

**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

**COMMISSIONER CLAYTON'S OPINION AND
RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS**

This Commissioner concurs in the Order Denying Motion To Dismiss filed by the majority and further wishes to respond to allegations made by the Office of Public Counsel (OPC) in his motion. Serious allegations have been lodged against the Commission and its members suggesting the occurrence of allegedly improper or illegal activity. This Commissioner supports the Order Denying Motion To Dismiss because it is based solidly in law, and the facts presented at hearing, thus far, suggest no wrongdoing on the part of three of the four Commissioners still in the case. This Commissioner must also respond directly to Public Counsel's assertions to assure the public of this Commissioner's impartiality, his lack of bias and his commitment to deciding every case fairly on the established record.

First and foremost, this Commissioner welcomes the scrutiny and attention given by the public, the press and the attorneys practicing before the Commission. The decisions rendered by this agency directly affect nearly all Missourians in the form of utility rates, environmental impact, economic development, and in citizens' basic health and welfare through safe and reliable utility service. Commission activities and decisions rarely receive wide-spread attention in the media and local public hearings held by the Commission attract a discouragingly small

number of citizens to participate in a complex and serpentine administrative law process.

Recently-enacted legislative changes, including statutes directly at issue in this case, have also gone relatively unnoticed as have legislative changes that have altered traditional methods of rate making with new surcharges for electric, water and gas utilities. Any opportunity to educate the public about the Commission is critically important.

In this case, OPC has challenged the impartiality of four Commissioners serving on the Commission. In support of his Motion To Dismiss, OPC cites the alleged occurrence of a day of meetings in which officials from Aquila and Great Plains appeared in Jefferson City to brief Commissioners on the potential for a future transaction involving the two utilities. OPC has alleged that these meetings were critically important for determining if and how the utilities would proceed based on reactions from Commissioners during the meetings. OPC has cited a number of exhibits and deposition testimony that refer to informal discussions with regulators in Kansas and Missouri prior to the transaction agreements being executed. OPC suggests that the lack of objection raised by Commissioners or the tacit approval of the various rate making methodologies taint the pending process sufficiently to warrant dismissal.

Prior to the filing of his motion, OPC suggested on the record, in response to a letter from the Missouri Attorney General, that he would seek dismissal of the case because of allegedly improper conduct committed by Chairman Davis and Commissioners Murray, Appling and Clayton.¹ The pending motion before the Commission has specific application to three of the four Commissioners who remain in the case, including Commissioners Murray, Appling and Clayton.² Chairman Davis is no longer subject to the pending motion because he recused himself from the case on December 6, 2007. Because of that recusal, this Opinion will focus

¹ Tr. at 993-995.

entirely on the allegations made against the three named Commissioners and does not address the merits of the allegations made against Chairman Davis. The evidence supporting allegations unique to Chairman Davis, including a number of e mails filed as exhibits, is irrelevant to the analysis associated with the three remaining Commissioners.³

There are no specific references to Commissioners Murray, Appling or Clayton in any of the testimony, the depositions, written documents or exhibits. These Commissioners are never mentioned by name anywhere in the evidence. There is no written account of any of the meetings with these Commissioners. There is no evidence that any of these Commissioners made any specific commitment or even expressed any opinion. No documents were given to the Commissioners. There is no evidence of partiality in favor of the transaction or any evidence of prejudgment on the part of the three Commissioners at issue. There is no record that either of the corporate boards were ever advised of the three Commissioners' positions and the record does not reflect any commitment for a time table for concluding this case by the three Commissioners. The totality of the evidence suggests a vague discussion, if any actually occurred.

It is important to review the record and identify the actual allegations lodged against these Commissioners. First of all, the record reflects that these Commissioners never met with Richard Green, the CEO of Aquila, and his e mails entered into evidence are devoid of any reference to any meeting with Commissioners Murray, Appling or Clayton.⁴ They do not describe any meeting and, further, they do not outline any commitment, prejudgment or commentary on the positions of Commissioners Murray, Appling or Clayton.

In addition, the evidence of meetings among the Commissioners and Great Plains

² Any reference to the language "these Commissioners" shall mean Commissioners Murray, Appling and Clayton, who are the remaining Commissioners in the case, subject to allegations of improper communications.

³ See *Union Electric Co. v. Public Service Com.*, 591 S.W.2d 134 (Mo. Ct. App. 1979).

