisions of the affiliate transactions rule that GPE/KCPL and Aquila are seeking relief from?

No. Staff points out in its report that:

> The Joint Applicants have requested a waiver that cannot be effectively evaluated or administered. The requested waiver lacks any real detail and also is, in essence, all inclusive. There is no effort by GPE, KCPL or Aquila to set out with any specificity the portions of the affiliate transaction rule to which the waiver would or would not apply, if the requested waiver were granted. The Joint Application states that the portions of the affiliate transaction rule for which KCPL seeks a waiver are "the provisions of the affiliate transactions rule under, 4 CSR 240-20-015, as it might pertain to transactions between Aquila and KCPL." A merger of KCPL and Aquila is not proposed by the Joint Application and in paragraph 46, at page 19, of the Joint Application, GPE and Aquila assert incongruously that "[b]ecause Aquila and KCPL will continue to be regulated by the Commission; the affiliate transaction rule is not applicable to transactions between KCPL and

> Aquila." GPE/KCPL and Aquila also contend incongruously in paragraph 46, at page 19, of the Joint Application, that they "request waiver from the affiliate transaction rule in order to facilitate transactions between KCPL and Aquila." The only explanation that GPE/KCPL and Aquila offer is that 4 CSR 240-20.015 is limited to preventing regulated utilities from subsidizing their non-regulated operations. Staff does not believe that 4CSR 240-20.015 is so limited.
> (Staff Report, page 65).

VII. Service Quality

1. Can service quality problems resulting from a merger/consolidation/acquisition of a works or system necessary or useful in the performance of duties to the public preclude the merger/consolidation/acquisition from being not detrimental to the public interest?

Yes. The Commission should be very concerned about service quality problems. As the Staff noted in its Report, the service quality problems that Missouri Gas Energy customers faced in MGE's early years in Missouri were severe and long-lasting. The potential for service quality problems is an issue that the Commission must consider, and it could therefore; cause the proposed merger to be detrimental to the public interest.

2. Has GPE/KCPL taken adequate measures to ensure that its proposed post-consolidation/post-merger/post-acquisition operations will not be detrimental to the public interest by precluding service quality issues arising from the consolidation/merger/acquisition?

Public Counsel takes no position on this issue.

VIII. Transmission and RTO/ISO Criteria

1. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of their intent to have Aquila participate in the Midwest ISO rather than SPP?

Public Counsel takes no position on this issue.

2. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of potential joint dispatch of the combined companies' generation resources, including the impacts on transmission and interconnection availability?

Public Counsel takes no position on this issue.

3. Should Commission approval of the Joint Application be conditioned upon Aquila being required to join and operate its generation and transmission facilities under the auspices of the Southwest Power Pool (SPP) Regional Transmission Organization (RTO) with KCPL within four (4) months of approval of the merger?

Public Counsel takes no position on this issue.

4. Should Commission approval of the Joint Application be conditioned upon Aquila and KCPL being required to consolidate their balancing authority areas within six (6) months of approval of the merger?

Public Counsel takes no position on this issue.

IX. Municipal Franchise and Energy Audit

1. Should Commission approval of the Joint Application be conditioned upon the negotiation of a single, unitary franchise between KCPL/Aquila and the City of Kansas City within nine (9) months of the Commission's approval of the merger?

Public Counsel takes no position on this issue.

2. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to fund a comprehensive energy audit by a third party to evaluate the City of Kansas City's opportunities for lower costs, increased efficiency, consolidated purchasing and cooperative sitting or cogeneration with the utility?

No. KCPL already has a broad portfolio of energy efficiency programs that are available to the City of Kansas City and other KCPL customers and there is no need or valid justification for a special energy efficiency service to be provided to the City of Kansas City which is fully funded by all other ratepayers.

X. Quality of Service Plan and Earnings Sharing Mechanism

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file an application for a Quality of Service Plan within 90 days of the Commission's final decision in this proceeding?

Public Counsel takes no position on the issue.