⁴ Exhibits 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 51.

officials is vague and without detail. There are no Great Plains documents reflecting the nature or detail of any meetings with Commissioners. The only reference to any particular Commissioner in writing attributed to Great Plains comes second-hand in Deposition exhibit 18 and that Commissioner is no longer in the case. Great Plains refers to Commissioners as Missouri regulators and on several occasions confuses whether regulators includes Commissioners, Commission staff or both.⁵

OPC argues that Great Plains was required to get some sort of informal approval prior to the filing of the case and that any meetings held were designed to elicit feedback prior to closing the deal. Although OPC argues that these meetings were critically important for Great Plains, the evidence suggests that Great Plains officials cannot even remember the day of the meetings. Despite four days of testimony and the filing of multiple exhibits, documents and data requests, it is still unclear when these meetings took place. One reference to the record suggests that no meetings ever occurred,⁶ another reference suggests a meeting date of Monday, January 8, 2007,⁷ another reference is to January 17th ⁸ and yet another reference is to January 24th.⁹ Great Plains continues to struggle with certainty in filing its response to OPC's motion by arguing that the meetings occurred either on January 17th or January 24th.¹⁰ In response to the Commission's request for more certainty of dates, Great Plains estimated that "to the best of its knowledge," the meetings occurred on January 17th.¹¹

Contrary to Great Plain's assertions that its staff met with "all of the Commissioners,"¹² this Commissioner has no recollection of ever meeting with any utility official regarding the

⁵ Tr. at 839-841.

⁶ Exhibit 107.

⁷ Tr. at 842.

⁸ Tr. at 876; Exhibit 106.

⁹ Exhibits 104HC, 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 859-860.

¹⁰ Applicant's Opposition to Motion To Dismiss dated December 26, 2007.

¹¹ Applicant's Response to Order Directing Filing dated December 28, 2007.

merger transaction. This Commissioner has no record of any such meeting taking place on either date. This Commissioner has no memory of the various rate making provisions that allegedly support the transaction, including granting an acquisition premium in rates, authorizing enhanced regulatory amortizations or pre-authorizing a sharing of suggested synergy savings associated with the transaction. This Commissioner's first recollection of any merger discussion was receiving the press release issued by the companies and the notice to Wall Street investors, which included a webcast of utility officials.

This Commissioner believes that the Great Plains officials may be mistaken that they met with each of the Commissioners and their vague references to the meeting dates supports that possible mistake. Piecing together the evidence, it appears that Aquila CEO, Richard Green, and Great Plains CEO, Michael Chesser, split up responsibilities in meeting with Kansas and Missouri regulators.¹³ Green had the obligation of meeting with the Chairman and several staff members.¹⁴ Great Plains CEO, Mike Chesser, and his staff agreed supposedly to meet with all the other Commissioners.¹⁵ The division of duties occurred on or about Tuesday, January 23, 2007, in a meeting between Mr. Chesser and Mr. Green and recounted in an e mail also dated January 23, 2007.

During the meeting, Mike [Chesser] and I came to agreement on the general logistics of "announcement day" as well as how we are going to meet with the Missouri and Kansas regulators. To start, we agreed I would call Chairman Jeff Davis, Wes Henderson (leader of the Missouri Commission Staff) and Bob Schallenberg (leader of the Missouri Commission Accounting Staff) and alert each that Mike and then I want to meet with them to discuss a potential combination of our two companies. I will do the same

¹² Tr. at 860.

¹³ Exhibit 119HC; Dep. Exhibit 18.

¹⁴ *Id.*

¹⁵ *Id.*

thing with Chairman Brian Moline of the Kansas Corporation Commission and Don Lowe (leader of the Kansas Corporation Commission Staff). The face to face meetings could happen as early as this week.

I did speak with Chairman Davis this morning. He said he would make time to take the meetings. We have also scheduled a call tomorrow morning at 9 a.m. with Wes Henderson and Bob Schallenberg to set a date to brief them.¹⁶

The implication from the first paragraph quoted above is that no contacts had been made as of Tuesday, January 23, 2007. The e mail suggests that these were the first arrangements at contacting anyone from the Missouri Commission—Commissioners or staff. It is not logical that the other Commissioners would have been briefed on January 17th, a week prior to the meeting with the Chairman.

Another e mail dated Thursday, January 25, 2007, recounted in detail that Mr. Green held a relatively unsuccessful meeting by phone with several staff members and then held a meeting with the Chairman.¹⁷ A follow up breakfast meeting between Green and Chessser was scheduled on Monday, January 29, 2007, to further discuss their progress.

Finally, the third e mail from Mr. Green is dated Wednesday, January 31, 2007. He refers to his contacts in Kansas and to contacts with the Missouri Chairman. Mr. Green also refers to his follow up conversations with Mr. Chessser, possibly from the breakfast meeting of Monday, January 29th referenced in the second e mail, in which he recounted details of Mr. Chessser's meetings. This e mail reflects, second-hand through Mr. Green, that Mr. Chessser held meetings in Kansas and Missouri. Speaking of Mr. Chessser to the Aquila Board, Mr. Green writes that, "I also had another meeting with Mike Chessser. He confirmed that [Great Plains] received the same mixed signals in Jefferson City." Mr. Green then explained Mr. Chessser's

¹⁶ Exhibit 119HC.

concerns with the Commission staff and their supposed lack of support for their plan. Commissioners Murray, Appling and Clayton are neither referenced individually nor are their reactions to the merger plan.¹⁸

Lastly, additional confirmation of the meeting date may be found in another document admitted into evidence. The document is a power point presentation by Great Plains management to the Board dated February 1, 2007. On page 3 of the presentation, entitled "Process Update," the author lists a number of items that had been completed or were pending. The second bullet point reads, "Giant (Great Plains) management met with KS & MO regulators on January 24th."¹⁹ There is a conflict in the evidence on the date on which any Commissioner meetings were held.

Consequently, if the meetings occurred January 24th, it is impossible that this Commissioner participated. This Commissioner was out of the country during part of the week of January 22nd, including January 24th. It would have been a physical impossibility for this Commissioner to have participated in any meeting on that day. Alternatively, if the meeting took place on January 17th, this Commissioner could have participated, although there is no record of any meeting and this Commissioner has no recollection of the meeting.

Regardless, even if the 10 – 15 minute meetings had taken place, there is absolutely no evidence of wrongdoing or inappropriate conduct on the part of these Commissioners. As the majority Order reflects, since 2003 and the passage of SS SCS HB 208, these meetings have been specifically authorized and approved by the Missouri General Assembly. This Commissioner was appointed in 2003 and has served under the current regulatory or legal framework for nearly his entire term, which specifically authorizes such communications.

¹⁷ Deposition Exhibit 18.

¹⁸ Exhibit 304.

The majority Order correctly cites the applicable law with regard to communications among parties and Commissioners. Section 386.210 clearly and unambiguously authorizes the meetings that may or may not have occurred between the three remaining Commissioners.

Section 1 reads that,

The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official agency or instrumentality thereof, on any matter relating to the performance of its duties.

The statute offers further guidance in section 2 which reads,

2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission. (emphasis added)²⁰

OPC and Interveners completely ignore this section in their pleadings. Since the case was not filed until April and was not pending during the alleged meetings, the communication cannot be considered improper. Absent some additional evidence suggesting partiality or bias, OPC's motion must fail.

Whether this activity is appropriate or not is another question. The public deserves to have confidence in those who hold the public trust and this case suggests that such meetings, while legally and statutorily authorized, may lead to cynicism and a significant lack of confidence in Commission business. This is at a time when the Commission cannot afford to lose credibility. Utility issues have moved to the forefront in terms of the regular filing of rate cases, recurrent power outages suggesting a need for new reliability standards, higher fuel costs, the implications from Washington on climate policy as well as other controversies at the

¹⁹ Exhibit 104HC.

Commission. The presence of these issues is causing the public to carefully watch the business of the Commission and the conduct of the Commissioners.

This Commissioner welcomes the public dialogue regarding Commission ethics and practice which may include a discussion on proposals for a new rule making, proposals to amend state statute or inquiries by the Missouri Senate. This Commissioner notes that any potential revisions to Commission practice or procedure should be to encourage more public disclosure of communications among all parties and Commissioners. However, several proposals solely address communications among utilities and Commissioners and do not make similar demands on interveners, the staff of the Commission or OPC, who may also communicate with Commissioners. Since the Commission is a tribunal expected to fairly balance the interests of all the parties in rendering a decision in a case, all parties should be equally treated with regard to all communications and dealings with Commissioners. It is disingenuous for movants to demand more disclosure of utility contacts while not suggesting similar treatment for themselves.²¹ This disclosure must also balance the need for Commissioners to be knowledgeable about utility issues without compromising the due process of potential adverse parties in cases.

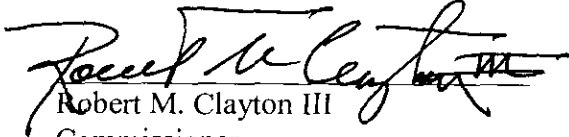
This Commissioner has a record that is free from partiality reflecting independence in decisions. This Commissioner intends to decide this case, as in all other cases, based on the record before the Commission. Many questions need to be asked and answered by the parties and the witnesses. Only after thoughtful study of the record and a full evaluation of the impact on the public and the parties can a decision be made. That is how the process is supposed to work. This Commissioner intends to see this case through to its conclusion in the manner required by statute, rule and canon.

²⁰ §386.210, RSMo. Supp. 2007.

²¹ See Case Number AX-2008-0201.

For the foregoing reasons, this Commissioner concurs.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 2nd day of January 2008.