2. Should Commission approval of the Joint Application be conditioned upon establishment of an Earnings Sharing Mechanism that returns to customers excess earnings of KCPL/Aquila above an authorized level?

Public Counsel takes no position on this issue.

XI. Future Rate Case

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file a comprehensive rate case with respect to the merged operations within three (3) years of the Commission's approval of the merger?

If the Commission approves the Joint Application, with or without modifications, Public Counsel believes that both KCPL and Aquila should be required to file a consolidated rate case proceeding consistent with the timing required in the Regulatory Plan for KCPL (Case No. EO-2005-0329) with respect to Rate Filing #4. If the Commission approves an Additional Amortization for Aquila, Aquila's overall rates at the time of such filing could face the same downward pressure to decrease rates as KCPL will face when Iatan 2 comes on-line, all things else being equal. This downward pressure is anticipated to result due to the elimination of the Additional Amortization producing a decrease in rates that is greater than the increase resulting from the inclusion of Iatan 2 in rate base for ratemaking purposes.

XII. Legal Issues

1. Have the Joint Applicants, Great Plains Energy, Incorporated, Kansas City Power & Light Company and Aquila, Inc. obtained from their Boards of Directors the authorizations necessary to effectuate actions required to merge, consolidate, combine, or integrate the systems, works and operations of KCPL and Aquila Networks – MPS and Aquila Networks – L&P proposed in the instant case?

No. The Staff Report makes quite clear that they have not.

2. Have the Joint Applicants, Great Plains Energy, Incorporated, Kansas City Power & Light Company and Aquila, Inc., applied to the Missouri Commission for the authorizations necessary to effectuate the merger, consolidation, combination, or integration of the systems, works and operations of KCPL and Aquila Networks – MPS and Aquila Networks – L&P proposed in the instant case?

No. The Staff Report makes quite clear that they have not.

3. What is the legal effect for future Commission cases of the present Commission adopting the GPE/KCPL/Aquila proposals contained in their Joint Application filed on April 4, 2007?

The Commission is not bound by *stare decisis*[1], so a future Commission – if necessary to fulfill its role of protecting the public – could change any aspects of the GPE/KCPL/Aquila proposals even if the current Commission adopted them.

4. Is the net detriment test utilized by the Joint Applicants as the not detrimental to the public interest standard, the criteria required by law for determining whether the proposed acquisition and related transactions are not detrimental to the public interest?

The proper test is that annunciated in the Fee Fee Trunk Sewer case[2]: the Commission should approve the transaction if it is not detrimental to the public interest. The Joint Applicant's notion of including shareholder benefits in this test should be firmly rejected.

Will the proposed merger cause a net detriment to the public interest because the cost of service on which rates for Missouri ratepayers of Aquila and KCPL will be established will be higher as a direct result of the merger than the cost of service would be for Aquila and KCPL absent the proposed transaction?

Yes, for all the reasons set out in the testimony of Public Counsel witnesses Dittmer and Trippensee and in the Staff Report, the proposed merger is detrimental to the public interest and should be rejected.

5. Does the Affiliate Transactions Rule, 4 CSR 240-20.015, apply to transactions between regulated electrical corporations that are wholly owned by the same parent company?

Yes. There is no exception in the rule for transactions between regulated electrical corporations that are wholly owned by the same parent company.

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[1]An administrative agency is not bound by stare decisis. *State ex rel. AG Processing, Inc. v. Public Serv Comm'n* , 120 S.W.3d 732, 736 (Mo.banc 2003). Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable. *Id., State ex rel. GTE North, Inc. v. Missouri Public Service Comm'n,* 835 S.W.2d 356, 371 (Mo. App. W.D. 1992), *City of Columbia v. Missouri State Bd. Of Mediation,* 605 S.W. 2d 192, 195 (Mo. App. W.D. 1980), *Mitchell v. City of Springfield,* 410 S.W.2d 585, 589-90 (Mo. App. Spring. 1966).

[2]

Respectfully submitted,

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